# NEW MEXICO STATUTES 1978

## ANNOTATED

## VOLUME 6

2022

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New Mexico Compilation Commission

# NEW MEXICO STATUTES 1978

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## 2022

## Volume 6

**Chapter 23: State Health Institutions**
**Chapter 24: Health and Safety**
**Chapter 25: Food**
**Chapter 26: Drugs and Cosmetics**
**Chapter 27: Public Assistance**
**Chapter 28: Human Rights**
**Chapter 29: Law Enforcement**
**Chapter 30: Criminal Offenses**
**Chapter 31: Criminal Procedure**

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This volume includes laws enacted through the Third Special Session of the Fifty-Fifth Legislature (2022 (3rd S.S.)) and annotations through 2022-NMSC-012 and 2022-NMCA-024.

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# Preface

This volume updates New Mexico Statutes Annotated, 1978 Compilation (NMSA 1978), through the legislation enacted at the Third Special Session of the 55th Legislature (2022 (3rd S.S.)). All permanent, general laws have been compiled. Other laws, such as applicability and severability clauses, have been noted in the annotations in the NMSA 1978 and published in the official Session Laws. Appropriations and bond authorizations, which are not compiled in the NMSA 1978, are also published in the official Session Laws.

The effect of amendments to the NMSA 1978 are given in brief form in a note following the amended section. The effective date of amendments and new laws compiled in the NMSA 1978 appears in a note following each section. For a listing of the placement of each section of the 2022 Session Laws, *see* the Tables of Disposition of Laws on *NMOneSource.com*.

Laws enacted without a specific effective date, or without an emergency clause, take effect pursuant to N.M. Const., Article IV, § 23 ninety (90) days after adjournment of the legislature. The effective date of the 2022 laws that took effect pursuant to Article IV, § 23 is May 18, 2022.

Legislation that was compiled, but had not taken effect at the time that the 2022 laws were printed, appears in italics to call attention to its postponed effectiveness. The effective date of these sections with postponed effective dates may be found in parentheses in the section headings. Sections that have been repealed by the legislature with an effective date after October, 2022 are published with the repeal dates in the heading at the beginning of the sections.

July 2022



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# CHAPTER 23

# State Health Institutions

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# ARTICLE 1

# General Provisions

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## 23-1-1. [Rules and regulations; equipment; employees.]

The boards of each of said institutions shall have power, and it shall be their duty, to pass and enforce bylaws, rules and regulations for the government of such institutions, for the proper carrying out of their several objects, not in conflict with the laws of the state of New Mexico, or any act of congress, and to provide all proper and necessary books, apparatus, instruments, medicines, clothing, food and supplies, and other materials or things necessary for the proper conduct of the several institutions hereinbefore named and the care, support and protection of the inmates thereof when necessary; also to employ all teachers, physicians, wardens or superintendents and employes [employees], and to prescribe the duties and compensation of each, and they shall have full power to remove or discharge any officer or employe [employee] appointed or selected by them in any of such institutions, when in their judgment the interest of such institution shall require.

**History: Laws 1903, ch. 2, § 7; Code 1915, § 5110; C.S. 1929, § 130-607; 1941 Comp., § 5-102; 1953 Comp., § 13-3-2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Compiler's notes.** — This section and 13-3-1, 1953 Comp., now compiled as 21-5-2 NMSA 1978, originally were enacted by Laws 1903, ch. 2, which created the New Mexico asylum for the deaf and dumb, the New Mexico reform school, the New Mexico institute for the blind and the miners' hospital of New Mexico. The government of such institutions is now controlled by the constitution of New Mexico and supplementary laws. This section may be superseded by 21-6-1 NMSA 1978, relating to powers and authority of the board of regents of the New Mexico school for the deaf, 21-5-2 NMSA 1978, relating to the management of the New Mexico school for the visually handicapped and by 23-3-2 to 23-3-4 NMSA 1978, relating to the board of trustees of the miners' hospital.

Laws 1903, ch. 2, §§ 1 to 4, refer to the New Mexico asylum for the deaf and dumb, the New Mexico reform school, the New Mexico institute for the blind and the miners' hospital of New Mexico. The first three of these institutions are now known as the New Mexico school for the deaf, at Sante Fe; the New Mexico boys' school, at Springer; and the New Mexico school for the visually handicapped, at Alamogordo. *See* N.M. Const., art. XII, § 11 and art. XIV, § 1.



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**Cross references.** — For exemptions from income tax, *see* 7-2-4 NMSA 1978.

ANNOTATIONS

**Employee must comply with internal grievance procedures.** — An employee must substantially comply with mandatory internal grievance procedures contained in an employee manual or handbook before filing suit for breach of contract claims based on an alleged failure of an employer to follow its employment policies. *Lucero v. Bd. of Regents of UNM*, 2012-NMCA-055, 278 P.3d 1043, cert. denied, 2012-NMCERT-004.

Where a university manager was terminated by the university; the manager did not follow the grievance process contained in the university's employee handbook by filing a grievance; the handbook governed the manager's employment with the university; and the manager filed an action in district court for breach of contract and wrongful termination alleging that the employee handbook created a contract and that the university breached the contract by failing to abide by the handbook's policies and procedures governing workplace performance, disciplinary action, a harassment-free workplace, employer-employee relations, progressive discipline and by disciplining the manager without just cause, the manager's claims were barred because the manager failed to exhaust the handbook's internal grievance procedures before filing the breach of contract action based on an alleged failure of the university to follow policies in the handbook. *Lucero v. Bd. of Regents of UNM*, 2012-NMCA-055, 278 P.3d 1043, cert. denied, 2012-NMCERT-004.

**Power to adopt rules and regulations.** — By virtue of this section, the board of managers of the miners' hospital is empowered to adopt reasonable rules and regulations for the protection of the inmates, and to expel patients who refuse to comply with the regulations. 1917-18 Op. Att'y Gen. No. 17-1966.

It is beyond authority of board of trustees of New Mexico reform school to make regulations by which boys committed to the school can be released on parole on the board's order. 1909-12 Op. Att'y Gen. 193.

**Liability of board for negligence.** — While the members of the board of the New Mexico school for the deaf and the institution cannot be held liable for negligence in the promulgation of rules and regulations and ensuing misfortunes and accidents, if they make negligent or malicious determinations in individual cases and accidents result which are the sole, direct and proximate results of such determinations, it is possible that they may be held personally liable. The circumstances of each case will be the basis for ascertaining whether there has been negligence. 1959-60 Op. Att'y Gen. No. 60-221.

**Miners' hospital board has power to remove or discharge any employee,** but it must exercise this power in accordance with the rules promulgated by the personnel board. 1964 Op. Att'y Gen. No. 64-130.

**Including physician.** — The miners' hospital board may dismiss a physician in their employment for not abiding by the rules and regulations of the hospital board, but the physician has the right to appeal the dismissal to the personnel board. 1964 Op. Att'y Gen. No. 64-130.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Denial by hospital of staff privileges or referrals to physician or other health care practitioner as violation of Sherman Act (15 USCS § 1 et seq.), 89 A.L.R. Fed. 419.

## 23-1-2. [Sale or lease of lands; disposition of proceeds.]

The New Mexico college of agriculture and mechanic arts [New Mexico state university] and all other state, educational and charitable institutions, in New Mexico, are authorized to expend the funds derived from the sale and lease of their lands, or so much thereof as may be necessary which are placed to the credit of the respective institutions, for buildings, equipment and other permanent improvements.

**History: Laws 1905, ch. 72, § 1; Code 1915, § 5153; C.S. 1929, § 130-1303; 1941 Comp., § 5-103; 1953 Comp., § 13-3-3.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

The name of the New Mexico college of agriculture and mechanic arts was changed to New Mexico state university by N.M. Const., art. XII, § 11, as repealed and reenacted on November 8, 1960.

**Cross references.** — For Fort Bayard medical center, *see* 23-1-12 NMSA 1978.

For management and purposes of normal schools and their successors, *see* N.M. Const., art. XII, § 13 and 21-3-4 NMSA 1978 et seq.

For northern New Mexico state school, *see* N.M. Const., art. XII, § 13 and 21-4-1 NMSA 1978.

For New Mexico school for the visually handicapped, *see* N.M. Const., art. XII, § 13 and 21-5-2 NMSA 1978.

For New Mexico school for the deaf, *see* N.M. Const., art. XII, § 13 and 21-6-1 NMSA 1978.

For university of New Mexico, *see* N.M. Const., art. XII, § 13 and 21-7-3 NMSA 1978 et seq.

For New Mexico state university, *see* N.M. Const., art. XII, § 13, 21-8-4, 21-8-5 and 21-8-8 NMSA 1978.

For New Mexico institute of mining and technology, *see* N.M. Const., art. XII, § 13 and 21-11-4 NMSA 1978 et seq.

For New Mexico military institute, *see* N.M. Const., art. XII, § 13 and 21-12-1 NMSA 1978 et seq.

For New Mexico boys' school at Springer, *see* N.M. Const., art. XIV, §§ 1, 3.

For girls' welfare home, *see* N.M. Const., art. XIV, §§ 1, 3.

For penitentiary, *see* N.M. Const., art. XIV, § 1 and 33-2-1 NMSA 1978 et seq.

For miners' hospital, *see* N.M. Const., art. XIV, §§ 1, 3 and 23-3-1 to 23-3-4 NMSA 1978.

For Las Vegas medical center (formerly New Mexico state hospital and meadows home for the aged), *see* N.M. Const., art. XIV, §§ 1, 3, and 23-1-12 NMSA 1978 et seq. and 23-5-1 NMSA 1978.

For Los Lunas medical center, *see* N.M. Const., art. XIV, §§ 1, 3 and 23-1-12 NMSA 1978 et seq.

For Carrie Tingley crippled children's hospital, *see* N.M. Const., art. XIV, §§ 1, 3 and 23-2-2 NMSA 1978 et seq.

ANNOTATIONS

**Girls' welfare home is state institution.** 1959-60 Op. Att'y Gen. No. 60-187.

**Girls' welfare home may expend proceeds of sale of property to acquire a new dormitory.** This may be done by paying cash to the contractor, or by assigning the payments due under a conditional sales contract or mortgage. Furthermore, the girls' welfare home may convey



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the property of the home to a contractor, in return for which the contractor will build the home a new dormitory. 1959-60 Op. Att'y Gen. No. 60-187.

**Girls' welfare home may sell property.** — A sale of property by the girls' welfare home falls squarely within the provisions of this section. 1959-60 Op. Att'y Gen. No. 60-187.

**Proceeds are placed in credit.** — Proceeds of the sale of lands by a state institution are placed to the credit of the selling institution. 1959-60 Op. Att'y Gen. No. 60-187.

**Drawing from permanent fund authorized.** — Regents of the university of New Mexico are authorized to draw upon any money in the permanent fund to pay for land and improvements. 1912-13 Op. Att'y Gen. No. 13-1119.

**Drawing from income fund.** — The capitol custodian committee is authorized to draw money from the income fund from lands donated for public buildings. 1912-13 Op. Att'y Gen. No. 13-1139.

**Restrictions on the appropriation of the miners' hospital trust fund revenues** contained in the 1988 appropriations bill were consistent with the rule that legislative conditions on appropriations be limited to the fiscal period covered by the bill and did not conflict with this section. 1989 Op. Att'y Gen. No. 89-30.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 14 C.J.S. Charities § 34; 14A C.J.S. Colleges and Universities § 11.

## 23-1-3. [Boards to disburse funds; reports.]

The board of regents or other boards of control of said institutions are hereby authorized to expend said moneys as herein provided for said purposes and said boards shall make a full and complete report of the expenditures which they may make under the provisions of this act [23-1-2, 23-1-3 NMSA 1978], giving amount and purpose for which expended, to the governor of the state of New Mexico.

**History: Laws 1905, ch. 72, § 2; Code 1915, § 5154; C.S. 1929, § 130-1304; 1941 Comp., § 5-104; 1953 Comp., § 13-3-4.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For public finances generally, *see* Chapter 6 NMSA 1978.

For finances of state educational institutions, *see* 6-17-1 NMSA 1978 et seq.

## 23-1-4. [Annual statement of receipts and disbursements.]

It is hereby made the duty of the several boards of managers of state charitable or other institutions which receive any money from the state treasury, at the end of each fiscal year to make out an itemized and detailed statement of all receipts and disbursements of such institution up to and including the last day of said fiscal year, which shall be sworn to as correct by the secretary, treasurer or other accounting officer of such institution who draws and receives the state funds and shall be transmitted to the governor of the state within the first thirty days of the new fiscal year; and any failure on the part of any person or officer to perform the duties herein specified shall subject such person to removal from his position and in case he is a bonded officer it shall be considered as a breach of his bond and be a misdemeanor in office, for which he may be fined in any sum not exceeding five hundred [dollars] [($500)] nor less than one hundred dollars [($100)], which shall be recovered from him and the sureties on his bond as a penalty.

**History: Laws 1901, ch. 98, § 3; Code 1915, § 5157; C.S. 1929, § 130-1307; 1941 Comp., § 5-108; 1953 Comp., § 13-3-8.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 23-1-5. [Indebtedness in excess of appropriations prohibited; exceptions.]

Every officer, board, body or agency or any member thereof, empowered to expend any public money or to direct the expenditure thereof, or to contract indebtedness against or in view of specific appropriations, is hereby prohibted [prohibited] from making any contract, incurring any expense, or contracting any liability against this state, or any public fund thereof, which shall make, tend to make or contemplate any excess of expenditure beyond the terms of the laws authorizing expenditures by them, or either of them, or under their direction; and it shall be unlawful for any trustee, superintendent, warden or other officer of any of the educational, penal, charitable or other institutions of this state, who, under the laws, has authority or may be vested with authority



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to purchase supplies, employ servants or assistants, contract indebtedness, or to do any act contemplating the expenditure of public moneys, to contract any indebtedness in behalf of such institutions or ostensibly against the state on account of such institutions in excess of the appropriations made for the maintenance and support thereof; but in respect to the penitentiary, the asylum for the insane, the reform school, the institute for the blind, the miners' hospital and the deaf and dumb asylum, if the specific appropriations therefor shall have become exhausted, food and clothing for the inmates thereof may be purchased on the credit of the state.

**History: Laws 1912, ch. 69, § 1; Code 1915, § 5158; C.S. 1929, § 130-1308; 1941 Comp., § 5-109; 1953 Comp., § 13-3-9.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

ANNOTATIONS

**Generally.** — Officers of educational institutions may incur indebtedness if not in excess of the appropriations made. 1915-16 Op. Att'y Gen. No. 15-1441.

**State school may borrow money** so long as it keeps its indebtedness within the appropriations. 1915-16 Op. Att'y Gen. No. 16-1811.

**Borrowing money to provide student quarters.** — Regents of university of New Mexico may borrow money, within the limits of the appropriation, to provide quarters for additional students. 1912-13 Op. Att'y Gen. No. 13-1101.

**Reform school is not authorized** to borrow money. 1912-13 Op. Att'y Gen. No. 13-974.

**Authority to lease and purchase property.** — The board of regents of the normal university (New Mexico highlands university) has authority to lease and purchase property for school purposes, if kept within the appropriation provided by the legislature. 1919-20 Op. Att'y Gen. No. 19-2213.

**Authority choose personnel for more than year.** — Board of regents of the school of mines may elect or appoint a president and instructors for longer terms than one year. 1915-16 Op. Att'y Gen. No. 16-1761.

**Miners' hospital trustees have no authority to spend in excess what appropriated.** — Except to the extent indicated in this section, the miners' hospital board of trustees has no authority to spend amounts in excess of what is properly appropriated for the miners' hospital. Nothing in the statute, however, prevents the board from seeking deficit supplement legislation to cover shortfalls, nor is the board denied the recourse of resorting to private, nonstate funds. 1989 Op. Att'y Gen. No. 89-30.

## 23-1-6. [Emergency food and clothing; resolution required; approval by governor.]

Before such food and clothing shall be purchased, in case of emergency, as provided in the preceding section [23-1-5 NMSA 1978], there shall be passed a resolution of the governing board of the institutions mentioned, respectively, setting forth the kind, quantity, quality and estimated cost of such supplies, food and clothing, and the necessity therefor, and showing the state of the funds appropriated to such institutions respectively; and a copy thereof certified by the president, chairman or other head of such board, and attested by its secretary or clerk, shall be transmitted to the governor, who, if he approve the same, shall return it to the board from which it came, with his approval thereon endorsed over his signature, and thereupon the purchases specified shall be authorized; but if he disapprove the resolution, he shall so notify the board aforesaid.

**History: Laws 1912, ch. 69, § 2; Code 1915, § 5159; C.S. 1929, § 130-1309; 1941 Comp., § 5-110; 1953 Comp., § 13-3-10.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 23-1-7. [Penalty for exceeding appropriations.]

Any person violating any of the provisions of the two preceding sections [23-1-5, 23-1-6 NMSA 1978] shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by a fine not exceeding $500 nor less than $100, or by imprisonment in the penitentiary for not less than six months nor more than one year, or by both such fine and imprisonment in the discretion of the court trying such cause.

**History: Laws 1912, ch. 69, § 3; Code 1915, § 5160; C.S. 1929, § 130-1310; 1941 Comp., § 5-111; 1953 Comp., § 13-3-11.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.



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## 23-1-8. [Grand jury to note statutes prohibiting indebtedness exceeding appropriations.]

It is hereby made the duty of the several district judges to call to the attention of grand jurors the provisions of the three preceding sections [23-1-5 to 23-1-7 NMSA 1978].

**History: Laws 1912, ch. 69, § 4; Code 1915, § 5161; C.S. 1929, § 130-1311; 1941 Comp., § 5-112; 1953 Comp., § 13-3-12.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 23-1-9. Repealed.

**Repeals.** — Laws 2017, ch. 87, § 31 repealed 23-1-9 NMSA 1978, as enacted by Laws 1941, ch. 69, § 1, relating to retirement and pensions for employees, effective June 16, 2017. For provisions of former section, *see* the 2016 NMSA 1978 on *NMOneSource.com*.

## 23-1-10. Repealed.

**Repeals.** — Laws 2017, ch. 87, § 31 repealed 23-1-10 NMSA 1978, as enacted by Laws 1941, ch. 69, § 2, relating to right to pension, maximum amount, inclusion in budget, effective June 16, 2017. For provisions of former section, *see* the 2016 NMSA 1978 on *NMOneSource.com*.

## 23-1-11. [Payment of pensions from excess of income from donated lands only.]

That all pensions provided by this act [23-1-11 NMSA 1978] shall be payable solely out of the income or current fund of the institution paying such pensions derived from the renting of lands of such institution donated by the United States of America, over and above such portion of such current income as may be necessary to service any bond issue of such institution heretofore lawfully issued, and no part of such pensions shall be paid out of the permanent fund of such institution, nor out of funds raised by general taxation.

**History: 1941 Comp., § 5-115, enacted by Laws 1941, ch. 69, § 3; 1953 Comp., § 13-3-15.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Compiler's notes.** — "This act" referred to Laws 1941, ch. 69, §§ 1, 2 and 3 (Sections 23-1-9, 23-1-10 and 23-1-11 NMSA 1978). Laws 2017, ch. 87, § 31 repealed Sections 23-1-9 and 23-1-10 NMSA 1978, effective June 16, 2017.

## 23-1-12. Transfer of existing institutions.

A. All property, appropriations and cash balances now held in the name of the following institutional facilities, or by any state agency for the indicated facilities, the use of which is not limited by the terms of any trust or constitutional provision, and staff employed by the following institutional facilities, are transferred to the department of health:

(1) New Mexico behavioral health institute at Las Vegas;
(2) Los Lunas medical center;
(3) Fort Bayard medical center veterans' unit;
(4) Villa Solano;
(5) Fort Stanton hospital;
(6) Turquoise lodge;
(7) Pecos lodge; and
(8) New Mexico state veterans' home.

B. The secretary of health may delegate the authority for the supervision and operation of any of the institutional facilities transferred under Subsection A of this section to any of the organizational units within the department of health.



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**History: 1953 Comp., § 13-12-1, enacted by Laws 1977, ch. 253, § 42; 2005, ch. 313, § 4; 2019, ch. 146, § 2.**

**The 2019 amendment,** effective July 1, 2019, transferred the New Mexico state veterans' home from the veterans' services department to the department of health; in Subsection A, in the introductory clause, after "constitutional provision,", added "and staff employed by the following institutional facilities", and added new Paragraph A(8).

**The 2005 amendment,** effective June 17, 2005, changed the name of the Las Vegas medical center to the New Mexico behavioral institute at Las Vegas in Subsection A(1) and added "veterans' unit" in Subsection A(3).

## 23-1-13. New medical center names.

A. Henceforth, the New Mexico state hospital at Las Vegas and the meadows home for the aged will be known as the "New Mexico behavioral health institute at Las Vegas". This center may offer general hospital care, extended care, intermediate care, skilled nursing services and out-patient care, as well as services now required by statute.

B. Henceforth, the Los Lunas hospital and training school at Los Lunas will be known as the "Los Lunas medical center". This center may offer general hospital care, extended care, skilled nursing services and out-patient care, as well as services now required by statute.

C. Henceforth, the Fort Bayard hospital will be known as the "Fort Bayard medical center". This center may offer general hospital care, extended care, skilled nursing services and out-patient care, as well as services now required by statute.

**History: 1953 Comp., § 13-12-1.2, enacted by Laws 1970, ch. 45, § 1; 2005, ch. 313, § 5.**

**The 2005 amendment,** effective June 17, 2005, changed the name of the Las Vegas medical center to the New Mexico behavioral institute at Las Vegas in Subsection A.

# ARTICLE 2

# Carrie Tingley Crippled Children's Hospital

Sec.
23-2-1. Carrie Tingley crippled children's hospital program created.
23-2-2. Advisory committee.
23-2-3. Powers and duties.
23-2-4 to 23-2-6. Repealed.
23-2-7. Carrie Tingley crippled children's hospital fund and program funds.
23-2-8. Repealed.
23-2-9. Receipts from public lands where no beneficiary is designated.

## 23-2-1. Carrie Tingley crippled children's hospital program created.

In order to provide care and treatment for the crippled children of New Mexico in need of long-term inpatient or outpatient care, there is hereby created the Carrie Tingley crippled children's hospital program to be administered by the board of regents of the university of New Mexico. For the purposes of this section, "crippled children" means children whose primary diagnosis is a chronic impairment which may require long-term inpatient or outpatient medical or surgical care or treatment.

**History: Laws 1937, ch. 13, § 1; 1941 Comp., § 5-301; 1953 Comp., § 13-5-1; Laws 1981, ch. 275, § 1; 1989, ch. 247, § 1.**

**Cross references.** — For hospital as state institution, *see* N.M. Const., art. XIV, § 1.

For licensure of health facilities under Public Health Act, *see* 24-1-5 NMSA 1978.

For Medical Malpractice Act, *see* Chapter 41, Article 5 NMSA 1978.

**ANNOTATIONS**

**Legislative intent.** — In enacting this section, the legislature plainly intended that Carrie Tingley crippled children's hospital be located in the buildings erected at Truth or Consequences. The location of Carrie Tingley cannot be changed without a change in this section. 1980 Op. Att'y Gen. No. 80-16 (rendered prior to 1981 amendment).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 40A Am. Jur. 2d Hospitals and Asylums §§ 1 to 26.

41 C.J.S. Hospitals § 6.



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## 23-2-2. Advisory committee.

The board of regents of the university of New Mexico shall appoint and consult with an advisory group consisting of at least three parents of children with a chronic impairment and two health professionals.

**History: Laws 1937, ch. 13, § 2; 1941 Comp., § 5-302; Laws 1951, ch. 127, § 1; 1953 Comp., § 13-5-2; Laws 1955, ch. 126, § 1; 1987, ch. 199, § 1; 1989, ch. 247, § 2.**

ANNOTATIONS

**Salary not authorized.** — Public officers are not entitled to a salary unless it is authorized by statute, and there is no such authorization for the directors of Carrie Tingley crippled children's hospital in Laws 1937, ch. 13. 1937-38 Op. Att'y Gen. No. 38-2036 (rendered prior to law).

## 23-2-3. Powers and duties.

The board of regents of the university of New Mexico shall manage, control and govern the Carrie Tingley crippled children's hospital program under rules, regulations or other directives and policies as the board of regents may from time to time prescribe. The board of regents of the university of New Mexico has the full power to enter into contracts or other agreements as it deems necessary or desirable for the operation and management of the Carrie Tingley crippled children's hospital program.

**History: 1978 Comp., § 23-2-3, enacted by Laws 1989, ch. 247, § 3.**

**Repeals and reenactments.** — Laws 1989, ch. 247, § 3 repealed 23-2-3 NMSA 1978, as enacted by Laws 1937, ch. 13, § 3, relating to powers and duties, and enacted a new section, effective June 16, 1989.

## 23-2-4 to 23-2-6. Repealed.

**Repeals.** — Laws 1989, ch. 247, § 8 repealed 23-2-4 to 23-2-6 NMSA 1978, as enacted by Laws 1937, ch. 13, §§ 4 to 6, relating to medical superintendent and other agents and employees, departments and services, and admittance to hospital, effective June 16, 1989.

## 23-2-7. Carrie Tingley crippled children's hospital fund and program funds.

There is created the "Carrie Tingley crippled children's hospital program fund". All money now held by the Carrie Tingley crippled children's hospital fund or payable to that fund in the future for the purpose of operating and managing the Carrie Tingley crippled children's hospital program shall be paid over to the board of regents of the university of New Mexico to be used for the purpose of operating the Carrie Tingley crippled children's hospital program. All money from patient care and treatment rendered by the Carrie Tingley crippled children's hospital program, now held or received in the future, shall be paid over to the board of regents of the university of New Mexico to be used for the purpose of operating the Carrie Tingley crippled children's hospital program.

**History: Laws 1937, ch. 13, § 7; 1941 Comp., § 5-307; 1953 Comp., § 13-5-7; Laws 1989, ch. 247, § 4.**

ANNOTATIONS

**Lottery for benefit of hospital illegal.** — Lottery to be conducted as part of a fair to be held in state for benefit of crippled children's hospital is illegal. *Harriman Inst. of Soc. Research, Inc. v. Carrie Tingley Crippled Children's Hosp.*, 1938-NMSC-062, 43 N.M. 1, 84 P.2d 1088.

## 23-2-8. Repealed.

**Repeals.** — Laws 1989, ch. 247, § 8 repealed 23-2-8 NMSA 1978, as enacted by Laws 1941, ch. 27, § 1, relating to an appropriation for the hospital maintenance fund, effective June 16, 1989.



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## 23-2-9. Receipts from public lands where no beneficiary is designated.

The commissioner of public lands and the state treasurer are authorized to transfer to the board of regents of the university of New Mexico for the credit of the Carrie Tingley crippled children's hospital program all receipts now held or which may hereafter be received from any lands acquired by the state by purchase and placed under the state land office where no beneficiary is specified, including Conchas dam lands.

**History: 1941 Comp., § 8-115a; Laws 1953, ch. 33, § 1; 1953 Comp., § 13-5-9; Laws 1989, ch. 247, § 5.**

# ARTICLE 3

# Miners' Hospital

Sec.
23-3-1. Purpose of miners' hospital; admission and maintenance of patients.
23-3-2. Board created; terms; composition; compensation.
23-3-3. Powers and duties.
23-3-4. Transfer of funds and property.

## 23-3-1. Purpose of miners' hospital; admission and maintenance of patients.

The miners' hospital of New Mexico is intended and meant to be for the free treatment and care of resident miners of the state of New Mexico, who may become sick or injured in the line of their occupation; and all lodging and medical care shall be free of charge, as shall all other expenses incurred by the patient, except in cases where such patient is possessed of property and means sufficient to enable him to pay the actual costs and charges incurred by his attendance at such hospital, in which case the governing authority may make provision for his being charged and paying such expenses incurred.

Provided, however, the governing authority may take in other patients for treatment and care, upon the payment of all expenses therefor by the patients, when they may be received and treated without excluding any miners from the hospital.

**History: Laws 1903, ch. 2, § 9; 1907, ch. 48, § 1; Code 1915, § 5106; C.S. 1929, § 130-501; 1941 Comp., § 5-401; 1953 Comp., § 13-6-1; Laws 1968, ch. 17, § 9.**

**Compiler's notes.** — Laws 1903, ch. 2, § 4, as amended by Laws 1986, ch. 12, § 1, provided for an institution to be called the miners' hospital of New Mexico, which institution is located at the city of Raton in Colfax County, New Mexico.

Laws 2009, ch. 125, § 44, effective June 19, 2009, appropriated $1,000,000 from the miners' trust fund to the miners' hospital for expenditure in fiscal years 2009 through 2013 to purchase and install an automated pharmaceutical dispensing system at the miners' hospital in Raton in Colfax county.

**Cross references.** — For confirmation as to state institution, *see* N.M. Const., art. XIV, § 1.

For control and management as provided by law, *see* N.M. Const., art. XIV, § 3.

For Medical Malpractice Act, *see* Chapter 41, Article 5 NMSA 1978.

### ANNOTATIONS

**Ownership of facility and equipment by state.** — Any facility and/or equipment provided for in the establishment of the miners' hospital is an integral part of that state institution and is fully owned by the State of New Mexico. 1957-58 Op. Att'y Gen. No. 57-209.

**Right of miner to be admitted.** — If a person is a miner at the time he seeks admission to the hospital, he meets the requirement of this section. 1959-60 Op. Att'y Gen. No. 60-127.

**Miner who has discontinued his occupation as miner** and who becomes sick or infirm, but not in line of his occupation, is not entitled to admission to miners' hospital free of charge. 1915-16 Op. Att'y Gen. No. 15-1448.

**Treatment as outpatient.** — Resident miners who meet other statutory requirements may be medically treated as outpatients free of charge. 1961-62 Op. Att'y Gen. No. 62-119.

**Nonminers treated at the miners' hospital** must pay all expenses for treatment and care in accordance with the applicable laws including fixed costs. 1988 Op. Att'y Gen. No. 88-21.

**When condition temporary.** — Resident miners who meet other statutory requirements may be admitted, treated and cared for free of charge when their condition is temporary rather than permanent or chronic. 1961-62 Op. Att'y Gen. No. 62-119.

**Miners' hospital may not sell or dispense medicine and drugs** while operating as a public institution which is not licensed as required under the provision of 61-11-1 NMSA 1978 et seq. 1957-58 Op. Att'y Gen. No. 57-254.

**No sales at doctors' request.** — The miners' hospital may not sell drugs or medical supplies to people who are



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not admitted to the hospital as inpatients or outpatients when doctors ask that such be sold to them. 1957-58 Op. Att'y Gen. No. 57-254.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40A Am. Jur. 2d Hospitals and Asylums §§ 1 to 26.
41 C.J.S. Hospitals § 6.

## 23-3-2. Board created; terms; composition; compensation.

A. There is created the "board of trustees of the miners' hospital of New Mexico". The board shall consist of five members appointed by the governor with the advice and consent of the senate. One member of the board shall be a licensed physician, two members shall be miners or their representatives and two members shall be representatives of the general public. Members of the board shall be appointed for staggered terms of five years each, except that the initial board shall be composed of one member appointed for a term of one year, one member appointed for a term of two years, one member appointed for a term of three years, one member appointed for a term of four years and one member appointed for a term of five years.

B. A majority of the board shall constitute a quorum for doing business.

C. Members of the board shall receive per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

**History: 1953 Comp., § 13-6-2, enacted by Laws 1975, ch. 19, § 1.**

ANNOTATIONS

**Members of legislature may not serve.** — Members of the legislature may not serve on the following boards and commissions: (1) livestock board; (2) state police board; (3) capitol buildings improvement commission (now department of finance and administration); (4) board of regents - El Rito normal; (5) state fair commission; (6) miners' hospital of New Mexico. 1959-60 Op. Att'y Gen. No. 59-140.

## 23-3-3. Powers and duties.

The board is a body corporate under the name of the board of trustees of the miners' hospital of New Mexico and has the power to sue and be sued, contract, acquire land by purchase or donation and to do all other things necessary to carry out its duties. The board shall supervise and control all functions of the operation and management of the miners' hospital of New Mexico.

**History: 1953 Comp., § 13-6-3, enacted by Laws 1975, ch. 19, § 2.**

ANNOTATIONS

**Restrictions on the appropriation of the miner's hospital trust fund revenues** contained in the 1988 appropriations bill were consistent with the rule that legislative conditions on appropriations be limited to the fiscal period covered by the bill and did not conflict with this section. 1989 Op. Att'y Gen. No. 89-30.

**Miners' hospital board has power to remove or discharge any employee,** but it must exercise this power in accordance with the rules promulgated by the personnel board. 1964 Op. Att'y Gen. No. 64-130.

**Removal of physician.** — The miners' hospital board may dismiss a physician in its employment for not abiding by the rules and regulations of the hospital board, but the physician has the right to appeal the dismissal to the personnel board. 1964 Op. Att'y Gen. No. 64-130.

**Authority to rent, lease or sell facilities and equipment.** — The renting or leasing of facilities and equipment would not be outside the authority granted. And further, a sale of laboratory and X-ray equipment owned by the state may be made by the chairman of the board in accordance with the provisions of 13-6-2 NMSA 1978. 1957-58 Op. Att'y Gen. No. 57-209.

**Expansion of facilities.** — The board of trustees for miners' hospital can commit the miners' trust and the state of New Mexico to acquire northern Colfax county hospital and agree to operate a general hospital to provide at least the health care services of the scope and quality appropriate to the needs of the population of Colfax county. The board does not violate the terms of the trust by placing $1 million in escrow for 75 years for the purchase of the facility that, under one method of valuation, had no significant value at the date of acquisition. 1988 Op. Att'y Gen. No. 88-21.

## 23-3-4. Transfer of funds and property.

All property, real, personal and mixed, including appropriations and cash balances now held by the hospitals and institutions department for the purpose of operating and managing the miners' hospital of New Mexico is transferred to the board of trustees of the miners' hospital of New Mexico.

**History: 1953 Comp., § 13-6-4, enacted by Laws 1975, ch. 19, § 3.**



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# ARTICLE 4

# New Mexico Veterans' Home

Sec.
23-4-1. Veterans' home created; advisory board.
23-4-2. Repealed.
23-4-3. Eligibility for care; standards.
23-4-4. Repealed.
23-4-4.1. Donations; gifts; bequests.
23-4-5, 23-4-6. Repealed.
23-4-7. Future transfer of lands; restrictions.

## 23-4-1. Veterans' home created; advisory board.

A. The "New Mexico state veterans' home" located near Truth or Consequences, New Mexico, is declared to be a state home for veterans of service in the armed forces of the United States and their qualifying spouses, surviving spouses and gold star parents.

B. The "Fort Bayard medical center veterans' unit", a separate and distinct unit of the Fort Bayard medical center, located near Silver City, New Mexico, is declared to be a state home for veterans of service in the armed forces of the United States.

C. There is created the "New Mexico veterans' home advisory board". The advisory board shall consist of nine members as follows:

(1) the secretary of health or the secretary's designee;

(2) the secretary of veterans' services or the secretary's designee;

(3) the secretary of aging and long-term services or the secretary's designee;

(4) the administrator of a private nursing home;

(5) a registered health care professional who is employed by a public or private nursing home;

(6) the state commander of the department of New Mexico veterans of foreign wars or the department commander's designee;

(7) the department commander of the American legion or the department commander's designee;

(8) the state commander of disabled American veterans or the state commander's designee; and

(9) a member of any other congressionally recognized veteran service organization.

D. The governor shall appoint the members designated in Paragraphs (4), (5) and (9) of Subsection C of this section, and their terms shall be for three years each.

E. The New Mexico state veterans' home shall be under the control and oversight of the department of health.

F. The New Mexico veterans' home advisory board shall provide advice to the secretaries of veterans' services and health and the administrators of the New Mexico state veterans' home and the Fort Bayard medical center regarding veterans' services.

**History: 1953 Comp., § 74-7-1, enacted by Laws 1974 (S.S.), ch. 2, § 1; 1983, ch. 329, § 1; 1986, ch. 103, § 1; 1987, ch. 133, § 1; 1991, ch. 24, § 1; 1993, ch. 7, § 1; 2001, ch. 40, § 1; 2004, ch. 19, § 25; 2017, ch. 84, § 8; 2019, ch. 146, § 3.**

**The 2019 amendment,** effective July 1, 2019, added the secretary of veterans' services or the secretary's designee to the New Mexico veterans' home advisory board", and provided that the New Mexico state veterans' home shall be under the control and oversight of the department of health; in Subsection C, deleted former Paragraph C(2) and added new Paragraph C(2); and in Subsection E, after "under the control", added "and oversight", after "of the", deleted "veterans' services", and after "department", added "of health".

**The 2017 amendment,** effective July 1, 2017, provided that the New Mexico state veterans' home is for qualifying spouses, surviving spouses and gold star parents of veterans of service in the armed forces of the United States, and made changes to the composition of the New Mexico home advisory board; in Subsection A, after "United States", added "and their qualifying spouses, surviving spouses and gold star parents"; in Subsection C, in the introductory language, after "veterans'", added "home", in Paragraph C(1), after "secretary of", deleted "veterans' services" and added "health", and after "or", deleted "his" and added "the secretary's", in Paragraph C(2), after "director of the", deleted "state benefits" and added "health care coordination", in Paragraph C(3), deleted "a veteran of World War II" and added the remainder of the paragraph, in Paragraph C(5), after "registered", deleted "nurse" and added "health care professional", in Paragraph C(6), deleted "a veteran of the Korean conflict" and added the remainder of the paragraph, in Paragraph C(7), after the paragraph designation, deleted "a veteran of the Vietnam conflict" and added the remainder of the paragraph, in Paragraph C(8), deleted "a veteran of the Gulf War" and added the remainder of the paragraph, and



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in Paragraph C(9), deleted "veteran of the Iraqi Freedom conflict" and added the remainder of the paragraph; in Subsection D, after "Paragraphs", deleted "(3) through" and added "(4), (5) and"; in Subsection E, after "control of the", added "veterans' services", and after "department", deleted "of health"; and in Subsection F, after the first occurrence of "veterans'", added "home", and after "advice to the", deleted "secretary of" and added "secretaries of veterans' services".

**The 2004 amendment,** effective May 19, 2004, in Subsection C, changed "chairman of the New Mexico veterans' service commission" to "secretary of veterans' services" and added new Paragraphs (8) and (9); and in Subsection D, provided for the appointment of the two new members of the New Mexico veterans' advisory board.

**The 2001 amendment,** effective June 15, 2001, substituted "Veterans' home" for "Veterans' center" in the section heading; substituted "New Mexico state veterans' home" for "New Mexico veterans' center" throughout the section; and inserted "New Mexico" preceding "veterans" in Paragraph C(1).

**The 1993 amendment,** effective June 18, 1993, substituted " 'New Mexico veterans' center' located near Truth or Consequences, New Mexico" for " 'Truth or Consequences veterans' center' located near Truth or Consequences, New Mexico, hereinafter referred to as the 'center' " in Subsection A; added current Subsection B; redesignated former Subsections B through D as current Subsections C through E; in current Subsection C, substituted "'New Mexico veterans' advisory board'" for "'advisory board of the Truth or Consequences veterans' center'", added "or his designee" at the end of Paragraph (1), substituted "a veteran of World War II" for "the administrator of Fort Bayard medical center" in Paragraph (3), inserted "of the Korean conflict" in Paragraph (6), and added Paragraph (7); in Subsection E, substituted "department of health" for "health and environment department"; added Subsection F; and made minor stylistic changes.

**The 1991 amendment,** effective June 14, 1991, substituted "a veteran" for "the director of the Albuquerque veterans' administration medical center" in Paragraph (6) of Subsection B; and, in Subsection C, inserted "and (6)" and made a related stylistic change.

## 23-4-2. Repealed.

**Repeals.** — Laws 1987, ch. 133, § 6 repealed 23-4-2 NMSA 1978, as enacted by Laws 1974 (1st S.S.), ch. 2, § 3, relating to duties of executive director of the veterans' center, effective June 19, 1987.

## 23-4-3. Eligibility for care; standards.

A. Occupancy in the New Mexico state veterans' home and the Fort Bayard medical center veterans' unit shall be for veterans of service in the armed forces of the United States who have served on active duty pursuant to rules adopted by the secretary of veterans' services consistent with federal guidelines. To be eligible for admission and continued occupancy, a veteran must be a citizen of the United States who enlisted or was drafted, inducted or commissioned in the armed forces of the United States, who was accepted for and assigned to active duty in the armed forces and was not separated from the armed forces under circumstances amounting to a dishonorable discharge from the armed forces.

B. Additionally, no more than twenty-five percent of the occupancy in the New Mexico state veterans' home shall consist of nonveterans from the following categories:

(1) spouses;

(2) surviving spouses; and

(3) gold star parents, as defined in the Veterans' Services Department Act [Chapter 9, Article 22 NMSA 1978].

C. Whenever a law, rule or regulation of the United States department of veterans affairs or any other law permits the state to receive federal funds for the use and benefit of the New Mexico state veterans' home, upon acceptance of a veteran of the armed forces of the United States not meeting the requirements of Subsection A of this section, the New Mexico veterans' home advisory board may adopt rules to authorize such veteran's acceptance.

**History: 1953 Comp., § 74-7-3, enacted by Laws 1974 (S.S.), ch. 2, § 4; 1983, ch. 329, § 3; 1986, ch. 103, § 2; 1987, ch. 133, § 2; 1993, ch. 7, § 2; 2001, ch. 40, § 2; 2017, ch. 84, § 9.**

**The 2017 amendment,** effective July 1, 2017, revised the eligibility standards for admission and continued occupancy in the New Mexico state veterans' home and the Fort Bayard medical center veterans' unit, and authorized the New Mexico home advisory board to adopt rules authorizing acceptance of veterans that do not meet the eligibility requirements in certain circumstances; in Subsection A, after "secretary of", deleted "health" and added "veterans' services", after "a veteran must be", deleted the paragraph designation "(1)", after "discharge from the armed forces", deleted "and" and deleted former Paragraph A(2); in Subsection B, Paragraph B(3), after "parents,", added "as defined in the Veterans' Services Department Act"; and in Subsection C, after "regulation of the", deleted "veterans' administration of the federal government" and added "United States department of veterans affairs", after "Subsection A of this section, the", added "New Mexico veterans' home advisory", and after "board", deleted "trustees".

**The 2001 amendment,** effective June 15, 2001, substituted "state veterans' home" for "veterans' center" and "rules" for "rules and regulations" throughout the section.



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**The 1993 amendment,** effective June 18, 1993, in Subsection A, substituted "New Mexico veterans' center and the Fort Bayard medical center veterans' unit" for "center", substituted "on active duty" for "at least ninety days of active duty", and deleted "and environment" following "health" in the first sentence, rewrote Paragraph (1) which read "release or separation from the service with an honorable discharge", and substituted "admission" for "application" at the end of Paragraph (2); and made stylistic changes in Subsections B and C.

## 23-4-4. Repealed.

**Repeals.** — Laws 1987, ch. 133, § 6 repealed 23-4-4 NMSA 1978, as enacted by Laws 1974 (1st S.S.), ch. 2, § 5, relating to payment of charges at the veterans' center, effective June 19, 1987.

## 23-4-4.1. Donations; gifts; bequests.

The New Mexico state veterans' home may accept donations, gifts and bequests of land, money or other things of value for the purposes of Sections 23-4-1 and 23-4-3 NMSA 1978. The title to such lands, together with all improvements thereon, shall vest in the state, and the deeds thereto, all insurance policies, certificates of water rights and other evidences of ownership of the land or improvements of the New Mexico state veterans' home shall be filed as provided by law. Except as provided by the conditions of such donations, gifts and bequests, all donations and gifts of money shall be deposited by law.

**History: 1978 Comp., § 23-4-4.1, enacted by Laws 1983, ch. 329, § 5; 1986, ch. 103, § 4; 1987, ch. 133, § 3; 1993, ch. 7, § 3; 2001, ch. 40, § 3.**

**The 2001 amendment,** effective June 15, 2001, substituted "state veterans' home" for "veterans' center" in two places and updated the internal reference in the first sentence.

**The 1993 amendment,** effective June 18, 1993, inserted "New Mexico veterans' " preceding "center" in the first and second sentences.

## 23-4-5, 23-4-6. Repealed.

**Repeals.** — Laws 1983, ch. 329, § 9, repealed 23-4-5 NMSA 1978, as enacted by Laws 1974 (1st S.S.), ch. 2, § 7, relating to donations and their title in state, and 23-4-6 NMSA 1978, as enacted by Laws 1974 (1st S.S.), ch. 2, § 8, relating to acquisition of lands and their title in state, effective April 8, 1983. For present provisions, *see* 23-4-4.1 NMSA 1978.

## 23-4-7. Future transfer of lands; restrictions.

A. The secretary of health shall designate not more than thirty acres of land immediately surrounding the old Carrie Tingley crippled children's hospital building, including the support buildings and three adjoining houses, which may not be designated as surplus property by the department of finance and administration pursuant to this section. Subsequent to such a designation, the department of finance and administration may determine, after the New Mexico state veterans' home has been established, that there exists acreage that is surplus to the needs of the New Mexico state veterans' home.

B. The department of finance and administration, with approval of the state board of finance, may transfer a portion of the designated surplus property not to exceed twenty-five acres to the Truth or Consequences school board to be used for a site for construction of a middle school.

C. Subsequent to the official decision of the Truth or Consequences school board to proceed or not to proceed with the construction of a middle school on property adjacent to the New Mexico state veterans' home, the department of finance and administration may transfer, with approval of the state board of finance, part or all of the remaining surplus property to the city of Truth or Consequences for use in future economic development projects.

D. All transfers of land provided for in this section shall be subject to the following conditions:

(1) the governor or his designee shall approve any plans for development of any part of the original site before commencement of any construction under such plans;

(2) if the Truth or Consequences school board has not developed a master plan for use of any property transferred to it by January 1, 1987 or has not substantially initiated this plan by January 1, 1993, the surplus property transferred to that school board shall revert to the state;



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(3) if the city of Truth or Consequences has not developed a master plan for use of any property transferred to it by January 1, 1987 or has not substantially initiated this plan by January 1, 1993, the surplus property transferred to that city shall revert to the state;

(4) the department of finance and administration shall not transfer as surplus property either the access to any well already existing on the site or any buildings on the site without the consent of the board of trustees; and

(5) no commitment on any parcel of land at the original site shall be made to the Truth or Consequences school board or to the city of Truth or Consequences until after such time as the New Mexico state veterans' home is approved by the legislature.

**History: Laws 1983, ch. 329, § 7; 1986, ch. 103, § 5; 1987, ch. 133, § 4; 1993, ch. 7, § 4; 2001, ch. 40, § 4.**

**The 2001 amendment,** effective June 15, 2001, substituted "state veterans' home" for "veterans' center" in Subsections A, C and D and substituted "New Mexico state veterans' home" for "center" at the end of Subsection A.

**The 1993 amendment,** effective June 18, 1993, deleted "and environment" following "health" in the first sentence of Subsection A and inserted "New Mexico veterans'" preceding "center" in Subsections A and C and Paragraph (5) of Subsection D.

# ARTICLE 5

# Las Vegas Medical Center

Sec.
23-5-1. Object.
Sec.
23-5-2. Repealed.

## 23-5-1. Object.

The object of the New Mexico behavioral health institute at Las Vegas is the observation, diagnosis, treatment, care and maintenance of the mentally ill.

**History: 1953 Comp., § 34-1-11.1, enacted by Laws 1959, ch. 360, § 1. 2005, ch. 313, § 6.**

**Cross references.** — For provisions of the Mental Health and Developmental Disabilities Code, *see* Chapter 43, Article 1 NMSA 1978.

**The 2005 amendment,** effective June 17, 2005, changed the name of the Las Vegas medical center to the New Mexico behavioral institute at Las Vegas.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Civil liability for physical measures undertaken in connection with treatment of mentally disordered patient, 8 A.L.R.4th 464.

Hospital's liability for mentally deranged patient's self-inflicted injuries, 36 A.L.R.4th 117.

## 23-5-2. Repealed.

**Repeals.** — Laws 1981, ch. 72, § 1, repealed 23-5-2 NMSA 1978, as enacted by Laws 1959, ch. 188, § 1, relating to the power of the governing authority of the state hospital to create branch facilities, effective March 21, 1981.

# ARTICLE 6

# Los Lunas Medical Center

(Repealed by Laws 1978, ch. 211, § 16.)

## 23-6-1, 23-6-2. Repealed.

**Repeals.** — Laws 1978, ch. 211, § 16, repealed former 34-3-2 and 34-3-5, 1953 Comp. (23-6-1, 23-6-2 NMSA 1978), relating to establishment, powers and duties of the Los Lunas hospital and training school, effective March 7, 1978.



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Laws 1981, ch. 72, § 1, purported to repeal 23-6-2 NMSA 1978, although it had already been repealed by Laws 1978, ch. 211, § 16.

# ARTICLE 7

# Community Mental Health Services

(Repealed by Laws 1999, ch. 270, § 10.)

## 23-7-1 to 23-7-12. Repealed.

**Repeals.** — Laws 1999, ch. 270, § 10 repealed 23-7-1 NMSA 1978, as enacted by Laws 1973, ch. 378, § 1, relating to pilot demonstration centers, effective July 1, 1999. For provisions of former section, *see* the 1998 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 9-7-6.3 NMSA 1978.

Laws 1999, ch. 270, § 10 repealed the Community Mental Health Services Act, 23-7-2 to 23-7-12 NMSA 1978, as enacted by Laws 1975, ch. 104, §§ 1 to 11, effective July 1, 1999. For provisions of former sections, *see* the 1998 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 9-7-6.3 NMSA 1978.

# ARTICLE 8

# Children's Psychiatric Unit at University of New Mexico

Sec.
23-8-1. Children's psychiatric unit; operational control.

## 23-8-1. Children's psychiatric unit; operational control.

After the completion of the construction and equipment of the children's psychiatric unit at Albuquerque by the hospitals and institutions department, as provided by Laws 1975, Chapter 140, the operational control of the children's psychiatric unit shall be by the regents of the university of New Mexico.

**History: 1953 Comp., § 73-25-3.1, enacted by Laws 1977, ch. 174, § 1.**

**Compiler's notes.** — Laws 1975, Chapter 140 was not compiled, as it was not of a general and permanent nature.

**Cross references.** — For provisions of the Mental Health and Developmental Disabilities Code, *see* Chapter 43, Article 1 NMSA 1978.

# ARTICLE 9

# Adolescent Treatment Hospital

Sec.
23-9-1. Short title.
23-9-2. Definitions.
23-9-3. Adolescent treatment hospital; creation.
23-9-4. Adolescent residential treatment facility; creation.
23-9-5. Adolescent treatment hospital governing board; creation; organization; duties.
23-9-6. Hospital admissions; treatment.
23-9-7. Adolescent treatment hospital and adolescent residential treatment facility administration.

## 23-9-1. Short title.

This act [23-9-1 through 23-9-7 NMSA 1978] may be cited as the "Adolescent Treatment Hospital Act".



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**History: Laws 1992, ch. 60, § 1.**

## 23-9-2. Definitions.

As used in the Adolescent Treatment Hospital Act :

A. "adolescent" means a person aged thirteen through twenty;

B. "adolescent treatment hospital" means the hospital created pursuant to the Adolescent Treatment Hospital Act;

C. "board" means the adolescent treatment hospital governing board;

D. "adolescent residential treatment facility" means the facility created pursuant to the Adolescent Treatment Hospital Act; and

E. "coordinated treatment panel" means the group made up of trained health and mental health professionals who review and approve psychosocial treatment recommendations, develop psychosocial treatment alternatives, track costs and cost-effectiveness and evaluate outcomes; and

F. "secretary" means the secretary of health.

**History: Laws 1992, ch. 60, § 2; 1998, ch. 28, § 1.**

**The 1998 amendment,** effective May 20, 1998, in Subsection E, deleted "from the human services department, the department of health, the state department of public education and the youth authority" following "professionals".

## 23-9-3. Adolescent treatment hospital; creation.

The "adolescent treatment hospital" is created. The adolescent treatment hospital shall provide care, treatment and reintegration into society for adolescents who are violent or who have a history of violence and have a mental disorder and who are amenable to treatment.

**History: Laws 1992, ch. 60, § 3.**

## 23-9-4. Adolescent residential treatment facility; creation.

The "adolescent residential treatment facility" is created. The adolescent residential treatment facility shall provide a residential treatment program designed for treating adolescents with serious emotional disturbances for the purpose of developing skills necessary for successful transition into the community. The facility shall include a therapeutic environment by establishing a therapeutic milieu or by using a reeducation model that emphasizes the building of competencies.

**History: Laws 1992, ch. 60, § 4.**

## 23-9-5. Adolescent treatment hospital governing board; creation; organization; duties.

A. There is created the "adolescent treatment hospital governing board" consisting of five members appointed by the secretary. The members shall serve at the pleasure of the secretary and shall be familiar with the treatment and care of violent adolescents who are mentally disordered.

B. The board shall advise the secretary on professional practices, community concerns and policies and procedures related to the treatment of adolescents admitted to the adolescent treatment hospital.

C. The board, in consultation with the secretary, shall make and adopt such reasonable rules and regulations as may be necessary or convenient to carry out its duties and to administer the provisions of the Adolescent Treatment Hospital Act.

**History: Laws 1992, ch. 60, § 5.**



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## 23-9-6. Hospital admissions; treatment.

A. Adolescents shall be admitted to the adolescent treatment hospital and adolescent residential treatment facility only in accordance with the provisions of the Mental Health and Developmental Disabilities Code [Chapter 43, Article 1 NMSA 1978] or the Children's Mental Health and Developmental Disabilities Act. The coordinated treatment panel may make recommendations on admissions.

B. The secretary shall, in consultation with the board, define admittance criteria; provided that the criteria may not exclude adolescents in the custody of other agencies who might otherwise meet the criteria for services provided through the adolescent treatment hospital.

C. The Mental Heath [Health] and Developmental Disabilities Code or the Children's Mental Health and Developmental Disabilities Act shall apply to inpatient treatment.

**History: Laws 1992, ch. 60, § 6; 1998, ch. 28, § 2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

The Children's Mental Health and Developmental Disabilities Act, referred to in Subsections A and C, appeared as 32A-6-1 to 32A-6-22 NMSA 1978 before being repealed by Laws 2007, ch. 162, § 31, effective June 15, 2007. For present comparable provisions, *see* Chapter 32A, Article 6A NMSA 1978.

**The 1998 amendment,** effective May 20, 1998, rewrote Subsection A, and inserted "or the Children's Mental Health and Developmental Disabilities Act" in Subsection C.

## 23-9-7. Adolescent treatment hospital and adolescent residential treatment facility administration.

A. The adolescent treatment hospital and adolescent residential treatment facility shall be under the administration and control of the department of health. The secretary of health shall ensure that the adolescent treatment hospital becomes accredited by an appropriate hospital accreditation organization within the limits of its appropriations and, notwithstanding that accreditation, shall also seek and maintain licensure under the appropriate state standards.

B. The adolescent treatment hospital and adolescent residential treatment facility may establish and maintain administrative units and services for administration, medical and mental health care treatment, nursing, dietetics, education, recreation, social work and related services as may be necessary to carry out the purposes for which the adolescent treatment hospital and adolescent residential treatment facility are established.

C. Employees of the adolescent treatment hospital and adolescent residential treatment facility shall be subject to the State Personnel Act [Chapter 10, Article 9 NMSA 1978].

D. The adolescent treatment hospital and adolescent residential treatment facility may develop and implement a reasonable schedule of fees for adolescents not in the custody of the state and not otherwise eligible for services paid for or supported by the state. All fee payments shall be deposited with the state treasurer and credited to the general fund.

E. The adolescent treatment hospital and adolescent residential treatment facility may accept donations, gifts or bequests of land, money or things of value for the establishment, maintenance and advancement of the adolescent treatment hospital and adolescent residential treatment facility. Title to lands acquired shall be vested in the state. Donations, gifts and bequests of money shall be deposited to the credit of the adolescent treatment hospital and adolescent residential treatment facility if required as a condition of the donation, gift or bequest.

**History: Laws 1992, ch. 60, § 7.**

# ARTICLE 10

# New Mexico Poison and Drug Information Center

Sec.
23-10-1. New Mexico poison and drug information center created.
23-10-2. Certification.
23-10-3. Duties.



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## 23-10-1. New Mexico poison and drug information center created.

The "New Mexico poison and drug information center" is created as part of the university of New Mexico health sciences center.

**History: Laws 2013, ch. 56, § 1.**
**Effective dates.** — Laws 2013, ch. 56 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

## 23-10-2. Certification.

The New Mexico poison and drug information center shall maintain certification by the American association of poison control centers.

**History: Laws 2013, ch. 56, § 2.**
**Effective dates.** — Laws 2013, ch. 56 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

## 23-10-3. Duties.

The New Mexico poison and drug information center shall:

A. provide expert, twenty-four-hour, seven-day-a-week assistance to the residents of New Mexico during possible poisoning emergencies;

B. provide expert, twenty-four-hour, seven-day-a-week emergency management and treatment referral of victims of poisoning to determine whether treatment can be accomplished at the scene of the incident or if transport to an emergency treatment or other facility is required;

C. provide expert, twenty-four-hour, seven-day-a-week treatment recommendations for all types of poisonings, chemical exposures, drug overdoses and exposure to chemical weapons of mass destruction. This information shall be provided to medical and nonmedical providers;

D. carry out follow-up for hospitalized and non-hospitalized poison patients to assess progress and recommend additional treatment as necessary;

E. carry out follow-up to families and other individuals, where practicable, to ensure that adequate care is provided;

F. work to improve the health of the residents of New Mexico by reducing illness and death associated with poisoning and by encouraging proper use of medications;

G. identify and address problems associated with poisoning and medication-related illness through education and public service;

H. work to reduce the costs associated with poisoning by treating people with less severe exposures at their homes with the center's guidance;

I. train health care professionals in the field of clinical toxicology;

J. expand knowledge in the field of clinical toxicology through an active research program;

K. prevent poisonings through surveillance of toxic events, education, regulation and collaboration with local, state and federal agencies;

L. offer drug information services that provide individualized, accurate, relevant and unbiased information to consumers and health care professionals regarding medication-related inquiries;

M. help train pharmacists to become drug information providers;

N. seek to effectively use the center's resources; and

O. work to advance the center's institutional mission while supporting professional and personal growth.

**History: Laws 2013, ch. 56, § 3.**
**Effective dates.** — Laws 2013, ch. 56 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.



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# CHAPTER 24

# Health and Safety

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# ARTICLE 1

# Public Health

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## 24-1-1. Short title.

Chapter 24, Article 1 NMSA 1978 may be cited as the "Public Health Act".

**History: 1953 Comp., § 12-34-1, enacted by Laws 1973, ch. 359, § 1; 2004, ch. 44, § 1; 2004, ch. 50, § 1.**

**The 2004 amendment,** effective May 19, 2004, changed the statutory reference from "Sections 1 through 22" to "Chapter 24, Article 1".

Laws 2004, ch. 44, § 1 and Laws 2004, ch. 50, § 1 enacted identical amendments to this section. The section was set out as amended by Laws 2004, ch. 50, § 1. *See* 12-1-8 NMSA 1978.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39 Am. Jur. 2d Health § 1 et seq.

39A C.J.S. Health and Environment § 1 et seq.

## 24-1-2. Definitions.

As used in the Public Health Act:

A. "condition of public health importance" means an infection, a disease, a syndrome, a symptom, an injury or other threat that is identifiable on an individual or community level and can reasonably be expected to lead to adverse health effects in the community;

B. "crisis triage center" means a health facility that:

(1) is licensed by the department of health; and

(2) provides stabilization of behavioral health crises and may include residential and nonresidential stabilization;

C. "department" means:

(1) the department of health; or

(2) the children, youth and families department as to residential treatment centers that serve persons up to twenty-one years of age, community mental health centers that serve only persons up to twenty-one years of age, day treatment centers that serve persons up to twenty-one years of age, shelter care homes and those outpatient facilities that are also community-based behavioral health facilities serving only persons up to twenty-one years of age;

D. "director" means the secretary;

E. "health care provider" means a person licensed to provide health care in the ordinary course of business, except as otherwise defined in the Public Health Act;

F. "health facility" means a public hospital, profit or nonprofit private hospital, general or special hospital, outpatient facility, crisis triage center, freestanding birth center, adult daycare facility, nursing home, intermediate care facility, assisted living facility, boarding home not under the control of an institution of higher learning, child care facility, shelter care home, diagnostic and treatment center, rehabilitation center, infirmary, community mental health center that serves both children and adults or adults only, residential treatment center that serves persons up to twenty-one years of age, community mental health center that serves only persons up to twenty-one years of age and day treatment center that serves persons up to twenty-one years of age or



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a health service organization operating as a freestanding hospice or a home health agency. The designation of these entities as health facilities is only for the purposes of definition in the Public Health Act and does not imply that a freestanding hospice or a home health agency is considered a health facility for the purposes of other provisions of state or federal laws. "Health facility" also includes those facilities that, by federal regulation, must be licensed by the state to obtain or maintain full or partial, permanent or temporary federal funding. It does not include the offices and treatment rooms of licensed private practitioners;

G. "screening" means a preliminary procedure, including a test or examination, that:

(1) may require further investigation; and

(2) can identify individuals with unrecognized health risk factors or asymptomatic disease conditions in populations;

H. "secretary" means:

(1) the secretary of health;

(2) the secretary of children, youth and families as to residential treatment centers that serve persons up to twenty-one years of age, community mental health centers that serve only persons up to twenty-one years of age, day treatment centers that serve persons up to twenty-one years of age, shelter care homes and those outpatient facilities that are also community-based behavioral health facilities serving only persons up to twenty-one years of age; or

(3) the secretary of early childhood education and care for child care facilities; and

I. "test" means any diagnostic or investigative analysis or medical procedure that determines the presence of, absence of or exposure to a condition of public health importance or its precursor in an individual.

**History: 1953 Comp., § 12-34-2, enacted by Laws 1973, ch. 359, § 2; 1977, ch. 253, § 39; 1979, ch. 25, § 1; 1981, ch. 171, § 10; 1983, ch. 112, § 1; 1987, ch. 27, § 1; 1996, ch. 35, § 1; 1999, ch. 165, § 1; 2003, ch. 284, § 1; 2007, ch. 325, § 6; 2007, ch. 326, § 1; 2015, ch. 61, § 1; 2015, ch. 153, § 1; 2017, ch. 87, § 4; 2018, ch. 34, § 1; 2022, ch. 30, § 5.**

**Cross references.** — For creation of the department of health, *see* 9-7-4 NMSA 1978.

For criminal records screening for caregivers employed by care providers, *see* 29-17-2 to 29-17-5 NMSA 1978.

**The 2022 amendment,** effective July 1, 2022, revised the definitions of "department", "health facility", and "secretary", as used in the Public Health Act; in Subsection C, Paragraph C(2), after "as to", deleted "child care centers"; in Subsection F, after "child care", deleted "center" and added "facility"; and in Subsection H, Paragraph H(2), after "as to", deleted "child care centers", and added Paragraph H(3).

**The 2018 amendment,** effective March 1, 2018, revised the definition of "crisis triage center" as used in the Public Health Act; and in Subsection B, at the end of Paragraph B(1), added "and", deleted former Paragraph B(2) and redesignated former Paragraph B(3) as Paragraph B(2), and in Paragraph B(2), after "health crises", deleted "including" and added "and may include residential and nonresidential".

**The 2017 amendment,** effective June, 16, 2017, defined "condition of public health importance", "health care provider", and revised the definition of "department" as used in the Public Health Act; added new Subsection A and redesignated former Subsections A through C as Subsections B through D, respectively; in Subsection C, after "'department', deleted "or 'division'", added new Paragraph C(1) and designated the language of the former subsection as Paragraph C(2), and in Paragraph C(2), after "twenty-one years of age;", deleted "and the department of health as to all other health facilities, unless otherwise designated"; added new Subsection E and redesignated former Subsection D as Subsection F; in Subsection F, after "crisis triage center", deleted "maternity home or shelter", and after "intermediate care facility", added "assisted living facility"; deleted former Subsection E, which defined "person"; added new Subsection G and redesignated former Subsection F as Subsection H; in Subsection H, added new Paragraph H(1) and designated the language of the former subsection as Paragraph H(2), and in Paragraph H(2), after "twenty-one years of age", deleted "and the secretary of health as to all other health facilities"; and added Subsection I.

**2015 Amendments.** — Laws 2015, ch. 153, 1, effective June 19, 2015, in Subsection D, after "home or shelter", added "freestanding birth center".

Laws 2015, ch. 61, § 1, effective June 19, 2015, added a new Subsection A and redesignated former Subsections A and B as Subsections B and C, respectively; deleted former Subsection C; in Subsection D, after "outpatient facility", added "crisis triage center", and after "licensed private practitioners" added "and"; and added a new Subsection E and redesignated the succeeding subsection accordingly.

**The 2007 amendment,** effective June 15, 2007, added to the definition of "department" shelter care homes and outpatient facilities that are also community-based behavioral health facilities serving only persons up to twenty-one years of age and defined "secretary" to mean the secretary of children, youth and families as to residential treatment centers, community mental health centers, day treatment centers, and outpatient facilities that are also community-based behavioral health facilities that serve persons up to twenty-one years of age and shelter care homes.

**The 2003 amendment,** effective June 20, 2003, substituted "residential treatment centers that serve persons up to twenty-one years of age, community mental health centers that serve only persons up to twenty-one years of age and day treatment centers that serve persons up to twenty-one years of age" for "and facilities" following "child care centers" in Subsection A; in Subsection D, inserted "that serves both children and adults or adults only, residential treatment center that serves persons up to twenty-one years of age, community mental health center that serves only persons up to twenty-one years of age and day treatment center that serves persons up to twenty-one years of age" following "mental health center", and substituted "that" for "which" following "includes those facilities".

**The 1999 amendment,** effective June 18, 1999, inserted "community mental health center" following "infirmary" in Subsection D.



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**The 1996 amendment,** effective May 15, 1996, rewrote Subsections A and B; in Subsection D, deleted "sanitarium" preceding "maternity" and "asylum" preceding "nursing" in the first sentence and substituted "entities as health facilities" for "services as a health facility" in the second sentence; and added Subsection E.

## 24-1-3. Powers and authority of department.

The department has authority to:

A. receive such grants, subsidies, donations, allotments or bequests as may be offered to the state by the federal government or any department thereof or by any public or private foundation or individuals;

B. supervise the health and hygiene of the people of the state and identify ways to evaluate and address community health problems;

C. investigate, control and abate the causes of disease, especially epidemics, sources of mortality and other conditions of public health;

D. establish, maintain and enforce isolation and quarantine;

E. close any public place and forbid gatherings of people when necessary for the protection of the public health;

F. respond to public health emergencies and assist communities in recovery;

G. establish programs and adopt rules to prevent infant mortality, birth defects and morbidity;

H. prescribe the duties of public health nurses and school nurses;

I. provide educational programs and disseminate information on public health;

J. maintain and enforce rules for the licensure of health facilities;

K. ensure the quality and accessibility of health care services and the provision of health care when health care is otherwise unavailable;

L. ensure a competent public health workforce;

M. bring action in court for the enforcement of health laws and rules and orders issued by the department;

N. enter into agreements with other states to carry out the powers and duties of the department;

O. cooperate and enter into contracts or agreements with the federal government or any other person to carry out the powers and duties of the department;

P. cooperate and enter into contracts or agreements with Native American nations, tribes and pueblos and off-reservation groups to coordinate the provision of essential public health services and functions;

Q. maintain and enforce rules for the control of conditions of public health importance;

R. maintain and enforce rules for immunization against conditions of public health importance;

S. maintain and enforce such rules as may be necessary to carry out the provisions of the Public Health Act and to publish the rules;

T. supervise state public health activities, operate a dental public health program and operate state laboratories for the investigation of public health matters;

U. sue and, with the consent of the legislature, be sued;

V. regulate the practice of midwifery;

W. administer legislation enacted pursuant to Title 6 of the Public Health Service Act, as amended and supplemented;

X. inspect such premises or vehicles as necessary to ascertain the existence or nonexistence of conditions dangerous to public health or safety;

Y. request and inspect, while maintaining federal and state confidentiality requirements, copies of:

(1) medical and clinical records reasonably required for the department's quality assurance and quality improvement activities; and

(2) all medical and clinical records pertaining to the individual whose death is the subject of inquiry by the department's mortality review activities; and

Z. do all other things necessary to carry out its duties.

**History: 1953 Comp., § 12-34-3, enacted by Laws 1973, ch. 359, § 3; 1975, ch. 183, § 2; 2001, ch. 119, § 2; 2017, ch. 87, § 5.**

**Cross references.** — For department of health generally, *see* Chapter 9, Article 7 NMSA 1978.



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For Title VI of the Public Health Service Act, *see* 42 U.S.C. § 291 et seq.

**The 2017 amendment,** effective June, 16, 2017, provided additional powers and authority to the department of health; in Subsection B, after "of the state", added "and identify ways to evaluate and address community health problems"; added a new Subsection F and redesignated former Subsections F through I as Subsections G through J, respectively; added new Subsections K and L and redesignated former Subsections J through L as Subsections M through O, respectively; added a new Subsection P and redesignated former Subsections M through V as Subsections Q through Z, respectively; in Subsection Q, after "the control of", deleted "communicable diseases deemed to be dangerous to public health" and added "conditions of public health importance"; in Subsection R, after "immunization against", deleted "diseases deemed to be dangerous to the public health" and added "conditions of public health importance"; and in Subsection W, after "Title", deleted "VI" and added "6".

**The 2001 amendment,** effective June 15, 2001, substituted "rules" for "regulations" throughout the section; and added Subsection U, redesignating former Subsection U as Subsection V.

### ANNOTATIONS

**Statutes delegating power to enact and enforce health regulations are to be liberally construed** in order to effectuate the purpose of their enactment. 1957-58 Op. Att'y Gen. No. 58-230.

**Liberal construction of statute.** — The health and social services department's (now department of health's) licensing power as delegated by the legislature in this article should be liberally construed to allow the department to prescribe, maintain and enforce necessary or desirable regulations to promote the psychological and physical well-being of children attending licensed child care centers. Included within the scope of the department's authority is the prescription, maintenance and enforcement of minimum standards for the care given children in licensed child care centers, provided such standards bear a reasonable relation to the public health and are reasonably adapted to prevent some existing or anticipated menace. 1976 Op. Att'y Gen. No. 76-37.

**Isolation of person afflicted with contagious disease.** — Under a general delegation of the power to take measures necessary to prevent the spread of contagious disease, health officers have the power to provide for the isolation of persons afflicted with such a disease. 1959-60 Op. Att'y Gen. No. 60-174.

**Licensed nurse need not also have midwife license.** — A family nurse practitioner authorized by the board of nursing to perform services constituting midwifery need not, as well, have a midwife license from the health services division (now department of health). 1981 Op. Att'y Gen. No. 81-07.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39 Am. Jur. 2d Health § 37 et seq.

Constitutional rights of owner as against destruction of building by public authorities, 14 A.L.R.2d 73.

Validity of regulations as to plumbers and plumbing, 22 A.L.R.2d 816.

Physical examination or test, health regulation requiring submission to, as to violation of constitutional rights, 25 A.L.R.2d 1407.

Propriety of state or local government health officer's warrantless search - post-Camara cases, 53 A.L.R.4th 1168.

39A C.J.S. Health and Environment §§ 3 to 54.

## 24-1-4. Creation of health regions; appointment of health officers; powers and duties of health officers.

A. The director shall establish health regions and may modify and create new health regions as the director deems necessary.

B. A regional health officer shall provide medical oversight to school nurses in the regional health officer's region. A school nurse shall make reports relating to public health as the regional health officer in the school nurse's region requires.

C. As used in this section, "medical oversight" means advice and direction that is provided by a regional health officer or under the direction of a regional health officer to a school nurse, or a school nurse's designee, who performs nursing activities in a school setting.

**History: 1953 Comp., § 12-34-4, enacted by Laws 1973, ch. 359, § 4; 2017, ch. 87, § 6.**

**Cross references.** — For district health officers generally, *see* 24-4-1 to 24-4-3 NMSA 1978.

**The 2017 amendment,** effective June, 16, 2017, provided additional duties for the secretary of health, provided duties for regional health officers, and defined "medical oversight" as used in this section; in the catchline, deleted "districts" and added "regions"; in Subsection A, after "shall establish health", deleted "districts" and added "regions", after "create new", deleted "ones" and added "health regions", and after "he", added "the director"; deleted former Subsections B through D, which related to district health officers", and added new Subsections B and C.

### ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39 Am. Jur. 2d Health § 16 et seq.

Personal liability of health officer, 24 A.L.R. 798.

39A C.J.S. Health and Environment §§ 3 to 17.

## 24-1-4.1. Certified nurse-midwives; prescriptive, distributing and administering authority.

A. Certified nurse-midwives who have fulfilled requirements for prescriptive authority may prescribe in accordance with rules, regulations, guidelines and formularies for individual certified nurse-midwives promulgated by the department of health.



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B. As used in this section, "prescriptive authority" means the ability of the certified nurse-midwife to practice independently, serve as a primary care provider and as necessary collaborate with licensed medical doctors or osteopathic physicians. Certified nurse-midwives who have fulfilled requirements for prescribing drugs may prescribe, distribute and administer to their patients dangerous drugs, including controlled substances included in Schedules II through V [30-31-7 through 30-31-10 NMSA 1978] of the Controlled Substances Act [Chapter 30 NMSA 1978], that have been prepared, packaged or fabricated by a licensed pharmacist or doses of drugs that have been prepackaged by a pharmaceutical manufacturer in accordance with the Pharmacy Act [Chapter 61, Article 11 NMSA 1978] and New Mexico Drug, Device and Cosmetic Act [Chapter 26, Article 1 NMSA 1978].

**History: Laws 1997, ch. 253, § 1.**

**Cross references.** — For Insurance Code provisions relating to freedom of choice of hospital and practitioner, *see* 59A-22-32 NMSA 1978.

For qualifications and scope of practice of certified nurse practitioners, *see* 61-3-23.2 NMSA 1978.

## 24-1-5. Licensure of health facilities; hearings; appeals.

A. A health facility shall not be operated without a license issued by the department. If a health facility is found to be operating without a license, in order to protect human health or safety, the secretary may issue a cease-and-desist order. The health facility may request a hearing that shall be held in the manner provided in this section. The department may also proceed pursuant to the Health Facility Receivership Act [Chapter 24, Article 1E NMSA 1978].

B. The department is authorized to make inspections and investigations and to prescribe rules it deems necessary or desirable to promote the health, safety and welfare of persons using health facilities.

C. Except as provided in Subsection F of this section, upon receipt of an application for a license to operate a health facility, the department shall promptly inspect the health facility to determine if it is in compliance with all rules of the department. Applications for hospital licenses shall include evidence that the bylaws or rules of the hospital apply equally to osteopathic and medical physicians. The department shall consolidate the applications and inspections for a hospital that also operates as a hospital-based primary care clinic.

D. Upon inspection of a health facility, if the department finds a violation of its rules, the department may deny the application for a license, whether initial or renewal, or it may issue a temporary license. A temporary license shall not be issued for a period exceeding one hundred twenty days, nor shall more than two consecutive temporary licenses be issued.

E. A one-year nontransferable license shall be issued to any health facility complying with all rules of the department. The license shall be renewable for successive one-year periods, upon filing of a renewal application, if the department is satisfied that the health facility is in compliance with all rules of the department or, if not in compliance with a rule, has been granted a waiver or variance of that rule by the department pursuant to procedures, conditions and guidelines adopted by rule of the department. Licenses shall be posted in a conspicuous place on the licensed premises, except that child care centers that receive no state or federal funds may apply for and receive from the department a waiver from the requirement that a license be posted or kept on the licensed premises.

F. A health facility that has been inspected and licensed by the department, that has received certification for participation in federal reimbursement programs and that has been fully accredited by a national accrediting organization approved by the federal centers for medicare and medicaid services or the department shall be granted a license renewal based on that accreditation. A freestanding birth center that has been inspected and licensed by the department and is accredited by the commission for accreditation of birth centers or its successor accreditation body shall be granted a license renewal based on that accreditation. Health facilities receiving less than full accreditation by an approved accrediting body may be granted a license renewal based on that accreditation. License renewals shall be issued upon application submitted by the health facility upon forms prescribed by the department. This subsection does not limit in any way the



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department's various duties and responsibilities under other provisions of the Public Health Act or under any other subsection of this section, including any of the department's responsibilities for the health and safety of the public.

G. The department may charge a reasonable fee not to exceed twelve dollars ($12.00) per bed for an inpatient health facility or three hundred dollars ($300) for any other health facility for each license application, whether initial or renewal, of an annual license or the second consecutive issuance of a temporary license. Fees collected shall not be refundable. All fees collected pursuant to licensure applications shall be deposited with the state treasurer for credit in a designated department recurring account for use in health facility licensure and certification operations.

H. The department may revoke or suspend the license of a health facility or may impose on a health facility an intermediate sanction and a civil monetary penalty provided in Section 24-1-5.2 NMSA 1978 after notice and an opportunity for a hearing before a hearing officer designated by the department to hear the matter and, except for child care centers and facilities, may proceed pursuant to the Health Facility Receivership Act upon a determination that the health facility is not in compliance with any rule of the department. If immediate action is required to protect human health and safety, the secretary may suspend a license or impose an intermediate sanction pending a hearing, provided the hearing is held within five working days of the suspension or imposition of the sanction, unless waived by the licensee, and, except for child care centers and facilities, may proceed ex parte pursuant to the Health Facility Receivership Act.

I. The department shall schedule a hearing pursuant to Subsection H of this section if the department receives a request for a hearing from a licensee:

(1) within ten working days after receipt by the licensee of notice of suspension, revocation, imposition of an intermediate sanction or civil monetary penalty or denial of an initial or renewal application;

(2) within four working days after receipt by the licensee of an emergency suspension order or emergency intermediate sanction imposition and notice of hearing if the licensee wishes to waive the early hearing scheduled and request a hearing at a later date; or

(3) within five working days after receipt of a cease-and-desist order.

The department shall also provide timely notice to the licensee of the date, time and place of the hearing, identity of the hearing officer, subject matter of the hearing and alleged violations.

J. A hearing held pursuant to provisions of this section shall be conducted in accordance with adjudicatory hearing rules and procedures adopted by rule of the department. The licensee has the right to be represented by counsel, to present all relevant evidence by means of witnesses and books, papers, documents, records, files and other evidence and to examine all opposing witnesses who appear on any matter relevant to the issues. The hearing officer has the power to administer oaths on request of any party and issue subpoenas and subpoenas duces tecum prior to or after the commencement of the hearing to compel discovery and the attendance of witnesses and the production of relevant books, papers, documents, records, files and other evidence. Documents or records pertaining to abuse, neglect or exploitation of a resident, client or patient of a health facility or other documents, records or files in the custody of the human services department or the office of the state long-term care ombudsman at the aging and long-term services department that are relevant to the alleged violations are discoverable and admissible as evidence in any hearing.

K. Any party may appeal the final decision of the department pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

L. A complaint about a health facility received by the department pursuant to this section shall be promptly investigated and appropriate action shall be taken if substantiated. The department shall develop a health facilities protocol in conjunction with the human services department, the protective services division of the children, youth and families department, the office of the state long-term care ombudsman and other appropriate agencies to ensure the health, safety and rights of individuals in health facilities. The health facilities protocol shall require:

(1) cross-reference among agencies pursuant to this subsection of an allegation of abuse, neglect or exploitation;

(2) an investigation, within the strict priority time frames established by each protocol member's rules, of an allegation or referral of abuse, neglect or exploitation after the department has made a good cause determination that abuse, neglect or exploitation occurred;



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(3) an agency to share its investigative information and findings with other agencies, unless otherwise prohibited by law; and

(4) require the receiving agency to accept the information provided pursuant to Paragraph (3) of this subsection as potential evidence to initiate and conduct investigations.

M. A complaint received by the department pursuant to this section shall not be disclosed publicly in a manner as to identify any individuals or health facilities if upon investigation the complaint is unsubstantiated.

N. The name and information regarding the person making a complaint pursuant to this section shall not be disclosed absent the consent of the informant or a court order.

O. Notwithstanding any other provision of this section, when there are reasonable grounds to believe that a child is in imminent danger of abuse or neglect while in the care of a child care facility, whether or not licensed, or upon the receipt of a report pursuant to Section 32A-4-3 NMSA 1978, the department shall consult with the owner or operator of the child care facility. Upon a finding of probable cause, the department shall give the owner or operator notice of its intent to suspend operation of the child care facility and provide an opportunity for a hearing to be held within three working days, unless waived by the owner or operator. Within seven working days from the day of notice, the secretary shall make a decision, and, if it is determined that any child is in imminent danger of abuse or neglect in the child care facility, the secretary may suspend operation of the child care facility for a period not in excess of fifteen days. Prior to the date of the hearing, the department shall make a reasonable effort to notify the parents of children in the child care facility of the notice and opportunity for hearing given to the owner or operator.

P. Nothing contained in this section or in the Public Health Act shall authorize either the secretary or the department to make any inspection or investigation or to prescribe any rules concerning group homes as defined in Section 9-8-13 NMSA 1978 except as are reasonably necessary or desirable to promote the health and safety of persons using group homes.

**History: 1953 Comp., § 12-34-5, enacted by Laws 1973, ch. 359, § 5; 1975, ch. 183, § 3; 1979, ch. 33, § 1; 1983, ch. 185, § 1; 1987, ch. 31, § 2; 1989, ch. 138, § 1; 1990, ch. 105, § 1; 1996, ch. 35, § 2; 1997, ch. 113, § 1; 1998, ch. 55, § 32; 1999, ch. 265, § 34; 2003, ch. 120, § 1; 2005, ch. 53, § 1; 2015, ch. 153, § 2; 2017, ch. 87, § 7.**

**Cross references.** — For inspections generally, *see* 24-1-16 to 24-1-19 NMSA 1978.

For confidentiality of files and records generally, *see* 24-1-20 NMSA 1978.

For abandonment or abuse of a child, *see* 30-6-1 NMSA 1978.

**The 2017 amendment,** effective June, 16, 2017, prohibited the disclosure of names and information regarding any person who makes a complaint about a health facility to the department of health, unless the complainant consents or there is a court order; and added a new Subsection N and redesignated the succeeding subsections accordingly.

**The 2015 amendment,** effective June 19, 2015, authorized renewal of a license for health facilities that are accredited by a national accrediting organization approved by the department of health or the federal centers for medicare and medicaid services and removed accreditation by the American osteopathic association, and provided that a freestanding birth center shall be granted a license renewal based on accreditation by the commission for accreditation of birth centers or its successor accreditation body; in Subsection F, after "fully accredited by", deleted "the joint commission on accreditation of health care organizations or the American osteopathic association" and added "a national accrediting organization approved by the federal centers for medicare and medicaid services or the department", after "based on that accreditation", added "A freestanding birth center that has been inspected and licensed by the department and is accredited by the commission for accreditation of birth centers or its successor accreditation body shall be granted a license renewal based on that accreditation.", and after "less than full accreditation by", deleted "the joint commission on the accreditation of health care organizations or by the American osteopathic association" and added "an approved accrediting body".

**The 2005 amendment,** effective July 1, 2005, amended Subsection G to increase the maximum fees that may be charged for initial and renewal license applications from $3.00 to $12.00 per bed and from $100 to $300 per facility and provided that all fees shall be credited to a "recurring account" for use in health facility licensure and certification operations.

**The 2003 amendment,** effective June 20, 2003, in Subsection A, substituted "A" for "No" at the beginning, inserted "not" preceding "be operated without"; in Subsection F, inserted "health" preceding "facility upon forms"; rewrote Subsection L; substituted "A complaint" for "Complaints" at the beginning of Subsection M; and substituted "when" for "where" preceding "there are reasonable grounds" in Subsection N.

**The 1999 amendment,** effective July 1, 1999, substituted "Section 39-3-1.1" for "Section 12-8A-1" in Subsection K.

**The 1998 amendment,** effective September 1, 1998, in the catchline, inserted "; hearings; appeals"; in Subsection C, substituted "rules" for "regulations" in two places; in Subsection D, substituted "rules" for "regulations" and "the department" for "it"; in Subsection E, substituted "rules" for "regulations" in two places, and substituted "rule" for "regulation" in three places; rewrote Subsection K; and made minor stylistic changes throughout the section.

**The 1997 amendment,** effective June 20, 1997, added the third sentence to Subsection C and made minor stylistic changes throughout the section.

**The 1996 amendment,** effective May 15, 1996, in Subsection A, substituted "secretary" for "director" in the second sentence and added the last sentence; in Subsection



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G, substituted "the second consecutive issuance" for "renewal"; in Subsection H, in the first sentence, deleted "after January 1, 1991" following the second occurrence of "facility" and added the exception near the middle of the sentence, and added the exception at the end of the second sentence; in Subsection N, deleted "health" preceding "facility" four times, substituted "32A-4-3" for "32-1-15" in the first sentence, and inserted "child-care" in the third and fourth sentences; in Subsection O, deleted "of health and environment" following "secretary"; and made stylistic changes throughout the section.

**The 1990 amendment,** effective July 1, 1990, substituted "in this section" for "in Subsection H of this section" at the end of the third sentence in Subsection A; added the language beginning "or if not in compliance" at the end of the second sentence in Subsection E; in Subsection H, inserted "or may impose on any health facility after January 1, 1991, any intermediate sanction or civil monetary penalty provided in Section 24-1-5.2 NMSA 1978" in the first sentence, inserted "or impose any intermediate sanction" and "or imposition of the sanction" in the second sentence, transferred the former third sentence and made it the beginning of the third sentence of present Subsection J and transferred the former fourth sentence to make it the first sentence of present Subsection K; added present Subsection I; added the first and second sentences, the language beginning "prior to or after the commencement" at the end of the third sentence and the fourth sentence of present Subsection J; added the second sentence of present Subsection K; added Subsection L; designated former Subsections I to K as present Subsections M to O; and substituted "any individuals" for "other individuals" in present Subsection M.

**ANNOTATIONS**

**Child care center operated by church.** — The statutory requirement of obtaining a license to operate a child care center did not violate the right of a church, which operated a child care center in which corporal punishment was allowed, to exercise religion freely. *Health Servs. Div. v. Temple Baptist Church*, 1991-NMCA-055, 112 N.M. 262, 814 P.2d 130, cert. denied, 112 N.M. 235, 814 P.2d 103.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Hospitals and Asylums § 5 et seq.

Validity, construction, and effect of statute requiring consultation with, or approval of, local governmental unit prior to locating group home, halfway house, or similar community residence for the mentally ill, 51 A.L.R.4th 1096.

Licensing and regulation of nursing or rest homes, 53 A.L.R.4th 689.

Propriety of state or local government health officer's warrantless search - post-Camara cases, 53 A.L.R.4th 1168.

Tort liability of private nursery school or day-care center, or employee thereof, for injury to child while attending facility, 58 A.L.R.4th 240.

Criminal liability under statutes penalizing abuse or neglect of the institutionalized infirm, 60 A.L.R.4th 1153.

Governmental liability for negligence in licensing, regulating, or supervising private day-care home in which child is injured, 68 A.L.R.4th 266.

41 C.J.S. Hospitals § 3 et seq.

## 24-1-5.1. Repealed.

**Repeals.** — Laws 1990, ch. 105, § 4 repealed 24-1-5.1 NMSA 1978, as enacted by Laws 1981, ch. 171, § 11, relating to health and safety certification of foster homes, effective July 1, 1990. For provisions of former section, *see* the 1989 NMSA 1978 on *NMOneSource.com*.

## 24-1-5.2. Health facilities; intermediate sanctions; civil penalty.

A. Upon a determination that a health facility is not in compliance with any licensing requirement of the department, the department, subject to the provisions of this section and Section 24-1-5 NMSA 1978, may:

(1) impose any intermediate sanction established by rule, including but not limited to:

(a) a directed plan of correction;

(b) facility monitors;

(c) denial of payment for new medicaid admissions to the facility;

(d) temporary management or receivership; and

(e) restricted admissions;

(2) assess a civil monetary penalty, with interest, for each day the facility is or was out of compliance. Civil monetary penalties shall not exceed a total of five thousand dollars ($5,000) per day. Penalties and interest amounts assessed under this paragraph and recovered on behalf of the state shall be remitted to the department in a recurring account in the state treasury for the sole purpose of funding the nonreimbursed cost of facility monitors, temporary management and health facility receiverships. The civil monetary penalties contained in this paragraph are cumulative and may be imposed in addition to any other fines or penalties provided by law; and

(3) with respect to health facilities other than childcare centers or facilities, proceed pursuant to the Health Facility Receivership Act [Chapter 24, Article 1E NMSA 1978].

B. The secretary shall adopt and promulgate rules specifying the criteria for imposition of any intermediate sanction and civil monetary penalty. The criteria shall provide for more severe sanctions for a violation that results in any abuse, neglect or exploitation of residents, clients or



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patients as defined in the rules or that places one or more residents, clients or patients of a health facility at substantial risk of serious physical or mental harm.

C. The provisions of this section for intermediate sanctions and civil monetary penalties shall apply to certified nursing facilities except when a federal agency has imposed the same remedies, sanctions or penalties for the same or similar violations.

D. Rules adopted by the department shall permit sanctions pursuant to Paragraphs (1) and (2) of Subsection A of this section for a specific violation in a certified nursing facility if:

(1) the state statute or rule is not duplicated by a federal certification rule; or

(2) the department determines intermediate sanctions are necessary if sanctions permitted pursuant to Paragraphs (1) and (2) of Subsection A of this section do not duplicate a sanction imposed under the authority of 42 U.S.C. 1395 or 1396 for a particular deficiency.

E. A health facility is liable for the reasonable costs of a directed plan of correction, facility monitors, temporary management or receivership imposed pursuant to this section and Section 24-1-5 NMSA 1978. The department may take all necessary and appropriate legal action to recover these costs from a health facility. All money recovered from a health facility pursuant to this subsection shall be paid into the general fund.

**History: 1978 Comp., § 24-1-5.2, enacted by Laws 1990, ch. 105, § 2; 1996, ch. 35, § 3; 2005, ch. 53, § 2.**

**Cross references.** — For Statewide Health Care Act, *see* 27-10-1 NMSA 1978.

**The 2005 amendment,** effective July 1, 2005, provided that penalties and interest amounts be remitted to the department to be used solely for funding the nonreimbursed cost of facility monitors, temporary management and health facility receiverships; provided that the provision for intermediate sanctions and monetary penalties shall apply to certified nursing facilities, except when a federal agency has already taken action; and provided that department rules shall permit sanctions for violations in a certified nursing facility if the state statute or the rule imposing the sanction is not duplicated by federal law or rule.

**The 1996 amendment,** effective May 15, 1996, in Subsection A, deleted "after January 1, 1994" following "that" in the introductory language and added Paragraph (3); in Subsection B, deleted "of health and environment" following "secretary" and substituted "and civil" for "including the amount of" and "penalty" for "penalties and the type and extent of intermediate sanctions"; in Subsection D, inserted "or receivership" in the first sentence; and made stylistic changes throughout the section.

## 24-1-5.3. Repealed.

**Repeals.** — Laws 1995, ch. 88, § 2 repealed 24-1-5.3 NMSA 1978, as enacted by Laws 1990, ch. 97, § 3, relating to immediate care facilities for the mentally retarded, licensure moratorium, effective July 1, 1997. For provisions of former section, *see* the 1996 NMSA 1978 on *NMOneSource.com*.

Laws 1997, ch. 217, § 1 amended 24-1-5.3 NMSA 1978, effective June 20, 1997. However, Laws 1995, ch. 88, § 2 repealed the section effective July 1, 1997.

## 24-1-5.4. Plan of growth; requirements; reporting.

No later than January 1, 1999 the human services department and the department of health shall develop a plan with approval of the first session of the forty-fourth legislature to control growth of intermediate care facilities for the mentally retarded and clarify the role of intermediate care facilities for the mentally retarded in the developmental disabilities care system. The plan shall include fiscal, geographical, service and access criteria necessary to provide for the needs of individuals in need of such facilities and shall be in accordance with the freedom of choice provisions of Title XIX of the Social Security Act. The departments shall present a joint report and legislative recommendations on growth of intermediate care facilities for the mentally retarded to the interim legislative health and human services committee no later than October 1, 1998.

**History: Laws 1997, ch. 217, § 2.**

**Cross references.** — For Title XIX of the federal Social Security Act, *see* 42 U.S.C. § 1396 et seq.

## 24-1-5.5. Repealed.

**Repeals.** — Laws 1998 (1st S.S.), ch. 1, § 2 repealed 24-1-5.5 NMSA 1978, as enacted by Laws 1998 (1st S.S.), ch. 1, § 1, relating to a licensure moratorium for intermediate care facilities for the mentally retarded, effective July 1, 2000. For provisions of former section, *see* the 1997 NMSA 1978 on *NMOneSource.com*.



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## 24-1-5.6. Northern New Mexico substance abuse treatment pilot project.

A. The department of health shall establish the northern New Mexico substance abuse treatment pilot project.

B. The northern New Mexico substance abuse treatment pilot project shall provide substance abuse treatment in Rio Arriba and Santa Fe counties.

C. Currently accepted treatment practices shall be used in the northern New Mexico substance abuse treatment pilot program [project].

D. The department of health shall seek federal funding to support and supplement the northern New Mexico substance abuse treatment pilot project.

E. The department of health shall report to the legislature annually by December 1 on the progress of the northern New Mexico substance abuse treatment pilot project.

F. The department of health shall coordinate with the human services department to determine whether any patient who participates in the northern New Mexico substance abuse treatment pilot project is eligible to receive temporary assistance for needy families pursuant to the New Mexico Works Act [Chapter 27, Article 2B NMSA 1978].

**History: Laws 1999 (1st S.S.), ch. 8, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 24-1-5.7. Methadone clinics; regulation by the human services department.

A. The federal government requires the state to approve the establishment of all new methadone clinics. In an effort to maintain compliance with the federal requirement, the human services department shall regulate the establishment and continuance of methadone clinics in New Mexico in accordance with its powers and duties.

B. In regulating methadone clinics, the human services department shall perform an assessment of the need for clinics and develop clinical and administrative standards as required by federal law. The human services department may consider other factors it deems necessary to ensure the provision of drug abuse treatment services and the protection of the health and safety of New Mexico residents.

C. For the purposes of this section, "methadone clinic" means a public or private facility that dispenses methadone for the detoxification treatment or maintenance treatment of narcotic addicts.

**History: Laws 2003, ch. 190, § 1; 2007, ch. 325, § 7.**

**The 2007 amendment,** effective June 15, 2007, changed "department of health" to "human services department"; eliminated the provision that the department is the state's public health agency and drug abuse agency; and changed "New Mexico citizens" to "New Mexico residents".

## 24-1-5.8. Legislative findings; licensing requirements for certain hospitals.

A. The legislature finds that:

(1) acute care general hospitals throughout New Mexico operate emergency departments and provide vital emergency medical services to patients requiring immediate medical care; and

(2) federal and state laws require hospitals that operate an emergency department to provide certain emergency services and care to any person, regardless of that person's ability to pay. Accordingly, these hospitals encounter significant financial losses when treating uninsured or underinsured patients.

B. As used in this section:

(1) "limited service hospital" means a hospital that limits admissions according to medical or surgical specialty, type of disease or medical condition, or a hospital that limits its inpatient



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hospital services to surgical services or invasive diagnostic and treatment procedures; provided, however, that a "limited service hospital" does not include:

(a) a hospital licensed by the department as a special hospital;

(b) an eleemosynary hospital that does not bill patients for services provided; or

(c) a hospital that has been granted a license prior to January 1, 2003;

(2) "department" means the department of health; and

(3) "low-income patient" means a patient whose family or household income does not exceed two hundred percent of the federal poverty level.

C. The department shall issue a license to an acute-care or general hospital or a limited services hospital that agrees to:

(1) continuously maintain and operate an emergency department that provides emergency medical services as determined by the department;

(2) participate in the medicaid, medicare and county indigent care programs;

(3) require a physician owner to disclose a financial interest in the hospital before referring a patient to the hospital;

(4) comply with the same quality standards applied to other hospitals;

(5) provide emergency services and general health care to nonpaying patients and low-income reimbursed patients in the same proportion as the patients are treated in acute-care general hospitals in the local community, as determined by the department in consultation with a statewide hospital organization, the government of the county in which the facilities are located and the affected hospitals; provided that:

(a) a hospital may appeal the determination of the department pursuant to Section 39-3-1.1 NMSA 1978; and

(b) the annual cost of the care required to be provided pursuant to this paragraph shall not exceed an amount equal to five percent of the hospital's annual revenue; and

(6) require a health care provider to disclose a financial interest before referring a patient to the hospital.

**History: Laws 2003, ch. 426, § 1.**

**Emergency clauses.** — Laws 2003, ch. 426, § 2 contained an emergency clause and was approved April 8, 2003.

## 24-1-5.9. Reporting requirements.

A. A hospital, a long-term care facility or a primary care clinic shall provide information sufficient for the secretary to make a reasonable assessment based on clear and convincing evidence of its financial viability, sustainability and potential impact on health care access. Information provided to the secretary pursuant to this section shall remain confidential, is exempt from the Inspection of Public Records Act [Chapter 14, Article 3 NMSA 1978], unless disclosure or use is mandated by the state or federal law, and shall not be used as a basis for suspension, revocation or issuance of a license. The hospital, long-term care facility or primary care clinic shall provide this information to the secretary at least sixty days before the anticipated effective date of a proposed licensure, closure, disposition or acquisition of the hospital, the long-term care facility or the primary care clinic or its essential services.

B. The secretary shall issue a notice of finding to the facility within sixty days of receiving information from the facility.

C. For the purposes of this section:

(1) "hospital" means a facility providing emergency or urgent care, inpatient medical care and nursing care for acute illness, injury, surgery or obstetrics. "Hospital" includes a facility licensed by the department as a critical access hospital, general hospital, long-term acute care hospital, psychiatric hospital, rehabilitation hospital, limited services hospital and special hospital;

(2) "long-term care facility" means a nursing home licensed by the department to provide intermediate or skilled nursing care; and



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(3) "primary care clinic" means a community-based clinic that provides the first level of basic or general health care for an individual's health needs, including diagnostic and treatment services and, if integrated into the clinic's service array, mental health services.

**History: Laws 2004, ch. 44, § 2 and Laws 2004, ch. 50, § 2.**

**Compiler's notes.** — Laws 2004, ch. 44, § 2 and Laws 2004, ch. 50, § 2 enacted identical new sections of law, effective May 19, 2004. The section was set out as enacted by Laws 2004, ch. 50, § 2. *See* 12-1-8 NMSA 1978.

## 24-1-5.10. Federal participation required; exception.

A. Except as provided in Subsection B of this section, all programs, clinics, hospitals and other health-related centers and entities, including those identified by the human services department pursuant to Paragraph (3) of Subsection A of Section 27-2-12.13 NMSA 1978, that are eligible under Section 340B of the federal Public Health Service Act, including hospitals and clinics licensed under the state Public Health Act, shall participate in that Section 340B federal prescription drug price discount program.

B. If an entity described in Subsection A of this section can demonstrate to the satisfaction of the department of health that the prescription drug price discount it receives other than through the Section 340B program results in greater savings to the state, the entity may be granted an exception to the requirements of this section.

**History: Laws 2004, ch. 47, § 1.**

**Cross references.** — For Section 340B of the federal Public Health Service Act, *see* 42 U.S.C., §340B.

## 24-1-6. Tests required for newborn infants.

A. The department shall adopt screening tests for the detection of congenital diseases that shall be given to every newborn infant, except that, after being informed of the reasons for the tests, the parents or guardians of the newborn child may waive the requirements for the tests in writing. The screening tests shall include at a minimum:

(1) 3-methylcrotonyl-CoA deficiency;
(2) 3-OH 3-CH3 glutaric aciduria;
(3) argininosuccinic acidemia;
(4) mitochondrial acetoacetyl-CoA thiolase deficiency;
(5) biotinidase deficiency;
(6) carnitine uptake defect;
(7) citrullinemia;
(8) congenital adrenal hyperplasia;
(9) congenital hypothyroidism;
(10) cystic fibrosis;
(11) galactosemia;
(12) glutaric acidemia type I;
(13) Hb S/beta-thalassemia;
(14) hearing deficiency;
(15) homocystinuria;
(16) isovaleric acidemia;
(17) long-chain L-3-OH acyl-CoA dehydrogenase deficiency;
(18) maple syrup urine disease;
(19) medium chain acyl-CoA dehydrogenase deficiency;
(20) methylmalonic acidemia;
(21) multiple carboxylase deficiency;
(22) phenylketonuria;
(23) proponic acidemia;
(24) sickle cell anemia;



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(25) trifunctional protein deficiency;
(26) tyrosinemia type I;
(27) very long-chain acyl-CoA dehydrogenase deficiency; and
(28) critical congenital heart disease by means of a test performed using a pulse oximeter before the newborn infant is discharged from the hospital or birthing facility where the newborn infant was born. For the purposes of this paragraph, "pulse oximeter" means a device that measures the oxygen saturation of arterial blood.

B. Upon the later of either January 1, 2011 or when the secretary finds that these screening tests are reasonably available, the department shall adopt screening tests for the detection of the following genetic diseases that shall be given to every newborn infant; except that, after being informed of the reasons for the tests, the parents or guardians of the newborn child may waive the requirements of the tests in writing. The screening tests shall include:
(1) acid maltase deficiency or glycogen storage disease type II;
(2) globoid cell leukodystrophy;
(3) Gaucher's disease;
(4) Niemann-Pick disease; and
(5) Fabry disease.

C. In determining which other congenital diseases to screen for, the secretary shall consider the recommendations of the New Mexico pediatric society of the American academy of pediatrics.

D. The department shall institute and carry on such laboratory services or may contract with another agency or entity to provide such services as are necessary to detect the presence of congenital diseases.

E. The department shall, as necessary, carry on an educational program among physicians, hospitals, public health nurses and the public concerning congenital diseases.

F. The department shall require that all hospitals or institutions having facilities for childbirth perform or have performed screening tests for congenital diseases on all newborn infants except if the parents or guardians of a child object to the tests in writing.

**History: 1953 Comp., § 12-34-6, enacted by Laws 1973, ch. 359, § 6; 1975, ch. 254, § 1; 1978, ch. 83, § 1; 1981, ch. 95, § 1; 2005, ch. 134, § 1; 2010, ch. 91, § 1; 2014, ch. 7, § 1.**

**Cross references.** — For education and testing with respect to sickle cell trait and sickle cell anemia, *see* 24-3-1 NMSA 1978.

**The 2014 amendment,** effective May 21, 2014, required testing for critical congenital heart disease in newborn infants; in Subsection A, Paragraph (16), deleted "academia" and added "acidemia"; in Subsection A, added Paragraph (28); and in Subsection C, after "New Mexico", changed "pediatrics" to "pediatric".

**The 2010 amendment,** effective May 19, 2010, added Subsection B and relettered succeeding subsections accordingly.

**The 2005 amendment,** effective June 17, 2005, required the health department to adopt screening tests for the diseases listed in Subsection A(1) through (27).

## 24-1-6.1. Newborn hearing testing required; department of health.

By July 1, 2001, the department of health shall adopt rules to require that infants born in health facilities licensed by the department shall be screened for hearing sensitivity prior to being discharged. The rules shall also require the testing of newborns brought to licensed health facilities after birth who have not received a hearing sensitivity screening and notification to the parents of all screened infants of the results of the hearing sensitivity screening. Nothing in this section shall be construed to require screening for hearing sensitivity of a newborn infant if the infant's parents object to the screening on the grounds that it conflicts with their religious beliefs.

**History: Laws 2001, ch. 82, § 1.**

**Emergency clauses.** — Laws 2001, ch. 82, § 2 contained an emergency clause and was approved April 2, 2001.

## 24-1-7. Sexually transmitted infections; reports of cases.

A. The department shall make available a list of sexually transmitted infections for which reporting is required.



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B. Reports of sexually transmitted infections shall be made in accordance with department rules.

C. Every health care provider that makes a diagnosis of, treats or prescribes for or otherwise has knowledge of a case of sexually transmitted infection for which reporting is required by department rules shall report the case immediately.

D. As used in this section, "health care provider" means:

(1) a person licensed to provide health care in the ordinary course of business;

(2) a superintendent or manager of a health care clinic;

(3) a dispensary, a charitable or penal institution or a municipal or county detention center; or

(4) a laboratory that performs testing for sexually transmitted infections.

**History: 1953 Comp., § 12-34-7, enacted by Laws 1973, ch. 359, § 7; 1993, ch. 341, § 1; 1978 Comp., § 24-1-7, repealed and reenacted by Laws 2017, ch. 87, § 8.**

**Repeals and reenactments.** — Laws 2017, ch. 87, § 8 repealed former 24-1-7 NMSA 1978 and enacted a new section, effective June, 16, 2017.

**The 1993 amendment,** effective July 1, 1993, substituted "sexually transmitted" for "venereal" in the catchline and "a sexually transmitted" for "venereal" throughout the section, and made a stylistic change in Subsection A.

ANNOTATIONS

**Law reviews.** — For comment, "Sex, Lies, and Lawsuits: A New Mexico Physician's Duty to Warn Third Parties Who Unknowingly May Be At Risk of Contracting HIV From a Patient," see 26 N.M.L. Rev. 481 (1996).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39 Am. Jur. 2d Health § 62.

Requiring submission to physical examination or test as violation of constitutional rights, 25 A.L.R.2d 1407.

Tort liability for infliction of venereal disease, 40 A.L.R.4th 1089.

## 24-1-8. Repealed.

**Repeals.** — Laws 2017, ch. 87, § 31 repealed 24-1-8 NMSA 1978, as enacted by Laws 1973, ch. 359, § 8, relating to communication regarding sexually transmitted diseases, effective June 16, 2017. For provisions of former section, *see* the 2016 NMSA 1978 on *NMOneSource.com*.

## 24-1-9. Capacity to consent to examination and treatment for a sexually transmitted infection.

Any person regardless of age has the capacity to consent to an examination and treatment by a licensed health care provider for any sexually transmitted infection.

**History: 1953 Comp., § 12-34-9, enacted by Laws 1973, ch. 359, § 9; 1993, ch. 341, § 3; 2017, ch. 87, § 9.**

**The 2017 amendment,** effective June, 16, 2017, made technical changes; in the catchline, deleted "disease" and added "infection", after "by a licensed", deleted "physician" and added "health care provider", and after "transmitted", deleted "disease" and added "infection".

**The 1993 amendment,** effective July 1, 1993, substituted "a sexually transmitted" for "venereal" in the catchline and "sexually transmitted" for "venereal" near the end of the section.

ANNOTATIONS

**Law reviews.** — For article, "Treating Children Under the New Mexico Mental Health and Developmental Disabilities Code," see 10 N.M.L. Rev. 279 (1980).

## 24-1-9.1. Sexually transmitted infections; testing of persons convicted of certain criminal offenses.

A. A test designed to identify any sexually transmitted infection may be performed on an offender convicted pursuant to state law of any criminal offense:

(1) involving contact between the penis and the vulva;

(2) involving contact between the penis and anus;

(3) involving contact between the mouth and penis;

(4) involving contact between the mouth and vulva;

(5) involving contact between the mouth and anus; or

(6) when the court determines from the facts of the case that there was a transmission or likelihood of transmission of bodily fluids from the offender to the victim of the criminal offense.



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B. When consent to perform a test on an offender cannot be obtained, the victim of a criminal offense described in Subsection A of this section may petition the court to order that a test be performed on the offender. When the victim of the criminal offense is a minor or incompetent, the parent or legal guardian of the victim may petition the court to order that a test be performed on the offender. The court shall order and the test shall be administered to the offender within ten days after the petition is filed by the victim or the victim's parent or guardian. Except for disclosures made pursuant to Section 24-1-7 NMSA 1978, the results of the test shall be disclosed only to the offender and to the victim or the victim's parent or legal guardian.

**History: 1978 Comp., § 24-1-9.1, enacted by Laws 1993, ch. 341, § 4; 2017, ch. 87, § 10.**

**The 2017 amendment,** effective June, 16, 2017, provided an exception to the disclosure provision; in the catchline, deleted "diseases" and added "infections"; in Subsection A, in the introductory clause, after "transmitted", deleted "disease" and added "infection"; and in Subsection B, after "offense is a minor or", deleted "an", after "filed by the victim", deleted "his" and added "or the victim's", and added "Except for disclosures made pursuant to Section 24-1-7 NMSA 1978".

**ANNOTATIONS**

**Law reviews.** — For note, "Tort Law – Turning Blood Into Whine: 'Fear of AIDS' as a Cognizable Cause of Action in New Mexico – Madrid v. Lincoln County Medical Center," see 28 N.M.L. Rev. 165 (1998).

## 24-1-9.2. Sexually transmitted infections; testing of persons formally charged for allegedly committing certain criminal offenses.

A. A test designed to identify any sexually transmitted infection may be performed on a person, upon the filing of a complaint, information or an indictment alleging that the person committed a state criminal offense:

(1) involving contact between the penis and the vulva;

(2) involving contact between the penis and anus;

(3) involving contact between the mouth and penis;

(4) involving contact between the mouth and vulva; or

(5) involving contact between the mouth and anus.

B. If consent to perform a test on an alleged offender cannot be obtained, the victim of the alleged criminal offense described in Subsection A of this section may petition the court, through the prosecuting office or personally, to order that a test be performed on the alleged offender; provided that the same test is first performed on the victim of the alleged criminal offense. The test may be performed on the alleged offender regardless of the result of the test performed on the victim of the alleged criminal offense. If the victim of the alleged criminal offense is a minor or incompetent, the parent or legal guardian of the victim of the alleged criminal offense may petition the court to order that a test be performed on the alleged offender.

C. The court may issue an order based on a finding of good cause after a hearing at which both the victim of the alleged criminal offense and the alleged offender have the right to be present. During the hearing, only affidavits, counter affidavits and medical reports regarding the facts that support or rebut the issuance of an order shall be admissible. The hearing shall be conducted within seventy-two hours after the victim petitions the court for the order. The petition and all proceedings in connection therewith shall be under seal. The court shall issue an order and the test shall be administered to the alleged offender within ten days after the petition is filed by the victim of the alleged criminal offense or the victim's parent or legal guardian.

D. Except for disclosures made pursuant to Section 24-1-7 NMSA 1978, the results of the test shall be disclosed only to the alleged offender and to the victim of the alleged criminal offense or the victim's parent or legal guardian. When the victim of the alleged criminal offense or the alleged offender has a positive test result, both the alleged offender and the victim of the alleged criminal offense shall be provided with counseling.

E. A prosecuting attorney may not use in a criminal proceeding arising out of the alleged criminal offense the fact that a test was administered to the alleged offender or the results of the test.

F. The provisions of this section shall not affect the rights and remedies available to the victim of the alleged criminal offense and the alleged offender in any civil action.



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G. The administration of a test to an alleged offender pursuant to the provisions of this section shall not preclude the subsequent administration of another test pursuant to the provisions of Section 24-1-9.1 NMSA 1978.

**History: 1978 Comp., § 24-1-9.2, enacted by Laws 1996, ch. 80, § 1; 2017, ch. 87, § 11.**

**Cross references.** — For informed consent for testing of persons charged with committing certain criminal offenses, *see* 24-2B-5.2 NMSA 1978.

**The 2017 amendment,** effective June, 16, 2017, provided an exception to the disclosure provision; in the catchline, deleted "diseases" and added "infections"; in Subsection A, in the introductory clause, after "transmitted", deleted "disease" and added "infection"; and in Subsection C, after "alleged criminal offense", deleted "his" and added "or the victim's", and after "parent or", added "legal"; and in Subsection D, added "Except for disclosures made pursuant to Section 24-1-7 NMSA 1978".

**ANNOTATIONS**

**Law reviews.** — For note, "Tort Law – Turning Blood Into Whine: 'Fear of AIDS' as a Cognizable Cause of Action in New Mexico – Madrid v. Lincoln County Medical Center," see 28 N.M.L. Rev. 165 (1998).

## 24-1-9.3. Sexually transmitted infections; mandatory counseling.

No positive test result for a sexually transmitted infection shall be revealed to the person upon whom the test was performed without the person performing the test or the health facility at which the test was performed providing or referring that person for individual counseling about:

A. the meaning of the test results;

B. the possible need for additional testing;

C. the availability of appropriate health care services, including mental health care, social services and support services; and

D. the benefits of locating and counseling any individual by whom the infected person may have been exposed to the sexually transmitted infection and any individual whom the infected person may have exposed to the sexually transmitted infection.

**History: 1978 Comp., § 24-1-9.3, enacted by Laws 1996, ch. 80, § 2; 2017, ch. 87, § 12.**

**The 2017 amendment,** effective June, 16, 2017, replaced "disease" or "diseases" with "infection" or "infections" throughout the section; and in Subsection C, after "social", added "services".

## 24-1-9.4. Sexually transmitted infections; confidentiality.

A. Except as provided in Section 24-1-9.2 NMSA 1978, no person or the person's agents or employees who require or administer a test for sexually transmitted infections shall disclose the identity of any person upon whom a test is performed or the result of such a test in a manner that permits identification of the subject of the test, except to the following persons:

(1) the subject of the test or the subject's legally authorized representative, guardian or legal custodian;

(2) any person designated in a legally effective release of the test results executed prior to or after the test by the subject of the test or the subject's legally authorized representative;

(3) an authorized agent, a credentialed or privileged physician or an employee of a health facility or health care provider if the health care facility or health care provider itself is authorized to obtain the test results, the agent or employee provides patient care or handles or processes specimens of body fluids or tissues and the agent or employee has a need to know such information;

(4) the department of health and the centers for disease control and prevention of the United States public health service in accordance with reporting requirements for a diagnosed case of a sexually transmitted infection;

(5) a health facility or health care provider that procures, processes, distributes or uses:

(a) a human body part from a deceased person, with respect to medical information regarding that person;

(b) semen for the purpose of artificial insemination;

(c) blood or blood products for transfusion or injection; or

(d) human body parts for transplant with respect to medical information regarding the donor or recipient;



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(6) health facility staff committees or accreditation or oversight review organizations that are conducting program monitoring, program evaluation or service reviews, as long as any identity remains confidential;

(7) authorized medical or epidemiological researchers who may not further disclose any identifying characteristics or information; and

(8) for purposes of application or reapplication for insurance coverage, an insurer or reinsurer upon whose request the test was performed.

B. Whenever disclosure is made, it shall be accompanied by a statement in writing that includes the following or substantially similar language: "This information has been disclosed to you from records whose confidentiality is protected by state law. State law prohibits you from making any further disclosure of this information without the specific written consent of the person to whom this information pertains or as otherwise permitted by law. A person who makes an unauthorized disclosure of this information is guilty of a petty misdemeanor and shall be sentenced to imprisonment in the county jail for a definite term not to exceed six months or the payment of a fine of not more than five hundred dollars ($500), or both.".

**History: 1978 Comp., § 24-1-9.4, enacted by Laws 1996, ch. 80, § 3; 2017, ch. 87, § 13.**

**The 2017 amendment,** effective June, 16, 2017, provided for a written statement regarding confidentiality that must accompany disclosures related to tests for sexually transmitted infections; replaced "disease" or "diseases" with "infection" or "infections" throughout the section; designated the previously undesignated introductory clause as Subsection A and redesignated former Subsections A through H as Paragraphs A(1) through A(8), respectively; in Paragraph A(5), designated former Paragraphs E(1) through E(4) as Subparagraphs A(5)(a) through A(5)(d), respectively; and added a new Subsection B.

## 24-1-9.5. Repealed.

**Repeals.** — Laws 2017, ch. 87, § 31 repealed 24-1-9.5 NMSA 1978, as enacted by Laws 1996, ch. 80, § 4, relating to sexually transmitted diseases, disclosure statement, effective June 16, 2017. For provisions of former section, *see* the 2016 NMSA 1978 on *NMOneSource.com*.

## 24-1-9.6. Sexually transmitted infections; disclosure.

A. A victim of a criminal offense or an alleged criminal offense who receives information pursuant to Section 24-1-9.1 or 24-1-9.2 NMSA 1978 may disclose the offender's or alleged offender's test results to the victim's health care provider as is reasonably necessary to protect the victim's health and safety or the health and safety of the victim's family or sexual partner.

B. Nothing in this section shall be construed to prevent a person who has been tested from disclosing in any way to any other person that person's own test results.

**History: 1978 Comp., § 24-1-9.6, enacted by Laws 1996, ch. 80, § 5; 2017, ch. 87, § 14.**

**The 2017 amendment,** effective June, 16, 2017, authorized certain disclosures when a person convicted of a criminal offense or alleged to have committed a criminal offense has been tested for sexually transmitted infections; in the catchline, deleted "diseases" and added "infections"; designated the formerly undesignated first paragraph as Subsection A; in Subsection A, after "victim of", added "a criminal offense or", after "Section", added "24-1-9.1 or", after "may disclose the", added "offender's or alleged offender's", after "test results", added "to the victim's health care provider", after "necessary to protect", deleted "his" and added "the victim's", and after "health and safety of", deleted "his" and added "the victim's"; and added Subsection B.

## 24-1-9.7. Penalty.

A person who, in violation of Section 24-1-9.4 NMSA 1978, makes an unauthorized disclosure of the results of a test designed to identify a sexually transmitted infection is guilty of a petty misdemeanor and shall be sentenced to imprisonment in the county jail for a definite term not to exceed six months or the payment of a fine of not more than five hundred dollars ($500) or both.

**History: 1978 Comp., § 24-1-9.7, enacted by Laws 1996, ch. 80, § 6; 2017, ch. 87, § 15.**

**The 2017 amendment,** effective June, 16, 2017, added the statutory reference for the unauthorized disclosure of test results for sexually transmitted infections; and after "A person who", added "in violation of Section 24-1-9.4 NMSA 1978", and after "transmitted", deleted "disease" and added "infection".



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## 24-1-10. Pregnancy; serological test for syphilis.

A. Every physician examining a pregnant woman for conditions relating to her pregnancy during the period of gestation or at delivery or both shall take or cause to be taken a sample of blood of such woman at the time of first examination.

B. All such blood samples shall be submitted to the state public health laboratory for a standard serological test for syphilis.

C. The standard serological test shall be a test for syphilis approved by the director of the department. Such serological tests shall be made on request without charge by the department.

**History: 1953 Comp., § 12-34-10, enacted by Laws 1973, ch. 359, § 10.**

**Cross references.** — For consent to examination and diagnosis for pregnancy, *see* 24-1-13 NMSA 1978.

## 24-1-11. Reporting of blood tests.

In reporting every birth and stillbirth, physicians and others required to make such reports shall state on the certificate whether a blood test for syphilis has been made upon a specimen of blood taken from the mother of the child for which a birth or stillbirth certificate is filed and the approximate date when the specimen was taken.

**History: 1953 Comp., § 12-34-11, enacted by Laws 1973, ch. 359, § 11.**

## 24-1-12. Health certificates; filing.

A. Any person who operates or is employed in a health facility shall, upon becoming employed or engaged in such occupation, present to the employer or, if self-employed, file at the place of business a health certificate from a licensed physician stating the person is free from communicable diseases in a transmissible state dangerous to the public health as defined by regulation of the health services division [public health division] of the health and environment department [department of health]. The certificate shall be obtained not more than ninety days prior to the date of employment.

B. All certificates shall be kept on file and be subject to inspection by the licensing authority.

**History: 1953 Comp., § 12-34-12, enacted by Laws 1973, ch. 359, § 12; 1981, ch. 46, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department and enacted a new 9-7-4 NMSA 1978 which created the department of health. Section 9-7-5 NMSA 1978, as amended by Laws 1991, ch. 25, § 17, made the secretary of health the administrative head of the department.

Subsection B of 9-7-4 NMSA 1978 provided that all references to the "health services division" shall be construed to be references to the "public health division".

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39 Am. Jur. 2d Health § 56 et seq.

39A C.J.S. Health and Environment §§ 38, 39.

## 24-1-13. Pregnancy; capacity to consent to examination and diagnosis.

Any person, regardless of age, has the capacity to consent to an examination and diagnosis by a licensed physician for pregnancy.

**History: 1953 Comp., § 12-34-13, enacted by Laws 1973, ch. 359, § 13.**

**Cross references.** — For standard serological test for syphilis for pregnant women, *see* 24-1-10 NMSA 1978.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Liability for incorrectly diagnosing existence or nature of pregnancy, 2 A.L.R.5th 769.



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## 24-1-13.1. Pregnancy; prenatal, delivery and postnatal treatment to a female minor; capacity to consent.

A health care provider shall have the authority, within the limits of his license, to provide prenatal, delivery and postnatal care to a female minor. A female minor shall have the capacity to consent to prenatal, delivery and postnatal care by a licensed health care provider.

**History: Laws 2001, ch. 314, § 1 and Laws 2001, ch. 327, § 1.**

**Compiler's notes.** — Laws 2001, ch. 314, § 1 and Laws 2001, ch. 327, § 1 enacted identical new sections of law, effective June 15, 2001. The section was set out as enacted by Laws 2001, ch. 327, § 1. *See* 12-1-8 NMSA 1978.

**Cross references.** — For age of majority, *see* 28-6-1 NMSA 1978.

## 24-1-13.2. Shaken baby syndrome prevention.

The department of health shall adopt rules, no later than December 31, 2017, requiring every hospital and freestanding birthing center to provide training and education to prevent shaken baby syndrome to every parent of every newborn before discharge of the newborn from the health facility. The rules shall require the health facility to maintain records to demonstrate compliance with this requirement and to report such information as the department deems appropriate regarding the training and education provided by such health facility. The department, in collaboration with the university of New Mexico health sciences center's department of pediatrics, shall approve training and instructional materials in both English and Spanish and shall include the use of shaken baby simulation dolls in the required curriculum.

**History: Laws 2017, ch. 119, § 1.**

**Effective dates.** — Laws 2017, ch. 119 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 24-1-14. [Sterilization;] special qualifications prohibited.

No hospital which permits any operation that results in sterilization to be performed therein or medical staff of such hospital shall require any person upon whom a sterilization operation is to be performed to meet any special qualifications which are not imposed on individuals seeking other types of operations in the hospital.

**History: 1953 Comp., § 12-34-14, enacted by Laws 1973, ch. 359, § 14.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

ANNOTATIONS

**Law reviews.** — For comment, "Voluntary Sterilization in New Mexico: Who Must Consent?" see 7 N.M.L. Rev. 121 (1976-77).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39 Am. Jur. 2d Health § 74.

Legality of voluntary nontherapeutic sterilization, 35 A.L.R.3d 1444.

When statute of limitations begins to run against malpractice action in connection with sterilization or birth control procedures, 93 A.L.R.3d 218.

## 24-1-15. Isolation; quarantine; protocol.

A. If the secretary or a representative of the department has knowledge that a person is infected with or reasonably believes that a person is infected with or exposed to a threatening communicable disease and the person has refused voluntary treatment, testing, evaluation, detention or observation, the secretary or the secretary's designee shall petition the court for an order to isolate or quarantine the person until the person is no longer a threat to the public health or until the person voluntarily complies with treatment and contagion precautions.

B. The secretary or a representative of the department whom the secretary designates may, by public health order, temporarily isolate or quarantine a person or group of persons if delay in isolating or quarantining would significantly jeopardize the secretary's ability to prevent or limit the transmission to others of a threatening communicable disease. The public health order shall



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expire at the end of twenty-four hours from the time of the commencement of the isolation or quarantine. The secretary may petition for a court order that authorizes the continued isolation or quarantine of the person or group of persons. In the petition, the secretary shall present facts used to support the need to have issued the public health order to isolate or quarantine.

C. Whether or not a public health order to isolate or quarantine was previously issued, a petition for a court order shall be made under oath or shall be accompanied by a sworn affidavit setting out specific facts showing the basis upon which isolation or quarantine is justified, including whether a person to be isolated or quarantined:

(1) is infected with, reasonably believed to be infected with or exposed to a threatening communicable disease; and

(2) poses a substantial likelihood of transmission of the threatening communicable disease to others because of inadequate separation from others.

D. Upon the filing of a petition, the court shall:

(1) immediately grant ex parte a court order to isolate or quarantine the affected person if there is probable cause from the specific facts shown by the affidavit or by the petition to give the judge reason to believe that the affected person poses a substantial threat to the public health and safety;

(2) cause the court order, notice of hearing and an advisement of the terms of the court order, including the affected person's rights to representation and re-petition for termination of a court order that removes and detains the affected person, to be immediately served on the affected person; and

(3) within five days after the granting of the court order, hold an evidentiary hearing to determine if the court shall continue the order.

E. A person held pursuant to a court order as set forth in Subsection D of this section shall be:

(1) entitled to representation by counsel at the evidentiary hearing and at all hearings thereafter for the duration of the period of removal and detention; and

(2) permitted to communicate on any matter, including the person's isolation or quarantine, with persons by telephone, or other reasonably available means that do not expose other persons to the risk of infection, for the duration of the period of isolation or quarantine.

F. Counsel may be retained by the person held or shall be appointed by the court if the court determines that the person held cannot afford legal representation or if the court determines that appointment of counsel is required in the interest of justice.

G. At the evidentiary hearing, the court shall review the circumstances surrounding the court order and, if the petitioner can show by clear and convincing evidence that the person being held has not voluntarily complied or will not voluntarily comply with appropriate treatment and contagion precautions, the court may continue the isolation or quarantine. The court shall order regular review of the order to isolate or quarantine by providing the person being held with a subsequent hearing within thirty days of the court order's issuance and every thirty days thereafter. The court order to isolate or quarantine shall be terminated and the affected person shall be released if:

(1) the person being held is certified by a public health official to pose no further risk to the public health;

(2) at a hearing, the petitioner, whose burden of proof continues under a clear and convincing standard, can no longer show that the person being held is infected with, reasonably believed to be infected with or exposed to a threatening communicable disease and that the affected person will not comply with appropriate treatment and contagion precautions voluntarily; or

(3) exceptional circumstances exist warranting the termination of the court order.

H. The provisions of this section do not permit the forcible administration of medications. A person isolated or quarantined pursuant to this section has the right to refuse to participate in medical treatment, testing, physical or mental examination, vaccination, specimen collection or preventive treatment.

I. A person who is isolated or quarantined pursuant to a court order may petition the court to contest the order or the conditions of isolation or quarantine at any time prior to the expiration of the order. If a petition is filed, the court shall hold a hearing within five days after the date of filing. The filing of a petition for a hearing pursuant to this subsection does not stay a court order for isolation or quarantine. At the hearing, the secretary shall offer clear and convincing evidence that:



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(1) the isolation or quarantine is warranted; or

(2) the conditions of isolation or quarantine are compliant with the provisions of this section.

J. When isolating or quarantining an affected person, the secretary shall ensure that:

(1) isolation or quarantine is the least restrictive means necessary to protect against the spread to others of a communicable disease or a potentially threatening communicable disease and may include confinement to the affected person's private home, if practicable, or if not practicable, to a private or public premises;

(2) an isolated person is confined separately from a quarantined person;

(3) the health status of an isolated or quarantined person is monitored regularly to determine whether continued isolation or quarantine is required;

(4) if a quarantined person becomes infected or is reasonably believed to be infected with the threatening communicable disease subsequent to quarantine, that affected person shall be promptly isolated;

(5) the needs of a person isolated or quarantined are addressed in a systematic and orderly manner, including the provision of adequate food, clothing, shelter, sanitation and comfort;

(6) there are methods of communication available to a person placed in isolation or quarantine to enable communication with family members, household members, legal representatives, advocates, the media and any licensed health care provider;

(7) an area of isolation or quarantine is maintained in a manner that minimizes the likelihood of further transmission of infection or other injury to other persons who are isolated or quarantined; and

(8) to the extent possible, cultural and religious beliefs shall be respected in addressing the needs of affected persons and in establishing and maintaining an area of isolation or quarantine.

K. A person shall not enter an area of isolation or quarantine except as authorized by the department. To protect the public health, the department may isolate or quarantine any person who has entered, with or without the secretary's authorization, into an area of isolation or quarantine.

L. Court proceedings shall be on the record and be closed to the general public. The records shall be sealed from public inspection.

M. A person who in good faith reports another person infected with a threatening communicable disease shall not be held liable for civil damages as a result of the report; provided that the person reported as being infected with a threatening communicable disease shall have the right to sue for damages sustained as a result of negligent or intentional reporting of inaccurate information or the disclosure of information to an unauthorized person.

N. During the period of isolation or quarantine, an employer shall not discharge from employment a person who is placed in isolation or quarantine pursuant to this section.

O. The secretary, after consultation with the state medical investigator, the secretary of public safety, the director and the chair of the board of funeral services, may implement and enforce measures that are reasonable and necessary to respond to a threatening communicable disease and provide for the safe disposal of human remains.

P. For purposes of this section:

(1) "area of isolation or quarantine" means the physical environs that the department designates as the area within which to restrict access as required to prevent transmission of a threatening communicable disease;

(2) "court" means:

(a) the district court of the judicial district where the person who is alleged to be infected with a threatening communicable disease resides or is found; or

(b) in the event that a district court cannot adequately provide services, a district court that the New Mexico supreme court designates;

(3) "isolate" means to physically separate for possible medical care a person who is infected or who is reasonably believed to be infected with a threatening communicable disease or potentially threatening communicable disease;

(4) "public health official" means the secretary, a regional health officer, the director of the public health division of the department, a chief medical officer or a representative of the department designated by the secretary to carry out the duties provided in this section;



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(5) "quarantine" means the precautionary physical separation of a person who has or may have been exposed to a threatening communicable disease or a potentially threatening communicable disease and who does not show a sign or symptom of a threatening communicable disease from persons who are not quarantined to protect against the transmission of the disease to persons who are not quarantined; and

(6) "threatening communicable disease" means a disease that causes death or great bodily harm, passes from one person to another and for which there is no means by which the public reasonably can avoid the risk of contracting the disease.

**History: 1953 Comp., § 12-34-15, enacted by Laws 1973, ch. 359, § 15; 1999, ch. 159, § 1; 2002, ch. 74, § 1; 2017, ch. 87, § 16.**

**The 2017 amendment,** effective June, 16, 2017, clarified the authority of the department of health to petition the court for orders of isolation or quarantine where a delay in isolation or quarantine would jeopardize the secretary of health's ability to prevent or limit transmission of a communicable disease, provided due process protections for any person subject to such orders, defined "area of isolation or quarantine", "isolate" and "quarantine", and revised certain definitions for purposes of this section; in the catchline, deleted "Reporting of contagious diseases" and added "Isolation; quarantine; protocol"; replaced "protective order" or "temporary protective order" with "court order" throughout the section; deleted former Subsection A and redesignated former Subsection B as Subsection A; in Subsection A, added "If the secretary or a representative of the department", after "infected with", added "or reasonably believes that a person is infected with or exposed to", after "refused voluntary treatment", added "testing, evaluation", after "detention or observation", added "the secretary or the secretary's designee", after "petition the court for an order to", deleted "detain the person who is infected with the threatening communicable disease" and added "isolate or quarantine the person", after "no longer a", deleted "contagious", after "threat to the public", added "health", after "or", added "until", and after "voluntarily complies with", deleted "the appropriate"; added a new Subsection B; in Subsection C, deleted "The" and added "Whether or not a public health order to isolate or quarantine was previously issued, a", after "petition", added "for a court order", and after "specific facts showing", deleted "that the person is infected with a threatening communicable disease" and added "the basis upon which isolation or quarantine is justified, including whether a person to be isolated or quarantined"; added the language in former Subsection D to Subsection C, and redesignated former Subsections E through I as Subsections D through H, respectively; in Paragraph C(1), after "is", deleted "actively infectious" and added "infected", added "reasonably believed to be infected with or exposed to", after "communicable disease", deleted "or presents a substantial likelihood of having a threatening communicable disease based on credible medical evidence", and deleted Paragraph C(3); in Subsection D, Paragraph D(1), after "to isolate", added "or quarantine", after the next "the", added "affected", after "person", deleted "infected with the threatening communicable disease", after "believe that the", added "affected", and after "person", deleted "infected with a threatening communicable disease", and in Paragraph D(2), after "including", deleted "his right" and added "the affected person's rights", after "detains the", deleted "infected" and added "affected", and after "served on the", deleted "allegedly infected" and added "affected"; in Subsection E, in the introductory clause, after "Subsection", changed "E" to "D", in Paragraph E(2), after "including", deleted "his removal and detention" and added "the person's isolation or quarantine", after "the period of", deleted "removal and detention" and added "isolation or quarantine"; in Subsection G, in the introductory paragraph, after "court may continue the", deleted "detention of the person infected with a threatening communicable disease" and added "isolation or quarantine", after "review of the order to", deleted "detain" and added "isolate or quarantine", after "hearing within", deleted "ninety" and added "thirty", after "issuance and every", deleted "ninety" and added "thirty", after "The", deleted "detention" and added "court", after "order", added "to isolate or quarantine", and after "terminated and the", added "affected", in Paragraph G(1), after "no further risk", deleted "of infecting others" and added "to the public health", and in Paragraph G(2), after "infected with", added "reasonably believed to be infected with or exposed to", after "disease and that", deleted "he" and added "the affected person"; in Subsection H, added the last sentence; added new Subsections I through K and redesignated former Subsection J and K as Subsections L and M, respectively; in Subsection L, added "Court", after "shall be", deleted "recorded stenographically, electronically, mechanically or by other appropriate means. The proceedings shall" and added "on the record and"; added new Subsections N and O and redesignated former Subsection L as Subsection P; in Subsection P, added a new Paragraph P(1) and designated former Paragraph P(1) as Paragraph P(2), in Paragraph P(2), designated the formerly undesignated first sentence as Subparagraph P(2)(a), added "or", and added new Subparagraph P(2)(b), added new Paragraph P(3) and redesignated former Paragraph P(2) as Paragraph P(4), in Paragraph P(4), after "means", added "the secretary", deleted "district" and added "regional", after "department", deleted "of health", after "medical officer or a", deleted "person" and added "representative of the department", after "by the secretary", deleted "of health", and added Paragraph P(5) and redesignated former Paragraph P(3) as Paragraph P(6).

**The 2002 amendment,** effective May 15, 2002, substituted "infected with a threatening communicable disease" for "sick with any disease dangerous to the public health" in Subsection A; deleted "and treat" following "detain" in Subsection B, and deleted similar references to treatment throughout the section; added new Subsections G, J, and K, and redesignated former Subsections G, H and I as Subsections H, I and L, respectively; and rewrote present Subsection H, shifting the burden of proof to the petitioner rather than the detainee.

**The 1999 amendment,** effective June 18, 1999, substituted "a public health official" for "the district health officer" in Subsection A and rewrote Subsection B which read: "Any health authority receiving notice that any person is infected with disease dangerous to the public health shall secure his voluntary isolation or, if such person refuses to submit to isolation, he shall file a complaint with any magistrate or district court judge having jurisdiction over the infected person. The complaint shall state the facts as related, under oath, by the health authority or the facts according to his information and belief. Any magistrate or district court judge having jurisdiction may, upon proper complaint, issue a warrant directed to an officer authorized to serve arrest warrants requiring such officer, under the direction of the complaining health authority, to isolate the person".



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ANNOTATIONS

**Power to compel hospitalization of persons infected with dangerous disease.** 1959-60 Op. Att'y Gen. No. 60-08.

**Law reviews.** — For comment, "Sex, Lies, and Lawsuits: A New Mexico Physician's Duty to Warn Third Parties Who Unknowingly May Be At Risk of Contracting HIV From a Patient," see 26 N.M.L. Rev. 481 (1996).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39 Am. Jur. 2d Health § 52.

AIDS infection as affecting right to attend public school, 60 A.L.R.4th 15.

Liability of doctor or other health practitioner to third party contracting contagious disease from doctor's patient, 3 A.L.R.5th 370.

39A C.J.S. Health and Environment § 19.

## 24-1-15.1. Protocol for management of active tuberculosis.

A. When a physician or other person knows that a person has, or is reasonably believed to be infected with, active tuberculosis, the physician or other person shall promptly notify the department.

B. Upon receiving notification that a person has active tuberculosis, the department shall prescribe the person a treatment plan meeting the department's therapeutic specifications for the infectious form of tuberculosis. The treatment plan shall include a notice to the person that failure to comply with the treatment plan will result in immediate initiation of court action to ensure compliance, as set forth in this section.

C. The secretary, or a representative of the department whom the secretary designates, may by public health order temporarily isolate a person or group of persons if delay in isolating the person or group would significantly jeopardize the secretary's ability to prevent or limit the transmission of tuberculosis to others. The public health order shall expire at the end of twenty-four hours from the time of the commencement of isolation. The secretary may petition for a court order that authorizes the continued isolation. In the petition, the secretary shall present facts used to support the need to have issued the public health order to isolate.

D. Whether or not a public health order was issued pursuant to Subsection C of this section, when the department has knowledge that a person who has active tuberculosis has failed to comply with the department's treatment plan as described in Subsection B of this section, the department shall petition for a court order for the person who has active tuberculosis to comply with whichever of the following courses of action the department deems appropriate:

(1) a program of directly observed therapy;

(2) isolation; or

(3) directly observed therapy and isolation.

E. A petition for a court order shall be made under oath or shall be accompanied by a sworn affidavit setting out specific facts showing the basis upon which isolation is justified, including whether the person to be isolated:

(1) has active tuberculosis or presents a substantial likelihood of having active tuberculosis based on credible medical evidence;

(2) after being advised of the condition and the risks posed thereby, has failed to comply with the department's treatment plan; and

(3) poses a substantial likelihood of transmission of tuberculosis to others because the person is actively infectious or poses a risk of relapse or development of a therapy-resistant strain of tuberculosis.

F. Upon the filing of a petition for a court order, the court shall:

(1) in cases where there is probable cause established by the petition to give the judge reason to believe that the person who has been alleged to have active tuberculosis poses a substantial threat to the public health and safety because the person is actively infectious, or poses a risk of relapse or development of a therapy-resistant strain of tuberculosis because of a history of noncompliance, immediately grant ex parte a court order to:

(a) administer a program of directly observed therapy;

(b) isolate the person and administer a program of directly observed therapy; or

(c) isolate the person, if the person refuses a program of directly observed therapy;

(2) cause the court order, notice of hearing and an advisement of the terms of the court order, including the rights of the person alleged to have active tuberculosis to representation and



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re-petition for termination of a court order, to be immediately served on the person alleged to have active tuberculosis; and

(3) within five days after the granting of the court order, hold an evidentiary hearing to determine if the court shall continue the court order.

G. A person held pursuant to a court order as set forth in Subsection F of this section shall be:

(1) entitled to representation by counsel at the evidentiary hearing and at all hearings thereafter for the duration of the period of isolation or program of directly observed therapy; and

(2) permitted to communicate on any matter, including the person's isolation or program of directly observed therapy, with persons by telephone or other reasonably available means that do not expose other persons to the risk of infection, for the duration of the period of isolation or program of directly observed therapy.

H. Counsel may be retained by the person under the court order or shall be appointed by the court if the court determines that the person held cannot afford legal representation or if the court determines that appointment of counsel is required in the interest of justice.

I. At the evidentiary hearing, the court shall review the circumstances surrounding the court order, and, if the petitioner can show by clear and convincing evidence that the person being held has not complied or will not comply with appropriate treatment and contagion precautions as the department deems necessary, the court shall continue the court order for the person who has active tuberculosis until completion of therapy, as deemed by the department. The court shall order regular review of the order by providing the person under a court order with a subsequent hearing within ninety days of the court order's issuance and every ninety days thereafter. The court order shall be terminated and the person shall be released if:

(1) at a hearing, the petitioner has not met its burden of showing by clear and convincing proof that the person under a court order has not completed therapy; or

(2) exceptional circumstances exist warranting the termination of the court order.

J. The provisions of this section do not permit the forcible administration of medications.

K. A person isolated pursuant to this section has the right to refuse any medical treatment, physical or mental examination, treatment program or invasive specimen collection. A person who has been directed by the secretary to submit to medical procedures and protocols because the person has active tuberculosis and refuses to submit to the procedures and protocols may be subject to continued isolation pursuant to this section.

L. A person who is isolated pursuant to a court order may petition the court to contest the order or the conditions of isolation at any time prior to the expiration of the court order. If a petition is filed, the court shall hold a hearing within five business days after the date of filing. At a hearing pursuant to a petition to contest, the secretary shall offer:

(1) clear and convincing evidence that the isolation is warranted; or

(2) proof that the conditions of isolation are compliant with the provisions of this section.

M. When isolating a person or group of persons, the secretary shall ensure that:

(1) isolation is imposed by the least restrictive means necessary to protect against the spread of tuberculosis to others and may include confinement to the isolated person's private home, if practicable, or, if not practicable, a private or public premises;

(2) the health status of an isolated person is monitored regularly to determine if continued isolation is required;

(3) the needs of a person isolated are addressed in a systematic and orderly manner, including the provision of adequate food, clothing, shelter, sanitation and comfort;

(4) there are methods of communication available to a person placed in isolation to enable communication with family members, household members, legal representatives, advocates, the media and any licensed health care provider;

(5) the premises used for isolation are maintained in a manner that minimizes the likelihood of further transmission of infection or other injury to other persons who are isolated; and

(6) to the extent possible, cultural and religious beliefs shall be respected in addressing the needs of persons and establishing and maintaining isolation premises.

N. The proceedings of any hearing held pursuant to this section shall be recorded stenographically, electronically or mechanically or by other appropriate means. The proceedings shall be closed to the general public and the records shall be sealed from public inspection.



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O. A person who in good faith reports that another person has active tuberculosis shall not be held liable for civil damages as a result of the report; provided that the person reported as having active tuberculosis shall have the right to sue for damages sustained as a result of negligent or intentional reporting of inaccurate information or the disclosure of information to an unauthorized person.

P. During the period of isolation, an employer shall not discharge from employment a person who is placed in isolation pursuant to this section.

Q. For purposes of this section:

(1) "active tuberculosis" means a disease caused by mycobacterium tuberculosis or other members of the mycobacterium tuberculosis complex family that has been determined, through current clinical, bacteriological or radiographic evidence, or whichever diagnostic procedures the department deems appropriate, to be present in a person who has not completed an appropriate course of antituberculosis medication, regardless of the state of communicability of the disease. A person with active tuberculosis includes a person with:

(a) tuberculosis that is resistant to the prescribed treatment plan;

(b) infectious tuberculosis or who presents a substantial likelihood of having infectious tuberculosis based on credible medical evidence;

(c) noninfectious tuberculosis who is at high risk of developing an infectious form of tuberculosis; and

(d) pulmonary or extrapulmonary tuberculosis;

(2) "completion of therapy" means completion of the prescribed therapy, as determined by the department based upon published national consensus tuberculosis treatment guidelines;

(3) "court" means the district court of the judicial district where the person who is alleged to have active tuberculosis resides or is found or a district court designated by the New Mexico supreme court;

(4) "department" means the department of health or a person designated by the secretary of health to carry out the duties provided in this section;

(5) "directly observed therapy" means a methodology for promoting patient adherence in which a health care provider or trained designee witnesses the patient ingest each dose of medication until the completion of prescribed therapy for tuberculosis; and

(6) "isolation" means:

(a) home isolation;

(b) home isolation with electronic monitoring;

(c) isolation in a hospital or other health care facility negative pressure room where appropriate security measures are undertaken to prevent the transmission of tuberculosis; or

(d) isolation in a prison or detention center negative pressure room with an appropriate level of medical care.

**History: Laws 2009, ch. 174, § 1; 2017, ch. 87, § 17.**

**The 2017 amendment,** effective June, 16, 2017, clarified the authority of the department of health to temporarily isolate a person or group of persons when a delay in isolating the person or group would jeopardize the secretary of health's ability to prevent or limit transmission of tuberculosis, provided due process protections for any person subject to such isolation, defined "active tuberculosis", and revised certain definitions for purposes of this section; replaced "infectious form of" with "active" throughout the section, and replaced "order of protection" or "temporary order of protection" with "court order" throughout the section; in Subsection A, after "a person has", deleted "an infectious form of" and added "or is reasonably believed to be infected with, active"; added new Subsection C; deleted former Subsection D; redesignated former Subsection C as Subsection D; in Subsection D, added "Whether or not a public health order was issued pursuant to Subsection C of this section", after "shall petition", deleted "the court"; in Subsection E, in the introductory clause, deleted "The" and added "A", and after "shall", deleted "state that the person for whom the order is sought" and added "be made under oath or shall be accompanied by a sworn affidavit setting out specific facts showing the basis upon which isolation is justified, including whether the person to be isolated"; added new Subsections K through M and redesignated former Subsections K and L as Subsections N and O, respectively; added new Subsection P and redesignated former Subsection M as Subsection Q; and in Subsection Q, added new Paragraph Q(1) and redesignated former Paragraphs Q(1) through Q(4) as Paragraphs Q(2) through Q(5), deleted former Paragraph Q(5), in Subparagraph Q(6)(c), after "negative pressure room", deleted "monitored by a security officer" and added "where appropriate security measures are undertaken to prevent the transmission of tuberculosis; or", and deleted former Subparagraph Q(6)(d) and redesignated former Subparagraph Q(6)(e) as Subparagraph Q(6)(d).



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## 24-1-15.2. Conditions of public health importance; reporting.

A. The secretary shall establish by rule a list of reportable conditions of public health importance. The list shall include conditions of humans or animals caused by exposure to toxic substances, microorganisms or any other pathogens or conditions that arise due to injury. The secretary shall:

(1) prescribe the manner of and the person responsible for reporting conditions of public health importance;

(2) classify each reportable condition of public health importance according to the urgency of reporting; and

(3) revise the list of reportable conditions of public health importance as necessary.

B. The secretary may enter into agreements or other arrangements with federal and tribal public health agencies for receipt and sharing of information regarding reportable conditions of public health importance.

C. The department shall disseminate reporting requirements to health care providers and other persons required to report conditions of public health importance.

D. A person with knowledge of a reportable condition of public health importance shall report the condition to the department.

**History: Laws 2017, ch. 87, § 18.**
**Effective dates.** — Laws 2017, ch. 87 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 24-1-15.3. Conditions of public health importance; testing; screening.

A. The department shall establish testing and screening procedures and programs to identify conditions of public health importance among individuals or among the general population of the state. The department shall:

(1) prior to testing or screening, explain to the individual the nature, scope, purposes, benefits, risks and possible outcomes of the test or screening, except as otherwise provided pursuant to this section or by state law;

(2) have a valid and reliable test for the condition of public health importance;

(3) when administering a test or screening, identify a condition of public health importance that poses a threat to an individual's or the public's health and that may be avoided, cured, alleviated or made less contagious through safe and effective treatment, modifications in individual behavior or public health interventions; and

(4) fully inform the individual of the individual's results, the meaning of the results, the possible need for additional testing and the availability of appropriate health care services, including mental health care and social and support services. If appropriate, the department shall provide counseling or inform the individual where such counseling services are available.

B. The department may petition for the issuance of a court order to require testing or medical examination of any individual who has or may have been exposed to a condition of public health importance that poses a significant risk or threat to the individual or others or to the public's health, in accordance with procedures established by department rules.

**History: Laws 2017, ch. 87, § 19.**
**Effective dates.** — Laws 2017, ch. 87 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 24-1-15.4. Individually identifiable health information; conditions of public health importance; confidentiality; use; disclosure.

A. Any use of individually identifiable health information pursuant to this section shall be limited to the minimum amount of information reasonably necessary to accomplish a public health purpose.



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B. Individually identifiable health information received by the department shall not be public information and shall not be disclosed without the authorization of the individual who is the subject of the information, except as otherwise provided in state or federal law.

C. In accordance with state and federal law, the secretary shall adopt and promulgate rules to allow an individual to have access to, inspect and obtain copies of the individual's individually identifiable health information.

D. Nothing in this section shall be construed to prevent an individual from disclosing that individual's own individually identifiable health information.

E. As used in this section, "individually identifiable health information" means information related to the provision of health care or public health services to an individual that:

(1) is directly related to diseases or a condition of public health importance; and

(2) can be used to identify the individual recipient of health care or public health services.

**History: Laws 2017, ch. 87, § 20.** **Effective dates.** — Laws 2017, ch. 87 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 24-1-16. Inspection definitions.

As used in Sections 16 through 19 [24-1-16 through 24-1-19 NMSA 1978] of the Public Health Act:

A. "inspectorial search" means an entry into and examination of premises or vehicles, for the purpose of ascertaining the existence or nonexistence of conditions dangerous to health or safety or otherwise relevant to the public interest, in accordance with inspection requirements prescribed by fire, housing, sanitation, welfare, zoning or other laws or ordinances duly enacted for the promotion of public well-being;

B. "inspection officer" means an official authorized by law to conduct inspectorial searches; and

C. "inspection order" means an order issued by a magistrate or other competent official authorizing an inspectorial search.

**History: 1953 Comp., § 12-34-16, enacted by Laws 1973, ch. 359, § 16.**

**Cross references.** — For constitutional provision relating to searches and seizures, *see* N.M. Const., art. II, § 10.

## 24-1-17. Inspectorial search by consent.

A. Within the scope of his authority with respect to the places to be inspected and the purpose for which inspection is to be carried out, an inspection officer may conduct an inspectorial search, with the voluntary consent of an occupant or custodian of the premises or vehicles to be inspected, who reasonably appears to the inspection officer to be in control of the places to be inspected or otherwise authorized to give such consent.

B. Before requesting consent for an inspectorial search, the inspection officer shall inform the person to whom the request is directed of the authority under and purposes for which the inspection is to be made and shall, upon demand, exhibit a badge or document evidencing his authority to make such inspections.

C. Inspections undertaken pursuant to this section shall be carried out with due regard for the convenience and privacy of the occupants, and during the daytime unless, because of the nature of the premises, the convenience of the occupants or other circumstances, there is a reasonable basis for carrying out the inspection at night.

D. Except in accordance with the provisions of the subsequent subsection adequate notice of the time and purpose of an inspection shall be sent to the occupants or custodians of premises or vehicles to be inspected not less than seven days before the inspection is undertaken.

E. The notice required by the preceding subsection may be dispensed with if, because of the nature of the inspection to be undertaken, the conduct of the occupants, or other circumstances, there is a reasonable basis for belief that such notice would obstruct, or seriously diminish the utility, of the inspection in question.



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**History: 1953 Comp., § 12-34-17, enacted by Laws 1973, ch. 359, § 17.**

**Cross references.** — For constitutional provision relating to searches and seizures, *see* N.M. Const., art. II, § 10.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Propriety of state or local government health officer's warrantless search - post-Camara cases, 53 A.L.R.4th 1168.

## 24-1-18. Inspection searches.

A. Upon sufficient showing that consent to an inspectorial search has been refused or is otherwise unobtainable within a reasonable period of time, an inspection officer may make application for an inspection order. Such application shall be made to a district court judge having jurisdiction over the premises or vehicle to be searched or an administrative official authorized by statute or ordinance to issue inspection orders.

B. The application shall be granted and the inspection order issued upon a sufficient showing that inspection in the area in which the premises or vehicles in question are located, or inspection of the particular premises or vehicles, is in accordance with reasonable legislative or administrative standards, and that the circumstances of the particular inspection for which application is made are otherwise reasonable. The issuing authority shall make and keep a record of the proceedings on the application, and enter thereon his finding in accordance with the requirements of this section.

C. The inspection officer executing the order shall, if the premises or vehicle in question are unoccupied at the time of execution, be authorized to use such force as is reasonably necessary to effect entry and make the inspection.

D. The officer conducting the search shall, if authorized by the issuing authority on proper showing, be accompanied by one or more law enforcement officers authorized to serve search warrants who shall assist the inspection officer in executing the order at his direction.

E. After execution of the order or after unsuccessful efforts to execute the order, as the case may be, the inspection officer shall return the order to the issuing authority with a sworn report of the circumstances of execution or failure thereof.

**History: 1953 Comp., § 12-34-18, enacted by Laws 1973, ch. 359, § 18.**

**Cross references.** — For constitutional provision relating to searches and seizures, *see* N.M. Const., art. II, § 10.

## 24-1-19. Emergency inspectorial searches.

A. Whenever it reasonably appears to an inspection officer that there may be a condition, arising under the laws he is authorized to enforce and imminently dangerous to health and safety, the detection or correction of which requires immediate access, without prior notice, to premises for purposes of inspectorial search, and if consent to such search is refused or cannot be promptly obtained, the inspection officer may make an emergency inspectorial search of the premises without an inspection order.

B. Upon completion of the emergency inspectorial search, the inspection officer shall make prompt report of the circumstances to the judicial or administrative authority to whom application for an inspection order would otherwise have been made.

**History: 1953 Comp., § 12-34-19, enacted by Laws 1973, ch. 359, § 19.**

**Cross references.** — For constitutional provision relating to searches and seizures, *see* N.M. Const., art. II, § 10.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Propriety of state or local government health officer's warrantless search - post-Camara cases, 53 A.L.R.4th 1168.

## 24-1-20. Records confidential.

A. The files and records of the department giving identifying information about individuals who have received or are receiving from the department treatment, diagnostic services or preventive



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care for diseases, disabilities or physical injuries, are confidential and are not open to inspection except where permitted by rule of the department, as provided in Subsection C of this section and to the secretary of health and environment [secretary of health] or to an employee of the health and environment department [department of health] authorized by the secretary to obtain such information, but the information shall only be revealed for use in connection with a governmental function of the secretary or the authorized employee. Both the secretary and the employees are subject to the penalty contained in Subsection F of this section if they release or use the information in violation of this section.

B. All information voluntarily provided to the director or his agent in connection with studies designated by him as medical research and approved by the secretary of health and environment [secretary of health], either conducted by or under the authority of the director for the purpose of reducing the morbidity or mortality from any cause or condition of health, is confidential and shall be used only for the purposes of medical research. The information shall not be admissible as evidence in any action of any kind in any court or before any administrative proceeding or other action.

C. The human services department and the office of the state long-term care ombudsman shall have prompt access to all files and records in the possession of the licensing and certification bureau of the department that are related to any health facility investigation. Officers and employees of those agencies with such access are subject to the penalty in Subsection F of this section if they release or use the information in violation of this section.

D. The files and records of the department are subject to subpoena for use in any pending cause in any administrative proceeding or in any of the courts of the state, unless otherwise provided by law.

E. No person supplying information to the department for use in a research project or any cooperating person in a research project shall be subject to any action for damages or other relief as a result of that activity.

F. Any person who discloses confidential information in violation of this section is guilty of a petty misdemeanor.

**History: 1953 Comp., § 12-34-20, enacted by Laws 1973, ch. 359, § 20; 1975, ch. 324, § 1; 1977, ch. 253, § 41; 1990, ch. 105, § 3.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department and enacted a new 9-7-4 NMSA 1978, creating the department of health.

**Cross references.** — For Health Information System Act, *see* Chapter 24, Article 14A NMSA 1978.

For sentencing for misdemeanors, *see* Chapter 31, Article 19 NMSA 1978.

**The 1990 amendment,** effective July 1, 1990, in Subsection A, in the first sentence, deleted "including information from other sources" following "records of the department" and inserted "as provided in Subsection C of this section," in the second sentence, substituted "Subsection F of this section" for "this section", added present Subsection C, redesignated former Subsections C to E as present Subsections D to F, substituted "in any administrative proceeding or in any of the courts" for "in any of the courts" in present Subsection D, and made stylistic changes in Subsections A, B and present D.

**Applicability.** — Laws 1990, ch. 105, § 5 made the provisions of the act authorizing imposition of intermediate sanctions and civil monetary penalties apply to health facility licensing regulation violations occurring on or after January 1, 1991.

**ANNOTATIONS**

**Law reviews.** — For comment, "Sex, Lies, and Lawsuits: A New Mexico Physician's Duty to Warn Third Parties Who Unknowingly May Be At Risk of Contracting HIV From a Patient," see 26 N.M.L. Rev. 481 (1996).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Public health record as subject of privilege, 136 A.L.R. 856.

## 24-1-21. Penalties.

Any person violating any of the provisions of the Public Health Act or any order, rule or regulation adopted pursuant to the provisions of the Public Health Act is guilty of a petty misdemeanor and shall be punished by a fine not to exceed one hundred dollars ($100) or imprisonment in the county jail for a definite term not to exceed six months or both such fine and imprisonment in the discretion of the court. Each day of a continuing violation of Subsection A of Section 24-1-5 NMSA 1978 after conviction shall be considered a separate offense. The department also may enforce its rules and orders by any appropriate civil action. The attorney general shall represent the department.



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**History: 1953 Comp., § 12-34-22, enacted by Laws 1973, ch. 359, § 22; 1975, ch. 183, § 4; 1983, ch. 185, § 2.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39 Am. Jur. 2d Health § 84 et seq.

39A C.J.S. Health and Environment §§ 48-52.

## 24-1-22. Scientific laboratory division; testing methods; certification.

A. The scientific laboratory division of the department of health is authorized to promulgate and approve satisfactory techniques or methods to test persons believed to be operating a motor vehicle or a motorboat under the influence of drugs or alcohol and to issue certification for test operators and their instructors that shall be subject to termination or revocation at the discretion of the scientific laboratory division. The scientific laboratory division is further authorized to establish or approve quality control measures for alcohol breath testing and to establish or approve standards of training necessary to ensure the qualifications of individuals conducting these analyses or collections.

B. The scientific laboratory division shall establish criteria and specifications for equipment, training, quality control, testing methodology, blood-breath relationships and the certification of operators, instructors and collectors of breath samples.

C. All laboratories analyzing breath, blood or urine samples pursuant to the provisions of the Implied Consent Act [66-8-105 through 66-8-112 NMSA 1978] and the Boating While Intoxicated Act [66-13-1 through 66-13-13 NMSA 1978] shall be certified by the scientific laboratory division. The certification shall be granted in accordance with the rules and regulations of the scientific laboratory division and shall be subject to termination or revocation for cause.

**History: Laws 1981, ch. 165, § 1; 2003, ch. 241, § 14.**

**Cross references.** — For provisions authorizing the performance of a blood-alcohol test, *see* 66-8-103, 66-8-104 and 66-8-109 NMSA 1978.

**The 2003 amendment,** effective July 1, 2003, in Subsection A, substituted "department of health" for "department of health and environment"; and inserted "or a motorboat" following "motor vehicle"; and in Subsection C, inserted "and the Boating While Intoxicated Act" following "Implied Consent Act".

**ANNOTATIONS**

**Failure to observe defendant for twenty minutes.** — A breath alcohol test taken after the defendant was continuously observed for only fifteen minutes was not admissible in her criminal case for driving while intoxicated, because it did not comply with a department of health regulation requiring breath samples to be collected only after the subject has been under continuous observation for at least 20 minutes prior to collection of the first breath sample. *State v. Gardner*, 1998-NMCA-160, 126 N.M. 125, 967 P.2d 465, cert. denied, 126 N.M. 107, 967 P.2d 447.

**Duty to make an accurate record.** — The statutory duty of the state laboratory division to monitor and certify all blood-alcohol testing and to establish quality control measures by regulation imposes a duty on the state laboratory to make an accurate record of blood-alcohol test results that qualifies as a reliable business record. *State v. Christian*, 1995-NMCA-027, 119 N.M. 776, 895 P.2d 676, cert. denied, 119 N.M. 514, 892 P.2d 961.

**Breath alcohol instruments treated differently than equipment for purposes of foundational requirements.** — The legislature has delegated full authority to the scientific laboratory division (SLD) over the testing of persons believed to be DUI, including the establishment of criteria and specifications for equipment, quality control, testing methodology and standards, and the certification of breath alcohol instruments, operators, and instructors. SLD regulations impose extensive and explicit certification requirements on instruments, including that each individual instrument have a current certificate evidencing compliance with SLD regulations. In contrast, the only requirements for equipment stated in the regulations are that SLD approve and maintain a list of approved manufacturer's equipment. The regulations contain no requirement that SLD or certified instrument operators must confirm that each individual component of the breath alcohol instrument are SLD-approved before a breath alcohol test (BAT) is administered, and the regulations contain no indication that such individual confirmation is necessary to ensure the accuracy of the BAT result. *State v. Hobbs*, 2016-NMCA-022, cert. denied, 2016-NMCERT-002.

**Legislature did not intend to create a statutory right** when it enacted this section, or to make compliance with regulations promulgated under this section mandatory. *State v. Watkins*, 1986-NMCA-080, 104 N.M. 561, 724 P.2d 769, writ dismissed, 104 N.M. 522, 724 P.2d 231.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Authentication of blood sample taken from human body for purposes of determining blood alcohol content, 76 A.L.R.5th 1.

Authentication of blood sample taken from human body for purposes other than determining blood alcohol content, 77 A.L.R.5th 201.

Authentication of organic nonblood specimen taken from human body for purposes of analysis, 78 A.L.R.5th 1.

## 24-1-23. Disclosure by medicare health care providers; limitation on charges to recipient of services.

A. As used in this section:



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(1) "health care provider" means any person who provides health care services the charges for which either he or the recipient of the services is eligible for payment or reimbursement of under provisions of the federal medicare program; and

(2) "recipient" means a person who is eligible under the federal medicare program provisions for reimbursement to him or payment on his behalf for charges for health care services.

B. A health care provider shall disclose to a recipient before providing services the provider's policy regarding whether or not the provider accepts assignment of medicare benefits.

**History: Laws 1987, ch. 157, § 1.**

## 24-1-24. Repealed.

**Repeals.** — Laws 2013, ch. 44, § 3 repealed 24-1-24 NMSA 1978, as enacted by Laws 1997, ch. 242, § 7, relating to the brain injury services fund, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

## 24-1-25. Holly Gonzales experimental treatment fund created.

A. The "Holly Gonzales experimental treatment fund" is created in the state treasury.

B. The Holly Gonzales experimental treatment fund shall be administered by the secretary of health. The money in the fund shall be used solely for the purpose of paying for the costs of federal drug administration approved experimental treatments or procedures for children with catastrophic, debilitating or terminal illnesses. An attending physician of a patient seeking coverage of a treatment or procedure from the fund shall certify to the secretary of health that conventional treatments or procedures cannot control or cure the illness, the expected outcome for the patient is death and the experimental treatment or procedure has a reasonable chance of either curing or controlling the illness for an extended period of time. The patient shall provide documentation from his medical insurer that the experimental treatment is not included in the policy covering the patient.

C. The patient shall submit receipts to the secretary of health for payment from the Holly Gonzales experimental treatment fund for the direct expenses of the experimental treatment or procedure and for associated expenses necessarily incurred in obtaining the treatment or procedure.

D. Disbursements from the Holly Gonzales experimental treatment fund shall be by warrant drawn by the secretary of finance and administration pursuant to vouchers signed by the secretary of health.

**History: Laws 2001, ch. 333, § 1.**

**Emergency clauses.** — Laws 2001, ch. 333, § 3 contained an emergency clause and was approved April 5, 2001.

## 24-1-26. Repealed.

**Repeals.** — Laws 2004, ch. 46, § 18 repealed 24-1-26 NMSA 1978, as enacted by Laws 2003, ch. 59, § 1, relating to the interagency behavioral health coordinating committee, effective May 19, 2004. For provisions of former section, *see* the 2003 NMSA 1978 on *NMOneSource.com*.

## 24-1-27. Purpose.

The purpose of creating a single interagency behavioral health purchasing collaborative is to develop a statewide system of behavioral health care that promotes the behavioral health and well-being of children, individuals and families; encourages a seamless system of care that is accessible and continuously available; and emphasizes prevention and early intervention, resiliency, recovery and rehabilitation.

**History: Laws 2004, ch. 46, § 1.**



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## 24-1-28. Behavioral health planning council created; powers and duties; membership.

There is created the "behavioral health planning council".

A. The council shall consist of the following members, all of whom shall be appointed by and serve at the pleasure of the governor:

(1) consumers of behavioral health services and consumers of substance abuse services, as follows:

(a) adults with serious mental illness;

(b) seniors;

(c) family members of adults with serious mental illness and of children with serious emotional or neurobiological disorders; and

(d) persons with co-occurring disorders;

(2) Native American representatives from a pueblo, an Apache tribe [Tribe], the Navajo Nation and an urban Native American population;

(3) providers;

(4) state agency representation from agencies responsible for:

(a) adult mental health and substance abuse;

(b) children's mental health and substance abuse;

(c) education;

(d) vocational rehabilitation;

(e) criminal justice;

(f) juvenile justice;

(g) housing;

(h) medicaid and social services;

(i) health policy planning;

(j) developmental disabilities planning; and

(k) disabilities issues and advocacy;

(5) such other members as the governor may appoint to ensure appropriate cultural and geographic representation; and

(6) advocates.

B. Providers and state agency representatives together may not constitute more than forty-nine percent of the council membership.

C. The council shall:

(1) advocate for adults, children and adolescents with serious mental illness or severe emotional, neurobiological and behavioral disorders, as well as those with mental illness or emotional problems, including substance abuse and co-occurring disorders;

(2) report annually to the governor and the legislature on the adequacy and allocation of mental health services throughout the state;

(3) encourage and support the development of a comprehensive, integrated, community-based behavioral health system of care, including mental health and substance abuse services, and services for persons with co-occurring disorders;

(4) advise state agencies responsible for behavioral health services for children and adults, as those agencies are charged in Section 9-7-6.4 NMSA 1978;

(5) meet regularly and at the call of the chair, who shall be selected by the council membership from among its members;

(6) establish subcommittees, to meet at least quarterly, as follows:

(a) a medicaid subcommittee, chaired by the secretary of human services or a designee, which may also serve as a subcommittee of the medicaid advisory committee;

(b) a child and adolescent subcommittee, chaired by the secretary of children, youth and families or a designee;

(c) an adult subcommittee, chaired by the secretary of health or a designee;

(d) a substance abuse subcommittee, chaired by the secretary of health or a designee, which shall include DWI issues and shall include representation from local DWI councils;



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(e) a Native American subcommittee, chaired by the secretary of Indian affairs or a designee; and

(f) other subcommittees as may be established by the chair of the council to address specific issues. All subcommittees may include nonvoting members appointed by the chair for purposes of providing expertise necessary to the charge of the respective subcommittee;

(7) review and make recommendations for the comprehensive mental health state block grant and the substance abuse block grant applications, the state plan for medicaid services and any other plan or application for federal or foundation funding for behavioral health services; and

(8) replace the governor's mental health planning council and act in accordance with Public Law 102-321 of the federal Public Health Service Act.

**History: Laws 2004, ch. 46, § 2; 2005, ch. 7, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**The 2005 amendment,** effective June 17, 2005, eliminated the requirement that Native American appointees to the behavioral health planning council be consumers of behavioral health services and consumers of substance abuse services and provides for the creation a Native American subcommittee of the council.

## 24-1-29. Commission created; members; duties.

A. There is created the "governor's HIV and AIDS policy commission", consisting of twenty-three members as follows:

(1) the secretary of health or the secretary's designee;

(2) the secretary of human services or the secretary's designee;

(3) the secretary of public education or the secretary's designee;

(4) the chief medical officer of the corrections department or the officer's designee;

(5) the chair of the department of health's medical advisory committee;

(6) the executive director of the New Mexico medical insurance pool or the director's designee;

(7) a representative from each of the six health management alliance organizations, appointed by the governor;

(8) six consumers reflecting the diversity of the HIV and AIDS populations in New Mexico, including Native Americans and other people of color, appointed by the governor; and

(9) five public members who have expertise in HIV and AIDS services, prevention, program administration, financial management and other categories of expertise required under federal planning requirements, appointed by the governor.

B. The governor shall appoint the chair of the commission. Members appointed by the governor shall serve for terms of three years, except that the initial term of seven members shall be two years. Vacancies of the appointed members shall be filled by appointment by the governor for the remainder of the unexpired term. Appointed members shall receive per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978] but shall receive no other compensation, perquisite or allowance. The commission shall be administratively attached to the department, which shall provide administrative services to the commission.

C. The commission shall:

(1) review and make recommendations on department HIV and AIDS policies;

(2) study and make recommendations to the department on all factors affecting the availability, quality and accessibility of health services for persons with HIV and AIDS, including:

(a) review and consult with the department's medical advisory committee regarding the HIV and AIDS drug formulary and policies of selection, utilization and provision of those drugs; and

(b) review policies and practices of each state agency with responsibilities to persons with HIV and AIDS, including statutes and rules governing these responsibilities;

(3) serve as a planning and advisory group to the department's HIV and AIDS services program;

(4) annually provide its evaluation and recommendations to the department for inclusion in the department's annual report, including recommendations for administrative and legislative changes, for resource allocation by the department and for funding;



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(5) provide information on HIV and AIDS programs and issues as requested by the executive and legislative branches of government;

(6) advocate for improved and expanded services for persons living with HIV and AIDS; and

(7) establish task forces as it deems necessary.

D. For purposes of this section:

(1) "commission" means the governor's HIV and AIDS policy commission;

(2) "department" means the department of health;

(3) "HIV and AIDS" means human immunodeficiency virus and acquired immune deficiency syndrome; and

(4) "consumers" means people living with HIV and AIDS.

**History: Laws 2005, ch. 5, § 1.**

**Compiler's note.** — Although this section has been compiled within the Public Health Act [Chapter 24, Article 1 NMSA 1978], it was not enacted as a section of that act.

**Effective dates.** — Laws 2005, ch. 5 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

## 24-1-30. Hand washing facilities; requirement.

Portable hand washing facilities shall be provided with at least one hand wash facility to every one-to-ten portable toilets in public locations where portable toilets are required by law or ordinance. The facilities shall be in close proximity to the toilets.

**History: Laws 2005, ch. 190, § 1.**

**Effective dates.** — Laws 2005, ch. 190 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

## 24-1-31. Save our children's sight fund created.

The "save our children's sight fund" is created in the state treasury. Money in the fund shall consist of appropriations, contributions, grants and statutory revenues directed to the fund. Money in the fund is appropriated to the department of health, which shall administer the fund for the purpose of development and implementation of a vision screening program making vision screenings and follow-up comprehensive examinations available to New Mexico children regardless of family income. Expenditures from the fund shall be by warrants of the secretary of finance and administration drawn pursuant to vouchers signed by the secretary of health or the secretary's authorized representative. Money in the fund shall not revert at the end of a fiscal year.

**History: Laws 2007, ch. 353, § 1 and Laws 2007, ch. 357, § 1.**

**Compiler's notes.** — Laws 2007, ch. 353, § 1 and Laws 2007, ch. 357, § 1, effective January 1, 2008, enacted identical new sections. The section was set out as enacted by Laws 2007, ch. 357, § 1. *See* 12-1-8 NMSA 1978.

## 24-1-32. Notice of the need for further vision evaluation and availability of funds.

The department of health shall promulgate rules for award of money from the save our children's sight fund. When the vision screen of a student indicates the need for further evaluation, the student's school shall notify the student's parent of that need and provide information on the availability of funds from the save our children's sight fund. The notice shall state that the parent, if the student is not already covered by health insurance for a comprehensive eye examination, may apply to the fund for the following expenses as a result of the screening:

A. a comprehensive eye examination by an optometrist or ophthalmologist whose services are used to follow up the school vision screen;

B. the cost of contact lenses or polycarbonate lenses and frames for eyeglasses; and

C. replacement insurance for lost or broken lenses.



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**History: Laws 2007, ch. 353, § 3 and Laws 2007, ch. 357, § 3.**

**Compiler's notes.** – Laws 2007, ch. 353, § 3 and Laws 2007, ch. 357, § 3, enacted identical new sections, both effective January 1, 2008.

**Temporary provisions.** — Laws 2007, ch. 353, § 5 and Laws 2007, ch. 357, § 5, provided that the secretary of health shall appoint an advisory committee to establish the standard for an appropriate vision screening. The committee shall consist of a practicing nurse, a representative of a statewide organization for the prevention of blindness, a licensed New Mexico optometrist, a licensed New Mexico ophthalmologist and a licensed New Mexico pediatrician. The department of health shall promulgate rules to establish vision screening test standards.

## 24-1-33. Communication regarding reconstructive breast surgery.

A. A health care provider that provides mastectomy or lumpectomy or lymph node dissection surgery of the breast shall provide information to the patient about the option of reconstructive surgery. The information shall be provided to the patient in writing and in advance of obtaining consent for the mastectomy or lumpectomy or lymph node dissection surgery of the breast. The information shall include at least a description of:

(1) reconstructive surgery options and the advantages and disadvantages of each option;

(2) the availability of health insurance or health care coverage for costs related to reconstructive surgery pursuant to the New Mexico Insurance Code [Chapter 59A NMSA 1978, except for Articles 30A and 42A] and the federal Women's Health and Cancer Rights Act of 1998; and

(3) patient access to reconstructive surgery services, including referring the patient to a health care provider that provides reconstructive surgery if the health care provider that performs the mastectomy or lumpectomy or lymph node dissection surgery of the breast does not offer reconstructive surgery services.

B. The department of health shall notify health care providers of the provisions of Subsection A of this section.

**History: Laws 2011, ch. 145, § 1.**

**Effective dates.** — Laws 2011, ch. 145 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2011, 90 days after the adjournment of the legislature.

## 24-1-34. Primary stroke centers; comprehensive stroke centers; acute stroke capable centers; department certification; rulemaking.

A. In accordance with department rules, the department shall certify any acute care hospital as a primary stroke center, comprehensive stroke center or acute stroke capable center if that hospital has been accredited by the joint commission or any other nationally recognized accrediting body as a primary stroke center, comprehensive stroke center or acute stroke capable center. The department shall post information regarding certification on the department's web site. If a hospital loses accreditation as a primary stroke center, comprehensive stroke center or acute stroke capable center, the secretary shall also remove that hospital's certification.

B. In accordance with department rules, the emergency medical systems bureau of the department shall work in coordination with all local and regional emergency medical services authorities statewide on the development of pre-hospitalization protocols related to the assessment, treatment and transport of stroke patients by licensed emergency medical services providers. These protocols shall include, at a minimum, plans for the triage and transport of stroke patients to the closest comprehensive or primary stroke center or, when appropriate, to an acute stroke capable center.

C. The secretary may adopt rules to assist and encourage primary stroke centers to enter into coordinated stroke care agreements with other health care facilities throughout the state to provide appropriate access to care for acute stroke patients.

**History: Laws 2012, ch. 4, § 1; 2015, ch. 90, § 1.**

**The 2015 amendment,** effective June 19, 2015, expanded sources of accreditation for stroke centers and required the emergency medical systems bureau, in coordination with regional emergency medical services authorities statewide, to develop pre-hospitalization protocols related to the treatment of stroke patients; in Subsection A, after "hospital has been accredited", added "by



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the joint commission or any other nationally recognized accrediting body", after "capable center", deleted "by the joint commission", and after "loses", deleted "joint commission certification" and added "accreditation"; and added Subsection B and redesignated the succeeding subsection accordingly.

## 24-1-35. Assisted living facilities contracts; limit on charges after resident death.

A. The contract for each resident of an assisted living facility shall include a refund policy to be implemented at the time of a resident's death. The refund policy shall provide that the resident's estate or responsible party is entitled to a prorated refund based on the calculated daily rate for any unused portion of payment beyond the termination date after all charges have been paid to the licensee. For the purpose of this section, the termination date shall be the date the unit is vacated by the resident due to the resident's death and cleared of all personal belongings.

B. If a resident's belongings are not removed within one week of the resident's death and the amount of belongings does not preclude renting the unit, the facility may clear the unit and charge the resident's estate for moving and storing the items at a rate equal to the actual cost to the facility, not to exceed ten percent of the regular rate for the unit; provided that the responsible party for the resident is given notice at least one week before the resident's belongings are removed. If the resident's belongings are not claimed within forty-five days after notification, the facility may dispose of them.

C. For the purposes of this section, "assisted living facility" means a facility required to be licensed as an assisted living facility for adults by the department of health.

**History: Laws 2013, ch. 114, § 1.**

**Emergency clauses.** — Laws 2013, ch. 114 contained an emergency clause and was approved April 2, 2013.

## 24-1-36. Statewide community-based adult fall risk awareness and prevention program.

A. By January 1, 2015, the department of health shall establish a statewide community-based adult fall risk awareness and prevention program.

B. In implementing the statewide community-based adult fall risk awareness and prevention program, the department of health shall:

(1) contract for the development of a culturally competent and literacy level-appropriate statewide community-based adult fall risk awareness and prevention media campaign, to include a web page, a referral clearinghouse and statewide media placement of print, radio and television messages;

(2) conduct program outreach to the public, to groups or to organizations that advocate for adult fall risk awareness and prevention and to health care providers;

(3) arrange for and coordinate adult fall risk awareness and prevention training and workshops;

(4) serve as a resource for information and written materials on adult fall risk awareness and prevention;

(5) act as a liaison between the New Mexico healthy aging collaborative, the New Mexico older adult falls prevention coalition, groups or organizations that advocate for adult fall risk awareness and prevention and sources of funding for adult fall risk awareness and prevention programming and activities;

(6) contract with one or more universities, colleges or other institutions of higher learning to provide educational programming in evidence-based fall risk assessment and fall prevention strategies;

(7) contract with one or more area agencies on aging, community hospitals, the federal Indian health service, tribally operated 638 health programs or urban Indian health programs to provide fall risk awareness and prevention programming and literature to the public;

(8) conduct trainer instructional workshops and booster training for evidence-based fall risk awareness and prevention programs; and



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(9) contract with one or more senior centers, community centers, parks and recreation departments or other local, county, municipal or tribal organizations providing services to senior citizens to implement evidence-based interventions for adult fall prevention.

**History: Laws 2014, ch. 37, § 1.** **Emergency clauses.** — Laws 2014, ch. 37, § 2, contained an emergency clause and was approved March 7, 2014.

## 24-1-37. Lay caregiver; aftercare; designation.

A. A hospital shall provide each patient or the patient's legal guardian with an opportunity to designate one lay caregiver following the patient's admission into a hospital and before the patient's discharge to the patient's residence.

B. As soon as practicable, a hospital shall attempt to consult with a designated lay caregiver to prepare the lay caregiver to provide aftercare. The hospital shall provide the lay caregiver with a discharge plan for the patient that describes the patient's aftercare needs. This discharge plan:

(1) may include, but is not limited to:

(a) culturally competent training on how to provide care and tasks;

(b) medication management guidelines;

(c) aftercare guidelines; and

(d) an identification of tasks that the discharging health care provider specifies;

(2) shall reflect the active engagement of a patient or lay caregiver in the discharge planning process and incorporate a patient's goals and preferences as much as possible; and

(3) shall educate a lay caregiver in a manner that is consistent with current accepted practices and is based on an assessment of the lay caregiver's learning needs.

C. A hospital shall allow a patient to change the patient's designation of a lay caregiver in the event that the originally designated lay caregiver becomes unavailable, unwilling or unable to care for the patient.

D. Designation of an individual as a lay caregiver pursuant to this section does not obligate that individual to accept the role of lay caregiver for the patient.

E. The provisions of this section shall not be construed to require a patient to designate a lay caregiver.

F. In the event that a patient or a patient's legal guardian declines to designate a lay caregiver pursuant to this section, a hospital shall promptly document this refusal to designate a lay caregiver in the patient's medical record.

G. A hospital shall not allow the process of appointing or refusal or failure to appoint a lay caregiver for a patient to interfere with, delay or otherwise affect the services that the hospital provides to a patient.

H. In the event that a hospital is unable to contact a designated lay caregiver, this lack of contact shall not interfere with or otherwise affect an appropriate discharge of the patient.

I. The provisions of this section shall not be construed to:

(1) create a private right of action against a hospital, hospital employee, contractor having a contractual relationship with a hospital or duly authorized agent of a hospital; or

(2) remove the obligation of a third-party payer to cover any health care item or service that the third-party payer is obligated to provide to a patient pursuant to the terms of a valid agreement, insurance policy, plan or certificate of coverage or health maintenance organization contract.

J. A hospital, hospital employee, contractor having a contractual relationship with a hospital or duly authorized agent of a hospital shall not be held liable in any way for an act or omission of a lay caregiver.

K. As used in this section:

(1) "aftercare" means assistance provided in a private home by a designated lay caregiver to a patient after the patient's discharge from a hospital. "Aftercare" includes exclusively those tasks related to a patient's condition at the time of discharge that do not require the lay caregiver performing the tasks to be a licensed, certified or otherwise authorized health care provider;



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(2) "discharge" means a patient's exit or release from a hospital to that patient's residence following an inpatient stay;

(3) "hospital" means a health facility licensed as a general acute hospital by the department of health;

(4) "lay caregiver" means an individual who is eighteen years of age or older, who has been designated as a lay caregiver pursuant to this section and who provides aftercare to a patient in the patient's residence; and

(5) "residence" means a dwelling considered by a patient to be the patient's home, not including a hospital, nursing home or group home or assisted living facility.

**History: Laws 2015, ch. 155, § 1.** **Effective dates.** — Laws 2015, ch. 155 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2015, 90 days after the adjournment of the legislature.

## 24-1-38. Hospitals; requirement to offer influenza and pneumococcal immunizations.

Each year between October 1 and March 1 and in accordance with the latest recommendations of the advisory committee on immunization practices of the federal centers for disease control and prevention, each hospital licensed by the department of health shall offer, prior to discharge, immunizations against the influenza virus and pneumococcal disease to all inpatients sixty-five years of age and older unless contraindicated for a patient and contingent upon the availability of the vaccine.

**History: Laws 2017, ch. 51, § 1.** **Effective dates.** — Laws 2017, ch. 51 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 24-1-39. Mammograms; health facilities; breast density disclosure.

A. A health facility that performs a mammogram examination shall include in the summary of the mammography report that is required pursuant to federal law to be provided to a patient information that identifies the patient's individual breast density classification based on the breast imaging reporting and data system established by the American college of radiology. If the health facility determines that a patient has heterogeneously dense or extremely dense breast tissue, the summary of the mammography report shall include the following notice: "Your mammogram indicates that you have dense breast tissue. Dense breast tissue is common and is not abnormal. However, dense breast tissue may make it harder to evaluate the results of your mammogram. It may also be associated with an increased risk of breast cancer. This information is being provided to raise your awareness and to inform your conversation with your health care provider. Together, you can decide if additional screening options may be right for you. A report of your results was sent to your health care provider.".

B. A health facility may direct a patient who receives a diagnostic or screening mammogram to information about breast density, which may include:

(1) the American college of radiology's most current brochure on the subject of breast density available on the American college of radiology's website;

(2) materials related to cancer or mammography produced by an educational institution; or

(3) materials related to cancer or mammography produced by an advocacy organization.

C. Nothing in this section shall be deemed to create a duty of care or other legal obligation beyond the duty to provide notice as set forth in Subsection A of this section. Nothing in this section shall be deemed to require a notice that is inconsistent with the provisions of the federal Mammography Quality Standards Act of 1992 or any regulations promulgated pursuant to that act.

**History: Laws 2019, ch. 4, § 1.**

**Compiler's notes.** – Laws 2019, ch. 4, § 1 was not enacted as part of the Public Health Act, but was compiled there for the convenience of the user.



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**Effective dates.** — Laws 2019, ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 24-1-40. Department of health; New Mexico board of dental health care; annual report; biennial report.

The department of health shall collaborate with the New Mexico board of dental health care and provide to the legislative health and human services committee and the legislative finance committee the following reports:

A. by October 1, 2020 and by each October 1 thereafter, a report relating to access to dental health care. The department shall compile for the report at least the following information with analysis and recommendations for legislative action relating to this information:

(1) the status of dental health care professional education loan-for-service programming;

(2) the feasibility of establishing a program allowing bachelor of arts degree recipients to matriculate directly to dental school for a doctor of dental medicine or doctor of dental surgery degree;

(3) the status of the state's medicaid program, including:

(a) simplification of administrative procedures regarding the provision of dental health care to medicaid recipients; and

(b) changes to reimbursement levels that would encourage dental health care professionals to accept more medicaid recipients as patients;

(4) the number of dental health care professionals taking advantage of the rural health care practitioner tax credit;

(5) other timely issues as determined by the New Mexico board of dental health care to have an impact on access to or the delivery of dental health care in New Mexico; and

(6) the identification of activities in the dental therapist's scope of practice that require dental therapy post-graduate clinical experience; and

B. by October 1, 2020 and by October 1 every two years thereafter, a report on the status of the dental therapist licensure program, including the:

(1) name and number of educational institutions offering accreditation of a dental therapy educational program;

(2) number of students enrolled in each dental therapy educational program, per educational institution;

(3) number of licensed dental hygienists enrolled in dental therapy educational programs, per educational institution;

(4) number of students who have graduated from dental therapy educational programs;

(5) name and number of locations where students are completing dental therapy post-graduate experience;

(6) number of graduates practicing under general supervision;

(7) practice location for all licensed dental therapists in the state, by county; and

(8) number of dental therapists in each county.

**History: Laws 2019, ch. 107, § 12.**

**Effective dates.** — Laws 2019, ch. 107, § 19 made Laws 2019, ch. 107, § 12 effective June 14, 2019.

**Temporary provisions.** — Laws 2019, ch. 107, § 17 provided that the department of health shall conduct an outcome report on the first five years of dental therapy practice in the state pursuant to this 2019 act. At a date five years following the date of the first issuance of a license to practice dental therapy in the state, the department of health shall consult with the New Mexico board of dental health care, the New Mexico dental hygienists' association and the New Mexico dental association to compile and issue a report to the legislative health and human services committee of the department's findings and recommendations regarding dental therapy, including:

A. its efficacy, effectiveness and cost;

B. its impact on access to dental health care;

C. the distribution of dental therapists statewide;

D. demographic representation among dental therapists;

E. issues related to supervision of dental therapists and their scope of practice;

F. evaluation of services delivered under indirect supervision for recommendation to general supervision; and

G. evaluation of services delivered under general supervision for recommendation to indirect supervision.



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## 24-1-41. Health facilities; certified nurse practitioners; certified nurse-midwives; privileges; parity with physicians.

A. Unless required by federal law, a health facility shall establish the same criteria for granting patient admitting or discharge privileges or in authorizing continuing patient care for certified nurse practitioners, certified nurse-midwives and clinical nurse specialists as the health facility has established for physicians.

B. A health facility shall ensure that certified nurse practitioners, certified nurse-midwives and clinical nurse specialists acting in accordance with these professionals' respective scopes of practice under New Mexico law are:

(1) eligible to serve on the health facility's medical staff;

(2) credentialed under the same procedures as the health facility has established for physicians; and

(3) authorized to conduct peer review of their professional colleagues.

C. As used in this section:

(1) "certified nurse-midwife" means an individual licensed as a registered nurse pursuant to the Nursing Practice Act [Chapter 61, Article 3 NMSA 1978] and licensed by the department of health as a certified nurse-midwife;

(2) "certified nurse practitioner" means a registered nurse who is licensed by the board of nursing for advanced practice as a certified nurse practitioner pursuant to the Nursing Practice Act;

(3) "clinical nurse specialist" means a registered nurse who is licensed by the board of nursing for advanced practice as a clinical nurse specialist and whose name and pertinent information are entered on the list of clinical nurse specialists maintained by the board of nursing;

(4) "health facility" means a health facility licensed by the department of health pursuant to the Public Health Act; and

(5) "physician" means an individual licensed to practice as a medical doctor or an osteopathic physician.

**History: Laws 2019, ch. 129, § 1.**

**Compiler's notes.** — Laws 2019, ch. 129, § 1 was erroneously compiled as 61-3-23.6 NMSA 1978 and has been recompiled as 24-1-41 NMSA 1978 by the compiler.

Laws 2019, ch. 129, § 1 was not enacted as part of the Public Health Act, but was compiled there for the convenience of the user.

**Effective dates.** — Laws 2019, ch. 129, § 2 made Laws 2019, ch. 129, § 1 effective July 1, 2020.

## 24-1-42. Eligibility for state or local health benefits.

A. A state or local health benefit shall be provided to all non-citizens, regardless of immigration status, if they meet all other qualifying criteria for such benefit.

B. For purposes of this section:

(1) "health care services" means treatment and services designed to promote improved health, including primary care, prenatal care, dental care, behavioral health care, provision of prescription drugs, preventive care or health outreach services, provided by a state agency, county, local government or state educational institution named in Article 12, Section 11 of the constitution of New Mexico or an entity with which the state agency, county, local government or state educational institution named in Article 12, Section 11 of the constitution of New Mexico contracts to provide such services; and

(2) "state or local health benefit" means any health benefit for which payments, assistance or health care services are provided to an individual, household or family eligibility unit by an agency of the state, a county, a local government or a state educational institution named in Article 12, Section 11 of the constitution of New Mexico or by appropriated funds of the state, a county, a local government or a state educational institution named in Article 12, Section 11 of the constitution of New Mexico, as permitted by federal law. "State or local health benefit" includes care or services for indigent persons or patients provided or funded pursuant to the Hospital Funding Act [Chapter 4, Article 48B NMSA 1978] or the Indigent Hospital and County Health Care Act [Chapter 27, Article 5 NMSA 1978].



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**History: Laws 2021, ch. 127, § 1.**

**Compiler's notes.** — Laws 2021, ch. 127, § 1 was not enacted as part of the Public Health Act, but was compiled there for the convenience of the user.

**Effective dates.** — Laws 2021, ch. 127 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 24-1-43. Reporting; medical aid in dying.

A. A health care provider who prescribes medical aid in dying to a qualified individual in accordance with the provisions of the End-of-Life Options Act [24-7C-1 to 24-7C-8 NMSA 1978] shall provide, in accordance with department rules, a report of that provider's participation. The department shall adopt and promulgate rules that establish the time frames and forms for reporting pursuant to this section and shall limit the reporting of data relating to qualified individuals who received prescriptions for medical aid in dying medication to the following:

(1) the qualified individual's age at death;

(2) the qualified individual's race and ethnicity;

(3) the qualified individual's gender;

(4) whether the qualified individual was enrolled in hospice at the time of death;

(5) the qualified individual's underlying medical condition; and

(6) whether the qualified individual self-administered the medical aid in dying medication and, if so, the date that this occurred.

B. The department shall promulgate an annual statistical report, containing aggregated data, on the information collected pursuant to Subsection A of this section on the total number of medical aid in dying medication prescriptions written statewide and on the number of health care providers who have issued prescriptions for medical aid in dying medication during that year. Data reported pursuant to this subsection shall not contain individually identifiable health information and are exempt from disclosure pursuant to the Inspection of Public Records Act [Chapter 14, Article 3 NMSA 1978].

C. As used in this section:

(1) "health care provider" means an individual authorized pursuant to the End-of-Life Options Act to prescribe medical aid in dying;

(2) "medical aid in dying" means the medical practice wherein a health care provider prescribes medication to a qualified individual who may self-administer that medication to end that individual's life in accordance with the provisions of the End-of-Life Options Act; and

(3) "qualified individual" means an individual who has met the requirements to receive medical aid in dying pursuant to the provisions of the End-of-Life Options Act.

**History: Laws 2021, ch. 132, § 9.**

**Effective dates.** — Laws 2021, ch. 132 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

# ARTICLE 1A

# Rural Primary Health Care

Sec.
24-1A-1. Short title.
24-1A-2. Purpose of act.
24-1A-3. Definitions.
24-1A-3.1. Department; technical and financial assistance.
24-1A-4. Rules and regulations.

## 24-1A-1. Short title.

This act [24-1A-1 through 24-1A-3, 24-1A-4 NMSA 1978] may be cited as the "Rural Primary Health Care Act".

**History: Laws 1981, ch. 295, § 1.**



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## 24-1A-2. Purpose of act.

The purpose of the Rural Primary Health Care Act is to recruit and retain health care personnel and assist in the provision of primary health care services through eligible programs in underserved areas of the state in order to better serve the health needs of the public.

**History: Laws 1981, ch. 295, § 2; 1983, ch. 236, § 1.**

## 24-1A-3. Definitions.

As used in the Rural Primary Health Care Act:

A. "health care underserved areas" means a geographic area in which it has been determined by the department of health, through the use of indices and other standards set by the department, that sufficient primary health care is not being provided to the citizens of that area;

B. "eligible programs" means nonprofit community-based entities that provide or commit to provide primary health care services for residents of health care underserved areas and includes rural health facilities and those serving primarily low-income populations;

C. "department" means the department of health; and

D. "primary health care" means the first level of basic or general health care for an individual's health needs, including diagnostic and treatment services.

**History: Laws 1981, ch. 295, § 3; 1983, ch. 236, § 2; 1996, ch. 29, § 2.**

**The 1996 amendment,** effective May 15, 1996, substituted "department of health" for "health and environment department" in Subsections A and C, and substituted "that provide or commit to provide" for "established to provide" and "health facilities" for "health clinics" in Subsection B.

## 24-1A-3.1. Department; technical and financial assistance.

To the extent funds are made available for the purposes of the Rural Primary Health Care Act, the department is authorized to:

A. provide for a program to recruit and retain health care personnel in health care underserved areas;

B. develop plans for and coordinate the efforts of other public and private entities assisting in the provision of primary health care services through eligible programs;

C. provide for technical assistance to eligible programs in the areas of administrative and financial management, clinical services, outreach and planning;

D. provide for distribution of financial assistance to eligible programs that have applied for and demonstrated a need for assistance in order to sustain a minimum level of delivery of primary health care services; and

E. provide a program for enabling the development of new primary care health care services or facilities, and that program:

(1) shall give preference to communities that have few or no community-based primary care services;

(2) may require in-kind support from local communities where primary care health care services or facilities are established;

(3) may require primary care health care services or facilities to assure provision of health care to the medically indigent; and

(4) shall permit the implementation of innovative and creative uses of local or statewide health care resources, or both, other than those listed in Paragraphs (2) and (3) of this subsection.

**History: 1978 Comp., § 24-1A-3.1, enacted by Laws 1983, ch. 236, § 3; 1991, ch. 212, § 18; 1996, ch. 29, § 3.**

**The 1996 amendment,** effective May 15, 1996, made stylistic changes in Subsection D; and in Subsection E, substituted "provide" for "institute" and "services" for "centers" in the introductory language, and substituted "services" for "centers" in Paragraphs (2) and (3).

**The 1991 amendment,** effective July 1, 1991, added Subsection E.



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## 24-1A-4. Rules and regulations.

Subject to the State Rules Act [Chapter 14, Article 4 NMSA 1978], the department shall adopt rules and regulations for recruiting health care personnel in health care underserved areas, and shall establish a formula for distribution of financial assistance to eligible programs which shall take into account the relative needs of applicants for assistance, provided that funds may not be expended for land or facility acquisition or debt amortization and further provided that a local match of ten percent shall be required from each local recipient for each request for assistance.

**History: Laws 1981, ch. 295, § 4; 1983, ch. 236, § 4.**

# ARTICLE 1B

# Maternal and Child Health Plan

Sec.
24-1B-1. Repealed.
24-1B-2. Repealed.
24-1B-3. Repealed.
24-1B-4. Repealed.
24-1B-5. Repealed.
24-1B-6. Repealed.
24-1B-7. Repealed.

## 24-1B-1. Repealed.

**Repeals.** — Laws 2019, ch. 57, § 7 repealed 24-1B-1 NMSA 1978, as enacted by Laws 1991, ch. 113, § 1, relating to short title, effective June 14, 2019. For provisions of former section, *see* the 2018 NMSA 1978 on *NMOneSource.com*.

## 24-1B-2. Repealed.

**Repeals.** — Laws 2019, ch. 57, § 7 repealed 24-1B-2 NMSA 1978, as enacted by Laws 1991, ch. 113, § 2, relating to purpose of act, effective June 14, 2019. For provisions of former section, *see* the 2018 NMSA 1978 on *NMOneSource.com*.

## 24-1B-3. Repealed.

**Repeals.** — Laws 2019, ch. 57, § 7 repealed 24-1B-3 NMSA 1978, as enacted by Laws 1991, ch. 113, § 3, relating to definitions, effective June 14, 2019. For provisions of former section, *see* the 2018 NMSA 1978 on *NMOneSource.com*.

## 24-1B-4. Repealed.

**Repeals.** — Laws 2019, ch. 57, § 7 repealed 24-1B-4 NMSA 1978, as enacted by Laws 1991, ch. 113, § 4, relating to planning council created, membership, effective June 14, 2019. For provisions of former section, *see* the 2018 NMSA 1978 on *NMOneSource.com*.

## 24-1B-5. Repealed.

**Repeals.** — Laws 2019, ch. 57, § 7 repealed 24-1B-5 NMSA 1978, as enacted by Laws 1991, ch. 113, § 5, relating to maternal and child health plans, effective June 14, 2019. For provisions of former section, *see* the 2018 NMSA 1978 on *NMOneSource.com*.

## 24-1B-6. Repealed.

**Repeals.** — Laws 2019, ch. 57, § 7 repealed 24-1B-6 NMSA 1978, as enacted by Laws 1991, ch. 113, § 6, relating to maternal and child health funds, effective June 14, 2019. For provisions of former section, *see* the 2018 NMSA 1978 on *NMOneSource.com*.



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## 24-1B-7. Repealed.

**Repeals.** — Laws 2019, ch. 57, § 7 repealed 24-1B-7 NMSA 1978, as enacted by Laws 1991, ch. 113, § 7, relating to department, powers and duties, effective June 14, 2019. For provisions of former section, *see* the 2018 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 1C

# Primary Care Capital Funding

Sec.
24-1C-1. Short title.
24-1C-2. Purpose.
24-1C-3. Definitions.
24-1C-4. Primary care capital fund; creation.
24-1C-5. Regulations.
24-1C-6. Department; authority; powers and duties.
24-1C-7, 24-1C-8. Repealed.
24-1C-9. Eligible entity; change in status.
24-1C-10. Report.

## 24-1C-1. Short title.

Chapter 24, Article 1C NMSA 1978 may be cited as the "Primary Care Capital Funding Act".

**History: Laws 1994, ch. 62, § 7; 1997, ch. 230, § 1.**

**The 1997 amendment,** effective June 20, 1997, substituted "Chapter 24, Article 1C NMSA 1978" for "Sections 7 through 16 of this act".

## 24-1C-2. Purpose.

The purpose of the Primary Care Capital Funding Act is to provide funding for capital projects to eligible entities in order to increase health care services in rural and other health care underserved areas in the state.

**History: Laws 1994, ch. 62, § 8.**

## 24-1C-3. Definitions.

As used in the Primary Care Capital Funding Act:

A. "authority" means the New Mexico finance authority;

B. "capital project" means repair, renovation or construction of a facility; purchase of land; acquisition of capital equipment of a long-term nature; or acquisition of capital equipment to be used in the delivery of primary care, telehealth or hospice services;

C. "department" means the department of health;

D. "eligible entity" means:

(1) a community-based nonprofit primary care clinic or hospice that operates in a rural or other health care underserved area of the state, that is a 501(c)(3) nonprofit corporation for federal income tax purposes and that is eligible for funding pursuant to the Rural Primary Health Care Act [24-1A-1 through 24-1A-3, 24-1A-4 NMSA 1978];

(2) a school-based health center that operates in a public school district and that meets department requirements or that is funded by the federal department of health and human services;

(3) a primary care clinic that operates in a rural or other health care underserved area of the state, that is owned by a county or municipality and that meets department requirements for eligibility; or

(4) a telehealth site that is operated by an entity described in this subsection;

E. "fund" means the primary care capital fund; and

F. "primary care" means the first level of basic or general health care for an individual's health needs, including diagnostic and treatment services and including services delivered at a primary



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care clinic, a telehealth site or a school-based health center; "primary care" includes the provision of mental health services if those services are integrated into the eligible entity's service array.

**History: Laws 1994, ch. 62, § 9; 2000, ch. 75, § 1; 2005, ch. 54, § 1; 2019, ch. 276, § 1.**

**Compiler's notes.** — The reference to "501(c)(3)" in Subsection D refers to 26 U.S.C. § 501(c)(3).

**The 2019 amendment,** effective June 14, 2019, revised the definition of "eligible entity" as used in the Primary Care Capital Funding Act; in Subsection D, added new Paragraph D(3) and redesignated former Paragraph D(3) as Paragraph D(4), and in Paragraph D(4), after "by an", deleted "eligible", and after "entity", deleted "pursuant to Paragraphs (1) and (2) of" and added "described in".

**The 2005 amendment,** effective June 17, 2005, defined "capital project" to include the acquisition of capital equipment to deliver primary care, telehealth or hospice services; modified the definition of "eligible entity" to include community-based nonprofit clinics and hospices regardless of the value of their assets if they are eligible for funding under the act, school-based health centers and telehealth sites operated by an eligible entity and defined "primary care" to include services delivered at a primary care clinic, telehealth site or school-based health center.

**The 2000 amendment,** effective May 17, 2000, in Subsection B, extended the definition of "capital project" to include the acquisition of long-term capital equipment.

## 24-1C-4. Primary care capital fund; creation.

A. The "primary care capital fund" is created as a revolving fund in the state treasury. The fund shall consist of appropriations, loan repayments, gifts, grants, donations and interest earned on investment of the fund. A separate account shall be maintained for appropriations, loan repayments, gifts, grants, donations and interest earned on investment of the account for loans to school-based health centers and telehealth sites. Money in the fund shall not revert at the end of a fiscal year.

B. The fund shall be administered by the authority. The authority may recover from the fund the costs of administering the fund and originating loans up to an amount equal to ten percent of original loan amounts. Money in the fund shall be expended only on warrants drawn by the secretary of finance and administration pursuant to vouchers signed by the chief executive officer of the authority or the chief executive officer's authorized representative.

**History: Laws 1994, ch. 62, § 10; 2005, ch. 54, § 2; 2019, ch. 276, § 2.**

**The 2019 amendment,** effective June 14, 2019, provided that the New Mexico finance authority may recover from the primary care capital fund the costs of administering the fund and originating loans up to an amount equal to ten percent of original loan amounts; in Subsection B, after "by the authority.", deleted "Administrative costs of", after "The authority", deleted "or department shall not be paid" and added "may recover", after "from the fund", added "the costs of administering the fund and originating loans up to an amount equal to ten percent of original loan amounts", and after "vouchers signed by the", deleted "director" and added "chief executive officer".

**The 2005 amendment,** effective June 17, 2005, required that a separate account be maintained for funds for loans to school-based health centers and telehealth sites.

## 24-1C-5. Regulations.

A. Prior to September 15, 1994, the department, in conjunction with the authority, shall adopt regulations to administer and implement the provisions of the Primary Care Capital Funding Act, including providing for:

(1) the determination of rural or other health care underserved areas of the state in which eligible entities may receive loans or contracts for services from the fund;

(2) procedures and forms for applying for loans or contracts for services for capital projects;

(3) documentation required to be provided by the applicant to justify the need for the capital project;

(4) documentation required to be provided by the applicant to demonstrate that the applicant is an eligible entity;

(5) procedures for review, evaluation and approval of loans and contracts for services, including the programmatic, organizational and financial information necessary to review, evaluate and approve an application;

(6) evaluation of the ability and competence of an applicant to provide efficiently and adequately for the completion of a proposed capital project;



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(7) approval of loan and contract for services applications, including provisions that accord priority attention to areas with the greatest need for primary care services;

(8) fair geographic distribution of loans and contracts for services;

(9) requirements for repayment of loans, including payment schedules, interest rates, loan terms and other requirements;

(10) ensuring the state's interest in any capital project by the filing of a lien equal to the total of the state's financial participation in the project; and

(11) such other requirements deemed necessary by the department to ensure that the state receives the primary care services for which the legislature appropriates money and that protects the state's interest in a capital project.

B. Regulations adopted by the department shall become effective when filed in accordance with the provisions of the State Rules Act [Chapter 14, Article 4 NMSA 1978].

**History: Laws 1994, ch. 62, § 11.**

**Cross references.** — For Indigent Hospital and County Health Care Act, *see* 27-5-1 NMSA 1978.

## 24-1C-6. Department; authority; powers and duties.

A. The department and the authority shall administer the loan programs and contracts for services established pursuant to the provisions of the Primary Care Capital Funding Act. The department and authority shall:

(1) enter into joint powers agreements with each other or other appropriate public agencies to carry out the provisions of that act; and

(2) apply to any appropriate federal, state or local governmental agency or private organization for grants and gifts to carry out the provisions of that act or to fund allied community-based health care programs.

B. The department or authority may, instead of a loan, contract for services with an eligible entity to provide free or reduced fee primary care services for sick and medically indigent persons as reasonably adequate legal consideration for money from the fund to the entity so it may acquire or construct a capital project to provide the services.

C. The department and authority may:

(1) make and enter into contracts and agreements necessary to carry out their powers and duties pursuant to the provisions of the Primary Care Capital Funding Act; and

(2) do all things necessary or appropriate to carry out the provisions of the Primary Care Capital Funding Act.

D. The authority is responsible for all financial duties of the programs, including:

(1) administering the fund;

(2) accounting for all money received, controlled or disbursed for capital projects in accordance with the provisions of the Primary Care Capital Funding Act;

(3) evaluating and approving loans and contracts for services, including determining financial capacity of an eligible entity;

(4) enforcing contract provisions of loans and contracts for services, including the ability to sue to recover money or property owed the state;

(5) determining interest rates and other financial aspects of a loan and relevant terms of a contract for services; and

(6) performing other duties in accordance with the provisions of the Primary Care Capital Funding Act, regulations promulgated pursuant to that act or joint powers agreements entered into with the department.

E. The department is responsible for the following duties:

(1) defining sick and medically indigent persons for purposes of the Primary Care Capital Funding Act;

(2) establishing priorities for loans and contracts for services;

(3) determining the appropriateness of the capital project;



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(4) evaluating the capability of an applicant to provide and maintain primary care or hospice services;

(5) selecting recipients of loans and persons with whom to contract for services;

(6) determining that capital projects comply with all state and federal licensing and procurement requirements; and

(7) contracting with an eligible entity to provide primary care services without charge or at a reduced fee for sick and medically indigent persons as defined by the department.

F. The authority may make a loan to an eligible entity to acquire, construct, renovate or otherwise improve a capital project, provided there is a finding:

(1) by the department that the project will provide primary care services to sick and medically indigent persons as defined by the department; and

(2) by the authority that there is adequate protection, including loan guarantees, real property liens, title insurance, security interests in or pledges of accounts and other assets, loan covenants and warranties or restrictions on other encumbrances and pledges for the state funds extended for the loan.

G. The authority may make a loan to a school-based health center that operates in a public school district or to a telehealth site for a capital project; provided, however, that the loan shall not exceed the amount in the account reserved for school-based health center or telehealth site funding.

**History: Laws 1994, ch. 62, § 12; 1997, ch. 230, § 2; 2005, ch. 54, § 3.**

**Cross references.** — For Indigent Hospital and County Health Care Act, *see* Chapter 27, Article 5 NMSA 1978.

**The 2005 amendment,** effective June 17, 2005, authorized loans to a school-based health center or telehealth site for a capital project in an amount that does not exceed the amount in the account for school-based health center or telehealth site funding.

**The 1997 amendment,** effective June 20, 1997, substituted "the following duties" for "programmatic duties, including" at the end of the introductory language of Subsection E, inserted "and procurement" in Paragraph E(6), inserted "renovate or otherwise improve" in the introductory language of Subsection F, and rewrote Paragraph F(2).

## 24-1C-7, 24-1C-8. Repealed.

**Repeals.** — Laws 1997, ch. 230, § 4 repealed 24-1C-7 and 24-1C-8 NMSA 1978, as enacted by Laws 1994, ch. 62, §§ 13 and 14, relating to land acquisition and ranking of liens on capital projects, effective June 20, 1997. For provisions of former sections, *see* the 1996 NMSA 1978 on *NMOneSource.com*.

## 24-1C-9. Eligible entity; change in status.

If an eligible entity that has received a loan or contract for services for a capital project ceases to maintain its nonprofit status or ceases to deliver primary care services at the site of the capital project for twelve consecutive months, the state may pursue the remedies provided in the loan agreement or contract for services or as provided by law.

**History: Laws 1994, ch. 62, § 15; 1997, ch. 230, § 3.**

**The 1997 amendment,** effective June 20, 1997, substituted "may pursue the remedies provided in the loan agreement or contract for services as provided by law" at the end of the section for language relating to the state having specific remedies at its option, subject to other liens having preference.

## 24-1C-10. Report.

The department and the authority shall report jointly to the governor and the legislature by December 1 of each year on the primary care capital funding program.

**History: Laws 1994, ch. 62, § 16.**



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# ARTICLE 1D

# Health Service Corps

Sec.
24-1D-1. Short title.
24-1D-2. Definitions.
24-1D-3. New Mexico health service corps; staff; department powers and duties.
24-1D-4. Corps sites; local assistance; reimbursements.
24-1D-5. Corps service; commitment stipends.
24-1D-6. Evaluations prior to corps service; stipend payback.
24-1D-7. Corps service for educational loan-for-service programs.
24-1D-8. Administrative assistance.
24-1D-9. Legal counsel.
24-1D-10. Failure to serve; penalty.

## 24-1D-1. Short title.

This act [24-1D-1 through 24-1D-10 NMSA 1978] may be cited as the "Health Service Corps Act".

**History: Laws 1994, ch. 63, § 1.**

## 24-1D-2. Definitions.

As used in the Health Service Corps Act:

A. "corps" means the New Mexico health service corps;

B. "department" means the department of health;

C. "health professional" means a physician, physician assistant, nurse practitioner, nurse-midwife, emergency medical technician-paramedic, dentist or dental hygienist;

D. "physician" means a medical doctor or doctor of osteopathic medicine;

E. "physician assistant" means a physician assistant or osteopathic physician assistant; and

F. "practice site" means a public health clinic or public or private nonprofit primary care clinic that is located in a state-designated medically underserved area or that serves a high-needs population and that uses a sliding fee scale approved by the department.

**History: Laws 1994, ch. 63, § 2; 2003, ch. 393, § 1.**

**The 2003 amendment,** effective June 20, 2003, in Subsection C, deleted "or" following "nurse-midwife" and inserted "dentist or dental hygienist" at the end of Subsection C.

## 24-1D-3. New Mexico health service corps; staff; department powers and duties.

A. The "New Mexico health service corps" is created in the department to recruit and place health professionals in rural and other medically underserved areas. The secretary of health may employ a medical director to head the corps. The medical director may employ support staff and employ or contract with health professional staff. Employees are subject to the provisions of the Personnel Act [Chapter 10, Article 9 NMSA 1978].

B. The corps has the power to:

(1) enter into contracts to carry out the provisions of the Health Service Corps Act and sue for enforcement of those contracts; and

(2) adopt and file, in accordance with the State Rules Act [Chapter 14, Article 4 NMSA 1978], rules and regulations to carry out the provisions of the Health Service Corps Act.

C. The corps shall:

(1) recruit health professionals as employees or contractors of the corps;

(2) determine physician specialties to be recruited, with a focus on family practice physicians;



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(3) establish criteria and procedures for the acceptance of applications and selection of recipients for commitment stipends;

(4) establish criteria and procedures for evaluating and qualifying corps health professionals;

(5) determine and maintain a list of eligible communities and practice sites;

(6) determine the need for health professionals at each practice site and assign staff as needed on a priority basis;

(7) provide support for health professionals at practice sites;

(8) work closely with the commission on higher education and the educational assistance foundation to coordinate the use of health professionals who have practice obligations pursuant to the Medical Student Loan for Service Act [Chapter 21, Article 22 NMSA 1978], the Osteopathic Medical Student Loan for Service Act [Chapter 21, Article 22A NMSA 1978] or the Nursing Student Loan for Service Act [Chapter 21, Article 22B NMSA 1978];

(9) work with the university of New Mexico school of medicine, college of nursing, the emergency medical services academy and any other entity to identify students or residents who qualify for the corps; and

(10) establish accounting and auditing procedures to account for all money paid to health professionals or received from communities and practice sites.

**History: Laws 1994, ch. 63, § 3.**

## 24-1D-4. Corps sites; local assistance; reimbursements.

The corps may require a community or practice site to pay the costs associated with providing corps health professionals in the community. The corps may allow in-kind contributions as partial or complete payment. The corps may negotiate with the community on the amount of money or in-kind services that shall be paid to the state. Money paid to the state shall be deposited in the general fund. Payback requirements and in-kind contributions shall be determined and negotiated based on formulas adopted pursuant to regulations.

**History: Laws 1994, ch. 63, § 4.**

## 24-1D-5. Corps service; commitment stipends.

A. The corps may provide commitment stipends to potential health professionals who agree to serve in the corps for at least two years. Commitment stipends shall be determined by the department within available revenue.

B. Nothing in the Health Service Corps Act prohibits the corps from hiring health professionals who have not received commitment stipends.

**History: Laws 1994, ch. 63, § 5.**

## 24-1D-6. Evaluations prior to corps service; stipend payback.

A. All corps health professionals shall be licensed or certified to practice in New Mexico. If the corps determines that a person does not meet the corps' standards for service, that person shall not serve as a corps health professional.

B. Prior to service, the corps shall evaluate every student and resident to whom commitment stipends have been paid. Evaluations shall continue during service. Evaluations shall include grades; licensing test scores; recommendations of professors, professional mentors and co-workers; and other factors the corps determines by regulation to be pertinent to ensuring the provision of quality health care through the corps.

C. If a person to whom a commitment stipend has been paid does not qualify for service, he shall pay back the total stipend on terms and conditions set forth in the contract with the corps.



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If a person to whom a commitment stipend has been paid is serving in the corps and he is deemed unsatisfactory, he shall pay back the amount of stipend determined by formula to be owed pursuant to terms and conditions set forth in the contract with the corps.

D. If a person to whom a commitment stipend has been paid qualifies for service, he may pay back the stipend through service in a community specified by the department under conditions approved by the department even if he is not an employee or contractor of the corps.

**History: Laws 1994, ch. 63, § 6.**

## 24-1D-7. Corps service for educational loan-for-service programs.

Service in the corps may be used to satisfy service requirements pursuant to the provisions of state educational loan-for-service programs.

**History: Laws 1994, ch. 63, § 7.**

## 24-1D-8. Administrative assistance.

The corps may contract with other agencies to assist it in paying stipends and collecting money owed pursuant to contract provisions or penalties.

**History: Laws 1994, ch. 63, § 8.**

## 24-1D-9. Legal counsel.

The office of general counsel of the department of health shall provide legal services to the corps. The general form of stipend contracts entered into pursuant to the provisions of the Health Service Corps Act shall be approved by a special assistant attorney general employed by the department of health and signed by the resident or student and the medical director or his authorized representative on behalf of the state. The corps is vested with full and complete authority and power to sue in its own name for any balance due the state from a resident or student on a contract. Money paid pursuant to contract shall be deposited in the general fund.

**History: Laws 1994, ch. 63, § 9.**

## 24-1D-10. Failure to serve; penalty.

If a health professional whom the corps deems qualified to serve does not serve or serves only a portion of his service obligation, he is subject to a penalty of three times the amount of the total commitment stipend, plus eighteen percent interest per year. The corps shall provide by regulation for mitigating circumstances, the assessment of the penalty and payback schedules.

**History: Laws 1994, ch. 63, § 10.**

# ARTICLE 1E

# Health Facility Receiverships

Sec.
24-1E-1. Short title.
24-1E-2. Definitions.
24-1E-3. Health facility receiverships authorized; venue.
24-1E-3.1. Rulemaking.
24-1E-4. Hearing on petition.
24-1E-5. Receiver's powers and duties.
24-1E-6. Termination of receivership.
24-1E-7. Facility may seek modification or termination.



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## 24-1E-1. Short title.

Chapter 24, Article 1E NMSA 1978 may be cited as the "Health Facility Receivership Act".

**History: 1978 Comp., § 24-1E-1, enacted by Laws 1996, ch. 35, § 4; 2001, ch. 225, § 1.**

**The 2001 amendment,** effective June 15, 2001, substituted "Chapter 24, Article 1E NMSA 1978" for "Sections 24-1E-1 through 24-1E-6".

## 24-1E-2. Definitions.

As used in the Health Facility Receivership Act:

A. "department" means the department of health;

B. "health facility" means:

(1) a health facility as defined in Subsection D of Section 24-1-2 NMSA 1978 other than a child-care center or facility, whether or not licensed by the state of New Mexico; or

(2) a community-based program providing services funded, directly or indirectly, in whole or in part, by the home and community-based medicaid waiver program or by developmental disabilities, traumatic brain injury or other medical disabilities programs;

C. "person" includes a natural person and any other form of entity recognized by law;

D. "receiver" means the secretary, upon appointment pursuant to the Health Facility Receivership Act; and

E. "secretary" means the secretary of health.

**History: 1978 Comp., § 24-1E-2, enacted by Laws 1996, ch. 35, § 5; 2001, ch. 225, § 2.**

**The 2001 amendment,** effective June 15, 2001, added the Paragraph (1) designation in Subsection B, and in that paragraph, substituted "state of New Mexico; or" for "department"; and added Paragraph B(2).

## 24-1E-3. Health facility receiverships authorized; venue.

A. The secretary may file a verified petition in the district court seeking appointment as receiver of a health facility if the facility:

(1) is being operated without a valid license from the division;

(2) will be closed within sixty days and adequate arrangements to relocate its residents have not been submitted to and approved by the secretary;

(3) has been abandoned, its residents have been abandoned or such abandonment is imminent; or

(4) presents a situation, physical condition, practice or method of operation that the secretary finds presents an imminent danger of death or significant mental or physical harm to its residents or other persons.

B. The proceedings shall be governed by, and the receiver's powers and duties shall be as specified in, the Receivership Act [44-8-1 through 44-8-10 NMSA 1978], supplemented as provided in the Health Facility Receivership Act.

C. Venue shall be laid in the district court for Santa Fe county or any other county in which the health facility or any of its satellite facilities is located.

D. Service of process shall be made in any manner provided by the Rules of Civil Procedure for the District Courts. If personal service cannot practicably or promptly be made as so provided, service may be made by delivery of the summons with the petition attached to any person in charge of the health facility at the time service is made.

E. The health facility shall file a responsive pleading within ten days after the date service is made or within such time as directed by the district court.

**History: 1978 Comp., § 24-1E-3, enacted by Laws 1996, ch. 35, § 6.**

**Cross references.** — For application for appointment of a receiver, *see* 44-8-5 NMSA 1978.

For Rules of Civil Procedure for the District Courts, *see* Rules 1-001 to 1-127 NMRA.



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## 24-1E-3.1. Rulemaking.

No later than December 31, 2001, the secretary shall promulgate rules to implement the provisions of the Health Facility Receivership Act.

As a minimum, the rules shall establish:

A. conditions under which a petition for a health facility receivership may be filed;

B. the duties, authority and responsibilities of the deputy receiver and the health facility;

C. the specific authority of the deputy receiver to impose financial conditions and requirements on the health facility;

D. minimum qualifications for deputy receivers; and

E. provisions that will be requested for inclusion in district court orders entered pursuant to the Health Facility Receivership Act .

**History: Laws 2001, ch. 225, § 4.**

## 24-1E-4. Hearing on petition.

A. Except in the case of an ex parte hearing under the Receivership Act [44-8-1 through 44-8-10 NMSA 1978], the district court shall hold a hearing on the petition within ten days after the petition is filed or as soon thereafter as practicable. The health facility shall be given notice of the hearing at least five days before the hearing date.

B. In the case of an ex parte hearing under the Receivership Act, the district court may enter an order appointing the secretary as temporary receiver, with all the rights and responsibilities of a receiver, for ten days or until a hearing can be held on the petition.

C. Following hearing, the district court shall appoint the secretary as receiver if it finds that any of the conditions of Subsection A of Section 24-1E-3 NMSA 1978 exists.

D. Following any regular or ex parte hearing, the district court may appoint a qualified person, experienced in health facility management, to act as deputy receiver. The person appointed as deputy receiver shall be free of conflict of interest with the health facility that is in receivership.

E. The receiver's bond shall be deemed satisfied by his bond under the Surety Bond Act [10-2-13 through 10-2-16 NMSA 1978]. If a deputy receiver is not a public employee covered under the Surety Bond Act, he shall obtain a fidelity and performance bond in an amount determined by the court. The cost of the bond shall be paid from the receivership estate.

**History: 1978 Comp., § 24-1E-4, enacted by Laws 1996, ch. 35, § 7; 2001, ch. 225, § 3.**

**The 2001 amendment,** effective June 15, 2001, inserted the last sentence of Subsection D.

## 24-1E-5. Receiver's powers and duties.

A. In addition to the receiver's powers and duties under the Receivership Act [44-8-1 through 44-8-10 NMSA 1978], the secretary as receiver and any deputy receiver under the Health Facility Receivership Act shall, except as the district court may otherwise order:

(1) perform all acts that are necessary to:

(a) correct or remedy each condition on which the receiver's appointment was based;

(b) ensure adequate care and necessary services for each resident or other person in the health facility;

(c) bring the facility into compliance with all applicable state and federal laws, rules and regulations; and

(d) manage and operate the health facility, including closing down, expanding or initiating new operations, hiring and firing officers and employees, contracting for necessary services, personnel, supplies, equipment, facilities and all other appropriate things, purchasing, selling, marshaling and otherwise managing its property and assets, paying the facility's obligations that are directly related to the health facility's operations or for providing adequate care and necessary services to residents or for other persons in the health facility, borrowing money and property and giving security for these and expending funds of the facility;



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(2) give notice of establishment of the receivership to interested persons and publish notice in a newspaper of general circulation in each county in which the health care facility and any of its satellite facilities is located;

(3) if a resident or other person in the health facility is to be discharged or transferred, discuss the options for alternative placement with the resident, other person in the health facility or the guardian of that resident or other person in the health facility, as applicable, and arrange to transfer the records and personal property of the resident or other person in the health facility to the alternative placement facility; and

(4) with the court's approval, void any lease, mortgage, secured transaction, contract or other agreement made prior to the appointment of the receiver or any transfer of money or property made within one year prior to the filing of the petition if such lease, mortgage, secured transaction, contract, agreement or other transfer of money or property was made without fair consideration, including excessive interest rate, was made with actual intent to hinder, delay or defraud either future or existing creditors, was made with shareholders or owners of the health facility or persons otherwise having an interest in the health facility or was unrelated to the normal and expected maintenance and operation of the health facility.

B. If, in the exercise of the receiver's powers pursuant to this section, the receiver is in possession of real estate, real or personal property or other goods or services subject to a lease, mortgage, secured transaction, contract or other agreement subject to being voided by the receiver pursuant to Paragraph (4) of Subsection A of this section, and such real estate, real or personal property or other goods or services are necessary for the continued operation of the health facility during the receivership, the receiver may, in lieu or [of] seeking to void such lease, mortgage, secured transaction, contract or other agreement, apply to the court to set a reasonable price, rate or rate of interest to be paid by the receiver under such lease, mortgage, secured transaction, contract or other agreement during the duration of the receivership. The receiver shall send notice of such an application to any known parties of the property, services or goods involved and shall publish the notice once at least thirty days prior to the hearing date in a newspaper of general circulation, and the court shall hold a hearing on the receiver's application within thirty days after the filing of the application by the receiver. Payment by the receiver of the amount determined by the court to be reasonable is a defense to any action against the receiver for payment or possession of the real estate, real or personal property or other goods or services, or to revocation of such services subject to the lease, mortgage, secured transaction, contract or other agreement. Payment by the receiver of the amount determined by the court to be reasonable shall not relieve the health facility from any liability upon termination of the receivership for the difference between the amount paid by the receiver and the amount due under the original lease, mortgage, secured transaction, contract or other agreement.

C. Nonpayment by the receiver of any debt of the health facility under a lease, mortgage, secured transaction, contract or other agreement reasonably deemed by the receiver not to be directly related to the health facility's operations or for providing adequate care and necessary services to residents or other persons in the health facility shall not subject the receiver to liability for payment. Nonpayment of any lease, mortgage, secured transaction, contract or other agreement reasonably deemed by the receiver not to be directly related to the health facility's operations or for providing adequate care and necessary services to residents or other persons in the health facility shall not relieve the health facility from any liability upon termination of the receivership for payment of the full amount due under the lease, mortgage, secured transaction, contract or other agreement.

D. A deputy receiver shall have the same powers and duties as the receiver, unless the court orders otherwise.

**History: 1978 Comp., § 24-1E-5, enacted by Laws 1996, ch. 35, § 8; 2007, ch. 58, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**The 2007 amendment,** effective June 15, 2007, added new Subsections B and C to permit a court to set reasonable amounts to be paid during a receivership by a receiver who holds property that is necessary for the operation of a health facility; relieved a receiver of liability for nonpayment of debts that the receiver determines are not related to a health facility's operations or for providing care for residents; and provided that nonpayment of the full amount of debts by the receiver does not relieve the health facility of liability for payment upon the termination of the receivership.



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## 24-1E-6. Termination of receivership.

The receivership shall terminate when the conditions that led to its establishment, and any other conditions that constitute grounds for establishment of a receivership, have ceased to exist. If the health facility is insolvent or otherwise financially distressed, the receivership shall terminate upon filing of federal bankruptcy proceedings, unless the district court orders otherwise.

**History: 1978 Comp., § 24-1E-6, enacted by Laws 1996, ch. 35, § 9.**

## 24-1E-7. Facility may seek modification or termination.

A health facility under receivership may petition the court at any time for modification or termination of the order of receivership.

**History: Laws 2001, ch. 225, § 5.**

# ARTICLE 1F

# Billy Griego HIV and AIDS Act

Sec.
24-1F-1. Short title.
24-1F-2. Purpose.
24-1F-3. Department of health; duties.
24-1F-4. Medical advisory committee created; membership; duties.
Sec.
24-1F-5. Independent constituent service program; duties.
24-1F-6. Annual report; policies and procedures.

## 24-1F-1. Short title.

This act [24-1F-1 through 24-1F-6 NMSA 1978] may be cited as the "Billy Griego HIV and AIDS Act".

**History: Laws 2005, ch. 6, § 1.**

**Compiler's note.** — Although this section has been compiled within the Public Health Act [Chapter 24, Article 1 NMSA 1978], it was not enacted as a section of that act.

**Effective dates.** — Laws 2005, ch. 6 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

## 24-1F-2. Purpose.

The purpose of the Billy Griego HIV and AIDS Act is to ensure that consumers are the focus of the funding and services provided and their consideration is to be the determining factor in all the state's human immunodeficiency virus and acquired immune deficiency syndrome programs.

**History: Laws 2005, ch. 6, § 2.**

**Compiler's note.** — Although this section has been compiled within the Public Health Act [Chapter 24, Article 1 NMSA 1978], it was not enacted as a section of that act.

**Effective dates.** — Laws 2005, ch. 6 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

## 24-1F-3. Department of health; duties.

The department of health shall serve as the state's human immunodeficiency virus and acquired immune deficiency syndrome service coordinator among all state agencies, providing direct and contract education and prevention and treatment services for eligible persons, subject



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to the availability of funds. The department shall serve as the state contract administrator for federal Ryan White services funding as well as for all federal centers for disease control and prevention human immunodeficiency virus and acquired immune deficiency syndrome programs. Services shall include prevention, clinical services, a drug assistance and insurance assistance program to eligible individuals and programs appropriate for Native Americans, including traditional medicine services. Services shall be delivered in a consumer-oriented model. The department of health shall include a quality assurance component in all services and shall ensure that all clients are educated about their rights and responsibilities and the department's grievance procedures.

**History: Laws 2005, ch. 6, § 3.**

**Compiler's note.** — Although this section has been compiled within the Public Health Act [Chapter 24, Article 1 NMSA 1978], it was not enacted as a section of that act.

**Cross references.** — For the Ryan White Care Act, *see* 42 U.S.C.A. Sections 300ff-11 et seq.

**Effective dates.** — Laws 2005, ch. 6 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

## 24-1F-4. Medical advisory committee created; membership; duties.

A. There is created at the department of health a "medical advisory committee" to consist of seven members, chaired by the department's chief medical officer or the officer's designee. Committee membership shall consist of four physicians and two consumers with current experience in the treatment of human immunodeficiency virus and acquired immune deficiency syndrome.

B. The committee shall review the department of health's human immunodeficiency virus and acquired immune deficiency syndrome drug formulary and policies regarding selection, utilization and provision of those drugs and recommend changes as appropriate to the department of health and report its recommendations to the governor's HIV and AIDS policy commission.

**History: Laws 2005, ch. 6, § 4.**

**Compiler's note.** — Although this section has been compiled within the Public Health Act [Chapter 24, Article 1 NMSA 1978], it was not enacted as a section of that act.

**Effective dates.** — Laws 2005, ch. 6 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

## 24-1F-5. Independent constituent service program; duties.

An independent "constituent services program" is created. The program shall review all fiscal matters and record and review all complaints and requests for services that come to its attention about public programs and services for persons living with the human immunodeficiency virus and acquired immune deficiency syndrome statewide. The program shall make an annual report to the department of health by November 1 of each year on its activities and recommendations.

**History: Laws 2005, ch. 6, § 5.**

**Compiler's note.** — Although this section has been compiled within the Public Health Act [Chapter 24, Article 1 NMSA 1978], it was not enacted as a section of that act.

**Effective dates.** — Laws 2005, ch. 6 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

## 24-1F-6. Annual report; policies and procedures.

A. The department of health shall provide an annual report on activities and expenditures conducted pursuant to the Billy Griego HIV and AIDS Act. The report shall be submitted no later than December 15 to the legislature and the governor.

B. The department of health shall develop and annually review policies and procedures pertaining to the Billy Griego HIV and AIDS Act.

**History: Laws 2005, ch. 6, § 6.**

**Compiler's note.** — Although this section has been compiled within the Public Health Act [Chapter 24, Article 1 NMSA 1978], it was not enacted as a section of that act.

**Effective dates.** — Laws 2005, ch. 6 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.



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# ARTICLE 1G

# New Mexico Telehealth and Health Information Technology Commission

Sec.
24-1G-1. Short title.
24-1G-2. Purpose.
24-1G-3. Definitions.
24-1G-4. New Mexico telehealth and health information technology commission created; powers and duties; membership.

## 24-1G-1. Short title.

Chapter 24, Article 1G NMSA 1978 may be cited as the "New Mexico Telehealth and Health Information Technology Commission Act".

**History: Laws 2005, ch. 55, § 1; 2007, ch. 14, § 1.**

**The 2007 amendment,** effective June 15, 2007, changed "This act" to "Chapter 24, Article 1G NMSA 1978" and changed the name of the "New Mexico Telehealth Commission Act" to the "New Mexico Telehealth and Health Information Technology Commission Act".

## 24-1G-2. Purpose.

The purpose of creating a telehealth and health information technology commission is to encourage a single, coordinated statewide effort to create a telehealth and health information technology system that:

A. provides and supports health care delivery, diagnosis, consultation, treatment, transfer of medical data and education when distance separates a patient and a health care provider; multiple health care providers involved in patient care; and health care providers and educational or professional activities;

B. addresses the problems of provider distribution in medically underserved areas of the state;

C. strengthens the health infrastructure;

D. attracts and retains health care providers in rural areas; and

E. helps reduce costs associated with health care and make health care more affordable.

**History: Laws 2005, ch. 55, § 2; 2007, ch. 14, § 2.**

**The 2007 amendment,** effective June 15, 2007, changed the name of the "telehealth commission" to the "telehealth and health information technology commission" and changed the name of the "telehealth system" to the "telehealth and health information technology system".

## 24-1G-3. Definitions.

As used in the New Mexico Telehealth and Health Information Technology Commission Act:

A. "commission" means the New Mexico telehealth and health information technology commission;

B. "health information technology" means products, devices or systems that allow for the secure electronic collection, storage, exchange or management of patient information; and

C. "telehealth" means the use of electronic information, imaging and communication technologies, including interactive audio, video and data communications as well as store-and-forward technologies, to provide and support health care delivery, diagnosis, consultation, treatment, transfer of medical data and education.

**History: Laws 2005, ch. 55, § 3; 2007, ch. 14, § 3.**

**The 2007 amendment,** effective June 15, 2007, changed the name of the "New Mexico Telehealth Commission Act" to the "New Mexico Telehealth and Health Information Technology Commission Act"; in Subsection A, changed the "telehealth commission" to the "telehealth and health information technology commission"; added Subsection B to define "health information technology"; and deleted "when distance separates the patient and the health care provider" at the end of Subsection C.



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## 24-1G-4. New Mexico telehealth and health information technology commission created; powers and duties; membership.

A. The "New Mexico telehealth and health information technology commission" is created. The commission is administratively attached to the department of health, which shall work in conjunction with the New Mexico health policy commission, in accordance with the Executive Reorganization Act [9-1-1 through 9-1-10 NMSA 1978].

B. The commission shall consist of no more than twenty-five members with members, one-third of whom shall be from rural areas, chosen from the following categories, all of whom shall be appointed by and serve at the pleasure of the governor:

(1) health care facilities;
(2) health care practitioners;
(3) health care workforce educators;
(4) telehealth technology experts;
(5) the telecommunications industry;
(6) the business community;
(7) health care insurance providers or other health care payers;
(8) the health information technology industry;
(9) Indian nations, tribes and pueblos;
(10) legislators;
(11) state agencies responsible for:
    (a) telecommunications;
    (b) public health;
    (c) medicaid and social services;
    (d) workforce development;
    (e) children's health and social services;
    (f) services for the elderly and persons with a disability;
    (g) criminal justice;
    (h) health policy and planning; and
    (i) education; and
(12) other members as the governor may appoint to ensure appropriate cultural and geographic representation and the interests of the public.

C. The commission shall:

(1) identify how telehealth and health information technology can be used to increase access to care and implement state comprehensive health plans;

(2) identify barriers to telehealth and health information technology utilization and expansion, including payment, infrastructure, training and workforce availability;

(3) inventory the state's telehealth and health information technology assets, map available telecommunications infrastructure and examine the financial impact of failing to develop the state's telehealth and health information technology capacities;

(4) coordinate public and private sector initiatives to enhance networking, portal development and connectivity and to expand telehealth and health information technology and telecommunications capacity;

(5) establish subcommittees as the commission deems necessary to fulfill its purpose, powers and duties or to address specific telehealth and health information technology issues;

(6) identify specific actions to increase collaborative efforts and public-private partnerships to increase the use of telehealth and health information technology for health care access development, patient outcome improvement, patient and workforce education and health care practitioner recruitment and development;

(7) develop and disseminate specific telehealth and health information technology guidelines to ensure quality of care, positive health outcomes, appropriate use of technology and protection of privacy and confidentiality;

(8) review and comment on initiatives, projects or grant applications to ensure telehealth and health information technology guidelines are met and maximum collaboration and cooperation across the state is encouraged;



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(9) meet at least once each quarter at the call of the chair or vice chair, who shall be designated by the governor from among the membership; and

(10) report annually to the governor and the legislature on the state of the telehealth and health information technology system and the adequacy and allocation of telehealth and health information technology services throughout the state, providing the governor and the legislature with specific recommendations for improving telehealth and health information technology and related service systems.

D. A majority of the members of the commission constitutes a quorum for the transaction of business.

**History: Laws 2005, ch. 55, § 4; 2007, ch. 14, § 4; 2007, ch. 46, § 13.**

**Cross reference.** — For the department of health, *see* 9-7-4 NMSA 1978.

For the New Mexico health policy commission, *see* 9-7-11.2 NMSA 1978.

**2007 Multiple Amendments.** — Laws 2007, ch. 14, § 4 and Laws 2007, ch. 46, § 13 enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2007, ch. 46, § 13, as the last act signed by the governor, is set out above and incorporates both amendments. The amendments enacted by Laws 2007, ch. 14, § 4 and Laws 2007, ch. 46, § 13 are described below. To view the session laws in their entirety, *see* the 2007 session laws on *NMOneSource.com*.

Laws 2007, ch. 46, § 13, effective June 15, 2007, made non-substantive language changes.

Laws 2007, ch. 14, § 4, effective June 15, 2007, changed the name of the "telehealth commission" to the "telehealth and health information technology commission" in Subsection A; added Paragraph (8) of Subsection B to include a member from the health information technology industry; added "and health information technology" in Paragraphs (1) through (6) and (10) of Subsection C; and changed "standards and" to "and health information technology" in Paragraphs (7) and (8) of Subsection C.

# ARTICLE 1H

# Bernalillo County Off-Reservation Native American Health Commission

Sec.
24-1H-1. Short title.
24-1H-2. Definitions.
24-1H-3. Bernalillo county off-reservation Native American health commission created; membership.
24-1H-4. Goals.
24-1H-5. Off-reservation Native American health care plan implementation.

## 24-1H-1. Short title.

This act [24-1H-1 through 24-1H-5 NMSA 1978] may be cited as the "Bernalillo County Off-Reservation Native American Health Commission Act".

**History: Laws 2008, ch. 79, § 1.**

**Effective dates.** — Laws 2008, ch. ch. 79, § 6 made the Bernalillo County Off-Reservation Native American Health Commission Act effective July 1, 2008.

## 24-1H-2. Definitions.

As used in the Bernalillo County Off-Reservation Native American Health Commission Act:

A. "commission" means the off-reservation Native American health commission;

B. "department" means the department of health;

C. "New Mexico tribe" means an Indian nation, tribe or pueblo located within New Mexico;

D. "off-reservation Native American" means a member of a federally recognized tribe or an Alaskan native who lives in an off-reservation urban area and is a resident;

E. "off-reservation nonprofit organization" means a corporate nonprofit entity that provides research, advocacy or health care services for the purpose of improving health care services or the overall health of Native Americans who are not living on reservations or pueblos;

F. "off-reservation urban area" means an area of land that is within Bernalillo county but not under the jurisdiction of a New Mexico tribe;

G. "resident" means a person who lives in and is domiciled in New Mexico; and

H. "secretary" means the secretary of health.



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**History: Laws 2008, ch. 79, § 2.**
**Cross references.** — For the department of health, *see* 9-7-4 NMSA 1978.

**Effective dates.** — Laws 2008, ch. ch. 79, § 6 made the Bernalillo County Off-Reservation Native American Health Commission Act effective July 1, 2008.

## 24-1H-3. Bernalillo county off-reservation Native American health commission created; membership.

A. The board of county commissioners of Bernalillo county may create the "Bernalillo county off-reservation Native American health commission" and appoint nine commission members for staggered three-year terms after soliciting nominations for its membership from appropriate off-reservation nonprofit organizations in Bernalillo county.

B. The board of county commissioners may agree to appoint the commission's members to include:

(1) someone who manages the Indian health service's Albuquerque-area urban Indian health program;

(2) someone experienced in the delivery of off-reservation Native American health care services in Bernalillo county;

(3) the tribal liaison for the department;

(4) two members who are members of a New Mexico tribe and have a background in providing or advocating for off-reservation Native American health care;

(5) three members who are members of a non-New Mexico tribe and have a background in providing or advocating for off-reservation Native American health care; and

(6) one member of the Bernalillo county community health council.

C. Upon approval by the board of county commissioners, the commission shall meet at least four times a year, elect its own chair for a term not to exceed three years and be paid as provided in the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978].

**History: Laws 2008, ch. 79, § 3.**

**Effective dates.** — Laws 2008, ch. ch. 79, § 6 made the Bernalillo County Off-Reservation Native American Health Commission Act effective July 1, 2008.

## 24-1H-4. Goals.

The goals of the commission may include:

A. within two years of being named, creation of an initial off-reservation Native American health care plan that includes:

(1) an estimate of the number and tribal affiliation of Native Americans living in the off-reservation urban area;

(2) an inventory of sources of non-emergency health care for off-reservation Native Americans, identifying federal, state and local public resources, tribal facilities and program duplications;

(3) a cross-jurisdictional budget analysis compiled from the most current annual figures reported by state and county facilities demonstrating the amount of health care funding for off-reservation Native Americans available to the existing non-emergency facilities;

(4) recommendations to eliminate duplications of services, improve access, initiate new services and consolidate non-emergency health care budgets for off-reservation Native Americans; and

(5) a comprehensive set of recommendations for redesigning the system of non-emergency health care available to off-reservation Native Americans;

B. within three years of being named, presentation of a plan for permanent restructuring of state and local budgets and services for off-reservation Native American health care to the legislature along with proposed legislation for that restructuring that addresses:

(1) financing for persons not eligible for medicaid;

(2) estimated costs or savings to the state from off-reservation Native Americans receiving medicaid;



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(3) ways to enhance use of preventive care;
(4) nonresidential substance abuse treatment;
(5) residential treatment for substance abuse withdrawal;
(6) coordination of health care facilities with transportation services; and
(7) domestic violence and suicide prevention programs; and

C. a set of recommendations to the secretary on projects and programs that fall within the parameters of the initial off-reservation Native American health care plan and the permanent restructuring plans as funding becomes available.

**History: Laws 2008, ch. 79, § 4.**

**Effective dates.** — Laws 2008, ch. ch. 79, § 6 made the Bernalillo County Off-Reservation Native American Health Commission Act effective July 1, 2008.

## 24-1H-5. Off-reservation Native American health care plan implementation.

A. The secretary may contract for services as recommended by the commission, unless the secretary enters an objection with the commission, detailing reasons why recommended services are not in keeping with the initial off-reservation Native American health care plan or the permanent restructuring plan.

B. Nothing in the Bernalillo County Off-Reservation Native American Health Commission Act shall prohibit the department from contracting for categories of off-reservation Native American health care services prior to its effective date or for services it deems essential for public health.

**History: Laws 2008, ch. 79, § 5.**

**Effective dates.** — Laws 2008, ch. ch. 79, § 6 made the Bernalillo County Off-Reservation Native American Health Commission Act effective July 1, 2008.

# ARTICLE 1I

# Health Care Practitioner Agreements

Sec.
24-1I-1. Definitions.
24-1I-2. Enforceability of a non-compete provision; other provisions void.
24-1I-3. Enforceability of other provisions.
24-1I-4. Liquidated damages.
24-1I-5. Applicability.

## 24-1I-1. Definitions.

As used in Chapter 24, Article 1I NMSA 1978:

A. "agreement" means a written contract to which a health care practitioner is a party; and

B. "health care practitioner" means:
(1) a dentist;
(2) an osteopathic physician;
(3) a physician;
(4) a podiatrist;
(5) a certified registered nurse anesthetist;
(6) a certified nurse practitioner; and
(7) a certified nurse-midwife.

**History: Laws 2015, ch. 96, § 1; 2017, ch. 123, § 1.**

**The 2017 amendment,** effective April 6, 2017, included certified nurse practitioners and certified nurse-midwives in the definition of "health care practitioner"; in the introductory clause, after "As used in", deleted "this act" and added "Chapter 24, Article 1I NMSA 1978"; and in Subsection B, added new Paragraphs B(6) and B(7).



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## 24-1I-2. Enforceability of a non-compete provision; other provisions void.

A. A non-compete provision in an agreement, which provision restricts the right of a health care practitioner to provide clinical health care services in this state, shall be unenforceable upon the termination of:

(1) the agreement;

(2) a renewal or extension of the agreement; or

(3) a health care practitioner's employment with a party seeking to enforce the agreement.

B. A provision in an agreement for clinical health care services to be rendered in this state is void, unenforceable and against public policy if the provision:

(1) makes the agreement subject to the laws of another state; or

(2) requires any litigation arising out of the agreement to be conducted in another state.

**History: Laws 2015, ch. 96, § 2; 2017, ch. 123, § 2.**

**The 2017 amendment,** effective April 6, 2017, made certain provisions in clinical health care services agreements void and unenforceable; in the catchline, added "other provisions void"; added the subsection designation "A." to the previously undesignated first sentence and redesignated former Subsections A through C as Paragraphs A(1) through A(3), respectively; and in Subsection A, in the introductory sentence, after "health care services", added "in this state"; and added Subsection B.

## 24-1I-3. Enforceability of other provisions.

Nothing in this act shall be construed to limit the enforceability of:

A. a provision in an agreement requiring a health care practitioner who has worked for an employer for an initial period of less than three years to repay all or a portion of:

(1) a loan;

(2) relocation expenses;

(3) a signing bonus or other remuneration to induce the health care practitioner to relocate or establish a health care practice in a specified geographic area; or

(4) recruiting, education and training expenses;

B. a nondisclosure provision relating to confidential information and trade secrets;

C. a nonsolicitation provision with respect to patients and employees of the party seeking to enforce the agreement for a period of one year or less after the last date of employment; or

D. any other provision of an agreement that is not in violation of law, including a provision for liquidated damages.

**History: Laws 2015, ch. 96, § 3.**

**Effective dates.** — Laws 2015, ch. 96 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2015, 90 days after the adjournment of the legislature.

## 24-1I-4. Liquidated damages.

A. An agreement may provide for liquidated damages in an amount that is reasonable at the time the agreement is executed and in light of anticipated harm and difficulty of proving the amount of loss resulting from breach of the agreement by any party.

B. A provision in an agreement fixing unreasonably large liquidated damages is void as a penalty.

**History: Laws 2015, ch. 96, § 4.**

**Effective dates.** — Laws 2015, ch. 96 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2015, 90 days after the adjournment of the legislature.

## 24-1I-5. Applicability.

A. Chapter 24, Article 1I NMSA 1978 does not apply to agreements between health care practitioners who are shareholders, owners, partners or directors of a health care practice.



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B. Except as provided by Subsection C of this section, the provisions of Chapter 24, Article 1I NMSA 1978 apply to agreements, or renewals or extensions of agreements, executed on or after July 1, 2015.

C. The provisions of Subsection B of Section 24-1I-2 NMSA 1978 apply to agreements, or renewals or extensions of agreements, executed on or after the effective date of this 2017 act.

**History: Laws 2015, ch. 96, § 5; 2017, ch. 123, § 3.**

**Compiler's notes.** — Laws 2017 ch. 123 contained an emergency clause provision. The "effective date of this 2017 act", referenced in Subsection C, is April 6, 2017, the date Laws 2017, ch. 123 was signed into law by the governor.

**The 2017 amendment,** effective April 6, 2017, made certain non-compete provisions in Section 24-1I-2(B) NMSA 1978 effective immediately; in Subsections A and B, changed "This act" to "Chapter 24, Article 1I NMSA 1978"; in Subsection B, added "Except as provided by Subsection C of this section"; and added Subsection C.

# ARTICLE 1J

# County and Tribal Health Councils

Sec.
24-1J-1. Short title.
24-1J-2. Purpose of act.
24-1J-3. Definitions.
24-1J-4. County and tribal health councils; designation.
24-1J-5. Health council functions.
24-1J-6. Department; powers and duties.

## 24-1J-1. Short title.

This act [24-1J-1 through 24-1J-6 NMSA 1978] may be cited as the "County and Tribal Health Councils Act".

**History: Laws 2019, ch. 57, § 1.**

**Effective dates.** — Laws 2019, ch. 57 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 24-1J-2. Purpose of act.

The purpose of the County and Tribal Health Councils Act is to improve the health of New Mexicans by encouraging the development of comprehensive, community-based health planning councils to identify and address local health needs and priorities.

**History: Laws 2019, ch. 57, § 2.**

**Effective dates.** — Laws 2019, ch. 57 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 24-1J-3. Definitions.

As used in the County and Tribal Health Councils Act:

A. "board" means the board of county commissioners of a county or leadership of a tribe;

B. "department" means the department of health;

C. "health council" means a county or tribal health council;

D. "jurisdiction" means a county or a tribe; and

E. "tribe" means an Indian nation, tribe, pueblo or chapter located within the boundaries of the state.

**History: Laws 2019, ch. 57, § 3.**

**Effective dates.** — Laws 2019, ch. 57 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.



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## 24-1J-4. County and tribal health councils; designation.

A. Residents of a jurisdiction may create a county or tribal health council to carry out the provisions of the County and Tribal Health Councils Act; provided that:

(1) a board shall recognize only a single health council for its jurisdiction; and

(2) two or more boards may collaborate to recognize a common, single health council representing two or more jurisdictions.

B. A board shall recognize only a county or tribal health council whose members represent a diverse spectrum of community interests, including individuals and public, private and nonprofit entities.

C. Members of a health council shall elect from among themselves a chair for a term designated by the health council.

D. Health council members shall not be paid, but they may receive per diem and mileage expenses as provided in the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978].

**History: Laws 2019, ch. 57, § 4.**
**Effective dates.** — Laws 2019, ch. 57 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 24-1J-5. Health council functions.

A. A health council shall prepare a community health plan, updated at regular intervals. A health council shall report its community health plan to the board and to the department.

B. Each community health plan shall include:

(1) a county or tribal health assessment and inventory of health resources;

(2) identification of health priorities determined through independent, community-based planning processes; and (3) strategies and resources to address health priorities.

C. A health council shall:

(1) monitor health and health care programs and services in order to identify potential gaps and to reduce potential duplication;

(2) collaborate with other entities to develop programs, networks, partnerships and coalitions as necessary to improve health;

(3) advise the board in its jurisdiction and other entities regarding policies that affect health;

(4) facilitate communication among local jurisdictions, state agencies and other entities; and

(5) identify additional public and private resources to improve health in its respective jurisdiction.

**History: Laws 2019, ch. 57, § 5.**
**Effective dates.** — Laws 2019, ch. 57 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 24-1J-6. Department; powers and duties.

The department shall:

A. in consultation with health councils, develop benchmarks, expectations and mechanisms to ensure the long-term viability of health councils;

B. in collaboration with universities, other state agencies and other public health entities, provide training, technical assistance and other supports to health councils;

C. in collaboration with other entities, develop a system to evaluate the effectiveness of health councils and the gathering of necessary evaluation data;

D. administer funding to support the work of the health councils, including local health council staffing, training and technical assistance, and monitor and evaluate contracts for funding; and



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E. adopt and promulgate rules as necessary to carry out the purposes of the County and Tribal Health Councils Act and to strengthen community-based health planning and self-determination.

**History: Laws 2019, ch. 57, § 6.**
**Effective dates.** — Laws 2019, ch. 57 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

# ARTICLE 1K

# Primary Care Council

Sec.
24-1K-1. Short title.
24-1K-2. Definitions.
24-1K-3. Primary care council created; duties.

## 24-1K-1. Short title.

This act [24-1K-1 to 24-1K-3 NMSA 1978] may be cited as the "Primary Care Council Act".

**History: Laws 2021, ch. 87, § 1.**
**Effective dates.** — Laws 2021, ch. 87 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 24-1K-2. Definitions.

As used in the Primary Care Council Act:

A. "department" means the human services department;

B. "primary care" means integrated, accessible health care services, provided by clinicians accountable for addressing the majority of a patient's personal health care needs, developing a sustained partnership with patients and practicing in the context of family and community; and

C. "secretary" means the secretary of human services.

**History: Laws 2021, ch. 87, § 2.**
**Effective dates.** — Laws 2021, ch. 87 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 24-1K-3. Primary care council created; duties.

A. The secretary shall create the "primary care council" to:

(1) develop a shared description of primary care practitioners and services;

(2) analyze annually the proportion of health care delivery expenditures allocated to primary care statewide;

(3) review national and state models of optimal primary care investment with the objectives of increasing access to primary care, improving the quality of primary care services and lowering the cost of primary care delivery statewide;

(4) review New Mexico state and county data and information about barriers to accessing primary care services faced by New Mexico residents;

(5) recommend policies, regulations and legislation to increase access to primary care, improve the quality of primary care services and lower the cost of primary care delivery while reducing overall health care costs;

(6) coordinate efforts with the graduate medical education expansion review board and other primary care workforce development initiatives to devise a plan that addresses primary care workforce shortages within the state;



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(7) report annually to the interim legislative health and human services committee and the legislative finance committee on ways that primary care investment could increase access to primary care, improve the quality of primary care services, lower the cost of primary care delivery, address the shortage of primary care providers and reduce overall health care costs; and

(8) develop and present to the secretary a five-year plan to determine how primary care investment could increase access to primary care, improve the quality of primary care services, lower the cost of primary care delivery, address the shortage of primary care providers and reduce overall health care costs.

B. The primary care council shall include nine voting members and thirteen advisory members, appointed by the secretary, and shall consist of:

(1) one member from the department;

(2) one member from the department of health;

(3) one member from the office of superintendent of insurance;

(4) one member from a statewide organization representing federally qualified health centers in New Mexico;

(5) five members from statewide organizations representing primary care providers or statewide health professional societies or associations; and

(6) thirteen nonvoting members representing health care and other stakeholders, in an advisory capacity.

C. The chair of the primary care council shall be elected by the voting members of the council.

D. The council shall meet at the call of the chair.

E. Members of the council shall not be paid per diem and mileage or other compensation for their services.

F. The secretary shall provide staff support for the council in the performance of its duties.

G. A simple majority of the voting members of the council constitutes a quorum.

H. The council shall hold its first meeting no later than October 1, 2021.

**History: Laws 2021, ch. 87, § 3.**

**Effective dates.** — Laws 2021, ch. 87 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

# ARTICLE 2

# Crippled Children Services

Sec.

24-2-1. Authority to conduct services for children with a disability.

## 24-2-1. Authority to conduct services for children with a disability.

The public health division of the department of health has authority to establish, administer and supervise activities to children who have a physical disability or whose condition may become a disability. The public health division also may supervise the administration of those services to children with a disability that are not administered directly by it.

**History: 1978 Comp., § 24-2-1, enacted by Laws 1977, ch. 253, § 40; 2007, ch. 46, § 14.**

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

# ARTICLE 2A

# Hemophilia Program

Sec.

24-2A-1. Short title.
24-2A-2. Definitions.
24-2A-3. Hemophilia fund created; use; calculation of costs.



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## 24-2A-1. Short title.

This act [24-2A-1 through 24-2A-3 NMSA 1978] may be cited as the "Theodore R. Montoya Memorial Hemophilia Program Act".

**History: Laws 1980, ch. 26, § 1.**

## 24-2A-2. Definitions.

As used in the Theodore R. Montoya Memorial Hemophilia Program Act:

A. "blood products" means certain components or factors obtained from whole blood which when periodically administered to persons suffering from hemophilia result in relief or control of the disease;

B. "eligible patient" means a person suffering from hemophilia whose case has been evaluated and accepted for provision of services by the hemophilia program established by the school;

C. "fund" means the hemophilia fund;

D. "hemophilia" means a genetic disease in which uncontrolled bleeding from otherwise minor causes may result in death or disability;

E. "hemophilia program" means the New Mexico comprehensive hemophilia diagnostic and treatment program established by the school to provide comprehensive clinical evaluation of patients suffering from hemophilia, out-patient blood product usage, counseling services to families of persons suffering from hemophilia and outreach to the public;

F. "provider" means any blood service or laboratory furnishing blood products to the school and its program administration for eligible patients;

G. "university" means the university of New Mexico; and

H. "secretary" means the secretary of health and environment [secretary of health].

**History: Laws 1980, ch. 26, § 2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department and enacted a new 9-7-4 NMSA 1978 which created the department of health. Section 9-7-5 NMSA 1978, as amended by Laws 1991, ch. 25, § 17, made the secretary of health the administrative head of the department.

## 24-2A-3. Hemophilia fund created; use; calculation of costs.

A. There is created in the state treasury the "hemophilia fund".

B. The fund shall be administered by the university and shall be used solely to provide hemophilia program services to eligible patients. The university may expend and distribute funds to:

(1) the university of New Mexico school of medicine for the costs of clinical evaluation, to include at least one visit per eligible patient per year;

(2) providers for the costs of blood products for each eligible patient, all as approved by the university of New Mexico school of medicine, to the extent not covered by insurance, medicaid or medicare;

(3) the university of New Mexico school of medicine for hemophilia program support, including nursing coordination, social services to patients and families and outreach for public education; and

(4) the university of New Mexico school of medicine for purchase of insurance or medicare coverage for patients who are eligible for coverage but have insufficient financial resources to pay the premiums.

**History: Laws 1980, ch. 26, § 3; 2001, ch. 308, § 1.**

**The 2001 amendment,** effective June 15, 2001, inserted the university of New Mexico school of medicine throughout the section and added Paragraph B(4).



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# ARTICLE 2B

# Human Immunodeficiency Virus Tests

Sec.
24-2B-1. Short title.
24-2B-2. Informed consent.
24-2B-3. Substituted consent.
24-2B-4. Mandatory counseling.
24-2B-5. Informed consent not required.
24-2B-5.1. Informed consent not required; testing of persons convicted of certain criminal offenses; responsibility to administer and pay for test.
24-2B-5.2. Informed consent not required; testing of persons formally charged for allegedly committing certain criminal offenses; responsibility to administer and pay for test.
24-2B-5.3. Informed consent not required; testing of persons who are source individuals.
24-2B-6. Confidentiality.
24-2B-7. Disclosure statement.
24-2B-8. Disclosure.
24-2B-9. Penalty.

## 24-2B-1. Short title.

Chapter 24, Article 2B NMSA 1978 may be cited as the "Human Immunodeficiency Virus Test Act".

**History: Laws 1989, ch. 227, § 1; 1993, ch. 107, § 1.**

**The 1993 amendment,** effective July 1, 1993, substituted "Chapter 24, Article 2B NMSA 1978" for "This act".

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Child custody and visitation rights of person infected with AIDS, 86 A.L.R.4th 211.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 A.L.R.5th 628.

Validity and propriety under circumstances, of court-ordered HIV testing, 87 A.L.R.5th 631.

The Propriety, under ERISA (29 USCS § 1001 et seq.) and the Americans With Disabilities Act (42 USCS § 12101 et seq.), of Capping Health Insurance Coverage for HIV-Related Claims, 131 A.L.R. Fed. 191.

## 24-2B-2. Informed consent.

No person shall perform a test designed to identify the human immunodeficiency virus or its antigen or antibody without first obtaining the informed consent of the person upon whom the test is performed, except as provided in Section 24-2B-5, 24-2B-5.1, 24-2B-5.2 or 24-2B-5.3 NMSA 1978. Informed consent shall be preceded by an explanation of the test, including its purpose, potential uses and limitations and the meaning of its results. Consent need not be in writing if there is documentation in the medical record that the test has been explained and the consent has been obtained. The requirement for full pre-test counseling may be waived under the following circumstances:

A. the performance of a prenatal test to determine if the human immunodeficiency virus or its antigen is present in a pregnant woman; provided that the woman, or her authorized representative, after having been informed of the option to decline the human immunodeficiency virus test, may choose not to have the human immunodeficiency virus test performed as a part of the routine prenatal testing if she or her authorized representative provides a written statement as follows:

> "I am aware that a test to identify the human immunodeficiency virus or its antigen or antibody is a part of routine prenatal testing. However, I voluntarily and knowingly choose not to have the human immunodeficiency virus test performed.
>
> _____
>
> (Name of patient or authorized representative)
>
> _____
>
> (Signature and date)."; or

B. when human immunodeficiency virus testing is part of routine medical care.

**History: Laws 1989, ch. 227, § 2; 1993, ch. 107, § 2; 1996, ch. 80, § 7; 2000, ch. 36, § 1; 2007, ch. 108, § 1.**

**The 2007 amendment,** effective June 15, 2007, provided that the requirement for immunodeficiency pre-test



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counseling may be waived if the human immunodeficiency virus test is part of routine medical care or if the test is performed as part of a routine prenatal test, unless the pregnant woman chooses not to have the test performed.

**The 2000 amendment,** effective May 17, 2000, inserted "or 24-2B-5.3" in the first sentence.

**The 1996 amendment,** effective July 1, 1996, inserted "or 24-2B-5.2 NMSA 1978" following "24-2B-5.1" and made a stylistic change in the first sentence.

**The 1993 amendment,** effective June 18, 1993, substituted "24-2B-5 or 24-2B-5.1 NMSA 1978" for "6 of the Human Immunodeficiency Virus Test Act" in the first sentence.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Damage action for HIV testing without consent of person tested, 77 A.L.R.5th 541.

## 24-2B-3. Substituted consent.

Informed consent shall be obtained from a legal guardian or other person authorized by law when the person is not competent. A minor shall have the capacity to give informed consent to have the human immunodeficiency virus test performed on himself.

**History: Laws 1989, ch. 227, § 3.**

## 24-2B-4. Mandatory counseling.

No positive test result shall be revealed to the person upon whom the test was performed without providing or referring that person for individual counseling about:

A. the meaning of the test results;

B. the possible need for additional testing;

C. the availability of appropriate health care services, including mental health care, social and support services; and

D. the benefits of locating and counseling any individual by whom the infected person may have been exposed to the human immunodeficiency virus and any individual whom the infected person may have exposed to the human immunodeficiency virus.

**History: Laws 1989, ch. 227, § 4; 2013, ch. 72, § 1.**

**The 2013 amendment,** effective March 29, 2013, eliminated the requirement that a person upon whom a positive immunodeficiency virus test has been performed be provided or referred to counseling; and after "performed without", deleted "the person performing the test or the health facility at which the test was performed".

## 24-2B-5. Informed consent not required.

Informed consent for testing is not required and the provisions of Section 24-2B-2 NMSA 1978 do not apply for:

A. a health care provider or health facility performing a test on the donor or recipient when the health care provider or health facility procures, processes, distributes or uses a human body part, including tissue and blood or blood products, donated for a purpose specified under the Uniform Anatomical Gift Act [repealed] or for transplant recipients or semen provided for the purpose of artificial insemination and the test is necessary to ensure medical acceptability of a recipient or the gift or semen for the purposes intended;

B. the performance of a test in bona fide medical emergencies when the subject of the test is unable to grant or withhold consent and the test results are necessary for medical diagnostic purposes to provide appropriate emergency care or treatment, except that post-test counseling or referral for counseling shall nonetheless be required when the individual is able to receive that post-test counseling. Necessary treatment shall not be withheld pending test results;

C. the performance of a test for the purpose of research if the testing is performed in a manner by which the identity of the test subject is not known and may not be retrieved by the researcher; or

D. the performance of a test done in a setting where the identity of the test subject is not known, such as in public health testing programs and sexually transmitted disease clinics.

**History: Laws 1989, ch. 227, § 5; 2000, ch. 36, § 2; 2003, ch. 342, § 1; 2007, ch. 108, § 2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 2007, ch. 323, § 35 repealed the Uniform Anatomical Gift Act, effective July 1, 2007. For comparable provisions, *see* Chapter 24, Article 6B, the Jonathan Spradling Revised Uniform Anatomical Gift Act.



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**Cross references.** — For waiver of immunodeficiency virus test, *see* 24-2B-2 NMSA 1978.

**The 2007 amendment,** effective June 15, 2007, eliminated the waiver of informed consent for testing if the human immunodeficiency virus test is performed as part of routine medical care or as a routine prenatal test, unless the pregnant woman chooses not to have the test performed.

**The 2003 amendment,** effective June 20, 2003, added Subsection E.

**The 2000 amendment,** effective May 17, 2000, substituted "Section 24-2B-2 NMSA 1978" for "Section 1 of the Human Immunodeficiency Virus Test Act" in the preliminary language of the section, deleted former Subsection D, concerning the testing of health care workers, and redesignated former Subsection E as Subsection D.

## 24-2B-5.1. Informed consent not required; testing of persons convicted of certain criminal offenses; responsibility to administer and pay for test.

A. A test designed to identify the human immunodeficiency virus or its antigen or antibody may be performed, without the offender's consent, on an offender convicted pursuant to state law of any criminal offense:

(1) involving contact between the penis and vulva;

(2) involving contact between the penis and anus;

(3) involving contact between the mouth and penis;

(4) involving contact between the mouth and vulva;

(5) involving contact between the mouth and anus; or

(6) when the court determines from the facts of the case that there was a transmission or likelihood of transmission of blood, semen or vaginal secretions from the offender to the victim.

B. If consent to perform a test on an offender cannot be obtained pursuant to the provisions of Section 24-2B-2 or 24-2B-3 NMSA 1978, the district attorney or other prosecutorial authority shall, upon the request of the victim of a criminal offense described in Subsection A of this section, petition the court to order that a test be performed on the offender not later than forty-eight hours from the date of the court order. If the victim of the criminal offense is a minor or incompetent, the parent or legal guardian of the victim may request the district attorney or other prosecutorial authority to petition the court to order that a test be performed on the offender. The petition and all proceedings in connection with the petition shall be under seal. The results of the test shall be disclosed as soon as practicable and only to the offender and to the victim or the victim's parent or legal guardian. If the offender has a positive test result, both the offender and victim shall be provided with counseling, as described in Section 24-2B-4 NMSA 1978.

C. If the offender is sentenced to imprisonment in a state corrections facility, the court's order shall direct the department of health to be responsible for the administration of and payment for the test and the lawful distribution of the test results.

D. If the offender is convicted of a misdemeanor or petty misdemeanor offense or is convicted of a felony offense that is suspended or deferred, the court's order shall direct the department of health to be responsible for the administration of and payment for the test and the lawful distribution of the test results.

E. If the offender is a minor adjudicated as a delinquent child pursuant to the provisions of the Children's Code [Chapter 32A NMSA 1978] and the court transfers legal custody of the minor to the children, youth and families department, the court's order shall direct the children, youth and families department to be responsible for the administration of and payment for the test and the lawful distribution of the test results.

F. If the offender is a minor adjudicated as a delinquent child pursuant to the provisions of the Children's Code and the court does not transfer legal custody of the minor to the children, youth and families department, the court's order shall direct the department of health to be responsible for the administration of and payment for the test and the lawful distribution of the test results.

**History: 1978 Comp., § 24-2B-5.1, enacted by Laws 1993, ch. 107, § 3; 2010, ch. 26, § 1.**

**The 2010 amendment,** effective May 19, 2010, in Subsection A, after "may be performed, without", deleted "his" and added "the offender's"; in Subsection B, in the first sentence, changed "When" to "If"; after "Section 24-2B-2 or 24-2B-3 NMSA 1978,", added "the district attorney or other prosecutorial authority shall, upon the request of"; after "Subsection A of this section", deleted "may"; and after "performed on the offender", added "not later than forty-eight hours from the date of the court order"; deleted the former second sentence, which provided that



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the petition and all proceedings in connection therewith shall be under seal; in the second sentence, added "If" and after "guardian of the victim may", added "request the district attorney or other prosecutorial authority to"; deleted the former third sentence, which provided that the court shall order and the test shall be administered to the offender within ten days after the petition is filed by the victim, parent or guardian; added the third sentence; in the fourth sentence, after "test shall be disclosed", added "as soon as practicable and"; and in the fifth sentence, changed "When" to "If"; and in Subsections C, D, E and F, at the beginning of each sentence, changed "When" to "If".

## 24-2B-5.2. Informed consent not required; testing of persons formally charged for allegedly committing certain criminal offenses; responsibility to administer and pay for test.

A. A test designed to identify the human immunodeficiency virus or its antigen or antibody may be performed, without the person's consent, on a person upon the filing of a complaint, information or an indictment alleging that the person committed a state criminal offense:

(1) involving contact between the penis and vulva;

(2) involving contact between the penis and anus;

(3) involving contact between the mouth and penis;

(4) involving contact between the mouth and vulva; or

(5) involving contact between the mouth and anus.

B. If consent to perform a test on an alleged offender cannot be obtained pursuant to the provisions of Section 24-2B-2 or 24-2B-3 NMSA 1978, the district attorney or other prosecutorial authority shall, upon the request of the victim of the alleged criminal offense described in Subsection A of this section, petition the court to order that a test be performed on the alleged offender not later than forty-eight hours from the date of the court order; provided that the same test is first performed on the victim of the alleged criminal offense. If the victim of the alleged criminal offense is a minor or incompetent, the parent or legal guardian of the victim of the alleged criminal offense may request the district attorney or other prosecutorial authority to petition the court to order that a test be performed on the alleged offender. The test may be performed on the alleged offender regardless of the result of the test performed on the victim of the alleged offense.

C. The court may issue an order based on a finding of good cause after a hearing at which both the victim of the alleged criminal offense and the alleged offender have the right to be present. During the hearing, only affidavits, counter affidavits and medical reports regarding the facts that support or rebut the issuance of an order shall be admissible. The hearing shall be conducted within seventy-two hours after the district attorney or other prosecutorial authority petitions the court for the order. The petition and all proceedings in connection therewith shall be under seal.

D. The results of the test shall be disclosed as soon as practicable and only to the alleged offender and to the victim of the alleged criminal offense or the victim's parent or legal guardian. When the victim of the alleged criminal offense or the alleged offender has a positive test result, both the alleged offender and the victim of the alleged criminal offense shall be provided with counseling, as described in Section 24-2B-4 NMSA 1978.

E. The court's order shall direct the department of health to be responsible for the administration of and payment for the test and the lawful distribution of the test results.

F. A prosecuting attorney may not use in a criminal proceeding arising out of the alleged criminal offense the fact that a test was administered to the alleged offender or the results of the test.

G. The provisions of this section shall not affect the rights and remedies available to the victim of the alleged criminal offense and alleged offender in any civil action.

H. The administration of a test to an alleged offender pursuant to the provisions of this section shall not preclude the subsequent administration of follow-up tests pursuant to the provisions of Section 24-2B-5.1 NMSA 1978.

**History: 1978 Comp., § 24-2B-5.2, enacted by Laws 1996, ch. 80, § 8; 2010, ch. 26, § 2.**

**Cross references.** — For testing for sexually transmitted diseases of persons charged with committing certain criminal offenses, *see* 24-1-9.2 NMSA 1978.

**The 2010 amendment,** effective May 19, 2010, in Subsection A, in the introductory sentence, after "performed, without", deleted "his" and added "the person's"; in Subsection B, in the first sentence, after "Section 24-2B-2 or 24-2B-3 NMSA 1978,", added "the district attorney or other prosecutorial authority shall, upon the request of"; after "Subsection A of this section;", deleted "may"; after "petition the court", deleted "through the prosecuting office or personally"; and after "performed on the alleged



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offender", added "not later than forty-eight hours from the date of the court order"; deleted the former second sentence, which provided that the test may be performed on the alleged offender regardless of the result of the test performed on the victim; in the second sentence, after "legal guardian of the victim of the alleged criminal offense may", added "request the district attorney or other prosecutorial authority to"; and added the third sentence; in Subsection C, in the third sentence, after "seventy-two hours after the", deleted "victim of the alleged criminal offense" and added "district attorney or other prosecutorial authority", deleted the former fifth sentence, which provided that the court shall issue the order and the test shall be administered within ten days after the petition is filed by the victim, parent or guardian; in Subsection D, in the first sentence, after "test shall be disclosed", added "as soon as practicable and"; and in Subsection H, after "subsequent administration of", deleted "another test" and added "follow-up tests".

## 24-2B-5.3. Informed consent not required; testing of persons who are source individuals.

A. As used in this section:

(1) "exposed individual" means a health care provider, first responder or other person, including an employee, volunteer or independent contracted agent of a health care provider or law enforcement agency, while acting within the scope of his employment; or a person who, while receiving services from a health care provider, is significantly exposed to the blood or other potentially infectious material of another person, when the exposure is proximately the result of the activity of the exposed individual or receipt of health care services from the source individual;

(2) "significantly exposed" means direct contact with blood or other potentially infectious material of a source individual in a manner that is capable of transmitting the human immunodeficiency virus; and

(3) "source individual" means a person whose blood or other potentially infectious material may have been or has been the source of a significant exposure.

B. A test designed to identify the human immunodeficiency virus or its antigen or antibody may be performed without the consent of a source individual when an exposed individual is significantly exposed.

C. If consent to perform a test on a source individual cannot be obtained pursuant to the provisions of Section 24-2B-2 or 24-2B-3 NMSA 1978, the exposed individual may petition the court to order that a test be performed on the source individual; provided that the same test shall first be performed on the exposed individual. The test may be performed on the source individual regardless of the result of the test performed on the exposed individual. If the exposed individual is a minor or incompetent, the parent or guardian may petition the court to order that a test be performed on the source individual.

D. The court may issue an order based on a finding of good cause after a hearing at which both the source individual and the exposed individual have the right to be present. The hearing shall be conducted within seventy-two hours after the petition is filed. The petition and all proceedings in connection with the petition shall be under seal. The test shall be administered on the source individual within three days after the order for testing is entered.

E. The results of the test shall be disclosed only to the source individual and the exposed or the exposed individual's parent or guardian. When the source individual or the exposed individual has a positive test result, both shall be provided with counseling as provided in Section 24-2B-4 NMSA 1978.

**History: 1978 Comp., § 24-2B-5.3, enacted by Laws 2000, ch. 36, § 3.**

## 24-2B-6. Confidentiality.

A. No person or the person's agents or employees who require or administer the test shall disclose the identity of any person upon whom a test is performed or the result of such a test in a manner that permits identification of the subject of the test, except to the following persons:

(1) the subject of the test or the subject's legally authorized representative, guardian or legal custodian;

(2) any person designated in a legally effective release of the test results executed prior to or after the test by the subject of the test or the subject's legally authorized representative;



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(3) an authorized agent, a credentialed or privileged physician or employee of a health facility or health care provider if the health care facility or health care provider itself is authorized to obtain the test results, the agent or employee provides patient care or handles or processes specimens of body fluids or tissues and the agent or employee has a need to know such information;

(4) the department of health in accordance with reporting requirements established by regulation;

(5) the department of health for the purpose of providing partner services;

(6) a health facility or health care provider that procures, processes, distributes or uses:

(a) a human body part from a deceased person, with respect to medical information regarding that person;

(b) semen provided prior to the effective date of the Human Immunodeficiency Virus Test Act for the purpose of artificial insemination;

(c) blood or blood products for transfusion or injection; or

(d) human body parts for transplant with respect to medical information regarding the donor or recipient;

(7) health facility staff committees or accreditation or oversight review organizations that are conducting program monitoring, program evaluation or service reviews, so long as any identity remains confidential;

(8) authorized medical or epidemiological researchers who may not further disclose any identifying characteristics or information; and

(9) for purposes of application or reapplication for insurance coverage, an insurer or reinsurer upon whose request the test was performed.

B. The department of health may disclose human immunodeficiency virus test results, including the identity of any person upon whom a test is performed:

(1) to the subject of the test or the subject's legally authorized representative, guardian or legal custodian;

(2) to the person who ordered the test or that person's agents or employees;

(3) in the conduct of public health practice, to appropriate municipal, county, state, federal or tribal public health agencies having at least equivalent security and confidentiality standards for human immunodeficiency virus test results as maintained by the department of health; and

(4) to health care personnel where necessary to protect the health of the individual who is the subject of the test or an individual who was significantly exposed to the subject of the test, provided that the health care personnel first provide to the department of health for review relevant medical records or other written attestations that document the need for access to the person's confidential human immunodeficiency virus test results.

C. For the purposes of this section:

(1) "partner services" means a protocol that the department of health establishes by regulation similar to those protocols and regulations for other reportable sexually transmitted diseases for contacting individuals whom it identifies to be at risk of human immunodeficiency virus infection due to contact with an individual whom it has identified, through reporting made pursuant to Paragraph (4) or (5) of Subsection A of this section, as having been infected with human immunodeficiency virus;

(2) "test" means a procedure that definitively diagnoses the presence of human immunodeficiency virus infection, either through the detection of the virus itself or the detection of antibodies against the virus; and

(3) "public health practice" means a population-based activity or individual effort aimed primarily at the prevention of injury, disease or premature mortality or the promotion of health in a community, including:

(a) surveillance and response; and

(b) developing public health policy.

**History: Laws 1989, ch. 227, § 6; 1997, ch. 214, § 1; 2010, ch. 4, § 1; 2013, ch. 72, § 2.**

**The 2013 amendment,** effective March 29, 2013, authorized the department of health to disclose human immunodeficiency virus test results for the purpose of conducting human immunodeficiency virus surveillance, investigation and intervention; added Subsection B; and added Paragraph (3) of Subsection C.



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**The 2010 amendment,** effective May 19, 2010, added Paragraph (5) of Subsection A, renumbered the succeeding paragraphs, and added Subsection B.

**The 1997 amendment,** effective June 20, 1997, rewrote Subsection D.

ANNOTATIONS

**Law reviews.** — For comment, "Sex, Lies, and Lawsuits: A New Mexico Physician's Duty to Warn Third Parties Who Unknowingly May Be At Risk of Contracting HIV From a Patient," see 26 N.M.L. Rev. 481 (1996).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — State statutes or regulations expressly governing disclosure of fact that person has tested positive for human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS), 12 A.L.R.5th 149.

## 24-2B-7. Disclosure statement.

No person to whom the results of a test have been disclosed may disclose the test results to another person except as authorized by the Human Immunodeficiency Virus Test Act. Whenever disclosure is made pursuant to that act, it shall be accompanied by a statement in writing that includes the following or substantially similar language: "This information has been disclosed to you from records whose confidentiality is protected by state law. State law prohibits you from making any further disclosure of such information without the specific written consent of the person to whom such information pertains, or as otherwise permitted by state law. A person who makes an unauthorized disclosure of this information is guilty of a petty misdemeanor and shall be sentenced to imprisonment in the county jail for a definite term not to exceed six months or the payment of a fine of not more than five hundred dollars ($500), or both."

**History: Laws 1989, ch. 227, § 7; 1996, ch. 80, § 9.**

**The 1996 amendment,** effective July 1, 1996, added the second sentence to the quoted language and made a stylistic change in the second sentence.

ANNOTATIONS

**Law reviews.** — For comment, "Sex, Lies, and Lawsuits: A New Mexico Physician's Duty to Warn Third Parties Who Unknowingly May Be At Risk of Contracting HIV From a Patient," see 26 N.M.L. Rev. 481 (1996).

## 24-2B-8. Disclosure.

Nothing in the Human Immunodeficiency Virus Test Act shall be construed to prevent a person who has been tested from disclosing in any way to any other person his own test results. Any victim of an alleged criminal offense who receives information pursuant to Section 24-2B-5.2 NMSA 1978 may disclose the test results as is reasonably necessary to protect his health and safety or the health and safety of his family or sexual partner.

**History: Laws 1989, ch. 227, § 8; 1996, ch. 80, § 10.**

**The 1996 amendment,** effective July 1, 1996, substituted "Disclosure" for "Self-disclosure" in the section head and added the last sentence.

## 24-2B-9. Penalty.

A person who makes an unauthorized disclosure of the results of a test designed to identify the human immunodeficiency virus or its antigen or antibody is guilty of a petty misdemeanor and shall be sentenced to imprisonment in the county jail for a definite term not to exceed six months or the payment of a fine of not more than five hundred dollars ($500), or both.

**History: 1978 Comp., § 24-2B-9, enacted by Laws 1996, ch. 80, § 11.**

# ARTICLE 2C
# Harm Reduction

Sec.
24-2C-1. Short title.
24-2C-2. Repealed.
24-2C-3. Definitions.
24-2C-4. Harm reduction program created; department responsibilities.
24-2C-5. Program.
24-2C-6. Repealed.



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## 24-2C-1. Short title.

Sections 1 through 6 [24-2C-1 through 24-2C-6 NMSA 1978] of this act may be cited as the "Harm Reduction Act".

**History: Laws 1997, ch. 256, § 1.**

## 24-2C-2. Repealed.

**Repeals.** — Laws 2022, ch. 4, § 5 repealed 24-2C-2 NMSA 1978, as enacted by Laws 1997, ch. 256, § 2, relating to purpose, effective May 18, 2022. For provisions of former section, *see* the 2021 NMSA 1978 on *NMOneSource.com*.

## 24-2C-3. Definitions.

As used in the Harm Reduction Act:

A. "department" means the department of health; and

B. "participant" means a person who receives supplies or devices or services provided by the harm reduction program.

**History: Laws 1997, ch. 256, § 3; 2022, ch. 4, § 1.**

**The 2022 amendment,** effective May 18, 2022, revised the definition of "participant," and removed the definition of "program," as used in the Harm Reduction Act; in Subsection B, after "'participant'", deleted "or 'client'", and after "means", deleted "an intravenous drug user who exchanges a used hypodermic syringe, needle or other object used to inject controlled substances or controlled substance analogs into the human body for a sterile hypodermic syringe and needle in compliance with the procedure of the program; and" and added "a person who receives supplies or devices or services provided by the harm reduction program"; and deleted former Subsection C, which defined "program".

## 24-2C-4. Harm reduction program created; department responsibilities.

A. The department shall:

(1) establish and administer a program that shall be known as the "harm reduction program" to reduce overdose mortality and other negative health outcomes associated with drug use;

(2) pursuant to rules established by the department, qualify persons as harm reduction program participants, issue a document that identifies the bearer of the document as a participant and provide the bearer of the document with access to supplies, devices or services provided by the program;

(3) compile data to assist in planning and evaluating efforts to combat overdose mortality and other negative health outcomes associated with drug use; and

(4) make an annual report, including legislative recommendations, to the legislative health and human services committee by October 1 each year.

B. The department shall appoint an advisory committee to include representation from:

(1) the office of the attorney general;

(2) the New Mexico state police division of the department of public safety;

(3) the infectious disease prevention and control bureau of the department;

(4) the director of the epidemiology and response division of the department or the director's designee;

(5) a medical officer of the public health division of the department; and

(6) other persons or representatives as chosen by the secretary of health to ensure a thorough and unbiased evaluation of the program established under the Harm Reduction Act.

C. The advisory committee shall:

(1) develop policies and procedures for evaluation of the harm reduction program;

(2) develop criteria for data collection and program evaluation; and

(3) meet as necessary to monitor and analyze data and produce a report on the harm reduction program's impact on overdose mortality and other negative health outcomes associated with drug use.

D. The department may contract with private providers to operate the harm reduction program.



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E. The department shall promulgate rules as necessary for the administration of the Harm Reduction Act, including developing criteria for the types of supplies or devices provided pursuant to the harm reduction program and standards for distribution of those supplies or devices through that program. The criteria and standards shall be developed to provide supplies and devices in order to reduce:

(1) cases of negative health outcomes associated with drug use, such as overdoses or the spread of infectious disease; and

(2) harm by promoting reduced use of non-sterile items and improving participant engagement in harm reduction services and prevention education.

**History: Laws 1997, ch. 256, § 4; 2022, ch. 4, § 2.**

**The 2022 amendment,** effective May 18, 2022, revised the purpose of the harm reduction program from simply a needle exchange program to include reducing overdose mortality and other negative health outcomes associated with drug use, required the department of health to qualify participants for services and to provide participants with a document identifying them as participants of the harm reduction program, changed a member of the advisory committee from the HIV bureau to the infectious disease prevention and control bureau, revised the advisory committee's duties to include monitoring the program's activities and reporting on its impact on overdose mortality and other negative health outcomes associated with drug use, and required the department of health to promulgate rules for the administration of the Harm Reduction Act; in Subsection A, Paragraph A(1), after "establish and administer a", deleted "harm reduction", after "program", deleted "for the purpose of sterile hypodermic syringe and needle exchange" and added "that shall be known as the 'harm reduction program' to reduce overdose mortality and other negative health outcomes associated with drug use", added a new Paragraph A(2) and redesignated former Paragraphs A(2) and A(3) as Paragraphs A(3) and A(4), respectively, in Paragraph A(3), after "efforts to combat", deleted "the spread of blood borne diseases" and added "overdose mortality and other negative health outcomes associated with drug use"; in Subsection B, in the introductory paragraph, deleted "Within thirty days of the effective date of the Harm Reduction Act", in Paragraph B(3), deleted "human immunodeficiency virus sexually transmitted disease" and added "infectious disease prevention and control", in Paragraph B(4), after "epidemiology", added "and response"; in Subsection C, Paragraph C(3), after "meet as necessary to", added "monitor and", after "analyze data", deleted "and monitor", and after "harm reduction", deleted "program" and added "program's impact on overdose mortality and other negative health outcomes associated with drug use"; and added Subsection E.

## 24-2C-5. Program.

The harm reduction program shall provide participants with:

A. sterile hypodermic syringes and needles in exchange for used hypodermic syringes, needles or other objects used to inject controlled substances or controlled substance analogs into the human body;

B. other objects used to prepare or consume controlled substances or controlled substance analogs;

C. supplies or devices used for testing controlled substances or controlled substance analogs for potentially dangerous adulterants;

D. supplies or devices approved by the department for distribution in accordance with rules established pursuant to Subsection E of Section 24-2C-4 NMSA 1978;

E. education on the prevention of:

(1) the transmission of the human immunodeficiency virus and hepatitis B and C; and

(2) drug overdose mortality and other negative health outcomes; and

F. referral to substance abuse treatment services.

**History: Laws 1997, ch. 256, § 5; 2022, ch. 4, § 3.**

**The 2022 amendment,** effective May 18, 2022, amended the existing provision that required the harm reduction program to provide participants with sterile hypodermic syringes to include providing participants with other objects used to prepare or consume controlled substances, supplies or devices used for testing controlled substances for potentially dangerous adulterants, and supplies or devices as needed to prevent overdose and infection, and required that the program educate participants on prevention of drug overdose mortality and other negative health outcomes; in the introductory clause, after "The", added "harm reduction", and after "shall provide", added "participants with"; added new Subsections B through D and redesignated former Subsections B and C as Subsections E and F, respectively; in Subsection E, in the introductory clause, after "education", deleted "to participants" and after "on", added "the prevention of", added new paragraph designation "(1)" and Paragraph E(2), in Paragraph E(1), after "B and C", deleted "and prevention measures"; and in Subsection F, after "services", deleted "for participants".

## 24-2C-6. Repealed.

**Repeals.** — Laws 2022, ch. 4, § 5 repealed 24-2C-6 NMSA 1978, as enacted by Laws 1997, ch. 256, § 6, relating to immunity from criminal liability, effective May 18, 2022. For provisions of former section, *see* the 2021 NMSA 1978 on *NMOneSource.com*.



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# ARTICLE 2D

# Pain Relief

Sec.
24-2D-1. Short title.
24-2D-2. Definitions.
24-2D-3. Disciplinary action; evidentiary requirements.
24-2D-4. Disciplinary action; prohibitions.
24-2D-5. Notification.
24-2D-5.1. Pain management continuing education.
24-2D-5.2. Overdose prevention and pain management advisory council created; duties.
24-2D-6. Scope of act.
24-2D-7. Requirements for health care providers who prescribe, distribute or dispense opioid analgesics.

## 24-2D-1. Short title.

Chapter 24, Article 2D NMSA 1978 may be cited as the "Pain Relief Act".

**History: Laws 1999, ch. 126, § 1; 2019, ch. 94, § 1.**

**The 2019 amendment,** effective June 14, 2019, changed "This act" to "Chapter 24, Article 2D NMSA 1978".

## 24-2D-2. Definitions.

As used in the Pain Relief Act:

A. "accepted guideline" means the most current clinical pain management guideline developed by the American geriatrics society or the American pain society or a clinical pain management guideline based on evidence and expert opinion that has been accepted by the New Mexico medical board;

B. "acute pain" means the normal, predicted physiological response to a noxious chemical or thermal or mechanical stimulus, typically associated with invasive procedures, trauma or disease and generally time-limited;

C. "board" means the licensing board of a health care provider;

D. "chronic pain" means pain that persists after reasonable medical efforts have been made to relieve the pain or its cause and that continues, either continuously or episodically, for longer than three consecutive months. "Chronic pain" does not include pain associated with a terminal condition or with a progressive disease that, in the normal course of progression, may reasonably be expected to result in a terminal condition;

E. "clinical expert" means a person who by reason of specialized education or substantial relevant experience in pain management has knowledge regarding current standards, practices and guidelines;

F. "disciplinary action" means any formal action taken by a board against a health care provider, upon a finding of probable cause that the health care provider has engaged in conduct that violates the board's practice act;

G. "health care provider" means a person who is licensed or otherwise authorized by law to provide health care in the ordinary course of business or practice of the person's profession and who has prescriptive authority within the limits of the person's license;

H. "opioid analgesic" means buprenorphine, butorphanol, codeine, hydrocodone, hydromorphine, levorphanol, meperidine, methadone, morphine, nalbuphine, oxycodone, oxymorphone, pentazocine and propoxyphene as well as their brand names, isomers and combinations;

I. "opioid antagonist" means a drug approved by the federal food and drug administration that when administered negates or neutralizes in whole or in part the pharmacological effects of an opioid analgesic in the body, including naloxone and such other medications approved by the board of pharmacy for the reversal of opioid analgesic overdoses;

J. "pain" means acute and chronic pain; and

K. "therapeutic purpose" means the use of pharmaceutical and non-pharmaceutical medical treatment that conforms substantially to accepted guidelines for pain management.

**History: Laws 1999, ch. 126, § 2; 2005, ch. 140, § 1; 2012, ch. 41, § 1; 2019, ch. 94, § 2.**

**The 2019 amendment,** effective June 14, 2019, defined "opioid analgesic" and "opioid antagonist" as used in



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the Pain Relief Act; added new Subsections H and I and redesignated former Subsections H and I as Subsections J and K, respectively.

**The 2012 amendment,** effective May 16, 2012, redefined "accepted guideline"; defined "acute pain" and "chronic pain"; redefined "pain"; in Subsection A, after "means", deleted the former definition, which defined "accepted guideline" as a practice guideline developed by a national organization, society or governmental agency and added the current language; added a new Subsection B; relettered former Subsection B as new Subsection C; added a new Subsection D and relettered the succeeding subsections accordingly; in Subsection F, after "violates the", deleted "provider's respective"; and in Subsection H, after the word "means", deleted the former definition, which defined "pain" as serious bodily discomfort that required the services of a health care provider to alleviate and added the existing language.

**The 2005 amendment,** effective June 17, 2005, defined "accepted guideline" in Subsection A to include a guideline developed by a national joint commission on accreditation of health care organizations and other boards of health care providers with prescriptive authority; defined "disciplinary action" in Subsection D, to mean a violation of the health care provider's respective board's practice act; deleted the definition of "intractable pain" in former Subsection F and added a definition of "pain" in subsection to mean a condition of bodily sensation of serious physical discomfort that requires health care provider service to alleviate.

## 24-2D-3. Disciplinary action; evidentiary requirements.

A. A health care provider who prescribes, dispenses or administers medical treatment for the purpose of relieving pain and who can demonstrate by reference to an accepted guideline that the provider's practice substantially complies with that guideline and with the standards of practice identified in Section 24-2D-4 NMSA 1978 shall not be disciplined pursuant to board action or criminal prosecution, unless the showing of substantial compliance with an accepted guideline by the health care provider is rebutted by clinical expert testimony. If no currently accepted guidelines are available, then rules issued by the board may serve the function of such guidelines for purposes of the Pain Relief Act. The board rules shall conform to the intent of that act. Guidelines established primarily for purposes of coverage, payment or reimbursement do not qualify as an "accepted guideline" when offered to limit treatment options otherwise covered within the Pain Relief Act.

B. In the event that a disciplinary action or criminal prosecution is pursued, the board or prosecutor shall produce clinical expert testimony supporting the finding or charge of violation of disciplinary standards or other legal requirements on the part of the health care provider. A showing of substantial compliance with an accepted guideline shall only be rebutted by clinical expert testimony.

C. The provisions of this section apply to health care providers in the treatment of pain, regardless of a patient's prior or current chemical dependency or addiction. Each board shall adopt rules establishing standards and procedures for the application of the Pain Relief Act, including pain management for patients with substance use disorders.

D. In an action brought by a board against a health care provider based on treatment of a patient for pain, the board shall consider the totality of the circumstances and shall not use as the sole basis of the action:

(1) a patient's age;
(2) a patient's diagnosis;
(3) a patient's prognosis;
(4) a patient's history of drug abuse;
(5) the absence of consultation with a pain specialist; or
(6) the quantity of medication prescribed or dispensed.

**History: Laws 1999, ch. 126, § 3; 2005, ch. 140, § 2; 2012, ch. 41, § 2.**

**The 2012 amendment,** effective May 16, 2012, required the boards to adopt standards and procedures for pain management for patients with substance use disorders and in Subsection C, in the second sentence, after "Pain Relief Act, including", deleted "the care and treatment of chemically dependent individuals" and added the remainder of the sentence.

**The 2005 amendment,** effective June 17, 2005, added Subsection D to provide that in an action brought by the board against a health care provider based on treatment of a patient for pain, the board shall not base its decision solely on the factors listed in Subsection D(1) through 6).

## 24-2D-4. Disciplinary action; prohibitions.

Nothing in the Pain Relief Act shall prohibit discipline or prosecution of a health care provider for:

A. failing to maintain complete, accurate and current records documenting the physical examination and medical history of the patient, the basis for the clinical diagnosis of the patient and the treatment plan for the patient;



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B. writing false or fictitious prescriptions for controlled substances scheduled in the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 or Sections 26-1-23 and 30-31-18 NMSA 1978;

C. prescribing, administering or dispensing pharmaceuticals in violation of the provisions of the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 or Sections 26-1-23 and 30-31-18 NMSA 1978; or

D. diverting medications prescribed for a patient to the provider's personal use or to other persons.

**History: Laws 1999, ch. 126, § 4.**

**Cross references.** — For the federal Comprehensive Drug Abuse Prevention and Control Act of 1970, *see* 21 U.S.C. § 801 et seq.

## 24-2D-5. Notification.

The board shall notify the following persons of the Pain Relief Act and accepted guidelines:

A. health care providers under its jurisdiction; and

B. a health care provider being investigated by the board in relation to the provider's pain management practices.

**History: Laws 1999, ch. 126, § 5; 2012, ch. 41, § 3.**

**The 2012 amendment,** effective May 16, 2012, provided for notice of the act and accepted guidelines; in the introductory sentence, after "The board shall", deleted "make reasonable efforts to" and after "notify", added "the following persons of the Pain Relief Act and accepted guidelines"; in Subsection A, after "its jurisdiction", deleted "of the existence of the Pain Relief Act and inform any" and added "and"; and in Subsection B, after "provider", added "being", after "investigated", added "by the board", after "provider's", added "pain management" and after "practices", deleted "in the management of pain of the existence of the act".

## 24-2D-5.1. Pain management continuing education.

A board shall require non-cancer pain management continuing education as determined by its rules for health care providers under the board's jurisdiction who hold a federal drug enforcement administration registration and licensure to prescribe opioids.

**History: Laws 2005, ch. 140, § 4; 2012, ch. 41, § 4.**

**The 2012 amendment,** effective May 16, 2012, required non-cancer pain management continuing education and after "A board shall", deleted "encourage" and added "require non-cancer", after "continuing education", added "as determined by its rules", after "by its rules for", deleted "all", after "health care providers", deleted "who have prescriptive authority and who treat patients with pain" and added the remainder of the sentence.

## 24-2D-5.2. Overdose prevention and pain management advisory council created; duties.

A. The "overdose prevention and pain management advisory council" is created and shall be administratively attached to the department of health. Members of the council shall be appointed by the governor to consist of one representative each from the department of health, the human services department, the department of public safety, the New Mexico medical board, the board of nursing, the board of pharmacy, the board of acupuncture and oriental medicine, the New Mexico board of dental health care, the chiropractic board, the university of New Mexico health sciences center, a harm reduction organization, a third-party payer, a statewide medical association, a statewide association of pharmacists, a statewide association of nurse practitioners, a statewide association of certified registered nurse anesthetists and a statewide association of osteopathic physicians; one person who is a pain management specialist; one person who is an addiction specialist; one person who is a consumer health care advocate; and one person who has no direct ties or pecuniary interest in the health care field.

B. The council shall meet at least quarterly to review the current status of overdose prevention and current pain management practices in New Mexico and national overdose prevention and pain management standards and educational efforts for both consumers and professionals. The



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council shall also make recommendations regarding overdose prevention and pain management practices. The council may create subcommittees as needed. Members who are not public employees shall receive per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978]. Public employee members shall receive mileage from their respective employers for attendance at council meetings.

**History: Laws 2005, ch. 140, § 3; 2012, ch. 41, § 5; 2018, ch. 12, § 1; 2021, ch. 54, § 8.**

**The 2021 amendment,** effective June 18, 2021, removed the board of osteopathic medicine from the list of state agencies from which a representative is to be appointed to the overdose prevention and pain management advisory council"; and in Subsection A, after "the board of pharmacy", deleted "the board of osteopathic medicine".

**The 2018 amendment,** effective May 16, 2018, revised the name of the overdose prevention and pain management advisory council, added representatives of certain state agencies, organizations and specialties to the advisory council's membership, and clarified the duties of the advisory council; in the catchline, deleted "Prescription drug misuse and"; in Subsection A, after "The", deleted "prescription drug misuse and", after "the department of health", added "the human services department, the department of public safety", after "board of osteopathic", deleted "medical examiners" and added "medicine", after "dental health care, the", deleted "board of", after "chiropractic", deleted "examiners" and added "board", after "health sciences center", added "a harm reduction organization, a third-party payer", and after "pain management specialist", added "one person who is an addiction specialist"; and in Subsection B, after "current status of", deleted "prescription drug misuse and", after "New Mexico and national", deleted "prescription drug misuse and", and after "The council shall also", deleted "recommend pain management and clinical guidelines" and added "make recommendations regarding overdose prevention and pain management practices. The council may create subcommittees as needed".

**The 2012 amendment,** effective May 16, 2012, changed the name and composition of the pain management advisory council; in the title added "Prescription drug misuse and overdose prevention and"; in Subsection A, in the first sentence, after "The", added "prescription drug misuse and overdose prevention and"; in the second sentence, after "one representative each from the" added "department of health, the"; after "oriental medicine", added "the New Mexico board of dental health care, the board of chiropractic examiners"; after "osteopathic physicians", added "one person who is a pain management specialist"; and after "health care advocate; and", deleted "three persons" and added "one person"; and in Subsection B, in the first sentence, after "quarterly to review", added "the current status of prescription drug misuse and overdose prevention and"; after "New Mexico and national", added "prescription drug misuse and overdose prevention and"; and after "professionals", deleted "and" and added a period; and in the second sentence, added "The council"; after "shall", added "also"; after "pain management", added "and clinical"; and after "guidelines", deleted "for each health care profession licensed in New Mexico with prescriptive authority to its respective board".

## 24-2D-6. Scope of act.

Nothing in the Pain Relief Act shall be construed as expanding the authorized scope of practice of health care providers.

**History: Laws 1999, ch. 126, § 6.**

## 24-2D-7. Requirements for health care providers who prescribe, distribute or dispense opioid analgesics.

A. A health care provider who prescribes, distributes or dispenses an opioid analgesic for the first time to a patient shall advise the patient on the risks of overdose and inform the patient of the availability of an opioid antagonist. With respect to a patient to whom an opioid analgesic has previously been prescribed, distributed or dispensed by the health care provider, the health care provider shall advise the patient on the risks of overdose and inform the patient of the availability of an opioid antagonist on the first occasion that the health care provider prescribes, distributes or dispenses an opioid analgesic each calendar year.

B. A health care provider who prescribes an opioid analgesic for a patient shall co-prescribe an opioid antagonist if the amount of opioid analgesic being prescribed is at least a five-day supply. The prescription for the opioid antagonist shall be accompanied by written information regarding the temporary effects of the opioid antagonist and techniques for administering the opioid antagonist. That written information shall contain a warning that a person administering the opioid antagonist should call 911 immediately after administering the opioid antagonist.

**History: Laws 2019, ch. 94, § 3.**

**Effective dates.** — Laws 2019, ch. 94 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.



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# ARTICLE 2E

## Testing for Viral Hepatitis

Sec.
24-2E-1. Repealed.
24-2E-2. Repealed.
24-2E-3. Repealed.

### 24-2E-1. Repealed.

**Repealed.** — Laws 2013, ch. 28, § 1 repealed 24-2E-1 NMSA 1978, as enacted by Laws 2001, ch. 136, § 1, relating to testing of persons for hepatitis, consent not required, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

### 24-2E-2. Repealed.

**Repealed.** — Laws 2013, ch. 28, § 1 repealed 24-2E-2 NMSA 1978, as enacted by Laws 2001, ch. 136, § 2, relating to confidentiality, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

### 24-2E-3. Repealed.

**Repealed.** — Laws 2013, ch. 28, § 1 repealed 24-2E-3 NMSA 1978, as enacted by Laws 2001, ch. 136, § 3, relating to penalties, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 3

## Sickle Cell Trait and Sickle Cell Anemia

Sec.
24-3-1. Sickle cell trait and sickle cell anemia; education; diagnosis.

### 24-3-1. Sickle cell trait and sickle cell anemia; education; diagnosis.

A. The health services division [public health division] of the health and environment department [department of health] shall provide by regulation procedures to establish, maintain, promote and effectuate a program designed to educate the general public and public and private school students regarding the nature and inheritance of sickle cell trait and sickle cell anemia. The division shall consult and advise the state board of education [public education department] concerning development and use of informational and educational materials relating to sickle cell trait and sickle cell anemia.

B. The health services division [public health division] of the health and environment department [department of health] shall provide by regulation for diagnosis of sickle cell trait and sickle cell anemia. Regulations shall provide for, among other things:

(1) the making available to all physicians by the health services division [public health division] of current information concerning the nature, effects, diagnosis and treatment of sickle cell trait and sickle cell anemia;

(2) the testing of all school-age children who may be susceptible to sickle cell trait and sickle cell anemia, at least once, as a part of the school health program; and

(3) the making available without cost to any person unable to afford the services of a physician, tests to diagnose sickle cell trait and sickle cell anemia.

**History: 1953 Comp., § 12-3-45, enacted by Laws 1973, ch. 300, § 1; 1977, ch. 253, § 25.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.



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Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department and enacted a new 9-7-4 NMSA 1978 which created the department of health. Section 9-7-5 NMSA 1978, as amended by Laws 1991, ch. 25, § 17, made the secretary of health the administrative head of the department.

Laws 2004, ch. 27, § 27 provided that all references in law to the state board of education shall be deemed to be references to the public education department.

Subsection B of 9-7-4 NMSA 1978 provided that all references to the "health services division" shall be construed to be references to the "public health division".

**Cross references.** — For education and testing relating to phenylketonuria, *see* 24-1-6 NMSA 1978.

For public education department, *see* Chapter 9, Article 24 NMSA 1978.

# ARTICLE 3A
# Certificates of Need for New Health Services

(Repealed by Laws 1981, ch. 300, § 9.)

## 24-3A-1 to 24-3A-13. Repealed.

**Repeals.** — Laws 1981, ch. 300, § 9 repealed 24-3A-1 to 24-3A-13 NMSA 1978, as enacted by Laws 1978, Chapter 104, the Certificate of Need Act, effective July 1, 1983.

# ARTICLE 3B
# Department of Health Education

Sec.
24-3B-1. Short title.
24-3B-2. Definitions.
24-3B-3. Education of school age residents.
24-3B-4. Fund created; use; calculation.

## 24-3B-1. Short title.

Chapter 24, Article 3B NMSA 1978 may be cited as the "Department of Health Education Act".

**History: 1978 Comp., § 24-3B-1, enacted by Laws 1978, ch. 211, § 1; 1991, ch. 25, § 27.**

**The 1991 amendment,** effective March 29, 1991, rewrote this section, which read "The provisions of Sections 1 through 4 may be cited as the 'Health and Environment Department Education Act'".

## 24-3B-2. Definitions.

As used in the Department of Health Education Act:

A. "department" means the department of health;

B. "educational appraisal and review committee" means the educational appraisal and review committee as defined in the special education regulations of the state board of education [public education department];

C. "evaluated school-age resident" means a school-age resident who has been evaluated by the department according to the state board of education [public education department] special education regulations;

D. "fund" means the department of health education fund;

E. "institution-bound resident" means an evaluated school-age resident who is not enrolled in a public school;

F. "referred school-age resident" means an evaluated school-age resident who has been referred to a school district for enrollment;

G. "school-age resident" means a school-age person as defined in Section 22-1-2 NMSA 1978 who is a client as defined in Section 43-1-3 NMSA 1978 in a state institution under the authority of the secretary; and

H. "secretary" means the secretary of health.



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**History: 1978 Comp., § 24-3B-2, enacted by Laws 1978, ch. 211, § 2; 1991, ch. 25, § 28.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 27, § 27 provided that all references in law to the state board of education shall be deemed to be references to the public education department.

**Cross references.** — For public education department, *see* Chapter 9, Article 24 NMSA 1978.

**The 1991 amendment,** effective March 29, 1991, added the catchline and substituted "Department of Health Education Act" for "Health and Environment Department Education Act" in the introductory phrase, "department of health" for "health and environment department as created under the Health and Environment Department Act" in Subsection A, "department of health" for "health and environment department" in Subsection D, "22-1-2 NMSA 1978" for "77-1-2 NMSA 1953" and "43-1-3 NMSA 1978" for "34-2A-2 NMSA 1953" in Subsection G and "health" for "the department" in Subsection H.

## 24-3B-3. Education of school age residents.

A. All school age residents shall be evaluated by the department for purposes of educational placement according to the special education regulations of the state board of education [public education department].

B. Any evaluated school age resident not recommended for placement in a public school by the department or as a result of the appeal process shall be provided an educational program by the institution in which he is a school age resident. All such educational programs shall be in accordance with the special education regulations of the state board of education [public education department].

C. The department shall refer any evaluated school age resident who has been recommended for placement in a public school to a school district for enrollment.

D. The educational appraisal and review committee of a school district shall evaluate and recommend placement of all referred school age residents according to the placement process as provided in the special education regulations of the state board of education [public education department]. A school district shall enroll all referred school age residents who have been recommended for placement in a public school by the educational appraisal and review committee of the school district.

E. The department may appeal any recommendation to not place a referred school age resident in a public school only if such recommendation is made by the educational appraisal and review committee of the school district where the institution, in which the referred school age resident is a client, is located. The appeal process shall be as provided in the special education regulations of the state board of education [public education department]. Any referred school age resident who has been recommended for placement in a public school as a result of the appeal process shall be enrolled in the school district where the institution, in which the referred school age resident is a client, is located, as provided in Paragraph (2), Subsection C of Section 22-12-4 NMSA 1978.

F. All school age residents who are enrolled in a public school shall be counted in the special education membership of the school district.

G. Transportation for all school age residents enrolled in a public school shall be provided to and from the institution in which they are clients and the public school in which they are enrolled. Such transportation shall be provided in accordance with Section 22-8-2 and Sections 22-16-1 through 22-16-10 NMSA 1978.

**History: 1978 Comp., § 24-3B-2 enacted by Laws 1978, ch. 211, § 3.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 27, § 27 provided that all references in law to the state board of education shall be deemed to be references to the public education department.

**Cross references.** — For public education department, *see* Chapter 9, Article 24 NMSA 1978.

## 24-3B-4. Fund created; use; calculation.

A. There is created the "health and environment department education fund" in the state treasury.

B. The fund shall be used solely to provide educational services to institution-bound residents of the state institutions under the authority of the secretary.

C. The secretary shall distribute the fund to institutions under his authority within limits established by law.



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D. The secretary shall determine the allocation to each institution from the fund according to the annual program cost of that institution as calculated on September 15 of the fiscal year.

E. The annual program cost for each institution shall be determined by the following calculation:

| | | | | | | |
|---|---|---|---|---|---|---|
| number of institution-bound residents | × | 3.9 | × | dollar value per program unit | = | annual program cost |

F. The dollar value per program unit shall be the same as the dollar value per program unit as established by the legislature for the state equalization guarantee.

G. Each director of each state institution under the authority of the secretary shall submit annually, on or before October 15, to the secretary an estimate for the succeeding fiscal year of the number of institution-bound residents and any other information necessary to calculate annual program cost.

H. The secretary shall submit annually, on or before November 15, to the department of finance and administration the recommendations of the department regarding the fund for the succeeding fiscal year, for inclusion in the executive budget document.

**History: 1978 Comp., § 24-3B-4, enacted by Laws 1978, ch. 211, § 4.**

**Cross references.** — For state equalization guarantee distributions, *see* 22-8-25 NMSA 1978.

# ARTICLE 4

# District Health Officers

Sec.
24-4-1. District health officer; compensation; private practice prohibited; exception.
24-4-2. Local public health offices; regional director; health officer; expenses.
24-4-3. Additional health officers; offices; expenses.

## 24-4-1. District health officer; compensation; private practice prohibited; exception.

Each district health officer shall receive the salary prescribed for such position by the state personnel board. The salary shall constitute full authority for the district health officers and they shall receive no other salary payment or fees from any other public source. No district health officer shall engage in the private practice of medicine, maintain an office for the practice of medicine, nor accept nor receive any fee, gratuity or emolument of any form for rendering medical or surgical service to any citizen of this state, except that permission for such practice may be given by the secretary of the health and environment department [secretary of health] in any district, the board of which has declared an emergency to exist.

**History: Laws 1935, ch. 131, § 6; 1941 Comp., § 71-206; Laws 1947, ch. 172, § 4; 1953 Comp., § 12-2-6; Laws 1957, ch. 174, § 3; 1973, ch. 4, § 8; 1977, ch. 253, § 17; 1980, ch. 81, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department and enacted a new 9-7-4 NMSA 1978 which created the department of health. Section 9-7-5 NMSA 1978, as amended by Laws 1991, ch. 25, § 17, made the secretary of health the administrative head of the department.

**Cross references.** — For appointment and establishment of powers and duties of district health officers and assistants, *see* 24-1-4 NMSA 1978.

For state personnel board, *see* 10-9-8 NMSA 1978.

ANNOTATIONS

**Section prohibits district health officers from engaging in the practice of medicine** except in conjunction with their duties as health officers. 1953-54 Op. Att'y Gen. No. 53-5753.

**Acceptance of payment for services.** — Where the board has not declared a state of emergency to exist in the district, the district health officer may not accept payment for his services since such would constitute the private practice of medicine and the receipt of a "fee, gratuity or emolument" for rendering medical or surgical services. 1957-58 Op. Att'y Gen. No. 57-117.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 39 Am. Jur. 2d Health § 8 et seq.

39A C.J.S. Health and Environment §§ 9 to 15.



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## 24-4-2. Local public health offices; regional director; health officer; expenses.

A. The board of county commissioners of each county shall provide suitable quarters for:

(1) the local public health offices, including office space for the administrative staff, office space for health care personnel and clinic space and waiting space for patients, their friends and families; and

(2) the regional director and regional health officer, including office space for the administrative staff.

B. The boards of county commissioners shall make proper provision for all office and other expense, including utilities and maintenance but excluding janitorial services, incurred in enforcing the health laws and regulations within the counties in which the expense is incurred.

C. The board of county commissioners of each county may, upon adoption of a resolution approved by the department of finance and administration, deposit such county funds as are provided in this section with the state treasurer to the credit of the department of health for such purposes as are provided in this section at such times as such funds are available; provided the depositing of such funds with the state treasurer is upon a voucher approved by the board of county commissioners subject to all statutes and regulations covering the disbursement of county funds, excepting that such funds may be so deposited prior to said payments being due and payable; and provided further that no such deposits shall be in excess of any line item of the approved county health budget.

**History: Laws 1935, ch. 131, § 7; 1941 Comp., § 71-207; 1953 Comp., § 12-2-7; Laws 1957, ch. 174, § 4; 1977, ch. 24, § 134; 1977, ch. 253, § 18; 1980, ch. 81, § 2; 2017, ch. 87, § 21.**

**Cross references.** — For state treasurer, *see* N.M. Const., art. V, § 1 and 8-6-1 NMSA 1978.

**The 2017 amendment,** effective June, 16, 2017, removed references to health districts and added references to health regions; in the catchline, deleted "Offices of county" and added "Local public", after "health", deleted "department and district" and added "offices; regional director"; designated the previously undesignated first sentence of the section as Subsection A, after "county", deleted "in such health districts", added paragraph designation "(1)", after "the", deleted "county health department and the district health officer" and added "local public health offices", after "office space for the", deleted "district health officer and", after "space for", deleted "physician" and added "health care", after "personnel", added "and", after "clinic space", deleted "for patients", and added new Paragraph A(2); designated the previously undesignated second sentence of the section as Subsection B, after "maintenance", added "but excluding janitorial services"; and designated the previously undesignated third sentence of the section as Subsection C, after "county", deleted "in such health districts", after "are provided", added "in this section", after "to the credit of the", added "department of", after "health", deleted "and environment department", and after "are provided", added "in this section".

## 24-4-3. Additional health officers; offices; expenses.

A. Whenever, in the opinion of the director of the public health division of the department of health, conditions require the employment of persons in addition to the district health officer to properly execute the health laws and regulations in any county, the board of county commissioners of such county, with the approval of the secretary of health, shall provide suitable quarters for such additional persons. The boards of county commissioners shall make proper provision for all office expenses and other expenses, including utilities and maintenance, for such additional persons.

B. The board of county commissioners of such county may, upon adoption of a resolution approved by the secretary of finance and administration, deposit county funds for such purposes as are provided pursuant to this section with the state treasurer to the credit of the department of health for such purposes as are provided in this section at such time as such funds are available. The depositing of such funds with the state treasurer shall be upon a voucher approved by the board of county commissioners subject to all statutes and regulations covering the disbursement of county funds except that such funds may be so deposited prior to disbursement being due and payable. No such deposits shall be in excess of the approved budget for this purpose.

**History: Laws 1919, ch. 85, § 36, added by 1920 (S.S.), ch. 2, § 1 (36); 1921, ch. 143, § 1 (36); 1929, ch. 55, § 1 (36); C.S. 1929, § 110-331; Laws 1941, ch. 97, § 1; 1941 Comp., § 71-211; 1953 Comp., § 12-2-11; Laws 1957, ch. 174, § 5; 1973, ch. 4, § 9; 1977, ch. 247, § 135; 1977, ch. 253, § 19; 1983, ch. 301, § 71; 2017, ch. 87, § 22.**

**Cross references.** — For state personnel board, *see* 10-9-8 NMSA 1978.



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**The 2017 amendment,** effective June, 16, 2017, required the secretary of health to provide for additional health officers when conditions require their employment to properly execute the health laws and regulations in any county, and removed the provision that the appointment and dismissal of additional health officers are governed by the State Personnel Act; in the catchline, deleted "state personnel board rules govern appointment and dismissal" and added "offices; expenses"; designated the previously undesignated first sentence of the section as Subsection A, after "director of the", added "public", after the first occurrence of "health", deleted "services", after "division of the", added "department of", after the second occurrence of "health", deleted "and environment department", after "approval of the", deleted "director of the" and added "secretary of", and after "health", deleted "services division, may employ such additional persons as the director shall designate, and their compensation and expenses shall be paid from the county general fund upon vouchers drawn by the district health officer" and added the remainder of the subsection; designated the previously undesignated remainder of the section as Subsection B, after "county funds", added "for such purposes", after "provided", added "pursuant to this section", after "credit of the", added "department of", after "health", deleted "and environment department", and after "provided", added "in this section", and deleted "the appointment and dismissal of all persons employed hereunder shall be governed by the rules promulgated under the Personnel Act by the personnel board".

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39A C.J.S. Health and Environment § 11.

# ARTICLE 5

# Immunization

Sec.
24-5-1. Immunization regulations.
24-5-1.1. Short title.
24-5-2. Unlawful to enroll in school unimmunized; unlawful to refuse to permit immunization.
24-5-3. Exemption from immunization.
24-5-4. Superintendent; duty to report.
24-5-5. Who may immunize; who must pay.
24-5-6. Penalty.
24-5-7. Immunization registry; creation.
24-5-8. Reporting.
24-5-9. Access.
24-5-10. Use.
24-5-11. Rules.
24-5-12. Obligations.
24-5-13. Rights.
24-5-14. Repealed.
24-5-15. Liability.

## 24-5-1. Immunization regulations.

The public health division of the department of health shall, after consultation with the state board of education [public education department], promulgate rules and regulations governing the immunization against diseases deemed to be dangerous to the public health, to be required of children attending public, private, home or parochial schools in the state. The immunizations required and the manner and frequency of their administration shall conform to recommendations of the advisory committee on immunization practices of the United States department of health and human services and the American academy of pediatrics. The public health division shall supervise and secure the enforcement of the required immunization program.

**History: 1953 Comp., § 12-3-4.1, enacted by Laws 1959, ch. 329, § 1; 1977, ch. 253, § 20; 1985, ch. 21, § 5; 1998, ch. 26, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 25, § 27, provided that all references to the state board of education shall be deemed references to the public education department. *See* 9-24-15 NMSA 1978.

**Cross references.** — For department of health, *see* 9-7-4 NMSA 1978.

For public education department, *see* Chapter 9, Article 24 NMSA 1978.

**The 1998 amendment,** effective May 20, 1998, in the first sentence, substituted "public health" for "health services", deleted "health and environment" following "division of the", and inserted "of health" near the beginning; substituted the language beginning with "recommendations of the advisory committee" for "recognized standard medical practice in the state" in the second sentence; and substituted "public health" for "health services" in the last sentence.

**ANNOTATIONS**

**Claim for defective design of vaccine.** — The Public Health Service Act, 42 U.S.C. § 201 et seq., and the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq., and the regulations promulgated thereunder, do not impliedly preempt a state common-law products liability claim for defective design of a pertussis vaccine. *MacGillivray v. Lederle Lab. Div.*, 667 F. Supp. 743 (D.N.M. 1987).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39 Am. Jur. 2d Health § 27; 68 Am. Jur. 2d Schools §§ 277 to 280.

Products liability: Pertussis vaccine manufacturers, 57 A.L.R.4th 911, 98 A.L.R. Fed. 124.

AIDS infection as affecting right to attend public school, 60 A.L.R.4th 15.

Power of court or other public agency to order vaccination over parental religious objection, 94 A.L.R.5th 613.

39A C.J.S. Health and Environment §§ 18, 22; 79 C.J.S. Schools and School Districts §§ 452, 453.



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## 24-5-1.1. Short title.

Chapter 24, Article 5 NMSA 1978 may be cited as the "Immunization Act".

**History: Laws 2004, ch. 45, § 1.**

## 24-5-2. Unlawful to enroll in school unimmunized; unlawful to refuse to permit immunization.

It is unlawful for any student to enroll in school unless he has been immunized, as required under the rules and regulations of the health services division [public health division] of the health and environment department [department of health], and can provide satisfactory evidence of such immunization. Provided that, if he produces satisfactory evidence of having begun the process of immunization, he may enroll and attend school as long as the immunization process is being accomplished in the prescribed manner. It is unlawful for any parent to refuse or neglect to have his child immunized, as required by this section, unless the child is properly exempted.

**History: 1953 Comp., § 12-3-4.2, enacted by Laws 1959, ch. 329, § 2; 1975, ch. 25, § 1; 1977, ch. 253, § 21.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department and enacted a new 9-7-4 NMSA 1978, which created the department of health. Section 9-7-5 NMSA 1978, as amended by Laws 1991, ch. 25, § 17, made the secretary of health the administrative head of the department.

Subsection B of 9-7-4 NMSA 1978 provided that all references to the "health services division" shall be construed to be references to the "public health division".

## 24-5-3. Exemption from immunization.

A. Any minor child through his parent or guardian may file with the health authority charged with the duty of enforcing the immunization laws:

(1) a certificate of a duly licensed physician stating that the physical condition of the child is such that immunization would seriously endanger the life or health of the child; or

(2) affidavits or written affirmation from an officer of a recognized religious denomination that such child's parents or guardians are bona fide members of a denomination whose religious teaching requires reliance upon prayer or spiritual means alone for healing; or

(3) affidavits or written affirmation from his parent or legal guardian that his religious beliefs, held either individually or jointly with others, do not permit the administration of vaccine or other immunizing agent.

B. Upon filing and approval of such certificate, affidavits or affirmation, the child is exempt from the legal requirement of immunization for a period not to exceed nine months on the basis of any one certificate, affidavits or affirmation.

**History: 1953 Comp., § 12-3-4.3, enacted by Laws 1959, ch. 329, § 3; 1979, ch. 42, § 1.**

**ANNOTATIONS**

**Section is controlling as to children** attending public, private or parochial schools. 1961-62 Op. Att'y Gen. No. 62-05.

**Chiropractors do not qualify as physicians** for the purposes intended by this section. 1959-60 Op. Att'y Gen. No. 59-96.

## 24-5-4. Superintendent; duty to report.

It is the duty of each school superintendent, whether of a public, private or parochial school, to cause to be prepared a record showing the required immunization status of every child enrolled in or attending a school under his jurisdiction. These records must be kept current and available to the public health authorities. The name of any parent or guardian who neglects or refuses to permit his child to be immunized against diseases as required by rules and regulations



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promulgated hereunder shall be reported by the school superintendent to the director of the health services division [public health division] of the health and environment department [department of health].

**History: 1953 Comp., § 12-3-4.4, enacted by Laws 1959, ch. 329, § 4; 1975, ch. 25, § 2; 1977, ch. 253, § 22.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department and enacted a new 9-7-4 NMSA 1978 which created the department of health. Section 9-7-5 NMSA 1978, as amended by Laws 1991, ch. 25, § 17, made the secretary of health the administrative head of the department.

Subsection B of 9-7-4 NMSA 1978 provided that all references to the "health services division" shall be construed to be references to the "public health division".

## 24-5-5. Who may immunize; who must pay.

The immunization required by Chapter 24, Article 5 NMSA 1978 may be done by any health care provider who holds a license or certificate pursuant to state law that authorizes him to immunize. If the parents are unable to pay, the immunization shall be provided by the public health division of the department of health. The department shall undertake every effort to obtain federal funding to implement the department's immunization program. No public health employee may receive any fee for immunization service if the service is compensated for by the public health division. Local school boards may contribute toward the cost of materials and supplies for immunizations.

**History: 1953 Comp., § 12-3-4.5, enacted by Laws 1959, ch. 329, § 5; 1977, ch. 253, § 23; 1998, ch. 26, § 2.**

**The 1998 amendment,** effective May 20, 1998, inserted "by Chapter 24, Article 5 NMSA 1978" in the first sentence; in the second sentence, substituted "public health" for "health services", deleted "health and environment" following "division of the", and inserted "of health" following "department"; added the third sentence; and substituted "public health" for "health services" in the fourth sentence.

## 24-5-6. Penalty.

Violation of any provisions relating to the immunization of school children is a misdemeanor.

**History: 1953 Comp., § 12-3-4.6, enacted by Laws 1959, ch. 329, § 6.**

**Cross references.** — For sentencing for misdemeanors, *see* 31-19-1 NMSA 1978.

## 24-5-7. Immunization registry; creation.

The department of health, in conjunction with the human services department, shall establish and maintain a state immunization registry. The registry shall be a single repository of accurate, complete and current immunization records to aid, coordinate and promote effective and cost-efficient disease prevention and control efforts.

**History: Laws 2004, ch. 45, § 2.**

## 24-5-8. Reporting.

Physicians, nurses, pharmacists and other health care providers shall report on immunization to the immunization registry unless the patient, or the patient's guardian if the patient is a minor, refuses to allow reporting of this information.

**History: Laws 2004, ch. 45, § 3; 2005, ch. 45, §1; 2013, ch. 93, § 1.**

**The 2013 amendment,** effective June 14, 2013, required health providers to report immunizations to the immunization registry; and after "providers", deleted "may" and added "shall".

**The 2005 amendment,** effective June 17, 2005, permitted pharmacists to report on immunization to the immunization registry unless the patient or minor patient's guardian refuses to allow the reporting of the immunization.



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## 24-5-9. Access.

Access to the information in the immunization registry shall be limited to primary care physicians, nurses, pharmacists, managed care organizations, school nurses and other appropriate health care providers or public health entities as determined by the secretary of health; provided that a managed care organization shall be entitled to access information only for its enrollees.

**History: Laws 2004, ch. 45, § 4; 2005, ch. 45, §2.**

**The 2005 amendment,** effective June 17, 2005, added pharmacists to the list of those persons who have access to information in the immunization registry.

## 24-5-10. Use.

The information contained in the immunization registry shall be used for the following purposes:

A. to ensure that the registrants receive all recommended immunizations in a timely manner by providing access to the registrant's immunization record;

B. to improve immunization rates by facilitating notice to registrants of overdue or upcoming immunizations; and

C. to control communicable diseases by assisting in the identification of individuals who require immediate immunization in the event of a disease outbreak.

**History: Laws 2004, ch. 45, § 5.**

## 24-5-11. Rules.

The secretary of health shall adopt rules for the immunization registry pursuant to the Immunization Act concerning the following:

A. the implementation and maintenance of the registry;

B. requirements for content and submission of reports of immunization to the registry;

C. procedures for the patient, or the patient's parent or guardian if the patient is a minor, to decline to participate in the registry;

D. procedures for the registrant, or the registrant's parent or guardian if the registrant is a minor, to review and correct information contained in the registry;

E. procedures for the registrant, or the registrant's parent or guardian if the registrant is a minor, to withdraw consent for participation at any time and to remove information from the registry;

F. limits on and methods of access to the registry by those authorized to gain access; and

G. procedures for managed care organizations to obtain summary statistics of immunization information on managed care organization members from the registry.

**History: Laws 2004, ch. 45, § 6.**

## 24-5-12. Obligations.

Nothing in the immunization registry is intended to affect the obligations of persons to have their children immunized pursuant to the Immunization Act.

**History: Laws 2004, ch. 45, § 7.**

## 24-5-13. Rights.

Nothing in the Immunization Act shall preclude the right of the patient, or the patient's parent or guardian if the patient is a minor, to claim exemption from immunization as defined in Section 24-5-3 NMSA 1978; nor shall anything in the Immunization Act require such patient to



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be included in the immunization registry if the patient, or the patient's parent or guardian if the patient is a minor, objects on any grounds, including that such registry conflicts with the religious belief of the patient, or the patient's parent or guardian if the patient is a minor.

**History: Laws 2004, ch. 45, § 8.**

## 24-5-14. Repealed.

**Repeals.** — Laws 2017, ch. 87, § 31 repealed 24-5-14 NMSA 1978, as enacted by Laws 2004, ch. 45, § 9, relating to participation in immunization registry, effective June 16, 2017. For provisions of former section, *see* the 2016 NMSA 1978 on *NMOneSource.com*.

## 24-5-15. Liability.

Any person reporting, receiving, using or disclosing information to or from the immunization registry as authorized by the Immunization Act or by any rule adopted pursuant to that act shall not be liable for civil damages of any kind connected with such submission, use or disclosure of immunization information.

**History: Laws 2004, ch. 45, § 10.**

# ARTICLE 5A

# Vaccine Purchasing

Sec.
24-5A-1. Short title.
24-5A-2. Definitions.
24-5A-3. Statewide vaccine purchasing program.
24-5A-4. Vaccine purchasing fund.
24-5A-5. Authorized uses of the vaccine purchasing fund.
24-5A-6. Reporting.
24-5A-7. Appeal; penalties.
24-5A-8. Powers and authority.
24-5A-9. Applicability.

## 24-5A-1. Short title.

This act [24-5A-1 through 24-5A-9 NMSA 1978] may be cited as the "Vaccine Purchasing Act".

**History: Laws 2015, ch. 5, § 1.**

**Emergency clauses.** — Laws 2015, ch. 5, § 10 contained an emergency clause and was approved March 20, 2015.

## 24-5A-2. Definitions.

As used in the Vaccine Purchasing Act:

A. "advisory committee on immunization practices" means the group of medical and public health experts that develops recommendations on how to use vaccines to control diseases in the United States, established under Section 222 of the federal Public Health Service Act;

B. "department" means the department of health;

C. "fund" means the vaccine purchasing fund;

D. "group health plan" means an employee welfare benefit plan to the extent that the plan provides medical care to employees or their dependents under the Employee Retirement Income Security Act of 1974 directly or through insurance, reimbursement or other means;

E. "health insurance coverage" means benefits consisting of medical care provided directly or through insurance or reimbursement or other means under any hospital or medical service policy or certificate, hospital or medical service plan contract or health maintenance organization contract offered by a health insurance issuer;



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F. "health insurer" means any entity subject to regulation by the office of superintendent of insurance that:

(1) provides or is authorized to provide health insurance or health benefit plans;

(2) administers health insurance or health benefit coverage; or

(3) otherwise provides a plan of health insurance or health benefits;

G. "insured child" means a child under the age of nineteen who is eligible to receive health insurance coverage from a health insurer or medical care pursuant to a group health plan;

H. "office of superintendent" means the office of superintendent of insurance;

I. "policy" means any contract of health insurance between a health insurer and the insured and all clauses, riders, endorsements and parts thereof;

J. "provider" means an individual or organization licensed, certified or otherwise authorized or permitted by law to provide vaccinations to insured children; and

K. "vaccines for children program" means the federally funded program that provides vaccines at no cost to eligible children pursuant to Section 1928 of the federal Social Security Act.

**History: Laws 2015, ch. 5, § 2.**

**Emergency clauses.** — Laws 2015, ch. 5, § 10 contained an emergency clause and was approved March 20, 2015.

**Cross references.** — For the federal Public Health Service Act, *see* 42 U.S.C.

For the federal Social Security Act, *see* 42 U.S.C. § 301 et seq.

## 24-5A-3. Statewide vaccine purchasing program.

A. The department shall establish and administer a statewide vaccine purchasing program to:

(1) expand access to childhood immunizations recommended by the advisory committee on immunization practices;

(2) maintain and improve immunization rates;

(3) facilitate the acquisition by providers of vaccines for childhood immunizations recommended by the advisory committee on immunization practices; and

(4) leverage public and private funding and resources for the purchase, storage and distribution of vaccines for childhood immunizations recommended by the advisory committee on immunization practices.

B. The department shall:

(1) purchase vaccines for all children in New Mexico, including children eligible for the vaccines for children program and insured children;

(2) invoice each health insurer and group health plan to reimburse the department for the cost of vaccines provided directly or indirectly by the department to such health insurer's or group health plan's insured children;

(3) maintain a list of registered providers who receive vaccines for insured children that are purchased by the state and provide such list to each health insurer and group health plan with every invoice;

(4) report the failure of a health insurer to reimburse the department within thirty days of the date of the invoice to the office of superintendent;

(5) report the failure of a health insurer or group health plan to reimburse the department within thirty days of the date of the invoice to the office of the attorney general for collection; and

(6) credit all receipts collected from health insurers and group health plans pursuant to the Vaccine Purchasing Act to the fund.

C. No later than July 1, 2015 and July 1 of each year thereafter, the department shall estimate the amount to be expended annually by the department to purchase, store and distribute vaccines recommended by the advisory committee on immunization practices to all insured children in the state, including a reserve of ten percent of the amount estimated.

D. No later than September 1, 2015 and each quarter thereafter, the department shall invoice each health insurer and each group health plan for one-fourth of its proportionate share of the estimated amount and reserve pursuant to Subsection C of this section, calculated pursuant to Subsection B of Section 6 [24-5A-6 NMSA 1978] of the Vaccine Purchasing Act.



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E. The department may update its estimated amount to be expended annually and its reserve to take into account increases or decreases in the cost of vaccines or the costs of additional vaccines that the department determines should be included in the statewide vaccine purchasing program and adjust the amount invoiced to each health insurer and group health plan the following quarter.

**History: Laws 2015, ch. 5, § 3.**

**Emergency clauses.** — Laws 2015, ch. 5, § 10 contained an emergency clause and was approved March 20, 2015.

## 24-5A-4. Vaccine purchasing fund.

A. The "vaccine purchasing fund" is created in the state treasury. The fund consists of amounts reimbursed to the state by health insurers and group health plans pursuant to the Vaccine Purchasing Act and of appropriations from, and transfers made to, the fund. Money in the fund shall be expended only for the purposes specified in the Vaccine Purchasing Act, by warrant issued by the secretary of finance and administration pursuant to vouchers approved by the secretary of health.

B. Money from the fund may be appropriated to the department to be expended only as authorized in Section 5 [24-5A-5 NMSA 1978] of the Vaccine Purchasing Act.

C. The fund shall be audited in the same manner as other state funds are audited, and all records of payments made from the fund shall be open to the public.

D. Any balance remaining in the fund shall not revert or be transferred to any other fund at the end of a fiscal year.

E. Money in the fund shall be invested by the state investment officer in accordance with the limitations in Article 12, Section 7 of the constitution of New Mexico. Income from investment of the fund shall be credited to the fund.

**History: Laws 2015, ch. 5, § 4.**

**Emergency clauses.** — Laws 2015, ch. 5, § 10 contained an emergency clause and was approved March 20, 2015.

## 24-5A-5. Authorized uses of the vaccine purchasing fund.

A. The fund shall be used for the purchase, storage and distribution of vaccines, as recommended by the advisory committee on immunization practices, for insured children who are not eligible for the vaccines for children program.

B. The department shall credit any balance remaining in the fund at the end of the fiscal year toward the department's purchase of vaccines the following year; provided that the department maintains a reserve of ten percent of the amount estimated to be expended in the following year.

C. The fund shall not be used:

(1) for the purchase, storage and distribution of vaccines for children who are eligible for the vaccines for children program;

(2) for administrative expenses associated with the statewide vaccine purchasing program; or

(3) to pass through a federally negotiated discount pursuant to 42 U.S.C. 1396s.

**History: Laws 2015, ch. 5, § 5.**

**Emergency clauses.** — Laws 2015, ch. 5, § 10 contained an emergency clause and was approved March 20, 2015.

## 24-5A-6. Reporting.

A. No later than one hundred twenty days following the enactment of the Vaccine Purchasing Act, the office of superintendent shall:



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(1) promulgate rules requiring each health insurer and group health plan to report the number of children it insured who were under the age of nineteen as of December 31, 2014 and to annually report the number of children it insures who will be under the age of nineteen as of December 31 of each subsequent year to the office of superintendent, excluding from such reports children who are enrolled in medicaid or in any medical assistance program administered by the department or the human services department and children who are American Indian or Alaska Natives; and

(2) for each health insurer or group health plan, provide the department with the number of insured children reported by such health insurer or group health plan pursuant to Paragraph (1) of this subsection.

B. Each health insurer and group health plan shall reimburse the department for the cost of vaccines for childhood immunizations purchased by the state for the benefit of such health insurer's or group health plan's insured children according to such health insurer's or group health plan's policy obligations and in accordance with health insurance coverage requirements under state and federal law. The amount reimbursed by each health insurer or group health plan shall be a fraction, the denominator of which is the total number of insured children reported by all health insurers and group health plans pursuant to Subsection A of this section and the numerator of which is the number of insured children reported by such health insurer or group health plan pursuant to Subsection A of this section multiplied by the total amount as determined by the department pursuant to Subsection B of Section 3 [24-5A-3 NMSA 1978] of the Vaccine Purchasing Act.

C. A health insurer's or group health plan's reimbursement to the department pursuant to the Vaccine Purchasing Act shall be deemed payment for clinical services and activities to promote health care quality for the purpose of calculating a health insurer's or group health plan's medical loss ratio.

**History: Laws 2015, ch. 5, § 6.**

**Emergency clauses.** — Laws 2015, ch. 5, § 10 contained an emergency clause and was approved March 20, 2015.

## 24-5A-7. Appeal; penalties.

A. A health insurer aggrieved pursuant to the Vaccine Purchasing Act may appeal as provided in Section 59A-4-20 NMSA 1978.

B. A health insurer or group health plan that fails to file a report required by the office of superintendent pursuant to Subsection A of Section 6 [24-5A-6 NMSA 1978] of the Vaccine Purchasing Act shall pay a late filing fee of five hundred dollars ($500) per day for each day from the date the report was due.

C. The office of superintendent may require a health insurer or group health plan subject to the Vaccine Purchasing Act to produce records that were used to prepare the report required under Subsection A of Section 6 of the Vaccine Purchasing Act. If the office of superintendent determines that there is other than a good faith discrepancy between the number of insured children reported and the number of insured children that should have been reported, the health insurer or group health plan shall pay a civil penalty of five hundred dollars ($500) for each report filed for which the office of superintendent determines there is such a discrepancy.

D. Failure of a health insurer or group health plan to make timely payment of an amount invoiced pursuant to Subsection D of Section 3 [24-5A-3 NMSA 1978] of the Vaccine Purchasing Act shall subject the health insurer or group health plan to a civil penalty of five hundred dollars ($500) for each day from the date the payment is due.

**History: Laws 2015, ch. 5, § 7.**

**Emergency clauses.** — Laws 2015, ch. 5, § 10 contained an emergency clause and was approved March 20, 2015.



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## 24-5A-8. Powers and authority.

The department and the office of superintendent shall promulgate and enforce such rules as may be necessary to carry out the provisions of the Vaccine Purchasing Act.

**History: Laws 2015, ch. 5, § 8.**

**Emergency clauses.** — Laws 2015, ch. 5, § 10 contained an emergency clause and was approved March 20, 2015.

## 24-5A-9. Applicability.

The provisions of the Vaccine Purchasing Act:

A. do not apply to an entity that only issues policies, certificates or subscriber contracts within New Mexico that are limited to a specific disease; hospital confinement; indemnity; accident-only; credit; dental; vision; medicare supplement; long-term care; disability income insurance; student health benefits-only coverage issued as a supplement to liability insurance; workers' compensation or similar insurance; automobile medical payment insurance; nonrenewable short-term coverage issued for a period of twelve months or less; medicaid; or any medical assistance program administered by the department or the human services department; and

B. apply to policies, plans, contracts and certificates delivered or issued for delivery or renewed, extended or amended in this state on or after January 1, 2015.

**History: Laws 2015, ch. 5, § 9.**

**Emergency clauses.** — Laws 2015, ch. 5, § 10 contained an emergency clause and was approved March 20, 2015.

# ARTICLE 6

# Anatomical Gifts

(Repealed by Laws 1995, ch. 116, § 16.)

## 24-6-1 to 24-6-11. Repealed.

**Repeals.** — Laws 1995, ch. 116, § 16 repealed 24-6-1 through 24-6-11 NMSA 1978, as enacted by Laws 1969, ch. 105, §§ 1 to 9, and Laws 1987 ch. 74, §§ 3 and 4, respectively, relating to anatomical gifts, effective July 1, 1995.

For provisions of the former sections, *see* the 1994 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 24, Article 6A NMSA 1978.

# ARTICLE 6A

# Uniform Anatomical Gift Act

Sec.
24-6A-1. Repealed.
24-6A-2. Repealed.
24-6A-3. Repealed.
24-6A-4. Repealed.
24-6A-5. Repealed.
24-6A-6. Repealed.
24-6A-6.1. Repealed.
24-6A-7. Repealed.
24-6A-7.1. Recompiled.
24-6A-8. Repealed.
24-6A-9. Repealed.
24-6A-9.1. Recompiled.
24-6A-9.2. Recompiled.
24-6A-10. Repealed.
24-6A-11. Repealed.
24-6A-12. Repealed.
24-6A-13. Repealed.
24-6A-14. Repealed.
24-6A-15. Repealed.

## 24-6A-1. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-1 NMSA 1978, as enacted by Laws 1995, ch. 116, § 1, relating to definitions of the Uniform Anatomical Gift Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com*.



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## 24-6A-2. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-2 NMSA 1978 of the Uniform Anatomical Gift Act, as enacted by Laws 1995, ch. 116, § 2, relating to making, amending, revoking and refusing to make anatomical gifts by individuals, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-6A-3. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-3 NMSA 1978, as enacted by Laws 1995, ch. 116, § 3, relating to making, revoking and objecting to anatomical gifts by others, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-6A-4. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-4 NMSA 1978, as enacted by Laws 1995, ch. 116, § 4, relating to authorization by office of medical investigator, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-6A-5. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-5 NMSA 1978, as enacted by Laws 1995, ch. 116, § 5, relating to required request, search and notification and civil or criminal immunity, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-6A-6. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-6 NMSA 1978, as enacted by Laws 1995, ch. 116, § 6, relating to persons who may become donees and purposes for which anatomical gifts may be made, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-6A-6.1. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-6.1 NMSA 1978, as enacted by Laws 2000, ch. 54, § 8, relating to identification of potential donees, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-6A-7. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-7 NMSA 1978, as enacted by Laws 1995, ch. 116, § 7, relating to delivery of document of gift, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-6A-7.1. Recompiled.

**Recompilation.** — Laws 2007, ch. 323, § 28, recompiled former 24-6A-7.1 NMSA 1978 as 24-6B-7.1 NMSA 1978, effective July 1, 2007.

## 24-6A-8. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-8 NMSA 1978, as enacted by Laws 1995, ch. 116, § 8, relating to rights and duties at death, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-6A-9. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-9 NMSA 1978, as enacted by Laws 1995, ch. 116, § 9, relating to coordination of procurement and use, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*



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## 24-6A-9.1. Recompiled.

**Recompilation.** — Laws 2007, ch. 323, § 29, recompiled former 24-6A-9.1 NMSA 1978 as 24-6B-9.1 NMSA 1978, effective July 1, 2007.

## 24-6A-9.2. Recompiled.

**Recompilation.** — Laws 2007, ch. 323, § 30, recompiled former 24-6A-9.2 NMSA 1978 as 24-6B-9.2 NMSA 1978, effective July 1, 2007.

## 24-6A-10. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-10 NMSA 1978, as enacted by Laws 1995, ch. 116, § 10, relating to sale or purchase of parts prohibited and criminal penalties, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-6A-11. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-11 NMSA 1978, as enacted by Laws 1995, ch. 116, § 11, relating to examination, autopsy and liability, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-6A-12. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-12 NMSA 1978, as enacted by Laws 1995, ch. 116, § 12, relating to transitional provisions, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-6A-13. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-13 NMSA 1978, as enacted by Laws 1995, ch. 116, § 13, relating to uniformity of application and construction, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-6A-14. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-14 NMSA 1978, as enacted by Laws 1995, ch. 116, § 14, relating to severability, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOne Source.com.*

## 24-6A-15. Repealed.

**Repeals.** — Laws 2007, ch. 323, § 35 repealed 24-6A-15 NMSA 1978, as enacted by Laws 1995, ch. 116, § 15, the short title of the act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOne Source.com.*

# ARTICLE 6B

# Jonathan Spradling Revised Uniform Anatomical Gift Act

Sec.
24-6B-1. Short title.
24-6B-2. Definitions.
24-6B-3. Applicability.
24-6B-4. Who may make anatomical gift before donor's death.
24-6B-5. Manner of making anatomical gift before donor's death.
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24-6B-7. Refusal to make anatomical gift; effect of refusal.
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Sec.
24-6B-9. Who may make anatomical gift of decedent's body or part.
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24-6B-16. Sale or purchase of parts prohibited.
24-6B-17. Other prohibited acts.
Sec.
24-6B-18. Immunity.
24-6B-19. Law governing validity; choice of law as to execution of document of gift; presumption of validity.
24-6B-20. Donor registry.
24-6B-21. Effect of anatomical gift on advance health-care directive.
24-6B-22. Cooperation between office of the state medical investigator and procurement organization.
24-6B-23. Facilitation of anatomical gift from decedent whose body is under jurisdiction of the office of the state medical investigator.
24-6B-24. Uniformity of application and construction.
24-6B-25. Relation to Electronic Signatures in Global and National Commerce Act.

## 24-6B-1. Short title.

Sections 1 through 25 of this act [24-6B-1 through 24-6B-25 NMSA 1978] may be cited as the "Jonathan Spradling Revised Uniform Anatomical Gift Act".

**History: Laws 2007, ch. 323, § 1.**

**Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-2. Definitions.

As used in the Jonathan Spradling Revised Uniform Anatomical Gift Act:

A. "adult" means an individual who is at least sixteen years of age;

B. "agent" means an individual:

(1) authorized to make health care decisions on the principal's behalf by a power of attorney for health care; or

(2) expressly authorized to make an anatomical gift on the principal's behalf by any other record signed by the principal;

C. "anatomical gift" means a donation of all or part of a human body to take effect after the donor's death for the purpose of transplantation, therapy, research or education;

D. "decedent" means a deceased individual whose body or part is or may be the source of an anatomical gift. "Decedent" includes a stillborn infant and, subject to restrictions imposed by law other than the Jonathan Spradling Revised Uniform Anatomical Gift Act, a fetus but not including a fetus that is the subject of an induced abortion;

E. "disinterested witness" means a witness other than the spouse, child, parent, sibling, grandchild, grandparent or guardian of the individual who makes, amends, revokes or refuses to make an anatomical gift, or another adult who exhibited special care and concern for the individual. "Disinterested witness" does not include a person to which an anatomical gift could pass pursuant to Section 11 [24-6B-11 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act;

F. "document of gift" means a donor card or other record used to make an anatomical gift. "Document of gift" includes a statement or symbol on a driver's license, identification card or donor registry;

G. "donor" means an individual whose body or part is the subject of an anatomical gift;

H. "donor registry" means a database that contains records of anatomical gifts and amendments to or revocations of anatomical gifts;

I. "driver's license" means a license or permit issued by the motor vehicle division of the taxation and revenue department to operate a vehicle, whether or not conditions are attached to the license or permit;

J. "eye bank" means a person that is licensed, accredited or regulated pursuant to federal or state law to engage in the recovery, screening, testing, processing, storage or distribution of human eyes or portions of human eyes;



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K. "guardian" means a person appointed by a court to make decisions regarding the support, care, education, health or welfare of an individual. "Guardian" does not include a guardian ad litem;

L. "hospital" means a facility licensed as a hospital pursuant to the law of any state or a facility operated as a hospital by the United States, a state or a subdivision of a state;

M. "identification card" means an identification card issued by the motor vehicle division of the taxation and revenue department;

N. "know" means to have actual knowledge;

O. "minor" means an individual who is under eighteen years of age;

P. "organ procurement organization" means a person designated by the secretary of the federal department of health and human services as an organ procurement organization;

Q. "parent" means a parent whose parental rights have not been terminated;

R. "part" means an organ, an eye or tissue of a human being. "Part" does not include the whole body;

S. "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity;

T. "physician" means an individual authorized to practice medicine or osteopathy pursuant to the law of any state;

U. "power of attorney for health care" includes an advance health-care directive as defined in the Uniform Health-Care Decisions Act [Chapter 24, Article 7A NMSA 1978];

V. "procurement organization" means an eye bank, organ procurement organization or tissue bank;

W. "prospective donor" means an individual who is dead or near death and has been determined by a procurement organization to have a part that could be medically suitable for transplantation, therapy, research or education. "Prospective donor" does not include an individual who has made a refusal;

X. "reasonably available" means able to be contacted by a procurement organization without undue effort and willing and able to act in a timely manner consistent with existing medical criteria necessary for the making of an anatomical gift;

Y. "recipient" means an individual into whose body a decedent's part has been or is intended to be transplanted;

Z. "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

AA. "refusal" means a record created pursuant to Section 7 [24-6B-7 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act that expressly states an intent to bar other persons from making an anatomical gift of an individual's body or part;

BB. "sign" means, with the present intent to authenticate or adopt a record:

(1) to execute or adopt a tangible symbol; or

(2) to attach to or logically associate with the record an electronic symbol, sound or process;

CC. "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States;

DD. "technician" means an individual determined to be qualified to remove or process parts by an appropriate organization that is licensed, accredited or regulated pursuant to federal or state law. "Technician" includes an enucleator;

EE. "tissue" means a portion of the human body other than an organ or an eye. "Tissue" does not include blood unless the blood is donated for the purpose of research or education;

FF. "tissue bank" means a person that is licensed, accredited or regulated pursuant to federal or state law to engage in the recovery, screening, testing, processing, storage or distribution of tissue; and

GG. "transplant hospital" means a hospital that furnishes organ transplants and other medical and surgical specialty services required for the care of transplant patients.

**History: Laws 2007, ch. 323, §2.**

**Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.



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## 24-6B-3. Applicability.

The Jonathan Spradling Revised Uniform Anatomical Gift Act applies to an anatomical gift or amendment to, revocation of or refusal to make an anatomical gift, whenever made.

**History: Laws 2007, ch. 323, § 3.**

**Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-4. Who may make anatomical gift before donor's death.

Subject to the provisions of Section 8 [24-6B-8 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act, an anatomical gift of a donor's body or part may be made during the life of the donor for the purpose of transplantation, therapy, research or education in the manner provided in Section 5 [24-6B-5 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act by:

A. the donor, if the donor is an adult or if the donor is a minor and is:

(1) emancipated; or

(2) authorized pursuant to state law to apply for an instruction permit because the donor is at least fifteen years of age;

B. an agent of the donor, unless the power of attorney for health care or other record prohibits the agent from making an anatomical gift;

C. a parent of the donor, if the donor is an unemancipated minor; or

D. the donor's guardian.

**History: Laws 2007, ch. 323, § 4.**

**Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-5. Manner of making anatomical gift before donor's death.

A. A donor may make an anatomical gift:

(1) by authorizing a statement or symbol indicating that the donor has made an anatomical gift to be imprinted on the donor's driver's license or identification card;

(2) in a will;

(3) during a terminal illness or injury of the donor, by any form of communication addressed to at least two adults, at least one of whom is a disinterested witness; or

(4) as provided in Subsection B of this section.

B. A donor or other person authorized to make an anatomical gift pursuant to Section 4 [24-6B-4 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act may make a gift by a donor card or other record signed by the donor or other person making the gift or by authorizing that a statement or symbol indicating that the donor has made an anatomical gift be included on a donor registry. If the donor or other person is physically unable to sign a record, the record may be signed by another individual at the direction of the donor or other person and shall:

(1) be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or the other person; and

(2) state that it has been signed and witnessed as provided in Paragraph (1) of this subsection.

C. Revocation, suspension, expiration or cancellation of a driver's license or identification card upon which an anatomical gift is indicated does not invalidate the gift.

D. An anatomical gift made by will takes effect upon the donor's death whether or not the will is probated. Invalidation of the will after the donor's death does not invalidate the anatomical gift.

**History: Laws 2007, ch. 323, § 5.**

**Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.



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## 24-6B-6. Amending or revoking anatomical gift before donor's death.

A. Subject to the provisions of Section 8 [24-6B-8 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act, a donor or other person authorized to make an anatomical gift pursuant to Section 4 [24-6B-4 NMSA 1978] of that act may amend or revoke an anatomical gift by:

(1) a record signed by:

(a) the donor;

(b) the other person; or

(c) subject to the provisions of Subsection B of this section, another individual acting at the direction of the donor or the other person if the donor or other person is physically unable to sign; or

(2) a later-executed document of gift that amends or revokes a previous anatomical gift or portion of an anatomical gift, either expressly or by inconsistency.

B. A record signed pursuant to Subparagraph (c) of Paragraph (1) of Subsection A of this section shall:

(1) be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or the other person; and

(2) state that it has been signed and witnessed as provided in Paragraph (1) of this subsection.

C. Subject to the provisions of Section 8 [24-6B-8 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act, a donor or other person authorized to make an anatomical gift pursuant to Section 4 of that act may revoke an anatomical gift by the destruction or cancellation of the document of gift, or the portion of the document of gift used to make the gift, with the intent to revoke the gift.

D. A donor may amend or revoke an anatomical gift that was not made in a will by any form of communication during a terminal illness or injury addressed to at least two adults, at least one of whom is a disinterested witness.

E. A donor who makes an anatomical gift in a will may amend or revoke the gift in the manner provided for amendment or revocation of wills or as provided in Subsection A of this section.

**History: Laws 2007, ch. 323, § 6.**

**Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-7. Refusal to make anatomical gift; effect of refusal.

A. An individual may refuse to make an anatomical gift of the individual's body or part by:

(1) a record signed by:

(a) the individual; or

(b) subject to the provisions of Subsection B of this section, another individual acting at the direction of the individual if the individual is physically unable to sign;

(2) the individual's will, whether or not the will is admitted to probate or invalidated after the individual's death; or

(3) any form of communication made by the individual during the individual's terminal illness or injury addressed to at least two adults, at least one of whom is a disinterested witness.

B. A record signed pursuant to Subparagraph (b) of Paragraph (1) of Subsection A of this section shall:

(1) be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the individual; and

(2) state that it has been signed and witnessed as provided in Paragraph (1) of this subsection.

C. An individual who has made a refusal may amend or revoke the refusal:

(1) in the manner provided in Subsection A of this section for making a refusal;



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(2) by subsequently making an anatomical gift pursuant to Section 5 [24-6B-5 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act that is inconsistent with the refusal; or

(3) by destroying or canceling the record evidencing the refusal, or the portion of the record used to make the refusal, with the intent to revoke the refusal.

D. Except as otherwise provided in Subsection H of Section 8 [24-6B-8 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act, in the absence of an express, contrary indication by the individual set forth in the refusal, an individual's unrevoked refusal to make an anatomical gift of the individual's body or part bars all other persons from making an anatomical gift of the individual's body or part.

**History: Laws 2007, ch. 323, § 7.**

**Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-7.1. Document of gift as a legal document.

A document of gift constitutes a legal document and has sufficient legal authority to be accepted by a designated or undesignated donee of anatomical gifts pursuant to the Jonathan Spradling Revised Uniform Anatomical Gift Act.

**History: Laws 2002, ch. 42, § 3; recompiled and amended by Laws 2007, ch. 323, § 28.**

**Recompilation.** — Laws 2007, ch. 323, § 28 recompiled and amended former 24-6A-7.1 NMSA 1978 as 24-6B-7.1 NMSA 1978, effective July 1, 2007.

**The 2007 amendment,** effective July 1, 2007, changed the name of the act.

## 24-6B-8. Preclusive effect of anatomical gift, amendment or revocation.

A. Except as otherwise provided in Subsection G of this section and subject to the provisions of Subsection F of this section, in the absence of an express, contrary indication by the donor, a person other than the donor is barred from making, amending or revoking an anatomical gift of a donor's body or part if the donor made an anatomical gift of the donor's body or part pursuant to Section 5 [24-6B-5 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act or an amendment to an anatomical gift of the donor's body or part pursuant to Section 6 [24-6B-6 NMSA 1978] of that act.

B. A donor's revocation of an anatomical gift of the donor's body or part pursuant to Section 6 of the Jonathan Spradling Revised Uniform Anatomical Gift Act is not a refusal and does not bar another person specified in Section 4 [24-6B-4 NMSA 1978] or 9 [24-6B-9 NMSA 1978] of that act from making an anatomical gift of the donor's body or part pursuant to Section 5 or 10 [24-6B-10 NMSA 1978] of that act.

C. If a person other than the donor makes an unrevoked anatomical gift of the donor's body or part pursuant to Section 5 of the Jonathan Spradling Revised Uniform Anatomical Gift Act or an amendment to an anatomical gift of the donor's body or part pursuant to Section 6 of that act, another person may not make, amend or revoke the gift of the donor's body or part pursuant to Section 10 of that act.

D. A revocation of an anatomical gift of a donor's body or part pursuant to Section 6 of the Jonathan Spradling Revised Uniform Anatomical Gift Act by a person other than the donor does not bar another person from making an anatomical gift of the body or part pursuant to Section 5 or 10 of that act.

E. In the absence of an express, contrary indication by the donor or other person authorized to make an anatomical gift pursuant to Section 4 of the Jonathan Spradling Revised Uniform Anatomical Gift Act, an anatomical gift of a part is neither a refusal to give another part nor a limitation on the making of an anatomical gift of another part at a later time by the donor or another person.



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F. In the absence of an express, contrary indication by the donor or other person authorized to make an anatomical gift pursuant to Section 4 of the Jonathan Spradling Revised Uniform Anatomical Gift Act, an anatomical gift of a part for one or more of the purposes set forth in Section 4 of that act is not a limitation on the making of an anatomical gift of the part for any of the other purposes by the donor or any other person pursuant to Section 5 or 10 of that act.

G. If a donor who is an unemancipated minor dies, a parent of the donor who is reasonably available may revoke or amend an anatomical gift of the donor's body or part.

H. If an unemancipated minor who signed a refusal dies, a parent of the minor who is reasonably available may revoke the minor's refusal.

**History: Laws 2007, ch. 323, § 8.**

**Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-9. Who may make anatomical gift of decedent's body or part.

A. Subject to the provisions of Subsections B and C of this section and unless barred by Section 7 [24-6B-7 NMSA 1978] or 8 [24-6B-8 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act, an anatomical gift of a decedent's body or part for purpose of transplantation, therapy, research or education may be made by any member of the following classes of persons who is reasonably available, in the order of priority listed:

(1) an agent of the decedent at the time of death who could have made an anatomical gift pursuant to Subsection B of Section 4 [24-6B-4 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act immediately before the decedent's death;

(2) the spouse of the decedent unless legally separated or unless there is a pending action for annulment, divorce, dissolution of marriage or separation;

(3) adult children of the decedent;

(4) parents of the decedent;

(5) adult siblings of the decedent;

(6) adult grandchildren of the decedent;

(7) grandparents of the decedent;

(8) an adult who exhibited special care and concern for the decedent;

(9) the persons who were acting as the guardians of the person of the decedent at the time of death; and

(10) any other person having the authority to dispose of the decedent's body.

B. If there is more than one member of a class listed in Paragraphs (1), (3), (4), (5), (6), (7) and (9) of Subsection A of this section entitled to make an anatomical gift, an anatomical gift may be made by a member of the class unless that member or a person to which the gift may pass pursuant to Section 11 [24-6B-11 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act knows of an objection by another member of the class. If an objection is known, the gift may be made only by a majority of the members of the class who are reasonably available.

C. A person may not make an anatomical gift if, at the time of the decedent's death, a person in a prior class pursuant to Subsection A of this section is reasonably available to make or to object to the making of an anatomical gift.

**History: Laws 2007, ch. 323, § 9.**

**Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-9.1. Identification of potential donors.

A. Each hospital in New Mexico, with the concurrence of its medical staff, shall develop by July 1, 2000 a protocol for identifying potential donors. The protocol shall be developed in collaboration with a procurement organization. The protocol shall provide that at or near the time of a patient's death and prior to the removal of life support, the hospital shall contact a procurement



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organization to determine the suitability of the patient as a donor. The person designated by the hospital to contact the procurement organization shall have the following information available prior to making the contact:

(1) the patient's identifier number;

(2) the patient's age;

(3) the cause of death; and

(4) any past medical history available.

B. The procurement organization shall determine the suitability for donation. If the procurement organization determines that donation is not appropriate based on established medical criteria, that determination shall be noted by hospital personnel on the patient's record and no further action is necessary.

C. If the procurement organization determines that the patient is a suitable candidate for donation, the procurement organization shall initiate donor proceedings by making a reasonable search for a document of gift or other information identifying the patient as a donor or as a person who has refused to make an anatomical gift.

D. The hospital must have and implement written protocols that:

(1) incorporate an agreement with a procurement organization under which the hospital must notify, in a timely manner, the procurement organization or a third party designated by the procurement organization of patients whose deaths are imminent and prior to the removal of life support from a patient who has died in the hospital;

(2) ensure that the retrieval, processing, preservation, storage and distribution of tissues and eyes does not interfere with vascular organ procurement;

(3) ensure that the family of each potential donor is informed of its options to donate organs, tissues or eyes or to decline to donate. The person designated by the hospital to initiate the request to the family must be a procurement organization employee or a designated requester;

(4) encourage discretion and sensitivity with respect to the circumstances, views and beliefs of the families of potential donors; and

(5) ensure that the hospital works cooperatively with the procurement organization in educating hospital staff on donation issues, reviewing death records to improve identification of potential donors and maintaining potential donors while necessary testing and placement of anatomical gifts take place.

E. Every hospital in the state shall establish a committee to develop and implement its organ and tissue donation policy and procedure to assist its staff in identifying and evaluating terminal patients who may be suitable organ or tissue donors. The committee shall include members of the administrative, medical and nursing staffs and shall appoint a member to act as a liaison between the hospital and the state procurement organization.

**History: Laws 2000, ch. 54, § 7; recompiled and amended by Laws 2007, ch. 323, § 29.**

**Recompilation.** — Laws 2007, ch. 323, § 29 recompiled former 24-6A-9.1 NMSA 1978 as 24-6B-9.1 NMSA 1978, effective July 1, 2007.

**The 2007 amendment,** effective July 1, 2007, changed "an individual" to "a person" in Subsection C.

## 24-6B-9.2. Death record reviews.

Every hospital shall work jointly with the appropriate procurement organization to conduct death record reviews at least annually. The procurement organization shall compile the results of the death record reviews and provide a report to the department of health by September 1 of each year; provided that the report to the department shall not identify hospitals, donors or recipients.

**History: Laws 2000, ch. 54, § 6; recompiled and amended by Laws 2007, ch. 323, § 30.**

**Recompilation.** — Laws 2007, ch. 323, § 30, recompiled former 24-6A-9.2 NMSA 1978 as 24-6B-9.2 NMSA 1978, effective July 1, 2007.

**The 2007 amendment,** effective July 1, 2007, changed "individual donors" to "donors".



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## 24-6B-10. Manner of making, amending or revoking anatomical gift of decedent's body or part.

A. A person authorized to make an anatomical gift pursuant to Section 9 [24-6B-9 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act may make an anatomical gift by a document of gift signed by the person making the gift or by that person's oral communication that is electronically recorded or is contemporaneously reduced to a record and signed by the individual receiving the oral communication.

B. Subject to the provisions of Subsection C of this section, an anatomical gift by a person authorized pursuant to Section 9 of the Jonathan Spradling Revised Uniform Anatomical Gift Act may be amended or revoked orally or in a record by any member of a prior class who is reasonably available. If more than one member of the prior class is reasonably available, the gift made by a person authorized pursuant to Section 9 of that act may be:

(1) amended only if a majority of the reasonably available members agree to the amending of the gift; or

(2) revoked only if a majority of the reasonably available members agree to the revoking of the gift or if they are equally divided as to whether to revoke the gift.

C. A revocation pursuant to Subsection B of this section is effective only if, before an incision has been made to remove a part from the donor's body or before invasive procedures have begun to prepare the recipient, the procurement organization, transplant hospital or physician or technician knows of the revocation.

**History: Laws 2007, ch. 323, § 10.** **Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-11. Persons that may receive anatomical gift; purpose of anatomical gift.

A. An anatomical gift may be made to the following persons named in the document of gift:

(1) a hospital; accredited medical school, dental school, college or university; organ procurement organization; or other appropriate person, for research or education;

(2) subject to the provisions of Subsection B of this section, an individual designated by the person making the anatomical gift if the individual is the recipient of the part; and

(3) an eye bank or tissue bank.

B. If an anatomical gift to an individual pursuant to Paragraph (2) of Subsection A of this section cannot be transplanted into the individual, the part passes in accordance with Subsection G of this section in the absence of an express, contrary indication by the person making the anatomical gift.

C. If an anatomical gift of one or more specific parts or of all parts is made in a document of gift that does not name a person described in Subsection A of this section but identifies the purpose for which an anatomical gift may be used, the following rules apply:

(1) if the part is an eye and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate eye bank;

(2) if the part is tissue and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate tissue bank;

(3) if the part is an organ and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate organ procurement organization as custodian of the organ; and

(4) if the part is an organ, an eye or tissue and the gift is for the purpose of research or education, the gift passes to the appropriate procurement organization.

D. For the purpose of Subsection C of this section, if there is more than one purpose of an anatomical gift set forth in the document of gift but the purposes are not set forth in any priority, the gift shall be used for transplantation or therapy, if suitable. If the gift cannot be used for transplantation or therapy, the gift may be used for research or education.



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E. If an anatomical gift of one or more specific parts is made in a document of gift that does not name a person described in Subsection A of this section and does not identify the purpose of the gift, the gift may be used only for transplantation or therapy, and the gift passes in accordance with Subsection G of this section.

F. If a document of gift specifies only a general intent to make an anatomical gift by words such as "donor", "organ donor" or "body donor", or by a symbol or statement of similar import, the gift may be used only for transplantation or therapy and the gift passes in accordance with Subsection G of this section.

G. For purposes of Subsections B, E and F of this section, the following rules apply:

(1) if the part is an eye, the gift passes to the appropriate eye bank;

(2) if the part is tissue, the gift passes to the appropriate tissue bank; and

(3) if the part is an organ, the gift passes to the appropriate organ procurement organization as custodian of the organ.

H. An anatomical gift of an organ for transplantation or therapy, other than an anatomical gift pursuant to Paragraph (2) of Subsection A of this section, passes to the organ procurement organization as custodian of the organ.

I. If an anatomical gift does not pass pursuant to Subsections A through H of this section or the decedent's body or part is not used for transplantation, therapy, research or education, custody of the body or part passes to the person under obligation to dispose of the body or part.

J. A person may not accept an anatomical gift if the person knows that the gift was not effectively made pursuant to Section 24-6B-5 or 24-6B-10 NMSA 1978 or if the person knows that the decedent made a refusal pursuant to Section 24-6B-7 NMSA 1978 that was not revoked. For purposes of this subsection, if a person knows that an anatomical gift was made on a document of gift, the person is deemed to know of any amendment or revocation of the gift or any refusal to make an anatomical gift on the same document of gift.

K. Except as otherwise provided in Paragraph (2) of Subsection A of this section, nothing in the Jonathan Spradling Revised Uniform Anatomical Gift Act affects the allocation of organs for transplantation or therapy.

L. An individual's participation in the state's medical cannabis program established pursuant to the Lynn and Erin Compassionate Use Act [Chapter 26, Article 2B NMSA 1978] shall not in itself constitute grounds for refusing to allow that individual to receive an anatomical gift.

**History: Laws 2007, ch. 323, § 11; 2019, ch. 247, § 13.**

**The 2019 amendment,** effective June 14, 2019, provided that an individual's participation in the state's medical cannabis program shall not in itself constitute grounds for refusing to allow that individual to receive an anatomical gift; in Subsection J, after the first occurrence of "Section", deleted "5 or 10 of the Jonathan Spradling Revised Uniform Anatomical Gift Act" and added "24-6B-5 or 24-6B-10 NMSA 1978", and after the second occurrence of "Section", deleted "7 of that act" and added "24-6B-7 NMSA 1978; and added new Subsection L.

## 24-6B-12. Search and notification.

A. The following persons shall make a reasonable search of an individual who the person reasonably believes is dead or near death for a document of gift or other information identifying the individual as a donor or as an individual who made a refusal:

(1) a law enforcement officer, firefighter, paramedic or other emergency rescuer finding the individual; and

(2) if no other source of the information is immediately available, a hospital, as soon as practical after the individual's arrival at the hospital.

B. If a document of gift or a refusal to make an anatomical gift is located by the search required by Paragraph (1) of Subsection A of this section and the individual or deceased individual to whom it relates is taken to a hospital, the person responsible for conducting the search shall send the document of gift or refusal to the hospital.

C. A person is not subject to criminal or civil liability for failing to discharge the duties imposed by this section but may be subject to administrative sanctions.



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**History: Laws 2007, ch. 323, § 12.** **Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-13. Delivery of document of gift not required; right to examine.

A. A document of gift need not be delivered during the donor's lifetime to be effective.

B. Upon or after an individual's death, a person in possession of a document of gift or a refusal to make an anatomical gift with respect to the individual shall allow examination and copying of the document of gift or refusal by a person authorized to make or object to the making of an anatomical gift with respect to the individual or by a person to which the gift could pass pursuant to Section 11 [24-6B-11 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act.

**History: Laws 2007, ch. 323, § 13.** **Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-14. Rights and duties of procurement organization and others.

A. When a hospital refers an individual at or near death to a procurement organization, the organization shall make a reasonable search of the records of the motor vehicle division of the taxation and revenue department and any donor registry that it knows exists for the geographical area in which the individual resides to ascertain whether the individual has made an anatomical gift.

B. A procurement organization shall be allowed reasonable access to information in the records of the motor vehicle division of the taxation and revenue department to ascertain whether an individual at or near death is a donor.

C. When a hospital refers an individual at or near death to a procurement organization, the organization may conduct any reasonable examination necessary to ensure the medical suitability of a part that is or could be the subject of an anatomical gift for transplantation, therapy, research or education from a donor or a prospective donor. During the examination period, measures necessary to ensure the medical suitability of the part may not be withdrawn unless the hospital or procurement organization knows that the individual expressed a contrary intent.

D. Unless prohibited by law other than the Jonathan Spradling Revised Uniform Anatomical Gift Act, at any time after a donor's death, the person to which a part passes pursuant to Section 11 [24-6B-11 NMSA 1978] of that act may conduct any reasonable examination necessary to ensure the medical suitability of the body or part for its intended purpose.

E. Unless prohibited by law other than the Jonathan Spradling Revised Uniform Anatomical Gift Act, an examination pursuant to Subsection C or D of this section may include an examination of all medical and dental records of the donor or prospective donor.

F. Upon the death of a minor who was a donor or had signed a refusal, unless a procurement organization knows the minor is emancipated, the procurement organization shall conduct a reasonable search for the parents of the minor and provide the parents with an opportunity to revoke or amend the anatomical gift or revoke the refusal.

G. Upon referral by a hospital pursuant to Subsection A of this section, a procurement organization shall make a reasonable search for any person listed in Section 9 [24-6B-9 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act having priority to make an anatomical gift on behalf of a prospective donor. If a procurement organization receives information that an anatomical gift to any other person was made, amended or revoked, it shall promptly advise the other person of all relevant information.

H. Subject to the provisions of Subsection I of Section 11 and Section 23 [24-6B-23 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act, the rights of the person to which a part passes pursuant to Section 11 of that act are superior to the rights of all others with respect to the part. The person may accept or reject an anatomical gift in whole or in part. Subject to the terms of the document of gift and the Jonathan Spradling Revised Uniform Anatomical Gift



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Act, a person that accepts an anatomical gift of an entire body may allow embalming, burial or cremation, and use of remains in a funeral service. If the gift is of a part, the person to which the part passes pursuant to Section 11 of the Jonathan Spradling Revised Uniform Anatomical Gift Act, upon the death of the donor and before embalming, burial or cremation, shall cause the part to be removed without unnecessary mutilation.

I. Neither the physician who attends the decedent at death nor the physician who determines the time of the decedent's death may participate in the procedures for removing or transplanting a part from the decedent.

J. A physician or technician may remove a donated part from the body of a donor that the physician or technician is qualified to remove.

**History: Laws 2007, ch. 323, § 14.** **Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-15. Coordination of procurement and use.

Each hospital in this state shall enter into agreements or affiliations with procurement organizations for coordination of procurement and use of anatomical gifts.

**History: Laws 2007, ch. 323, § 15.** **Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-16. Sale or purchase of parts prohibited.

A. Except as otherwise provided in Subsection B of this section, a person who for valuable consideration, knowingly purchases or sells a part for transplantation or therapy if removal of a part from an individual is intended to occur after the individual's death commits a third degree felony and upon conviction is subject to a fine not exceeding five thousand dollars ($5,000) or imprisonment not exceeding six years, or both.

B. A person may charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation or disposal of a part.

**History: Laws 2007, ch. 323, § 16.** **Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-17. Other prohibited acts.

A person who, in order to obtain a financial gain, intentionally falsifies, forges, conceals, defaces or obliterates a document of gift, an amendment or revocation of a document of gift, or a refusal, commits a third degree felony and upon conviction is subject to a fine not exceeding five thousand dollars ($5,000) or imprisonment not exceeding six years, or both.

**History: Laws 2007, ch. 323, § 17.** **Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-18. Immunity.

A. A person that acts in accordance with the Jonathan Spradling Revised Uniform Anatomical Gift Act or with the applicable anatomical gift law of another state, or attempts in good faith to do so, is not liable for the act in a civil action, criminal prosecution or administrative proceeding.

B. Neither the person making an anatomical gift nor the donor's estate is liable for any injury or damage that results from the making or use of the gift.



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C. In determining whether an anatomical gift has been made, amended or revoked pursuant to the Jonathan Spradling Revised Uniform Anatomical Gift Act, a person may rely upon representations of an individual listed in Paragraph (2), (3), (4), (5), (6), (7) or (8) of Subsection A of Section 9 [24-6B-9 NMSA 1978] of that act relating to the individual's relationship to the donor or prospective donor unless the person knows that the representation is untrue.

**History: Laws 2007, ch. 323, § 18.** **Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-19. Law governing validity; choice of law as to execution of document of gift; presumption of validity.

A. A document of gift is valid if executed in accordance with:

(1) the Jonathan Spradling Revised Uniform Anatomical Gift Act;

(2) the laws of the state or country where it was executed; or

(3) the laws of the state or country where the person making the anatomical gift was domiciled, has a place of residence or was a national at the time the document of gift was executed.

B. If a document of gift is valid pursuant to this section, the law of this state governs the interpretation of the document of gift.

C. A person may presume that a document of gift or amendment of an anatomical gift is valid unless that person knows that it was not validly executed or was revoked.

**History: Laws 2007, ch. 323, § 19.** **Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-20. Donor registry.

A. The motor vehicle division of the taxation and revenue department shall establish a donor registry pursuant to the provisions of Subsection B of Section 66-5-10 NMSA 1978.

B. The motor vehicle division of the taxation and revenue department shall cooperate with a person that administers any donor registry that this state establishes, contracts for or recognizes for the purpose of transferring to the donor registry all relevant information regarding a donor's making, amendment to or revocation of an anatomical gift.

C. A donor registry shall:

(1) allow a donor or other person authorized pursuant to Section 4 [24-6B-4 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act to include on the donor registry a statement or symbol that the donor has made, amended or revoked an anatomical gift;

(2) be accessible to a procurement organization to allow it to obtain relevant information on the donor registry to determine, at or near death of the donor or a prospective donor, whether the donor or prospective donor has made, amended or revoked an anatomical gift; and

(3) be accessible for purposes of Paragraphs (1) and (2) of this subsection seven days a week on a twenty-four-hour basis.

D. Personally identifiable information on a donor registry about a donor or prospective donor may not be used or disclosed without the express consent of the donor, prospective donor or person who made the anatomical gift for any purpose other than to determine, at or near death of the donor or prospective donor, whether the donor or prospective donor has made, amended or revoked an anatomical gift.

E. This section does not prohibit any person from creating or maintaining a donor registry that is not established by or under contract with the state. Any such registry shall comply with the provisions of Subsections C and D of this section.

**History: Laws 2007, ch. 323, § 20.** **Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.



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## 24-6B-21. Effect of anatomical gift on advance health-care directive.

A. As used in this section:

(1) "advance health-care directive" means a power of attorney for health care, a health-care directive made pursuant to the provisions of the Uniform Health-Care Decisions Act [Chapter 24, Article 7A NMSA 1978] or a record signed by a prospective donor containing the prospective donor's direction concerning a health-care decision for the prospective donor;

(2) "declaration" means a record signed by a prospective donor specifying the circumstances under which a life support system may be withheld or withdrawn from the prospective donor; and

(3) "health-care decision" means any decision made regarding the health care of the prospective donor.

B. If a prospective donor has a declaration or advance health-care directive, measures necessary to ensure the medical suitability of an organ for transplantation or therapy may not be withheld or withdrawn from the prospective donor, unless the declaration expressly provides to the contrary.

**History: Laws 2007, ch. 323, § 21.** **Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-22. Cooperation between office of the state medical investigator and procurement organization.

A. The office of the state medical investigator shall cooperate with procurement organizations to maximize the opportunity to recover anatomical gifts for the purpose of transplantation, therapy, research or education.

B. If the office of the state medical investigator receives notice from a procurement organization that an anatomical gift might be available or was made with respect to a decedent whose body is under the jurisdiction of the office of the state medical investigator and a post-mortem examination is going to be performed, unless the office of the state medical investigator denies recovery in accordance with Section 23 [24-6B-23 NMSA 1978] of the Jonathan Spradling Revised Uniform Anatomical Gift Act, the office of the state medical investigator or its designee shall conduct a post-mortem examination of the body or the part in a manner and within a period compatible with its preservation for the purposes of the anatomical gift.

C. A part may not be removed from the body of a decedent under the jurisdiction of the office of the state medical investigator for transplantation, therapy, research or education unless the part is the subject of an anatomical gift. The body of a decedent under the jurisdiction of the office of the state medical investigator may not be delivered to a person for research or education unless the body is the subject of an anatomical gift. This subsection does not preclude the office of the state medical investigator from performing the medico-legal investigation upon the body or parts of a decedent under the jurisdiction of the office of the state medical investigator.

**History: Laws 2007, ch. 323, § 22.** **Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-23. Facilitation of anatomical gift from decedent whose body is under jurisdiction of the office of the state medical investigator.

A. Upon request of a procurement organization, the office of the state medical investigator shall release to the procurement organization the name, contact information and available medical and social history of a decedent whose body is under the jurisdiction of the office of the state medical investigator. If the decedent's body or part is medically suitable for transplantation, therapy, research or education, the office of the state medical investigator shall release post-mortem examination results to the procurement organization. The procurement organization may make a



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subsequent disclosure of the post-mortem examination results or other information received from the office of the state medical investigator only if relevant to transplantation or therapy.

B. The office of the state medical investigator may conduct a medico-legal investigation by reviewing all medical records, laboratory test results, x-rays, other diagnostic results and other information that any person possesses about a donor or prospective donor whose body is under the jurisdiction of the office of the state medical investigator that the office of the state medical investigator determines may be relevant to the investigation.

C. A person that has any information requested by the office of the state medical investigator pursuant to Subsection B of this section shall provide that information as expeditiously as possible to allow the office of the state medical investigator to conduct the medico-legal investigation within a period compatible with the preservation of parts for the purpose of transplantation, therapy, research or education.

D. If an anatomical gift has been or might be made of a part of a decedent whose body is under the jurisdiction of the office of the state medical investigator and a post-mortem examination is not required, or the office of the state medical investigator determines that a post-mortem examination is required but that the recovery of the part that is the subject of an anatomical gift will not interfere with the examination, the office of the state medical investigator and the procurement organization shall cooperate in the timely removal of the part from the decedent for the purpose of transplantation, therapy, research or education.

E. If an anatomical gift of a part from the decedent under the jurisdiction of the office of the state medical investigator has been or might be made, but the office of the state medical investigator initially believes that the recovery of the part could interfere with the post-mortem investigation into the decedent's cause or manner of death, the office of the state medical investigator shall consult with the procurement organization or physician or technician designated by the procurement organization about the proposed recovery. After consultation, the office of the state medical investigator may allow the recovery.

F. Following the consultation pursuant to Subsection E of this section, in the absence of mutually agreed-upon protocols to resolve conflict between the office of the state medical investigator and the procurement organization, if the office of the state medical investigator intends to deny recovery, the office of the state medical investigator or its designee, at the request of the procurement organization, shall attend the removal procedure for the part before making a final determination not to allow the procurement organization to recover the part. During the removal procedure, the office of the state medical investigator or its designee may allow recovery by the procurement organization to proceed, or, if the office of the state medical investigator or its designee reasonably believes that the part may be involved in determining the decedent's cause or manner of death, may deny recovery by the procurement organization.

G. If the office of the state medical investigator or its designee denies recovery pursuant to Subsection F of this section, the office of the state medical investigator or its designee shall:

(1) explain in a record the specific reasons for not allowing recovery of the part;

(2) include the specific reasons in the records of the office of the state medical investigator; and

(3) provide a record with the specific reasons to the procurement organization.

H. If the office of the state medical investigator or its designee allows recovery of a part pursuant to Subsection D, E or F of this section, the procurement organization, upon request, shall cause the physician or technician who removes the part to provide the office of the state medical investigator with a record describing the condition of the part, a biopsy, a photograph and any other information and observations that would assist in the post-mortem examination.

I. If the office of the state medical investigator or its designee is required to be present at a removal procedure pursuant to Subsection F of this section, upon request the procurement organization requesting the recovery of the part shall reimburse the office of the state medical investigator or its designee for the additional costs incurred in complying with the provisions of Subsection F of this section.

**History: Laws 2007, ch. 323, § 23.**

**Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.



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## 24-6B-24. Uniformity of application and construction.

In applying and construing the Jonathan Spradling Revised Uniform Anatomical Gift Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**History: Laws 2007, ch. 323, § 24.**

**Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

## 24-6B-25. Relation to Electronic Signatures in Global and National Commerce Act.

The Jonathan Spradling Revised Uniform Anatomical Gift Act modifies, limits and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(a) of that act, 15 U.S.C. Section 7001, or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

**History: Laws 2007, ch. 323, § 25.**

**Effective dates.** — Laws 2007, ch. 323, § 36 made the Jonathan Spradling Revised Uniform Anatomical Gift Act effective July 1, 2007.

# ARTICLE 7

# Right to Die

(Repealed by Laws 1984, ch. 99, § 9; 1997, ch. 168, § 15.)

## 24-7-1 to 24-7-11. Repealed.

**Repeals.** — Laws 1997, ch. 168, § 15 repealed 24-7-1 to 24-7-10 NMSA 1978, as enacted by Laws 1977, ch. 287, §§ 1 to 10 and Laws 1984, ch. 99, § 6, the Right to Die Act, effective July 1, 1997. Laws 1984, ch. 99, § 9, repealed 24-7-11 NMSA 1978, as enacted by Laws 1977, ch. 287, § 11. For present comparable provisions, *see* Chapter 24, Article 7A NMSA 1978.

# ARTICLE 7A

# Uniform Health-Care Decisions

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## 24-7A-1. Definitions.

As used in the Uniform Health-Care Decisions Act:



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A. "advance health-care directive" means an individual instruction or a power of attorney for health care made, in either case, while the individual has capacity;

B. "agent" means an individual designated in a power of attorney for health care to make a health-care decision for the individual granting the power;

C. "capacity" means an individual's ability to understand and appreciate the nature and consequences of proposed health care, including its significant benefits, risks and alternatives to proposed health care and to make and communicate an informed health-care decision. A determination of lack of capacity shall be made only according to the provisions of Section 24-7A-11 NMSA 1978;

D. "emancipated minor" means an individual between the ages of sixteen and eighteen who has been married, who is on active duty in the armed forces or who has been declared by court order to be emancipated;

E. "guardian" means a judicially appointed guardian or conservator having authority to make a health-care decision for an individual;

F. "health care" means any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual's physical or mental condition;

G. "health-care decision" means a decision made by an individual or the individual's agent, guardian or surrogate, regarding the individual's health care, including:

(1) selection and discharge of health-care practitioners and institutions;

(2) approval or disapproval of diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate;

(3) directions relating to life-sustaining treatment, including withholding or withdrawing life-sustaining treatment and the termination of life support; and

(4) directions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care;

H. "health-care institution" means an institution, facility or agency licensed, certified or otherwise authorized or permitted by law to provide health care in the ordinary course of business;

I. "health-care practitioner" means an individual licensed, certified or otherwise authorized or permitted by law to provide health care in the ordinary course of business or practice of a profession;

J. "individual instruction" means an individual's direction concerning a health-care decision for the individual made while the individual has capacity;

K. "life-sustaining treatment" means any medical treatment or procedure without which the individual is likely to die within a relatively short time, as determined to a reasonable degree of medical certainty by the primary care practitioner;

L. "person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency or instrumentality or any other legal or commercial entity;

M. "physician" means an individual authorized to practice medicine or osteopathy;

N. "power of attorney for health care" means the designation of an agent to make health-care decisions for the individual granting the power, made while the individual has capacity;

O. "primary care practitioner" means a health-care practitioner designated by an individual or the individual's agent, guardian or surrogate to have primary responsibility for the individual's health care;

P. "prineipal" means an adult or emancipated minor who, while having capacity, has made a power of attorney for health care by which the adult or emancipated minor delegates the right to make health-care decisions for the adult or emancipated minor to an agent;

Q. "protected person" means an adult or emancipated minor for whom a guardian has been appointed;

R. "qualified health-care professional" means a health-care practitioner who is a physician, physician assistant, nurse practitioner, nurse, psychologist or social worker;

S. "reasonably available" means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient's health-care needs;

T. "state" means a state of the United States, the District of Columbia, the commonwealth of Puerto Rico or a territory or insular possession subject to the jurisdiction of the United States;



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U. "supervising health-care practitioner" means the primary care practitioner, or if there is no primary care practitioner or if the primary care practitioner is not reasonably available, the health-care practitioner who has undertaken primary responsibility for an individual's health care; and

V. "surrogate" means an individual, other than a patient's agent or guardian, authorized under the Uniform Health-Care Decisions Act to make a health-care decision for the patient.

**History: Laws 1995, ch. 182, § 1; 1997, ch. 168, § 1; 2009, ch. 159, § 1; 2015, ch. 116, § 4.**

**The 2015 amendment,** effective June 19, 2015, amended the definitions of primary care practitioner" and "supervising health-care practitioner" as used in the Uniform Health-Care Decisions Act; in Paragraph (1) of Subsection G, after "health-care", deleted "providers" and added "practitioners"; in Subsection I, after "health-care", deleted "provider" and added "practitioner"; in Subsection K, after "primary", deleted "physician" and added "care practitioner"; in Subsection O, after "primary", deleted "'physician' means a physician designated by an individual or the individual's agent, guardian or surrogate to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes the responsibility" and added "'care practitioner' means a health-care practitioner designated by an individual or the individual's agent, guardian or surrogate to have primary responsibility for the individual's health care"; in Subsection R, after "health-care", deleted "provider" and added "practitioner"; in Subsection U, after "health-care", deleted "provider" and added "practitioner", and after "primary", deleted "physician or, if there is no primary physician or the primary physician is not reasonably available, the health-care provider who has undertaken primary responsibility for an individual's health", and after "care", added "practitioner, or if there is no primary care practitioner or if the primary care practitioner is not reasonably available, the health-care practitioner who has undertaken primary responsibility for an individual's health care".

**Temporary provisions.** — Laws 2015, ch. 116, § 16 provided that by January 1, 2016, every cabinet secretary, agency head and head of a political subdivision of the state shall update rules requiring an examination by, a certificate from or a statement of a licensed physician to also accept such examination, certificate or statement from an advanced practice registered nurse, certified nurse-midwife or physician assistant working within that person's scope of practice.

**The 2009 amendment,** effective June 19, 2009, added Subsection Q and deleted former Subsection V, which defined "ward".

**The 1997 amendment,** effective July 1, 1997, added Subsections D, K, P and V and Paragraph G(3), and made a stylistic change.

**ANNOTATIONS**

**Law reviews.** — For lecture, "Euthanasia and the right to die: Nancy Cruzan and New Mexico," see 20 N.M.L. Rev. 675 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Patient's right to refuse treatment allegedly necessary to sustain life, 93 A.L.R.3d 67.

Judicial power to order discontinuance of life-sustaining treatment, 48 A.L.R.4th 67.

Living wills: validity, construction, and effect, 49 A.L.R.4th 812.

Tortious maintenance or removal of life supports, 58 A.L.R.4th 222.

Propriety of, and liability related to, issuance or enforcement of do not resuscitate (DNR) orders, 46 A.L.R.5th 793.

## 24-7A-2. Advance health-care directives.

A. An adult or emancipated minor, while having capacity, has the right to make his or her own health-care decisions and may give an individual instruction. The instruction may be oral or written; if oral, it must be made by personally informing a health-care provider. The instruction may be limited to take effect only if a specified condition arises.

B. An adult or emancipated minor, while having capacity, may execute a power of attorney for health care, which may authorize the agent to make any health-care decision the principal could have made while having capacity. The power must be in writing and signed by the principal. The power remains in effect notwithstanding the principal's later incapacity under the Uniform Health-Care Decisions Act or Article 5 of the Uniform Probate Code [Chapter 45, Article 5 NMSA 1978]. The power may include individual instructions. Unless related to the principal by blood, marriage or adoption, an agent may not be an owner, operator or employee of a health-care institution at which the principal is receiving care.

C. Unless otherwise specified in a power of attorney for health care, the authority of an agent becomes effective only upon a determination that the principal lacks capacity, and ceases to be effective upon a determination that the principal has recovered capacity.

D. Unless otherwise specified in a written advance health-care directive, a determination that an individual lacks or has recovered capacity or that another condition exists that affects an individual instruction or the authority of an agent, shall be made according to the provisions of Section 11 [24-7A-11 NMSA 1978] of the Uniform Health-Care Decisions Act.



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E. An agent shall make a health-care decision in accordance with the principal's individual instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent's determination of the principal's best interest. In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent.

F. A health-care decision made by an agent for a principal is effective without judicial approval.

G. A written advance health-care directive may include the individual's nomination of a guardian of the person.

**History: Laws 1995, ch. 182, § 2.**

## 24-7A-2.1. Prohibited practice.

A. No insurer or other provider of benefits regulated by the New Mexico Insurance Code [Chapter 59A NMSA 1978, except for Articles 30A and 42A] or a state agency shall require a person to execute or revoke an advance health-care directive as a condition for membership in, being insured for or receiving coverage or benefits under an insurance contract or plan.

B. No insurer may condition the sale, procurement or issuance of a policy, plan, contract, certificate or other evidence of coverage, or entry into a pension, profit-sharing, retirement, employment or similar benefit plan, upon the execution or revocation of an advance health-care directive; nor shall the existence of an advance health-care directive modify the terms of an existing policy, plan, contract, certificate or other evidence of coverage of insurance.

C. The provisions of this section shall be enforced by the superintendent of insurance under the New Mexico Insurance Code.

**History: Laws 1997, ch. 168, § 14.**

## 24-7A-3. Revocation of advance health-care directive.

A. An individual, while having capacity, may revoke the designation of an agent either by a signed writing or by personally informing the supervising health-care provider. If the individual cannot sign, a written revocation must be signed for the individual and be witnessed by two witnesses, each of whom has signed at the direction and in the presence of the individual and of each other.

B. An individual, while having capacity, may revoke all or part of an advance health-care directive, other than the designation of an agent, at any time and in any manner that communicates an intent to revoke.

C. A health-care provider, agent, guardian or surrogate who is informed of a revocation shall promptly communicate the fact of the revocation to the supervising health-care provider and to any health-care institution at which the patient is receiving care.

D. The filing of a petition for or a decree of annulment, divorce, dissolution of marriage or legal separation revokes a previous designation of a spouse as agent unless otherwise specified in the decree or in a power of attorney for health care. A designation revoked solely by this subsection is revived by the individual's remarriage to the former spouse, by a nullification of the divorce, annulment or legal separation or by the dismissal or withdrawal, with the individual's consent, of a petition seeking annulment, divorce, dissolution of marriage or legal separation.

E. An advance health-care directive that conflicts with an earlier advance health-care directive revokes the earlier directive to the extent of the conflict.

**History: Laws 1995, ch. 182, § 3; 1997, ch. 168, § 2.**

**The 1997 amendment,** effective July 1, 1997, in Subsection A, substituted "either" for "only" in the first sentence and added the second sentence.

## 24-7A-4. Optional form.

The following form may, but need not, be used to create an advance health-care directive. The other sections of the Uniform Health-Care Decisions Act govern the effect of this or any other



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writing used to create an advance health-care directive. An individual may complete or modify all or any part of the following form:

"OPTIONAL ADVANCE HEALTH-CARE DIRECTIVE

Explanation

You have the right to give instructions about your own health care. You also have the right to name someone else to make health-care decisions for you. This form lets you do either or both of these things. It also lets you express your wishes regarding the designation of your primary care practitioner.

THIS FORM IS OPTIONAL. Each paragraph and word of this form is also optional. If you use this form, you may cross out, complete or modify all or any part of it. You are free to use a different form. If you use this form, be sure to sign it and date it.

PART 1 of this form is a power of attorney for health care. PART 1 lets you name another individual as agent to make health-care decisions for you if you become incapable of making your own decisions or if you want someone else to make those decisions for you now even though you are still capable. You may also name an alternate agent to act for you if your first choice is not willing, able or reasonably available to make decisions for you. Unless related to you, your agent may not be an owner, operator or employee of a health-care institution at which you are receiving care.

Unless the form you sign limits the authority of your agent, your agent may make all health-care decisions for you. This form has a place for you to limit the authority of your agent. You need not limit the authority of your agent if you wish to rely on your agent for all health-care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right to:

(a) consent or refuse consent to any care, treatment, service or procedure to maintain, diagnose or otherwise affect a physical or mental condition;
(b) select or discharge health-care practitioners and institutions;
(c) approve or disapprove diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate; and
(d) direct the provision, withholding or withdrawal of artificial nutrition and hydration and all other forms of health care.

PART 2 of this form lets you give specific instructions about any aspect of your health care. Choices are provided for you to express your wishes regarding life-sustaining treatment, including the provision of artificial nutrition and hydration, as well as the provision of pain relief. In addition, you may express your wishes regarding whether you want to make an anatomical gift of some or all of your organs and tissue. Space is also provided for you to add to the choices you have made or for you to write out any additional wishes.

PART 3 of this form lets you designate a primary care practitioner to have primary responsibility for your health care.

After completing this form, sign and date the form at the end. It is recommended but not required that you request two other individuals to sign as witnesses. Give a copy of the signed and completed form to your physician, to any other health-care practitioners you may have, to any health-care institution at which you are receiving care and to any health-care agents you have named. You should talk to the person you have named as agent to make sure that he or she understands your wishes and is willing to take the responsibility.

You have the right to revoke this advance health-care directive or replace this form at any time.

* * * * * * * * * * * * * * * * * * * * *

PART 1

POWER OF ATTORNEY FOR HEALTH CARE

(1) DESIGNATION OF AGENT: I designate the following individual as my agent to make health-care decisions for me:



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_____

(name of individual you choose as agent)

_____

(address) (city) (state) (zip code)

_____

(home phone) (work phone)

If I revoke my agent's authority or if my agent is not willing, able or reasonably available to make a health-care decision for me, I designate as my first alternate agent:

_____

(name of individual you choose as first alternate agent)

_____

(address) (city) (state) (zip code)

_____

(home phone) (work phone)

If I revoke the authority of my agent and first alternate agent or if neither is willing, able or reasonably available to make a health-care decision for me, I designate as my second alternate agent:

_____

(name of individual you choose as second alternate agent)

_____

(address) (city) (state) (zip code)

_____

(home phone) (work phone)

(2) AGENT'S AUTHORITY: My agent is authorized to obtain and review medical records, reports and information about me and to make all health-care decisions for me, including decisions to provide, withhold or withdraw artificial nutrition, hydration and all other forms of health care to keep me alive, except as I state here:

_____

_____

(Add additional sheets if needed.)

(3) WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE: My agent's authority becomes effective when my primary care practitioner and one other qualified health-care professional determine that I am unable to make my own health-care decisions. If I initial this box [ ], my agent's authority to make health-care decisions for me takes effect immediately.

(4) AGENT'S OBLIGATION: My agent shall make health-care decisions for me in accordance with this power of attorney for health care, any instructions I give in PART 2 of this form and my other wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health-care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

(5) NOMINATION OF GUARDIAN: If a guardian of my person needs to be appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing, able or reasonably available to act as guardian, I nominate the alternate agents whom I have named, in the order designated.

PART 2

INSTRUCTIONS FOR HEALTH CARE



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If you are satisfied to allow your agent to determine what is best for you in making end-of-life decisions, you need not fill out this part of the form. If you do fill out this part of the form, you may cross out any wording you do not want.

(6) END-OF-LIFE DECISIONS: If I am unable to make or communicate decisions regarding my health care, and IF (i) I have an incurable or irreversible condition that will result in my death within a relatively short time, OR (ii) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, OR (iii) the likely risks and burdens of treatment would outweigh the expected benefits, THEN I direct that my health-care practitioners and others involved in my care provide, withhold or withdraw treatment in accordance with the choice I have initialed below in one of the following three boxes:

[ ] I CHOOSE NOT To Prolong Life
I do not want my life to be prolonged.

[ ] I CHOOSE To Prolong Life
I want my life to be prolonged as long as possible within the limits of generally accepted health-care standards.

[ ] I CHOOSE To Let My Agent Decide
My agent under my power of attorney for health care may make life-sustaining treatment decisions for me.

(7) ARTIFICIAL NUTRITION AND HYDRATION: If I have chosen above NOT to prolong life, I also specify by marking my initials below:

[ ] I DO NOT want artificial nutrition OR
[ ] I DO want artificial nutrition.
[ ] I DO NOT want artificial hydration unless required for my comfort OR
[ ] I DO want artificial hydration.

(8) RELIEF FROM PAIN: Regardless of the choices I have made in this form and except as I state in the following space, I direct that the best medical care possible to keep me clean, comfortable and free of pain or discomfort be provided at all times so that my dignity is maintained, even if this care hastens my death:

_____

_____

(9) ANATOMICAL GIFT DESIGNATION: Upon my death I specify as marked below whether I choose to make an anatomical gift of all or some of my organs or tissue:

[ ] I CHOOSE to make an anatomical gift of all of my organs or tissue to be determined by medical suitability at the time of death, and artificial support may be maintained long enough for organs to be removed.

[ ] I CHOOSE to make a partial anatomical gift of some of my organs and tissue as specified below, and artificial support may be maintained long enough for organs to be removed.

_____

_____

[ ] I REFUSE to make an anatomical gift of any of my organs or tissue.
[ ] I CHOOSE to let my agent decide.

(10) OTHER WISHES: (If you wish to write your own instructions, or if you wish to add to the instructions you have given above, you may do so here.) I direct that:

_____

_____

(Add additional sheets if needed.)



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PART 3

PRIMARY CARE PRACTITIONER

(11) I designate the following as my primary care practitioner:

_____

(name of primary care practitioner)

_____

(address) (city) (state) (zip code)

_____

(phone)

If the primary care practitioner I have designated above is not willing, able or reasonably available to act as my primary care practitioner, I designate the following as my primary care practitioner:

_____

(name of primary care practitioner)

_____

(address) (city) (state) (zip code)

_____

(phone)

* * * * * * * * * * * * * * * * * * * * *

(12) EFFECT OF COPY: A copy of this form has the same effect as the original.

(13) REVOCATION: I understand that I may revoke this OPTIONAL ADVANCE HEALTH-CARE DIRECTIVE at any time, and that if I revoke it, I should promptly notify my supervising health-care practitioner and any health-care institution where I am receiving care and any others to whom I have given copies of this power of attorney. I understand that I may revoke the designation of an agent either by a signed writing or by personally informing the supervising health-care practitioner.

(14) SIGNATURES: Sign and date the form here:

_____ _____

(date) (sign your name)

_____ _____

(address) (print your name)

_____ _____

(city) (state) (your social security number)

(Optional) SIGNATURES OF WITNESSES:

First witness Second witness

_____ _____

(print name) (print name)

_____ _____

(address) (address)

_____ _____

(city) (state) (city) (state)

_____ _____

(signature of witness) (signature of witness)

_____ _____

(date) (date)".

**History: Laws 1995, ch. 182, § 4; 1997, ch. 168, § 3; 2000, ch. 54, § 9; 2015, ch. 116, § 5.**

**The 2015 amendment,** effective June 19, 2015, substituted each reference to "primary physician" with "primary



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care practitioner"; in the second undesignated paragraph, after "primary", deleted "physician" and added "care practitioner"; in the seventh undesignated paragraph, after "designate a", deleted "physician" and added "primary care practitioner"; in the eighth undesignated paragraph, after the first occurrence of "health-care", deleted "providers" and added "practitioners"; in Paragraph (3) of Part 1 of the form; after "primary", deleted "physician" and added "care practitioner"; in Paragraph (6) of Part 2 of the form, after "health-care", deleted "providers" and added "practitioners"; in Part 3 of the form, in the heading, after "PRIMARY", deleted "PHYSICIAN" and added "CARE PRACTITIONER", in Paragraph (11) of Part 3 of the form, after "the following", deleted "physician as my primary physician" and added "as my primary care practitioner", after "name of", deleted "physician" and added "primary care practitioner", after "If the", deleted "physician" and added "primary care practitioner", after "act as my primary", deleted "physician" and added "care practitioner", after "I designate the following", deleted "physician as my primary physician" and added "as my primary care practitioner", and after "name of", deleted "physician" and added "primary care practitioner"; and in Paragraph (13) of Part 3 of the form, after the first occurrence of "supervising health-care", deleted "provider" and added "practitioner", and after the second occurrence of "supervising health-care", deleted "provider" and added "practitioner".

**Temporary provisions.** — Laws 2015, ch. 116, § 16 provided that by January 1, 2016, every cabinet secretary, agency head and head of a political subdivision of the state shall update rules requiring an examination by, a certificate from or a statement of a licensed physician to also accept such examination, certificate or statement from an advanced practice registered nurse, certified nurse-midwife or physician assistant working within that person's scope of practice.

**The 2000 amendment,** effective May 17, 2000, in the fifth paragraph of the Explanation section, added the third sentence; added Item 9 of Part 3 of the form and redesignated the remaining sections accordingly.

**The 1997 amendment,** effective July 1, 1997, in the second paragraph of the form, rewrote the last sentence which read "You do not have to sign any form"; in the paragraph of the form explaining Part 2, substituted "life-sustaining treatment" for "the provision, withholding or withdrawal of treatment to keep you alive" in the second sentence; in paragraph (3) in Part 1 of the form, deleted "unless I mark the following box" at the end of the first sentence and substituted "initial" for "mark" in the second sentence; rewrote paragraphs (6), (7), and (8) in Part 2 of the form; substituted "either" for "only" in the last sentence in paragraph (12) of Part 3 of the form; and made stylistic changes.

## 24-7A-5. Decisions by surrogate.

A. A surrogate may make a health-care decision for a patient who is an adult or emancipated minor if the patient has been determined according to the provisions of Section 24-7A-11 NMSA 1978 to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available.

B. An adult or emancipated minor, while having capacity, may designate any individual to act as surrogate by personally informing the supervising health-care provider. In the absence of a designation or if the designee is not reasonably available, any member of the following classes of the patient's family who is reasonably available, in descending order of priority, may act as surrogate:

(1) the spouse, unless legally separated or unless there is a pending petition for annulment, divorce, dissolution of marriage or legal separation;

(2) an individual in a long-term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other's well-being;

(3) an adult child;

(4) a parent;

(5) an adult brother or sister; or

(6) a grandparent.

C. If none of the individuals eligible to act as surrogate under Subsection B of this section is reasonably available, an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values and who is reasonably available may act as surrogate.

D. A surrogate shall communicate his assumption of authority as promptly as practicable to the patient, to members of the patient's family specified in Subsection B of this section who can be readily contacted and to the supervising health-care provider.

E. If more than one member of a class assumes authority to act as surrogate and they do not agree on a health-care decision and the supervising health-care provider is so informed, the supervising health-care provider shall comply with the decision of a majority of the members of that class who have communicated their views to the provider. If the class is evenly divided concerning the health-care decision and the supervising health-care provider is so informed, that class and all individuals having lower priority are disqualified from making the decision.



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F. A surrogate shall make a health-care decision in accordance with the patient's individual instructions, if any, and other wishes to the extent known to the surrogate. Otherwise, the surrogate shall make the decision in accordance with the surrogate's determination of the patient's best interest. In determining the patient's best interest, the surrogate shall consider the patient's personal values to the extent known to the surrogate.

G. A health-care decision made by a surrogate for a patient shall not be made solely on the basis of the patient's pre-existing physical or medical condition or pre-existing or projected disability.

H. A health-care decision made by a surrogate for a patient is effective without judicial approval.

I. A patient, at any time, may disqualify any person, including a member of the patient's family, from acting as the patient's surrogate by a signed writing or by personally informing a health-care provider of the disqualification. A health-care provider who is informed by the patient of a disqualification shall promptly communicate the fact of disqualification to the supervising health-care provider and to any health-care institution at which the patient is receiving care.

J. Unless related to the patient by blood, marriage or adoption, a surrogate may not be an owner, operator or employee of a health-care institution at which the patient is receiving care.

K. A supervising health-care provider may require an individual claiming the right to act as surrogate for a patient to provide a written declaration under penalty of perjury stating facts and circumstances reasonably sufficient to establish the claimed authority.

**History: Laws 1995, ch. 182, § 5; 1997, ch. 168, § 4.**

**The 1997 amendment,** effective July 1, 1997, added "and to the supervising health-care provider" at the end of Subsection D; added Subsection G; and made stylistic changes.

**ANNOTATIONS**

**Conditions precedent for surrogate decisions.** — Before a surrogate may make health-care decisions and enter into an agreement to admit a person who lacks capacity to a health-care institution, there must be a showing that the person was admitted based on the conclusions of two physicians that the person lacked capacity, and if there exists an individual with the express power to make health-care decisions on behalf of the person, there must be a showing of that individual's approval or unavailability before the surrogate may make health-care decisions. *Corum v. Roswell Senior Living*, LLC, 2010-NMCA-105, 149 N.M. 287, 248 P.3d 329, cert. denied, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

**Conditions precedent for surrogate decisions.** — Where the decedent was admitted into defendant's nursing home by the decedent's spouse; the decedent lacked capacity to enter into an admission agreement; the decedent's spouse signed an admission agreement that contained an arbitration clause; the decedent's spouse had no written authority designating the spouse as an agent with power of attorney, guardian, or surrogate; at the time the decedent's spouse signed the admission agreement, the decedent's child had durable financial and medical power of attorney over the decedent; the administrator of the nursing home attempted to telephone the decedent's child, but was unsuccessful; and there was no indication that two physicians had determined that the decedent lacked capacity at the time the decedent's spouse signed the admission agreement, the decedent's spouse did not have power to enter into the arbitration agreement. *Corum v. Roswell Senior Living, LLC*, 2010-NMCA-105, 149 N.M. 287, 248 P.3d 329, cert. denied, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

## 24-7A-6. Decisions by guardian.

A. A guardian shall comply with the protected person's individual instructions made while the protected person had capacity and shall not disregard the protected person's preferences contained in an advance health-care directive unless the appointing court expressly so authorizes after notice to the agent, if any, and the protected person. The court may disregard such preferences if it finds by clear and convincing evidence that the preferences do not accurately reflect the free choice of the protected person at the time of making the individual instructions or that the protected person revoked the individual instructions while the protected person had capacity pursuant to Subsection B of Section 24-7A-3 NMSA 1978. This provision does not affect the court's ability to grant relief pursuant to a petition as provided in Section 24-7A-14 NMSA 1978.

B. A health-care decision of an agent appointed by a person having capacity takes precedence over that of a guardian, unless the appointing court expressly directs otherwise after notice to the agent and the protected person.

C. Subject to the provisions of Subsections A and B of this section, a health-care decision made by a guardian for the protected person is effective without judicial approval, if the appointing court has expressly authorized the guardian to make health-care decisions for the protected person, in



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accordance with the provisions of Section 45-5-312 NMSA 1978, after notice to the protected person and any agent.

**History: Laws 1995, ch. 182, § 6; 2009, ch. 159, § 2.**

**The 2009 amendment,** effective June 19, 2009, changed "ward" to "protected person"; and in Subsection A, between "shall comply with the" and "advance health-care directive", changed "ward's individual instructions and may not revoke the ward's" to "protected person's individual instructions made while the protected person had capacity and shall not disregard the protected person's preferences contained in an"; and added the second and third sentences.

## 24-7A-6.1. Life-sustaining treatment for unemancipated minors.

A. Except as otherwise provided by law, a parent or guardian of an unemancipated minor may make that minor's health-care decisions.

B. A parent or guardian of an unemancipated minor shall have the authority to withhold or withdraw life-sustaining treatment for the unemancipated minor, subject to the provisions of this section and the standards for surrogate decision-making for adults provided for in the Uniform Health-Care Decisions Act.

C. Subject to the provisions of Subsection B of this section, if an unemancipated minor has capacity sufficient to understand the nature of that unemancipated minor's medical condition, the risks and benefits of treatment and the contemplated decision to withhold or withdraw life-sustaining treatment, that unemancipated minor shall have the authority to withhold or withdraw life-sustaining treatment.

D. For purposes of Subsection C of this section, a determination of the mental and emotional capacity of an unemancipated minor shall be determined by two qualified health-care professionals, one of whom shall be the unemancipated minor's primary care practitioner and the other of whom shall be a health-care practitioner that works with unemancipated minors of the minor's age in the ordinary course of that health-care practitioner's practice. If the unemancipated minor lacks capacity due to mental illness or developmental disability, one of the qualified health-care professionals shall be a person whose training and expertise aid in the assessment of functional impairment.

E. If the unemancipated minor's primary care practitioner has reason to believe that a parent or guardian of an unemancipated minor, including a non-custodial parent, has not been informed of a decision to withhold or withdraw life-sustaining treatment, the primary care practitioner shall make reasonable efforts to determine if the uninformed parent or guardian has maintained substantial and continuous contact with the unemancipated minor and, if so, shall make reasonable efforts to notify that parent or guardian before implementing a decision.

F. If there is disagreement regarding the decision to withhold or withdraw life-sustaining treatment for an unemancipated minor, the provisions of Section 24-7A-11 NMSA 1978 shall apply.

**History: Laws 1997, ch. 168, § 13; 2009, ch. 220, § 2; 2015, ch. 116, § 6.**

**The 2015 amendment,** effective June 19, 2015, amended the Uniform Health-Care Decisions Act provision, relating to life-sustaining treatment of unemancipated minors, by substituting each reference to "primary physician" with "primary care practitioner"; in Subsection D, after "minor's primary", deleted "physician" and added "care practitioner", after "whom shall be a", deleted "physician" and added "health-care practitioner", after "ordinary course of that", deleted "physician's" and after "health-care", added "practitioner's"; and in Subsection E, after "minor's primary", deleted "physician" and added "care practitioner", and after "the primary", deleted "physician" and added "care practitioner".

**The 2009 amendment,** effective June 19, 2009, deleted former Subsection G, which defined "unemancipated minor".

## 24-7A-6.2. Consent to health care for certain minors fourteen years of age or older.

A. An unemancipated minor fourteen years of age or older who has capacity to consent may give consent for medically necessary health care; provided that the minor is:

(1) living apart from the minor's parents or legal guardian; or

(2) the parent of a child.

B. For purposes of this section, "medically necessary health care" means clinical and rehabilitative, physical, mental or behavioral health services that are:



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(1) essential to prevent, diagnose or treat medical conditions or that are essential to enable an unemancipated minor to attain, maintain or regain functional capacity;

(2) delivered in the amount and setting with the duration and scope that is clinically appropriate to the specific physical, mental and behavioral health-care needs of the minor;

(3) provided within professionally accepted standards of practice and national guidelines; and

(4) required to meet the physical, mental and behavioral health needs of the minor, but not primarily required for convenience of the minor, health-care provider or payer.

C. The consent of the unemancipated minor to examination or treatment pursuant to this section shall not be disaffirmed because of minority.

D. The parent or legal guardian of an unemancipated minor who receives medically necessary health care is not liable for payment for those services unless the parent or legal guardian has consented to such medically necessary health care; provided that the provisions of this subsection do not relieve a parent or legal guardian of liability for payment for emergency health care provided to an unemancipated minor.

E. A health-care provider or a health-care institution shall not be liable for reasonably relying on statements made by an unemancipated minor that the minor is eligible to give consent pursuant to Subsection A of this section.

F. Nothing in this section shall otherwise limit the rights of an unemancipated minor to consent to treatment, nor shall this section be read to conflict with the rights of parents and children pursuant to the Children's Mental Health and Developmental Disabilities Act [32A-6A-1 through 32A-6A-30 NMSA 1978].

**History: 1978 Comp., § 24-7A-6.2, as enacted by Laws 2009, ch. 220, § 3.**

**Effective dates.** — Laws 2009, ch. 220 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

## 24-7A-7. Obligations of health-care practitioner.

A. Before implementing a health-care decision made for a patient, a supervising health-care practitioner shall promptly communicate to the patient the decision made and the identity of the person making the decision.

B. A supervising health-care practitioner who knows of the existence of an advance health-care directive, a revocation of an advance health-care directive, a challenge to a determination of lack of capacity or a designation or disqualification of a surrogate shall promptly record its existence in the patient's health-care record and, if it is in writing, shall request a copy and, if one is furnished, shall arrange for its maintenance in the health-care record.

C. A supervising health-care practitioner who makes or is informed of a determination that a patient lacks or has recovered capacity or that another condition exists that affects an individual instruction or the authority of an agent, guardian or surrogate shall promptly record the determination in the patient's health-care record and communicate the determination to the patient and to any person then authorized to make health-care decisions for the patient.

D. Except as provided in Subsections E and F of this section, a health-care practitioner or health-care institution providing care to a patient shall comply:

(1) before and after the patient is determined to lack capacity, with an individual instruction of the patient made while the patient had capacity;

(2) with a reasonable interpretation of the individual instruction made by a person then authorized to make health-care decisions for the patient; and

(3) with a health-care decision for the patient that is not contrary to an individual instruction of the patient and is made by a person then authorized to make health-care decisions for the patient, to the same extent as if the decision had been made by the patient while having capacity.

E. A health-care practitioner may decline to comply with an individual instruction or health-care decision for reasons of conscience. A health-care institution may decline to comply with an individual instruction or health-care decision if the instruction or decision is contrary to a policy



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of the health-care institution that is expressly based on reasons of conscience and if the policy was timely communicated to the patient or to a person then authorized to make health-care decisions for the patient.

F. A health-care practitioner or health-care institution may decline to comply with an individual instruction or health-care decision that requires medically ineffective health care or health care contrary to generally accepted health-care standards applicable to the health-care practitioner or health-care institution. "Medically ineffective health care" means treatment that would not offer the patient any significant benefit, as determined by a health-care practitioner.

G. A health-care practitioner or health-care institution that declines to comply with an individual instruction or health-care decision shall:

(1) promptly so inform the patient, if possible, and any person then authorized to make health-care decisions for the patient;

(2) provide continuing care to the patient until a transfer can be effected; and

(3) unless the patient or person then authorized to make health-care decisions for the patient refuses assistance, immediately make all reasonable efforts to assist in the transfer of the patient to another health-care practitioner or health-care institution that is willing to comply with the individual instruction or decision.

H. A health-care practitioner or health-care institution may not require or prohibit the execution or revocation of an advance health-care directive as a condition for providing health care.

I. The Uniform Health-Care Decisions Act does not require or permit a health-care institution or health-care practitioner to provide any type of health care for which the health-care institution or health-care practitioner is not licensed, certified or otherwise authorized or permitted by law to provide.

**History: Laws 1995, ch. 182, § 7; 1997, ch. 168, § 5; 2015, ch. 116, § 7.**

**The 2015 amendment,** effective June 19, 2015, amended the Uniform Health-Care Decisions Act provision relating to the obligations of health-care practitioners; substituted each reference to "health-care provider" with "health-care practitioner" throughout the section; in Paragraph (2) of Subsection D, after "interpretation of", deleted "that" and added "the individual"; in Subsection F, after "as determined by a", deleted "physician" and added "health-care practitioner"; and in Paragraph (3) of Subsection G, after "willing to comply with the", added "individual".

**Temporary provisions.** — Laws 2015, ch. 116, § 16 provided that by January 1, 2016, every cabinet secretary, agency head and head of a political subdivision of the state shall update rules requiring an examination by, a certificate from or a statement of a licensed physician to also accept such examination, certificate or statement from an advanced practice registered nurse, certified nurse-midwife or physician assistant working within that person's scope of practice.

**The 1997 amendment,** effective July 1, 1997, inserted "health-care" preceding "institution" throughout the section; substituted "supervising health-care provider" for "primary physician" near the beginning of Subsection C; and made stylistic changes.

## 24-7A-8. Health-care information.

Unless otherwise specified in an advance health-care directive, a person then authorized to make health-care decisions for a patient has the same rights as the patient to request, receive, examine, copy and consent to the disclosure of medical or any other health-care information.

**History: Laws 1995, ch. 182, § 8.**

## 24-7A-9. Immunities.

A. A health-care provider or health-care institution acting in good faith and in accordance with generally accepted health-care standards applicable to the health-care provider or health-care institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for:

(1) complying or attempting to comply with a health-care decision of a person apparently having authority to make a health-care decision for a patient, including a decision to withhold or withdraw health care or make an anatomical gift;

(2) declining to comply with a health-care decision of a person based on a belief that the person then lacked authority;



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(3) complying or attempting to comply with an advance health-care directive and assuming that the directive was valid when made and has not been revoked or terminated;

(4) declining to comply with a health-care directive as permitted by Subsection E or F of Section 24-7A-7 NMSA 1978; or

(5) complying or attempting to comply with any other provision of the Uniform Health-Care Decisions Act.

B. An individual acting as agent, guardian or surrogate under the Uniform Health-Care Decisions Act is not subject to civil or criminal liability or to discipline for unprofessional conduct for health-care decisions made in good faith.

**History: Laws 1995, ch. 182, § 9; 2000, ch. 54, § 10.**

**The 2000 amendment,** effective May 17, 2000, inserted "health-care" following both instances of "health care provider or" in the preliminary language of Subsection A, inserted "or make an anatomical gift" in Subsection A(1), and updated the statutory reference in Subsection A(4).

## 24-7A-10. Statutory damages.

A. A health-care provider or health-care institution that intentionally violates the Uniform Health-Care Decisions Act is subject to liability to the aggrieved individual for damages of five thousand dollars ($5,000) or actual damages resulting from the violation, whichever is greater, plus reasonable attorney fees.

B. A person who intentionally falsifies, forges, conceals, defaces or obliterates an individual's advance health-care directive or a revocation of an advance health-care directive without the individual's consent or a person who coerces or fraudulently induces an individual to give, revoke or not give or revoke an advance health-care directive is subject to liability to that individual for damages of five thousand dollars ($5,000) or actual damages resulting from the action, whichever is greater, plus reasonable attorney fees.

C. The damages provided in this section are in addition to other types of relief available under other law, including civil and criminal law and law providing for disciplinary procedures.

**History: Laws 1995, ch. 182, § 10; 1997, ch. 168, § 6.**

**The 1997 amendment,** effective July 1, 1997, inserted "health-care" preceding "institution" in Subsection A; substituted "five thousand dollars ($5,000)" for "two thousand five hundred dollars ($2,500)" in Subsections A and B; and made stylistic changes.

## 24-7A-11. Capacity.

A. The Uniform Health-Care Decisions Act does not affect the right of an individual to make health-care decisions while having capacity to do so.

B. An individual is presumed to have capacity to make a health-care decision, to give or revoke an advance health-care directive and to designate a surrogate.

C. Unless otherwise specified in a written advance health-care directive, a determination that an individual lacks or has recovered capacity or that another condition exists that affects an individual instruction or the authority of an agent shall be made by two qualified health-care professionals, one of whom shall be the primary care practitioner. If the lack of capacity is determined to exist because of mental illness or developmental disability, one of the qualified health-care professionals shall be a person whose training and expertise aid in the assessment of functional impairment.

D. An individual shall not be determined to lack capacity solely on the basis that the individual chooses not to accept the treatment recommended by a health-care practitioner.

E. An individual, at any time, may challenge a determination that the individual lacks capacity by a signed writing or by personally informing a health-care practitioner of the challenge. A health-care practitioner who is informed by the individual of a challenge shall promptly communicate the fact of the challenge to the supervising health-care practitioner and to any health-care institution at which the individual is receiving care. Such a challenge shall prevail unless otherwise ordered by the court in a proceeding brought pursuant to the provisions of Section 24-7A-14 NMSA 1978.



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F. A determination of lack of capacity under the Uniform Health-Care Decisions Act shall not be evidence of incapacity under the provisions of Article 5 of the Uniform Probate Code [Chapter 45 NMSA 1978].

**History: Laws 1995, ch. 182, § 11; 1997, ch. 168, § 7; 2015, ch. 116, § 8.**

**The 2015 amendment,** effective June 19, 2015, amended the Uniform Health-Care Decisions Act provision, relating to the capacity of individuals making their own health-care decisions; and substituted each reference to "primary physician" or "health-care provider" with "primary care practitioner" or "health-care practitioner" throughout the section.

**Temporary provisions.** — Laws 2015, ch. 116, § 16 provided that by January 1, 2016, every cabinet secretary, agency head and head of a political subdivision of the state shall update rules requiring an examination by, a certificate from or a statement of a licensed physician to also accept such examination, certificate or statement from an advanced practice registered nurse, certified nurse-midwife or physician assistant working within that person's scope of practice.

**The 1997 amendment,** effective July 1, 1997, deleted "or disqualify" following "designate" in Subsection B; and made a stylistic change.

## 24-7A-12. Effect of copy.

A copy of a written advance health-care directive, revocation of an advance health-care directive or designation or disqualification of a surrogate has the same effect as the original.

**History: Laws 1995, ch. 182, § 12.**

## 24-7A-13. Effect of the Uniform Health-Care Decisions Act.

A. The Uniform Health-Care Decisions Act does not create a presumption concerning the intention of an individual who has not made or who has revoked an advance health-care directive.

B. Death resulting from the withholding or withdrawal of health care in accordance with the Uniform Health-Care Decisions Act does not for any purpose:

(1) constitute a suicide, a homicide or other crime; or

(2) legally impair or invalidate a governing instrument, notwithstanding any term of the governing instrument to the contrary. "Governing instrument" means a deed, will, trust, insurance or annuity policy, account with POD (payment on death designation), security registered in beneficiary form (TOD), pension, profit-sharing, retirement, employment or similar benefit plan, instrument creating or exercising a power of appointment or a dispositive, appointive or nominative instrument of any similar type.

C. The Uniform Health-Care Decisions Act does not authorize mercy killing, assisted suicide, euthanasia or the provision, withholding or withdrawal of health care, to the extent prohibited by other statutes of this state.

D. The Uniform Health-Care Decisions Act does not authorize or require a health-care provider or health-care institution to provide health care contrary to generally accepted health-care standards applicable to the health-care provider or health-care institution.

E. The Uniform Health-Care Decisions Act does not authorize an agent or surrogate to consent to the admission of an individual to a mental health-care facility. If the individual's written advance health-care directive expressly permits treatment in a mental health-care facility, the agent or surrogate may present the individual to a facility for evaluation for admission.

F. The Uniform Health-Care Decisions Act does not affect other statutes of this state governing treatment for mental illness of an individual admitted to a mental health-care institution.

**History: Laws 1995, ch. 182, § 13; 1997, ch. 168, § 8.**

**The 1997 amendment,** effective July 1, 1997, inserted "health-care" preceding "institution" in two places in Subsection D and substituted "admitted" for "involuntarily committed" in Subsection F.

## 24-7A-14. Judicial relief.

On petition of a patient, the patient's agent, guardian or surrogate, a health-care provider or health-care institution involved with the patient's care, an individual described in Subsection B



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or C of Section 24-7A-5 NMSA 1978, the district court may enjoin or direct a health-care decision or order other equitable relief. A proceeding under this section is governed by the Rules of Civil Procedure for the District Courts.

**History: Laws 1995, ch. 182, § 14; 1997, ch. 168, § 9.**

**Cross references.** — For Rules of Civil Procedure for the District Courts, *see* Rule 1-001 NMRA.

**The 1997 amendment,** effective July 1, 1997, in the first sentence, inserted "health-care" preceding "institution"; deleted "or another person having an interest in the patient's welfare" following "NMSA 1978"; and made a stylistic change.

**ANNOTATIONS**

**Standing.** — A not-for-profit corporation authorized by federal law to pursue legal remedies on behalf of persons with developmental disabilities lacked standing to bring an action to stay the district court's order permitting termination of artificial nutrition and hydration of a patient. *Protection & Advocacy Sys. v. Presbyterian Healthcare Servs.*, 1999-NMCA-122, 128 N.M. 73, 989 P.2d 890.

## 24-7A-15. Uniformity of application and construction.

The Uniform Health-Care Decisions Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject matter of that act among states enacting it.

**History: Laws 1995, ch. 182, § 15.**

## 24-7A-16. Transitional provisions.

A. An advance health-care directive is valid for purposes of the Uniform Health-Care Decisions Act if it complies with the provisions of that act, regardless of when or where executed or communicated.

B. The Uniform Health-Care Decisions Act does not impair a guardianship, living will, durable power of attorney, right-to-die statement or declaration or other advance directive for health-care decisions that is in effect before July 1, 1995.

C. Any advance directive, durable power of attorney for heath care decisions, living will, right-to-die statement or declaration or similar document that is executed in another state or jurisdiction in compliance with the laws of that state or jurisdiction shall be deemed valid and enforceable in this state to the same extent as if it were properly made in this state.

**History: Laws 1995, ch. 182, § 16; 1997, ch. 168, § 10.**

**The 1997 amendment,** effective July 1, 1997, added Subsection C and made a stylistic change.

## 24-7A-17. Short title.

Chapter 24, Article 7A NMSA 1978 may be cited as the "Uniform Health-Care Decisions Act".

**History: Laws 1995, ch. 182, § 17; 2009, ch. 159, § 3; 2009, ch. 220, § 1.**

**The 2009 amendment,** effective June 19, 2009, changed the reference of the act to the chapter and article of NMSA 1978.

Laws 2009, ch. 159, § 3 and Laws 2009, ch. 220, § 1 enacted identical amendments to this section. The section was set out as amended by Laws 2009, ch. 220, § 1. *See* 12-1-8 NMSA 1978.

## 24-7A-18. Severability.

If any provision of the Uniform Health-Care Decisions Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of that act which can be given effect without the invalid provision or application, and to this end the provisions of that act are severable.

**History: Laws 1995, ch. 182, § 18.**



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# ARTICLE 7B

# Mental Health Care Treatment Decisions

Sec.
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24-7B-2. Purpose.
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24-7B-4. Advance directive for mental health treatment.
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24-7B-9. Obligations of mental health treatment provider.
24-7B-10. Health care information.
24-7B-11. Immunities.
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24-7B-13. Statutory damages.
24-7B-14. Effect of copy.
24-7B-15. Effect of the Mental Health Care Treatment Decisions Act.
24-7B-16. Transitional provisions.

## 24-7B-1. Short title.

Chapter 24, Article 7B NMSA 1978 may be cited as the "Mental Health Care Treatment Decisions Act".

**History: Laws 2006, ch. 7, § 1; 2009, ch. 159, § 4.**

**The 2009 amendment,** effective June 19, 2009, changed the reference to the act to the chapter and article of NMSA 1978.

ANNOTATIONS

**Assisted outpatient treatment ordinance preempted by state law.** — The Mental Health and Developmental Disabilities Code, Chapter 43, Article 1 NMSA 1978, and the Mental Health Care Treatment Decisions Act, Chapter 24, Article 7B NMSA 1978, create a comprehensive scheme governing the treatment of individuals with mental illness, with or without the consent of those individuals, which together preempt home-rule municipalities from enacting a separate ordinance regulating individuals with mental illness. *Protection & Advocacy Sys. v. City of Albuquerque*, 2008-NMCA-149, 145 N.M. 156, 195 P.3d 1, cert. denied, 2008-NMCERT-009, 145 N.M. 257, 196 P.3d 488.

## 24-7B-2. Purpose.

The purpose of the Mental Health Care Treatment Decisions Act is to ensure appropriate care and treatment of persons with behavioral health needs in the community.

**History: Laws 2006, ch. 7, § 2.**

**Effective dates.** — Laws 2006, ch. 7 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-7B-3. Definitions.

As used in the Mental Health Care Treatment Decisions Act:

A. "advance directive for mental health treatment" means an individual instruction or power of attorney for mental health treatment made pursuant to the Mental Health Care Treatment Decisions Act;

B. "agent" means an individual designated in a power of attorney for mental health treatment to make a mental health treatment decision for the individual granting the power;

C. "capacity" means an individual's ability to understand and appreciate the nature and consequences of proposed mental health treatment, including significant benefits and risks and alternatives to the proposed mental health treatment, and to make and communicate an informed mental health treatment decision. A written determination or certification of lack of capacity shall be made only according to the provisions of the Mental Health Care Treatment Decisions Act;

D. "emancipated minor" means an individual between the ages of sixteen and eighteen who has been married, who is on active duty in the armed forces or who has been declared by court order to be emancipated;

E. "guardian" means a judicially appointed guardian having authority to make a mental health decision for an individual;



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F. "individual instruction" means an individual's direction concerning a mental health treatment decision for the individual, made while the individual has capacity, which is to be implemented when the individual has been determined to lack capacity;

G. "mental health treatment" means services provided for the prevention of, amelioration of symptoms of or recovery from mental illness or emotional disturbance, including electroconvulsive treatment, treatment with medication, counseling, rehabilitation services or evaluation for admission to a facility for care or treatment of persons with mental illness, if required;

H. "mental health treatment decision" means a decision made by an individual or the individual's agent or guardian regarding the individual's mental health treatment, including:

(1) selection and discharge of health care or mental health treatment providers and institutions;

(2) approval or disapproval of diagnostic tests, programs of medication and mental health treatment; and

(3) directions relating to mental health treatment;

I. "mental health treatment facility" means an institution, facility or agency licensed, certified or otherwise authorized or permitted by law to provide mental health treatment in the ordinary course of business;

J. "mental health treatment provider" or "health care provider" means an individual licensed, certified or otherwise authorized or permitted by law to provide diagnosis or mental health treatment in the ordinary course of business or practice of a profession;

K. "mental illness" means a substantial disorder of a person's emotional process, thoughts or cognition that grossly impairs judgment, behavior or capacity to recognize reality, but "mental illness" does not mean a developmental disability;

L. "power of attorney for mental health treatment" means the designation of an agent to make mental health treatment decisions for the individual granting the power, made while the individual has capacity;

M. "primary health care professional" means a qualified health care professional designated by an individual or the individual's agent or guardian to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated qualified health care professional is not reasonably available, a qualified health care professional who undertakes that responsibility;

N. "principal" means an adult or emancipated minor who, while having capacity, has made a power of attorney for mental health treatment by which the adult or emancipated minor delegates the right to make mental health treatment decisions for that adult or emancipated minor to an agent;

O. "protected person" means an adult or emancipated minor for whom a guardian has been appointed;

P. "qualified health care professional" means a licensed health care provider who is a physician, physician assistant, nurse practitioner, nurse or psychologist;

Q. "reasonably available" means able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient's mental health treatment needs; and

R. "supervising health care provider" means the primary qualified health care professional or, if the primary qualified health care professional is not reasonably available, the health care provider who has undertaken primary responsibility for an individual's health care.

**History: Laws 2006, ch. 7, § 3; 2009, ch. 159, § 5.**

**The 2009 amendment,** effective June 19, 2009, added Subsection O and deleted Subsection R, which defined "ward".

## 24-7B-4. Advance directive for mental health treatment.

A. An adult or emancipated minor, while having capacity, has the right to make the adult or emancipated minor's own mental health treatment decisions and may give an individual instruction. The individual instruction may be oral or written; if oral, it shall be made by personally



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informing a health care provider. The individual instruction may be limited to take effect only if a specified condition arises.

B. An adult or emancipated minor, while having capacity, may execute a power of attorney for mental health treatment that may authorize the agent to make any mental health treatment decision the principal could have made while having capacity. The power of attorney for mental health treatment shall be in writing signed by the principal and witnessed pursuant to Subsections I and J of this section. The power of attorney for mental health treatment shall remain in effect notwithstanding the principal's later incapacity under the Mental Health Care Treatment Decisions Act or Article 5 of the Uniform Probate Code [45-5-101 NMSA 1978]. The power of attorney for mental health treatment may include individual instructions. Unless related to the principal by blood, marriage or adoption, an agent may not be an attending qualified health care professional or an employee of the qualified health care professional or an owner, operator or employee of a mental health treatment facility at which the principal is receiving care.

C. Unless otherwise specified in a power of attorney for mental health treatment, the authority of an agent becomes effective only upon certification that the principal lacks capacity and ceases to be effective upon a determination that the principal has recovered capacity.

D. Unless otherwise specified in a written advance directive for mental health treatment, written certification that an individual lacks or has recovered capacity or that another condition exists that affects an individual instruction or the authority of an agent shall be made according to the provisions of the Mental Health Care Treatment Decisions Act.

E. An agent shall make a mental health treatment decision in accordance with the principal's individual instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent's determination of the principal's best interest. In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent.

F. A mental health treatment decision made by an agent for a principal is effective without judicial approval.

G. A written advance directive for mental health treatment may include the individual's nomination of a choice of guardian of the individual.

H. The fact that an individual has executed an advance directive for mental health treatment shall not constitute an indication of mental illness.

I. A written advance directive for mental health treatment is valid only if it is signed by the principal and a witness who is at least eighteen years of age and who attests that the principal:

(1) is known to the witness;

(2) signed the advance directive for mental health treatment in the witness' presence;

(3) appears to have capacity; and

(4) is not acting under duress, fraud or undue influence.

J. For purposes of the advance directive for mental health treatment, the witness shall not be:

(1) an agent of the principal;

(2) related to the principal by blood or marriage;

(3) entitled to any part of the principal's estate or have a claim against the principal's estate;

(4) the attending qualified health care professional; or

(5) an owner, operator or employee of a mental health treatment facility at which the principal is receiving care or of any parent organization of the mental health treatment facility.

**History: Laws 2006, ch. 7, § 4.**

**Effective dates.** — Laws 2006, ch. 7 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-7B-5. Capacity.

A. The Mental Health Care Treatment Decisions Act does not affect the right of an individual to make mental health treatment decisions while having the capacity to do so.



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B. An individual is presumed to have capacity to make a mental health treatment decision, to give an advance directive for mental health treatment or to revoke an advance directive for mental health treatment.

C. An individual shall not be determined to lack capacity solely on the basis that the individual chooses not to accept the treatment recommended by a health care provider.

D. An individual, at any time, may challenge a determination that the individual lacks capacity by a signed writing or by personally informing a health care provider of the challenge. A health care provider who is informed by the individual of a challenge shall promptly communicate the fact of the challenge to the supervising health care provider and to any mental health treatment facility at which the individual is receiving care. Such a challenge shall prevail unless the agent or the treating mental health care provider obtains an order in district court finding the principal does not have the capacity to make mental health treatment decisions.

E. A determination of lack of capacity under the Mental Health Care Treatment Decisions Act shall not be evidence of incapacity under the provisions of Article 5 of the Uniform Probate Code [45-5-101 NMSA 1978].

F. A determination of incapacity shall only be made by two persons, a qualified health care professional and a mental health treatment provider. If after the examination the principal is determined to lack capacity and is in need of mental health treatment, a written certification, substantially in the form provided in Subsection G of this section, of the principal's condition shall be made a part of the principal's medical record.

G. The following certification of the examination of a principal determining whether the principal is in need of mental health treatment and whether the principal does or does not lack capacity may be used by examiners:

"OPTIONAL EXAMINER'S CERTIFICATION

We, the undersigned, have made an examination of _____, and do hereby certify that we have made a careful personal examination of the actual condition of the person and on such examination we find that _____:

1. (Is) (Is not) in need of mental health treatment; and

2. (Does) (Does not) lack capacity to participate in decisions about (her) (his) mental health treatment.

The facts and circumstances on which we base our opinions are stated in the following report of symptoms and history of case, which is hereby made a part hereof.

According to the advance directive for mental health treatment, (name of patient) _____, wishes to receive mental health treatment in accordance with the preferences and instructions stated in the advance directive for mental health treatment.

We are duly licensed to practice in this state of New Mexico, are not related to _____ by blood or marriage and have no interest in her/his estate.

Witness our hands this _____ day of _____, 20___

_____ M.D., D.O., Ph.D., Other
_____ M.D., D.O., Ph.D., Other
Subscribed and sworn to
before me this _____ day of _____, 20____
_____
Notary Public



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REPORT OF SYMPTOMS AND HISTORY OF CASE BY EXAMINERS

I. GENERAL

Complete name _____
Place of residence _____
Sex _____ Ethnicity _____
Age _____
Date of Birth _____

II. STATEMENT OF FACTS AND CIRCUMSTANCES

Our determination that the principal (is) (is not) in need for mental health treatment is based on the following:

_____
_____

Our determination that the principal does not have the capacity to participate in the principal's mental health treatment decisions is based on:

1. the principal's ability to understand and communicate the nature of the proposed health care or mental health treatment described as:

_____
_____

2. the principal's ability to understand and communicate the consequences of the proposed health care or mental health treatment described as:

_____
_____

3. the principal's ability to understand and communicate the significant benefits, risks and alternatives to the proposed health care or mental health treatment described as:

_____
_____

4. the principal's ability to understand and communicate a choice about the proposed health care or mental health treatment described as:

_____
_____

III. NAME AND RELATIONSHIPS OF FAMILY MEMBERS/OTHERS TO BE NOTIFIED

Other data _____

Dated at _____, New Mexico, this _____ day of _____, 20____

_____ M.D., D.O., Ph.D.,
_____ Other Address

_____ M.D., D.O., Ph.D.,
_____ Other Address."

**History: Laws 2006, ch. 7, § 5.**

**Effective dates.** — Laws 2006, ch. 7 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.



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## 24-7B-6. Revocation of advance directive for mental health treatment.

A. An individual, while having capacity, may revoke the designation of an agent either by a signed writing or by personally informing the supervising health care provider. If the individual cannot sign, a written revocation shall be signed for the individual and be witnessed by two witnesses pursuant to Subsections I and J of Section 4 [24-7B-4 NMSA 1978] of the Mental Health Care Treatment Decisions Act, each of whom has signed at the direction of the individual and in the presence of the individual and each other.

B. An individual, while having capacity, may revoke all or part of an advance directive for mental health treatment, other than the designation of an agent, at any time and in any manner that communicates an intent to revoke.

C. A mental health treatment provider, agent or guardian who is informed of a revocation shall promptly communicate the fact of the revocation to the supervising health care provider and to any mental health treatment facility at which the patient is receiving care.

D. The filing of a petition for or a decree of annulment, divorce, dissolution of marriage or legal separation revokes a previous designation of a spouse as agent, unless otherwise specified in the decree or in a power of attorney for mental health treatment. A designation revoked solely by this subsection is revived by the individual's remarriage to the former spouse, by a nullification of the divorce, annulment or legal separation or by the dismissal or withdrawal, with the individual's consent, of a petition seeking annulment, divorce, dissolution of marriage or legal separation.

E. An advance directive for mental health treatment that conflicts with an earlier advance directive for mental health treatment revokes the earlier directive to the extent of the conflict.

F. Unless otherwise specified in the power of attorney for mental health treatment, an advance health-care directive pursuant to the Uniform Health-Care Decisions Act [Chapter 24, Article 7A NMSA 1978] and an advance directive for mental health treatment shall be treated separately. A revocation of a power of attorney for mental health treatment shall not affect the validity of a power of attorney.

**History: Laws 2006, ch. 7, § 6.**

**Effective dates.** — Laws 2006, ch. 7 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-7B-7. Optional form for advance directive for mental health treatment.

A. The form provided in Subsection E of this section may be used to create an individual instruction regarding mental health treatment. An individual may complete or modify all or any part of the form. The Mental Health Care Treatment Decisions Act governs the effect of this or any other writing used to create an advance directive for mental health treatment.

B. A principal may designate a capable person eighteen years of age or older to act as an agent to make mental health treatment decisions. An alternative agent may also be designated to act as an agent if the original agent is unable or unwilling to act at any time. An appointment of an agent may be accomplished by using the form provided by Subsection E of this section.

C. An agent who has accepted the appointment in writing shall have authority to make decisions, in consultation with the primary health care professional, about mental health treatment on behalf of the principal only when the principal is certified to lack capacity and to require mental health treatment as provided by the Mental Health Care Treatment Decisions Act. These decisions shall be consistent with any wishes or instructions the principal has expressed in the instruction. If the wishes or instructions of the principal are not expressed, the agent shall act in what the agent believes to be the best interest of the principal. The agent may consent to evaluation for admission to inpatient mental health treatment on behalf of the principal if so authorized in the advance directive for mental health treatment.

D. An agent may renounce the agent's authority by giving notice to the principal. If a principal lacks capacity, the agent may renounce the agent's authority by giving notice to the named



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alternative agent, if any, or, if none, to the attending qualified health care professional or health care provider. The primary health care professional or health care provider shall note the withdrawal of the last named agent as part of the principal's medical record.

E. An advance directive for mental health treatment may be executed by using the following optional form, completed or modified to the extent desired by the individual, and the form may be notarized:

"ADVANCE DIRECTIVE FOR MENTAL HEALTH TREATMENT

I, _____, being a person with capacity, willfully and voluntarily make known my wishes about mental health treatment, by my instructions to others through my advance directive for mental health treatment, or by my appointment of an agent, or both. If a guardian or an agent is appointed to make mental health decisions for me, I intend this document to take precedence over other means of ascertaining my wishes and interests.

The fact that I may have left blanks in this directive does not affect its validity in any way. I intend that all completed sections be followed. I intend this directive to take precedence over any other mental health directives I have previously executed, to the extent that they are inconsistent with this document, or unless I expressly state otherwise in either document.

I understand that I may revoke this directive in whole or in part if I am a person with capacity. I understand that I cannot revoke this directive if one qualified health care professional and one mental health treatment provider find that I am an incapacitated person, unless I successfully challenge the determination of incapacity.

I understand there are some circumstances where my provider may not have to follow my directive, specifically, if the treatment requested in this directive is infeasible or unavailable, the facility or provider is not licensed or authorized to provide the treatment requested or the directive conflicts with other applicable law.

I thus do hereby declare:

I. DECLARATION FOR MENTAL HEALTH TREATMENT

If a mental health treatment provider and a qualified health care professional, one of whom is my primary health care professional, if reasonably available, determine that my ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that I lack the capacity to refuse or consent to mental health treatment and that mental health treatment is necessary, I direct my primary health care professional and a mental health treatment provider, pursuant to the Mental Health Care Treatment Decisions Act, to provide the mental health treatment I have indicated below by my signature.

I understand that "mental health treatment" means services provided for the prevention of, amelioration of symptoms of or recovery from mental illness or emotional disturbance, including but not limited to electroconvulsive treatment, treatment with medication, counseling, rehabilitation services or evaluation for admission to a facility for care or treatment of persons with mental illness, if required.

Preferences and Instructions About Treatment, Facilities and Physicians

I would like the physician(s) named below to be involved in my treatment decisions:

Dr. _____ Contact information _____
Dr. _____ Contact information _____



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I do not wish to be treated by Dr. _____

Other Preferences: _____

Preferences and Instructions About Other Providers

I am receiving other treatment or care from providers who I feel have an impact on my mental health care. I would like the following treatment provider(s) to be contacted when this directive is effective:

Name: _____ Profession: _____
Contact Information _____

Name: _____ Profession: _____
Contact Information _____

Preferences and Instructions About Medications for Mental Health Treatment
(*initial and complete all that apply*)

____ I consent, and authorize my agent to consent, to the following medications:
_____

____ I do not consent, and I do not authorize my agent to consent, to the administration of the following medications:
_____

____ I am willing to take the medications excluded above if my only reason for excluding them is the side effects, which include _____, and these side effects can be eliminated by dosage adjustment or other means.

____ I am willing to try any other medications the hospital doctor recommends.

____ I am willing to try any other medications my outpatient doctor recommends.

____ I do not want to try any other medications.

Medication Allergies

I have allergies to, or severe side effects from, the following:
_____

I have the following other preferences or instructions about medications:
_____

Preferences and Instructions About Hospitalization and Alternatives
(*initial all that apply and, if desired, rank "1" for first choice, "2" for second choice, and so on*)

____ In the event my psychiatric condition is serious enough to require 24-hour care and I have no physical conditions that require immediate access to emergency medical care, I prefer to receive this care in programs/facilities designed as alternatives to psychiatric hospitalization.

____ I would also like the interventions below to be tried before hospitalization is considered:

____ Calling someone or having someone call me when needed
Name: _____ Telephone: _____



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____ Having a mental health service provider come to see me
____ Going to a crisis triage center or emergency room
____ Staying overnight at a crisis respite (temporary) bed
____ Seeing a provider for help with psychiatric medications
____ Other, specify: _____

Authority to Consent to Inpatient Treatment

I consent, and authorize my agent to consent, to evaluation for admission to inpatient mental health treatment.
(*Sign one*)

____ If deemed appropriate by my agent and treating physician
_____Signature

or

____ Under the following circumstances (*specify symptoms, behaviors or circumstances that indicate the need for hospitalization*)
_____
_____Signature

____ I do not consent, or authorize my agent to consent, to evaluation for admission to inpatient treatment
_____Signature

Preferences and Instructions About Use of Seclusion or Restraint

I would like the interventions below to be tried before use of seclusion or restraint is considered (*initial all that apply*)

____ "Talk me down": one-on-one
____ More medication
____ Time out/privacy
____ Show of authority/force
____ Shift my attention to something else
____ Set firm limits on my behavior
____ Help me to discuss/vent feelings
____ Decrease stimulation
____ Offer to have neutral person settle dispute
____ Other, specify _____

If it is determined that I am engaging in behavior that requires seclusion, physical restraint and/or emergency use of medication, I prefer these interventions in the order I have chosen (*choose "1" for first choice, "2" for second choice, and so on*):

____ Seclusion
____ Seclusion and physical restraint (combined)
____ Medication by injection
____ Medication in pill or liquid form

In the event my physician decides to use medication in response to an emergency situation after due consideration of my preferences and instructions for emergency treatments stated above, I expect the choice of medication to reflect any preferences and instructions I have expressed in this directive.



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The preferences and instructions I have expressed in this section regarding medication in emergency situations do not constitute consent to use of the medication for nonemergency treatment.

Preferences and Instructions About Electroconvulsive Therapy

My wishes regarding electroconvulsive therapy are (*sign one*):

____ I do not consent, nor authorize my agent to consent, to the administration of electroconvulsive therapy.

_____Signature

____ I consent, and authorize my agent to consent, to the administration of electroconvulsive therapy.

_____Signature

____ I consent, and authorize my agent to consent, to the administration of electroconvulsive therapy, but only under the following conditions:

_____

_____Signature

Preferences and Instructions About Who Is Permitted to Visit

If I have been admitted to a mental health treatment facility, the following people are not permitted to visit me there:

Name: _____
Name: _____
Name: _____

I understand that persons not listed above may be permitted to visit me.

Additional Instructions About My Mental Health Care

Other instructions about my mental health care: _____
In case of emergency, please contact: _____
Name: _____ Address: _____
Work Telephone: _____ Home telephone: _____
Physician: _____ Address: _____
Telephone: _____

The following may help me to avoid a hospitalization:

_____

I generally react to being hospitalized as follows:

_____

Staff of the hospital or crisis unit can help me by doing the following:

_____

Refusal of Treatment

I do not consent to any mental health treatment.

_____
Signature



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I further state that this document and the information contained in it may be released to any requesting licensed mental health professional.

_____ _____
Signature of principal Date

_____ _____
Signature of witness Date

II. APPOINTMENT OF AGENT

If my primary health care professional and a mental health provider determine that my ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that I lack the capacity to refuse or consent to mental health treatment and that mental health treatment is necessary, I direct my primary health care professional and other health care providers, pursuant to the Mental Health Care Treatment Decisions Act, to follow the instructions of my agent.

I hereby appoint:

Name _____
Address _____
Telephone _____ to act as my agent to make decisions regarding my mental health treatment if I become incapable of giving or withholding informed consent for that treatment.

If the person named above refuses or is unable to act on my behalf, or if I revoke that person's authority to act as my agent, I authorize the following person to act as my agent:

Name _____
Address _____
Telephone _____

My agent is authorized to make decisions that are consistent with the wishes I have expressed in my declaration. If my wishes are not expressed, my agent is to act in what he or she believes to be my best interest.

_____ _____
Signature of principal Date

III. CONFLICTING PROVISION

I understand that if I have completed both a declaration and have appointed an agent and if there is a conflict between my agent's decision and my declaration, my declaration shall take precedence unless I indicate otherwise.

_____Signature

I understand that if I have completed both an advance health care directive and an advance directive for mental health treatment, that those directives should be executed as separate instructions.

_____Signature

IV. OTHER PROVISIONS

1. In the absence of my ability to give directions regarding my mental health treatment, it is my intention that this advance directive for mental health treatment shall be honored as the expression of my legal right to consent or to refuse to consent to mental health treatment.



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2. I direct the following concerning the care of my minor children:

_____

3. This advance directive for mental health treatment shall be in effect until it is revoked.

4. I understand that I may revoke this advance directive for mental health treatment at any time.

5. I understand and agree that if I have any prior advance directives for mental health treatment, and if I sign this advance directive for mental health treatment, my prior advance directives for mental health treatment are revoked.

6. I understand the full importance of this advance directive for mental health treatment and I am emotionally and mentally competent to make this advance directive for mental health treatment.

Signed this _____ day of _____, 20__

_____

Signature

_____

City, county and state of residence

This advance directive was signed in my presence.

_____

Signature of witness

_____

Address

_____."

**History: Laws 2006, ch. 7, § 7.** **Effective dates.** — Laws 2006, ch. contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-7B-8. Decisions by guardian.

A. A guardian shall comply with the protected person's individual instructions made while the protected person had capacity and may not disregard the protected person's preferences contained in an advance directive for mental health treatment unless the appointing court expressly so authorizes after notice to the agent, if any, and the protected person. The court may disregard such preferences if it finds by clear and convincing evidence that the preferences do not accurately reflect the free choice of the protected person at the time of making the individual instructions or that the protected person revoked the individual instructions while the protected person had capacity pursuant to Subsection B of Section 24-7A-3 NMSA 1978.

B. A mental health treatment decision of an agent appointed by an individual having capacity takes precedence over that of a guardian, unless the appointing court expressly directs otherwise after notice to the agent and the protected person.

C. Subject to the provisions of Subsections A and B of this section, a mental health treatment decision made by a guardian for the protected person is effective without judicial approval, if the appointing court has expressly authorized the guardian to make mental health treatment decisions for the protected person, in accordance with the provisions of Sections 43-1-15 or 45-5-312 NMSA 1978, after notice to the protected person and any agent.



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**History: Laws 2006, ch. 7, § 8; 2009, ch. 159, § 6.**

**The 2009 amendment,** effective June 19, 2009, changed "ward" to "protected person"; in Subsection A, between "shall comply with the" and "advance health-care", changed "ward's individual instructions and may not revoke the ward's" to "protected person's individual instructions made while the protected person had capacity and may not disregard the protected person's preferences contained in an"; and added the last sentence.

## 24-7B-9. Obligations of mental health treatment provider.

A. Before implementing a mental health treatment decision made for a patient, a supervising health care provider shall promptly communicate to the patient the decision made and the identity of the person making the decision.

B. A supervising health care provider who knows of the existence of an advance directive for mental health treatment, a revocation of an advance directive for mental health treatment or a challenge to a determination or certification of lack of capacity shall promptly record its existence in the patient's health care record and, if it is in writing, shall request a copy and, if one is furnished, shall arrange for its maintenance in the health care record.

C. A qualified health care professional shall disclose an advance directive for mental health treatment to other qualified health care professionals only when it is determined that disclosure is necessary to give effect to or provide treatment in accordance with an individual instruction.

D. A supervising health care provider who makes or is informed of a written determination or certification pursuant to Section 5 [24-7B-5 NMSA 1978] of the Mental Health Care Treatment Decisions Act that a patient lacks or has recovered capacity or that another condition exists that affects an individual instruction or the authority of an agent or guardian shall promptly record the determination in the patient's health care record and communicate the determination or certification to the patient and to any person then authorized to make mental health treatment decisions for the patient.

E. Except as provided in Subsections F and G of this section, a health care provider or mental health treatment facility providing care to a patient shall comply:

(1) before and after the patient is determined to lack capacity, with an individual instruction of the patient made while the patient had capacity;

(2) with a reasonable interpretation of the individual instruction made by a person then authorized to make mental health treatment decisions for the patient; and

(3) with a mental health treatment decision for the patient that is not contrary to an individual instruction of the patient and is made by a person then authorized to make mental health treatment decisions for the patient, to the same extent as if the decision had been made by the patient while having capacity.

F. A mental health treatment provider may only decline to comply with an individual instruction or mental health treatment decision for any of the following reasons:

(1) the treatment requested is infeasible or unavailable;

(2) the facility or provider is not licensed or authorized to provide the treatment requested; or

(3) the treatment requested conflicts with other applicable law.

G. A mental health treatment provider or mental health treatment facility may decline to comply with an individual instruction or mental health treatment decision that requires medically ineffective health care or health care contrary to generally accepted health care standards applicable to the mental health treatment provider or mental health treatment facility. "Medically ineffective health care" means treatment that would not offer the patient any significant benefit, as determined by a physician chosen by the principal or agent.

H. A health care provider or mental health treatment facility that declines to comply with an individual instruction or mental health care decision shall:

(1) promptly so inform the patient, if possible, and any person then authorized to make mental health care decisions for the patient;

(2) provide continuing care to the patient until a transfer can be effected; and

(3) unless the patient or person then authorized to make mental health treatment decisions for the patient refuses assistance, immediately make all reasonable efforts to assist in the



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transfer of the patient to another health care provider or mental health treatment facility that is willing to comply with the individual instruction or decision.

I. A health care provider or mental health treatment facility shall not require or prohibit the execution or revocation of an advance directive for mental health treatment as a condition for providing health care.

J. The Mental Health Care Treatment Decisions Act does not require or permit a mental health treatment facility or health care provider to provide any type of mental health treatment for which the mental health treatment facility or health care provider is not licensed, certified or otherwise authorized or permitted by law to provide.

**History: Laws 2006, ch. 7, § 9.**
**Effective dates.** — Laws 2006, ch. contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-7B-10. Health care information.

Unless otherwise specified in an advance directive for mental health treatment, a person then authorized to make mental health treatment decisions for a patient has the same rights as the patient to request, receive, examine, copy and consent to the disclosure of medical or any other health care information.

**History: Laws 2006, ch. 7, § 10.**
**Effective dates.** — Laws 2006, ch. 7 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-7B-11. Immunities.

A. A health care provider or mental health treatment facility acting reasonably and on reasonable grounds and in accordance with generally accepted health care standards applicable to the health care provider or mental health treatment facility is not subject to civil or criminal liability or to discipline for unprofessional conduct for:

(1) complying or attempting to comply with a mental health treatment decision of a person apparently having authority to make a mental health treatment decision for a patient;

(2) declining to comply with a mental health treatment decision of a person based on a belief that the person then lacked authority;

(3) complying or attempting to comply with an advance directive for mental health treatment and assuming that the directive was valid when made and has not been revoked or terminated;

(4) declining to comply with a mental health treatment directive as permitted; or

(5) complying or attempting to comply with any other provision of the Mental Health Care Treatment Decisions Act.

B. An individual acting as agent or guardian under the Mental Health Care Treatment Decisions Act is not subject to civil or criminal liability or to discipline for unprofessional conduct for mental health treatment decisions made in good faith.

**History: Laws 2006, ch. 7, § 11.**
**Effective dates.** — Laws 2006, ch. 7 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-7B-12. Prohibited practice.

A. No insurer or other provider of benefits regulated by the New Mexico Insurance Code [Chapter 59A NMSA 1978, except for Articles 30A and 42A] or a state agency shall require a person to execute or revoke an advance directive for mental health treatment as a condition for membership in, being insured for or receiving coverage or benefits under an insurance contract or plan.



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B. No insurer may condition the sale, procurement or issuance of a policy, plan, contract, certificate or other evidence of coverage, or entry into a pension, profit-sharing, retirement, employment or similar benefit plan, upon the execution or revocation of an advance directive for mental health treatment; nor shall the existence of an advance directive for mental health treatment modify the terms of an existing policy, plan, contract, certificate or other evidence of coverage of insurance.

C. The provisions of this section shall be enforced by the superintendent of insurance under the New Mexico Insurance Code.

**History: Laws 2006, ch. 7, § 12.**
**Effective dates.** — Laws 2006, ch. 7 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-7B-13. Statutory damages.

A. A health care provider or mental health treatment facility that intentionally violates the Mental Health Care Treatment Decisions Act is subject to liability to the aggrieved individual for damages of five thousand dollars ($5,000) or actual damages resulting from the violation, whichever is greater, plus reasonable attorney fees.

B. A person who intentionally falsifies, forges, conceals, defaces or obliterates an individual's advance directive for mental health treatment or a revocation of an advance directive for mental health treatment without the individual's consent or a person who coerces or fraudulently induces an individual to give, revoke or not give or revoke an advance directive for mental health treatment is subject to liability to that individual for damages of five thousand dollars ($5,000) or actual damages resulting from the action, whichever is greater, plus reasonable attorney fees.

C. The damages provided in this section are in addition to other types of relief available under other law, including civil and criminal law and law providing for disciplinary procedures.

**History: Laws 2006, ch. 7, § 13.**
**Effective dates.** — Laws 2006, ch. 7 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-7B-14. Effect of copy.

A copy of a written advance directive for mental health treatment or revocation of an advance directive for mental health treatment has the same effect as the original.

**History: Laws 2006, ch. 7, § 14.**
**Effective dates.** — Laws 2006, ch. 7 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-7B-15. Effect of the Mental Health Care Treatment Decisions Act.

A. The Mental Health Care Treatment Decisions Act does not create a presumption concerning the intention of an individual who has not made or who has revoked an advance directive for mental health treatment.

B. Death resulting from the withholding or withdrawal of health care in accordance with the Mental Health Care Treatment Decisions Act does not for any purpose:

(1) constitute a suicide, a homicide or other crime; or

(2) legally impair or invalidate a governing instrument, notwithstanding any term of the governing instrument to the contrary. "Governing instrument" means a deed, will, trust, insurance or annuity policy, account with POD (payment on death designation), security registered in beneficiary form (TOD), pension, profit-sharing, retirement, employment or similar benefit plan, instrument creating or exercising a power of appointment or a dispositive, appointive or nominative instrument of any similar type.



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C. The Mental Health Care Treatment Decisions Act does not authorize mercy killing, assisted suicide, euthanasia or the provision, withholding or withdrawal of health care, to the extent prohibited by other statutes of this state.

D. The Mental Health Care Treatment Decisions Act does not authorize or require a health care provider or mental health treatment facility to provide health care contrary to generally accepted health care standards applicable to the health care provider or mental health treatment facility.

E. The Mental Health Care Treatment Decisions Act does not authorize an agent to consent to the admission of an individual to a mental health treatment facility. If the individual's written advance directive for mental health treatment expressly permits treatment in a mental health treatment facility, the agent may present the individual to a facility for evaluation for admission.

F. The Mental Health Care Treatment Decisions Act does not affect other statutes of this state governing treatment for mental illness of an individual admitted to a mental health treatment facility, including involuntary commitment to a mental health treatment facility for mental illness.

**History: Laws 2006, ch. 7, § 15.**
**Effective dates.** — Laws 2006, ch. 7 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-7B-16. Transitional provisions.

A. An advance directive for mental health treatment is valid for purposes of the Mental Health Care Treatment Decisions Act if it complies with the provisions of that act, regardless of when or where executed or communicated.

B. The Mental Health Care Treatment Decisions Act does not impair a guardianship, living will, durable power of attorney, right-to-die statement or declaration or other advance directive for health care decisions that is in effect before July 1, 2006.

C. Any mental health treatment or psychiatric advance directive, durable power of attorney for health care decisions, living will, right-to-die statement or declaration or similar document that is executed in another state or jurisdiction in compliance with the laws of that state or jurisdiction shall be deemed valid and enforceable in this state to the same extent as if it were properly made in this state.

**History: Laws 2006, ch. 7, § 16.**
**Effective dates.** — Laws 2006, ch. 7 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

# ARTICLE 7C

# End-of-Life Options

Sec.
24-8-1. Short title.
24-8-2. Definitions.
24-8-3. Legislative findings; purpose of act.
24-8-4. Prohibition against interference with medical judgment of certain health care professionals.
24-8-5. Prohibition against imposition of standards and requirements as prerequisites for receipt of requested family planning services.
24-8-6. Health facility licensure; affirmative statement of compliance required as condition of licensure; prohibition against certain policies of health facilities, state and local governmental units.
24-8-7. Publicly funded family planning services; provision of certain services to medically indigent persons free of charge and to other persons at a cost consistent with their ability to pay.
24-8-8. Coordination of family planning services.



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## 24-7C-1. Short title.

Sections 1 through 8 [24-7C-1 to 24-7C-8 NMSA 1978] of this act may be cited as the "End-of-Life Options Act" or the "Elizabeth Whitefield End-of-Life Options Act".

**History: Laws 2021, ch. 132, § 1.**
**Effective dates.** — Laws 2021, ch. 132 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

**Severability.** — Laws 2021, ch. 132, § 11 provided that if any part or application of the End-of-Life Options Act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 24-7C-2. Definitions.

As used in the End-of-Life Options Act:

A. "adult" means a resident of the state who is eighteen years of age or older;

B. "capacity" means an individual's ability to understand and appreciate health care options available to that individual, including significant benefits and risks, and to make and communicate an informed health care decision. A determination of capacity shall be made only according to professional standards of care and the provisions of Section 24-7A-11 NMSA 1978;

C. "health care entity" means an entity, other than an individual, that is licensed to provide any form of health care in the state, including a hospital, clinic, hospice agency, home health agency, long-term care agency, pharmacy, group medical practice, medical home or any similar entity;

D. "health care provider" means any of the following individuals authorized pursuant to the New Mexico Drug, Device and Cosmetic Act [Chapter 26, Article 1 NMSA 1978] to prescribe a medication to be used in medical aid in dying:

(1) a physician licensed pursuant to the Medical Practice Act [Chapter 61, Article 6 NMSA 1978];

(2) an osteopathic physician licensed pursuant to the Osteopathic Medicine Act [Chapter 61, Article 10 NMSA 1978];

(3) a nurse licensed in advanced practice pursuant to the Nursing Practice Act [Chapter 61, Article 3 NMSA 1978]; or

(4) a physician assistant licensed pursuant to the Physician Assistant Act [61-6-7 to 61-6-10 NMSA 1978] or the Osteopathic Medicine Act;

E. "medical aid in dying" means the medical practice wherein a health care provider prescribes medication to a qualified individual who may self-administer that medication to bring about a peaceful death;

F. "mental health professional" means a state-licensed psychiatrist, psychologist, master social worker, psychiatric nurse practitioner or professional clinical mental health counselor;

G. "prescribing health care provider" means a health care provider who prescribes medical aid in dying medication;

H. "qualified individual" means an individual who has met the requirements of Section 3 [24-7C-3 NMSA 1978] of the End-of-Life Options Act;

I. "self-administer" means taking an affirmative, conscious, voluntary action to ingest a pharmaceutical substance; and

J. "terminal illness" means a disease or condition that is incurable and irreversible and that, in accordance with reasonable medical judgment, will result in death within six months.

**History: Laws 2021, ch. 132, § 2.**
**Effective dates.** — Laws 2021, ch. 132 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

**Severability.** — Laws 2021, ch. 132, § 11 provided that if any part or application of the End-of-Life Options Act is held invalid, the remainder or its application to other situations or persons shall not be affected.



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## 24-7C-3. Medical aid in dying; prescribing health care provider determination; form.

A prescribing health care provider may provide a prescription for medical aid in dying medication to an individual only after the prescribing health care provider has:

A. determined that the individual has:

(1) capacity;

(2) a terminal illness;

(3) voluntarily made the request for medical aid in dying; and

(4) the ability to self-administer the medical aid in dying medication;

B. provided medical care to the individual in accordance with accepted medical standards of care;

C. determined that the individual is making an informed decision after discussing with the individual the:

(1) individual's medical diagnosis and prognosis;

(2) potential risks associated with self-administering the medical aid in dying medication that the individual has requested the health care provider to prescribe;

(3) probable result of self-administering the medical aid in dying medication to be prescribed;

(4) individual's option of choosing to obtain the medical aid in dying medication and then deciding not to use it; and

(5) feasible alternative, concurrent or additional treatment opportunities, including hospice care and palliative care focused on relieving symptoms and reducing suffering;

D. determined in good faith that the individual's request does not arise from coercion or undue influence by another person;

E. noted in the individual's health record the prescribing health care provider's determination that the individual qualifies to receive medical aid in dying;

F. confirmed in the individual's health record that at least one physician or osteopathic physician licensed pursuant to the Medical Practice Act [Chapter 61, Article 6 NMSA 1978] or the Osteopathic Medicine Act [Chapter 61, Article 10 NMSA 1978] has determined, after conducting an appropriate examination, that the individual has capacity, a terminal illness and the ability to self-administer the medical aid in dying medication. That physician may be the prescribing health care provider pursuant to this section, the individual's hospice health care provider or another physician who meets the requirements of this subsection;

G. affirmed that the individual is:

(1) enrolled in a medicare-certified hospice program; or

(2) eligible to receive medical aid in dying after the prescribing health care provider has referred the individual to a consulting health care provider, who has experience with the underlying condition rendering the qualified individual terminally ill, and the consulting health care provider has:

(a) examined the individual;

(b) reviewed the individual's relevant medical records; and

(c) confirmed, in writing, the prescribing health care provider's prognosis that the individual is suffering from a terminal illness; and

H. provided substantially the following form to the individual and enters the form into the individual's health record after the form has been completed with all of the required signatures and initials:

"REQUEST FOR MEDICATION TO END MY LIFE IN A PEACEFUL MANNER

I, _____, am an adult of sound mind.

I am suffering from a terminal illness, which is a disease or condition that is incurable and irreversible and that, according to reasonable medical judgment, will result in my death within six months. My health care provider has determined that the illness is in its terminal phase. _____ (Patient Initials)

I have been fully informed of my diagnosis and prognosis, the nature of the medical aid in dying medication to be prescribed and the potential associated risks, the expected result and the feasible



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alternative, concurrent or additional treatment opportunities, including hospice care and palliative care focused on relieving symptoms and reducing suffering. _____ (Patient Initials)

I request that my health care provider prescribe medication that will end my life in a peaceful manner if I choose to self-administer the medication, and I authorize my health care provider to contact a willing pharmacist to fulfill this request. _____ (Patient Initials)

I understand that I have the right to rescind this request at any time. _____ (Patient Initials)

I understand the full import of this request, and I expect to die if I self-administer the medical aid in dying medication prescribed. I further understand that although most deaths occur within three hours, my death may take longer. My health care provider has counseled me about this possibility. _____ (Patient Initials)

I make this request voluntarily and without reservation.

Signed: _____

Date: _____ Time: _____

DECLARATION OF WITNESSES:

We declare that the person signing this request:

1. is personally known to us or has provided proof of identity;
2. signed this request in our presence;
3. appears to be of sound mind and not under duress, fraud or undue influence; and
4. is not a patient for whom either of us is a health care provider.

| | Witness 1: | Witness 2: |
|---|---|---|
| Signature: | _____ | _____ |
| Printed Name: | _____ | _____ |
| Relationship to Patient: | _____ | _____ |
| Date: | _____ | _____. |

NOTE: No more than one witness shall be a relative by blood, marriage or adoption of the person signing this request. No more than one witness shall own, operate or be employed at a health care facility where the person signing this request is a patient or resident.".

**History: Laws 2021, ch. 132, § 3.**

**Effective dates.** — Laws 2021, ch. 132 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

**Severability.** — Laws 2021, ch. 132, § 11 provided that if any part or application of the End-of-Life Options Act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 24-7C-4. Determining capacity.

If an individual has a recent history of a mental health disorder or an intellectual disability that could cause impaired judgment with regard to end-of-life medical decision making, or if, in the opinion of the prescribing health care provider or consulting health care provider, an individual currently has a mental health disorder or an intellectual disability that may cause impaired judgment with regard to end-of-life medical decision making, the individual shall not be determined to have capacity to make end-of-life decisions until the:

A. health care provider refers the individual for evaluation by a mental health professional with the training and expertise to assess a person with such a disorder or disability; and

B. mental health professional determines the individual to have capacity to make end-of-life decisions after evaluating the individual during one or more visits with the individual.

**History: Laws 2021, ch. 132, § 4.**

**Effective dates.** — Laws 2021, ch. 132 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

**Severability.** — Laws 2021, ch. 132, § 11 provided that if any part or application of the End-of-Life Options Act is held invalid, the remainder or its application to other situations or persons shall not be affected.



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## 24-7C-5. Waiting period.

A prescription for medical aid in dying medication shall:

A. not be filled until forty-eight hours after the prescription for medical aid in dying medication has been written, unless the qualified individual's prescribing health care provider has medically confirmed that the qualified individual may, within reasonable medical judgment, die before the expiration of the waiting period identified herein, in which case, the prescription may be filled once the prescribing health care provider affirms that all requirements have been fulfilled pursuant to Section 3 [24-7C-3 NMSA 1978] of the End-of-Life Options Act; and

B. indicate the date and time that the prescription for medical aid in dying medication was written and indicate the first allowable date and time when it may be filled.

**History: Laws 2021, ch. 132, § 5.**

**Effective dates.** — Laws 2021, ch. 132 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

**Severability.** — Laws 2021, ch. 132, § 11 provided that if any part or application of the End-of-Life Options Act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 24-7C-6. Medical aid in dying; right to know.

A health care provider shall inform a terminally ill patient of all reasonable options related to the patient's care that are legally available to terminally ill patients that meet the medical standards of care for end-of-life care.

**History: Laws 2021, ch. 132, § 6.**

**Effective dates.** — Laws 2021, ch. 132 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

**Severability.** — Laws 2021, ch. 132, § 11 provided that if any part or application of the End-of-Life Options Act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 24-7C-7. Immunities; conscience-based decisions.

A. A person shall not be subject to criminal liability, licensing sanctions or other professional disciplinary action for:

(1) participating, or refusing to participate, in medical aid in dying in good faith compliance with the provisions of the End-of-Life Options Act; or

(2) being present when a qualified patient self-administers the prescribed medical aid in dying medication to end the qualified individual's life in accordance with the provisions of the End-of-Life Options Act.

B. A health care entity, professional organization or association, health insurer, managed care organization or health care provider shall not subject a person to censure, discipline, suspension, loss or denial of license, credential, privileges or membership or other penalty for participating, or refusing to participate, in the provision of medical aid in dying in good faith compliance with the provisions of the End-of-Life Options Act.

C. No health care provider who objects for reasons of conscience to participating in the provision of medical aid in dying shall be required to participate in the provision of medical aid in dying under any circumstance. If a health care provider is unable or unwilling to carry out an individual's request pursuant to the End-of-Life Options Act, that health care provider shall so inform the individual and refer the individual to a health care provider who is able and willing to carry out the individual's request or to another individual or entity to assist the requesting individual in seeking medical aid in dying. If the health care provider transfers the individual's care to a new health care provider, the prior health care provider shall transfer, upon request, a copy of the individual's relevant medical records to the new health care provider.

D. A health care entity shall not forbid or otherwise sanction a health care provider who provides medical aid in dying in accordance with the End-of-Life Options Act off the premises of the health care entity or when the health care provider is not acting within the normal course and scope of the health care provider's employment with the health care entity.



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E. A health care entity may sanction a health care provider for participating in medical aid in dying on the premises of the prohibiting health care entity only if the health care entity has given written notice to the health care provider of the prohibiting entity's written policy forbidding participation in medical aid in dying and the health care provider participates in medical aid in dying:

(1) on the premises of the health care entity; or

(2) within the course and scope of the health care provider's employment for the health care entity.

F. Nothing in this section shall be construed to prevent:

(1) a health care provider from participating in medical aid in dying while the health care provider is acting outside the health care entity's premises or outside the course and scope of the health care provider's capacity as an employee; or

(2) an individual who seeks medical aid in dying from contracting with the individual's prescribing health care provider or consulting health care provider to act outside the course and scope of the provider's affiliation with the sanctioning health care entity.

G. A health care entity that imposes sanctions on a health care provider pursuant to the End-of-Life Options Act shall act reasonably, both substantively and procedurally, and shall be neither arbitrary nor capricious in its imposition of sanctions.

H. Participating in medical aid in dying shall not be the basis for a report of unprofessional conduct.

I. A health care entity that prohibits medical aid in dying shall accurately and clearly articulate this in an appropriate location on any website maintained by the entity and in any appropriate materials given to patients to whom the health care entity provides health care in words to be determined by the health care entity.

**History: Laws 2021, ch. 132, § 7.**

**Effective dates.** — Laws 2021, ch. 132 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

**Severability.** — Laws 2021, ch. 132, § 11 provided that if any part or application of the End-of-Life Options Act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 24-7C-8. Prohibited acts.

Nothing in the End-of-Life Options Act shall be construed to authorize a physician or any other person to end an individual's life by lethal injection, mercy killing or euthanasia. Actions taken in accordance with the End-of-Life Options Act shall not be construed, for any purpose, to constitute suicide, assisted suicide, euthanasia, mercy killing, homicide or adult abuse under the law.

**History: Laws 2021, ch. 132, § 8.**

**Effective dates.** — Laws 2021, ch. 132 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

**Severability.** — Laws 2021, ch. 132, § 11 provided that if any part or application of the End-of-Life Options Act is held invalid, the remainder or its application to other situations or persons shall not be affected.

# ARTICLE 8

# Family Planning

Sec.

24-8-1. Short title.
24-8-2. Definitions.
24-8-3. Legislative findings; purpose of act.
24-8-4. Prohibition against interference with medical judgment of certain health care professionals.
24-8-5. Prohibition against imposition of standards and requirements as prerequisites for receipt of requested family planning services.
24-8-6. Health facility licensure; affirmative statement of compliance required as condition of licensure; prohibition against certain policies of health facilities, state and local governmental units.
24-8-7. Publicly funded family planning services; provision of certain services to medically indigent persons free of charge and to other persons at a cost consistent with their ability to pay.
24-8-8. Coordination of family planning services.



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## 24-8-1. Short title.

This act [24-8-1 through 24-8-8 NMSA 1978] may be cited as the "Family Planning Act".

**History: 1953 Comp., § 12-30-1, enacted by Laws 1973, ch. 107, § 1.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 12 Am. Jur. 2d Birth Control §§ 1 et seq.

Validity of regulations as to contraceptives or the dissemination of birth control information, 96 A.L.R.2d 955.

Liability of manufacturer or seller for injury or death allegedly caused by use of contraceptive, 70 A.L.R.3d 315.

Sexual partner's tort liability to other partner for fraudulent misrepresentation regarding sterility or use of birth control resulting in pregnancy, 2 A.L.R.5th 301.

Parent's child support liability as affected by other parent's fraudulent misrepresentation regarding sterility or use of birth control, or refusal to abort pregnancy, 2 A.L.R.5th 337.

Liability of manufacturer or seller for injury or death allegedly caused by use of contraceptive, 54 A.L.R.5th 1.

1 C.J.S. Abortion and Birth Control; Family Planning §§ 1 to 12; 39A C.J.S. Health and Environment § 43.

## 24-8-2. Definitions.

As used in the Family Planning Act:

A. "contraceptive procedures" means any medically accepted procedure to prevent pregnancy;

B. "family planning services" includes contraceptive procedures and services (diagnosis, treatment, supplies and follow-up), social services, educational and informational services;

C. "health facility" means a hospital, clinic, nursing home, intermediate care facility or pharmacy;

D. "medically indigent" means a person who has insufficient funds to pay for family planning services;

E. "local governmental units" means counties, municipalities and public school districts and any of their agencies, departments, commissions, committees, institutions and educational institutions;

F. "physician" means a person licensed or authorized to practice medicine or osteopathy under the provisions of Sections 61-6-1 through 61-6-28 and 61-10-1 [repealed] through 61-10-21 NMSA 1978; and

G. "state" means the state and its agencies, departments, commissions, committees, institutions and educational institutions.

**History: 1953 Comp., § 12-30-2, enacted by Laws 1973, ch. 107, § 2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2016, ch. 90, § 29 repealed 61-10-1 NMSA 1978 effective July 1, 2016.

**ANNOTATIONS**

**Law reviews.** — For comment, "Voluntary Sterilization in New Mexico: Who Must Consent?" see 7 N.M.L. Rev. 121 (1976-77).

## 24-8-3. Legislative findings; purpose of act.

A. The legislature finds that:

(1) family planning has been recognized as an essential component of standard health care and has been recognized nationally and internationally as a universal human right;

(2) continuing population growth causes or aggravates many social, economic and environmental problems, both in this state and in the nation;

(3) family planning services are not available as a practical matter to many persons in this state;

(4) it is desirable that family planning services be readily accessible to all who want and need them; and

(5) dissemination of information about family planning by the state and its local governmental units is consistent with public policy.

B. It is the purpose of the Family Planning Act to assure that comprehensive family planning services are accessible on a voluntary basis to all who want and need them.

**History: 1953 Comp., § 12-30-3, enacted by Laws 1973, ch. 107, § 3.**



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## 24-8-4. Prohibition against interference with medical judgment of certain health care professionals.

The Family Planning Act does not prohibit or inhibit any person from refusing to provide any family planning service on the grounds that there are valid medical reasons for the refusal and that those reasons are based upon the judgment of a physician or a physician assistant, advanced practice registered nurse or certified nurse-midwife working within that person's scope of practice given in the specific case of the person for whom services are refused.

**History: 1953 Comp., § 12-30-4, enacted by Laws 1973, ch. 107, § 4; 2015, ch. 116, § 9.**

**The 2015 amendment,** effective June 19, 2015, amended the Family Planning Act provision, relating to the prohibition against interference with medical judgment, by including other health care professionals with each reference to "physician"; in the catchline, after "judgment of", deleted "physicians" and added "certain health care professionals"; and in the middle of the section, after "judgment of a physician", added "or a physician assistant, advanced practice registered nurse or certified nurse-midwife working within that person's scope of practice".

**Temporary provisions.** — Laws 2015, ch. 116, § 16 provided that by January 1, 2016, every cabinet secretary, agency head and head of a political subdivision of the state shall update rules requiring an examination by, a certificate from or a statement of a licensed physician to also accept such examination, certificate or statement from an advanced practice registered nurse, certified nurse-midwife or physician assistant working within that person's scope of practice.

## 24-8-5. Prohibition against imposition of standards and requirements as prerequisites for receipt of requested family planning services.

Neither the state, its local governmental units nor any health facility furnishing family planning services shall subject any person to any standard or requirement as a prerequisite to the receipt of any requested family planning service except for:

A. a requirement of referral to a physician or a physician assistant, advanced practice registered nurse or certified nurse-midwife working within that person's scope of practice when the requested family planning service is something other than information about family planning or nonprescription items;

B. any requirement imposed by law or regulation as a prerequisite to the receipt of a family planning service; or

C. payment for the service when payment is required in the ordinary course of providing the particular service to the person involved.

**History: 1953 Comp., § 12-30-5, enacted by Laws 1973, ch. 107, § 5; 2015, ch. 116, § 10.**

**The 2015 amendment,** effective June 19, 2015, amended the Family Planning Act provision, relating to the prohibition against imposition of standards and requirements as prerequisites for receipt of family planning services, by including other health care professionals with each reference to "physician"; in Subsection A, after "physician", added "or a physician assistant, advanced practice registered nurse or certified nurse-midwife working within that person's scope of practice".

**Temporary provisions.** — Laws 2015, ch. 116, § 16 provided that by January 1, 2016, every cabinet secretary, agency head and head of a political subdivision of the state shall update rules requiring an examination by, a certificate from or a statement of a licensed physician to also accept such examination, certificate or statement from an advanced practice registered nurse, certified nurse-midwife or physician assistant working within that person's scope of practice.

**ANNOTATIONS**

**Law reviews.** — For comment, "Voluntary Sterilization in New Mexico: Who Must Consent?" see 7 N.M.L. Rev. 121 (1976-77).

For article, "Treating Children Under the New Mexico Mental Health and Developmental Disabilities Code," see 10 N.M.L. Rev. 279 (1980).

## 24-8-6. Health facility licensure; affirmative statement of compliance required as condition of licensure; prohibition against certain policies of health facilities, state and local governmental units.

A. No health facility shall include in its bylaws or other governing policy statement a statement that:



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(1) interferes with the physician-patient relationship in connection with the provision of any family planning service; or

(2) establishes or authorizes any standard or requirement in violation of Section 5 [24-8-5 NMSA 1978] of the Family Planning Act, provided that nothing in the Family Planning Act shall be construed to require any hospital or clinic that objects on moral or religious grounds to admit any person for the purpose of being sterilized.

B. Neither the state nor its local governmental units shall have any written or unwritten policy that interferes with the physician-patient relationship in connection with the provision of family planning services except for provisions required by law or regulations relating to payment from public funds to a provider of family planning services.

C. No license or a renewal of a license shall be issued by the state to a health facility if it is in violation of the provisions of Subsection A of this section.

**History: 1953 Comp., § 12-30-6, enacted by Laws 1973, ch. 107, § 6.**

**Cross references.** — For licensing of health facilities generally, *see* 24-1-5 NMSA 1978.

## 24-8-7. Publicly funded family planning services; provision of certain services to medically indigent persons free of charge and to other persons at a cost consistent with their ability to pay.

To the extent that public funds are available, in any family planning services program operated by the state and its governmental units and in any family planning services program in which public funds are expended:

A. family planning services consisting only of information about family planning shall be furnished to persons free of charge; and

B. other family planning services shall be furnished to medically indigent persons free of charge and to all other persons at a cost consistent with their ability to pay.

**History: 1953 Comp., § 12-30-7, enacted by Laws 1973, ch. 107, § 7.**

## 24-8-8. Coordination of family planning services.

Any family planning services program developed or operated by the state or its local governmental units shall be developed and operated in coordination with other public and private family planning services programs existing in the state.

**History: 1953 Comp., § 12-30-8, enacted by Laws 1973, ch. 107, § 8.**

# ARTICLE 9

# Sterilization

Sec.

24-9-1. Sterilization; consent of abandoning spouse unnecessary.

## 24-9-1. Sterilization; consent of abandoning spouse unnecessary.

Any person, otherwise capable of consenting to medical treatment, need not obtain the consent of his spouse for his voluntary medical sterilization if such person has been abandoned by his spouse.

**History: 1953 Comp., § 12-3-43, enacted by Laws 1971, ch. 14, § 3; 1973, ch. 266, § 1.**

**Cross references.** — For prohibition against requiring special qualifications of individuals upon whom



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sterilization operation is to be performed, *see* 24-1-14 NMSA 1978.

ANNOTATIONS

**Law reviews.** — For comment, "Voluntary Sterilization in New Mexico: Who Must Consent?" see 7 N.M.L. Rev. 121 (1976-77).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39 Am. Jur. 2d Health §§ 74, 107.

Medical malpractice, and measure and element of damages, in connection with sterilization or birth control procedures, 27 A.L.R.3d 906.

Legality of voluntary nontherapeutic sterilization, 35 A.L.R.3d 1444.

Promise: recovery against physician on basis of breach of contract to achieve particular result or cure, 43 A.L.R.3d 1221.

Asexualization or sterilization of criminals or defectives, 53 A.L.R.3d 960.

When a statute of limitations begins to run against malpractice action in connection with sterilization or birth control procedures, 93 A.L.R.3d 218.

39A C.J.S. Health and Environment § 43.

# ARTICLE 9A

# Maternal, Fetal and Infant Experimentation

Sec.
24-9A-1. Definitions.
24-9A-2. Pregnant woman.
24-9A-3. Fetus.
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## 24-9A-1. Definitions.

As used in the Maternal, Fetal and Infant Experimentation Act:

A. "viability" means that stage of fetal development when the unborn child is potentially able to live outside the mother's womb, albeit with artificial aid;

B. "conception" means the fertilization of the ovum of a human female by the sperm of a human male;

C. "health" means physical or mental health;

D. "clinical research" means any biomedical or behavioral research involving human subjects, including the unborn, conducted according to a formal procedure. The term is to be construed liberally to embrace research concerning all physiological processes in human beings and includes research involving human in vitro fertilization, but shall not include diagnostic testing, treatment, therapy or related procedures conducted by formal protocols deemed necessary for the care of the particular patient upon whom such activity is performed and shall not include human in vitro fertilization performed to treat infertility; provided that this procedure shall include provisions to ensure that each living fertilized ovum, zygote or embryo is implanted in a human female recipient, and no physician may stipulate that a woman must abort in the event the pregnancy should produce a child with a disability. Provided that emergency medical procedures necessary to preserve the life or health of the mother or the fetus shall not be considered to be clinical research;

E. "subject at risk", "subject" or "at risk" means any person who may be exposed to the likelihood of injury, including physical or psychological injury, as a consequence of participation as a subject in:

(1) any research, development or related activity that departs from the application of those established and accepted methods deemed necessary to meet the person's needs;

(2) controlled research studies necessary to establish accepted methods designed to meet the person's needs; or

(3) research activity that poses a significant risk to the subject;

F. "significant risk" means an activity that is likely to cause disfigurement or loss or impairment of the function of any member or organ;

G. "fetus" means the product of conception from the time of conception until the expulsion or extraction of the fetus or the opening of the uterine cavity, but shall not include the placenta, extraembryonic membranes, umbilical cord, extraembryonic fluids and their resident cell types and cultured cells;

H. "live-born infant" means an offspring of a person that exhibits heartbeat, spontaneous respiratory activity, spontaneous movement of voluntary muscles or pulsation of the umbilical cord



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if still attached to the infant ex utero; provided the Maternal, Fetal and Infant Experimentation Act does not apply to a fetus or infant absent the characteristics set forth in this subsection;

I. "infant" means an offspring of a human being from the time it is born until the end of its first chronological year;

J. "born" means the time the head or any other part of the body of the fetus emerges from the vagina or the time the uterine cavity is opened during a caesarean section or hysterotomy; and

K. "in vitro fertilization" means any fertilization of human ova that occurs outside the body of a female, either through admixture of donor human sperm and ova or by any other means.

**History: Laws 1979, ch. 132, § 1; 1985, ch. 98, § 1; 2007, ch. 46, § 15.**

**The 2007 amendment,** effective June 15, 2007, amended the section to make non-substantive language changes.

**ANNOTATIONS**

**Law reviews.** — For article, "Constitutional Limits on New Mexico's In Vitro Fertilization Law," see 24 N.M.L. Rev. 125 (1994).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Physician's use of patient's tissues, cells or bodily substances for medical research or economic purposes, 16 A.L.R.5th 143.

## 24-9A-2. Pregnant woman.

A. No woman, known to be pregnant according to generally accepted medical standards, shall be involved as a subject in any clinical research activity unless:

(1) the purpose of the activity is to meet the health needs of the mother or the fetus and the fetus will be placed at risk only to the minimum extent necessary to meet such needs; or

(2) there is no significant risk to the fetus.

B. An activity permitted under Subsection A of this section may be conducted only if the mother is legally competent and has given her informed consent after having been fully informed regarding possible impact on the fetus.

**History: Laws 1979, ch. 132, § 2.**

## 24-9A-3. Fetus.

A. No fetus shall be involved as a subject in any clinical research activity unless the purpose of the activity is to meet the health needs of the particular fetus and the fetus will be placed at risk only to the minimum extent necessary to meet such needs or no significant risk to the fetus is imposed by the research activity.

B. An activity permitted under Subsection A of this section shall be conducted only if the mother is legally competent and has given her informed consent.

**History: Laws 1979, ch. 132, § 3.**

## 24-9A-4. Live-born infant.

A. No live-born infant shall be involved as a subject in any clinical research activity unless the purpose of the activity is to meet the health needs of that particular infant, and the infant will be placed at risk only to the minimum extent necessary to meet such needs or no significant risk to such infant is imposed by the research activity.

B. An activity permitted under Subsection A of this section shall be conducted only if:

(1) the nature of the investigation is such that adults or mentally competent persons would not be suitable subjects; and

(2) the mother or father or the infant's legal guardian is mentally competent and has given his or her informed consent.

**History: Laws 1979, ch. 132, § 4.**



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## 24-9A-5. Research activity.

A. No clinical research activity involving fetuses, live-born infants or pregnant women shall be conducted unless:

(1) appropriate studies on animals and nonpregnant human beings have been completed;

(2) anyone engaged in conducting the research activity will have no part in:

(a) any decisions as to the timing, method and procedures used to terminate the pregnancy; and

(b) determining the viability of the fetus at the termination of the pregnancy; and

(3) no procedural changes which may cause significant risk to the fetus or the pregnant woman will be introduced into the procedure for terminating the pregnancy solely in the interest of the research activity.

B. No inducements, monetary or otherwise, shall be offered to any woman to terminate her pregnancy for the purpose of subjecting her fetus or live-born infant to clinical research activity.

C. No consent to involve a pregnant woman, fetus or infant as a subject in clinical research activity shall be valid unless the pregnant woman or the parent or guardian of the infant has been fully informed of the following:

(1) a fair explanation of the procedures to be followed and their purposes, including identification of any procedures which are experimental;

(2) a description of any attendant discomforts and risks reasonably to be expected;

(3) a description of any benefits reasonably to be expected;

(4) a disclosure of any appropriate alternative procedures that might be advantageous for the subject;

(5) an offer to answer any inquiries concerning the procedure; and

(6) an instruction that the person who gave the consent is free to withdraw his consent and to discontinue participation in the project or activity at any time without prejudice to the subject.

**History: Laws 1979, ch. 132, § 5.**

## 24-9A-6. Penalty.

Whoever knowingly and willfully violates the provisions of Section 2, 3 or 4 [24-9A-2, 24-9A-3 or 24-9A-4 NMSA 1978] of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in the county jail for a definite term of less than one year, or to the payment of a fine of not more than one thousand dollars ($1,000), or to both imprisonment and fine in the discretion of the judge.

**History: Laws 1979, ch. 132, § 6.**

## 24-9A-7. Short title.

Sections 1 through 7 [24-9A-1 through 24-9A-7 NMSA 1978] of this act may be cited as the "Maternal, Fetal and Infant Experimentation Act".

**History: Laws 1979, ch. 132, § 7.**

# ARTICLE 10

# Consent to Medical Care; Emergency Care; Transfusions

Sec.

24-10-1. Emancipated minors; hospital, medical and surgical care.
24-10-2. Consent for emergency attention by person in loco parentis.
24-10-3. Persons coming to aid or rescue of another rendering emergency care; release from liability.
24-10-4. Emergency defined.
24-10-5. Transfusions; limited liability.
24-10-6. Blood donation; minors.



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## 24-10-1. Emancipated minors; hospital, medical and surgical care.

Notwithstanding any other provision of the law, and without limiting cases in which consent may otherwise be obtained or is not required, any emancipated minor or any minor who has contracted a lawful marriage may give consent to the furnishing of hospital, medical and surgical care to such minor, and the consent is not subject to disaffirmance because of minority. The consent of a parent of an emancipated minor or of a minor who has contracted a lawful marriage is not necessary in order to authorize hospital, medical and surgical care. For the purposes of this section only, subsequent judgment of annulment of the marriage or judgment of divorce shall not deprive the minor of his adult status once attained.

**History: 1953 Comp., § 12-12-1, enacted by Laws 1963, ch. 32, § 1; recompiled as 1953 Comp., § 12-25-1, by Laws 1972, ch. 51, § 9.**

**Cross references.** — For health care decisions, *see* Chapter 24, Article 7A NMSA 1978.

For age of majority, *see* 28-6-1 NMSA 1978.

For effect of minority upon limitations period for malpractice actions, *see* 41-5-13 NMSA 1978.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Power of courts or other public agencies, in the absence of statutory authority, to order compulsory medical care for adult, 9 A.L.R.3d 1391.

Voluntary acts: what voluntary acts of child, other than marriage or entry in military service, terminate parent's obligation to support, 32 A.L.R.3d 1055.

Medical practitioner's liability for treatment given child without parent's consent, 67 A.L.R.4th 511.

Power of court or other public agency to order medical treatment over parental religious objections for child whose life is not immediately endangered. 21 A.L.R.5th 248.

What voluntary acts of child, other than marriage or entry into military service, terminate parent's obligation to support, 55 A.L.R.5th 557.

42 C.J.S. Infants § 116.

## 24-10-2. Consent for emergency attention by person in loco parentis.

Notwithstanding any other provision of the law, in cases of emergency in which a minor is in need of immediate hospitalization, medical attention or surgery and the parents of the minor cannot be located for the purpose of consenting thereto, after reasonable efforts have been made under the circumstances, consent for the emergency attention may be given by any person standing in loco parentis to the minor.

**History: 1953 Comp., § 12-12-2, enacted by Laws 1963, ch. 32, § 2; recompiled as 1953 Comp., § 12-25-2, by Laws 1972, ch. 51, § 9.**

**Cross references.** — For age of majority, *see* 28-6-1 NMSA 1978.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 42 Am. Jur. 2d Infants §§ 16, 17, 55, 72; 59 Am. Jur. 2d Parent and Child §§ 11, 48, 74, 88.

Propriety of surgically invading incompetent or minor for benefit of third party, 4 A.L.R.5th 1000.

42 C.J.S. Infants §§ 93, 181.

## 24-10-3. Persons coming to aid or rescue of another rendering emergency care; release from liability.

No person who comes to the aid or rescue of another person by providing care or assistance in good faith at or near the scene of an emergency, as defined in Section 24-10-4 NMSA 1978, shall be held liable for any civil damages as a result of any action or omission by that person in providing that care or assistance, except when liable for an act of gross negligence; but nothing in this section applies to the provision of emergency care or assistance when it is rendered for remuneration or with the expectation of remuneration or is rendered by a person or agent of a principal who was at the scene of the accident or emergency because he or his principal was soliciting business or performing or seeking to perform some services for remuneration.

**History: 1953 Comp., § 12-12-3, enacted by Laws 1963, ch. 59, § 1; recompiled as 1953 Comp., § 12-25-3, by Laws 1972, ch. 51, § 9; 1997, ch. 86, § 1.**

**Cross references.** — For medical malpractice generally, *see* Chapter 41, Article 5 NMSA 1978.

**The 1997 amendment,** effective June 20, 1997, rewrote this section.



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ANNOTATIONS

**Border patrol agents.** — In a suit alleging that border patrol agents negligently caused plaintiff's injuries in the course of extricating him from his vehicle after an accident, the agents were liable for their actions only to the extent a private person, in the same circumstances, would be liable and, under this section, would be liable only for gross negligence, rather than ordinary negligence. *Ortiz v. United States Border Patrol*, 39 F. Supp. 2d 1321 (D.N.M. 1999).

**Law reviews.** — For note, "The New Mexico Medico - Legal Malpractice Panel - An Analysis," *see* 3 N.M.L. Rev. 311 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 61 Am. Jur. 2d Physicians, Surgeons and Other Healers, § 160.

Liability of operator of ambulance service for personal injuries to person being transported, 68 A.L.R.4th 14.

Construction and application of "Good Samaritan" statutes, 68 A.L.R.4th 294.

Rescue doctrine: liability of one who negligently causes motor vehicle accident for injuries to person subsequently attempting to rescue persons or property, 73 A.L.R.4th 737.

65 C.J.S. Negligence § 63(107).

## 24-10-4. Emergency defined.

As used in Sections 24-10-3 and 24-10-4 NMSA 1978, "emergency" means an unexpected occurrence of injury or illness occurring in public or private places to a person that results from:

A. motor vehicle accidents and collisions;

B. acts of God; and

C. other accidents and events of similar nature.

**History: 1953 Comp., § 12-12-4, enacted by Laws 1963, ch. 59, § 2; recompiled as 1953 Comp., § 12-25-4, by Laws 1972, ch. 51, § 9; 1999, ch. 141, § 1.**

**The 1999 amendment,** effective June 18, 1999, added the catchline and rewrote the section which read: "As used in this act 'emergency' means an unexpected occurrence involving injury or illness to persons, including motor vehicle accidents and collisions, disasters, and other accidents and events of similar nature occurring in public or private places".

## 24-10-5. Transfusions; limited liability.

The procuring, furnishing, donating, processing, distributing or using of human whole blood, plasma, blood products, blood derivatives, human tissue or organs or any component thereof shall not give rise to any implied warranties of any type, and the doctrine of strict tort liability shall not be applicable to the transmission of hepatitis or human immunodeficiency virus in the blood, plasma, blood products, blood derivatives, human tissue or organs or any component thereof. Nothing in this section shall be construed as affecting the liability of any person, firm, corporation or other organization for negligence or willful misconduct.

**History: 1953 Comp., § 12-12-5, enacted by Laws 1971, ch. 119, § 1; 1953 Comp., § 12-25-5 by Laws 1972, ch. 51, § 9; 1978 Comp., § 24-10-5; Laws 1987, ch. 104, § 1.**

ANNOTATIONS

**Law reviews.** — For note, "The New Mexico Medico - Legal Malpractice Panel - An Analysis," see 3 N.M.L. Rev. 311 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Hospitals and Asylums § 27 et seq; 61 Am. Jur. 2d Physicians, Surgeons and Other Healers, §§ 132, 159, 161, 173, 178.

Application of rule of strict liability in tort to person or entity rendering medical services, 100 A.L.R.3d 1205.

Liability of hospital, physician, or other individual medical practitioner for injury or death resulting from blood transfusion, 20 A.L.R.4th 136.

Liability of blood supplier or donor for injury or death resulting from blood transfusion, 24 A.L.R.4th 508.

Discovery of identity of blood donor, 56 A.L.R.4th 755.

Liability for donee's contraction of Acquired Immune Deficiency Syndrome (AIDS) from blood transfusion, 64 A.L.R.5th 333.

Validity, construction, and application of blood shield statutes, 75 A.L.R.5th 229.

## 24-10-6. Blood donation; minors.

A. A minor who is at least seventeen years of age may donate blood to a licensed, accredited or approved blood bank, storage facility or hospital without parental consent.

B. A minor shall not receive monetary payment from a licensed, accredited or approved blood bank, storage facility or hospital for a donation of blood or blood components.

**History: Laws 2003, ch. 79, § 1.**



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# ARTICLE 10A

# Emergency Medical Services Fund

Sec.
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24-10A-2. Purpose of act.
24-10A-2.1. Definitions.
24-10A-3. Emergency medical services fund created; funding.
24-10A-3.1. Regulations.
24-10A-4. Funding program; purpose; determination of needs.
24-10A-4.1. Emergency medical services system improvement projects.
24-10A-4.2. Mutual aid agreements; regionalized, integrated response plans.
24-10A-5. Funding program; awards; appeals.
24-10A-6. Distribution of fund.
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24-10A-8. Funding program; control of expenditures.
24-10A-9. Funding program; inspection by the bureau.
24-10A-10. Loss of funding eligibility.

## 24-10A-1. Short title.

Chapter 24, Article 10A NMSA 1978 may be cited as the "Emergency Medical Services Fund Act".

**History: 1978 Comp., § 24-10A-1, enacted by Laws 1978, ch. 178, § 1; 1987, ch. 246, § 1.**

## 24-10A-2. Purpose of act.

The purpose of the Emergency Medical Services Fund Act is to make money available to municipalities and counties for use in the establishment and enhancement of local emergency medical services, statewide emergency medical services and trauma services in order to reduce injury and loss of life.

**History: 1978 Comp., § 24-10A-2, enacted by Laws 1978, ch. 178, § 2; 1987, ch. 246, § 2; 1994, ch. 61, § 1; 2001, ch. 258, § 1; 2001, ch. 273, § 1.**

**The 2001 amendment,** effective July 1, 2001, deleted "in proportion to their needs" following "municipalities and counties" and inserted "statewide emergency medical services and trauma services".

Laws 2001, ch. 258, § 1 and Laws 2001, ch. 273, § 1 enacted identical amendments to this section. The section was set out as amended by Laws 2001, ch. 273, § 1. *See* 12-1-8 NMSA 1978.

**The 1994 amendment,** effective July 1, 1994, deleted "It is" at the beginning, inserted "is" following "Act", substituted "money" for "funds", deleted "incorporated" before "municipalities", inserted "and" following "municipalities", deleted "and fire districts of the state" following "counties", deleted "of emergency medical services; the purchase, repair and maintenance of emergency medical service vehicles, equipment and supplies; and the training and licensing" following "establishment", inserted "and enhancement" before "of local", and deleted "personnel" following "services" near the end.

## 24-10A-2.1. Definitions.

As used in the Emergency Medical Services Fund Act:

A. "bureau" means the emergency medical systems bureau of the department;

B. "committee" means the statewide emergency medical services advisory committee appointed pursuant to the provisions of Section 24-10B-7 NMSA 1978;

C. "department" means the department of health;

D. "fund" means the emergency medical services fund;

E. "local recipient" means a publicly owned or contracted ambulance or air ambulance service, medical rescue service, fire department rescue service, regionalized emergency medical service agency; or other prehospital emergency medical service care provider based in the state:

(1) that routinely responds to an individual's need for immediate medical care in order to prevent loss of life or aggravation of physical or psychological illness or injury;

(2) whose application for funding through the Emergency Medical Services Fund Act is sponsored by a municipality or county; and

(3) that meets department guidelines for certification, including:



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(a) personnel training;

(b) participation in emergency medical service data collection and submission to the state emergency medical systems database;

(c) participation in local design and planning for efficient delivery of emergency medical services;

(d) participation in mutual aid agreements and medical control; and

(e) participation in medical control for emergency medical services;

F. "municipality" means an incorporated city, town or village;

G. "regionalized emergency medical service agency" means a rural or frontier emergency medical service agency composed of multiple geographic districts with response area populations of fewer than two hundred fifty people per square mile;

H. "secretary" means the secretary of health; and

I. "tribe" means a federally recognized Native American nation, tribe or pueblo located wholly or partially in the state.

**History: Laws 1994, ch. 61, § 2; 2001, ch. 258, § 2; 2001, ch. 273, § 2; 2017, ch. 87, § 23.**

**The 2017 amendment,** effective June, 16, 2017, defined "regionalized emergency medical service agency" and "tribe", and revised certain definitions, as used in the Emergency Medical Services Fund Act; in Subsection A, after "means the", deleted "injury prevention and", after "emergency medical", deleted "services" and added "systems", and after "bureau of", deleted "the public health division of"; in Subsection E, in the introductory clause, after "means", deleted "an" and added "a publicly owned or contracted", after "rescue service", deleted "air ambulance service" and added "regionalized emergency medical service agency", after "prehospital", added "emergency medical service" and after "care provider", added "based in the state", in Paragraph E(3), in the introductory clause, after "guidelines", deleted "concerning" and added "for certification, including", added subparagraph designation "(a)", in Subparagraph E(3)(a), after "personnel training", deleted "use of bureau-approved run forms", added new Subparagraphs E(3)(b) and E(3)(c), added subparagraph designation "(d)", and added new Subparagraph E(3)(e); added new Subsection G and redesignated former Subsection G as Subsection H; and added Subsection I.

**The 2001 amendment,** effective July 1, 2001, substituted "injury prevention" for "primary care" in Subsection A; inserted "statewide" in Subsection B; in the introductory language of Subsection E, inserted "medical" preceding "rescue services" and inserted "air ambulance service"; deleted Subsection G, which defined "run" and redesignated former Subsection H as G.

## 24-10A-3. Emergency medical services fund created; funding.

A. The "emergency medical services fund" is created in the state treasury. Money in the fund shall not revert at the end of any fiscal year. Money appropriated to the fund or accruing to it through gifts, grants, fees or bequests shall be deposited in the fund. Interest earned on investment of the fund shall be credited to the general fund. Disbursements from the fund shall be made upon warrants drawn by the secretary of finance and administration pursuant to vouchers signed by the secretary or the secretary's authorized representative.

B. The bureau shall administer the fund and provide for the distribution of the fund pursuant to the Emergency Medical Services Fund Act and rules adopted pursuant to the provisions of that act.

C. In any fiscal year, no less than seventy-five percent of the money in the fund shall be used for the local emergency medical services funding program to support the cost of supplies and equipment and operational costs other than salaries and benefits for emergency medical services personnel. This money shall be distributed to municipalities and counties on behalf of eligible local recipients, using a formula established pursuant to rules adopted by the department. The formula shall determine each municipality's and county's share of the fund based on the relative geographic size and population of each county. The formula shall also base the distribution of money for each municipality and county on the relative number of runs of each local recipient eligible to participate in the distribution.

D. In any fiscal year, no more than:

(1) twenty-two percent of the fund may be used for emergency medical services system improvement projects, including the purchase of emergency medical services vehicles, local and statewide emergency medical services system support projects, the statewide trauma care system program and the emergency medical dispatch agency support program; and



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(2) three percent of the fund may be used by the bureau for administrative costs, including monitoring and providing technical assistance.

E. In any fiscal year, money in the fund that is not distributed pursuant to the provisions of Subsection D of this section may be distributed pursuant to the provisions of Subsection C of this section.

**History: 1978 Comp., § 24-10A-3, enacted by Laws 1978, ch. 178, § 3; 1987, ch. 246, § 3; 1989, ch. 324, § 18; 1994, ch. 61, § 3; 2001, ch. 258, § 3; 2001, ch. 273, § 3; 2017, ch. 87, § 24.**

**The 2017 amendment,** effective June, 16, 2017, removed the provision allowing emergency medical services regional offices to use funds from the emergency medical services fund for administrative costs; in Subsection A, after "signed by the secretary or", deleted "his" and added "the secretary's"; and in Subsection D(2), after "used by the bureau", deleted "and emergency medical services regional offices".

**The 2001 amendment,** effective July 1, 2001, inserted "and the emergency medical dispatch agency support program" at the end of Paragraph D(1) and inserted "and emergency medical services regional offices" in Paragraph D(2).

Laws 2001, ch. 258, § 3 and Laws 2001, ch. 273, § 3 enacted identical amendments to this section. The section was set out as amended by Laws 2001, ch. 273, § 3. *See* 12-1-8 NMSA 1978.

**The 1994 amendment,** effective July 1, 1994, rewrote Subsection A, deleted former Subsections B and D, rewrote and redesignated former Subsection C as Subsection B, and added Subsections C to E.

## 24-10A-3.1. Regulations.

The department shall adopt regulations pursuant to Subsection E of Section 9-7-6 NMSA 1978 to carry out the provisions of the Emergency Medical Services Fund Act.

**History: Laws 1994, ch. 61, § 13.**

## 24-10A-4. Funding program; purpose; determination of needs.

A. The "local emergency medical services funding program" is created. The program shall provide for the:

(1) establishment or enhancement of local emergency medical services, including the use of advanced technology equipment;

(2) operational costs other than salaries and benefits of local emergency medical services personnel;

(3) purchase, repair and maintenance of emergency medical services vehicles, equipment and supplies, including the use of advanced technology equipment; and

(4) training and licensing of local emergency medical services personnel.

B. Annually on or before June 1, the bureau shall consider and determine, in accordance with the formula adopted by rule of the department, the amount of distribution to municipalities and counties that have applied for money from the fund. In making its determination, the bureau shall ensure that no municipality or county receives money from the fund for the purpose of accumulation as defined by rule of the department, except as waived by the bureau in writing for good cause shown. The bureau shall also ensure that each local recipient is in compliance with the rules of the department.

**History: 1978 Comp., § 24-10A-4, enacted by Laws 1978, ch. 178, § 4; 1979, ch. 141, § 1; 1987, ch. 246, § 4; 1994, ch. 61, § 4; 2000, ch. 16, § 1; 2001, ch. 258, § 4; 2001, ch. 273, § 4.**

**The 2001 amendment,** effective July 1, 2001, in Subsection B, substituted "except as waived by the bureau in writing for good cause shown" for the provision that a municipality or county may accumulate balances only for the purpose of purchasing vehicles or equipment with bureau approval.

Laws 2001, ch. 258, § 4 and Laws 2001, ch. 273, § 4 enacted identical amendments to this section. The section was set out as amended by Laws 2001, ch. 273, § 4. *See* 12-1-8 NMSA 1978.

**The 2000 amendment,** effective May 17, 2000, in Subsection B, substituted "rule" for "regulation" in both the first and second sentence; added the proviso in the second sentence; and substituted "rules" for "regulations" in the last sentence.

**The 1994 amendment,** effective July 1, 1994, inserted "Funding program; purpose" in the catchline, added Subsection A, and rewrote and designated the formerly undesignated provisions as Subsection B.



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## 24-10A-4.1. Emergency medical services system improvement projects.

A. Applications for emergency medical services system improvement projects shall be submitted separately from applications for the local emergency medical services funding program. The bureau shall award emergency medical services system improvement projects after a review of the applications. The awards shall be made based on a priority ranking, demonstrated need for funding and recommendations from the committee. Money awarded shall be used in compliance with applicable rules.

B. Applications for funding to purchase emergency medical services vehicles shall be submitted by municipalities or counties on behalf of local recipients. The municipality or county shall commit to providing matching funds of at least twenty-five percent of the cost of purchasing the vehicle.

C. Applications for funding of local and statewide projects shall demonstrate the need for funding and a plan to use the funding to enhance or better integrate local emergency medical services systems or to improve the health, safety and training of emergency medical services technicians statewide.

D. A statewide trauma care system program shall be developed and determined by the bureau in consultation with the committee. The statewide trauma care system program shall provide for the support, development and expansion of the statewide trauma care system in accordance with rules adopted by the department.

E. The emergency medical dispatch agency support program shall fund allowable costs of dispatch agencies that meet criteria established pursuant to rules by the department.

**History: Laws 1994, ch. 61, § 10; 2001, ch. 258, § 5; 2001, ch. 273, § 5.**

**The 2001 amendment,** effective July 1, 2001, added Subsection E.

Laws 2001, ch. 258, § 5 and Laws 2001, ch. 273, § 5 enacted identical amendments to this section. The section was set out as amended by Laws 2001, ch. 273, § 5. *See* 12-1-8 NMSA 1978.

## 24-10A-4.2. Mutual aid agreements; regionalized, integrated response plans.

Municipalities, counties, tribes and local recipients may develop mutual aid agreements and regionalized, integrated response plans with other municipalities, counties, tribes and local recipients for the purpose of ensuring that adequate emergency medical services coverage exists throughout the state. For the benefit of the public, equipment and other emergency medical services resources obtained through money from the fund shall be shared among the parties to a mutual aid agreement or regionalized, integrated response plan.

**History: Laws 1994, ch. 61, § 11; 2017, ch. 87, § 25.**

**The 2017 amendment,** effective June, 16, 2017, authorized municipalities, counties, tribes and local recipients to develop regionalized, integrated response plans with other municipalities, counties, tribes and local recipients to ensure that adequate emergency medical services coverage exists throughout the state; in the catchline, added "regionalized, integrated response plans"; in the first sentence, deleted "Incorporated", after "counties", added "tribes" in two places, after "local recipients", deleted "are encouraged to" and added "may", after "develop mutual aid agreements", added "and regionalized, integrated response plans", and after "to a mutual aid agreement", added "or regionalized, integrated response plan".

## 24-10A-5. Funding program; awards; appeals.

The bureau shall promptly notify each municipality and county that has applied for money and the local recipient of the bureau's determination to grant or deny an application for funding through the local emergency medical services funding program. A municipality or county may appeal a determination of the bureau within ten working days after notification of the determination. The bureau shall refer the appeal to the committee for its review and recommendation. The committee shall make its recommendation to the secretary, who shall make a final determination about whether to grant or deny an application for funding. The secretary shall notify the appellant of the secretary's decision within thirty days of the date on which the committee has notified the secretary of its recommendation.



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**History: 1978 Comp., § 24-10A-5, enacted by Laws 1978, ch. 178, § 5; 1987, ch. 246, § 5; 1994, ch. 61, § 5; 2017, ch. 87, § 26.**

**The 2017 amendment,** effective June, 16, 2017, changed the deadline by which the secretary of health must notify an appellant of the secretary's decision on an appeal of a grant or denial of funding from the emergency medical services funding program; after "shall notify the appellant of", deleted "his" and added "the secretary's", and after "decision", deleted "on or before June 30" and added "within thirty days of the date on which the committee has notified the secretary of its recommendation".

**The 1994 amendment,** effective July 1, 1994, rewrote this section to the extent that a detailed comparison is impracticable.

## 24-10A-6. Distribution of fund.

On or before August 31, the local emergency medical services funding program distribution shall be made to each municipality and county as determined by the department. No more than one percent of the amount appropriated to the local emergency medical services funding program shall be distributed from the fund to the benefit of a single local recipient in any fiscal year pursuant to the local emergency medical services funding program, with the exception of a regionalized emergency medical service agency, to ensure that appropriate emergency medical service is available statewide.

**History: 1978 Comp., § 24-10A-6, enacted by Laws 1978, ch. 178, § 6; 1979, ch. 141, § 2; 1987, ch. 246, § 6; 1994, ch. 61, § 6; 2001, ch. 258, § 6; 2001, ch. 273, § 6; 2017, ch. 87, § 27.**

**The 2017 amendment,** effective June, 16, 2017, removed the limitation on funding to a regionalized emergency medical services agency; and after "local emergency medical services funding program", added "with the exception of a regionalized emergency medical service agency".

**The 2001 amendment,** effective July 1, 2001, deleted "incorporated" preceding "municipality" in the first sentence; substituted "No more than one percent of the amount appropriated to the local emergency medical services funding program shall" for "No more than twenty thousand dollars ($20,000) shall"; and inserted "to ensure that appropriate emergency medical service is available statewide" at the end of the subsection.

Laws 2001, ch. 258, § 6 and Laws 2001, ch. 273, § 6 enacted identical amendments to this section. The section was set out as amended by Laws 2001, ch. 273, § 6. *See* 12-1-8 NMSA 1978.

**The 1994 amendment,** effective July 1, 1994, deleted "emergency medical services" preceding "fund" in the catchline and rewrote the section.

## 24-10A-7. Funding program; expenditures from fund.

Any money distributed from the fund for the purposes of the local emergency medical services funding program shall be expended only for those purposes.

**History: 1978 Comp., § 24-10A-7, enacted by Laws 1978, ch. 178, § 7; 1979, ch. 141, § 3; 1987, ch. 246, § 7; 1994, ch. 53, § 1; 1994, ch. 61, § 7.**

**The 1994 amendment,** effective July 1, 1994, rewrote the catchline, which read: "Expenditures from fund", and rewrote the body of section to the extent that a detailed comparison was impracticable.

Laws 1994, ch. 53, § 1, effective May 18, 1994, also enacted amendments to this section that inserted "and the financing and refinancing thereof" following the former language "equipment and supplies". The section was set out as amended by Laws 1994, ch. 61, § 7. *See* 12-1-8 NMSA 1978.

## 24-10A-8. Funding program; control of expenditures.

Money distributed from the fund shall be expended only for the purposes stated in the application to the bureau and shall be expended on the authorization of the chief executive of the municipality or county upon vouchers issued by its treasurer.

**History: 1978 Comp., § 24-10A-8, enacted by Laws 1978, ch. 178, § 8; 1987, ch. 246, § 8; 1994, ch. 61, § 8; 2017, ch. 87, § 28.**

**The 2017 amendment,** effective June, 16, 2017, deleted "incorporated" preceding "municipality".

**The 1994 amendment,** effective July 1, 1994, added "Funding program" at the beginning of the catchline, deleted "emergency medical services" in two places, deleted "of the health services division of the health and environment department" following "bureau", inserted "or" following "municipality", deleted "or fire district" following "county", and corrected a misspelling.



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## 24-10A-9. Funding program; inspection by the bureau.

The bureau and its designated agents have the authority at all normal hours of operation to enter in and upon all buildings and premises where emergency medical services vehicles, equipment and supplies acquired with expenditures from the fund are located for the purposes of examination and inspection.

**History: 1978 Comp., § 24-10A-9, enacted by Laws 1978, ch. 178, § 9; 1987, ch. 246, § 9; 1994, ch. 61, § 9.**

**The 1994 amendment,** effective July 1, 1994, in the catchline, added "Funding program" at the beginning and deleted "emergency medical services" after "the"; and rewrote the section.

## 24-10A-10. Loss of funding eligibility.

A municipality, county or local recipient that the bureau finds has expended money in violation of the Emergency Medical Services Fund Act may be ineligible to receive funding from the bureau for a period of not less than one year or more than three years, as determined by the bureau in accordance with rules and regulations adopted by the department.

**History: Laws 1994, ch. 61, § 12.**

# ARTICLE 10B

# Emergency Medical Services System

Sec.
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24-10B-12. Academy; duties.
24-10B-13. Certification of STEMI receiving and referring centers.

## 24-10B-1. Short title.

Chapter 24, Article 10B NMSA 1978 may be cited as the "Emergency Medical Services Act".

**History: Laws 1983, ch. 190, § 1; 2014, ch. 47, § 1.**

**The 2014 amendment,** effective July 1, 2014, added the NMSA chapter and article for the Emergency Medical Services Act; and at the beginning of the sentence, deleted "This act" and added "Chapter 24, Article 10B NMSA 1978".

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Liability of operator of ambulance service for personal injuries to person being transported, 68 A.L.R.4th 14.

Liability for negligence of ambulance attendants, emergency medical technicians and the like, rendering emergency medical care outside hospital, 16 A.L.R.5th 605.

## 24-10B-2. Purpose.

The purpose of the Emergency Medical Services Act is to enhance and regulate a comprehensive emergency medical services system in the state as set forth in that act. Nothing in the Emergency Medical Services Act shall be construed to preclude a local emergency medical services system from adopting standards that are more stringent than those authorized by the Emergency Medical Services Act.



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**History: Laws 1983, ch. 190, § 2; 1993, ch. 161, § 1; 2003, ch. 243, § 1.**

**The 2003 amendment,** effective July 1, 2003, rewrote the first sentence of the section.

**The 1993 amendment,** effective June 18, 1993, rewrote this section to the extent that a detailed comparison would be impracticable.

## 24-10B-3. Definitions.

As used in the Emergency Medical Services Act:

A. "academy" means an emergency medical services training program administered through the department of emergency medicine of the university of New Mexico school of medicine;

B. "advance directive" means a written instruction, such as a living will, durable power of attorney for health care or emergency medical services do not resuscitate form recognizable under state law and relating to the provision of health care when an individual is incapacitated;

C. "air ambulance service" means any governmental or private service that provides air transportation specifically designed to accommodate the medical needs of a person who is ill, injured or otherwise mentally or physically incapacitated and who requires in-flight medical supervision;

D. "approved emergency medical services training program" means an emergency medical services training program that is sponsored by a post-secondary educational institution, accredited by a national educational accrediting organization for emergency medical services or active in the accreditation process, and is approved by the joint organization on education committee and participates in the joint organization on education committee;

E. "bureau" means the injury prevention and emergency medical services bureau of the public health division of the department;

F. "certified emergency medical service" means an organization that meets minimum standards to provide emergency services and is approved by the bureau, including emergency medical dispatch agencies, pre-hospital or interfacility care services and special event services organized to provide emergency medical services;

G. "critical incident stress management program" means a program of preventive education and crisis intervention intended to reduce the negative effects of critical stress on emergency responders;

H. "department" means the department of health;

I. "emergency medical dispatch" means an advanced form of dispatch communications used to improve emergency medical services response to medical and traumatic emergencies that utilizes specially trained emergency medical dispatchers, in accordance with an emergency medical dispatch priority reference system and the department-approved scopes of practice;

J. "emergency medical dispatcher" means a person who is trained and licensed pursuant to Subsection F of Section 24-10B-4 NMSA 1978 to receive calls for emergency medical assistance, provide pre-arrival medical instructions, dispatch emergency medical assistance and coordinate its response;

K. "emergency medical services" means the services rendered by providers in response to an individual's need for immediate medical care to prevent loss of life or aggravation of physical or psychological illness or injury;

L. "emergency medical services first responder" means a person who is licensed by the department and who functions within the emergency medical services system to provide initial emergency aid;

M. "emergency medical services system" means a coordinated system of health care delivery that responds to the needs of the sick and injured and includes emergency medical services;

N. "emergency medical technician" means a provider who has been licensed by the department to provide patient care;

O. "health care facility" means a hospital, clinic or other entity licensed or approved by the department;

P. "injury prevention" means to promote and implement efforts to reduce the risk and severity of intentional and unintentional injuries;

Q. "medical direction" means guidance or supervision provided by a physician to a provider or emergency medical services system and that may include authority over and responsibility for



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emergency medical dispatch, direct patient care and transport of patients, arrangements for medical control and all other aspects of patient care delivered by a provider;

R. "paramedic" means a provider licensed at that level by the department to provide patient care;

S. "physician" means a doctor of medicine or doctor of osteopathy who is licensed or otherwise authorized to practice medicine or osteopathic medicine in New Mexico;

T. "protocol" means a predetermined, written medical care plan and includes standing orders;

U. "provider" means a person who has been licensed by the department to provide patient care pursuant to the Emergency Medical Services Act;

V. "regional office" means an emergency medical services planning and development agency formally recognized and supported by the bureau;

W. "secretary" means the secretary of health;

X. "special skills" means a set of procedures or therapies that are beyond the scope of practice of a given level of licensure and that have been approved by the medical direction committee for use by a specified provider; and

Y. "state emergency medical services medical director" means a physician designated by the department to provide overall medical direction to the statewide emergency medical services system, whose duties include serving as a liaison to the medical community and chairing the medical direction committee.

**History: 1978 Comp., § 24-10B-3, enacted by Laws 1993, ch. 161, § 2; 2003, ch. 243, § 2.**

**Repeals and reenactments.** — Laws 1993, ch. 161, § 2 repealed 24-10B-3 NMSA 1978, as enacted by Laws 1983, ch. 190, § 3, and enacted a new section, effective June 18, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

**The 2003 amendment,** effective July 1, 2003, rewrote the section.

## 24-10B-4. Bureau; duties.

The bureau is designated as the lead agency for the emergency medical services system, including injury prevention, and shall establish and maintain a program for regional planning and development, improvement, expansion and direction of emergency medical services throughout the state, including:

A. design, development, implementation and coordination of emergency medical services communications systems to join the personnel, facilities and equipment of a given region or system that will allow for medical direction;

B. provision of technical assistance to the public regulation commission for further development and implementation of standards for certification of ambulance services, vehicles and equipment;

C. development of requirements for the collection of data and statistics to evaluate the availability, operation and quality of providers in the state;

D. adoption of rules for emergency medical services medical direction upon the recommendation of the medical direction committee;

E. approval of continuing education programs for emergency medical services personnel;

F. adoption of rules pertaining to the training and licensure of emergency medical dispatchers and their instructors;

G. adoption of rules based upon the recommendations of a trauma advisory committee, for implementation and monitoring of a statewide, comprehensive trauma care system, including:

(1) minimum standards for designation or retention of designation as a trauma center or a participating trauma facility;

(2) pre-hospital care management guidelines for the triage and transportation of traumatized persons;

(3) establishment for interfacility transfer criteria and transfer agreements;

(4) standards for collection of data relating to trauma system operation, patient outcome and trauma prevention; and

(5) creation of a state trauma care plan;



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H. adoption of rules, based upon the recommendations of the air transport advisory committee, for the certification of air ambulance services;

I. adoption of rules pertaining to authorization of providers to honor advance directives, such as emergency medical services do not resuscitate forms, to withhold or terminate care in certain pre-hospital or interfacility circumstances, as guided by local medical protocols;

J. operation of a critical incident stress management program for emergency providers utilizing specifically trained volunteers who shall be considered public employees for the purposes of the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978] when called upon to perform their duties;

K. adoption of rules to establish a cardiac arrest targeted response program pursuant to the Cardiac Arrest Response Act [24-10C-1 through 24-10C-7 NMSA 1978], including registration of automated external defibrillator programs, maintenance of equipment, data collection, approval of automated external defibrillator training programs and a schedule of automated external defibrillator program registration fees;

L. adoption of rules for the administration of an emergency medical services certification program for certified emergency medical services; and

M. promoting, developing, implementing, coordinating and evaluating risk reduction and injury prevention systems.

**History: Laws 1983, ch. 190, § 4; 1993, ch. 161, § 3; 1999, ch. 94, § 8; 2003, ch. 243, § 3.**

**The 2003 amendment,** effective July 1, 2003, rewrote the section.

**The 1999 amendment,** effective July 1, 1999, substituted "public regulation commission" for "state corporation commission" in Subsection B; added Subsection M; and made related stylistic changes.

**The 1993 amendment,** effective June 18, 1993, substituted "the emergency medical services system" for "emergency medical services" and deleted "but not limited to" from the end in the introductory language; substituted "or interfacility care" for "or hospital to hospital care" in Subsection A; inserted "state corporation" in Subsection B; inserted "development of requirements for the" and substituted "providers" for "emergency medical services" in Subsection C; rewrote Subsection D; rewrote former Subsection E as present Subsection F; deleted former Subsection F, relating to the adoption of guidelines for the survey and elective designation of medical facilities according to critical care categories; and added present Subsections E and G through L.

## 24-10B-4.1. Records confidentiality.

A. Any files or records in the possession of the bureau, a regional office or a provider containing identifying information about individuals requesting or receiving treatment or other health services and any unsubstantiated complaints received by the bureau regarding any provider shall be confidential and not subject to public inspection.

B. Such files, records and complaints may be subject to subpoena for use in any pending cause in any administrative proceeding or in any of the courts of this state, unless otherwise provided by law.

**History: Laws 2003, ch. 243, § 11.**

**Effective dates.** — Laws 2003, ch. 243, § 14, made Laws 2003, ch. 243, § 11 effective July 1, 2003.

## 24-10B-4.2. Approved training programs.

Approved emergency medical services training programs for providers are an integral part of the emergency medical services system and the programs shall include:

A. improving and expanding emergency medical services within regions through focused emergency medical services educational activities;

B. furthering the knowledge base of emergency medical services education; and

C. securing physicians as medical directors to advise approved training programs in medical matters and to serve as liaison to the state emergency medical services medical director and the medical community as a whole.

**History: Laws 2003, ch. 243, § 12.**

**Effective dates.** — Laws 2003, ch. 243, § 14, made Laws 2003, ch. 243, § 12 effective July 1, 2003.



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## 24-10B-4.3. Regional offices; duties.

A. Regional offices may be established by the department to assist the bureau to provide regional planning and development, improvement, expansion and direction of emergency medical services and injury prevention in their respective geographic regions.

B. Regional offices may provide technical support and assistance, training coordination, outreach, advocacy, prevention and public education and leadership to communities and providers in their respective geographic regions. They may also provide specific support to the bureau for functions such as licensing examination, planning, evaluation and Emergency Medical Services Fund Act [Chapter 24, Article 10A NMSA 1978] administration.

**History: Laws 2003, ch. 243, § 13.**

**Effective dates.** — Laws 2003, ch. 243, § 14, made Laws 2003, ch. 243, § 13 effective July 1, 2003.

## 24-10B-5. Licensure required; penalty.

A. The department shall by rule adopt and enforce licensure requirements, including minimum standards for training, continuing education and disciplinary actions consistent with the Uniform Licensing Act [61-1-1 through 61-1-31 NMSA 1978], for all persons who provide emergency medical services within the state, irrespective of whether the services are remunerated. The rules shall include authorization for the bureau to issue at least annually an updated list of skills, techniques and medications approved for use at each level of licensure. The secretary may waive licensure requirements as needed during a declared emergency.

B. Licensed emergency medical technicians may function within health care facilities under their licensure and approved New Mexico emergency medical services scope of practice. Nothing in this subsection shall prohibit a health care facility from assigning additional duties and responsibilities in accordance with law. This subsection shall not expand the New Mexico emergency medical services scope of practice under the emergency medical technician's license.

C. In addition to the requirements specified in Subsection A of this section, the department may:

(1) prohibit the use of "emergency medical dispatcher", "emergency medical technician", "emergency medical services first responder", "paramedic" or similar terms connoting expertise in providing emergency medical services by any person not licensed or certified under the Emergency Medical Services Act;

(2) deny, suspend or revoke licensure in accordance with the provisions of the Uniform Licensing Act; and

(3) establish a schedule of reasonable fees for application, examination or licensure and regular renewal thereof.

D. Any person who represents himself to be an "emergency medical dispatcher", "emergency medical technician-basic", "emergency medical technician-intermediate", "emergency medical technician-paramedic", "emergency medical services first responder" or "paramedic", or who uses similar terms connoting expertise in providing emergency medical services while not currently licensed under the Emergency Medical Services Act is guilty of a misdemeanor.

**History: Laws 1983, ch. 190, § 5; 1993, ch. 161, § 4; 2003, ch. 243, § 4.**

**The 2003 amendment,** effective July 1, 2003, rewrote the catchline; in Subsection A, in the first sentence, after "shall by", changed "regulation" to "rule", and after "enforce licensure", deleted "and certification"; and in the second sentence, changed "Such regulations" to "The rules" and substituted "licensure." and the present final sentence for "life support. When setting requirements for licensure of persons also subject to the Ambulance Standards Act, the bureau shall consult with the state corporation commission"; inserted present Subsection B and redesignated former Subsection B as Subsection C; deleted "certified" preceding "emergency medical services" and "or certification" following "licensure" twice in present Subsection C; and added Subsection D.

**The 1993 amendment,** effective June 18, 1993, rewrote Subsection A and Paragraph (1) of Subsection B, and substituted "department" for "bureau" in the introductory language of Subsection B.



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## 24-10B-5.1. Licensing commission established.

A. The secretary shall appoint an "emergency medical services licensing commission", which shall be staffed by the bureau and composed of one lay person, three emergency medical technicians, one from each level of licensure, and three physicians, at least two of whom shall have expertise in emergency medicine and who are appointed from a list proposed by the New Mexico chapter of the American college of emergency physicians.

B. The composition of the emergency medical services licensing commission shall reflect geographic diversity and both public and private interests. The members shall serve for three-year staggered terms. The duties of and procedures for the emergency medical services licensing commission shall be delineated in rules promulgated pursuant to Subsection A of Section 24-10B-5 NMSA 1978. Such duties include:

(1) providing a forum for the receipt of public comment regarding emergency medical services licensing matters;

(2) oversight of the bureau's licensure functions;

(3) receiving complaints, directing investigations and authorizing the initiation of actions by the bureau regarding contemplated refusal to grant initial licensure and for disciplinary actions against licensees; and

(4) the granting of waivers, for good cause shown, of rules pertaining to licensure renewal.

C. The emergency medical services licensing commission may compel the production of books, records and papers pertinent to any investigation authorized by the Emergency Medical Services Act and may seek enforcement of any subpoena so issued through the district court in the county in which the custodian of the document is located in camera.

D. The emergency medical services licensing commission shall meet as needed, but not less frequently than semiannually. The emergency medical services licensing commission shall be subject to the provisions of the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978].

**History: Laws 1993, ch. 161, § 5; 2003, ch. 243, § 5.**

**The 2003 amendment,** effective July 1, 2003, inserted present Subsection C and redesignated former Subsection C as Subsection D.

## 24-10B-5.2. Criminal history background screening.

A. The department is authorized to obtain the criminal history records of applicants and licensees and to exchange fingerprint data directly with the federal bureau of investigation, the department of public safety and any other law enforcement agency or organization. The department shall require fingerprinting of applicants and licensees for the purposes of this section.

B. The secretary shall adopt and promulgate rules to:

(1) require criminal history background checks for applicants and licensees;

(2) identify the information from a criminal history background check that may form the basis of a denial, suspension or revocation of licensure or any other disciplinary action; and

(3) otherwise carry out the provisions of this section.

C. The department shall comply with applicable confidentiality requirements of the department of public safety and the federal bureau of investigation regarding the dissemination of criminal history background check information.

D. An applicant or licensee whose license is denied, suspended or revoked, or who is otherwise disciplined based on information obtained in a criminal history background check, shall be entitled to review the information obtained pursuant to this section and to appeal the decision pursuant to the Uniform Licensing Act [61-1-1 through 61-1-31 NMSA 1978].

E. The applicant or licensee shall bear any costs associated with ordering or conducting criminal history background checks.

F. The provisions of the Criminal Offender Employment Act [28-2-1 through 28-2-6 NMSA 1978] shall govern any consideration of criminal history records required or permitted by the Emergency Medical Services Act.

G. As used in this section:



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(1) "applicant" means a person applying for licensure to provide emergency medical services under the Emergency Medical Services Act; and

(2) "licensee" means a person that holds a license to provide emergency medical services pursuant to the Emergency Medical Services Act.

**History: Laws 2014, ch. 47, § 2.** **Effective dates.** — Laws 2014, ch. 47, § 3 made Laws 2014, ch. 47, § 2 effective July 1, 2014.

## 24-10B-6. Treatment authorized.

A. Notwithstanding the provisions of the Medical Practice Act [Chapter 61, Article 6 NMSA 1978], Sections 61-10-1 [repealed] through 61-10-22 NMSA 1978 or the Nursing Practice Act [Chapter 61, Article 3 NMSA 1978], any person licensed by the bureau may render emergency medical services commensurate with his level of licensure, as medically indicated.

B. Individuals licensed pursuant to the provisions of the Medical Practice Act, Sections 61-10-1 [repealed] through 61-10-22 NMSA 1978 or the Nursing Practice Act are not required to be licensed under the Emergency Medical Services Act.

**History: Laws 1983, ch. 190, § 6; 1993, ch. 161, § 6; 2003, ch. 243, § 6.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2016, ch. 90, § 29 repealed 61-10-1 NMSA 1978 effective July 1, 2016.

**The 2003 amendment,** effective July 1, 2003, substituted "the Medical Practice Act" for the references to Sections 61-6-1 through 61-6-31 NMSA 1978 in Subsections A and B and deleted the terms "certification" or "certified" throughout the section.

**The 1993 amendment,** effective June 18, 1993, rewrote Subsection A; deleted former Subsection B, which read: "In addition to the activities allowed under the provisions of Subsection A of this section, any licensed advanced life support personnel, under medical control, may render advanced life support"; and renumbered former Subsection C as Subsection B.

## 24-10B-7. Committees established.

A. The secretary shall appoint a statewide emergency medical services advisory committee to advise the bureau in carrying out the provisions of the Emergency Medical Services Act. The advisory committee shall include, at a minimum, representatives from the state medical society, the state emergency medical technicians' association, the state firefighters' association, the New Mexico ambulance association, the state nurses' association, the association of public safety communications organization/national emergency numbers association, the lead state agency for public safety and emergency preparedness, the state emergency services council, the New Mexico health and hospital systems association, the university of New Mexico health sciences center, the state fire chiefs' association, a consumer, emergency medical service regional offices and other interested provider and consumer groups as determined by the secretary. The advisory committee shall establish appropriate subcommittees, including a trauma advisory committee and an air transport advisory committee.

B. The joint organization on education committee shall be composed, at a minimum, of the director and medical director of the academy and each approved emergency medical services training program or their designee, the state emergency medical services medical director, the bureau chief or his designee, who shall serve without vote, each emergency medical services regional office training coordinator and one provider from the three highest levels of licensure, who are appointed by the secretary from a list proposed by the statewide emergency medical services advisory committee. The duties of the joint organization on education committee include:

(1) developing minimum curricula content for approved emergency medical services training programs;

(2) establishing minimum standards for approved emergency medical services training programs;

(3) reviewing and approving the applications of organizations seeking to become approved emergency medical services training programs; and



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(4) developing minimum qualifications for and maintaining a list of instructors for each of the approved emergency medical services training programs.

C. The secretary shall appoint a medical direction committee to advise the bureau on matters relating to medical direction. The state emergency medical services medical director shall be a member of the committee and shall act as its chairman. The medical direction committee shall include, at a minimum, a physician representative experienced in pre-hospital medical care selected from a list proposed by the New Mexico chapter of the American college of emergency physicians, a physician representative from the academy, one physician from each of the emergency medical services geographic regions, one physician with pediatric emergency medicine expertise, one physician representing emergency medical dispatchers and one provider from the three highest levels of licensure. Members shall be selected to represent both public and private interests. The duties of the medical direction committee include:

(1) reviewing the medical appropriateness of all rules proposed by the bureau;

(2) reviewing and approving the applications of providers for special skills authorizations;

(3) assisting in the development of rules pertaining to medical direction; and

(4) reviewing at least annually a list of skills, techniques and medications approved for use at each level of licensure that shall be approved by the secretary and issued by the bureau.

D. The committees created in this section are subject to the provisions of the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978], to the extent that funds are available for that purpose.

E. Any decision that the bureau proposes to make contrary to the recommendation of any committee created in this section shall be communicated in writing to that committee. Upon the request of that committee, the decision shall be submitted for reconsideration to the director of the public health division of the department and subsequently to the secretary. Any decision made pursuant to a request for reconsideration shall be communicated in writing by the department to the appropriate committee.

**History: Laws 1983, ch. 190, § 7; 1993, ch. 161, § 8; 2003, ch. 243, § 7.**

**The 2003 amendment,** effective July 1, 2003, in Subsection A, inserted "at a minimum" following "advisory committee shall include"; in the second sentence, added the language following "state firefighters' association" and preceding "emergency medical service"; and added "as determined by the secretary" at the end of the sentence; and rewrote Subsections B and C.

**The 1993 amendment,** effective June 18, 1993, rewrote the catchline; designated the existing provisions as Subsection A; in Subsection A, substituted "The secretary shall appoint a statewide emergency medical services" for "Pursuant to Section 9-7-11 NMSA 1978, the secretary of health and environment shall appoint an" in the first sentence, substituted "firefighters'" for "firemen's" and "offices" for "planning bodies" in the second sentence, and added the last sentence; and added Subsections B through E.

## 24-10B-8. Liability.

In any claim for civil damages arising out of the provision of emergency medical services by personnel described in Section 24-10B-5 NMSA 1978, those personnel shall be considered health care providers for purposes of the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978] if the claim is against a governmental entity or a public employee as defined by that act.

**History: Laws 1983, ch. 190, § 8; 1993, ch. 161, § 9.**

**The 1993 amendment,** effective June 18, 1993, substituted "24-10B-5 NMSA 1978" for "5 of the Emergency Medical Services Act".

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Liability for injury or death allegedly caused by activities of hospital "rescue team," 64 A.L.R.4th 1200.

Application of "firemen's rule" to bar recovery by emergency medical personnel injured in responding to, or at scene of, emergency, 89 A.L.R.4th 1079.

## 24-10B-9. Emergency first aid.

Nothing in the Emergency Medical Services Act shall prevent fire and rescue services, public safety organizations and other trained units or individuals from rendering emergency first aid



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to the public commensurate with their training. Nothing in the Emergency Medical Services Act shall be construed to supersede other statutory authority permitting the rendering of first aid.

**History: Laws 1983, ch. 190, § 9; 1993, ch. 161, § 10; 2003, ch. 243, § 8.**

**The 2003 amendment,** effective July 1, 2003, did not change the text of the section.

**The 1993 amendment,** effective June 18, 1993, deleted "service" after "first aid" in the first sentence, and substituted "other statutory authority permitting the rendering of first aid" for "the provisions of the Search and Rescue Act" in the second sentence.

## 24-10B-9.1. Emergency transportation.

Any person may be transported to an appropriate health care facility by an emergency medical technician, under medical direction, when the emergency medical technician makes a good faith judgment that the person is incapable of making an informed decision about his own safety or need for medical attention and is reasonably likely to suffer disability or death without the medical intervention available at such a facility.

**History: Laws 1993, ch. 161, § 11; 2003, ch. 243, § 9.**

**The 2003 amendment,** effective July 1, 2003, substituted "medical direction" for "medical control".

## 24-10B-10. Enforcement.

The department may bring civil action in any district court to enforce any of the provisions of the Emergency Medical Services Act.

**History: Laws 1983, ch. 190, § 10.**

## 24-10B-11. Summoning emergency vehicle without cause; penalty.

Any person who willfully summons an ambulance or emergency response vehicle or reports that one is needed when that person knows that the ambulance or emergency response vehicle is not needed is guilty of a petty misdemeanor.

**History: Laws 1983, ch. 190, § 11.**

**Cross references.** — For sentencing for misdemeanors, *see* Chapter 31, Article 19 NMSA 1978.

## 24-10B-12. Academy; duties.

The academy is designated as the lead emergency medical services training agency. Its duties include:

A. administering formal emergency medical services training conducted in New Mexico, other than training provided by other approved emergency medical services training programs;

B. furthering the knowledge of emergency medical services education;

C. securing a physician as its medical director to advise it in medical matters and to serve as liaison to the state emergency medical services medical director and the medical community as a whole;

D. supporting, promoting and conducting scholarly research regarding emergency medical services; and

E. reporting and publishing emergency medical services information.

**History: Laws 1993, ch. 161, § 7; 2003, ch. 243, § 10.**

**The 2003 amendment,** effective July 1, 2003, inserted "emergency medical services" preceding "training" in the introductory sentence; substituted "formal emergency medical services" for "all basic life support" in Subsection A; and added Subsections D and E.



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## 24-10B-13. Certification of STEMI receiving and referring centers.

A. As used in this section, "STEMI" means ST segment elevation myocardial infarction.

B. In accordance with department rules, the department shall certify an acute care hospital as a STEMI receiving center or STEMI referring center if that hospital has been accredited as a STEMI receiving center or STEMI referring center by a nationally recognized organization that provides STEMI receiving or referring accreditation.

C. The department shall post information regarding certification on the department's website. The department shall coordinate with local and regional emergency medical services on the development and implementation of triage and transport plans for STEMI patients.

D. If a hospital loses its national accreditation as a STEMI receiving center or STEMI referring center, the secretary shall revoke the hospital's certification.

E. The secretary may adopt rules:

(1) relating to STEMI certification and revocation of certification by the department; and

(2) to assist and encourage STEMI receiving centers to enter into coordinated STEMI care agreements with STEMI referring centers and other health care facilities throughout the state to provide appropriate access to care for acute heart attack patients.

**History: Laws 2013, ch. 6, § 1; 2019, ch. 28, § 1.**

**The 2019 amendment,** effective June 14, 2019, revised the certification criteria for STEMI receiving and referring centers, and required the department of health to coordinate with local and regional emergency medical services on the development and implementation of triage and transport plans for STEMI patients; in Subsection B, after "referring center by", deleted "the society of cardiovascular patient care or another" and added "a"; and in Subsection C, added the last sentence.

# ARTICLE 10C

# Cardiac Arrest Response

Sec.
24-10C-1. Short title.
24-10C-2. Findings and purpose.
24-10C-3. Definitions.
24-10C-4. Protection of public safety.
Sec.
24-10C-5. Authority.
24-10C-6. Exemption.
24-10C-7. Limited liability protections.

## 24-10C-1. Short title.

Sections 1 through 7 [24-10C-1 through 24-10C-7 NMSA 1978] of this act may be cited as the "Cardiac Arrest Response Act".

**History: Laws 1999, ch. 94, § 1.**

**Effective dates.** — Laws 1999, ch. 94, § 9, made Laws 1999, ch. 94, § 1 effective July 1, 1999.

## 24-10C-2. Findings and purpose.

A. The legislature finds that:

(1) each year more than three hundred fifty thousand Americans die from out-of-hospital sudden cardiac arrest;

(2) the American heart association estimates that more than twenty thousand deaths could be prevented each year if early defibrillation were more widely available. In cardiac arrest the first several minutes are the most crucial time in which performing defibrillation can significantly improve chances for survival;

(3) the reality is that even in the best emergency medical services systems, emergency medical technicians or first responders may not always be able to arrive during that critical window of time; and



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(4) virtually all communities in New Mexico have invested in 911 emergency response systems, emergency medical personnel and ambulance vehicles. However, many of them do not have enough defibrillators in their community [communities].

B. It is the purpose of the Cardiac Arrest Response Act to encourage greater acquisition, deployment and use of automated external defibrillators in communities across the state.

**History: Laws 1999, ch. 94, § 2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Effective dates.** — Laws 1999, ch. 94, § 9, made Laws 1999, ch. 94, § 2 effective July 1, 1999.

## 24-10C-3. Definitions.

As used in the Cardiac Arrest Response Act:

A. "automated external defibrillator" means a medical device heart monitor and defibrillator that:

(1) has received approval of its premarket modification filed pursuant to 21 U.S.C. 360(k), from the United States food and drug administration;

(2) is capable of recognizing cardiac arrest that will respond to defibrillation, ventricular fibrillation or rapid ventricular tachycardia, and is capable of determining whether defibrillation should be performed; and

(3) upon determining that defibrillation should be performed, automatically charges and is capable of delivering an electrical impulse to an individual's heart;

B. "automated external defibrillator program" means a program of trained targeted responders registered with the department;

C. "defibrillation" means the administration of a controlled electrical charge to the heart to restore a viable cardiac rhythm;

D. "department" means the department of health;

E. "good Samaritan" means a person who lacks automated external defibrillator training but who has access to an automated external defibrillator and provides emergency automated external defibrillator services to a person in need of defibrillation, provided that the good Samaritan:

(1) acts without willful, wanton or reckless behavior that is the cause of injury or death; and

(2) acts without compensation;

F. "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture or any legal or commercial entity; and

G. "trained targeted responder" means a person trained in the use of an automated external defibrillator under emergency cardiac care guidelines.

**History: Laws 1999, ch. 94, § 3; 2007, ch. 163, § 1; 2015, ch. 33, § 1.**

**The 2015 amendment,** effective June 19, 2015, amended certain definitions as used in the Cardiac Arrest Response Act; in Subsection B, after "department", deleted "and operating under the supervision of a physician medical director"; in Subsection E, after "person in", deleted "apparent cardiac arrest" and added "need of defibrillation"; in Paragraph (1) of Subsection E, after "acts", deleted "in good faith as an ordinary prudent person would have in the same or similar circumstances" and added "without willful, wanton or reckless behavior that is the cause of injury or death"; deleted former Subsection F relating to the definition of "physician"; and added a new Subsection F.

**The 2007 amendment,** effective June 15, 2007, added Subsection E defining "good Samaritan".

## 24-10C-4. Protection of public safety.

A person that acquires an automated external defibrillator shall ensure that:

A. a trained targeted responder is designated to oversee all aspects of the automated external defibrillator program, including training, emergency medical services coordination, protocol approval and automated external defibrillator deployment strategies, and that the trained targeted responder provides overall quality assurance and reviews each case in which the automated external defibrillator is used by the program;



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B. the trained targeted responders receive appropriate training in cardiopulmonary resuscitation and in the use of an automated external defibrillator by a nationally recognized course in cardiopulmonary response and automated external defibrillator use approved by the department or other training programs authorized by the department;

C. the defibrillator is maintained and tested according to the manufacturer's guidelines;

D. any person that renders emergency care or treatment on a person in cardiac arrest by using an automated external defibrillator activates the emergency medical system as soon as possible and reports any clinical use of the automated external defibrillator to the designated trained targeted responder;

E. the automated external defibrillator program is registered with the department; and

F. the local emergency medical services and local 911 agencies have been notified of the automated external defibrillator program.

**History: Laws 1999, ch. 94, § 4; 2007, ch. 163, § 2; 2015, ch. 33, § 2.**

**The 2015 amendment,** effective June 19, 2015, provided for certain duties of a trained targeted responder overseeing an automated external defibrillator program; in the introductory sentence, after "person", deleted "who" and added "that"; in Subsection A, after "a", deleted "physician medical director oversees" and added "trained targeted responder is designated to oversee", and after "that the", deleted "physician medical director" and added "trained targeted responder"; in Subsection B, after "targeted", deleted "responder receives" and added "responders receive"; and in Subsection D, after "person", deleted "who" and added "that", and after "defibrillator to the", deleted "physician medical director" and added "designated trained targeted responder".

**The 2007 amendment,** effective June 15, 2007, changed "AED" to "automated external defibrillator".

## 24-10C-5. Authority.

A person may acquire an automated external defibrillator if the person has met all the requirements of Section 24-10C-4 NMSA 1978. Nothing in this section limits the right of a person to practice a health profession that the person is otherwise authorized to practice in accordance with the laws of New Mexico.

**History: Laws 1999, ch. 94, § 5; 2007, ch. 163, § 3.**

**The 2007 amendment,** effective June 15, 2007, changed "AED" to "automated external defibrillator" and provided that a person may acquire an automated external defibrillator if he has met the requirements of Section 24-10C-4 NMSA 1978.

## 24-10C-6. Exemption.

Nothing in the Cardiac Arrest Response Act precludes a physician or a physician assistant, advanced practice registered nurse or certified nurse-midwife working within that person's scope of practice from prescribing an automated external defibrillator to a patient for use by the patient's caregiver on an individual patient, and the use does not require the individual to function in an approved program.

**History: Laws 1999, ch. 94, § 6; 2007, ch. 163, § 4; 2015, ch. 116, § 11.**

**The 2015 amendment,** effective June 19, 2015, amended the Cardiac Arrest Response Act provision, relating to prescribing an automated external defibrillator, by including other health care professionals with each reference to "physician"; and in the first sentence, after "physician", added "or a physician assistant, advanced practice registered nurse or certified nurse-midwife working within that person's scope of practice".

**Temporary provisions.** — Laws 2015, ch. 116, § 16 provided that by January 1, 2016, every cabinet secretary, agency head and head of a political subdivision of the state shall update rules requiring an examination by, a certificate from or a statement of a licensed physician to also accept such examination, certificate or statement from an advanced practice registered nurse, certified nurse-midwife or physician assistant working within that person's scope of practice.

**The 2007 amendment,** effective June 15, 2007, changed "AED" to "automated external defibrillator".

## 24-10C-7. Limited liability protections.

A. The following persons who render emergency care or treatment by the use of an automated external defibrillator pursuant to the provisions of the Cardiac Arrest Response Act shall not be



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subject to civil liability, provided that they have acted with reasonable care and in compliance with the requirements of that act:

(1) a trained targeted responder who provides supervisory services pursuant to the Cardiac Arrest Response Act;

(2) a person that provides training in cardiopulmonary resuscitation and use of automated external defibrillation;

(3) a person that acquires, provides or makes available to the public an automated external defibrillator pursuant to the Cardiac Arrest Response Act;

(4) the owner, manager or operator of the property or facility where the automated external defibrillator is located;

(5) a person that authorizes, directs or supervises the installation or placement of an automated external defibrillator; and

(6) the trained targeted responder.

B. A good Samaritan who renders emergency care or treatment by the use of an automated external defibrillator pursuant to the provisions of the Cardiac Arrest Response Act shall not be subject to civil liability; provided that the good Samaritan has acted without willful, wanton or reckless behavior that is the cause of injury or death and in compliance with the requirements of that act.

**History: Laws 1999, ch. 94, § 7; 2007, ch. 163, § 5; 2015, ch. 33, § 3.**

**The 2015 amendment,** effective June 19, 2015, limited the liability of a good Samaritan who comes to the aid of a person in need of defibrillation; in the catchline, deleted "immunity" and added "liability"; designated the previously undesignated introductory sentence as Subsection A; redesignated former Subsections A, B, C and D as Paragraphs (1), (2), (3) and (4) of Subsection A, respectively; in Paragraph (1) of Subsection A, after "a", deleted "physician" and added "trained targeted responder"; in Paragraph (2) of Subsection A, after "person", deleted "who" and added "that"; in Paragraph (3) of Subsection A, after "person", deleted "who" and added "that", and after "acquires", added "provides or makes available to the public"; in Paragraph (4) of Subsection A, after "owner", added "manager or operator"; added Paragraph (5) of Subsection A; redesignated former Subsection E as Paragraph (6) of Subsection A, and after "responder", deleted "and"; deleted former Subsection F relating to "a good Samaritan"; and added Subsection B.

**The 2007 amendment,** effective June 15, 2007, changed "AED" to "automated external defibrillator" and granted immunity from liability to a good Samaritan.

# ARTICLE 10D

# Sexual Assault Survivors Emergency Care

Sec.
24-10D-1. Short title.
24-10D-2. Definitions.
24-10D-3. Emergency care for sexual assault survivors; standard of care.
24-10D-4. Training.
24-10D-5. Enforcement; administrative fines.

## 24-10D-1. Short title.

This act [24-10D-1 through 24-10D-5 NMSA 1978] may be cited as the "Sexual Assault Survivors Emergency Care Act".

**History: Laws 2003, ch. 91, § 1.**

**Cross references.** — For sexual offenses, *see* Chapter 30, Article 9 NMSA 1978.

## 24-10D-2. Definitions.

As used in the Sexual Assault Survivors Emergency Care Act:

A. "department" means the department of health;

B. "emergency care for sexual assault survivors" means medical examinations, procedures and services provided by a hospital to a sexual assault survivor following an alleged sexual assault;

C. "emergency contraception" means a drug approved by the federal food and drug administration that prevents pregnancy after sexual intercourse;



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D. "hospital" means a facility providing emergency or urgent health care;

E. "medically and factually accurate and objective" means verified or supported by the weight of research conducted in compliance with accepted scientific methods and standards; published in peer-reviewed journals; and recognized as accurate and objective by leading professional organizations and agencies with relevant expertise in the field of obstetrics and gynecology, such as the American college of obstetricians and gynecologists;

F. "sexual assault" means the crime of criminal sexual penetration; and

G. "sexual assault survivor" means a female who alleges or is alleged to have been sexually assaulted and who presents as a patient to a hospital.

**History: Laws 2003, ch. 91, § 2.**

## 24-10D-3. Emergency care for sexual assault survivors; standard of care.

A. A hospital that provides emergency care for sexual assault survivors shall:

(1) provide each sexual assault survivor with medically and factually accurate and objective written and oral information about emergency contraception;

(2) orally and in writing inform each sexual assault survivor of her option to be provided emergency contraception at the hospital; and

(3) provide emergency contraception at the hospital to each sexual assault survivor who requests it.

B. The provision of emergency contraception pills shall include the initial dose that the sexual assault survivor can take at the hospital as well as the subsequent dose that the sexual assault survivor may self-administer twelve hours following the initial dose.

**History: Laws 2003, ch. 91, § 3.**

## 24-10D-4. Training.

No later than September 30, 2003:

A. a hospital shall ensure that all personnel who provide care to sexual assault survivors are trained to provide medically and factually accurate and objective information about emergency contraception; and

B. the department shall adopt rules regulating the training to be provided by hospitals pursuant to the Sexual Assault Survivors Emergency Care Act to personnel who provide emergency care for sexual assault survivors.

**History: Laws 2003, ch. 91, § 4.**

## 24-10D-5. Enforcement; administrative fines.

A. Complaints of failure to provide services required by the Sexual Assault Survivors Emergency Care Act may be filed with the department.

B. The department shall immediately investigate every complaint it receives regarding failure of a hospital to provide services required by the Sexual Assault Survivors Emergency Care Act to determine the action to be taken to satisfy the complaint.

C. The department shall compile all complaints it receives regarding failure to provide services required by the Sexual Assault Survivors Emergency Care Act and shall retain the complaints for at least ten years so that they can be analyzed for patterns of failure to provide services pursuant to that act.

D. If the department determines that a hospital has failed to provide the services required in the Sexual Assault Survivors Emergency Care Act, the department shall:



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(1) issue a written warning to the hospital upon receipt of a complaint that the hospital is not providing the services required by the Sexual Assault Survivors Emergency Care Act; and

(2) based on the department's investigation of the first complaint, require the hospital to correct the deficiency leading to the complaint.

E. If after the issuance of a written warning to the hospital pursuant to Subsection D of this section, the department finds that the hospital has failed to provide services required by the Sexual Assault Survivors Emergency Care Act, the department shall, for a second through fifth complaint, impose on the hospital a fine of one thousand dollars ($1,000):

(1) per sexual assault survivor who is found by the department to have been denied medically and factually accurate and objective information about emergency contraception or who is not offered or provided emergency contraception; or

(2) per month from the date of the complaint alleging noncompliance until the hospital provides training pursuant to the rules of the department.

F. For the sixth and subsequent complaint against the same hospital if the department finds the hospital has failed to provide services required by the Sexual Assault Survivors Emergency Care Act, the department shall impose an intermediate sanction pursuant to Section 24-1-5.2 NMSA 1978 or suspend or revoke the license of the hospital issued pursuant to the Public Health Act [Chapter 24, Article 1 NMSA 1978].

**History: Laws 2003, ch. 91, § 5.**

**Severability.** — Laws 2003, ch. 91, § 6 provided for the severability of the act if any part or application thereof is held invalid.

# ARTICLE 10E

# Trauma System Fund Authority

Sec.
24-10E-1. Short title.
24-10E-2. Purpose of act.
24-10E-3. Definitions.
24-10E-4. Trauma system fund authority created; membership.
24-10E-5. Duties.
24-10E-6. Trauma system fund created; funding.
24-10E-7. Rules.

## 24-10E-1. Short title.

This act [24-10E-1 through 24-10E-7 NMSA 1978] may be cited as the "Trauma System Fund Authority Act".

**History: Laws 2006, ch. 13, § 1.**

**Effective dates.** — Laws 2006, ch. 13 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-10E-2. Purpose of act.

The purpose of the Trauma System Fund Authority Act is to provide funding to sustain existing trauma centers, support the development of new trauma centers and develop a statewide trauma system.

**History: Laws 2006, ch. 13, § 2.**

**Effective dates.** — Laws 2006, ch. 13 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-10E-3. Definitions.

As used in the Trauma System Fund Authority Act:



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A. "authority" means the trauma system fund authority;
B. "department" means the department of health;
C. "fund" means the trauma system fund;
D. "secretary" means the secretary of health; and
E. "statewide trauma system" means a coordinated continuum of care that includes injury prevention, emergency medical, acute care hospital and rehabilitative services and that is subject to accountability and system improvement.

**History: Laws 2006, ch. 13, § 3.**
**Effective dates.** — Laws 2006, ch. 13 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-10E-4. Trauma system fund authority created; membership.

A. The "trauma system fund authority" is created. The authority is administratively attached to the department.

B. The authority shall consist of at least nine members, all of whom shall be appointed by and serve at the pleasure of the governor. The membership of the authority shall include the following:

(1) the secretary or the secretary's designee;
(2) representation from the medical specialty of trauma physicians;
(3) at least one member of a statewide organization representing physicians in New Mexico;
(4) at least one member representing emergency and trauma nursing practice;
(5) at least one member of a statewide organization representing hospitals and health systems in New Mexico;
(6) at least one member of a statewide organization representing injury prevention;
(7) the chair of the statewide emergency medical services advisory committee;
(8) the chair of the trauma advisory committee; and
(9) at least one member of a statewide organization representing rehabilitation services.

C. Authority members shall elect a chair and other officers as the authority deems appropriate.

D. The authority shall meet regularly at the call of the chair.

**History: Laws 2006, ch. 13, § 4.**
**Effective dates.** — Laws 2006, ch. 13 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-10E-5. Duties.

The authority shall:

A. develop criteria by which distribution of funds to existing trauma centers and potential new centers will occur;

B. receive applications and determine and monitor the actual distribution of money from the fund that will support the development of a statewide system of trauma care;

C. oversee the department's administration of the fund and the development of a trauma system; and

D. report annually to the interim legislative health and human services committee and the legislative finance committee.

**History: Laws 2006, ch. 13, § 5.**
**Effective dates.** — Laws 2006, ch. 13 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-10E-6. Trauma system fund created; funding.

A. The "trauma system fund" is created in the state treasury. The fund shall consist of money appropriated and transferred to the fund, money received by the authority from any public or



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private source and tax revenues distributed to the fund by law. Interest earned on investment of the fund shall be credited to the fund. Disbursements from the fund shall be made upon warrants drawn by the secretary of finance and administration pursuant to vouchers signed by the secretary of health or the secretary's authorized representative. Money in the fund shall not revert at the end of any fiscal year.

B. Money in the fund is appropriated to the department for the purpose of making distributions approved by the authority and for administering the Trauma System Fund Authority Act; provided that no more than five percent of the fund may be used by the department for administrative costs, including monitoring, trauma system development and providing technical assistance.

**History: Laws 2006, ch. 13, § 6.**

**Effective dates.** — Laws 2006, ch. 13 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 24-10E-7. Rules.

The department shall promulgate rules to carry out the provisions of the Trauma System Fund Authority Act.

**History: Laws 2006, ch. 13, § 7.**

**Effective dates.** — Laws 2006, ch. 13 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

# ARTICLE 11

# Medical Investigations

Sec.
24-11-1. Board of medical investigators; creation; membership; compensation.
24-11-2. Meetings; duties.
24-11-3. State medical investigator; qualifications; duties; office.
24-11-4. References to coroner.
24-11-5. Reports of violent death.
24-11-6. Death certificate; release of body; reports.
24-11-6.1. Deceased members of Indian nations, tribes or pueblos; consultation and certification required.
24-11-7. Examination; autopsy; inquest.
24-11-8. Reports to district attorney.
24-11-9. Subpoena; oath.
24-11-10. Penalties.

## 24-11-1. Board of medical investigators; creation; membership; compensation.

There is created the "board of medical investigators", consisting of the dean of the university of New Mexico school of medicine, the secretary of health, the chief of the New Mexico state police, the chair of the board of funeral services and the secretary of Indian affairs. The members of the board of medical investigators shall receive no compensation for their services as board members other than as provided in the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978].

**History: 1953 Comp., § 12-17-1, enacted by Laws 1971, ch. 112, § 1; and recompiled as 1953 Comp., § 12-29-1, by Laws 1972, ch. 51, § 9; 1973, ch. 286, § 1; 1977, ch. 253, § 38; 1981, ch. 96, § 1; 2003, ch. 191, § 1; 2012, ch. 48, § 2.**

**Cross references.** — For chairman of the board of funeral services, *see* 61-32-5 NMSA 1978.

**The 2012 amendment,** effective July 1, 2012, changed the name of the board of thanatopractice to the board of funeral service; in the first sentence, after "chair of the board of", deleted "thanatopractice" and added "funeral services" and after "board of funeral services and the", deleted "director of the New Mexico office" and added "secretary".

**The 2003 amendment,** effective July 1, 2003, deleted "medical school at the" following "dean of the", inserted "school of medicine" following "of New Mexico", substituted "health, the chief of the New Mexico" for "health and environment, the chief of the" following " the secretary of", and substituted "and the director of the New Mexico office of Indian affairs" for "of the state of New Mexico" following "state board of thanatopractice".

### ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 18 Am. Jur. 2d Coroners or Medical Examiners § 1 et seq.

18 C.J.S. Coroners § 1 et seq.



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## 24-11-2. Meetings; duties.

A. The board of medical investigations [investigators] shall meet at least annually and as often as necessary to conduct the business of the board. Additional meetings may be called by the chairman or by a majority of the members of the board.

B. At the first annual meeting of the board, the members shall elect one of their number as chairman.

C. The board of medical investigations [investigators] shall formulate broad policy for the operation of the office of the state medical investigator and the offices of the district medical investigators.

D. The board of medical investigations [investigators] shall employ and fix the compensation of a qualified state medical investigator who shall be assigned as an employee of the university of New Mexico school of medicine.

**History: 1953 Comp., § 12-17-2, enacted by Laws 1971, ch. 112, § 2; recompiled as 1953 Comp., § 12-29-2, by Laws 1972, ch. 51, § 9; 1973, ch. 286, § 2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 24-11-3. State medical investigator; qualifications; duties; office.

A. The state medical investigator shall be a physician licensed to practice in New Mexico. Insofar as practicable, the medical investigator shall be trained in the fields of pathology and forensic medicine.

B. The state medical investigator shall maintain his office at the school of medicine at the university of New Mexico.

C. The state medical investigator shall appoint district medical investigators and where necessary deputy medical investigators who shall serve at his pleasure. The state medical investigator may assign deputy medical investigators to districts to work under the supervision of a district medical investigator. The district medical investigator shall be a licensed physician. When deemed necessary by the state medical investigator, he may direct a deputy or district medical examiner to enter another district for the purpose of carrying out medical investigations.

D. Any district created by the state medical investigator to be staffed by a district medical investigator shall be co-extensive with one or more counties.

E. The state medical investigator may enter into agreements for services to be performed by persons in the course of medical investigations.

F. The state medical investigator shall, subject to the approval of the board of medical investigations, promulgate rules and regulations for the proper investigation of deaths occurring within this state.

G. The state medical investigator shall maintain records of the deaths occurring within this state which are investigated by either state or district medical investigators.

H. In addition to other duties prescribed in this section, the state medical investigator shall also serve as the district medical investigator for Bernalillo county.

I. Funds for the operation of the state and district medical investigators' offices shall be appropriated to and administered by the university of New Mexico school of medicine.

**History: 1953 Comp., § 12-17-3, enacted by Laws 1971, ch. 112, § 3; recompiled as 1953 Comp., § 12-29-3, by Laws 1972, ch. 51, § 9; 1973, ch. 286, § 3.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 18 C.J.S. Coroners §§ 3 to 9.

## 24-11-4. [References to coroner.]

As used in the New Mexico Statutes Annotated, 1978 Compilation, "coroner" means the district medical investigator.

**History: 1953 Comp., § 15-43-43.1, enacted by Laws 1971, ch. 112, § 10.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.



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## 24-11-5. Reports of violent death.

When any person comes to a sudden, violent or untimely death or is found dead and the cause of death is unknown, anyone who becomes aware of the death shall report it immediately to law enforcement authorities or the office of the state or district medical investigator. The public official so notified, shall in turn notify either, or both, the appropriate law enforcement authorities or the office of the state or district medical investigator. The state or district medical investigator, or a deputy medical investigator under his direction, shall, without delay, view and take legal custody of the body.

**History: 1953 Comp., § 15-43-44, enacted by Laws 1961, ch. 91, § 2; 1971, ch. 112, § 4; 1973, ch. 286, § 4; 1975, ch. 7, § 1.**

**Cross references.** — For failure to report death, *see* 24-11-10 NMSA 1978.

**ANNOTATIONS**

**Autopsy reports are testimonial.** — Autopsy reports regarding individuals who suffered a violent death are testimonial for purposes of confrontation clause analysis, because medical examiners are required by 24-11-8 NMSA 1978 to report their findings to the district attorney. *State v. Navarette*, 2013-NMSC-003, 294 P.3d 435.

## 24-11-6. Death certificate; release of body; reports.

A. If, after viewing the body, notifying the law enforcement agency with jurisdiction and making an investigation, the state or district medical investigator is satisfied that the death was not caused by criminal act or omission and that there are no suspicious circumstances about the death, he shall execute a death certificate in the form required by law. He shall also execute a certificate on a form prescribed by the health and social services department [department of health], authorizing release of the body to the funeral director for burial. In those cases in which the investigation is performed by a deputy medical investigator, if, after viewing the body, notifying the law enforcement agency with jurisdiction and making an investigation, he is satisfied that the death was not caused by criminal act or omission and that there are no suspicious circumstances about the death, he shall report this finding to the state or district medical investigator under whose direction he is working. Upon receipt of a report from a deputy medical investigator under this subsection, the state or district medical investigator may execute a death certificate and a certificate authorizing release of the body for burial.

B. In those cases where the death resulted from a motor vehicle accident on a public highway, and the state, district or deputy medical investigator performs or causes to be performed a test or tests to determine the alcoholic content of the deceased's blood, a copy of the report of this test shall be sent to the planning division of the state highway department for the department's use only for statistical purposes. The copy of the report sent to the planning division of the state highway department of the results shall not contain any identification of the deceased and shall not be subject to judicial process.

**History: 1953 Comp., § 15-43-45, enacted by Laws 1961, ch. 91, § 3; 1969, ch. 36, § 1; 1971, ch. 112, § 5; 1973, ch. 286, § 5; 1975, ch. 7, § 2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1977, ch. 253, §§ 5 and 14 abolished the health and social services department and transferred property and personnel to the health and environment department. Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department and enacted a new 9-7-4 NMSA 1978 which created the department of health.

**Cross references.** — For disposition of dead bodies generally, *see* Chapter 24, Article 12 NMSA 1978.

**ANNOTATIONS**

**Use of original report.** — Under Subsection B, no evidentiary limitation is placed on an original report which identifies the deceased person; to disallow its use in civil and criminal cases would render the report valueless. *South v. Lucero*, 1979-NMCA-046, 92 N.M. 798, 595 P.2d 768, cert. denied, 92 N.M. 675, 593 P.2d 1078.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 18 Am. Jur. 2d Coroners or Medical Examiners § 1 et seq.

Admissibility of finding of coroner to show cause of death in workmen's compensation cases, 6 A.L.R. 548.

Insurance: coroner's verdict or report as evidence on issue of suicide, 28 A.L.R.2d 352.

Homicide: cremation of victim's body as violation of accused's right, 70 A.L.R.4th 1091.

18 C.J.S. Coroners § 23.



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## 24-11-6.1. Deceased members of Indian nations, tribes or pueblos; consultation and certification required.

A. The state medical investigator shall make reasonable efforts to determine if a deceased person is a member of a federally recognized Indian nation, tribe or pueblo. If a deceased person has been determined to be a member of a federally recognized Indian nation, tribe or pueblo, the state medical investigator shall use all due diligence to avoid an autopsy except when legally required due to possible criminal acts or omissions, an obscure cause of death or other reasons or pursuant to consent given according to the provisions of Section 24-12-4 NMSA 1978. The state medical investigator shall use the least invasive means possible to satisfy the investigator's legal duties in conducting an autopsy.

B. If the state medical investigator determines that an autopsy cannot be avoided, the investigator shall attempt to provide advance notice of the autopsy to the surviving spouse or next of kin, or to the Indian nation, tribe or pueblo of the deceased. The state medical investigator shall provide documentation concerning the autopsy upon request of the surviving spouse or next of kin, or if none is identified, to the Indian nation, tribe or pueblo of which the deceased was a member.

C. If requested by the surviving spouse or the next of kin, or if none is identified, by the Indian nation, tribe or pueblo through an official representative designated pursuant to Subsection E of this section, the state medical investigator shall permit a law enforcement officer of the Indian nation, tribe or pueblo of the deceased to be present during the autopsy. The law enforcement officer attending the autopsy may not interfere with the autopsy procedure and shall follow the health regulations governing autopsy procedures.

D. After any legally required autopsy or postmortem examination has been conducted, the state medical investigator shall use all due diligence to consult with the surviving spouse or next of kin of the deceased regarding the disposition of all of the deceased's remains. Unless other treatment of the remains is required by law, the state medical investigator shall replace all body parts and, if requested, shall provide written certification to the surviving spouse or next of kin of the deceased that the investigator has replaced all body parts.

E. The state medical investigator shall request that each Indian nation, tribe and pueblo located in New Mexico designate, and keep current the designation of, an official representative that the state medical investigator shall contact when it is necessary to contact a tribal representative regarding an autopsy or the disposition of the remains of a deceased member of the Indian nation, tribe or pueblo.

**History: Laws 2003, ch. 191, § 2; 2005, ch. 263, § 1.**

**The 2005 amendment,** effective June 17, 2005, deleted the former provision that if a deceased person is a member of a federally recognized Indian nation, tribe or pueblo, the state medical investigator shall use all due diligence after a legally required autopsy or post-mortem examination, to consult with the legal next of kin of the deceased regarding the disposition of all of the deceased's remains, unless other treatment of the remains is provided for by law, and added Subsections A through E to provide for the autopsy of deceased members of an Indian nation, tribe or pueblo and for the disposition of the remains of the deceased.

## 24-11-7. Examination; autopsy; inquest.

If the deceased is unidentified, the state, district or deputy medical investigator may order the body fingerprinted and photographed. When the state, district or deputy medical investigator suspects a death was caused by a criminal act or omission or if the cause of death is obscure, he shall order an autopsy performed by a qualified pathologist certified by the state board of medical examiners who shall record every fact found in the examination tending to show the identity and condition of the body and the time, manner and cause of death. The pathologist shall sign the report under oath and deliver it to the state, district or deputy medical investigator within a reasonable time. The state, district or deputy medical investigator may take the testimony of the pathologist and any other persons and this testimony, combined with the written report of the pathologist, constitutes an inquest.



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**History: 1953 Comp., § 15-43-46, enacted by Laws 1961, ch. 91, § 4; 1971, ch. 112, § 6; 1973, ch. 286, § 6.**

**ANNOTATIONS**

**Authority of board.** — If a medical investigator suspects that criminal conduct caused a death or that the cause of death is obscure, the board of medical investigators may, without the consent of the decedent or the decedent's family, order an autopsy or apply to disinter the decedent to perform an autopsy. *In re Johnson*, 1980-NMSC-069, 94 N.M. 491, 612 P.2d 1302.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 18 Am. Jur. 2d Coroners or Medical Examiners §§ 7 to 15.

Reviewing, setting aside or quashing verdict at coroner's inquest, 78 A.L.R.2d 1218.

Civil liability in conjunction with autopsy, 97 A.L.R.5th 419.

18 C.J.S. Coroners §§ 10 to 26.

## 24-11-8. Reports to district attorney.

The state or district medical investigator shall promptly report his findings, or the findings of a deputy medical investigator that has performed an investigation under his direction, to the district attorney in each death investigated. Upon request of the district attorney, the state or district medical investigator shall send a complete record of the medical investigation in any case, including a transcript of the testimony of witnesses examined at any inquest.

**History: 1953 Comp., § 15-43-47, enacted by Laws 1961, ch. 91, § 5; 1971, ch. 112, § 7; 1973, ch. 286, § 7.**

## 24-11-9. Subpoena; oath.

The state, district or deputy medical investigator may administer oaths and may issue a subpoena to compel the attendance and production of evidence by any necessary witness and the subpoena may be enforced in the district court. Any subpoena shall be served without cost by the sheriff or any deputy or by any member of the New Mexico state police.

**History: 1953 Comp., § 15-43-48, enacted by Laws 1961, ch. 91, § 6; 1971, ch. 112, § 8; 1973, ch. 286, § 8.**

## 24-11-10. Penalties.

A. It is unlawful to:

(1) willfully and without good cause neglect or refuse to report a death to law enforcement authorities or the office of the state or district medical investigator as required by law; or

(2) willfully and unnecessarily touch, remove or disturb any dead body required by law to be reported to the state or district medical investigator, or any article on or near the body or disturb its surroundings until authority is granted by the state, district or deputy medical investigator.

B. Any person violating this section is guilty of a petty misdemeanor.

**History: 1953 Comp., § 15-43-50, enacted by Laws 1961, ch. 91, § 8; 1971, ch. 112, § 9; 1973, ch. 286, § 9; 1975, ch. 7, § 3.**

**Cross references.** — For duty to report deaths, *see* 24-11-5 NMSA 1978.

For sentencing for misdemeanors, *see* 31-19-1 NMSA 1978.

# ARTICLE 12

# Disposition of Dead Bodies

Sec.

24-12-1. Notification of relatives of deceased; authorization of person designated on record of emergency data form to direct burial; unclaimed decedents.

24-12-2. Disposition of unclaimed body; transmission of records of institution.

Sec.

24-12-3. Penalties.

24-12-4. Post-mortem examinations and autopsies; consent required.



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## 24-12-1. Notification of relatives of deceased; authorization of person designated on record of emergency data form to direct burial; unclaimed decedents.

A. State, county or municipal officials having charge or control of a body of a dead person shall use due diligence to notify the relatives of the deceased.

B. If the decedent died while serving in any branch of the United States armed forces, the United States reserve forces or the national guard, during any period of duty when the secretary of the military service concerned can provide for the recovery, care and disposition of remains, and the decendent [decedent] completed a United States department of defense record of emergency data form or its successor form, the authority to direct the burial of the decedent or to provide other funeral and disposition arrangements for the decedent devolves on the person designated by the decedent pursuant to that form.

C. If no claimant is found who will assume the cost of burial, the official having charge or control of the body shall notify the medical investigator stating, when possible, the name, age, sex and cause of death of the deceased.

D. The body shall be embalmed according to rules of the state agency having jurisdiction. After the exercise of due diligence required in Subsection A of this section and the report to the medical investigator required in Subsection C of this section, the medical investigator shall be furnished detailed data demonstrating such due diligence and the fact that no claimant has been found. When the medical investigator has determined that due diligence has been exercised, that reasonable opportunity has been afforded relatives to claim the body and that the body has not been claimed, the medical investigator shall issue a certificate determining that the remains are unclaimed. In no case shall an unclaimed body be disposed of in less than two weeks from the date of the discovery of the body.

**History: Laws 1941, ch. 148, § 1; 1941 Comp., § 71-501; 1953 Comp., § 12-7-1; reenacted by Laws 1973, ch. 354, § 1; 1977, ch. 204, § 1; 1999, ch. 241, § 1; 2011, ch. 22, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For medical investigations generally, *see* Chapter 24, Article 11 NMSA.

For burial of indigents generally, *see* Chapter 24, Article 13 NMSA 1978.

**The 2011 amendment,** effective June 17, 2011, authorized a person designated on a United States department of defense record of emergency data form to direct the disposition of the remains of a decedent who died while serving in the armed forces, reserve forces or national guard.

**The 1999 amendment,** effective June 18, 1999, in Subsection A, substituted "having charge or control of a body of a dead person" for "having charge or control of bodies to be buried at public expense"; and in Subsection B, substituted "sex and cause of death of the deceased" for "sex and cause of death of any person required to be buried at public expense".

### ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 22A Am. Jur. 2d Dead Bodies § 1 et seq.

Dead bodies: liability for improper manner of reinterment, 53 A.L.R.4th 394.

25A C.J.S. Dead Bodies § 1 et seq.

## 24-12-2. Disposition of unclaimed body; transmission of records of institution.

A. Upon the issuance of his certificate that the remains are unclaimed, the medical investigator shall retain the body for use only for medical education or shall certify that the body is unnecessary or unsuited for medical education and release it to the state, county or municipal officials having charge or control of the body for burial. The state, county or municipal officials shall have the body removed for disposition within three weeks from the date on which the medical investigator released the body.

B. If the body is retained for use in medical education, the facility or person receiving the body for that use shall pay the costs of preservation and transportation of the body and shall keep a permanent record of bodies received.

C. If a deceased person was an inmate of a public institution, the institution shall transmit, upon request of the medical investigator, a brief medical history of the unclaimed dead person for purposes of identification and permanent record. The records shall be open to inspection by any state or county official or district attorney.



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**History: Laws 1941, ch. 148, §§ 3 to 5; 1941 Comp., §§ 71-503 to 71-505; 1953 Comp., § 12-7-2, reenacted by Laws 1973, ch. 354, § 2; 1977, ch. 204, § 2; 1999, ch. 241, § 2.**

**Repeals and reenactments.** — Laws 1973, ch. 354, § 2, repealed 12-7-2, 1953 Comp., relating to conduct of postmortem examinations, and enacted a new section. For present comparable provisions, *see* 24-12-4 NMSA 1978.

**Cross references.** — For burial of indigents, *see* 24-13-1 NMSA 1978.

**The 1999 amendment,** effective June 18, 1999, in Subsection A, added the last sentence.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Homicide: cremation of victim's body as violation of accused's right, 70 A.L.R.4th 1091.

## 24-12-3. Penalties.

A. Any person who conducts a post-mortem examination on an unclaimed body without express permission of the medical investigator is guilty of a misdemeanor and shall be punished by imprisonment in the county jail for not more than one year or by the imposition of a fine of not more than one thousand dollars ($1,000), or both such imprisonment and fine.

B. Any person who unlawfully disposes of, uses or sells an unclaimed body is guilty of a fourth degree felony and shall be punished by imprisonment in the state penitentiary for a term of not less than one year nor more than five years or by the imposition of a fine of not more than five thousand dollars ($5,000), or both such imprisonment and fine.

**History: Laws 1941, ch. 148, §§ 2, 4; 1941 Comp., §§ 71-502, 71-504; 1953 Comp., § 12-7-4, reenacted by Laws 1973, ch. 354, § 3.**

**Repeals and reenactments.** — Laws 1973, ch. 354, § 3 repealed 12-7-4, 1953 Comp., relating to disposition of unclaimed bodies, and enacted a new section. Provisions relating to the disposition of unclaimed bodies presently appear in 24-12-2 NMSA 1978.

**Cross references.** — For medical investigations generally, *see* Chapter 24, Article 11 NMSA 1978.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 22A Am. Jur. 2d Dead Bodies §§ 4, 44 to 47, 58, 112.

Validity, construction and application of statutes making it a criminal offense to mistreat or wrongfully dispose of dead body, 81 A.L.R.3d 1071.

25A C.J.S. Dead Bodies § 10.

## 24-12-4. Post-mortem examinations and autopsies; consent required.

A. An autopsy or post-mortem examination may be performed on the body of a deceased person by a physician or surgeon whenever consent to the procedure has been given by:

(1) written authorization signed by the deceased during his lifetime;

(2) authorization of any person or on behalf of any entity whom the deceased designated in writing during his lifetime to take charge of his body for burial or other purposes;

(3) authorization of the deceased's surviving spouse;

(4) authorization of an adult child, parent or adult brother or sister of the deceased if there is no surviving spouse or if the surviving spouse is unavailable, incompetent or has not claimed the body for burial after notification of the death of the decedent;

(5) authorization of any other relative of the deceased if none of the persons enumerated in Paragraphs (2) through (4) of this subsection is available or competent to give authorization; or

(6) authorization of the public official, agency or person having custody of the body for burial if none of the persons enumerated in Paragraphs (2) through (5) of this subsection is available or competent to give authorization.

B. An autopsy or post-mortem examination shall not be performed under authorization given under the provisions of Paragraph (4) of Subsection A of this section by any one of the persons enumerated if, before the procedure is performed, any one of the other persons enumerated objects in writing to the physician or surgeon by whom the procedure is to be performed.

C. An autopsy or post-mortem examination may be performed by a pathologist at the written direction of the district attorney or his authorized representative in any case in which the district attorney is conducting a criminal investigation.

D. An autopsy or post-mortem examination may be performed by a pathologist at the direction of the state, district or deputy medical investigator when he suspects the death was caused by a criminal act or omission or if the cause of death is obscure.



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E. For purposes of this section, "autopsy" means a post-mortem dissection of a dead human body in order to determine the cause, seat or nature of disease or injury and includes the retention of tissues customarily removed during the course of autopsy for evidentiary, identification, diagnosis, scientific or therapeutic purposes.

**History: 1953 Comp., § 12-7-9, enacted by Laws 1965, ch. 86, § 1; reenacted by 1973, ch. 354, § 4; 1993, ch. 129, § 1.**

**Cross references.** — For medical investigations generally, *see* Chapter 24, Article 11 NMSA 1978.

**The 1993 amendment,** effective June 18, 1993, made minor stylistic changes throughout Subsection A and added Subsection E.

**ANNOTATIONS**

**Purpose of Subsection D** is to authorize a medical investigator to order an autopsy when he suspects that criminal conduct caused a death or that the cause of a death is obscure, even when no consent is obtained. *In re Johnson*, 1980-NMSC-069, 94 N.M. 491, 612 P.2d 1302.

**State registrar shall issue permit to disinter when medical investigator so requires** pursuant to the duties and responsibilities of his office. *In re Johnson*, 1980-NMSC-069, 94 N.M. 491, 612 P.2d 1302.

**Requirement of notice of intended autopsy or disinterment.** — Under some circumstances due process may require than an interested relative be given notice of an intended autopsy or disinterment of a deceased. *In re Johnson*, 1980-NMSC-069, 94 N.M. 491, 612 P.2d 1302.

**Religious freedom suit where consent not given.** — The right given by this statute to a number of alternative persons to authorize an autopsy is not co-extensive with the right of any of those same statutorily-named persons to assert a violation of a personal religious freedom if his consent was not obtained. *Smialek v. Begay*, 1986-NMSC-049, 104 N.M. 375, 721 P.2d 1306, cert. denied, 479 U.S. 1020, 107 S. Ct. 677, 93 L. Ed. 2d 727.

**Immunity for wrongful decision to perform autopsy.** — In an action for damages on the basis of an alleged wrongful decision to perform an autopsy, even if this section, which provides for consent for postmortem examinations created a private cause of action, it did not override the state medical investigator's grant of immunity under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978]. *Begay v. State*, 1985-NMCA-117, 104 N.M. 483, 723 P.2d 252, *rev'd on other grounds*, *Smialek v. Begay*, 1986-NMSC-049, 104 N.M. 375, 721 P.2d 1306.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 22A Am. Jur. 2d Dead Bodies §§ 59, 60, 64 to 69.

Removal and reinterment of remains, 21 A.L.R.2d 472.

Power of court to order disinterment and autopsy or examination for evidential purposes in a civil case, 21 A.L.R.2d 538.

Immunity from liability for damages in tort of state or governmental unit in operating hospital, 25 A.L.R.2d 203, 18 A.L.R.4th 858.

Insurance policy, time for making autopsy or making demand therefor, 30 A.L.R.2d 837.

Disinterment in criminal cases, 63 A.L.R.3d 1294.

Liability for wrongful autopsy, 18 A.L.R.4th 858.

Civil liability in conjunction with autopsy, 97 A.L.R.5th 419.

25A C.J.S. Dead Bodies § 8(3).

# ARTICLE 12A

# Cremations

Sec.

24-12A-1. Right to authorize cremation; definitions.
24-12A-2. No written instructions; priority of others to decide disposition.
24-12A-3. Unclaimed bodies and bodies of indigent persons; cremation permitted.

## 24-12A-1. Right to authorize cremation; definitions.

A. Any adult may authorize his own cremation and the lawful disposition of his cremated remains by:

(1) stating his desire to be cremated in a written statement that is signed by the individual and notarized or witnessed by two persons; or

(2) including an express statement in his will indicating that the testator desired that his remains be cremated upon his death.

B. A personal representative acting pursuant to a will or Article 3 of Chapter 45 NMSA 1978 or a funeral establishment, a commercial establishment, a direct disposition establishment or a crematory shall comply with a statement made in conformance with the provisions of Subsection A of this section. A statement that conforms to the provisions of Subsection A of this section is authorization to a personal representative, funeral establishment, commercial establishment, direct disposition establishment or crematory that the remains of the decedent are to be cremated. Statements dated prior to the effective date of this act are to be given effect if they meet the requirements of Subsection A of this section.



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C. A personal representative, funeral establishment or crematory acting in reliance upon a document executed pursuant to the provisions of this section, who has no actual notice of revocation or contrary indication, is presumed to be acting in good faith.

D. No funeral establishment, commercial establishment, direct disposition establishment, crematory or employee of a funeral establishment, commercial establishment, direct disposition establishment or crematory or other person that relies in good faith on a statement written pursuant to this section shall be subject to liability for cremating the remains in accordance with the express instructions of a decedent. The written document is a complete defense to a cause of action by any person against any other person acting in accordance with the instructions of the decedent.

E. As used in this section:

(1) "commercial establishment" means an office, premises or place of business that provides for the practice of funeral service or direct disposition services exclusively to licensed funeral or direct disposition establishments;

(2) "cremate" means to reduce a dead human body by direct flame to a residue that may include bone fragments; and

(3) "direct disposition establishment" means an office, premises or place of business that provides for the disposition of a dead human body as quickly as possible, without a funeral, graveside service, committal service or memorial service, whether public or private, and without embalming of the body unless embalming is required by the place of disposition.

**History: Laws 1993, ch. 200, § 1.**

**Cross references.** — For cremations, *see* 61-32-19 NMSA 1978.

## 24-12A-2. No written instructions; priority of others to decide disposition.

A. Except as provided in Subsection B of this section, if a decedent has left no written instructions regarding the disposition of the decedent's remains, the following persons in the order listed shall determine the means of disposition, not to be limited to cremation, of the remains of the decedent:

(1) the surviving spouse;

(2) a majority of the surviving adult children of the decedent;

(3) the surviving parents of the decedent;

(4) a majority of the surviving siblings of the decedent;

(5) an adult who has exhibited special care and concern for the decedent, who is aware of the decedent's views and desires regarding the disposition of the decedent's body and who is willing and able to make a decision about the disposition of the decedent's body; or

(6) the adult person of the next degree of kinship in the order named by New Mexico law to inherit the estate of the decedent.

B. If a decedent left no written instructions regarding the disposition of the decedent's remains, died while serving in any branch of the United States armed forces, the United States reserve forces or the national guard and completed a United States department of defense record of emergency data form or its successor form, the person authorized by the decedent to determine the means of disposition on a United States department of defense record of emergency data form shall determine the means of disposition, not to be limited to cremation.

**History: Laws 1993, ch. 200, § 2; 1995, ch. 17, § 1; 2011, ch. 22, § 2.**

**Cross references.** — For cremations, *see* 61-32-19 NMSA 1978.

**The 2011 amendment,** effective June 17, 2011, authorized a person designated on a United States department of defense record of emergency data form to direct the disposition of the remains of a decedent who left no written instructions and who died while serving in the armed forces, reserve forces or national guard.

**The 1995 amendment,** effective June 16, 1995, inserted "adult" in Subsection B.

**ANNOTATIONS**

**Burial plan.** — Where the decedent's contract for a reserved burial plot specified only where the decedent was to be buried, the decedent's surviving spouse alone had the authority to arrange the details of the decedent's burial and had the authority to contract with the cemetery to convert the decedent's single plot into a double plot. *Eisert v. Archdiocese of Santa Fe*, 2009-NMCA-042, 146 N.M. 179, 207 P.3d 1156, cert. denied, 2009-NMCERT-004, 146 N.M. 641, 213 P.3d 791.



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## 24-12A-3. Unclaimed bodies and bodies of indigent persons; cremation permitted.

The body of an unclaimed decedent or an indigent person, the disposition of which is the responsibility of the county pursuant to the provisions of Chapter 24, Article 13 NMSA 1978, may be cremated upon the order of the county official responsible for ensuring the disposition of the body or upon the order of any other government official authorized to order the cremation. Absent a showing of bad faith or malicious intent, the official ordering the cremation and the person or establishment carrying out the cremation shall be immune from liability related to the cremation.

**History: 1978 Comp., § 24-12A-3, enacted by Laws 1999, ch. 241, § 3.**

# ARTICLE 13

# Burial of Indigents

Sec.
24-13-1. Burial or cremation of unclaimed decedents and of indigents.
24-13-2. Persons deemed indigent.
24-13-3. Expenses for burial or cremation.
24-13-4. Burial after investigation; cost of opening and closing grave.
24-13-5. Payment of burial or cremation expenses; commissioners' liability.
24-13-6. Money from relatives; duty of funeral director.
24-13-7. Failure to notify; funeral director's liability.
24-13-8. District attorneys to enforce burial act.

## 24-13-1. Burial or cremation of unclaimed decedents and of indigents.

For the purposes of Chapter 24, Article 13 NMSA 1978, a dead person whose body has not been claimed by a friend, relative or other interested person assuming the responsibility for and expense of disposition shall be considered an unclaimed decedent. It is the duty of the board of county commissioners of each county in this state to cause to be decently interred or cremated the body of any unclaimed decedent or indigent person. The county shall ensure that the body is buried or cremated no later than thirty days after a determination has been made that the body has not been claimed, but no less than two weeks after death. If the body is cremated, the county shall ensure that the cremated remains are retained and stored for no less than two years in a manner that allows for identification of the remains. After the expiration of two years the cremated remains may be disposed of, provided the county retains a record of the place and manner of disposition for not less than five years after such disposition.

**History: Laws 1939, ch. 224, § 1; 1941 Comp., § 73-204; 1953 Comp., § 13-2-4; Laws 1999, ch. 241, § 4.**

**Cross references.** — For disposition of dead bodies generally, *see* Chapter 24, Article 12 NMSA 1978.

For definitions applicable to provisions of this article, *see* 27-1-1 NMSA 1978.

**The 1999 amendment,** effective June 18, 1999, added the catchline; added the first sentence; in the second sentence, substituted "It is the duty" for "It shall be the duty" and "or cremated the body of any unclaimed decedent or indigent person" for "the body of any dead having no visible estate out of which to defray the cost of his burial, and when no relative or friend of such decedent will undertake to bury him"; and added the third and fourth sentences.

### ANNOTATIONS

**County's responsibility for burial of indigents** does not rest upon residence of the indigents. 1941-42 Op. Att'y Gen. No. 42-4081.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 22A Am. Jur. 2d Dead Bodies § 19.

## 24-13-2. Persons deemed indigent.

A deceased person shall be considered to be an indigent for purposes of Chapter 24, Article 13 NMSA 1978 if his estate is insufficient to cover the cost of burial or cremation.

**History: Laws 1939, ch. 224, § 2; 1941 Comp., § 73-205; 1953 Comp., § 13-2-5; Laws 1999, ch. 241, § 5.**

**The 1999 amendment,** effective June 18, 1999, added the catchline; and rewrote the section, which formerly read "No deceased person shall be considered to be an indigent if there are any sums, no matter how small, with which to defray the cost of such burial".



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## 24-13-3. Expenses for burial or cremation.

If the unclaimed decedent had known assets or property of sufficient value to defray the expenses of cremation or burial, invoices for the expenses shall be forwarded to such person or official authorized by law to be appointed administrator of the estate of the decedent, and such person or official shall pay the expenses out of the decedent's estate. To the extent that the deceased person is indigent, the burial or cremation expenses shall be borne by the county of residence of the deceased person. If the county of residence of the deceased person is not known, the burial or cremation expenses shall be borne by the county in which the body was found. The burial or cremation expenses may be paid by the county out of the general fund or the county indigent hospital claims fund [county health care assistance fund] in an amount up to six hundred dollars ($600) for the burial or cremation of any adult or minor.

**History: Laws 1939, ch. 224, § 3; 1941 Comp., § 73-206; 1953 Comp., § 13-2-6; Laws 1957, ch. 123, § 1; 1959, ch. 59, § 1; 1987, ch. 274, § 1; 1991, ch. 6, § 1; 1999, ch. 241, § 6; 2001, ch. 307, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2014, ch. 79, § 18 provided that all references in law to a county indigent hospital claims fund shall be deemed to be references to a county health care assistance fund pursuant to the Indigent Hospital and County Health Care Act, effective March 12, 2014.

**The 2001 amendment,** effective June 15, 2001, inserted the county indigent hospital claims fund in the last sentence.

**The 1999 amendment,** effective June 18, 1999, rewrote the section, which formerly read "The expenses for the burial or cremation of an indigent person may be paid by the county out of the general fund in an amount up to six hundred dollars ($600) for the burial of any adult or minor".

**The 1991 amendment,** effective March 9, 1991, rewrote the section following "general fund in", which read "the amount of three hundred dollars ($300) for the burial of any adult or minor over the age of six years and three hundred dollars ($300) for the burial of any minor up to the age of six years".

### ANNOTATIONS

**Commissioners are under duty to pay $100 (now $600) for burial of indigent** regardless of the particular circumstances prior to the indigent's burial. 1970 Op. Att'y Gen. No. 70-44.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25A C.J.S. Dead Bodies § 7.

## 24-13-4. Burial after investigation; cost of opening and closing grave.

The board of county commissioners after proper investigation shall cause any deceased indigent or unclaimed decedent to be decently interred or cremated. The cost to be paid by the county of opening and closing a grave shall not exceed six hundred dollars ($600), which sum shall be in addition to the sums enumerated in Section 24-13-3 NMSA 1978.

**History: Laws 1939, ch. 224, § 4; 1941 Comp., § 73-207; 1953 Comp., § 13-2-7; Laws 1957, ch. 123, § 2; 1997, ch. 116, § 1; 1999, ch. 241, § 7.**

**The 1999 amendment,** effective June 18, 1999, inserted "or unclaimed decedent" in the first sentence and "to be paid by the county" in the second sentence.

**The 1997 amendment,** effective June 20, 1997, substituted "$600" for "$35" and made a stylistic change.

### ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 22A Am. Jur. 2d Dead Bodies §§ 75, 78 to 81.

25A C.J.S. Dead Bodies §§ 4(3), 8(4).

## 24-13-5. Payment of burial or cremation expenses; commissioners' liability.

The board of county commissioners of any county within this state may authorize payment for the burial or cremation of an indigent person, as defined in Section 24-13-2 NMSA 1978 or of an unclaimed decedent, as defined in Section 24-13-1 NMSA 1978. All available assets of the deceased shall be used to reimburse the county for the cost of burial or cremation. Should the county be required to pay expenses for burial or cremation of an unclaimed decedent who has left an estate, the estate shall reimburse the county for those expenses. The county commissioners shall be liable either personally or officially to the county they represent in double the amount they have paid toward the burial or cremation of a person other than as authorized by this section.



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**History: Laws 1939, ch. 224, § 5; 1941 Comp., § 73-208; 1953 Comp., § 13-2-8; Laws 1999, ch. 241, § 8.**

**The 1999 amendment,** effective June 18, 1999, rewrote the section which formerly read "If the board of county commissioners of any county within this state shall pay to any person any sum purporting to be for the burial of an indigent person when in fact such deceased person was known by the board of county commissioners to be not an indigent, as above defined, said county commissioners shall be liable either personally or officially to the county which they represent in double the amount which they have paid".

## 24-13-6. Money from relatives; duty of funeral director.

Should any funeral director or other person allowed by law to conduct the business of a funeral director accept money from the relatives or friend of a deceased person whom the board of county commissioners has determined to be an indigent or an unclaimed decedent, the funeral director shall immediately notify the board of county commissioners of the payment or offer for payment, and the board of county commissioners shall not thereafter pay for the burial or cremation involved, or, if the board of county commissioners has already paid for the burial or cremation, the funeral director shall immediately refund the money paid to him by the board of county commissioners for the burial or cremation.

**History: Laws 1939, ch. 224, § 6; 1941 Comp., § 73-209; 1953 Comp., § 13-2-9; Laws 1999, ch. 241, § 9.**

**The 1999 amendment,** effective June 18, 1999, added the catchline and made stylistic changes throughout.

## 24-13-7. Failure to notify; funeral director's liability.

If any funeral director or other person authorized by law to conduct the business of a funeral director receives or contracts to receive any money or thing of value from relatives or friends of a deceased alleged indigent or unclaimed decedent whose burial or cremation expenses are paid or to be paid by the board of county commissioners and fails to notify the board of county commissioners of that fact, the funeral director or other person authorized by law to conduct the business of a funeral director shall be liable to the county in an amount double the amount paid or to be paid by the board of county commissioners of that county.

**History: Laws 1939, ch. 224, § 7; 1941 Comp., § 73-211; 1953 Comp., § 13-2-11; Laws 1999, ch. 241, § 10.**

**The 1999 amendment,** effective June 18, 1999, added the catchline and made stylistic changes throughout.

## 24-13-8. [District attorneys to enforce burial act.]

The various district attorneys of this state are hereby expressly empowered and directed to enforce the provisions of this act [24-13-1 through 24-13-8 NMSA 1978] on behalf of the various counties which they represent.

**History: Laws 1939, ch. 224, § 8; 1941 Comp., § 73-211; 1953 Comp., § 13-2-11.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

# ARTICLE 14

# Vital Statistics

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## 24-14-1. Short title.

Chapter 24, Article 14 NMSA 1978 may be cited as the "Vital Statistics Act".

**History: 1953 Comp., § 12-4-23, enacted by Laws 1961, ch. 44, § 1; 2013, ch. 183, § 1.**

**The 2013 amendment,** effective January 1, 2014, added the NMSA chapter and article for the Vital Statistics Act; and at the beginning of the sentence, deleted "This act" and added "Chapter 24, Article 14 NMSA 1978".

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39 Am. Jur. 2d Health § 51.

Official death certificate as evidence of cause of death in civil or criminal action, 21 A.L.R.3d 418.

39A C.J.S. Health and Environment § 41.

## 24-14-2. Definitions.

As used in the Vital Statistics Act:

A. "vital statistics" means the data derived from certificates and reports of birth, death, spontaneous fetal death and induced abortion and related reports;

B. "system of vital statistics" includes the registration, collection, preservation, amendment and certification of vital records and related activities, including the tabulation, analysis and publication of statistical data derived from these records;

C. "filing" means the presentation of a certificate, report or other record of a birth, death, spontaneous fetal death or adoption for registration by the bureau;

D. "registration" means the acceptance by the bureau and the incorporation in its official records of certificates, reports or other records provided for in the Vital Statistics Act of births, deaths, spontaneous fetal deaths, adoptions and legitimations;

E. "live birth" means the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, which after the expulsion or extraction breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached;

F. "spontaneous fetal death" means death prior to the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, results in other than a live birth and that is not an induced abortion; and death is indicated by the fact that, after the expulsion or extraction, the fetus does not breathe or show any other evidence of life, such as beating of the heart, pulsation of the umbilical cord or definite movement of voluntary muscles;

G. "dead body" means a human body, or parts of such body or bones thereof other than skeletal remains that can be classified as artifacts, dead within the meaning of Section 12-2-4 NMSA 1978;

H. "final disposition" means the burial, interment, cremation, entombment, pulverization or other authorized disposition of a dead body or fetus;

I. "department" means the department of health;

J. "court" means a court of competent jurisdiction;

K. "state registrar" means the designated employee of the bureau;

L. "vital records" means certificates of birth and death;

M. "induced abortion" means the purposeful interruption of pregnancy with the intention other than to produce a live-born infant;

N. "physician" means a person authorized or licensed to practice medicine or osteopathy pursuant to the laws of this state;

O. "institution" means any establishment, public or private:

(1) that provides in-patient medical, surgical or diagnostic care or treatment;



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(2) that provides nursing, custodial or domiciliary care; or

(3) to which persons are committed by law; and

P. "bureau" means the vital records and health statistics bureau of the department.

**History: 1953 Comp., § 12-4-24, enacted by Laws 1961, ch. 44, § 2; 1973, ch. 264, § 1; 1977, ch. 206, § 1; 1977, ch. 253, § 26; 1981, ch. 309, § 1; 2009, ch. 215, § 10.**

**Cross references.** — For department of health, *see* 9-7-4 NMSA 1978.

**The 2009 amendment,** effective January 1, 2010, in Subsection I, changed "health and environment department" to "department of health"; in Subsection K, changed "health division of the health and environment" to "bureau"; and added Subsection P.

## 24-14-3. Vital records and health statistics bureau; state system.

There is established in the department a "vital records and health statistics bureau" for the purpose of installing, maintaining and operating a system of vital statistics throughout this state and carrying out all regulations relating to vital records and health statistics established by the department.

**History: 1953 Comp., § 12-4-25, enacted by Laws 1961, ch. 44, § 3; 1973, ch. 264, § 2; 1977, ch. 253, § 27; 1981, ch. 309, § 2; 2009, ch. 215, § 11.**

**The 2009 amendment,** effective January 1, 2010, deleted "health services division of the" before "department" and changed "vital statistics bureau" to "vital records and health statistics bureau".

## 24-14-4. State registrar; appointment.

The secretary of the department shall appoint the state registrar in accordance with the provisions of the Personnel Act [Chapter 10, Article 9 NMSA 1978].

**History: 1953 Comp., § 12-4-26, enacted by Laws 1961, ch. 44, § 4; 1973, ch. 264, § 3; 2009, ch. 215, § 12.**

**The 2009 amendment,** effective January 1, 2010, changed "director" to "secretary".

## 24-14-5. Duties of state registrar.

A. The state registrar shall:

(1) administer and enforce the Vital Statistics Act and regulations issued pursuant to it and issue instructions for the efficient administration of the system of vital records and health statistics;

(2) direct and supervise the system of vital records and health statistics and be custodian of its records;

(3) direct, supervise and control the activities of all public employees, other than hospital employees, when they are engaged in activities pertaining to the operation of the system of vital records and health statistics;

(4) prescribe, with the approval of the department and after consultation with medical records professionals in the state, furnish and distribute such forms as are required by the Vital Statistics Act;

(5) prepare and publish reports of vital records and health statistics of this state and such other reports as may be required by the department;

(6) conduct training programs to promote uniformity of policy and procedures throughout the state; and

(7) provide to local health agencies copies of or data derived from certificates and reports required under the Vital Statistics Act as determined necessary for local health planning and program activities. The copies or data shall remain the property of the bureau, and the uses that may be made of them shall be prescribed by the state registrar.

B. The state registrar may establish or designate offices in the state to aid in the efficient administration of the system of vital records and health statistics and may delegate such functions and duties vested in the state registrar to employees of the bureau and to employees of



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any office of the state or political subdivision designated to aid in administering the Vital Statistics Act.

**History: 1953 Comp., § 12-4-27, enacted by Laws 1961, ch. 44, § 5; 1973, ch. 264, § 4; 1977, ch. 253, § 28; 1981, ch. 309, § 3; 2009, ch. 215, § 13.**

**The 2009 amendment,** effective January 1, 2010, in Subsection A changed "system of vital statistics" to "system of vital records and health statistics".

## 24-14-6. Repealed.

**Repeals.** — Laws 1981, ch. 309, § 26, repealed 24-14-6 NMSA 1978, as enacted by Laws 1961, ch. 44, § 6, relating to registration districts, effective March 21, 1981.

## 24-14-7. Appointment and removal of local registrars.

The state registrar:

A. may appoint local registrars in order to carry out the provisions of the Vital Statistics Act; and

B. may remove local registrars for reasonable cause.

**History: 1953 Comp., § 12-4-29, enacted by Laws 1961, ch. 44, § 7; 1981, ch. 309, § 4.**

## 24-14-8. Duties of local registrar.

The local registrar shall:

A. administer and enforce the provisions of the Vital Statistics Act and instructions, rules and regulations issued pursuant thereto;

B. require that certificates be completed and filed in accordance with the Vital Statistics Act and the rules and regulations issued pursuant thereto; and

C. transmit to the state registrar bimonthly, or more frequently when directed by that official, the certificates, reports or other returns filed with him.

**History: 1953 Comp., § 12-4-30, enacted by Laws 1961, ch. 44, § 8; 1981, ch. 309, § 5.**

## 24-14-9 to 24-14-11. Repealed.

**Repeals.** — Laws 1981, ch. 309, § 26, repealed 24-14-9 to 24-14-11 NMSA 1978, as enacted by Laws 1961, ch. 44, § 11, relating to the compensation of, and payment of fees to, the subregistrar and insufficiency of county funds, effective March 21, 1981.

## 24-14-12. Form and contents of certificates and reports.

A. In order to promote and maintain uniformity in the system of vital records and health statistics, the forms of certificates, reports and other returns required by the Vital Statistics Act or by regulations adopted pursuant to that act shall include as a minimum the items recommended by the federal agency responsible for national vital records and health statistics, subject to the approval of modifications by the department.

B. Each certificate, report and other document required to be registered under the Vital Statistics Act shall be on a form or in a format prescribed by the state registrar.

C. All vital records shall contain the date received for registration.

D. Information required in certificates or reports required or authorized by the Vital Statistics Act may be filed and registered by photographic, electronic or other means as prescribed by the state registrar; provided that certificates shall be filed and registered by either physical or photographic means.



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**History: 1953 Comp., § 12-4-34, enacted by Laws 1961, ch. 44, § 12; 1973, ch. 264, § 7; 1977, ch. 253, § 31; 1981, ch. 309, § 6; 2009, ch. 215, § 14.**

**The 2009 amendment,** effective January 1, 2010, in Subsection A changed "system of vital statistics" to "system of vital records and health statistics".

## 24-14-13. Birth registration.

A. A certificate of birth for each live birth that occurs in this state shall be filed with the bureau or as otherwise directed by the state registrar within ten days after the birth and shall be registered if it has been completed and filed in accordance with this section. When a birth, however, occurs on a moving conveyance, a birth certificate shall be registered in this state and the place where the child is first removed shall be considered the place of birth.

B. When a birth occurs in an institution, the person in charge of the institution or the person's designated representative shall obtain the personal data, prepare the certificate of birth, secure the signatures required and file it as directed in this section. The physician or other person in attendance shall certify the medical information required by the certificate of birth within ten working days after the birth in accordance with policies established by the institution where the birth occurred. The person in charge of the institution or the person's designee shall complete and sign the certificate of birth.

C. When a birth occurs outside an institution, the certificate of birth shall be prepared and filed by one of the following in the indicated order of priority:

(1) the physician in attendance at or immediately after the birth;

(2) any other person in attendance at or immediately after the birth; or

(3) the father, the mother or, in the absence of the father and the inability of the mother, the person in charge of the premises where the birth occurred.

D. If the mother was married at the time of either conception or birth, the name of the husband shall be entered on the certificate of birth as the father of the child, unless paternity has been determined pursuant to Subsection F or G of this section or by a court, in which case the name of the father as determined pursuant to Subsection F or G of this section or by the court shall be entered.

E. If the mother was not married at the time of either conception or birth, but the mother and father have signed under penalty of perjury an acknowledgment of paternity on a form provided by the bureau pursuant to the New Mexico Uniform Parentage Act [40-11A-101 through 40-11A-903 NMSA 1978], the father's name, date of birth and social security number shall be entered on the acknowledgment of paternity. The name of the father shall not be entered on the certificate of birth without such a written acknowledgment of paternity signed under penalty of perjury by the mother and the person to be named as the father, unless a determination of paternity has been made by a court, in which case the name of the father as determined by the court shall be entered.

F. At or before the birth of a child to an unmarried woman, the person in charge of the institution, a designated representative, the attending physician or midwife shall:

(1) provide an opportunity for the child's mother and father to sign under penalty of perjury an acknowledgment of paternity on a form provided by the bureau pursuant to the New Mexico Uniform Parentage Act. The completed acknowledgment of paternity shall be filed with the bureau. The acknowledgment shall contain or have attached to it:

(a) a statement by the mother consenting to the assertion of paternity;

(b) a statement by the father that he is the father of the child;

(c) written information, furnished by the human services department, explaining the implications of signing, including legal parental rights and responsibilities; and

(d) the social security numbers of both parents; and

(2) provide written information, furnished by the human services department, to the mother and father, regarding the benefits of having the child's paternity established and of the availability of paternity establishment services and child support enforcement services.

G. If a married mother claims that her husband is not the father of the child, the husband signs under penalty of perjury a denial of paternity on a form provided by the bureau pursuant to the New Mexico Uniform Parentage Act and the non-husband agrees that he is the father, an



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acknowledgment of paternity may be signed under penalty of perjury by the mother and the non-husband. Upon filing the acknowledgment of paternity and the denial of paternity with the bureau, the name of the non-husband shall be entered on the certificate of birth as the father.

H. Pursuant to an interagency agreement for proper reimbursement, the bureau shall make available to the human services department the birth certificate, the mother's and father's social security numbers and paternity acknowledgments or denials. The human services department shall use these records only in conjunction with its duties as the state IV-D agency responsible for the child support program under Title IV-D of the federal Social Security Act.

I. Each party shall be provided with copies of any acknowledgment of paternity and any related denial of paternity.

J. The forms of acknowledgment of paternity and denial of paternity furnished by the bureau shall comply with the requirements of the New Mexico Uniform Parentage Act and shall be provided in English and in Spanish.

**History: 1953 Comp., § 12-4-35, enacted by Laws 1961, ch. 44, § 13; 1981, ch. 309, § 7; 1993, ch. 287, § 1; 2009, ch. 215, § 15.**

**Cross references.** — For issuance of new birth certificates following adoptions, legitimations and paternity determinations, *see* 24-14-17 NMSA 1978.

For requirement for reporting on birth certificate whether blood test for syphilis taken from mother, *see* 24-1-11 NMSA 1978.

For Title IV-D of the federal Social Security Act, *see* 42 U.S.C. § 651 et seq.

**The 2009 amendment,** effective January 1, 2010, changed "certificate" to "certificate of birth"; in Subsection D, in the first sentence, after "name of the father as determined", added "pursuant to Subsection F or G of this section or"; in Subsection E, after "conception or birth, but the" added "mother and", after "mother and father have signed", added "under penalty of perjury"; between "acknowledgment of paternity" and "the father's name", changed "as provided by this section" to "on a form provided by the bureau pursuant to the New Mexico Uniform Parentage Act"; in the second sentence, after "certificate of birth without", deleted "the written consent of" and added "such a written acknowledgment of paternity signed under penalty of perjury by"; in Paragraph (1) of Subsection F, changed "natural father to complete an acknowledgement of paternity" to "father to sign under penalty of perjury an acknowledgment of paternity on a form provided by the bureau pursuant to the New Mexico Uniform Parentage Act"; in the second sentence, after "The completed", deleted "affidavit" and added "acknowledgment of paternity"; and changed "vital statistics bureau of the public health division of the department" to "bureau"; in Subparagraphs (a) and (b) of Paragraph (1) of Subsection F, changed "sworn statement" to "statement"; in Subparagraph (b) of Paragraph (1) of Subsection F deleted "natural" before "father"; in Subsection G, in the first sentence, after "the husband", deleted "agrees that he is not the father" and added "signs under penalty of perjury a denial of paternity on a form provided by the bureau pursuant to the New Mexico Uniform Parentage Act"; changed "the putative father" to "the non-husband"; after "of paternity may be signed", added "under penalty of perjury"; and changed "respective parties and duly notarized" to "mother and the non-husband"; and in the second sentence, after "Upon filing", deleted "this affidavit" and added "the acknowledgment of paternity and the denial of paternity"; in Subsection H, in the first sentence, after "paternity acknowledgments", added "or denials"; and added Subsections I and J.

**The 1993 amendment,** effective June 18, 1993, inserted "of the public health division of the department" in the first sentence of Subsection A; inserted "or G" in Subsection D; added the language beginning "but the father has signed" to the end of the first sentence of Subsection E; added Subsections F and H, redesignating former Subsection F as Subsection G; substituted "acknowledgment" for "affidavit" in the first sentence and inserted "of birth" in the second sentence, in Subsection G; and made stylistic changes in Subsections D, E, and G.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39 Am. Jur. 2d Health § 106.

39A C.J.S. Health and Environment § 41.

## 24-14-14. Unknown parentage; foundling registration.

A. Whoever assumes the custody of a living infant of unknown parentage shall report on a form and in the manner prescribed by the state registrar within ten days the following information:

(1) the date and place of finding;

(2) sex, color or race and approximate age of child;

(3) name and address of the person or institution with whom the child has been placed for care;

(4) name given to the child by the custodian; and

(5) other data required by the state registrar.

B. A report registered under this section constitutes the certificate of birth for the infant.



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C. If the child is subsequently identified and a standard certificate of birth can be established, any report registered under this section shall be sealed and may be opened only by order of the district court or as provided by regulation.

**History: 1953 Comp., § 12-4-36, enacted by Laws 1961, ch. 44, § 14; 1981, ch. 309, § 8.**

## 24-14-15. Delayed registration of births.

A. When the birth of a person born in this state has not been registered, a certificate may be filed in accordance with regulations of the department. The certificate shall be registered subject to evidentiary requirements prescribed by regulation to substantiate the alleged facts of birth.

B. Certificates of birth registered one year or more after the date of birth shall show on their face the date of the delayed registration.

C. A summary statement of the evidence submitted in support of the delayed registration shall be endorsed on the certificate.

D. When an applicant does not submit the minimum documentation required in the regulations for delayed registration or when the state registrar finds reason to question the validity or adequacy of the certificate or the documentary evidence, the state registrar shall not register the delayed certificate and shall advise the applicant of the reason for this action.

E. The department may by regulation provide for the denial of an application for delayed registration which is not actively prosecuted.

**History: 1953 Comp., § 12-4-37, enacted by Laws 1961, ch. 44, § 15; 1981, ch. 309, § 9.**

## 24-14-16. Judicial procedure to establish facts of birth.

A. If a delayed certificate of birth is rejected under the provisions of Section 24-14-15 NMSA 1978, a petition may be filed with a court for an order establishing a record of the date and place of the birth and the parentage of the person whose birth is to be registered.

B. The petition shall allege that:

(1) the person for whom a delayed certificate of birth is sought was born in this state;

(2) no record of birth of the person can be found in the bureau;

(3) diligent efforts by the petitioner have failed to obtain the evidence required in accordance with Section 24-14-15 NMSA 1978;

(4) the state registrar has refused to register a delayed certificate of birth; and

(5) any other allegations as may be required.

C. The petition shall be accompanied by a statement of the registration official made in accordance with Section 24-14-15 NMSA 1978 and all documentary evidence that was submitted to the registration official in support of the registration. The petition shall be sworn to by the petitioner.

D. The court shall fix a time and place for hearing the petition and shall give the registration official who refused to register the petitioner's delayed certificate of birth ten days' notice of the hearing. The official or the official's authorized representative may appear and testify in the proceeding.

E. If the court finds from the evidence presented that the person for whom a delayed certificate of birth is sought was born in this state, it shall make findings as to the place and date of birth, parentage and other findings as the case may require and shall issue an order to establish a record of birth. This order shall include the birth data to be registered, a description of the evidence presented in the manner prescribed by Section 24-14-15 NMSA 1978 and the date of the court's action.

F. The court shall determine the parent-child relationship of the mother and father pursuant to the New Mexico Uniform Parentage Act [40-11A-101 through 40-11A-903 NMSA 1978].

G. The clerk of the court shall forward each order to the state registrar not later than the tenth day of the calendar month following the month in which it was entered. The order shall be registered by the state registrar and shall constitute the record of birth from which copies may be issued in accordance with Sections 24-14-28 and 24-14-29 NMSA 1978.



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**History: 1953 Comp., § 12-4-38, enacted by Laws 1961, ch. 44, § 16; 1981, ch. 309, § 10; 2009, ch. 215, § 16.**

**The 2009 amendment,** effective January 1, 2010, added Subsection F.

## 24-14-17. New birth certificates following adoption, legitimation and paternity determination.

A. The state registrar shall establish a new certificate of birth for a person born in this state when he receives the following:

(1) a report of adoption as provided in this section, a report of adoption prepared and filed in accordance with the laws of another state or country or a certified copy of the decree of adoption together with the information necessary to identify the original certificate of birth and to establish a new certificate of birth; except that a new certificate of birth shall not be established if so requested by the court decreeing the adoption, the adoptive parents or the adopted person; or

(2) a request that a new certificate of birth be established and evidence as required by regulation proving that the person has been legitimated or that a court has determined the paternity of the person.

B. When a new certificate of birth is established, the actual place and date of birth shall be shown. It shall be substituted for the original certificate of birth. Thereafter, the original certificate and the evidence of adoption, paternity determination or legitimation shall not be subject to inspection except upon order of a court or in accordance with the provisions of Section 24-14-13 NMSA 1978 or in the case of a single adoptive parent.

C. Upon receipt of notice of annulment of adoption, the original certificate of birth shall be restored to its place in the files, and the new certificate and evidence shall not be subject to inspection except upon order of a court.

D. If no certificate of birth is on file for the person for whom a new certificate is to be established under this section, a delayed certificate of birth shall be filed with the state registrar as provided in Section 24-14-15 NMSA 1978 before a new certificate of birth is established.

E. For each adoption decreed by a court in this state, the court shall require the preparation of a report of adoption on a form prescribed and furnished by the state registrar. The report shall include such facts as are necessary to locate and identify the certificate of birth of the person adopted, shall provide information necessary to establish a new certificate of birth of the person adopted and shall identify the order of adoption and be certified by the clerk of the court.

**History: 1953 Comp., § 12-4-39, enacted by Laws 1961, ch. 44, § 17; 1973, ch. 264, § 8; 1981, ch. 309, § 11; 1993, ch. 287, § 2.**

**Cross references.** — For registration of births generally, *see* 24-14-13 to 24-14-15 NMSA 1978.

**The 1993 amendment,** effective June 18, 1993, in Subsection A, deleted "foreign" after "another state or" in Paragraph (1) and inserted "of birth" in Paragraph (2), and in Subsection B, inserted "or in accordance with the provisions of Section 24-14-13 NMSA 1978" in the second sentence.

### ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity and application of statute authorizing change in record of birthplace of adopted child, 14 A.L.R.4th 739.

## 24-14-18. Report of induced abortions.

A. Each induced abortion which occurs in this state shall be reported to the state registrar within five days by the person in charge of the institution in which the induced abortion was performed. If the induced abortion was performed outside an institution, the attending physician shall prepare and file the report.

B. The reports required under this section are statistical reports to be used only for medical and health purposes and shall not be incorporated into the permanent official records of the system of vital statistics. The report shall not include the name or address of the patient involved in the abortion. The department shall not release the name or address of the physician involved in the abortion. A schedule for the disposition of these reports shall be provided for by regulation.



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**History: 1953 Comp., § 12-4-39.1, enacted by Laws 1977, ch. 206, § 2; 1981, ch. 309, § 12.**

**Compiler's notes.** — Inasmuch as both Laws 1977, ch. 206, § 2, and Laws 1977, ch. 223, § 1, enacted a new 12-4-39.1, 1953 Comp., though dealing with different matters, the provision in Chapter 223 was compiled as 12-4-39.2, 1953 Comp. instead. Chapter 223 was compiled as 24-14-19 NMSA 1978.

**ANNOTATIONS**

**Law reviews.** — For comment, "Perspectives on the Abortion Decision," see 9 N.M.L. Rev. 175 (1978-79).

## 24-14-19. Adoption of foreign-born; certificate of birth.

A. The state registrar shall establish a certificate of birth for a person of foreign birth adopted under New Mexico law when the registrar receives:

(1) a certified copy of a judgment of adoption granted by the court;

(2) an order issued by the court to establish a certificate of birth for that adopted person; and

(3) any other evidence as provided in Section 24-14-17 NMSA 1978 necessary to establish a new certificate of birth.

B. The certificate of birth established under this section shall be on a form prescribed by the state registrar and shall show the probable country of birth, pursuant to the findings of the court, and shall state that the certificate is not evidence of United States citizenship.

**History: 1953 Comp., § 12-4-39.1, enacted by Laws 1977, ch. 223, § 1; 1981, ch. 309, § 13.**

**Compiler's notes.** — Although this section was enacted as 12-4-39.1, 1953 Comp., it was originally compiled as 12-4-39.2, 1953 Comp., since there already existed a 12-4-39.1, 1953 Comp. *See* compilers notes under 24-14-18 NMSA 1978.

## 24-14-20. Death registration.

A. A death certificate for each death that occurs in this state shall be filed within five days after the death and prior to final disposition. The death certificate shall be registered by the state registrar if it has been completed and filed in accordance with this section, subject to the exception provided in Section 24-14-24 NMSA 1978; provided that:

(1) if the place of death is unknown but the dead body is found in this state, a death certificate shall be filed with a local registrar within ten days after the occurrence. The place where the body is found shall be shown as the place of death. If the date of death is unknown, it shall be approximated by the state medical investigator; and

(2) if death occurs in a moving conveyance in the United States and the body is first removed from the conveyance in this state, the death shall be registered in this state and the place where the body is first removed shall be considered the place of death. When a death occurs on a moving conveyance while in international waters or air space or in a foreign country or its air space and the body is first removed from the conveyance in this state, the death shall be registered in this state, but the certificate shall show the actual place of death insofar as can be determined by the state medical investigator.

B. The funeral service practitioner or person acting as a funeral service practitioner who first assumes custody of a dead body shall:

(1) file the death certificate;

(2) obtain the personal data from the next of kin or the best qualified person or source available; and

(3) obtain the medical certification of cause of death.

C. The medical certification shall be completed and signed within forty-eight hours after death by the physician or nurse practitioner in charge of the patient's care for the illness or condition that resulted in death, except when inquiry is required by law. Except as provided in Subsection D of this section, in the absence of the physician or nurse practitioner, or with the physician's or the nurse practitioner's approval, the medical certification may be completed and signed by the physician's associate physician or the nurse practitioner's associate nurse practitioner, the chief medical officer of the institution in which death occurred or the physician who performed an autopsy on the decedent; provided that the individual has access to the medical history of the case and views the deceased at or after death and that death is due to natural causes.



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D. Unless there is reasonable cause to believe that the death is not due to natural causes, a registered nurse employed by a nursing home may pronounce the death of a resident of the nursing home and a registered nurse employed by a hospital may pronounce the death of a patient of the hospital. The nurse shall have access to the medical history of the case and view the deceased at or after death, and the individual who completes the medical certification shall not be required to view the deceased at or after death. The death shall be pronounced pursuant to procedures or facility protocols prescribed by the hospital for patients or by the physician who is the medical director of the nursing home for residents. The procedures or facility protocols shall ensure that the medical certification of death is completed in accordance with the provisions of Subsection C of this section.

E. For purposes of this section:

(1) "hospital" means a public hospital, profit or nonprofit private hospital or a general or special hospital that is licensed as a hospital by the department of health;

(2) "nurse practitioner" means a registered nurse who is licensed by the board of nursing for advanced practice as a certified nurse practitioner and whose name and pertinent information are entered on the list of certified nurse practitioners maintained by the board of nursing; and

(3) "nursing home" means any nursing institution or facility required to be licensed under state law as a nursing facility by the public health division of the department of health, whether proprietary or nonprofit, including skilled nursing home facilities.

F. When death occurs without medical attendance as set forth in Subsection C or D of this section or when death occurs more than ten days after the decedent was last treated by a physician, the case shall be referred to the state medical investigator for investigation to determine and certify the cause of death.

G. An amended death certificate based on an anatomical observation shall be filed within thirty days of the completion of an autopsy.

**History: 1953 Comp., § 12-4-40, enacted by Laws 1961, ch. 44, § 18; 1973, ch. 264, § 9; 1981, ch. 309, § 14; 1995, ch. 104, § 1; 2001, ch. 83, § 1; 2009, ch. 29, § 1.**

**Cross references.** — For extension of time for registration, *see* 24-14-24 NMSA 1978.

For medical investigations of deaths, *see* Chapter 24, Article 11 NMSA 1978.

For disposition of dead bodies, *see* Chapter 24, Article 12 NMSA 1978.

**The 2009 amendment,** effective June 19, 2009, in Subsection C, added "nurse practitioner"; in Subsection E, deleted former Paragraph (1), which defined "nursing home"; and in Subsection E, added Paragraphs (2) and (3).

**The 2001 amendment,** effective June 15, 2001, inserted the provision that a registered nurse employed by a hospital may pronounce the death of a patient in certain circumstances in Subsection D; and in Subsection E, inserted the Paragraph (1) designation and added Paragraph (2).

**The 1995 amendment,** effective June 16, 1995, inserted the proviso at the beginning of the second sentence of Subsection C, added Subsections D and E, redesignated former Subsections D and E as Subsections F and G, substituted "Subsection C or D" for "Paragraph C" in Subsection F, and made minor stylistic changes throughout the section.

**ANNOTATIONS**

**Issuance of copies by county clerk.** — County clerks may not issue copies of death certificates on file in their office unless the vital statistics bureau promulgates regulations authorizing it or unless the legislature amends this article to grant county clerks such authority. 1988 Op. Att'y Gen. No. 88-01.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39 Am. Jur. 2d Health § 106.

Official death certificate as evidence of cause of death in civil or criminal action, 21 A.L.R.3d 418.

39A C.J.S. Health and Environment § 41.

## 24-14-21. Delayed registration of death.

A. When a death occurring in this state has not been registered, a certificate may be filed in accordance with regulations of the board of medical investigators. The certificate shall be registered subject to evidentiary requirements as prescribed by regulation to substantiate the alleged facts of death.

B. Certificates of death registered one year or more after the date of death shall be marked "delayed" and shall show on their face the date of the delayed registration.

**History: 1953 Comp., § 12-4-41, enacted by Laws 1961, ch. 44, § 19; 1973, ch. 264, § 10; 1981, ch. 309, § 15.**

**Cross references.** — For medical investigations of deaths generally, *see* Chapter 24, Article 11 NMSA 1978.



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## 24-14-22. Reports of spontaneous fetal death.

A. Each spontaneous fetal death that occurs in this state after the fetus has attained a gestational age of at least twenty weeks, or if gestational age is unknown when the fetus weighs not less than three hundred fifty grams, shall be reported to the state registrar within ten days of fetal death with the bureau or as the state registrar directs.

B. The state registrar shall incorporate registrations of fetal death into the vital records of the bureau.

C. When a spontaneous fetal death required to be reported by this section occurs in an institution, the person in charge of the institution or the designated representative of that person shall report the spontaneous fetal death and shall advise the woman who delivered under circumstances in which spontaneous fetal death occurred, or a family member whom the woman designates, of the option to request a report of spontaneous fetal death and a certificate of still birth.

D. When a spontaneous fetal death for which a report of spontaneous fetal death is required occurs on a moving conveyance and the fetus is first removed from the conveyance in this state, the fetal death shall be reported in this state. The place where the fetus was first removed from the conveyance shall be considered the place of fetal death.

E. When a spontaneous fetal death required to be reported by this section occurs and the place of the spontaneous fetal death is unknown, the place where the dead fetus was found shall be considered the place of spontaneous fetal death.

F. When a spontaneous fetal death required to be reported by this section occurs without medical attendance at or immediately after the delivery or when inquiry is required by law, the state medical investigator shall investigate the cause of fetal death and shall prepare and file the report.

G. The name of the woman who delivered under circumstances in which a spontaneous fetal death occurred and, if the woman requests it, the name of the father or second parent shall be entered on the spontaneous fetal death report in accordance with the provisions of Section 24-14-13 NMSA 1978.

H. When a spontaneous fetal death occurs, the state registrar shall record the name of the fetus upon the registration of spontaneous fetal death when requested by the woman who delivered under circumstances in which the spontaneous fetal death occurred, or when requested by a family member whom the woman designates.

I. A delayed registration of spontaneous fetal death may be filed in accordance with Section 24-14-21 NMSA 1978; provided that the woman who delivered under circumstances in which a spontaneous fetal death occurred, or a family member whom the woman designates, may present a copy of the report of spontaneous fetal death or other medical records by the woman's health care provider, who attended the delivery or who has received the woman's medical records as they pertain to the delivery, to substantiate the alleged facts of the spontaneous fetal death as the state registrar establishes by rule.

J. When the bureau has in its files a registration of spontaneous fetal death or receives evidence of a spontaneous fetal death, the state registrar shall produce a copy of a report of spontaneous fetal death upon the request of the woman who delivered under circumstances in which a spontaneous fetal death occurred, or upon the request of a family member whom the woman designates, without regard to the date on which a report of spontaneous fetal death was filed or when the spontaneous fetal death was registered.

K. For purposes of this section, "still birth" means an unintended, intrauterine spontaneous fetal death that occurs:

(1) after the fetus has attained a gestational age of at least twenty weeks; or

(2) when the fetus has attained a weight of not less than three hundred fifty grams, if gestational age is unknown.

**History: 1953 Comp., § 12-4-42, enacted by Laws 1961, ch. 44, § 20; 1981, ch. 309, § 16; 2013, ch. 183, § 2.**

**Cross references.** — For extension of time for filing certificate, *see* 24-14-24 NMSA 1978.

**The 2013 amendment,** effective January 1, 2014, required registration of fetal death for certain spontaneous fetal deaths; deleted former Subsection A, which required that a spontaneous fetal death, where the fetus weighed five hundred grams or more, be reported to the state register; deleted former Subsection B, which required that an institution in which a dead fetus was delivered file a report; added Subsections A through C; in Subsection D,



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in the first sentence, after "a spontaneous fetal death", added "for which a report of spontaneous fetal death is required", after "conveyance in this state" deleted "or when a dead fetus is found in this state and the place of fetal death is unknown" and in the second sentence, after "remove from the conveyance", deleted "or the dead fetus was found"; added Subsection E, in Subsection G, after "The name of the", deleted "parents" and added "woman who delivered under circumstances in which a spontaneous fetal death occurred and, if the woman requests it, the name of the father or second parent"; deleted former Subsection F, which required that all reports of fetal deaths be completed within ten days after the death; and added Subsections H through K.

## 24-14-22.1. Certificates of still birth.

A. The state registrar shall establish a certificate of still birth. A person required to report a spontaneous fetal death shall inform a woman who has delivered under circumstances in which a spontaneous fetal death has occurred, or a family member whom the woman designates, that the report of spontaneous fetal death and a certificate of still birth are available from the bureau upon request. Upon the request of a woman who delivered under circumstances in which a spontaneous fetal death occurred, or the request of a family member whom the woman designates, a certificate of still birth shall be completed and filed in accordance with Section 24-14-13 NMSA 1978.

B. Notwithstanding the provisions of Subsection A of this section, and upon the request of a woman who delivered under circumstances in which a spontaneous fetal death occurred, or the request of a family member whom the woman designates, the state registrar shall issue a certificate of still birth without regard to the date on which a report of spontaneous fetal death was filed, when the spontaneous fetal death was registered or when a report of spontaneous fetal death was issued.

C. A certificate of still birth shall include:

(1) the following sentence: "THIS CERTIFICATE OF STILL BIRTH CANNOT BE USED AS PROOF OF A LIVE BIRTH, FOR IDENTIFICATION OR FOR ANY OTHER PURPOSE."; and

(2) only those of the following that are requested by the woman who delivered under circumstances in which a spontaneous fetal death occurred:

(a) the sex of the still-born fetus;

(b) the record number of the report of spontaneous fetal death;

(c) the date and time of delivery;

(d) the county of delivery; or

(e) the full name, birth date and birthplace of the woman who delivered under circumstances in which a spontaneous fetal death occurred.

D. Upon the request of the woman who delivered under circumstances in which a spontaneous fetal death occurred, the certificate of still birth shall include a name for the fetus delivered under circumstances in which the spontaneous fetal death occurred.

E. A certificate of still birth shall not be used to calculate live birth statistics.

F. This section provides for a person's right to request a certificate of still birth and the procedures pursuant to which a person may obtain a certificate of still birth. The provisions of this section shall not be construed to create any other right, privilege or entitlement or to abrogate any existing right, privilege or entitlement.

G. For purposes of this section, "still birth" means an unintended, intrauterine spontaneous fetal death that occurs:

(1) after the fetus has attained a gestational age of at least twenty weeks; or

(2) when the fetus has attained a weight of not less than three hundred fifty grams, if gestational age is unknown.

**History: Laws 2013, ch. 183, § 4.**

**Effective dates.** — Laws 2013, ch. 183, § 5 made Laws 2013, ch. 183, § 4 effective January 1, 2014.

## 24-14-23. Permits; authorization for final disposition.

A. For deaths or spontaneous fetal deaths which have occurred in this state, no burial-transit permit shall be required for final disposition of the remains if the disposition occurs in this state and is performed by a funeral service practitioner or direct disposer.



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B. A burial-transit permit shall be issued by the state registrar or a local registrar for those bodies which are to be transported out of the state for final disposition or when final disposition is being made by a person other than a funeral service practitioner or direct disposer.

C. A burial-transit permit issued under the law of another state or country which accompanies a dead body or fetus brought into this state shall be authority for final disposition of the body or fetus in this state.

D. A permit for disinterment and reinterment shall be required prior to disinterment of a dead body or fetus except as authorized by regulation or otherwise provided by law. The permit shall be issued by the state registrar or state medical investigator to a licensed funeral service practitioner or direct disposer.

E. A permit for cremation of a body shall be required prior to the cremation. The permit shall be issued by the state medical investigator to a licensed funeral service practitioner, direct disposer or any other person who makes the arrangements for final disposition.

**History: 1953 Comp., § 12-4-43, enacted by Laws 1961, ch. 44, § 21; 1981, ch. 309, § 17; 1985, ch. 230, § 1.**

**Cross references.** — For disposition of dead bodies, *see* Chapter 24, Article 12 NMSA 1978.

For burial of indigents, *see* Chapter 24, Article 13 NMSA 1978.

ANNOTATIONS

**State registrar shall issue permit to disinter when medical investigator so requires** pursuant to the duties and responsibilities of his office. *In re Johnson*, 1980-NMSC-069, 94 N.M. 491, 612 P.2d 1302.

**Requirement of notice of intended autopsy or disinterment.** — Under some circumstances due process may require that an interested relative be given notice of an intended autopsy or disinterment of a deceased. *In re Johnson*, 1980-NMSC-069, 94 N.M. 491, 612 P.2d 1302.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 22A Am. Jur. 2d Dead Bodies §§ 5, 6, 48, 49.

Dead bodies: liability for improper manner of reinterment, 53 A.L.R.4th 394.

39A C.J.S. Health and Environment § 42.

## 24-14-24. Extension of time.

A. The department may, by regulation and upon conditions as it may prescribe to assure compliance with the purposes of the Vital Statistics Act, provide for the extension of the periods prescribed in Sections 24-14-20, 24-14-22 and 24-14-23 NMSA 1978 for the filing of death certificates, spontaneous fetal death reports, medical certifications of cause of death and for the obtaining of burial-transit permits in cases where compliance with the applicable prescribed period would result in undue hardship.

B. Regulations of the department may provide for the issuance of a burial-transit permit prior to the filing of a certificate upon conditions designed to assure compliance with the purposes of the Vital Statistics Act in cases where compliance with the requirement that the certificate be filed prior to the issuance of the permit would result in undue hardship.

**History: 1953 Comp., § 12-4-44, enacted by Laws 1961, ch. 44, § 22; 1973, ch. 264, § 11; 1977, ch. 253, § 32; 1981, ch. 309, § 18.**

**Cross references.** — For death certificates, *see* 24-14-20 NMSA 1978.

For spontaneous fetal death reports, *see* 24-14-22 NMSA 1978.

For burial-transit permits, *see* 24-14-23 NMSA 1978.

For issuance of death certificates subsequent to medical investigations, *see* 24-11-6 NMSA 1978.

## 24-14-25. Correction and amendment of vital records.

A. A certificate or report registered under the Vital Statistics Act may be amended only in accordance with that act and regulations adopted by the department pursuant to that act to protect the integrity and accuracy of vital records and health statistics.

B. Upon receipt of a certified copy of a court order changing the name of a person born in this state and upon request of the person or the person's parent, guardian or legal representative, the state registrar shall amend the original certificate of birth to reflect the new name.

C. Upon request and receipt of an acknowledgment of paternity signed under penalty of perjury by both parents of a child born to an unmarried mother or, in the case of a married mother, upon receipt of an acknowledgment of paternity signed under penalty of perjury by the mother and the non-husband and of a denial of paternity signed under penalty of perjury by the husband, the state registrar shall amend a certificate of birth to show the paternity if paternity is not shown on the birth certificate. The certificate of birth shall not be marked "amended".



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D. Upon receipt of a statement signed under penalty of perjury by an individual born in this state, or the individual's parent, guardian or legal representative, indicating the gender identity of the individual, together with a certified copy of an order changing the name of the individual, if applicable, the certificate of birth of the individual shall be reissued to reflect a designation of male, female or X, as prescribed by regulation. The certificate of birth shall not be marked "amended" pursuant to Subsection F of this section.

E. When an applicant does not submit the minimum documentation required in the regulations for amending a vital record or when the state registrar has reasonable cause to question the validity or adequacy of the applicant's statements or statements made under penalty of perjury or the documentary evidence and if the deficiencies are not corrected, the state registrar shall not amend the vital records and shall advise the applicant of the reason for this action.

F. A certificate or report that is amended under this section shall be marked "amended", except as otherwise provided in Subsections C and D of this section. The date of the amendment and a summary description of the evidence submitted in support of the amendment shall be endorsed on or made a part of the record. The department shall prescribe by regulation the conditions under which additions or minor corrections may be made to certificates or records within one year after the date of the event without the certificate or record being marked "amended".

G. For the purposes of this section, "X" refers to a gender other than male or female or an, undesignated gender.

**History: 1953 Comp., § 12-4-45, enacted by Laws 1961, ch. 44, § 23; 1981, ch. 309, § 19; 2009, ch. 215, § 17; 2019, ch. 89, § 1.**

**Cross references.** — For issuance of new birth certificates following adoptions, legitimations and paternity determinations, *see* 24-14-17 NMSA 1978.

**The 2019 amendment,** effective June 14, 2019, provided for amendment of sex designation on vital records; in Subsection D, deleted "the person in charge of an institution or from the attending physician" and added "an individual born in this state, or the individual's parent, guardian or legal representative", after "indicating the", deleted "sex of an" and added "gender identity of the", deleted "born in this state has been changed by surgical procedure", after "changing the name of the", deleted "person" and added "individual, if applicable", after "the individual shall be", deleted "amended" and added "reissued to reflect a designation of male, female or X", and added "The certificate of birth shall not be marked "amended" pursuant to Subsection F of this section."; in Subsection F, changed "Subsection C" to "Subsections C and D; and added Subsection G.

**The 2009 amendment,** effective January 1, 2010, in Subsection C, after "acknowledgment of paternity", added "signed under penalty of perjury by both parents"; after "of a child born" deleted "out of wedlock signed by both parents" and added "to an unmarried mother"; between "in the case of a married mother" and "the state registrar", deleted "as provided for in Subsection F of Section 24-14-13 NMSA 1978" and added the new language; in Subsection D, after "Upon receipt of a", deleted "duly notarized" and after "statement", added "signed under penalty of perjury by"; in Subsection E, after "adequacy of the applicant's", deleted "sworn" and after "statements", added "or statements made under penalty of perjury"; and in Subsection F, after "as otherwise provided in", added "Subsection C of".

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 76 C.J.S. Records § 21 et seq.

## 24-14-26. Reproduction of records.

To preserve vital records, the state registrar is authorized to prepare typewritten, photographic, electronic or other reproductions of original records and files in his office. The reproductions when certified by him shall be accepted as the original record. The documents from which permanent reproductions have been made and verified may be disposed of as provided by regulation.

**History: 1953 Comp., § 12-4-46, enacted by Laws 1961, ch. 44, § 24; 1981, ch. 309, § 20.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Photostatic or other method of recording instrument, 57 A.L.R. 159.

## 24-14-27. Disclosure of records.

A. The state registrar or other custodian of vital records shall not permit inspection of or disclosure of information contained in vital records or copying or issuance of a copy of all or part of any record except as authorized by law.



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B. The department shall provide access to record level data required by the New Mexico health policy commission. The New Mexico health policy commission may only release record level data obtained from vital records in the aggregate. For the purposes of this subsection, "record level data" means one or more unique and non-aggregated data elements relating to a single identifiable individual. The department may authorize the disclosure of data contained in vital records for other research purposes.

C. When one hundred years have elapsed after the date of birth or fifty years have elapsed after the date of death, the vital records of these events in the custody of the state registrar shall become open public records, and information shall be made available in accordance with regulations that provide for the continued safekeeping of the records; provided that vital records of birth shall not become open public records prior to the individual's death.

**History: 1953 Comp., § 12-4-47, enacted by Laws 1961, ch. 44, § 25; 1981, ch. 309, § 21; 1994, ch. 59, § 1; 2017, ch. 87, § 29.**

**The 2017 amendment,** effective June, 16, 2017, removed the provision making it unlawful for any person to permit inspection or to disclose information contained in vital records, and prohibited the state registrar or other custodian of vital records from permitting inspection of or disclosing information contained in vital records; in Subsection A, deleted "It is unlawful for any person to" and added "The state registrar or other custodian of vital records shall not", after "inspection of or", deleted "to disclose" and added "disclosure", after "contained in vital records or", deleted "to copy" and added "copying", and after "or", deleted "issue" and added "issuance of"; and in Subsection B, after the first occurrence of "New Mexico health policy commission", deleted "and the health information system created in the Health Information System Act", and after the second occurrence of "New Mexico health policy commission", deleted "and the health information system".

**The 1994 amendment,** effective March 4, 1994, in Subsection B, added the first three sentences and inserted "other" in the last sentence; and substituted "that provide" for "which shall provide" in Subsection C.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 66 Am. Jur. 2d Records and Recording Laws §§ 12 to 30.

False news reports as to births, betrothals, marriages, divorces or similar marital matters as libel and slander, 9 A.L.R.3d 559.

76 C.J.S. Records § 60 et seq.

## 24-14-28. Copies or data from the system of vital statistics.

A. In accordance with the Vital Statistics Act and the regulations adopted pursuant to that act:

(1) the state registrar shall, upon receipt of a written application, issue a certified copy of any certificate or record in the state registrar's custody to anyone demonstrating a tangible and direct interest, except that:

(a) certified copies of birth records shall exclude all medical information unless a complete certificate is specifically requested and the request for a complete certificate is approved by the state registrar; and

(b) issuance of copies of birth records shall be subject to the provisions of the Missing Child Reporting Act [repealed];

(2) a certified copy of a certificate or any part thereof, including records reproduced from paper documents or photographic, magnetic or electronic files, shall be considered for all purposes the same as the original and is prima facie evidence of the facts therein stated; provided that the evidentiary value of a certificate or record filed more than one year after the event or a record that has been amended shall be determined by the judicial or administrative body or official before whom the certificate is offered as evidence;

(3) the agency of the United States government responsible for national vital statistics may be furnished copies or data as it may require for national statistics, upon the condition that the data shall not be used for other than statistical purposes unless so authorized by the state registrar;

(4) at the discretion of the state registrar, federal, state, local and other public or private agencies may upon request be furnished copies or data for statistical or administrative purposes upon the conditions as may be prescribed by the department;

(5) no person shall prepare or issue any report of an induced abortion or any certificate that purports to be an original, certified copy or copy of a certificate of birth, death or spontaneous fetal death or reproduction of a certified copy except as authorized in the Vital Statistics Act or regulations adopted pursuant to that act;



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(6) the state registrar may, by written agreement, transmit copies of records and other reports required by the Vital Statistics Act to offices of vital statistics outside this state when the records or other reports relate to residents of those jurisdictions or persons born outside those jurisdictions. The agreement shall require that the copies be used for statistical purposes only and shall provide for the retention and disposition of copies. Copies received by the state registrar from offices of vital statistics in other states shall be handled in the manner prescribed in this section; and

(7) the state registrar shall, upon receipt of a written application from an unaccompanied youth, issue a certified copy of that youth's birth record to the youth, without requiring a signature of an adult.

B. A local education agency homeless liaison, a school counselor and a school nurse each have a tangible and direct interest pursuant to Subsection A of this section in a certified copy of the birth record of a homeless child or youth who is enrolled in the local education agency and in a certified copy of the birth record of a younger sibling of a homeless child or youth who is enrolled in the local education agency.

C. A social worker in this state has a tangible and direct interest pursuant to Subsection A of this section in a:

(1) certified copy of the birth record of a homeless child or youth who is a client of the social worker; and

(2) certified copy of the birth record of a younger sibling of a homeless child or youth who is a client of the social worker.

D. For the purposes of this section:

(1) "homeless child or youth" means an individual who is twenty-five years of age or younger and lacks a fixed, regular and adequate nighttime residence, including an individual who:

(a) lives in the housing of another person due to that individual's loss of housing, economic hardship or other reason related to that individual's lack of a fixed residence;

(b) lives in a motel, hotel, trailer park or camping ground due to that individual's lack of alternative adequate accommodations;

(c) lives in an emergency or transitional shelter;

(d) sleeps in a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings; or

(e) lives in an automobile, a park, a public space, an abandoned building, substandard housing, a bus station, a train station or a similar setting; and

(2) "unaccompanied youth" means an individual who is twenty-five years of age or younger, is not in the physical custody of a parent or legal guardian and lacks a fixed, regular and adequate nighttime residence, including an individual who:

(a) lives in the housing of another person due to that individual's loss of housing, economic hardship or other reason related to that individual's lack of a fixed residence;

(b) lives in a motel, hotel, trailer park or camping ground due to that individual's lack of a fixed residence;

(c) lives in an emergency or transitional shelter;

(d) sleeps in a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings; or

(e) lives in an automobile, a park, a public space, an abandoned building, substandard housing, a bus station, a train station or a similar setting.

**History: 1953 Comp., § 12-4-48, enacted by Laws 1961, ch. 44, § 26; 1972, ch. 34, § 1; 1977, ch. 206, § 3; 1981, ch. 309, § 22; 1987, ch. 25, § 5; 2021, ch. 100, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2010, ch. 33, § 15 repealed the Missing Child Reporting Act, effective May 19, 2010.

**The 2021 amendment,** effective June 18, 2021, eliminated restrictions on access to vital records for homeless children or youth and unaccompanied youth, and defined "homeless child or youth" and "unaccompanied youth" for purposes of this section; redesignated former Subsections A through F as Paragraphs A(1) through A(6), respectively, in Subsection A, Paragraph A(1), redesignated former Paragraphs A(1) and A(2) as Subparagraphs A(1)(a) and A(1)(b), respectively, and added Paragraph A(7); and added new Subsections B through D.

## ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 29A Am. Jur. 2d Evidence § 1372 et seq.; 39 Am. Jur. 2d Health



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§ 51; 66 Am. Jur. 2d Records and Recording Laws §§ 13, 14, 28.

Admissibility, under public records exception to hearsay rule, of record kept by public official without express statutory direction or authorization, 80 A.L.R.3d 414.

76 C.J.S. Records § 60 et seq.

## 24-14-29. Fees for copies and searches.

A. The fee for each search of a vital record to produce a certified copy of a birth certificate shall be ten dollars ($10.00) and shall include one certified copy of the record, if available. A fee shall not be charged for a certified copy of a birth certificate of a homeless individual.

B. The fee for the establishment of a delayed record or for the revision or amendment of a vital record, as a result of an adoption, a legitimation, a correction or other court-ordered change to a vital record, shall be ten dollars ($10.00). The fee shall include one certified copy of the delayed record.

C. The fee for each search of a vital record to produce a copy of a report of spontaneous fetal death or a certificate of still birth shall be five dollars ($5.00) and shall include one certified copy of the record of fetal death, if available.

D. The fee for each search of a vital record to produce a certified copy of a death certificate shall be five dollars ($5.00) and shall include one certified copy of the record, if available.

E. Revenue from the fees imposed in this section shall be distributed as follows:

(1) an amount equal to three-fifths of the revenue from the fee imposed by Subsection A of this section, an amount equal to one-half of the revenue from the fee imposed by Subsection B of this section and an amount equal to one-fifth of the revenue from the fee imposed by Subsection D of this section shall be distributed to the day-care fund; and

(2) the remainder of the revenue from the fees imposed by Subsections A, B, C and D of this section shall be deposited in the state general fund.

F. For the purposes of this section, "homeless individual" means an individual:

(1) who lacks a fixed, regular and adequate nighttime residence, including an individual who:

(a) lives in the housing of another person due to that individual's loss of housing, economic hardship or other reason related to that individual's lack of a fixed residence;

(b) lives in a motel, hotel, trailer park or camping ground due to the lack of alternative adequate accommodations;

(c) lives in an emergency or transitional shelter;

(d) sleeps in a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings; or

(e) lives in an automobile, a park, a public space, an abandoned building, substandard housing, a bus station, a train station or a similar setting; and

(2) whose homelessness can be verified through an attestation, which shall not be required to be notarized, by one of the following:

(a) a public or private governmental or nonprofit agency that provides services to homeless individuals;

(b) a local education agency homeless liaison, school counselor or school nurse;

(c) a social worker licensed in this state; or

(d) the homeless individual.

**History: 1953 Comp., § 12-4-49, enacted by Laws 1961, ch. 44, § 27; 1973, ch. 264, § 12; 1981, ch. 309, § 23; 1987, ch. 62, § 1; 1988, ch. 114, § 1; 2013, ch. 183, § 3; 2021, ch. 100, § 2.**

**Cross references.** — For day-care fund, *see* 24-14-29.1 NMSA 1978.

For state general fund, *see* 6-4-2 NMSA 1978.

**The 2021 amendment,** effective June 18, 2021, eliminated fees for certified birth certificates for homeless individuals, and defined "homeless individual" for purposes of this section; in Subsection A, after "if available", added "A fee shall not be charged for a certified copy of a birth certificate of a homeless individual"; and added Subsection F.

**The 2013 amendment,** effective January 1, 2014, provided for a fee for searches of vital records for reports of spontaneous fetal deaths; and added Subsection C.

**ANNOTATIONS**

**County clerks may not issue certified copies of death certificates** simply to allow someone the chance to avoid the higher fees charged for the issuance of such certificates by the vital statistics bureau. 1988 Op. Att'y Gen. No. 88-01.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 66 Am. Jur. 2d Records and Recording Laws §§ 13, 14.

76 C.J.S. Records § 60 et seq.



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## 24-14-29.1. Day-care fund created; use; appropriation.

There is created in the state treasury a fund to be known as the "day-care fund". The fund shall be invested by the state treasurer as other state funds are invested. The fund shall consist of distributions of revenue collected since July 1, 1987 and future revenues collected pursuant to Section 24-14-29 NMSA 1978. All balances in the day-care fund are appropriated to the children, youth and families department for use in implementing the income-eligible day-care program under the Social Services Block Grant Act Title XX.

**History: Laws 1988, ch. 114, § 2; 1989, ch. 324, § 19; 1993, ch. 151, § 1.**

**Cross references.** — For the Social Services Block Grant Act (Title XX), *see* 42 U.S.C. §§ 1397 et seq.

**The 1993 amendment,** effective July 1, 1993, substituted "children, youth and families department" for "human services department" in the last sentence.

## 24-14-30. Duty to furnish information.

A. Any person having knowledge of the facts regarding any birth, death, spontaneous fetal death or induced abortion shall furnish this information upon demand to the state registrar.

B. Not later than the tenth day of the month following the month of occurrence, each funeral service practitioner shall send to the state registrar a list showing all dead bodies embalmed or otherwise prepared for final disposition during the preceding month. Such list shall be made on forms prescribed by the state registrar.

**History: 1953 Comp., § 12-4-50, enacted by Laws 1961, ch. 44, § 28; 1981, ch. 309, § 24.**

## 24-14-31. Penalties.

A. Except for violations of Section 24-14-18 NMSA 1978, any person is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978, who willfully and knowingly:

(1) makes any false statement or supplies any false information in a report, record or certificate required to be filed;

(2) with the intent to deceive, alters, amends, counterfeits, copies or mutilates any report, record or certificate, application or supporting documentation;

(3) uses or attempts to use or furnishes to another for use for any purpose of deception any certificate, record, report or certified copy that has been altered, amended or mutilated or that contains false information in whole or in part, or that is related to the birth or death of another person, whether living or dead; or

(4) neglects or violates any of the provisions of the Vital Statistics Act [Chapter 24, Article 14 NMSA 1978] or refuses to perform any of the duties imposed upon the person by that act.

B. Any person who willfully and knowingly permits inspection of or discloses information contained in vital statistics records of adoptions or induced abortions or copies or issues a copy of all or part of any record of an adoption or induced abortion, except as authorized by law, is guilty of a fourth degree felony and shall be sentenced in accordance with the provisions of the Criminal Sentencing Act [Chapter 31, Article 18 NMSA 1978].

**History: 1953 Comp., § 12-4-51, enacted by Laws 1961, ch. 44, § 29; 1977, ch. 206, § 4; 1981, ch. 309, § 25; 1993, ch. 247, § 1; 2017, ch. 87, § 30.**

**Cross references.** — For disclosure of information or records, *see* 24-14-27 NMSA 1978.

**The 2017 amendment,** effective June, 16, 2017, clarified certain violations of the Vital Statistics Act; in Subsection A, Paragraph A(2), after "amends", added "counterfeits, copies", after "certificate", added "application or supporting documentation", in Paragraph A(3), after "contains false information", added "in whole or in part, or that is related to the birth or death of another person, whether living or dead", and in Paragraph A(4), after "imposed upon", deleted "him" and added "the person".

**The 1993 amendment,** effective July 1, 1993, in Subsection A, rewrote the introductory language, made stylistic changes in Paragraph (3), and substituted "fails to perform" for "neglects" in Paragraph (4).

### ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 66 Am. Jur. 2d Records and Recording Laws §§ 10, 11.

76 C.J.S. Records § 57 et seq.



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# ARTICLE 14A

# Health Information Systems

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## 24-14A-1. Short title.

Chapter 24, Article 14A NMSA 1978 may be cited as the "Health Information System Act".

**History: Laws 1989, ch. 29, § 1; 1994, ch. 59, § 2.**

**Cross references.** — For confidential health records, *see* 24-1-20 NMSA 1978.

**The 1994 amendment,** effective March 4, 1994, substituted "Chapter 24, Article 14A NMSA 1978" for "This act".

## 24-14A-2. Definitions.

As used in the Health Information System Act:

A. "aggregate data" means data that are obtained by combining like data elements in a manner that precludes specific identification of a single client;

B. "data source" or "data provider" means a person that possesses health information, including any public or private sector licensed health care practitioner, primary care clinic, ambulatory surgery center, ambulatory urgent care center, ambulatory dialysis unit, home health agency, long-term care facility, hospital, pharmacy, third-party payer and any public entity that has health information;

C. "department" means the department of health;

D. "health information" or "health data" means any data relating to health care; health status, including environmental, social and economic factors; the health system; or health costs and financing;

E. "hospital" means any general or special hospital licensed by the department, whether publicly or privately owned;

F. "long-term care facility" means any skilled nursing facility or nursing facility licensed by the department, whether publicly or privately owned;

G. "record-level data" means a medical record that contains unique and nonaggregated data elements that relate to a single identifiable individual; and

H. "third-party payer" means any public or private payer of health care services and includes health maintenance organizations and health insurers.

**History: Laws 1989, ch. 29, § 2; 1994, ch. 59, § 3; 2009, ch. 166, § 1; 2012, ch. 15, § 1; 2021, ch. 71, § 1.**

**The 2021 amendment,** effective June 18, 2021, revised the definitions of "aggregate data" and record-level data", as used in the Health Information System Act; in Subsection A, after "single client", deleted "or provider"; and in Subsection G, after "identifiable individual", deleted "provider or hospital".

**The 2012 amendment,** effective May 16, 2012, eliminated the New Mexico health policy commission and deleted former Subsection B, which defined "commission" as the New Mexico health policy commission, and relettered the succeeding subsections accordingly.

**The 2009 amendment,** effective June 19, 2009, added Subsection C; deleted former Subsection G, which defined "data source"; and added Subsection H.

**The 1994 amendment,** effective March 4, 1994, deleted former Subsection B, which defined "committee"; inserted present Subsection B; rewrote Subsection C, which read " 'department' means the health and environment department"; substituted "environmental, social and economic factors; the health system; or health costs and financing" for "environmental factors; the health system; and health costs" in Subsection D; deleted "health and environment" preceding "department" in Subsection E; substituted "nursing facility licensed by the department"



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for "intermediate care facility licensed by the health and environment department" in Subsection F; rewrote Subsection G, which formerly defined "private sector data source"; deleted former Subsection H, which defined "public sector data source"; and redesignated former Subsection I as present Subsection H.

## 24-14A-3. Health information system; creation; duties of department.

A. The "health information system" is created for the purpose of assisting the department, legislature and other agencies and organizations in the state's efforts in collecting, analyzing and disseminating health information to assist:

(1) in the performance of health planning and policymaking functions, including identifying personnel, facility, education and other resource needs and allocating financial, personnel and other resources where appropriate;

(2) consumers in making informed decisions regarding health care; and

(3) in administering, monitoring and evaluating a statewide health plan.

B. In carrying out its powers and duties pursuant to the Health Information System Act, the department shall not duplicate databases that exist in the public sector or databases in the private sector to which it has electronic access. Every governmental entity shall provide the department with access to its health-related data as needed by the department. The department shall collect data from data sources in the most cost-effective and efficient manner.

C. The department shall establish, operate and maintain the health information system.

D. In establishing, operating and maintaining the health information system, the department shall:

(1) obtain information on the following health factors:

(a) mortality and natality, including accidental causes of death;

(b) morbidity;

(c) health behavior;

(d) disability;

(e) health system costs, availability, utilization and revenues;

(f) environmental factors;

(g) health personnel;

(h) demographic factors;

(i) social, cultural and economic conditions affecting health, including language preference;

(j) family status;

(k) medical and practice outcomes as measured by nationally accepted standards and quality of care; and

(l) participation in clinical research trials;

(2) give the highest priority in data gathering to information needed to implement and monitor progress toward achievement of the state health policy, including determining where additional health resources such as personnel, programs and facilities are most needed, what those additional resources should be and how existing resources should be reallocated;

(3) standardize collection and specific methods of measurement across databases and use scientific sampling or complete enumeration for collecting and reporting health information;

(4) take adequate measures to provide health information system security for all health data acquired under the Health Information System Act and protect individual patient and health care practitioner confidentiality. The right to privacy for the individual shall be a major consideration in the collection and analysis of health data and shall be protected in the reporting of results;

(5) adopt and promulgate rules necessary to establish and administer the provisions of the Health Information System Act, including an appeals process for data sources and procedures to protect data source proprietary information from public disclosure;

(6) establish definitions, formats and other common information standards for core health data elements of the health information system in order to provide an integrated financial, statistical and clinical health information system, including a geographic information system, that



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allows data sharing and linking across databases maintained by data sources and federal, state and local public agencies;

(7) develop and maintain health and health-related data inventories and technical documentation on data holdings in the public and private sectors;

(8) collect, analyze and make available health data to support preventive health care practices and to facilitate the establishment of appropriate benchmark data to measure performance improvements over time;

(9) establish and maintain a systematic approach to the collection and storage of health data for longitudinal, demographic and policy impact studies;

(10) use expert system-based protocols to identify individual and population health risk profiles and to assist in the delivery of primary and preventive health care services;

(11) collect health data sufficient for consumers to be able to evaluate health care services, plans, providers and payers and to make informed decisions regarding quality, cost and outcome of care across the spectrum of health care services, providers and payers;

(12) collect comprehensive information on major capital expenditures for facilities, equipment by type and by data source and significant facility capacity reductions; provided that for the purposes of this paragraph and Section 24-14A-5 NMSA 1978, "major capital expenditure" means purchases of at least one million dollars ($1,000,000) for construction or renovation of facilities and at least five hundred thousand dollars ($500,000) for purchase or lease of equipment, and "significant facility capacity reductions" means those reductions in facility capacities as defined by the department;

(13) serve as a health information clearinghouse, including facilitating private and public collaborative, coordinated data collection and sharing and access to appropriate data and information, maintaining patient and client confidentiality in accordance with state and federal requirements;

(14) collect data in the most cost-efficient and effective method feasible and adopt rules that place a limit on the maximum amount of unreimbursed costs that a data source can incur in any year for the purposes of complying with the data requirements of the Health Information System Act; and

(15) identify disparities in health care access and quality by aggregating the information collected pursuant to Paragraph (1) of this subsection by population subgroups to include race, ethnicity, gender and age.

**History: Laws 1989, ch. 29, § 3; 1994, ch. 59, § 4; 2005, ch. 321, § 12; 2005, ch. 322, § 1; 2012, ch. 15, § 2; 2015, ch. 121, § 1.**

**The 2015 amendment,** effective June 19, 2015, amended the Health Information System Act by replacing "provider" with "health care practitioner" when requiring the department of health to take adequate measures to provide health information system security for acquired health data and to protect health care practitioner confidentiality; and in Paragraph (4) of Subsection D, after "individual patient and", deleted "provider" and added "health care practitioner".

**The 2012 amendment,** effective May 16, 2012, transferred data management duties from the New Mexico health policy commission to the department of health; in the title, after "duties of", deleted "commission" and added "department"; changed "commission" to "department" throughout Subsections A, B, C and D; in Subsection D(14), changed "regulations" to "rules", and in Subsection D(15), changed "subsection D of this section" to "this subsection".

**Temporary provisions.** — Laws 2012, ch. 15, § 11, provided that on July 1, 2012:

A. all appropriations, money, records, equipment, supplies and other property directly related to the collection, analysis and dissemination of health information data pursuant to the Health Information System Act shall be transferred from the New Mexico health policy commission to the department of health; and

B. all contracts directly related to the collection, analysis and dissemination of health information data pursuant to the Health Information System Act shall be binding and effective on the department of health.

**The 2005 amendment,** effective June 17, 2005, changed "system" to "health information system" in Subsections D and D(4); provided in Subsection D(1)(i) that conditions affecting health include language preference; added Subsection D(1)(l) to provide that the commission shall obtain information on participation in clinical research trials; and added Subsection D(15) to provide that the commission identify disparities in health care access and quality by aggregating information collected pursuant to Paragraph (1) of Subsection D by population subgroups to include race, ethnicity, gender and age.

**The 1994 amendment,** effective March 4, 1994, substituted "commission" for "department" in the catchline and throughout the section; rewrote and designated the former undesignated provisions as Subsections A and C to E; added a new Subsection B; redesignated former Subsections A to E as Paragraphs D(1) to D(5); redesignated former Paragraphs A(1) to A(10) as present Subparagraphs D(1)(a) to D(1)(j); inserted "cultural" in Subparagraph D(1)(i); added Subparagraph D(1)(k) and made a related stylistic change; added the language beginning "including" in Paragraph D(2); and added Paragraphs D(6) to D(14).



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## 24-14A-3.1. Repealed.

**Repeals.** — Laws 2005, ch. 321, § 14 repealed 24-14A-3.1 NMSA 1978, as enacted by Laws 1994, ch. 59, § 13, relating to creation of advisory committee, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

## 24-14A-3.2. Repealed.

**Repeals.** — Laws 2005, ch. 321, § 14 repealed 24-14A-3.2 NMSA 1978, as enacted by Laws 1994, ch. 59, § 14, relating to health information alliance, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

## 24-14A-4. Health information system; applicability.

A. All data sources shall participate in the health information system. Requests for health data under the Health Information System Act from a member of a data source category shall, where reasonable and equitable, be made to all members of that data source category.

B. Upon making any request for health data pursuant to the Health Information System Act, the department shall provide reasonable deadlines for compliance and shall give notice that noncompliance may subject the person to a civil penalty pursuant to Section 24-14A-10 NMSA 1978.

C. To the extent possible, the health information system shall be established in a manner to facilitate the exchange of information with other databases, including those maintained by the Indian health service and various agencies of the federal government.

**History: Laws 1989, ch. 29, § 4; 1994, ch. 59, § 5; 2012, ch. 15, § 3.**

**The 2012 amendment,** effective May 16, 2012, transferred the duty to provide deadlines for compliance and notices of noncompliance from the New Mexico health policy commission to the department of health; and in Subsection B, after "Health Information System Act, the", deleted "commission" and added "department".

**The 1994 amendment,** effective March 4, 1994, rewrote Subsection A; substituted "commission" for "department" and "Section 24-14A-10 NMSA 1978" for "Section 10 of the Health Information System Act" in Subsection B; deleted former Subsections C to E, relating to submitting reports for periods ending December 31, 1990, June 30, 1991, and March 31, 1991; and redesignated former Subsection F as present Subsection C, and inserted "health information" before "system" therein.

## 24-14A-4.1. Annual review of data needs.

At least once each year, the department shall review its data collection requirements to determine the relevancy of the data elements on which it collects data and review its regulations and procedures for collecting, analyzing and reporting data for efficiency, effectiveness and appropriateness. The review shall consider the cost incurred by data sources to collect and submit data.

**History: Laws 1994, ch. 59, § 11; 2005, ch. 321, § 13; 2012, ch. 15, § 4.**

**The 2012 amendment,** effective May 16, 2012, transferred the duty to review data collection requirements from the New Mexico health policy commission to the department of health; and after "once each year, the", deleted "commission" and added "department".

**The 2005 amendment,** effective June 17, 2005, deleted the former provision that the commission review its data collection requirements with the recommendations of the advisory committee and health information alliance.

## 24-14A-4.2. Investigatory powers.

The department has the right to verify the accuracy of data provided by any data source. The verification may include requiring the data source to submit documentation sufficient to verify the accuracy of the data in question or to provide direct inspection during normal business hours of only the records and documents that pertain directly to the data in question; provided that no data source shall be required to expend more than twenty-five thousand dollars ($25,000) each year to comply with the provisions of this section.



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**History: Laws 1994, ch. 59, § 12; 2012, ch. 15, § 5.**
**The 2012 amendment,** effective May 16, 2012, transferred the authority to verify data from the New Mexico health policy commission to the department of health; in the first sentence, after "The", deleted "commission" and added "department".

## 24-14A-4.3. Agency cooperation.

All state agencies and political subdivisions shall cooperate with and assist the department in carrying out the provisions of the Health Information System Act, including sharing information and joining in any appropriate health information system.

**History: Laws 1994, ch. 59, § 15; 2012, ch. 15, § 6.**
**The 2012 amendment,** effective May 16, 2012, required state agencies and political subdivisions to assist the department of health, and after "assist the", deleted "commission" and added "department".

## 24-14A-5. Health information system; implementation; regulations.

In order to minimize the imposition of new reporting requirements on persons subject to the provisions of the Health Information System Act, the regulations to the extent reasonably possible shall provide that:

A. data shall be collected in a uniform manner;

B. when practicable, data collection shall be through the use of a standardized billing form as required by law;

C. other health data required to be submitted may include:

(1) data that would customarily be collected in the ordinary course of business for the data source;

(2) annual audited financial statements customarily prepared by a data source;

(3) information on major capital expenditures;

(4) data established by regulation to be collected to carry out the requirements of the Health Information System Act; and

(5) data required to be collected by other state or federal laws; and

D. annual surveys or collection of data may be used as an alternative to collection of health data from some health service providers to the extent it can be shown that the information collected will meet validity and quality standards.

**History: Laws 1989, ch. 29, § 5; 1994, ch. 59, § 6.**
**The 1994 amendment,** effective March 4, 1994, redesignated the subsections; deleted "health data collection" preceding "provisions" in the introductory language; deleted former Paragraph A(2) relating to obtaining data from third party payers; rewrote Subsections B and C; and deleted former Subsections B and E, relating to schedule of implementation and regulations, respectively.

## 24-14A-6. Health information system; access.

A. Access to data in the health information system shall be provided in accordance with regulations adopted by the department pursuant to the Health Information System Act.

B. A data provider may obtain data it has submitted to the system, as well as aggregate data, but, except as provided in Subsection D of this section, it shall not have access to data submitted by another provider that is limited only to that provider unless that data is aggregated data and publicly disseminated by the department. Except as provided in Subsection D of this section, in no event may a data provider obtain data regarding an individual patient except in instances where the data were originally submitted by the requesting provider. Prior to the release of any data, in any form, data sources shall be permitted the opportunity to verify the accuracy of the data pertaining to that data source. Data identified in writing as inaccurate shall be corrected prior to the data's release. Time limits shall be set for the submission and review of data by data sources, and penalties shall be established for failure to submit and review the data within the established time.

C. Any person may obtain any aggregate data publicly disseminated by the department.



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D. Through a secure delivery or transmission process, the department may share record-level data with a federal agency that is authorized to collect, analyze or disseminate health information. The department shall remove identifiable individual or provider information from the record-level data prior to its disclosure to the federal agency. In providing hospital information under an agreement or arrangement with a federal agency, the department shall ensure that any identifiable hospital information disclosed is necessary for the agency's authorized use and that its disclosure meets with state and federal privacy and confidentiality laws, rules and regulations.

**History: Laws 1989, ch. 29, § 6; 1994, ch. 59, § 7; 2009, ch. 166, § 2; 2012, ch. 15, § 7; 2015, ch. 121, § 2.**

**The 2015 amendment,** effective June 19, 2015, allowed any person or data provider access to aggregated health information data that is publicly disseminated by the department of health; in Subsection B, after "only to that provider", added "unless that data is aggregated data and publicly disseminated by the department"; and in Subsection C, after "aggregate data", added "publicly disseminated by the department".

**The 2012 amendment,** effective May 16, 2012, authorized the department of health to regulate access to data in the health information system; in Subsection A, changed "commission" to "department"; in Subsection B, changed "Subsections D and E" to "Subsection D" in two instances; deleted former Subsection D, which authorized the New Mexico health policy commission to share personal data with the department of health; and relettered former Subsection E, as Subsection D and changed "commission" to "department" throughout the subsection.

**The 2009 amendment,** effective June 19, 2009, in Subsection B, in the first sentence, after "aggregate data, but", added "except as provided in Subsections D and E of this Section"; after "it", changed "may" to "shall" and at the beginning of the second sentence, added "Except as provided in Subsections D and E of this section"; and added Subsections D and E.

**The 1994 amendment,** effective March 4, 1994, substituted "commission" for "department" in Subsection A, and rewrote Subsection B.

## 24-14A-6.1. Web site; public access; data.

By January 1, 2018, the department shall ensure that the public is provided with access, free of charge, to a user-friendly, searchable and easily accessible web site on which the department shall post and update on a regular basis cost, quality and such other information it publishes pursuant to the Health Information System Act. The web site shall be accessible through the sunshine portal. The department shall adopt and promulgate rules to carry out the provisions of this section.

**History: Laws 2015, ch. 121, § 5.**

**Effective dates.** — Laws 2015, ch. 121 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2015, 90 days after the adjournment of the legislature.

## 24-14A-7. Health information system; reports.

A. A report in printed format that provides information of use to the general public shall be produced annually. The report shall be made available upon request. The department may make the report available on tape or other electronic format.

B. The department shall provide an annual report of its activities, including health care system statistics, to the legislature. The report shall be submitted by November 15 each year.

**History: Laws 1989, ch. 29, § 7; 1994, ch. 59, § 8; 2012, ch. 15, § 8.**

**The 2012 amendment,** effective May 16, 2012, transferred the duty to provide reports to the general public and the legislature from the New Mexico health policy commission to the department of health; in Subsection A, in the third sentence after "The", deleted "commission" and added "department"; and in Subsection B, in the first sentence after "The", deleted "commission" and added "department".

**The 1994 amendment,** effective March 4, 1994, designated the formerly undesignated provisions as Subsection A, and in that subsection, substituted "that" for "which" in the first sentence, deleted "to health care providers, purchasers, employers, consumers and other interested parties" following "available" in the second sentence, and substituted "commission" for "department" in the third sentence; and added Subsection B.

## 24-14A-8. Health information system; confidentiality.

A. Health information collected and disseminated pursuant to the Health Information System Act is strictly confidential and shall not be a matter of public record or accessible to the public



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except as provided in this section and Sections 24-14A-6 and 24-14A-7 NMSA 1978. No data source shall be liable for damages to any person for having furnished the information to the department.

B. Record-level data provided to the department pursuant to Section 24-14A-6 NMSA 1978 are confidential. The agency that receives record-level data shall not disclose the data except to the extent that they are included in a compilation of aggregate data.

C. The individual forms, electronic information or other forms of data collected by and furnished for the health information system shall not be public records subject to inspection pursuant to Section 14-2-1 NMSA 1978. The department may release or disseminate aggregate data, including those data that pertain to a specifically identified hospital or other type of health facility. These data shall be public records if the release of these data does not violate state or federal law relating to the privacy and confidentiality of individually identifiable health information.

**History: Laws 1989, ch. 29, § 8; 1994, ch. 59, § 9; 2009, ch. 166, § 3; 2012, ch. 15, § 9; 2015, ch. 121, § 3.**

**The 2015 amendment,** effective June 19, 2015, provided that the department of health may release aggregate health information data and that this data shall be a part of the public record only if the data does not violate state or federal privacy and confidentiality laws; in Subsection A, after "except as provided", added "in this section and"; in Subsection C, after "NMSA 1978.", deleted "Compilations of" and added "The department may release or disseminate", after "aggregate data", deleted "prepared for release or dissemination from the data collected except for a report prepared for an individual data provider or the provider's designee containing information concerning only its transactions", and added "including those data that pertain to a specifically identified hospital or other type of health facility. These data", and after "shall be public records", added "if the release of these data does not violate state or federal law relating to the privacy and confidentiality of individually identifiable health information."

**The 2012 amendment,** effective May 16, 2012, limited the liability of data sources that furnish data to the department of health; required agencies that receive record-level data to keep the data confidential; in Subsection A, in the second sentence after "information to the", deleted "commission" and added "department"; and in Subsection B, in the second sentence after "The", deleted "department" and added "agency".

**The 2009 amendment,** effective June 19, 2009, in Subsection A, at the end of the second sentence, added "to the commission"; added Subsection B; and in Subsection C, in the first sentence, after "individual forms" deleted "computer tapes" and added "electronic information"; and in the last sentence, after "data provider", added "or the provider's designee".

**The 1994 amendment,** effective March 4, 1994, substituted the language beginning "strictly confidential" for "subject to the confidentiality provisions of Section 14-6-1 NMSA 1978" in Subsection A, and inserted "health information" in the first sentence of Subsection B.

## 24-14A-9. Health information system; fees.

Except for the annual reports required pursuant to the Health Information System Act, the department may collect a fee of up to one hundred dollars ($100) per hour to offset partially the costs of producing public-use data aggregations or data for single use special studies. Entities contributing data to the system shall be charged reduced rates. Rates shall be established by regulation and shall be reviewed annually. Fees collected pursuant to this section are appropriated to the department to carry out the provisions of the Health Information System Act.

**History: Laws 1989, ch. 29, § 9; 1994, ch. 59, § 10; 2012, ch. 15, § 10.**

**The 2012 amendment,** effective May 16, 2012, authorized the department of health to collect fees; in the first sentence after "Information System Act, the", deleted "commission" and added "department"; and in the fourth sentence, after "appropriated to the", deleted "commission" and added "department".

**The 1994 amendment,** effective March 4, 1994, added at the beginning of the first sentence "Except for the annual reports required pursuant to the Health Information System Act," and made a related stylistic change; substituted "commission may" for "department has authority to establish and", and "a fee of up to one hundred dollars ($100) per hour" for "fees" in the first sentence; and substituted "commission" for "department" in the last sentence.

## 24-14A-10. Health information system; violation; civil penalty.

A. It is unlawful for any person subject to the data reporting requirements of the Health Information System Act and the regulations adopted pursuant to that act not to comply with any of those requirements.

B. A civil action may be brought in the name of the state alleging a violation of Subsection A of this section and a petition may be made to the district court for temporary or permanent



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injunctive relief. In any such action, if the court finds that a person has wilfully violated Subsection A of this section, upon petition to the court there may be recovered on behalf of the state a civil penalty not to exceed one thousand dollars ($1,000).

**History: Laws 1989, ch. 29, § 10.**

## 24-14A-11. Advisory committee.

The secretary of health shall appoint a health information system advisory committee to advise the department in carrying out the provisions of the Health Information System Act. The secretary shall establish the membership and duties of the committee by rule.

**History: Laws 2015, ch. 121, § 4.**
**Effective dates.** — Laws 2015, ch. 121 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2015, 90 days after the adjournment of the legislature.

# ARTICLE 14B

# Electronic Medical Records

Sec.
24-14B-1. Short title.
24-14B-2. Purpose.
24-14B-3. Definitions.
24-14B-4. Electronic medical records; electronic signatures; legal recognition.
24-14B-5. Retention of electronic medical records.
24-14B-6. Use and disclosure of electronic health care information.
24-14B-7. Liability.
24-14B-8. Out-of-state disclosures.
24-14B-9. Exclusion of certain insurers.
24-14B-10. State agency; electronic medical records.

## 24-14B-1. Short title.

This act [24-14B-1 through 24-14B-10 NMSA 1978] may be cited as the "Electronic Medical Records Act".

**History: Laws 2009, ch. 69, § 1.**
**Effective dates.** — Laws 2009, ch. 69 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

## 24-14B-2. Purpose.

The purpose of the Electronic Medical Records Act is to provide for the use, disclosure and protection of electronic medical records.

**History: Laws 2009, ch. 69, § 2.**
**Effective dates.** — Laws 2009, ch. 69 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

## 24-14B-3. Definitions.

As used in the Electronic Medical Records Act:

A. "demographic information" means information that identifies the individual who is the subject of the health care information, including the individual's name, date of birth and address and other information necessary to identify the individual, that may be used to identify the individual or that associates the individual with the individual's electronic medical record;

B. "disclose" means to release, transfer, provide, give access to or otherwise divulge in any other manner information outside the entity holding the information;



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C. "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities;

D. "electronic medical record" means an electronic record of an individual patient's health care information that may contain demographic information;

E. "electronic signature" means an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by an individual with the intent to sign the record;

F. "health care" means care, services or supplies related to the health of an individual and includes:

(1) preventive, diagnostic, therapeutic, rehabilitative, maintenance or palliative care and counseling;

(2) services, assessments or procedures that are concerned with the physical or mental condition or functional status of an individual or that affect the structure or function of the body of an individual; and

(3) the sale or dispensing of a drug, a device, a piece of equipment or other item in accordance with a prescription;

G. "health care group purchaser" means a person who is licensed, certified or otherwise authorized or permitted by the New Mexico Insurance Code [Chapter 59A NMSA 1978, except for Articles 30A and 42A] to pay for or purchase health care on behalf of an identified individual or group of individuals, regardless of whether the cost of coverage or services is paid for by the purchaser or the persons receiving coverage or services;

H. "health care information" means any information, whether oral or recorded in any form or medium, related to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual;

I. "health care institution" means an institution, facility or agency licensed, certified or otherwise authorized or permitted by law to provide health care in the ordinary course of business;

J. "health information exchange" means an arrangement among persons participating in a defined secure electronic network service, such as a regional health information organization, that allows the sharing of health care information about individual patients among different health care institutions or unaffiliated providers. The use of an electronic medical record system by a health care provider, by or within a health care institution or by an organized health care arrangement as defined by the federal Health Insurance Portability and Accountability Act of 1996 does not constitute a health information exchange;

K. "information" means data, including text, images, sounds and codes and computer programs, software and databases;

L. "provider" means an individual who is licensed, certified or otherwise authorized or permitted by law to provide health care in the ordinary course of business or practice of a profession;

M. "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

N. "record locator service" means an information service that contains demographic information and the location of health care information of a specified individual across different health care institutions or unaffiliated providers that participate in the service. The use of an electronic medical record system by a health care provider or by an organized health care arrangement as defined by the federal Health Insurance Portability and Accountability Act of 1996 does not constitute a record locator service; and

O. "treatment" means the provision, coordination or management of health care and related services by one or more providers, including the coordination or management of health care by a provider with a third party; consultation between providers relating to an individual; or the referral of an individual for health care from one provider to another.

**History: Laws 2009, ch. 69, § 3.**

**Effective dates.** — Laws 2009, ch. 69 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.



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## 24-14B-4. Electronic medical records; electronic signatures; legal recognition.

If a law or rule requires a medical record to be in writing, or if a law or rule requires a signature pertaining to a medical record, an electronic medical record or an electronic signature satisfies that law or rule, except for a court rule.

**History: Laws 2009, ch. 69, § 4.**
**Effective dates.** — Laws 2009, ch. 69 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

## 24-14B-5. Retention of electronic medical records.

A. If a law or rule requires that a medical record be retained, the requirement is satisfied by retaining an electronic record that:

(1) accurately reflects the medical record; and

(2) remains accessible and is capable of being accurately reproduced for later reference.

B. If a law or rule requires a medical record to be presented or retained in its original form or provides consequences if the medical record is not presented or retained in its original form, that law or rule is satisfied by an electronic medical record retained in accordance with Subsection A of this section.

C. A medical record retained as an electronic medical record in accordance with Subsection A of this section satisfies a law or rule requiring a person to retain a medical record for evidentiary, audit or other purposes.

**History: Laws 2009, ch. 69, § 5.**
**Effective dates.** — Laws 2009, ch. 69 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

## 24-14B-6. Use and disclosure of electronic health care information.

A. A provider, health care institution, health information exchange or health care group purchaser shall not use or disclose health care information in an individual's electronic medical record to another person without the consent of the individual except as allowed by state or federal law.

B. A provider, health care institution or health care group purchaser may disclose demographic information and information about the location of an individual's electronic medical records to a record locator service in accordance with state or federal law. A provider or health care institution participating in a health information exchange using a record locator service shall not have access to demographic information, information about the location of the individual's electronic medical records or information in an individual's electronic medical record except in connection with the treatment of the individual or as permitted by the consent of the individual or as otherwise permitted by state or federal law.

C. A record locator service shall maintain an audit log of persons obtaining access to information in the record locator service, which audit log shall contain, at a minimum, information on:

(1) the identity of the person obtaining access to the information;

(2) the identity of the individual whose information was obtained;

(3) the location from which the information was obtained;

(4) the specific information obtained; and

(5) the date that the information was obtained.

D. The audit log shall be made available by a health information exchange on the request of an individual whose health care information is the subject of the audit log; provided, however, that the audit log made available to the individual shall include only information related



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to that individual. The audit log shall be made available to the requesting individual annually for a fee not to exceed twenty-five cents ($.25) per page as established by the department of health.

E. A record locator service shall provide a mechanism under which individuals may exclude their demographic information and information about the location of their electronic medical records from the record locator service. A person operating a record locator service or a health information exchange that receives an individual's request to exclude all of the individual's information from the record locator service is responsible for removing that information from the record locator service within thirty days. An individual's request for exclusion of information shall be in writing and shall include a waiver of liability for any harm caused by the exclusion of the individual's information.

F. When information in an individual's electronic medical record is requested using a record locator service or a health information exchange:

(1) the requesting provider or health care institution shall warrant that the request is for the treatment of the individual, is permitted by the individual's written authorization or is otherwise permitted by state or federal law; and

(2) the person disclosing the information may rely upon the warranty of the person making the request that the request is for the treatment of the individual, is permitted with the consent of the individual or is otherwise permitted by state or federal law.

G. Notwithstanding any other provision of law, information in an individual's electronic medical record may be disclosed:

(1) to a provider that has a need for information about the individual to treat a condition that poses an immediate threat to the life of any individual and that requires immediate medical attention;

(2) except as provided in the Electronic Medical Records Act, to a record locator service or a health information exchange for the development and operation of the record locator service and the health information exchange; and

(3) to a provider, health care institution or health care group purchaser for treatment, payment or health care operation activities, in compliance with the federal Health Insurance Portability and Accountability Act of 1996 and the regulations promulgated pursuant to that act, and if applicable, in compliance with 42 U.S.C. Section 290dd-2 and the regulations promulgated pursuant to that section.

H. For the purposes of this section, "health care operation activities" includes administrative, financial, legal and quality improvement activities of a covered entity that are necessary to conduct business and to support the core functions of treatment and payment and are limited to the activities listed in the definition of "health care operations" at 45 C.F.R. 164.501.

**History: Laws 2009, ch. 69, § 6; 2021, ch. 113, § 1.**

**The 2021 amendment,** effective July 1, 2021, provided that information in an individual's electronic medical record may be disclosed to certain entities for treatment, payment or health care operation activities, and defined "health care operation activities" for purposes of this section; in Subsection G, added Paragraph G(3); and added Subsection H.

## 24-14B-7. Liability.

If an individual requests to exclude all of the individual's information from the record locator service pursuant to Subsection E of Section 6 [24-14B-6 NMSA 1978] of the Electronic Medical Records Act, the record locator service, health information exchange, health care institution or provider shall not be liable for any harm to the individual caused by the exclusion of the individual's information.

**History: Laws 2009, ch. 69, § 7.**

**Effective dates.** — Laws 2009, ch. 69 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.



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## 24-14B-8. Out-of-state disclosures.

A disclosure otherwise permissible under the Electronic Medical Records Act may be made to providers, health care group purchasers, health care institutions, health information exchanges or record locator services located or operating outside of the state.

**History: Laws 2009, ch. 69, § 8.**
**Effective dates.** — Laws 2009, ch. 69 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

## 24-14B-9. Exclusion of certain insurers.

Nothing in the Electronic Medical Records Act shall be construed to apply to a person operating as a property and casualty insurer, workers' compensation insurer, life insurer, long-term care insurer or disability income insurer.

**History: Laws 2009, ch. 69, § 9.**
**Effective dates.** — Laws 2009, ch. 69 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

## 24-14B-10. State agency; electronic medical records.

If a state agency requires the use of electronic medical records for any type of health care or health coverage program, the agency shall allow a health care group purchaser, health care institution, health information exchange, provider, record locator service or any other person to use any public, proprietary or open source hardware or software; provided that the hardware or software complies with federal interoperability-certified laws or rules.

**History: Laws 2009, ch. 69, § 10.**
**Effective dates.** — Laws 2009, ch. 69 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

# ARTICLE 14C

# Health Care Work Force Data Collection, Analysis and Policy

Sec.
24-14C-1. Short title.
24-14C-2. Definitions.
24-14C-3. Health care work force database; collection of data; housing of data; analysis and reporting.
24-14C-4. Database establishment and maintenance; delegation.
24-14C-5. Health care work force data collection by boards; mandatory compliance for applicants; reporting by boards; confidentiality of data; rulemaking.
24-14C-6. Health care work force work group; work force data analysis; recruitment planning; strategic plan for improving health care access; work force survey.

## 24-14C-1. Short title.

Chapter 24, Article 14C NMSA 1978 may be cited as the "Health Care Work Force Data Collection, Analysis and Policy Act".

**History: Laws 2011, ch. 152, § 1; 2012, ch. 16, § 1.**

**The 2012 amendment,** effective May 16, 2012, changed the statutory reference from "The act" to "Chapter 24, Article 14C NMSA 1978".



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## 24-14C-2. Definitions.

As used in the Health Care Work Force Data Collection, Analysis and Policy Act:

A. "board" means any state health care work force licensing or regulatory board, including the New Mexico medical board; the New Mexico board of dental health care; the board of nursing; the board of pharmacy; any other licensing or regulatory board that the chancellor designates; any other health professional licensing board listed in Chapter 61 NMSA 1978; and the university;

B. "chancellor" means the chancellor for health sciences of the university of New Mexico;

C. "database" means the health care work force database created pursuant to the Health Care Work Force Data Collection, Analysis and Policy Act;

D. "ethnicity" means an individual's self-identification or affiliation as either "Hispanic or Latino" or "not Hispanic or Latino" according to cultural, historical, linguistic or religious ties;

E. "New Mexico center for health care workforce analysis" means a state entity that collects, analyzes and reports data regarding the state's health care work force and collaborates with the federal national center for health care workforce analysis pursuant to Section 5103 of the federal Patient Protection and Affordable Care Act;

F. "race" means an individual's self-identification or affiliation with one of the following categories used to identify individuals according to historical or phenotypical characteristics:

(1) American Indian or Alaska Native;

(2) Asian;

(3) Black or African American;

(4) Native Hawaiian or other Pacific Islander;

(5) White; or

(6) a mixture of any of the categories listed in Paragraphs (1) through (5) of this subsection; and

G. "university" means the university of New Mexico.

**History: Laws 2011, ch. 152, § 2; 2012, ch. 16, § 2; 2021, ch. 54, § 9.**

**The 2021 amendment,** effective June 18, 2021, removed the board of osteopathic medical examiners from the list of boards included in the definition of "board" as used in the Health Care Work Force Data Collection, Analysis and Policy Act; and in Subsection A, after "New Mexico medical board", deleted "the board of osteopathic medical examiners".

**The 2012 amendment,** effective May 16, 2012, transferred duties under the act from the health department to the University of New Mexico; in Subsection A, after "any other licensing and regulatory board that the", changed "secretary of health" to "chancellor" and after "Chapter 61 NMSA 1978; and the", changed "department" to "university"; added a new Subsection B and relettered former Subsection B as new Subsection C; deleted former Subsection C, which defined "department" as the department of health; and added Subsection G.

## 24-14C-3. Health care work force database; collection of data; housing of data; analysis and reporting.

A. Subject to the availability of state, federal or private foundation funding or other sources of funding, the chancellor shall create and maintain the "health care work force database". The chancellor shall:

(1) enter into agreements with entities to create, house and provide information to state agencies, the legislature and the governor and, as the legislature or governor deems appropriate, any others regarding the state's health care work force; and

(2) seek federal or other sources of funding to create a New Mexico center for health care workforce analysis and to ensure the additional funding and staffing needed to achieve the anticipated outcomes.

B. A board shall supply the university with data pertaining to licensed health care providers for inclusion in the database. A board shall collect a core essential data set at the time of new licensure or licensure renewal, including, but not limited to, a provider's:

(1) demographics, including race, ethnicity and primary and other languages spoken;

(2) practice status, including, but not limited to:

(a) active practices in New Mexico and other locations;



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(b) practice type; and

(c) practice settings, such as hospitals, public schools, higher education institutions, clinics and other clinical settings;

(3) education, training and primary and secondary specialties for all health professions as appropriate;

(4) average hours worked per week and the average number of weeks worked per year in the licensed profession over the past twelve months;

(5) percentage of practice engaged in direct patient care and in other activities, such as teaching, research and administration, in the licensed profession;

(6) practice plans for the next five years, including retiring from a health care profession, moving out of state or changing health care work hours; and

(7) professional liability insurance costs and availability as they relate to barriers to practice.

C. The chancellor shall provide to the department of health, in a manner that conforms to department of health rules, access to health care work force data that the university administers pursuant to the Health Care Work Force Data Collection, Analysis and Policy Act.

**History: Laws 2011, ch. 152, § 3; 2012, ch. 16, § 3.**

**The 2012 amendment,** effective May 16, 2012, transferred duties under the act from the health department to the University of New Mexico; required the chancellor to provide data to the health department; in Subsection A, changed "secretary of health" to "chancellor" in two instances; in Subsection B, in the first sentence, after "shall supply the", changed "department" to "university"; and added Subsection C.

**Temporary provisions.** — Laws 2012, ch. 16, § 8 provided that on July 1, 2012:

A. all data, appropriations, property, personnel and records related to data collection, analysis, storage or use pursuant to the Health Care Work Force Data Collection, Analysis and Policy Act shall be transferred from the department of health to the university of New Mexico; and

B. any contracts related to data collection, analysis, storage or use that are binding on the department of health pursuant to the Health Care Work Force Data Collection, Analysis and Policy Act shall be binding on the board of regents of the university of New Mexico.

## 24-14C-4. Database establishment and maintenance; delegation.

A. The chancellor may contract and collaborate with a private or public entity to establish and maintain the database, to analyze data collected, to develop reports for the legislature or the executive branch or to perform other duties to carry out the provisions of the Health Care Work Force Data Collection, Analysis and Policy Act.

B. An entity that establishes, maintains or analyzes data or develops reports by contract pursuant to Subsection A of this section shall provide to the department of health, in a manner that conforms to department of health rules, access to any health care work force data that the entity establishes, maintains, analyzes or reports.

**History: Laws 2011, ch. 152, § 4; 2012, ch. 16, § 4.**

**The 2012 amendment,** effective May 16, 2012, authorized the chancellor to contract with private or public entities to establish and maintain the database; required an entity that established and maintained the database to provide the department of health access to health care work force data that the entity established and maintained; designated the first paragraph as Subsection A and changed "secretary of health" to "chancellor"; and added Subsection B.

## 24-14C-5. Health care work force data collection by boards; mandatory compliance for applicants; reporting by boards; confidentiality of data; rulemaking.

A. An applicant for a license from a board or renewal of a license by a board shall provide the information prescribed by the chancellor pursuant to Subsection C of this section. This section applies to applicants for health professional licensure or renewal of health professional licensure pursuant to Chapter 61 NMSA 1978.

B. A board shall not approve a subsequent application for a license or renewal of a license until the applicant provides the information pursuant to Subsection C of this section.

C. A board shall adopt rules regarding the manner, form and content of reporting data; the consistency of data entry fields used; and the information that an applicant, pursuant to Subsection A



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of this section, shall provide to a board. At a minimum, the rules shall provide for a core essential data set, including the applicant's:

(1) demographics, including race, ethnicity and primary and other languages spoken;

(2) practice status, including, but not limited to:

(a) active practices in New Mexico and other locations;

(b) practice type; and

(c) practice settings, such as hospital, clinic or other clinical settings;

(3) education, training and primary and secondary specialties;

(4) average hours worked per week and the average number of weeks worked per year in the licensed profession;

(5) percentage of practice engaged in direct patient care and in other activities, such as teaching, research and administration, in the licensed profession; and

(6) practice plans for the next five years, including retiring from the health care profession, moving out of state or changing health care work hours.

D. A board shall report health care work force information collected pursuant to this section to the chancellor.

E. A board shall keep confidential and not release personally identifiable data collected under this section for any person licensed, registered or certified by the board. The provisions of this subsection do not apply to the release of information to a law enforcement agency for investigative purposes or to the release to the chancellor for state health planning purposes. A person with whom the university contracts to perform data collection, storage and analysis shall protect the privacy of that data. The chancellor shall ensure that the responses of applicants shall be kept confidential, including taking special precautions when the identity of an applicant may be ascertained due to the applicant's location or occupation.

F. A board shall promulgate rules as necessary to perform the board's duties pursuant to this section, including rules for collecting, storing and analyzing data in addition to the information required to be collected by the Health Care Work Force Data Collection, Analysis and Policy Act.

**History: Laws 2011, ch. 152, § 5; 2012, ch. 16, § 5.**

**The 2012 amendment,** effective May 16, 2012, transferred the duties of the secretary of health to the chancellor; in Subsection A, in the first sentence after "provide information prescribed by the" deleted "secretary of health" and added "chancellor"; in Subsection D, at the end of the sentence deleted "secretary of health" and added "chancellor"; and in Subsection E, in the second sentence after "release to the", deleted "secretary of health" and added "chancellor", in the third sentence after "A person with whom the", deleted "department" and added "university", and in the fourth sentence after "The", deleted "secretary of health" and added "chancellor".

## 24-14C-6. Health care work force work group; work force data analysis; recruitment planning; strategic plan for improving health care access; work force survey.

The chancellor for health sciences of the university of New Mexico shall convene a health care work force work group that includes representatives of health care consumers; health care providers; organized groups representing physicians, physician assistants, nurses, nurse practitioners, dentists, dental hygienists and pharmacists; health care work force training institutions; the department of health; the public education department; the higher education department; and the boards. The work group shall:

A. analyze and make recommendations to the legislature regarding incentives to attract qualified individuals, including those from minority groups underrepresented among health care professions, to pursue health care education and practice in New Mexico;

B. develop a short-term plan and a five-year plan to improve health care access, with a draft report on the plans to be submitted to the interim legislative health and human services committee by November 1, 2011. Beginning October 1, 2012, the work group shall make detailed annual reports to the legislative health and human services committee by October 1 of each year;



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C. analyze the collected data and make recommendations to the legislature for building healthier communities and improving health outcomes; and

D. devise an electronic survey, designed to be completed by applicants within fifteen minutes, for boards to provide to applicants for licensure or renewal of licensure, which includes questions regarding the information required pursuant to Subsection C of Section 24-14C-5 NMSA 1978 and any other survey questions that the chancellor and the work group deem appropriate.

**History: Laws 2011, ch. 152, § 6; 2012, ch. 16, § 6.**

**The 2012 amendment,** effective May 16, 2012, transferred the duties of the secretary of health to the chancellor; in the introductory sentence after "The", deleted "secretary of health" and added "chancellor for health sciences of the university of New Mexico" and after "health care work force training institutions, the", deleted "New Mexico health policy commission" and added "department of health"; and in Subsection D, after "any other survey questions that the", deleted "secretary of health" and added "chancellor".

**Temporary provisions.** — Laws 2012, ch. 16, § 7 amended Laws 2011, ch. 152, § 7 to provide that to carry out the provisions set forth in the Health Care Work Force Data Collection, Analysis and Policy Act, the chancellor for health sciences of the university of New Mexico shall seek funding pursuant to Section 5102 of the federal Patient Protection and Affordable Care Act, as well as funding from any other source, public or private, that the chancellor deems appropriate.

# ARTICLE 15

# Ski Safety

Sec.
24-15-1. Short title.
24-15-2. Purpose of act.
24-15-3. Definitions.
24-15-4. Insurance.
24-15-5. Penalty.
24-15-6. Provisions in lieu of others.
24-15-7. Duties of ski area operators with respect to skiing areas.
24-15-8. Duties of ski area operators with respect to ski lifts.
24-15-9. Duties of passengers.
24-15-10. Duties of the skiers.
24-15-11. Liability of ski area operators.
24-15-12. Liability of passengers.
24-15-13. Liability of skiers.
24-15-14. Limitation of actions; notice of claim.

## 24-15-1. Short title.

Chapter 24, Article 15 NMSA 1978 may be cited as the "Ski Safety Act".

**History: 1953 Comp., § 12-16-1, enacted by Laws 1969, ch. 218, § 1; recompiled as 1953 Comp., § 12-28-1, by Laws 1972, ch. 51, § 9; 1979, ch. 279, § 1.**

ANNOTATIONS

**Doctrine of comparative negligence** is applicable to claims brought under the Ski Safety Act where both the skier and the ski area operator are alleged to have breached statutory duties. *Lopez v. Ski Apache Resort*, 1992-NMCA-047, 114 N.M. 202, 836 P.2d 648, cert. denied, 113 N.M. 815, 833 P.2d 1181.

**Law reviews.** — For article, "Bartlett Revisited – New Mexico Tort Law Twenty Years After the Abolition of Joint and Several Liability – Part One," see 33 N.M.L. Rev. 1 (2003).

For article, "Tort Law – The Application of the Rescue Doctrine Under Comparative Negligence Principles: Govich v. North American Systems, Inc.", see 23 N.M.L. Rev. 349 (1993).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27A Am. Jur. 2d Entertainment and Sports Law § 54 et seq.

Private owner's liability to trespassing children for injury sustained by sledding, tobogganing, skiing, skating or otherwise sliding on his land, 19 A.L.R.3d 184.

## 24-15-2. Purpose of act.

A. In order to safeguard life, health, property and the welfare of this state, it is the policy of New Mexico to protect its citizens and visitors from unnecessary hazards in the operation of ski lifts and passenger aerial tramways and to require liability insurance to be carried by operators of ski lifts and tramways. The primary responsibility for the safety of operation, maintenance, repair and inspection of ski lifts and tramways rests with the operators of such devices. The primary responsibility for the safety of the individual skier while engaging in the sport of skiing rests with the skier himself. The state, through the Ski Safety Act, recognizes these responsibilities and duties on the part of the ski area operator and the skier.



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B. It is recognized that there are inherent risks in the sport of skiing, which should be understood by each skier and which are essentially impossible to eliminate by the ski area operator. It is the purpose of the Ski Safety Act to define those areas of responsibility and affirmative acts for which ski area operators shall be liable for loss, damage or injury and those risks which the skier or passenger expressly assumes and for which there can be no recovery.

**History: 1953 Comp., § 12-16-2, enacted by Laws 1969, ch. 218, § 2; recompiled as 1953 Comp., § 12-28-2, by Laws 1972, ch. 51, § 9; 1979, ch. 279, § 2; 1997, ch. 211, § 1.**

**The 1997 amendment,** effective June 20, 1997, designated the existing paragraphs as Subsections A and B, respectively, and inserted "or passenger" following "skier" near the end of Subsection B.

**ANNOTATIONS**

**Duties for ski operators.** — Section 24-15-7 NMSA 1978, not this section, sets out the specific duties for ski operators in a skiing area. *Barba v. Taos Ski Valley, Inc.*, 1998 Colo. J. C.A.R. 2324 (10th Cir. 1998), decision without published opinion, 145 F.3d 1345 (10th Cir. 1998).

## 24-15-3. Definitions.

As used in the Ski Safety Act:

A. "ski lift" means any device operated by a ski area operator used to transport passengers by single or double reversible tramway, chair lift or gondola lift, T-bar lift, J-bar lift, platter lift or similar device or a fiber rope tow;

B. "passenger" means any person, at any time in the year, who is lawfully using a ski lift or is waiting to embark or has recently disembarked from a ski lift and is in its immediate vicinity;

C. "ski area" means the property owned, permitted, leased or under the control of the ski area operator and administered as a single enterprise within the state;

D. "ski area operator" means any person, partnership, corporation or other commercial entity and its agents, officers, employees or representatives who has operational responsibility for any ski area or ski lift;

E. "skiing" means participating in the sport in which a person slides on snow, ice or a combination of snow and ice while using skis;

F. "skiing area" means all slopes, trails, terrain parks and competition areas, not including any ski lift;

G. "skier" means any person, including a person enrolled in ski school or other class for instruction, who is on skis and present at a skiing area under the control of a ski area operator for the purpose of engaging in the sport of skiing by utilizing the ski slopes and trails and does not include a passenger;

H. "ski slopes and trails" means those areas designated by the ski area operator to be used by skiers for the purpose of participating in the sport of skiing;

I. "ski retention device" means a device designed to help prevent runaway skis; and

J. "skis" means any device used for skiing, including alpine skis, telemark skis, cross-country skis, mono-skis, snowboards, bladerunners, adaptive devices used by disabled skiers, or tubes, sleds or any other device used to accomplish the same or a similar purpose to participate in the sport of skiing.

**History: Laws 1969, ch. 218, § 3; 1953 Comp., § 12-16-3; recompiled as 1953 Comp., § 12-28-3 by Laws 1972, ch. 51, § 9; 1979, ch. 279, § 3; 1997, ch. 211, § 2.**

**The 1997 amendment,** effective June 20, 1997, inserted "at any time in the year" near the beginning of Subsection B, added Subsections E and J, redesignated former Subsections E to H as Subsections F to I, inserted "terrain parks and competition areas" in Subsection F, inserted "including a person enrolled in ski school or other class for instruction, who is on skis and" near the beginning of Subsection G, substituted "a passenger" for "the use of a ski lift" at the end of Subsection G, and made minor stylistic changes throughout the section.

## 24-15-4. Insurance.

A. Every operator shall file with the state corporation commission [public regulation commission] and keep on file therewith proof of financial responsibility in the form of a current insurance policy in a form approved by the commission, issued by an insurance company authorized to do



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business in the state, conditioned to pay, within the limits of liability herein prescribed, all final judgments for personal injury or property damage proximately caused or resulting from negligence of the operator covered thereby, as such negligence is defined and limited by the Ski Safety Act. The minimum limits of liability insurance to be provided by operators shall be as follows:

SKI SAFETY ACT
LIABILITY INSURANCE
LIMITS OF LIABILITY
REQUIRED MINIMUM COVERAGES
FOR INJURIES, DEATH OR DAMAGES

| KIND AND NUMBER OF LIFTS OPERATED | LIMITS FOR BODILY INJURY TO OR DEATH OF ONE PERSON | LIMITS FOR BODILY INJURY TO OR DEATH OF ALL PERSONS INJURED OR KILLED IN ANY ONE ACCIDENT | PROPERTY DAMAGE |
|---|---|---|---|
| Not more than three surface lifts | $100,000 | $300,000 | $5,000 |
| Not more than three ski lifts, including one or more chair lifts | 250,000 | 500,000 | 25,000 |
| More than three ski lifts or one or more tramways | 500,000 | 1,000,000 | 50,000. |

B. No ski lift or tramway shall be operated in this state after the effective date of the Ski Safety Act unless a current insurance policy as required herein is in effect and properly filed with the state corporation commission [public regulation commission]. Each policy shall contain a provision that it cannot be canceled prior to its expiration date without thirty days' written notice of intent to cancel served by registered mail on the insured and on the commission.

**History: 1953 Comp., § 12-16-4, enacted by Laws 1969, ch. 218, § 4; recompiled as 1953 Comp., § 12-28-4, by Laws 1972, ch. 51, § 9; 1997, ch. 211, § 3.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1998, ch. 108, § 80 deemed that all references to the state corporation commission be construed as references to the public regulation commission.

**Cross references.** — For duties of operators, *see* 24-15-7 NMSA 1978.

For public regulation commission, *see* N.M. Const., art. XI, § 1.

**The 1997 amendment,** effective June 20, 1997, designated the existing paragraphs as Subsections A and B respectively, in Subsection A, added the table heading which reads "SKI SAFETY ACT LIABILITY INSURANCE LIMITS OF LIABILITY REQUIRED MINIMUM COVERAGES FOR INJURIES, DEATH OR DAMAGES", increased the minimum limits of liability insurance throughout the table, and made a minor stylistic change in Subsection B.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27A Am. Jur. 2d Entertainment and Sports Law § 4.

## 24-15-5. Penalty.

Any operator convicted of operating a ski lift or aerial passenger tramway without having obtained and kept in force an insurance policy as required by the Ski Safety Act is guilty of a misdemeanor punishable by a fine of not more than five hundred dollars ($500) for each day of illegal operation. The attorney general or the district attorney of the county where the ski area is located has the power to bring proceedings in the district court of the county in which the ski area is located to enjoin the operation of any ski lift or tramway being operated without a current insurance policy, in the amounts prescribed herein, being obtained and kept in force and covering the operator concerned.



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**History: 1953 Comp., § 12-16-5, enacted by Laws 1969, ch. 218, § 5; recompiled as 1953 Comp., § 12-28-5, by Laws 1972, ch. 51, § 9; 1997, ch. 211, § 4.**

**The 1997 amendment,** effective June 20, 1997, substituted "having obtained and kept in force" for "having filed" near the beginning of the section, substituted "five hundred dollars ($500)" for "one hundred dollars ($100)" in the first sentence, and substituted "being obtained and kept in force" for "being on file" near the end of the section.

## 24-15-6. Provisions in lieu of others.

Provisions of the Ski Safety Act are in lieu of all other regulations, registration or licensing requirements for ski areas, ski lifts and tramways. Ski lifts and tramways shall not be construed to be common carriers within the meaning of the laws of New Mexico.

**History: 1953 Comp., § 12-16-6, enacted by Laws 1969, ch. 218, § 6; recompiled as 1953 Comp., § 12-28-6, by Laws 1972, ch. 51, § 9.**

ANNOTATIONS

**Skier as third party beneficiary of permit between United States and ski resort.** — The dismissal of an injured skier's claim that she was a third party beneficiary under the terms of the permit between the United States and the ski resort was proper since the Ski Safety Act provided the exclusive remedy available to the skier. *Kidd v. Taos Ski Valley, Inc.*, 88 F.3d 848 (10th Cir. 1996).

## 24-15-7. Duties of ski area operators with respect to skiing areas.

Every ski area operator shall have the following duties with respect to the operation of a skiing area:

A. to mark all snow-maintenance vehicles and to furnish such vehicles with flashing or rotating lights, which shall be in operation whenever the vehicles are working or are in movement in the skiing area;

B. to mark with a visible sign or other warning implement the location of any hydrant or similar equipment used in snow-making operations and located on ski slopes and trails;

C. to mark in a plainly visible manner the top or entrance to each slope, trail or area with the appropriate symbol for its relative degree of difficulty, using the symbols established or approved by the national ski areas association; and those slopes, trails or areas which are closed, or portions of which present an unusual obstacle or hazard, shall be marked at the top or entrance or at the point of the obstacle or hazard with the appropriate symbols as are established or approved by the national ski areas association or by the New Mexico ski area operators association;

D. to maintain one or more trail boards at prominent locations at each ski area displaying that area's network of ski trails and slopes with each trail and slope rated in accordance with the symbols and containing a key to the symbols;

E. to designate by trail board or otherwise at the top of or entrance to the subject trail or slope which trails or slopes are open or closed;

F. to place or cause to be placed, whenever snow-maintenance vehicles or snow-making operations are being undertaken upon any trail or slope while such trail or slope is open to the public, a conspicuous notice to that effect at or near the top or entrance of such trail or slope;

G. to provide ski patrol personnel trained in first aid, which training meets at least the requirements of the national ski patrol outdoor emergency care course, and also trained in winter rescue and toboggan handling to serve the anticipated number of injured skiers and to provide personnel trained for the evacuation of passengers from stalled aerial ski lifts. A first aid room or building shall be provided with adequate first aid supplies, and properly equipped rescue toboggans shall be made available at all reasonable times at the top of ski slopes and trails to transport injured skiers from the ski slopes and trails to the first aid room;

H. to post notice of the requirements of the Ski Safety Act concerning the use of ski retention devices;

I. to warn of or correct particular hazards or dangers known to the operator where feasible to do so; and

J. to warn of snowmobiles or all-terrain vehicles (ATV's) operated on the ski slopes or trails with at least one lighted headlamp, one lighted red tail lamp, a brake system and a fluorescent flag



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that is at least forty square inches and is mounted at least six feet above the bottom of the tracks or tires.

**History: Laws 1969, ch. 218, § 7; 1953 Comp., § 12-16-7; recompiled as 1953 Comp., § 12-28-7 by Laws 1972, ch. 51, § 9; 1979, ch. 279, § 4; 1997, ch. 211, § 5.**

**The 1997 amendment,** effective June 20, 1997, rewrote Subsection C, inserted "at the top of or entrance to the subject trail or slope" in Subsection E, inserted "or entrance" near the end of Subsection F, substituted "meets at least the requirements of the national ski patrol outdoor emergency care course" for "meets the requirements of the American Red Cross advanced first aid course" near the beginning of Subsection G, added Subsection J, and made minor stylistic changes in Subsections H and I.

ANNOTATIONS

**Duty to provide warning** to skiers of the degree of difficulty of ski slopes or the existence of unusual obstacles or hazards located in skiing areas, imposed under Subsections C and I, may assume additional significance as the difficulty of the skiing area becomes more pronounced, or the degree of danger posed by the risk of collision with an unprotected ski tower located in the designated skiing area increases. *Lopez v. Ski Apache Resort*, 1992-NMCA-047, 114 N.M. 202, 836 P.2d 648, cert. denied, 113 N.M. 815, 833 P.2d 1181.

**Duty to warn.** — A ski resort did not breach its duty to warn under this section when it installed a single strand diversionary rope and blocked off an otherwise skiable area since the evidence was that the rope had been in place for at least 12 years and over one million skiers had managed to ski past it without injury. *Kidd v. Taos Ski Valley, Inc.*, 88 F.3d 848 (10th Cir. 1996).

**Conspicuous warnings not required.** — The Ski Safety Act does not require the trail warnings of unusual obstacles or hazards to be conspicuous. *Barba v. Taos Ski Valley, Inc.*, 145 F.3d 1345 (10th Cir. 1998).

**Duties for ski operators.** — This section, not 24-15-2 NMSA 1978, sets out the specific duties for ski operators in a skiing area. *Barba v. Taos Ski Valley, Inc.*, 145 F.3d 1345 (10th Cir. 1998).

**Warning adequate.** — Where the uncontroverted evidence was that Taos did not "know" that the picnic table near ski trail was a hazard because it had been at that same location for more than twenty years and no one had collided with it, the trail map board marking the location of the picnic table on the ski run and the sign warning of unmarked obstacles were adequate under the standards of the National Ski Areas Association, and, therefore, under the Ski Safety Act. *Barba v. Taos Ski Valley, Inc.*, 1998 Colo. J. C.A.R. 2324, (10th Cir. 1998), decision without published opinion, 145 F.3d 1345 (10th Cir. 1998).

**"Warn or correct" hazards.** — Where skier was injured by colliding with picnic table while skiing and argued that rather than warn of the picnic table, the operator should have corrected the hazard, the plain language of the Ski Safety Act specifically states that the operator must "warn or correct" hazards. *Barba v. Taos Ski Valley, Inc.*, 1998 Colo. J. C.A.R. 2324, (10th Cir. 1998), decision without published opinion, 145 F.3d 1345 (10th Cir. 1998).

**Doctrine of comparative negligence** is applicable to claims brought under the act where both the skier and the ski area operator are alleged to have breached statutory duties. *Lopez v. Ski Apache Resort*, 1992-NMCA-047, 114 N.M. 202, 836 P.2d 648, cert. denied, 113 N.M. 815, 833 P.2d 1181.

**General duty to novice skier.** — The scope of the duty imposed on ski operations in Subsection I of this section was not broad enough to encompass the duty to provide a general warning to a novice skier that, because of the skier's limited abilities, portions of a beginner slope may have been dangerous. *Philippi v. Sipapu, Inc.*, 961 F.2d 1492 (10th Cir. 1992).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27A Am. Jur. 2d Entertainment and Sports Law §§ 54 et seq., 81, 82.

Ski resort's liability for skier's injuries resulting from condition of ski run or slope, 55 A.L.R.4th 632.

## 24-15-8. Duties of ski area operators with respect to ski lifts.

Every ski area operator shall have the duty to operate, repair and maintain all ski lifts in safe condition. The ski area operator, prior to December 1 of each year, shall certify to the state corporation commission [public regulation commission] the policy number and name of the company providing liability insurance for the ski area and the date of the ski lift inspections and the name of the person making such inspections.

**History: Laws 1969, ch. 218, § 8; 1953 Comp., § 12-16-8; recompiled as 1953 Comp., § 12-28-8 by Laws 1972, ch. 51, § 9; 1979, ch. 279, § 5.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1998, ch. 108, § 80 deemed that all references to the state corporation commission be construed as references to the public regulation commission.

**Cross references.** — For public regulation commission, *see* N.M. Const., art. XI, § 1.

ANNOTATIONS

**The doctrine of comparative negligence** is applicable to claims brought under the act where both the skier and the ski area operator are alleged to have breached statutory duties. *Lopez v. Ski Apache Resort*, 1992-NMCA-047, 114 N.M. 202, 836 P.2d 648, cert. denied, 113 N.M. 815, 833 P.2d 1181.

## 24-15-9. Duties of passengers.

Every passenger shall have the duty to conduct himself carefully and not to:

A. board or embark upon or disembark from a ski lift except at an area designated for such purpose;



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B. drop, throw or expel any object from a ski lift;

C. do any act which shall interfere with the running or operation of a ski lift;

D. use any ski lift unless the passenger has the ability to use it safely without any instruction on its use by the ski area operator or requests and receives instruction before boarding the ski lift;

E. willfully or negligently engage in any type of conduct which contributes to or causes injury to any person;

F. embark on a ski lift without the authority of the ski area operator;

G. use any ski lift without engaging such safety or restraining devices as may be provided; or

H. wear skis without properly securing ski retention devices; or

I. use a ski lift while intoxicated or under the influence of any controlled substance.

**History: 1978 Comp., § 24-15-9, enacted by Laws 1979, ch. 279, § 6.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27A Am. Jur. 2d Entertainment and Sports Law § 88 et seq.

## 24-15-10. Duties of the skiers.

A. It is recognized that skiing as a recreational sport is inherently hazardous to skiers, and it is the duty of each skier to conduct himself carefully.

B. A person who takes part in the sport of skiing accepts as a matter of law the dangers inherent in that sport insofar as they are obvious and necessary. Each skier expressly assumes the risk of and legal responsibility for any injury to person or property which results from participation in the sport of skiing, in the skiing area, including any injury caused by the following: variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees or other forms of forest growth or debris; lift towers and components thereof, pole lines and snow-making equipment which are plainly visible or are plainly marked in accordance with the provisions of Section 24-15-7 NMSA 1978; except for any injuries to persons or property resulting from any breach of duty imposed upon ski area operators under the provisions of Sections 24-15-7 and 24-15-8 NMSA 1978. Therefore, each skier shall have the sole individual responsibility for knowing the range of his own ability to negotiate any slope or trail, and it shall be the duty of each skier to ski within the limits of the skier's own ability, to maintain reasonable control of speed and course at all times while skiing, to heed all posted warnings, to ski only on a skiing area designated by the ski area operator and to refrain from acting in a manner which may cause or contribute to the injury of anyone.

C. Responsibility for collisions by any skier while actually skiing, with any person or object, shall be solely that of each individual involved in the collision, except where an employee, agent or officer of the ski area operator is personally involved in a collision while in the course and scope of his employment or where a collision resulted from any breach of duty imposed upon a ski area operator under the provisions of Sections 24-15-7 or 24-15-8 NMSA 1978. Each skier has the duty to stay clear of and avoid collisions with snow-maintenance equipment, all-terrain vehicles and snowmobiles marked in compliance with the provisions of Subsections A and J of Section 24-15-7 NMSA 1978, all other vehicles, lift towers, signs and any other structures, amenities or equipment on the ski slopes and trails or in the skiing area.

D. No person shall:

(1) place any object in the skiing area or on the uphill track of any ski lift which may cause a passenger or skier to fall;

(2) cross the track of any T-bar lift, J-bar lift, platter lift or similar device or a fiber rope tow, except at a designated location;

(3) when injured while skiing or using a ski lift or, while skiing, when involved in a collision with any skier or object in which an injury results, leave the ski area before giving his name and current address to the ski area operator, or representative or employee of the ski area operator, and the location where the injury or collision occurred and the circumstances thereof; provided, however, in the event a skier fails to give the notice required by this paragraph, a court, in determining whether or not such failure constitutes a violation of the Ski Safety Act, may consider the reasonableness or feasibility of giving such notice; or



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(4) use a ski lift, skiing area, slopes or trails while intoxicated or under the influence of any controlled substance.

E. No skier shall fail to wear retention straps or other ski retention devices to help prevent runaway skis.

F. Any skier upon being injured shall indicate, to the ski patrol personnel offering first aid treatment or emergency removal to a first aid room, his acceptance or rejection of such services as provided by the ski area operator. If such service is not refused or if the skier is unable to indicate his acceptance or rejection of such service, the acceptance of the service is presumed to have been accepted by the skier. Such acceptance shall not constitute a waiver of any action for negligent provision of the service by the ski patrol personnel.

**History: 1978 Comp., § 24-15-10, enacted by Laws 1979, ch. 279, § 7; 1997, ch. 211, § 6.**

**The 1997 amendment,** effective June 20, 1997, deleted the former fourth sentence of Subsection B relating to responsibilities for collisions by skiers, added Subsection C and redesignated the remaining subsections accordingly, and inserted "skiing area, slopes or trails" in Paragraph D(4).

ANNOTATIONS

**Failure of a skier to give notice of her alleged injury** to the ski lift operator was not a proper ground for summary judgment for the operator, where there was no evidence that any alleged failure of the skier to comply with the provisions of this section was causally related to the loss or damage claimed by the skier. *Wood v. Angel Fire Ski Corp.*, 1989-NMCA-021, 108 N.M. 453, 774 P.2d 447.

**Doctrine of comparative negligence.** — The doctrine of comparative negligence is applicable to claims brought under the Act where both the skier and the ski area operator are alleged to have breached statutory duties. *Lopez v. Ski Apache Resort*, 1992-NMCA-047, 114 N.M. 202, 836 P.2d 648, cert. denied, 113 N.M. 815, 833 P.2d 1181.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27A Am. Jur. 2d Entertainment and Sports Law § 88 et seq.

Skier's liability for injuries to or death of another person, 75 A.L.R.5th 583.

## 24-15-11. Liability of ski area operators.

Any ski area operator shall be liable for loss or damages caused by the failure to follow the duties set forth in Sections 24-15-7 and 24-15-8 NMSA 1978 where the violation of duty is causally related to the loss or damage suffered, and shall continue to be subject to liability in accordance with common-law principles of vicarious liability for the willful or negligent actions of its principals, agents or employees which cause injury to a passenger, skier or other person. The ski area operator shall not be liable to any passenger or skier acting in violation of his duties as set forth in Sections 24-15-9 and 24-15-10 NMSA 1978 where the violation of duty is causally related to the loss or damage suffered.

**History: 1978 Comp., § 24-15-11, enacted by Laws 1979, ch. 279, § 8.**

ANNOTATIONS

**Failure to stop ski lift.** — Genuine issue of material fact, precluding summary judgment, existed concerning whether, despite any alleged negligence attributable to a skier, the ski lift operator negligently failed to stop the ski lift once he became aware that the skier had just disembarked from the ski lift, was unable to move, and was in a position of peril. *Wood v. Angel Fire Ski Corp.*, 1989-NMCA-021, 108 N.M. 453, 774 P.2d 447.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Liability of operator of skiing, tobogganing or bobsledding facilities for injury to patron or participant, 94 A.L.R.2d 1431, 95 A.L.R.3d 203.

Ski resort's liability for skier's injuries resulting from condition of ski run or slope, 55 A.L.R.4th 632.

## 24-15-12. Liability of passengers.

Any passenger shall be liable for loss or damages resulting from violations of the duties set forth in Section 24-15-9 NMSA 1978, and shall not be able to recover from the ski area operator for any losses or damages where the violation of duty is causally related to the loss or damage suffered.

**History: 1978 Comp., § 24-15-12, enacted by Laws 1979, ch. 279, § 9.**

## 24-15-13. Liability of skiers.

Any skier shall be liable for loss or damages resulting from violations of the duties set forth in Section 24-15-10 NMSA 1978, and shall not be able to recover from the ski area operator



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for any losses or damages where the violation of duty is causally related to the loss or damage suffered.

**History: 1978 Comp., § 24-15-13, enacted by Laws 1979, ch. 279, § 10.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Skier's liability for injuries to or death of another person, 75 A.L.R.5th 583.

## 24-15-14. Limitation of actions; notice of claim.

A. Unless a ski area operator is in violation of the Ski Safety Act, with respect to the skiing area and ski lifts, and the violation is a proximate cause of the injury complained of, no action shall lie against such ski area operator by any skier or passenger or any representative of a skier or passenger. This prohibition shall not prevent the bringing of an action against a ski area operator for damages arising from injuries caused by negligent operation, maintenance or repair of the ski lift.

B. No suit or action shall be maintained against any ski area operator for injuries incurred as a result of the use of a ski lift or ski area unless the same is commenced within three years of the time of the occurrence of the injuries complained of.

**History: 1978 Comp., § 24-15-14, enacted by Laws 1979, ch. 279, § 11.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Liability of operator of skiing, tobogganing or bobsledding facilities for injury to patron or participant, 94 A.L.R.2d 1431, 95 A.L.R.3d 203.

# ARTICLE 15A

# Search and Rescue

Sec.
24-15A-1. Short title.
24-15A-2. Purpose of act.
24-15A-3. Definitions.
24-15A-4. State search and rescue resource officer; position created.
24-15A-5. State search and rescue resource officer; powers and duties.
24-15A-6. State search and rescue review board created; membership; duties and responsibilities; terms.

## 24-15A-1. Short title.

This act [24-15A-1 through 24-15A-6 NMSA 1978] may be cited as the "Search and Rescue Act".

**History: 1978 Comp., § 24-15A-1, enacted by Laws 1978, ch. 107, § 1.**

**Cross references.** — For rules promulgated pursuant to the Search and Rescue Act, *see* Certification for Search and Rescue Persons, 10.24.1 NMAC.

## 24-15A-2. Purpose of act.

It is the purpose of the Search and Rescue Act:

A. to prepare, organize and coordinate efforts of federal, state and local governmental agencies and volunteer organizations for prompt and efficient search, location, rescue, recovery, care and treatment of persons lost, entrapped or in physical danger;

B. to further coordinate national and state search and rescue agreements; and

C. to develop and administer a statewide plan for search and rescue.

**History: 1978 Comp., § 24-15A-2, enacted by Laws 1978, ch. 107, § 2.**



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## 24-15A-3. Definitions.

As used in the Search and Rescue Act:

A. "search and rescue" or "SAR" means the employment, coordination and utilization of available resources and personnel in locating, relieving the distress and preserving the lives of and removing survivors from the site of a disaster, emergency or hazard to a place of safety in the case of lost, stranded, entrapped or injured persons;

B. "board" means the state search and rescue review board;

C. "AFRCC" means the air force rescue coordination center, which is the federal agency responsible for coordinating federal SAR activities within the inland region pursuant to the national search and rescue plan;

D. "state SAR control agency" means the department of public safety;

E. "state SAR mission initiator" means the New Mexico state police officer so appointed and SAR trained;

F. "state SAR resource officer" means the official located within the department of public safety responsible for coordinating SAR resources and administering the state SAR plan;

G. "field coordinator" means a person certified by the board with special training and expertise responsible for the efficient organization and conduction of a SAR mission;

H. "civil air patrol" means the civil air patrol division of the department of military affairs and an air force auxiliary responsible for coordinating air searches which are authorized by the AFRCC;

I. "mission" means each separate group effort in the employment, direction and guidance of personnel and facilities in searching for and rendering aid to persons lost or in distress;

J. "chief" means the chief of the New Mexico state police division of the department of public safety; and

K. "director" means the director of the technical and emergency support division of the department of public safety.

**History: 1978 Comp., § 24-15A-3, enacted by Laws 1978, ch. 107, § 3; 1979, ch. 202, § 8; 1989, ch. 204, § 16.**

**Cross references.** — For the public safety department, *see* Chapter 9, Article 19 NMSA 1978.

For the civil air patrol division, *see* Chapter 20, Article 7 NMSA 1978.

## 24-15A-4. State search and rescue resource officer; position created.

A. The position of "state search and rescue resource officer" is created within the department of public safety.

B. The state search and rescue resource officer shall be a noncommissioned employee.

C. The state search and rescue resource officer shall be the chief administrator of the state search and rescue plan.

**History: 1978 Comp., § 24-15A-3, enacted by Laws 1978, ch. 107, § 4; 1979, ch. 202, § 8; 1989, ch. 204, § 17.**

## 24-15A-5. State search and rescue resource officer; powers and duties.

The state search and rescue resource officer shall, with the approval of the director:

A. compile, maintain and disseminate an inventory of resources available in the state;

B. compile, maintain and disseminate rosters of persons, agencies and organizations available for search and rescue purposes;

C. develop a training program for the certification of search and rescue instructors and, by regulation, adopt a system of certification of search and rescue persons;

D. act as contact agent for the state in search and rescue matters;

E. develop and periodically review requirements for insurance coverage for search and rescue volunteers;

F. coordinate the training of mission initiators and field coordinators;



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G. maintain records of missions at the state SAR control agency; and

H. submit to the risk management division of the general services department claims for coverage pursuant to Section 13-5-1 NMSA 1978 for damage to personal property of volunteers incurred in the course and scope of an authorized search and rescue mission.

**History: 1978 Comp., § 24-15A-5, enacted by Laws 1978, ch. 107, § 5; 1979, ch. 202, § 10; 1989, ch. 204, § 18; 2019, ch. 234, § 1.**

**Cross references.** — For rules promulgated pursuant to the Search and Rescue Act, *see* Certification for Search and Rescue Persons, 10.24.1 NMAC.

**The 2019 amendment,** effective July 1, 2019, required the state search and rescue officer to submit insurance claims for search and rescue volunteers' personal property damaged during the course of an authorized mission; added new Subsection H.

## 24-15A-6. State search and rescue review board created; membership; duties and responsibilities; terms.

A. There is created a policy advisory committee, to be known as the "state search and rescue review board", whose duty it is to evaluate the operation of the New Mexico search and rescue plan; evaluate problems of specific missions; and make findings of fact and recommendations to the chief, director and other appropriate authorities. The board shall consist of the state search and rescue resource officer, who shall be a nonvoting member, and seven members appointed by the governor as follows:

(1) the secretary of public safety or his designee;

(2) the secretary of health or his designee;

(3) a representative of the civil air patrol division of the department of military affairs;

(4) a representative of the New Mexico emergency services council;

(5) a member certified as a search and rescue person;

(6) a member of the New Mexico sheriff's association;

(7) the chief of the New Mexico state police division of the department of public safety or his designee; and

(8) a member of the general public who shall act as chairman of the board and who shall vote only in case of a tie.

B. The board shall have the duty and responsibility to:

(1) meet at least quarterly or more frequently at the call of the chairman;

(2) evaluate the operation and effectiveness of the state SAR plan and make recommendations to the director;

(3) evaluate the operational effectiveness of specific missions, make findings of fact and recommendations to the chief and other appropriate authorities for the elimination of problems and the improvement of overall conduct of the mission;

(4) hold hearings and invite individuals to appear and testify before the board and reimburse such witnesses for travel expenses incurred;

(5) prepare a report for the attorney general's office in cases of victim hospitalization or death; and

(6) with the approval of the chief, certify field coordinators and confirm certification of SAR persons.

C. The governor shall appoint the seven appointed members for staggered terms of three years each made in such a manner that the terms of not more than three members expire on January 1 of 1979, 1980 and 1981. Thereafter, appointments shall be made so that the terms of not more than three members expire on January 1 of each year. Vacancies shall be filled by appointment by the governor for the unexpired term. Any member of the board who misses more than two consecutive meetings shall automatically be removed as a member of the board.

**History: 1978 Comp., § 24-15A-6, enacted by Laws 1978, ch. 107, § 6; 1979, ch. 202, § 11; 1983, ch. 296, § 28; 1989, ch. 204, § 19; 1993, ch. 15, § 1.**

**Cross references.** — For the public safety department, *see* Chapter 9, Article 19 NMSA 1978.

For the civil air patrol division, *see* Chapter 20, Article 7 NMSA 1978.

**The 1993 amendment,** effective June 18, 1993, in Subsection A, deleted "and environment" following "health" in Paragraph (2) and inserted "or his designee" in Paragraph (7).



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# ARTICLE 16

# Dee Johnson Clean Indoor Air

Sec.
24-16-1. Short title.
24-16-2. Declaration of policy and intent; public health.
24-16-3. Definitions.
24-16-4. Smoking prohibited.
24-16-5. Repealed.
24-16-6. Repealed.
24-16-7. Repealed.
24-16-8. Repealed.
24-16-9. Repealed.
24-16-10. Repealed.
24-16-11. Repealed.
24-16-12. Smoking-permitted areas.
24-16-13. Prohibition of smoking near entrances, windows and ventilation systems.
24-16-14. Responsibilities of employers.
24-16-15. Posted smokefree and smoking-permitted areas.
24-16-16. Enforcement.
24-16-17. Violations.
24-16-18. Penalties.
24-16-19. Nonretaliation; nonwaiver.
24-16-20. Explicit nonpreemption.

## 24-16-1. Short title.

Chapter 24, Article 16 NMSA 1978 may be cited as the "Dee Johnson Clean Indoor Air Act".

**History: Laws 1985, ch. 85, § 1; 2007, ch. 20, § 1.**

**The 2007 amendment,** effective June 15, 2007, changed "This act" to "Chapter 24, Article 16 NMSA 1978" and changed the name of the "Clean Indoor Air Act" to the "Dee Johnson Clean Indoor Air Act".

**Severability.** — Laws 2007, ch. 20, § 14, effective June 15, 2007, provided for the severability of the act if any part or application thereof is held invalid.

**ANNOTATIONS**

**Banning smoking entirely in schools.** — Although the Clean Indoor Air Act (now Dee Johnson Clean Indoor Air Act) allows the use of tobacco products by adults in smoking-permitted areas of public buildings, including school buildings, owned or leased by the state or any of its political subdivisions, the state board of education or local school boards can choose to ban smoking by both adults and minors on public school campuses. 1994 Op. Att'y Gen. No. 94-03.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and application of nonsmoking regulations, 65 A.L.R.4th 1205.

Secondary smoke as battery, 46 A.L.R.5th 813.

## 24-16-2. Declaration of policy and intent; public health.

The legislature finds and declares that the smoking of tobacco, or any other weed or plant, is a positive danger to health and a health hazard to those who are present in enclosed places and that smoking in such areas should be confined to designated smoking areas. The legislature further declares its intention to protect the public health from such hazards in public places and places of employment without imposing exorbitant costs on persons in management and control of the places subject to the [Dee Johnson] Clean Indoor Air Act. It is not the intent of the legislature to preempt the field of regulation of smoking in public from the enactment of ordinances by local governing bodies which are not inconsistent with the [Dee Johnson] Clean Indoor Air Act.

**History: Laws 1985, ch. 85, § 2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Constitutional law, validity, construction and application of municipal ordinances restricting smoking in restaurants, 105 A.L.R. 5th 333.

## 24-16-3. Definitions.

As used in the Dee Johnson Clean Indoor Air Act:

A. "bar" means an establishment that is devoted to the selling or serving of alcoholic beverages for consumption by patrons on the premises and in which the serving of food is only incidental to the consumption of those beverages, including taverns, nightclubs, cocktail lounges and cabarets;

B. "cigar bar" means an establishment that:



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(1) is a bar as defined in Subsection A of this section; and

(2) is engaged in the business of selling cigars for consumption by patrons on the premises and generates ten percent or more of its total annual gross revenue or at least ten thousand dollars ($10,000) in annual sales from the sale of cigars, not including any sales from vending machines. A cigar bar that fails to generate at least ten percent of its total annual sales from the sale of cigars in the calendar year after December 31, 2006, not including sales from vending machines, shall not be defined as a cigar bar and shall not thereafter be known as such regardless of sales figures. A cigar bar shall agree to provide adequate information to demonstrate to the state's satisfaction compliance with this definition;

C. "department" means the department of health;

D. "designated outdoor smoking area" means an area where smoking may be permitted, designated by an employer or manager, outside an indoor workplace or indoor public place; provided that the following conditions are maintained:

(1) smoking shall not be permitted near any building entrance, including a door, window or ventilation system of any facility where smoking is prohibited under the provisions of the Dee Johnson Clean Indoor Air Act, so as to prevent secondhand smoke from entering the indoor workplace or indoor public place; and

(2) employees or members of the general public are not required to walk through the smoking area to gain entrance to the indoor workplace or indoor public place;

E. "e-cigarette" means a product containing or delivering nicotine or another substance intended for human consumption that can be used by a person in any manner for the purpose of inhaling vapor or aerosol from the product, including a device, whether manufactured, distributed, marketed or sold as an e-cigarette, e-cigar, e-pipe, e-hookah or vape pen or under another product name or descriptor;

F. "employer" means an individual, a partnership, a corporation or the state or a political subdivision of the state that employs the services of one or more individuals;

G. "enclosed" means an interior space predominantly or totally bounded on all sides and above by physical barriers, regardless of whether such barriers consist of or include uncovered openings, screened or otherwise partially covered openings or open or closed windows;

H. "indoor public place" means the enclosed area within a governmental or nongovernmental place to which the public is invited or in which the public is permitted regardless of whether work or public business, meetings or hearings occur at any given time;

I. "indoor workplace" means an enclosed place where one or more persons engage in work, including lobbies, reception areas, offices, conference and meeting rooms, employee cafeterias and lunchrooms, break rooms and employee lounges, classrooms, auditoriums, hallways, stairways, waiting areas, elevators and restrooms and includes all indoor workplaces and enclosed parts regardless of whether work occurs at any given time;

J. "private club" means an organization, whether incorporated or not, that is the owner, lessee or occupant of a building or portion thereof used exclusively for the organization's purposes at all times, that is operated solely for recreational, fraternal, social, patriotic, political, benevolent or athletic purposes, but not for pecuniary gain, and that only sells alcoholic beverages incidental to its operation. The organization shall have bylaws or a constitution to govern its activities and shall have been granted an exemption as a club under the provisions of Section 501 of the Internal Revenue Code of 1986, as amended;

K. "retail tobacco store" means a retail store, used primarily for the sale of tobacco products, including e-cigarettes, and accessories and in which the sale of other products is merely incidental, including smoke shops, cigar shops or hookah lounges, and does not include establishments that offer for sale alcoholic beverages for consumption by patrons on the premises;

L. "secondhand smoke" means:

(1) smoke emitted from inhaling from, exhaling from, burning, carrying or holding:

(a) a lighted or heated cigar, cigarette, hookah or pipe; or

(b) any other lighted or heated tobacco or plant product intended for inhalation, including cannabis, whether natural or synthetic; or

(2) the aerosol or vapor emitted from inhaling or exhaling or any other use of an e-cigarette;

M. "smokefree area" means a building or other enclosed space where smoking is prohibited;



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N. "smoking" means:

(1) inhaling from, exhaling from, burning, carrying or holding:

(a) a lighted or heated cigar, cigarette, hookah or pipe; or

(b) any other lighted or heated tobacco or plant product intended for inhalation, including cannabis, whether natural or synthetic; or

(2) any use of an e-cigarette that creates an aerosol or vapor;

O. "smoking-permitted area" means a building or other enclosed space where smoking may be permitted; provided that secondhand smoke does not infiltrate any area where smoking is prohibited pursuant to the Dee Johnson Clean Indoor Air Act; and

P. "standalone building" means a building whose heating, air conditioning and ventilation system services only that building.

**History: Laws 1985, ch. 85, § 3; 2007, ch. 20, § 2; 2019, ch. 128, § 1.**

**Cross references.** — For Section 501 of the Internal Revenue Code of 1986, *see* 26 U.S.C., § 501.

**The 2019 amendment,** effective June 14, 2019, defined "e-cigarette" and "standalone building", revised the definitions of "secondhand smoke" and "smoking", and removed the definition of "restaurant" for purposes of the Dee Johnson Clean Indoor Air Act; added new Subsection E and redesignated former Subsections E through I as Subsections F through J, respectively; deleted former Subsection J, which defined "restaurant"; in Subsection K, after "tobacco products,", added "including e-cigarettes"; in Subsection L, in the introductory clause, after "means", deleted "smoke emitted from lighted, smoldering or burning tobacco when the smoker is not inhaling, smoke emitted at the mouthpiece during puff drawing and smoke exhaled by the smoker", and added new Paragraphs L(1) and L(2); in Subsection N, added new paragraph designation "(1)", in Paragraph N(1), added new subparagraph designations "(a)" and "(b)", in Subparagraph N(1)(a), after "lighted", added "or heated cigar, cigarette, hookah or pipe; or", in Subparagraph N(1)(b), after the subsection designation, added "any other lighted or heated", after "tobacco", added "or plant", and after "product", deleted "including all types of cigarettes, cigars and pipes and any other lighted tobacco product" and added "intended for inhalation, including cannabis, whether natural or synthetic; or", and added new Paragraph N(2); and added new Subsection P.

**The 2007 amendment,** effective June 15, 2007, changed the name of the "Clean Indoor Air Act" to the "Dee Johnson Clean Indoor Air Act"; deleted former Subsection A, which defined "employer" as the state or political subdivision who employees more than fifteen persons; deleted former Subsection B, which defined "place of employment" as an enclosed indoor area under the control of a public employer that employees frequent during the course of employment; deleted former Subsection C, which defined "public meeting" as a meeting required by law to be an open meeting; deleted former Subsection D, which defined "public place" as any enclosed indoor area in a building owned or leased by the state or a political subdivision; deleted former Subsection E, which defined "smoke" or "smoking" as the carrying or holding of a lighted pipe, cigar or cigarette; deleted former Subsection F, which defined "smoking permitted area" as a portion of a public place in which smoking is permitted; added new Subsection A to define "bar"; added new Subsection B to define "cigar bar"; added new Subsection C to define "department"; added new Subsection D to define "designated outdoor smoking area"; added new Subsection E to define "employer"; added new Subsection F to define "enclosed"; added Subsection G to define "indoor public place"; added Subsection H to define "indoor workplace"; added Subsection I to define "private club"; added Subsection J to define "restaurant"; added Subsection K to define "retail tobacco store"; added Subsection L to define "secondhand smoke"; added Subsection M to define "smokefree area"; added Subsection N to define "smoking"; and added Subsection O to define "smoking-permitted area".

**Severability.** – Laws 2007, ch. 20. § 14, effective June 15, 2007, provided for the severability of the act if any part or application thereof is held invalid.

**ANNOTATIONS**

**Public place.** — State law regulating smoking does not impose controls on Indians who sell jewelry on the portal of the Palace of the Governors, because the portals are not a "public place" for the purposes of this article. 1987 Op. Att'y Gen. No. 87-21 (rendered under prior law).

A jail is a "public place" within the meaning of Subsection D. 1989 Op. Att'y Gen. No. 89-03 (rendered under prior law).

**Municipal ordinance which was broader** than the Clean Air Act, in that the ordinance applied to private businesses and work areas, was permissible because it contemplated rather than conflicted with the purpose of the act. 1989 Op. Att'y Gen. No. 89-03.

## 24-16-4. Smoking prohibited.

A. It is unlawful for a person to smoke in any indoor workplace or indoor public place or in buses, taxicabs or other means of public transit not specifically exempted pursuant to the Dee Johnson Clean Indoor Air Act.

B. No part of the state capitol or capitol north shall be designated as a smoking-permitted area.

**History: Laws 1985, ch. 85, § 4; 1999, ch. 250, § 1; 2002, ch. 2, § 1; 2007, ch. 20, § 3.**

**The 2007 amendment,** effective June 15, 2007, deleted "a public place or a public meeting except in smoking permitted areas" and added the provision that prohibits smoking in any indoor workplace or indoor public place or in buses, taxicabs or other public transit not exempted pursuant to the Dee Johnson Clean Indoor Air Act.



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**Severability.** – Laws 2007, ch. 20, § 14, effective June 15, 2007, provided for the severability of the act if any part or application thereof is held invalid.

**The 2002 amendment,** effective May 15, 2002, made a minor stylistic change in the first sentence, and in the second sentence deleted "Except for private offices and the house and senate lounges" and added "or capitol north".

**The 1999 amendment,** effective June 18, 1999, added the last sentence.

## 24-16-5. Repealed.

**Repeals.** — Laws 2007, ch. 20, § 13 repealed 24-16-5 NMSA 1978, as enacted by Laws 1985, ch. 85, § 5, relating to smoking-permitted areas, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-16-6. Repealed.

**Repeals.** — Laws 2007, ch. 20, § 13 repealed 24-16-6 NMSA 1978, as enacted by Laws 1985, ch. 85, § 6, relating to the designation of smoking-permitted areas, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-16-7. Repealed.

**Repeals.** — Laws 2007, ch. 20, § 13 repealed 24-16-7 NMSA 1978, as enacted by Laws 1985, ch. 85, § 7, relating to smoking in places of employment, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-16-8. Repealed.

**Repeals.** — Laws 2007, ch. 20, § 13 repealed 24-16-8 NMSA 1978, as enacted by Laws 1985, ch. 85, § 8, relating to required signs in smoking-permitted areas, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-16-9. Repealed.

**Repeals.** — Laws 2007, ch. 20, § 13 repealed 24-16-9 NMSA 1978, as enacted by Laws 1985, ch. 85, § 9, relating to the person in charge of a public place or meeting, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-16-10. Repealed.

**Repeals.** — Laws 2007, ch. 20, § 13 repealed 24-16-10 NMSA 1978, as enacted by Laws 1985, ch. 85, § 10, relating to violations of the Clean Indoor Air Act, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-16-11. Repealed.

**Repeals.** — Laws 2007, ch. 20, § 13 repealed 24-16-11 NMSA 1978, as enacted by Laws 1985, ch. 85, § 11, relating to penalties, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 24-16-12. Smoking-permitted areas.

Notwithstanding any other provision of the Dee Johnson Clean Indoor Air Act, smoking-permitted areas include the following:

A. a private residence, unless it is used commercially to provide child care, adult care or health care or any combination of those activities;

B. a retail tobacco store; provided that, for a retail tobacco store established on or after the effective date of this 2019 act, the store shall be located in a standalone building;

C. a cigar bar; provided that, for a cigar bar established on or after June 14, 2019, the bar shall be located in a standalone building;



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D. the facilities of a tobacco manufacturing company licensed by the United States to manufacture tobacco products that are operated by the company in its own name and that are used exclusively by the company in its business of manufacturing, marketing or distributing its tobacco products; provided that secondhand smoke does not infiltrate other indoor workplaces or other indoor public places where smoking is otherwise prohibited under the Dee Johnson Clean Indoor Air Act;

E. a state-licensed gaming facility, casino or bingo parlor;

F. designated outdoor smoking areas;

G. private clubs;

H. hotel and motel rooms that are rented to guests and are designated as smoking-permitted rooms; provided that not more than ten percent of rooms rented to guests in a hotel or motel may be so designated;

I. a site that is being used in connection with the practice of cultural or ceremonial activities by Native Americans and that is in accordance with the federal American Indian Religious Freedom Act, 42 U.S.C. 1996 and 1996a;

J. a theatrical stage or a motion picture or television production set when it is necessary for performers to smoke as part of the production; and

K. an indoor or outdoor cannabis consumption area pursuant to the Cannabis Regulation Act [26-2C-1 to 26-2C-42 NMSA 1978].

**History: Laws 2007, ch. 20, § 4; 2019, ch. 128, § 2; 2021 (1st S.S.), ch. 4, § 57.**

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, added indoor or outdoor cannabis consumption areas pursuant to the Cannabis Regulation Act to the list of smoking-permitted areas; added Subsection K.

**The 2019 amendment,** effective June 14, 2019, provided additional restrictions on smoking permitted areas; in Subsection A, after "residence,", deleted "except during hours of business operation while it is being" and added "unless it is"; in Subsection B, after the semicolon, added "provided that, for a retail tobacco store established on or after the effective date of this 2019 act, the store shall be located in a standalone building"; in Subsection C, after the semicolon, added "provided that, for a cigar bar established on or after the effective date of this 2019 act, the bar shall be located in a standalone building"; deleted Subsection F and redesignated former Subsections G and H as Subsections F and G, respectively; deleted Subsection I and redesignated former Subsection J as Subsection H; in Subsection H, after "not more than", deleted "twenty-five" and added "ten"; deleted Subsection K and redesignated former Subsection L as Subsection I; and deleted Subsection M and redesignated former Subsection N as Subsection J.

**Severability.** – Laws 2007, ch. 20, § 14, effective June 15, 2007, provided for the severability of the act if any part or application thereof is held invalid.

## 24-16-13. Prohibition of smoking near entrances, windows and ventilation systems.

Smoking is prohibited near entrances, windows and ventilation systems of all workplaces and public places where smoking is prohibited by the Dee Johnson Clean Indoor Air Act. An individual who owns, manages, operates or otherwise controls the use of a premises subject to the provisions of the Dee Johnson Clean Indoor Air Act shall establish a smokefree area that extends a reasonable distance from any entrances, windows and ventilation systems to any enclosed areas where smoking is prohibited. The reasonable distance shall be a distance sufficient to ensure that persons entering or leaving the building or facility shall not be subjected to breathing secondhand smoke and to ensure that secondhand smoke does not enter the building or facility through entrances, windows, ventilation systems or any other means.

**History: Laws 2007, ch. 20, § 5; 2019, ch. 128, § 3.**

**The 2019 amendment,** effective June 14, 2019, provided that a smokefree area should extend a reasonable distance from building entrances sufficient to ensure that persons entering or leaving the building shall not be subject to secondhand smoke; after "subjected to breathing", deleted "tobacco" and added "secondhand", and after "to ensure that", deleted "tobacco" and added "secondhand".

**Severability.** – Laws 2007, ch. 20, § 14, effective June 15, 2007, provided for the severability of the act if any part or application thereof is held invalid.

## 24-16-14. Responsibilities of employers.

A. Employers shall provide that their places of employment meet the requirements of the Dee Johnson Clean Indoor Air Act.



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B. An employer shall adopt, implement, post and maintain a written smoking policy pursuant to the Dee Johnson Clean Indoor Air Act.

**History: Laws 2007, ch. 20, § 6.**
**Effective dates.** — Laws 2007, ch. 20, contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

**Severability.** – Laws 2007, ch. 20, § 14, effective June 15, 2007, provided for the severability of the act if any part or application thereof is held invalid.

## 24-16-15. Posted smokefree and smoking-permitted areas.

A. To advise persons of the existence of smokefree areas or smoking-permitted areas, signs shall be posted as follows:

(1) for each indoor workplace or indoor public place where smoking is prohibited pursuant to the Dee Johnson Clean Indoor Air Act, a "NO SMOKING" sign shall be posted where it is clear, conspicuous and easily legible at each public entrance. Posting of "NO SMOKING" signs is the responsibility of the owner, operator, manager or other person having control of the indoor workplace or indoor public place; and

(2) for each indoor workplace or indoor public place where smoking is permitted pursuant to the Dee Johnson Clean Indoor Air Act, a "SMOKING PERMITTED" sign shall be posted where it is clear, conspicuous and easily legible at each public entrance, unless an owner, operator or manager chooses to prohibit smoking in all or part of an indoor workplace or indoor public place where smoking is otherwise permitted.

B. Nothing in the Dee Johnson Clean Indoor Air Act shall be construed so as to require the posting of signs at a residence, except during the hours of business operation while it is being used commercially to provide child care, adult care or health care or any combination of those activities.

**History: Laws 2007, ch. 20, § 7.**
**Effective dates.** — Laws 2007, ch. 20, contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

**Severability.** – Laws 2007, ch. 20, § 14, effective June 15, 2007, provided for the severability of the act if any part or application thereof is held invalid.

## 24-16-16. Enforcement.

A. The local fire, police or sheriff's department with appropriate jurisdiction over the location where a violation of the provisions of the Dee Johnson Clean Indoor Air Act occurs shall enforce that act by issuance of a citation.

B. A person may register a complaint regarding an alleged violation pursuant to the Dee Johnson Clean Indoor Air Act to initiate enforcement of that act with the department or the local fire, police or sheriff's department.

C. The designated enforcement agencies may inspect an establishment for compliance with the Dee Johnson Clean Indoor Air Act.

**History: Laws 2007, ch. 20, § 8.**
**Effective dates.** — Laws 2007, ch. 20, contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

**Severability.** – Laws 2007, ch. 20, § 14, effective June 15, 2007, provided for the severability of the act if any part or application thereof is held invalid.

## 24-16-17. Violations.

It is unlawful for a person who owns, manages, operates or otherwise controls the use of premises subject to regulation under the Dee Johnson Clean Indoor Air Act to violate its provisions. The owner, manager or operator of premises subject to regulation under the Dee Johnson Clean Indoor



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Air Act shall not be subject to a penalty if a person on the premises is in violation of the Dee Johnson Clean Indoor Air Act as long as the owner, manager or operator has posted signs, implemented the appropriate policy and informed the person that the person is in violation of the Dee Johnson Clean Indoor Air Act.

**History: Laws 2007, ch. 20, § 9.**
**Effective dates.** — Laws 2007, ch. 20, contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

**Severability.** – Laws 2007, ch. 20, § 14, effective June 15, 2007, provided for the severability of the act if any part or application thereof is held invalid.

## 24-16-18. Penalties.

A person eighteen years of age or older who violates a provision of the Dee Johnson Clean Indoor Air Act is subject to:

A. a fine not to exceed one hundred dollars ($100) for the first violation of that act;

B. a fine not to exceed two hundred dollars ($200) for the second violation of that act within any consecutive twelve-month period of the first violation; and

C. a fine not to exceed five hundred dollars ($500) for the third and each subsequent violation of that act within any consecutive twelve-month period of a previous violation.

**History: Laws 2007, ch. 20, § 10.**
**Effective dates.** — Laws 2007, ch. 20, contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

**Severability.** – Laws 2007, ch. 20, § 14, effective June 15, 2007, provided for the severability of the act if any part or application thereof is held invalid.

## 24-16-19. Nonretaliation; nonwaiver.

A. A person or employer shall not discharge, refuse to hire or in any manner retaliate against an employee, applicant for employment or patron because that employee, applicant or patron exercises any rights afforded by the Dee Johnson Clean Indoor Air Act or reports or attempts to prosecute a violation of that act.

B. An employee who works in a setting where an employer allows smoking does not waive or otherwise surrender any legal rights the employee may have against the employer or any other party.

**History: Laws 2007, ch. 20, § 11.**
**Effective dates.** — Laws 2007, ch. 20, contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

**Severability.** – Laws 2007, ch. 20, § 14, effective June 15, 2007, provided for the severability of the act if any part or application thereof is held invalid.

## 24-16-20. Explicit nonpreemption.

Nothing in the Dee Johnson Clean Indoor Air Act shall be construed to preempt or in any manner preclude specific provisions of a county or municipal smoking ordinance; provided that the smokefree provisions of such a county or municipal ordinance are inclusive of all minimum standards and provisions for smokefree areas within the Dee Johnson Clean Indoor Air Act.

**History: Laws 2007, ch. 20, § 12.**
**Effective dates.** — Laws 2007, ch. 20, contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

**Severability.** – Laws 2007, ch. 20, § 14, effective June 15, 2007, provided for the severability of the act if any part or application thereof is held invalid.



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# ARTICLE 17

# Continuing Care

Sec.
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## 24-17-1. Short title.

Chapter 24, Article 17 NMSA 1978 may be cited as the "Continuing Care Act".

**History: Laws 1985, ch. 102, § 1; 2010, ch. 88, § 1.**

**Cross references.** — For the Long-Term Care Ombudsman Act, *see* 28-17-1 NMSA 1978.

**The 2010 amendment,** effective May 19, 2010, at the beginning of the sentence, deleted "Sections 1 through 13 of this act" and added "Chapter 24, Article 17 NMSA 1978".

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Liability of nursing home for violating statutory duty to notify third party concerning patient's medical condition, 46 A.L.R.5th 821.

## 24-17-2. Findings and purpose.

A. The legislature finds that continuing care communities are an important and growing alternative for the provision of long-term residential, social and health maintenance needs for the elderly; however, the legislature also finds that severe consequences to residents may result when a provider becomes insolvent or unable to provide responsible care.

B. The purpose of the Continuing Care Act is to provide for disclosure and the inclusion of certain information in continuing care contracts in order that residents may make informed decisions concerning continuing care; to provide protection for residents; and to ensure the solvency of communities.

**History: Laws 1985, ch. 102, § 2; 2010, ch. 88, § 2.**

**The 2010 amendment,** effective May 19, 2010, in Subsection B, after "protection of residents; and", added "to ensure the solvency of".

## 24-17-3. Definitions.

As used in the Continuing Care Act:

A. "affiliate" means a person having a five percent or greater interest in a provider;

B. "community" means a retirement home, retirement community, home for the aged or other place that undertakes to provide continuing care;

C. "continuing care" means furnishing, pursuant to a contract that requires entrance or advance fees and service or periodic fees, independent-living and health or health-related services. Entrance or advanced fees do not include security or damage deposit fees that amount to less than three months' service or periodic fees. These services may be provided in the community, in the resident's independent living unit or in another setting, designated by the continuing care contract, to an individual not related by consanguinity or affinity to the provider furnishing the care. The services include, at a minimum, priority access to a nursing facility or hospital either on site or at a site designated by the continuing care contract;

D. "continuing care contract" means an agreement by a provider to furnish continuing care to a resident;



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E. "liquid reserves" means cash or other assets that are available within sixty days to satisfy a community's expenses and that do not include real property or interests in real property;

F. "net operating expenses" means the total costs of operating a community, including taxes and insurance but not including amortization, depreciation or long-term debt service;

G. "person" means an individual, corporation, partnership, trust, association or other legal entity;

H. "priority access to a nursing facility or hospital" means that a nursing facility or hospital services the residents of independent living units or that there is a promise of such health care or health-related services being available in the future;

I. "provider" means the owner or manager of a community that provides, or offers to provide, continuing care;

J. "resident" means, unless otherwise specified, an actual or prospective purchaser of, nominee of or subscriber to a continuing care contract;

K. "type A" agreement means an extensive entrance-fee contract that includes housing, residential services, amenities and unlimited specific health-related services with little or no substantial increase in monthly payments, except to cover normal operating costs and inflation adjustments;

L. "type B" agreement means a modified entrance-fee contract that includes housing, residential services, amenities and a specific amount of health care with no substantial increase in monthly payments, except to cover normal operating costs and inflation adjustments. After the specified amount of health care is used, persons served pay either a discounted rate or the full per diem rates for required health care services; and

M. "unit" means the living quarters that a resident buys, leases or has assigned as part of the continuing care contract.

**History: Laws 1985, ch. 102, § 3; 1991, ch. 263, § 8; 2005, ch. 215, § 1; 2010, ch. 88, § 3.**

**The 2010 amendment,** effective May 19, 2010, added Subsections E, F, K and L, and relettered the succeeding subsections accordingly.

**The 2005 amendment,** effective June 17, 2005, defined "continuing care" in Subsection C to mean furnishing services, pursuant to a contract that requires entrance or advance fees and service or periodic fees and provided in Subsection C that entrance or advanced fees do not include security or damage deposit fees that amount to less than three months' service or periodic fees.

**The 1991 amendment,** effective June 14, 1991, rewrote Subsection C; deleted "for life or a specified time of more than one year" at the end of the first sentence and a second sentence reading "'Continuing care contract' includes a life interest or similar agreement, long-term leases and agreements that are terminable by either party" in Subsection D; deleted former Subsections E to G, which defined "entrance fee", "life interest" and "long-term lease"; redesignated former Subsection H as present Subsection E; added present Subsection F; and redesignated former Subsections I to K as present Subsections G to I.

## 24-17-4. Disclosure.

A. A provider shall furnish a current annual disclosure statement that meets the requirements set forth in Subsection B of this section and the aging and long-term services department's and attorney general's consumer's guide to continuing care communities to each actual resident and to a prospective resident at least seven days before the provider enters into a continuing care contract with the prospective resident, or prior to the prospective resident's first payment, whichever occurs first. For the purposes of this subsection, the obligation to furnish information to each actual resident shall be deemed satisfied if a copy of the disclosure statement and the consumer's guide is given to the residents' association, if there is one, and a written message has been delivered to each actual resident, stating that personal copies are available upon request.

B. The disclosure statement provided pursuant to Subsection A of this section shall include:

(1) a brief narrative summary of the contents of the disclosure statement written in plain language;

(2) the name and business address of the provider;

(3) if the provider is a partnership, corporation or association, the names, addresses and duties of its officers, directors, trustees, partners or managers;

(4) the name and business address of each of the provider's affiliates;



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(5) a statement as to whether the provider or any of its officers, directors, trustees, partners, managers or affiliates, within ten years prior to the date of application:

(a) was convicted of a felony, a crime that if committed in New Mexico would be a felony or any crime having to do with the provision of continuing care;

(b) has been held liable or enjoined in a civil action by final judgment, if the civil action involved fraud, embezzlement, fraudulent conversion or misappropriation of property;

(c) had a prior discharge in bankruptcy or was found insolvent in any court action; or

(d) had a state or federal license or permit suspended or revoked or had any state, federal or industry self-regulatory agency commence an action against the provider or any of its officers, directors, trustees, partners, managers or affiliates and the result of such action;

(6) the name and address of any person whose name is required to be provided in the disclosure statement who owns any interest in or receives any remuneration from, either directly or indirectly, any other person providing or expected to provide to the community goods, leases or services with a real or anticipated value of five hundred dollars ($500) or more and the name and address of the person in which such interest is held. The disclosure shall describe such goods, leases or services and the actual or probable cost to the community or provider and shall describe why such goods, leases or services should not be purchased from an independent entity;

(7) the name and address of any person owning land or property leased to the community and a statement of what land or property is leased;

(8) a statement as to whether the provider is, or is associated with, a religious, charitable or other organization and the extent to which the associate organization is responsible for the financial and contractual obligations of the provider or community;

(9) the location and description of real property being used or proposed to be used in connection with the community's contracts to furnish care;

(10) a statement as to the community's or corporation's liquid reserves to assure payment of debt obligations and an ongoing ability to provide services to residents. The statement shall also include a description of the community's or corporation's reserves, including a specific explanation as to how the community or corporation intends to comply with the requirements of Section 24-17-6 NMSA 1978;

(11) for communities that provide type A and type B agreements:

(a) a summary of a comprehensive actuarial analysis within the last five years; and

(b) an annual future-service obligation calculation by an actuary who is a member of the American academy of actuaries and who is experienced in analyzing continuing care communities;

(12) an audited financial statement and an audit report prepared in accordance with generally accepted accounting principles applied on a consistent basis and certified by a certified public accountant, including an income statement or statement of activities, a cash-flow statement or sources and application of funds statement and a balance sheet as of the end of the provider's last fiscal year. The balance sheet should accurately reflect the deferred revenue balance, including entrance fees and any other prepaid services, and should include notes describing the community's long-term obligations and identifying all the holders of mortgages and notes;

(13) a sample copy of the contract used by the provider; and

(14) a list of documents and other information available upon request, including:

(a) a copy of the Continuing Care Act;

(b) if the provider is a corporation, a copy of the articles of incorporation; if the provider is a partnership or other unincorporated association, a copy of the partnership agreement, articles of association or other membership agreement; and if the provider is a trust, a copy of the trust agreement or instruments;

(c) resumes of the provider and its officers, directors, trustees, partners or managers;

(d) a copy of lease agreements between the community and any person owning land or property leased to the community;

(e) information concerning the location and description of other properties, both existing and proposed, of the provider in which the provider owns any interest and on which communities are or are intended to be located and the identity of previously owned or operated communities;



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(f) a copy of the community's policies and procedures; and

(g) other data, financial statements and pertinent information with respect to the provider or community, or its directors, trustees, members, managers, branches, subsidiaries or affiliates, that a resident requests and that is reasonably necessary in order for the resident to determine the financial status of the provider, its sole member and the community and the management capabilities of the managers and owners, including the most recent audited financial statements of comparable communities owned, managed or developed by the provider, its sole member or its principal.

C. Each year, within one hundred eighty days after the end of the community's fiscal year, the provider shall furnish to actual residents the disclosure statement as outlined in this section. For purposes of this subsection, the obligation to furnish the required information to residents shall be deemed satisfied if the information is given to the residents' association, if there is one, and a written message has been delivered to each resident, stating that personal copies of the information are available upon request.

**History: Laws 1985, ch. 102, § 4; 1991, ch. 263, § 9; 2005, ch. 215, § 2; 2010, ch. 88, § 4; 2021, ch. 56, § 1.**

**The 2021 amendment,** effective June 18, 2021, added information that must be included in the disclosure statement that each provider of continuing care must furnish to each resident or prospective resident; in Subsection B, Subparagraph B(11)(a), after "summary of", deleted "an" and added "a comprehensive", and in Subparagraph B(14)(g), after "status of the provider", added "its sole member", and after "developed by the provider", added "its sole member".

**The 2010 amendment,** effective May 19, 2010, in Subsection A, in the first sentence, at the beginning of the sentence, after "A", deleted "person who provides or offers to provide continuing care in this state" and added "provider"; after "provider shall furnish", changed "a current annual disclosure statement and a consumer's guide" to "a current annual disclosure statement that meets the requirements set forth in Subsection B of this section and the aging and long-term services department's and attorney general's consumer's guide"; and after "continuing care communities", changed "as furnished by the aging and long-term services department or the attorney general's office to actual residents and to a prospective resident at least seven days prior to entering into a continuing care contract with the prospective resident" to "to each actual resident and to a prospective resident at least seven days before the provider enters into a continuing care contract with the prospective resident, or prior to the prospective resident's first payment, whichever occurs first"; in Subsection A, in the second sentence, after "obligation to furnish information", changed "to actual residents shall be deemed satisfied if a copy is given" to "to each actual resident shall be deemed satisfied if a copy of the disclosure statement and the consumer's guide is given"; and after "message has been delivered to", deleted "all residents" and added "each actual resident, stating"; in Subsection B, in the introductory sentence, after "disclosure statement", added "provided pursuant to Subsection A of this section"; in Paragraph (4) of Subsection B, after "business address of", deleted "any affiliate" and added "each of the provider's affiliates"; in Subparagraph (d) of Paragraph (5) of Subsection B, after "commence an action against", deleted "him" and added "the provider or any of its officers, directors, trustees, partners, managers or affiliates"; in Paragraph (10) of Subsection B, in the first sentence, after "a statement as to", changed "whether the community maintains reserves" to "the community's or corporation's liquid reserves"; after "debt obligations and", deleted "the" and added "an ongoing"; and in the second sentence, at the beginning of the sentence, added "The statement shall also include"; after "a description of", deleted "such" and added "the community's or corporation's"; and after "community's or corporation's reserves", added the remainder of the sentence; in Paragraph (11) of Subsection B, at the beginning of the sentence, deleted "for those communities that charge an entrance fee that were not in operation on June 14, 1985 an" and added "for communities that provide type A and type B agreements, a summary of an"; after "actuarial analysis", deleted "of the community performed" and added "within the last five years and an annual future-service obligation calculation"; and after "by an actuary", added "who is a member of the American academy of actuaries and who is"; in Paragraph (12) of Subsection B, in the first sentence, added new language between "an audited financial statement" and "as of the end of the provider's last fiscal year"; after "as of the end of the provider's last fiscal year", deleted "or a copy of the previous year's tax filings with the internal revenue service"; and added the last sentence; in Subparagraph (g) of Paragraph (14) of Subsection B, after "pertinent information", deleted "requested by the resident"; after "subsidiaries, or affiliates", added "that a resident requests and"; and after "is reasonably necessary", added "in order"; and in Subsection C, in the second sentence, after "written message has been delivered to", deleted "all residents" and added "each resident".

**The 2005 amendment,** effective June 17, 2005, deleted the former provision in Subsection A which provided that advertising, representations or contractual provisions indicating that a nursing facility or hospital services the residents of independent living units or advertising that there is a close proximity of residential units to nursing or acute care units shall imply an agreement to provide or offer to provide continuing care; deleted the former provision of Subsection B(12) which required the audit report to be prepared in accordance with generally accepted accounting principles applied on a consistent basis and certified by a certified public accountant, including a cash flow statement or sources and application of funds statement and a balance sheet and a description of long-term obligations and the holders of mortgages and notes; provided in Subsection B(12) that the disclosure statement include an audited financial statement or a copy of the previous year's tax filing with the internal revenue service; deleted the former provision of Subsection C which required the provider to furnish a current financial statement and audit report prepared in accordance with generally accepted accounting principles applied on a consistent basis and certified by a certified public accountant, including a cash flow statement or sources and application of funds statement and a balance sheet and a description of the long-term obligations and any other changes in the disclosure statement required to be furnished by Subsection A; and provided in Subsection C that the provider shall provide the disclosure statement outlined in this section.



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**The 1991 amendment,** effective June 14, 1991, in Subsection A, inserted the second sentence and deleted the former final sentence, which read "A community that is in operation on the effective date of the Continuing Care Act may have a grace period of not more than one hundred eighty days to prepare its disclosure statement"; and substituted "eighty days" for "twenty days" near the beginning of the first sentence in Subsection C.

## 24-17-5. Contract information.

A. A provider is responsible for ensuring that a continuing care contract is written in clear and understandable language.

B. A continuing care contract shall, at a minimum:

(1) describe the community's admission policies, including age, health status and minimum financial requirements, if any;

(2) describe the health and financial conditions required for a person to continue to be a resident;

(3) describe the circumstances under which the resident will be permitted to remain in the community in the event of financial difficulties of the resident;

(4) list the total consideration paid, including donations, entrance fees, subscription fees, periodic fees and other fees paid or payable; provided, however, that a provider cannot require a resident to transfer all the resident's assets or the resident's real property to the provider or community as a condition for providing continuing care and the provider shall reserve the right to charge periodic fees;

(5) describe in detail all items of service to be received by the resident, such as food, shelter, medical care, nursing care and other health services, and whether services will be provided for a designated time period or for the resident's lifetime;

(6) as an addendum to the contract, provide a description of items of service, if any, that are available to the resident but that are not covered in the entrance or monthly fee;

(7) specify taxes and utilities, if any, that the resident must pay;

(8) specify that deposits or entrance fees paid by or for a resident shall be held in trust for the benefit of the resident in a federally insured New Mexico bank until the resident has taken possession of the resident's unit or the resident's contract cancellation period has ended, whichever occurs later;

(9) state the terms under which a continuing care contract may be canceled by the resident or the community and the basis for establishing the amount of refund of the entrance fee;

(10) state the terms under which a continuing care contract is canceled by the death of the resident and the basis for establishing the amount of refund, if any, of the entrance fee;

(11) state when fees will be subject to periodic increases and what the policy for increases will be; provided, however, that the provider shall give advance notice of not less than thirty days to the residents before the change becomes effective and increases shall be based upon economic necessity, the reasonable cost of operating the community, the cost of care and a reasonable return on investment as defined by rules promulgated by the aging and long-term services department;

(12) state the entrance fee and periodic fees that will be charged if the resident marries while living in the community, the terms concerning the entry of a spouse to the community and the consequences if the spouse does not meet the requirements for entry;

(13) indicate funeral and burial services that are not furnished by the provider;

(14) state the rules and regulations of the provider then in effect and state the circumstances under which the provider claims to be entitled to have access to the resident's unit;

(15) list the resident's and provider's respective rights and obligations as to any real or personal property of the resident transferred to or placed in the custody of the provider;

(16) describe the rights of the residents to form a residents' association and the participation, if any, of the association in the community's decision-making process;

(17) describe the living quarters purchased by or assigned to the resident;

(18) provide under what conditions, if any, the resident may assign the use of a unit to another;

(19) include the policy and procedure with regard to changes in accommodations due to an increase or decrease in the number of persons occupying an individual unit;



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(20) state the conditions upon which the community may sublet or relet a resident's unit;

(21) state the fee adjustments that will be made in the event of a resident's voluntary absence from the community for an extended period of time;

(22) include the procedures to be followed when the provider temporarily or permanently changes the resident's accommodations, either within the community or by transfer to a health facility; provided that the contract shall state that such changes in accommodations shall only be made to protect the health or safety of the resident or the general and economic welfare of all other residents of the community;

(23) if the community includes a nursing facility, describe the admissions policies and what will occur if a nursing facility bed is not available at the time it is needed;

(24) in the event the resident is offered a priority for nursing facility admission at a facility that is not owned by the community, describe with which nursing facility the formal arrangement is made and what will occur if a nursing facility bed is not available at the time it is needed;

(25) include the policy and procedures for determining under what circumstances a resident will be considered incapable of independent living and will require a permanent move to a nursing facility. The contract shall also state who will participate in the decision for permanent residency in the nursing facility and shall provide that the resident shall have an advocate involved in that decision; provided that if the resident has no family member, attorney, guardian or other responsible person to act as the resident's advocate, the provider shall request the local office of the human services department to serve as advocate;

(26) specify the types of insurance, if any, the resident is required to maintain, including medicare, other health insurance and property insurance;

(27) specify the circumstances, if any, under which the resident will be required to apply for any public assistance, including medical assistance, or any other public benefit programs;

(28) in bold type of not less than twelve-point type on the signature page, state that a contract for continuing care may present a significant financial risk and that a person considering a continuing care contract should consult with an attorney and with a financial advisor concerning the advisability of pursuing continuing care; provided, however, that failure to consult with an attorney or financial advisor shall not be raised as a defense to bar recovery for a resident in any claims arising under the provisions of the Continuing Care Act;

(29) in bold type of not less than twelve-point type on the front of the contract, state that nothing in the contract or the Continuing Care Act should be construed to constitute approval, recommendation or endorsement of any continuing care community by the state of New Mexico;

(30) contain a provision describing the community's plan for resident relocation upon closure or circumstances that necessitate relocation;

(31) in immediate proximity to the space reserved in the contract for the signature of the resident, in bold type of not less than twelve-point type, state the following:

"You, the buyer, may cancel this transaction at any time prior to midnight of the seventh day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right."; and

(32) contain a completed form, in duplicate, captioned "Notice of Cancellation", which shall be attached to the contract and easily detachable, and which shall contain in twelve-point boldface type the following information and statements in the same language as that used in the contract.

"NOTICE OF CANCELLATION

Date: _____

(enter date of transaction)

You may cancel this transaction without any penalty or obligation within seven days from the above date. If you cancel, any payments made by you under the contract or sale and any negotiable instrument executed by you will be returned within ten business days following receipt by the provider of your cancellation notice, and any security interest or lien arising out of the transaction will be canceled.



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To cancel this transaction, deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram, to: _____
(Name of Provider)

at _____
(Address of Provider's Place of Business)

not later than midnight of _____
(Date)

I hereby cancel this transaction.

_____
(Buyer's Signature)

_____
(Date)".

**History: Laws 1985, ch. 102, § 5; 2005, ch. 215, § 3; 2010, ch. 88, § 5; 2021, ch. 56, § 2.**

**The 2021 amendment,** effective June 18, 2021, required that a continuing care contract contain a provision describing the community's plan for resident relocation upon closure or circumstances that necessitate relocation; and in Subsection B, added a new Paragraph B(30) and redesignated former Paragraphs B(30) and B(31) as Paragraphs B(31) and B(32), respectively.

**The 2010 amendment,** effective May 19, 2010, in Subsection A, at the beginning of the sentence, after "A", added "provider is responsible for ensuring that a"; in Paragraph (4) of Subsection B, after "transfer all the resident's assets", added "or the resident's real property"; in Paragraph (5) of Subsection B, after "designated period or for", deleted "life" and added "the resident's lifetime"; in Paragraph (8) of Subsection B, after "until the resident has", deleted "occupied his" and added "taken possession of the resident's"; and at the end of the sentence, added "whichever occurs later"; in Paragraph (11) of Subsection B, at the end of the sentence, deleted "no later than January 31, 2006"; in Paragraph (21) of Subsection B, after "state", added "the fee adjustments that will be made"; after "in the event of", added "a resident's"; and after "extended period of time", deleted "by the resident, what fee adjustments, if any, will be made"; in Paragraph (24) of Subsection B, at the beginning of the sentence, deleted "describe, if" and added "in the event"; and after "not owned by the community", added "describe"; in Paragraph (26) of Subsection B, after "resident", deleted "must" and added "is required to"; in Paragraph (27) of Subsection B, after "required to apply for", changed "medicaid public assistance, or any other" to "any public assistance, including medical assistance, or any other"; and in Paragraph (28) of Subsection B, after "twelve-point type on the", deleted "front of the contract" and added "signature page, state".

**The 2005 amendment,** effective June 17, 2005, deleted the former requirements in Subsection B(8) that payments be held in trust in a cash escrow account in a New Mexico trust company on a trust department of a federally insured New Mexico bank and that after the resident has notified the trustee that he has occupied his unit, the money, including interest, be released to the provider; added the provisions in Subsection B(8) that the trust be held for the benefit of the resident until the resident's contract cancellation period has ended, and provided in Subsection B(11) that economic necessity, the reasonable cost of operating the community, the cost of care and reasonable return on investment as defined by rule promulgated by the aging and long-term services department not later than January 31, 2006.

**ANNOTATIONS**

**Reasonable rate of return on investment.** — Nonprofit continuing care facilities are required to consider a reasonable rate of return on investment before imposing rate increases. *Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, 146 N.M. 473, 212 P.3d 361, *rev'g* 2008-NMCA-033, 143 N.M. 640, 179 P.3d 1248.

**Not unconstitutionally vague.** — The requirement that non-profit continuing care facilities base rate increases, in part, on a reasonable rate of return on investment is not unconstitutionally vague. *Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, 146 N.M. 473, 212 P.3d 361, *rev'g* 2008-NMCA-033, 143 N.M. 640, 179 P.3d 1248.

**Reasonable return on investment.** — The Continuing Care Act does not require a non-profit organization to base fee increases on a reasonable return on investment. *Bishop v. Evangelical Lutheran Good Samaritan Soc'y*, 2008-NMCA-033, 143 N.M. 640, 179 P.3d 1248, *rev'd* by 2009-NMSC-036. 146 N.M. 473, 212 P.3d 361.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Plaintiff's rights to punitive or multiple damages when cause of action renders both available, 2 A.L.R.5th 449.

## 24-17-6. Requirements for financial reserves.

A. Any deposits or entrance fees paid by or for a resident shall be held in trust for the benefit of the resident in a federally insured New Mexico bank until the resident has occupied the resident's unit or the resident's contract cancellation period has ended, whichever occurs later.



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B. In addition to the amounts held in trust for specific residents under Subsection A of this section, a community that provides a type A agreement shall maintain at all times liquid reserves equal to the principal and interest payments due for a twelve-month period on all accounts of any mortgage loan and other long-term debt, as well as three months' worth of net operating expenses.

C. A community that provides a type A or type B agreement shall keep the funds maintained under Subsection A of this section in federally insured bank accounts that are separate from the community's operating accounts.

D. For communities that provide type B agreements, reserves shall be calculated on a prorated basis for residents who fall under type B agreements.

**History: Laws 1985, ch. 102, § 6; 2005, ch. 215, § 4; 2010, ch. 88, § 6.**

**The 2010 amendment,** effective May 19, 2010, in Subsection A, at the end of the sentence, added "whichever occurs later"; and added Subsections B, C and D.

**The 2005 amendment,** effective June 17, 2005, deleted the former requirements that payments be held in trust in a cash escrow account in a New Mexico trust company on a trust department of a federally insured New Mexico bank and that after the resident has notified the trustee that he has occupied his unit, the money, including interest, be released to the provider; and added the provision that the trust be held for the benefit of the resident until the resident's contract cancellation period has ended.

## 24-17-7. Disclosure statements filed with the aging and long-term services department for public inspection.

No later than July 1, 2022 and each year thereafter, within one hundred eighty days after the end of a community's fiscal year, a provider shall provide a copy of the disclosure statement and any amendments to that statement to the aging and long-term services department for public inspection during regular working hours.

**History: Laws 1985, ch. 102, § 7; 2021, ch. 56, § 3.**

**Cross references.** — For the aging and long-term services department, *see* 28-4-4 NMSA 1978.

**The 2021 amendment,** effective June 18, 2021, required the provider of continuing care to submit a copy of the disclosure statement to the aging and long-term services department no later than July 1, 2022 and each year thereafter, within 180 days after the end of the community's fiscal year; and after "filed with the", deleted "state agency on", and after "aging", added "and long-term services department"; added "No later than July 1, 2022 and each year thereafter, within one hundred eighty days after the end of a community's fiscal year", after "shall", deleted "file" and added "provide", after "statement to the", deleted "state agency on", and after "aging", added "and long-term services department".

## 24-17-8. Consumer's guide to continuing care communities.

The office of the attorney general and the aging and long-term services department may publish and distribute a consumer's guide to continuing care communities and may publish an annual directory of communities in New Mexico.

**History: Laws 1985, ch. 102, § 8; 2005, ch. 215, § 5.**

**Cross references.** — For aging and long-term services department, *see* 28-4-4 NMSA 1978.

**The 2005 amendment,** effective June 17, 2005, changed the publication requirements from "shall" to "may".

## 24-17-9. Repealed.

**Repeals.** — Laws 1991, ch. 263, § 11 repealed 24-17-9 NMSA 1978, as enacted by Laws 1985, ch. 102, § 9, relating to civil liability, effective June 14, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com.*

## 24-17-10. Restraint of prohibited acts; remedies.

A. Whenever the attorney general has reasonable belief that any person is violating or is about to violate any provision of the Continuing Care Act, or any regulation promulgated pursuant to that act, and that proceedings would be in the public interest, the attorney general may bring an



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action in the name of the state to restrain or prevent violations of that act or regulations promulgated pursuant to that act. The action may be brought in the district court of the county in which the person resides or has the person's principal place of business or in the district court for Santa Fe county. The attorney general acting on behalf of the state shall not be required to post bond when seeking a temporary or permanent injunction in such action.

B. In any action filed pursuant to this section of the Continuing Care Act, including an action with respect to unimproved real property, the attorney general may petition the district court for temporary or permanent injunctive relief, and restitution or remedies available pursuant to Section 24-17-15 NMSA 1978.

C. Any person who is the subject of an action brought under this section shall have the right to demand a jury trial.

**History: Laws 1985, ch. 102, § 10; 1991, ch. 263, § 10; 2010, ch. 88, § 7.**

**The 2010 amendment,** effective May 19, 2010, in Subsection A, in the first sentence, after "Continuing Care Act", added "or any regulation promulgated pursuant to that act" and at the end of the sentence, added "or regulations promulgated pursuant to that act"; and in Subsection B, at the end of the sentence, added "or remedies available pursuant to Section 24-17-15 NMSA 1978".

**The 1991 amendment,** effective June 14, 1991, deleted "has violated" following "violating" and substituted "to restrain or prevent" for "alleging" in the first sentence in Subsection A; inserted "this section of" in Subsection B; deleted former Subsection C, which read "In any action brought under this section, if the court finds that a person is willfully violating or has willfully violated the Continuing Care Act, the attorney general, upon petition to the court, may recover on behalf of the state, a civil penalty of not exceeding five thousand dollars ($5,000) per violation"; and redesignated former Subsection D as present Subsection C.

## 24-17-11. Applicability.

A. The provisions of the Continuing Care Act apply equally to for-profit and nonprofit provider organizations and shall be construed as the minimum requirements to be imposed upon any person offering or providing continuing care.

B. The provisions of the Continuing Care Act do not apply to closed-membership organizations that operate communities solely for the benefit of their members.

**History: Laws 1985, ch. 102, § 11.**

**Saving clauses.** — Laws 1985, ch. 102, § 12 provided that nothing in the Continuing Care Act shall be construed in any way to impair contracts in effect prior to the effective date of that act, June 14, 1985.

## 24-17-12. Right to a written transfer policy.

A provider shall adopt and follow a written policy establishing the procedure and criteria applicable when deciding to transfer residents from one level of care to another.

**History: Laws 1991, ch. 263, § 1.**

## 24-17-13. Right to organize and participate.

A. Residents have the right to organize a resident association and to engage in concerted activities for the purpose of keeping themselves informed of the operation of the facility or for the purpose of other mutual aid or protection. A provider shall take appropriate steps to encourage and facilitate the establishment of a resident association in each facility. At a minimum, these steps shall include the posting in conspicuous places of written notices of the right of residents to organize into a resident association and to use the facility for association meetings.

B. The administration of an operating facility shall meet at least quarterly with the resident association, if one exists, or with interested residents if there is no resident association. The following procedures shall apply:

(1) the provider shall notify all residents at least seven days in advance of each meeting;

(2) the provider shall post the meeting agenda in a conspicuous place and make copies of it available; and



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(3) if the resident association requests, the provider shall ensure that a member or an authorized representative of the board of directors, a general partner or a principal owner attends the meeting.

**History: Laws 1991, ch. 263, § 2.**

## 24-17-14. Right to protection against retaliatory conduct.

Retaliatory conduct by a provider or any person acting on the provider's behalf against a resident for lawful efforts to secure or enforce his legal rights as a resident is a violation of the Continuing Care Act.

**History: Laws 1991, ch. 263, § 3.**

## 24-17-15. Right to civil action for damages.

A. Residents, as a class or otherwise, may bring an action in a court of competent jurisdiction to recover actual and punitive damages for injury resulting from a violation of the Continuing Care Act.

B. The court may award reasonable attorneys' fees and costs to the prevailing party in an action brought under this section.

C. The right of a resident to bring an action pursuant to this section is in addition to any other rights or remedies the resident may have by statute or common law.

**History: Laws 1991, ch. 263, § 4.**

## 24-17-16. Identification and procedures for correction of violations.

A. The aging and long-term services department shall review disclosure statements filed pursuant to the Continuing Care Act for compliance with that act.

B. If the aging and long-term services department determines that a person or an organization has engaged in or is about to engage in an act or practice constituting a violation of the Continuing Care Act or any rule adopted pursuant to that act, the aging and long-term services department shall issue a notice of violation in writing to that person or organization and send copies to the resident association of any facility affected by the notice.

C. The notice of violation shall state the following:

(1) a description of a violation at issue;

(2) the action that, in the judgment of the aging and long-term services department, the provider should take to conform to the law or the assurances that the aging and long-term services department requires to establish that no violation is about to occur;

(3) the compliance date by which the provider shall correct any violation or submit assurances;

(4) the requirements for filing a report of compliance; and

(5) the applicable sanctions for failure to correct the violation or failure to file the report of compliance according to the terms of the notice of violation.

D. At any time after receipt of a notice of violation, the person or organization to which the notice is addressed or the aging and long-term services department may request a conference. The aging and long-term services department shall schedule a conference within thirty days of a request.

E. The purpose of the conference is to discuss the contents of the notice of violation and to assist the addressee to comply with the requirements of the Continuing Care Act. Subject to rules that the aging and long-term services department may promulgate, a representative of



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the resident association at any facility affected by the notice shall have a right to attend the conference.

F. A person receiving a notice of violation shall submit a signed report of compliance as provided by the notice. The aging and long-term services department shall send a copy to the resident association of any facility affected by the notice.

G. Upon receipt of the report of compliance, the aging and long-term services department shall take steps to determine that compliance has been achieved.

**History: Laws 1991, ch. 263, § 5; 2021, ch. 56, § 4.**

**The 2021 amendment,** effective June 18, 2021, required the aging and long-term services department to review disclosure statements filed pursuant to the Continuing Care Act for compliance with the act, replaced references to the state agency on aging with the aging and long-term services department, and extended the time within which the aging and long-term services department must schedule a conference following a notice of violation; substituted "state agency on aging" with "aging and long-term services department" throughout; added a new Subsection A and redesignated former Subsections A through F as Subsections B through G, respectively; and in Subsection D, after "schedule a conference within", changed "seven" to "thirty".

## 24-17-17. Rules and regulations authorized.

The aging and long-term services department shall promulgate all rules and regulations necessary or appropriate to administer the provisions of the Continuing Care Act.

**History: Laws 1991, ch. 263, § 6; 2010, ch. 88, § 8; 2021, ch. 56, § 5.**

**The 2021 amendment,** effective June 18, 2021, removed a provision related to the promulgation of certain rules and regulations; and after "Continuing Care Act", deleted "including but not limited to requirements regarding financial reserves, disclosure and actuarial studies".

**The 2010 amendment,** effective May 19, 2010, at the beginning of the sentence, after "The", deleted "state agency on aging" and added "aging and long-term services department"; and after "Continuing Care Act", added the remainder of the sentence.

## 24-17-18. Report to attorney general; civil action; civil penalties.

A. A person may report an alleged violation of the Continuing Care Act or rules promulgated pursuant to that act to the attorney general or to the aging and long-term services department.

B. Any time after the aging and long-term services department issues a notice of violation, the department may send the attorney general a written report alleging a possible violation of the Continuing Care Act or any rule adopted pursuant to that act.

C. Upon receipt of a report from any source alleging a violation of the Continuing Care Act or rules promulgated pursuant to that act, the attorney general shall promptly review the allegation. Upon finding that an allegation received pursuant to this subsection is credible, the attorney general shall file an appropriate action against the alleged violator in a court of competent jurisdiction.

D. Upon finding violations of any provisions of the Continuing Care Act or any rule adopted pursuant to that act, the court may impose a civil penalty in the amount of five dollars ($5.00) per resident or up to five hundred dollars ($500), in the discretion of the court, for each day that the violation remains uncorrected after the compliance date stipulated in a notice of violation issued pursuant to the Continuing Care Act.

**History: Laws 1991, ch. 263, § 7; 2021, ch. 56, § 6.**

**The 2021 amendment,** effective June 18, 2021, allowed any person to report violations of the Continuing Care Act or rules promulgated pursuant to the act, and required the attorney general to accept and review alleged violations of the Continuing Care Act reported from any source; added a new Subsection A and subsection designations "B" through "D"; in Subsection B, substituted references to the "state agency on aging" with the "aging and long-terms services department"; and in Subsection C, after "report", added "from any source alleging a violation of the Continuing Care Act or rules promulgated pursuant to that act", and after "attorney general shall promptly", deleted "conduct an investigation to determine whether grounds exist for formally finding a violation. If the attorney general makes that finding, he" and added "review the allegation. Upon finding that an allegation received pursuant to this subsection is credible, the attorney general".



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# ARTICLE 17A

# Long-Term Care Services

Sec.
24-17A-1. Short title.
24-17A-2. Definitions.
24-17A-3. Interagency committee created; coordinated service delivery system; lead agency; service delivery system.
Sec.
24-17A-4. Service delivery system; components; principles.
24-17A-5. Report.
24-17A-6. Senior center food gardens authorized.

## 24-17A-1. Short title.

This act [24-17A-1 through 24-17A-5 NMSA 1978] may be cited as the "Long-term Care Services Act".

**History: Laws 1998, ch. 82, § 1.**

## 24-17A-2. Definitions.

As used in the Long-term Care Services Act:

A. "consumer" means a long-term care service recipient who has a physical or mental illness, injury or disability or who suffers from any cognitive impairment that restricts or limits the person's activities of daily living or instrumental activities of daily living and who is under the care of a provider;

B. "long-term care" means home- or community-based care provided to a consumer that is designed to maintain the consumer's independence and autonomy in the consumer's residence and includes support services such as personal, respite, attendant, residential or institutional care; case management; services such as meals, homemaker, home repair, transportation, companion, adult day health care, emergency response or day habilitation; physical, occupational or speech therapy; nursing; or help with chores;

C. "residence" means a consumer's home, an independent living center, an adult day health care facility, a community center, an assisted living facility, an adult residential care facility, a nursing home or a senior citizen center; and

D. "service delivery system" means a unified statewide, comprehensive home- and community-based service delivery system that integrates and coordinates all health, medical and social services that meet the individual needs of consumers and support them in remaining in their own homes and communities.

**History: Laws 1998, ch. 82, § 2.**

## 24-17A-3. Interagency committee created; coordinated service delivery system; lead agency; service delivery system.

A. The "interagency committee on long-term care" is created.

B. Members of the interagency committee on long-term care shall be the heads of the following agencies or their designated representatives:

(1) the state agency on aging [aging and long-term services department];
(2) the human services department;
(3) the department of health;
(4) the children, youth and families department;
(5) the labor department;
(6) the governor's committee on concerns of the handicapped;
(7) the developmental disabilities planning council; and
(8) the department of insurance.



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C. The interagency committee on long-term care shall design and implement a coordinated service delivery system that fulfills the legislative mandate to develop a coordinated long-term care system.

D. The governor shall appoint a chairperson from the membership of the interagency committee on long-term care.

**History: Laws 1998, ch. 82, § 3.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 2004, ch. 23, § 13 provided that all references to the state agency on aging be deemed references to the aging and long-term services department.

## 24-17A-4. Service delivery system; components; principles.

The interagency committee on long-term care shall take into consideration, within available resources, the following principles in the design, development and implementation of the integrated long-term care delivery system to:

A. ensure the dignity and respect of consumers in the treatment and support provided;

B. tailor home- and community-based long-term care services and programs to provide full access and coordination to meet the individual needs of consumers;

C. develop and provide home- and community-based long-term care services and programs of the highest quality;

D. provide for consumer self-determination by providing options for individual choice and consumer input in home- and community-based long-term care;

E. implement a state policy that defines the state's obligation regarding long-term care by integrating applicable state and federal mandates related to long-term care services;

F. diversify institutional care options that explore and enhance appropriate alternatives to institutional care; and

G. integrate various funding sources to provide quality, affordable services to the consumer.

**History: Laws 1998, ch. 82, § 4.**

## 24-17A-5. Report.

The chairperson shall present a report to the legislature on the progress of the interagency committee on long-term care and the status of the coordinated service delivery system. The report shall include conclusions and recommendations to further the work of the interagency committee on long-term care and to complete the process of integrating the service delivery system in the state.

**History: Laws 1998, ch. 82, § 5.**

## 24-17A-6. Senior center food gardens authorized.

A. The aging and long-term services department shall permit any senior center to coordinate the planting, cultivation, growing, tending and harvesting by senior center staff and senior participants of edible fruits and vegetables on the senior center's premises for inclusion in food service or distribution to senior participants.

B. For the purposes of this section:

(1) "senior center" means a community-based center:

(a) that serves as a resource for information on aging, support for family caregivers and training; and

(b) where senior participants receive services and participate in programs; and

(2) "senior participant" means an individual who is at least fifty years of age or older or who is otherwise eligible to receive services or to participate in programs administered by the aging and long-term services department or its designees.

**History: Laws 2019, ch. 152, § 1.**

**Effective dates.** — Laws 2019, ch. 152 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.



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# ARTICLE 17B

# Long-Term Care Facility Dementia Training

Sec.
24-17B-1. Short title.
24-17B-2. Definitions.
24-17B-3. Training required.
24-17B-4. Department oversight and rulemaking.
24-17B-5. Dementia training certificates.

## 24-17B-1. Short title.

This act [24-17B-1 to 24-17B-5 NMSA 1978] may be cited as the "Long-Term Care Facility Dementia Training Act".

**History: Laws 2021, ch. 111, § 1.**
**Effective dates.** — Laws 2021, ch. 111 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 24-17B-2. Definitions.

As used in the Long-Term Care Facility Dementia Training Act:

A. "department" means the department of health;

B. "direct care service" means services provided to long-term care facility residents that maintain or improve the health and quality of life of the residents;

C. "direct care service staff member" means a person:

(1) employed by or contracted with a long-term care facility, either directly or through a third-party agreement, to provide in-person direct care services to long-term care facility residents; or

(2) contracted with a long-term care facility, either directly or through a third-party agreement, to provide at least ten hours per week in direct care services by video, audio or telephonic means; and

D. "long-term care facility" means every long-term care facility licensed by the state.

**History: Laws 2021, ch. 111, § 2.**
**Effective dates.** — Laws 2021, ch. 111 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 24-17B-3. Training required.

A. Each long-term care facility and long-term care facility contractor that is subject to the Long-Term Care Facility Dementia Training Act shall provide training from the department's current list of approved standardized training programs and continuing education as prescribed by the department to each direct care service staff member that it employs on:

(1) standards approved by the department for recognizing and treating Alzheimer's disease and dementia;

(2) person-centered care;

(3) activities of daily living; and

(4) any other subjects within the scope of long-term care facility dementia training identified by the department pursuant to the Long-Term Care Facility Dementia Training Act.

B. Training may be online or in-person and shall be a training program of at least four hours and approved by the department pursuant to Section 5 [24-17B-5 NMSA 1978] of the Long-Term Care Facility Dementia Training Act.

C. A person conducting the training shall have:

(1) at least two years of work experience related to Alzheimer's disease, dementia, health care, gerontology or other related field; and

(2) successfully completed training equivalent to the requirements provided in the Long-Term Care Facility Dementia Training Act, including passage of any skills competency



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or knowledge test required by the department pursuant to Subsection B of Section 4 [24-17B-4 NMSA 1978] of the Long-Term Care Facility Dementia Training Act.

D. Every direct care service staff member shall complete the requirements for and obtain certification as provided in Subsection E of this section.

E. A direct care service staff member:

(1) hired after January 1, 2022 shall complete the training required pursuant to this section within sixty days of the start of employment;

(2) hired prior to January 1, 2022 who has not received training within the past twenty-four months equivalent to the requirements set forth in the Long-Term Care Facility Dementia Training Act shall complete training within sixty days of January 1, 2022;

(3) hired prior to January 1, 2022 who received training within the past twenty-four months equivalent to the requirements set forth in the Long-Term Care Facility Dementia Training Act shall be issued a training certificate by the department; and

(4) who has successfully obtained a training certificate but has had a lapse of dementia-related direct care service employment for twenty-four consecutive months or more shall complete training within sixty days of the start of employment.

F. Every long-term care facility contractor that is subject to the Long-Term Care Facility Dementia Training Act shall provide a copy of every direct care service staff member's dementia training certificate obtained pursuant to Paragraph (3) of Subsection E of this section or Section 5 of the Long-Term Care Facility Dementia Training Act to every long-term care facility where that staff member provides direct care service.

**History: Laws 2021, ch. 111, § 3.**
**Effective dates.** — Laws 2021, ch. 111 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 24-17B-4. Department oversight and rulemaking.

In consultation with the aging and long-term services department, the department shall:

A. identify, approve, publish a list of and periodically review online or in-person standardized training programs that meet the requirements of the Long-Term Care Facility Dementia Training Act;

B. develop or approve and periodically review required evaluation instruments that demonstrate competency and knowledge gained in training topics;

C. promulgate rules:

(1) for evaluation and continuing education on the training topics for treatment and care of persons with Alzheimer's disease or dementia; and

(2) as necessary to carry out the Long-Term Care Facility Dementia Training Act;

D. issue interpretative guidance as necessary to ensure compliance with the Long-Term Care Facility Dementia Training Act;

E. oversee and approve all long-term care facility dementia training programs related to the Long-Term Care Facility Dementia Training Act;

F. issue training certificates pursuant to Paragraph (3) of Subsection E of Section 3 [24-17B-3 NMSA 1978] of the Long-Term Care Facility Dementia Training Act; and

G. give notice of the requirements of the Long-Term Care Facility Dementia Training Act to long-term care facilities within ninety days of the effective date of that act.

**History: Laws 2021, ch. 111, § 4.**
**Effective dates.** — Laws 2021, ch. 111 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 24-17B-5. Dementia training certificates.

The provider of training conducted pursuant to the Long-Term Care Facility Dementia Training Act shall issue a certificate to staff upon completion of initial training. The certificate shall be valid



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so long as the certificate holder meets the continuing education requirements set forth by the department pursuant to the Long-Term Care Facility Dementia Training Act and the certificate holder has not had a lapse of dementia-related direct care service employment for twenty-four consecutive months or more. The certificate shall be valid among long-term care facilities. Each long-term care facility and long-term care facility contractor that is subject to the Long-Term Care Facility Dementia Training Act shall be responsible for maintaining documentation regarding completed dementia training, evaluation and continuing education for each direct care service staff member.

**History: Laws 2021, ch. 111, § 5.**

**Effective dates.** — Laws 2021, ch. 111 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

# ARTICLE 18

# Children's and Juvenile Facility Criminal Records Screening

(Recompiled)

## 24-18-1 to 24-18-4. Recompiled.

**Recompilations.** — Former 24-18-1 to 24-18-4 NMSA 1978, as enacted by Laws 1985, Chapter 140, were recompiled as 32-9-1 to 32-9-4 NMSA 1978.

Laws 1993, ch. 77 recompiled former 32-9-1 through 32-9-4 NMSA 1978 as 32A-15-1 through 32A-15-4 NMSA 1978, effective July 1, 1993.

# ARTICLE 19

# Children's Trust Fund

Sec.
24-19-1. Short title.
24-19-2. Purpose.
24-19-3. Definitions.
24-19-4. Children's trust fund created; expenditure limitations.
24-19-5. Children's trust fund board of trustees created; members.
24-19-6. Per diem and mileage; board.
24-19-7. Duties of the board.
24-19-8. Children, youth and families department; additional powers and duties.
24-19-9. Acceptance of federal funds and private donations.
24-19-10. Next generation fund; created; expenditure limitations.
24-19-11. Next generation council; created; membership; purpose.

## 24-19-1. Short title.

Chapter 24, Article 19 NMSA 1978 may be cited as the "Children's Trust Fund Act".

**History: Laws 1986, ch. 15, § 1; 2005, ch. 65, § 1.**

**The 2005 amendment,** effective June 17, 2005, changed the statutory reference for the act.

## 24-19-2. Purpose.

It is the purpose of the Children's Trust Fund Act to:

A. be a statewide resource that advocates for and educates about the prevention of child abuse and neglect;

B. provide the means to develop innovative children's projects and programs that address one or more of the following:

(1) preventing abuse and neglect of children;

(2) providing medical, psychological and other appropriate treatment for children who are victims of abuse or neglect; and



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(3) developing community-based services aimed at the prevention and treatment of child abuse and neglect; and

C. manage the next generation fund projects and programs.

**History: Laws 1986, ch. 15, § 2; 2005, ch. 65, § 2; 2013, ch. 25, § 1.**

**The 2013 amendment,** effective June 14, 2013, expanded the function of the Children's Trust Fund Act to make the fund a statewide resource for the prevention of child abuse and neglect; added Subsection A and renumbered subsequent subsections; in Subsection B, after "children's projects", added "and programs"; and in Subsection C, after "next generation fund projects", added "and programs".

**The 2005 amendment,** effective June 17, 2005, added the purpose of managing next generation fund projects.

## 24-19-3. Definitions.

As used in the Children's Trust Fund Act:

A. "board" means the children's trust fund board of trustees;

B. "children's projects and programs" means projects and programs that provide services to children, including services to their families, consistent with the purposes of the Children's Trust Fund Act;

C. "council" means the next generation council;

D. "department" means the children, youth and families department;

E. "next generation fund projects and programs" means projects and programs funded from the next generation fund that meet the requirements for funding provided in Section 24-19-10 NMSA 1978; and

F. "secretary" means the secretary of children, youth and families.

**History: Laws 1986, ch. 15, § 3; 1992, ch. 57, § 19; 2005, ch. 65, § 3; 2013, ch. 25, § 2.**

**Cross references.** — For children, youth and families department, *see* 9-2A-1 NMSA 1978 et seq.

**The 2013 amendment,** effective June 14, 2013, expanded the function of the Children's Trust Fund Act to include children's programs; in Subsection B, after "children's projects", added "and programs" and after "services to children", deleted "on a one-time, short-term demonstration basis"; and in Subsection E, after "next generation fund projects", added "and programs", after "means projects", added "and programs", and after "Section", deleted "5 of this 2005 act" and added "24-19-10 NMSA 1978".

**The 2005 amendment,** effective June 17, 2005, added definitions for "council" and "next generation fund projects".

**The 1992 amendment,** effective July 1, 1992, substituted "that" for "which" in Subsection B; and substituted "children, youth and families" for "human services" in Subsections C and D.

## 24-19-4. Children's trust fund created; expenditure limitations.

A. The "children's trust fund" is created in the state treasury. The children's trust fund may be used for any purpose enumerated in Section 24-19-2 NMSA 1978. All income received from investment of the fund shall be credited to the fund. No money appropriated to the fund or otherwise accruing to it shall be disbursed in any manner except as provided in the Children's Trust Fund Act.

B. The children's trust fund shall be administered by the department for the purpose of funding children's projects and programs from the income received from investment of the fund; provided that none of the income shall be used for capital expenditures. All income from investment of the fund is appropriated to the department for that purpose or for administrative costs as provided in Subsection C of this section. Grants, distributions and transfers of money from the fund shall be made only from the income received from investment of the fund and from other sources pursuant to Section 24-19-9 NMSA 1978, including federal funds, private donations, bequests and other public and private grants.

C. Up to ten percent of the income received from investment of the children's trust fund may be expended for costs of administration of the fund and administration of the children's projects and programs undertaken with fund money. Administrative costs include per diem and mileage, staff salaries and expenses related to administration of the fund.

D. Disbursements from income credited to the children's trust fund and appropriated to the department shall be made only upon warrants drawn by the secretary of finance and administration



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pursuant to vouchers signed by the secretary of children, youth and families or the secretary's designated representative to fund children's projects and programs approved by the board.

E. One-half of the money transferred to the children's trust fund pursuant to Section 40-1-11 NMSA 1978 and all of the money transferred to the children's trust fund pursuant to Section 66-3-420 NMSA 1978 shall be deemed income received from investment of the fund.

**History: Laws 1986, ch. 15, § 4; 1990, ch. 26, § 1; 1992, ch. 57, § 20; 1993, ch. 175, § 1; 1993, ch. 199, § 1; 2004, ch. 74, § 1; 2005, ch. 65, § 4; 2013, ch. 25, § 3.**

**Cross references.** — For secretary of children, youth and families, *see* 9-2A-6 NMSA 1978.

**The 2013 amendment,** effective June 14, 2013, expanded the function of the Children's Trust Fund Act to include children's programs; expanded the source of money for expenditures from the fund; in Subsection B, in the first sentence, after "funding children's projects", added "and programs" and in the third sentence, after "income received from investment of the fund", added the remainder of the sentence; in Subsection C, after "administration of the children's projects", added "and programs"; and in Subsection D, after "designated representative to fund children's projects", added "and programs".

**The 2005 amendment,** effective June 17, 2005, deleted "appropriations" in Subsection B and substituted "distributions" and made non-substantive changes in wording in Subsections A and D.

**The 2004 amendment,** effective March 4, 2004, amended Subsection E to add "and all of the money transferred to the children's trust fund pursuant to Section 66-3-420 NMSA 1978".

**The 1993 amendment,** effective June 18, 1993, substituted "1997" for "1994" in Subsection E.

**The 1992 amendment,** effective July 1, 1992, substituted "children, youth and families" for "human services" in Subsection D.

**The 1990 amendment,** effective May 16, 1990, substituted "Section 24-19-2 NMSA 1978" for "Section 2 of the Children's Trust Fund Act" in the first sentence in Subsection A, substituted "children's trust fund" for "fund" and "children's projects" for "projects" in the first sentence in Subsection C, and substituted "June 30, 1994" for "June 30, 1992" in Subsection E.

## 24-19-5. Children's trust fund board of trustees created; members.

A. There is created the "children's trust fund board of trustees" consisting of thirteen nonpartisan members, not employees of the state, knowledgeable in the area of children's programs and representative of multiple, diverse perspectives within the state, who shall be appointed by the governor with the advice and consent of the senate. Of these members, at least two shall be individuals of recognized standing in the field of children's services. On the initial board, two members shall be appointed for terms ending on July 1, 1988; two members shall be appointed for terms ending on July 1, 1989; and three members shall be appointed for terms ending on July 1, 1990. Thereafter, appointments shall be made for terms of four years. Vacancies of appointed members shall be filled by appointment by the governor for the unexpired term.

B. The board shall select a person from its membership to serve as chair.

**History: Laws 1986, ch. 15, § 5; 1987, ch. 135, § 1; 2013, ch. 25, § 4.**

**The 2013 amendment,** effective June 14, 2013, increased the number of trustees of the children's trust fund board; in Subsection A, in the first sentence, after "consisting of", deleted "nine" and added "thirteen nonpartisan", and after "children's programs", added "and representative of multiple, diverse perspectives within the state", and in the fifth sentence, after "shall be filled", added "by appointment".

## 24-19-6. Per diem and mileage; board.

Members of the board shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

**History: Laws 1986, ch. 15, § 6.**

## 24-19-7. Duties of the board.

At least four times a year, the board shall meet upon the call of its chair to take all action necessary or proper for the administration of the Children's Trust Fund Act. The board shall also approve or disapprove proposals submitted and shall base its decision on the proposals' merit and feasibility, the best interest of the beneficiaries of the children's project or program proposals and the capacity of the children's projects' or programs' success or failure for evaluation.



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**History: Laws 1986, ch. 15, § 7; 2005, ch. 65, § 6; 2013, ch. 25, § 5.**

**The 2013 amendment,** effective June 14, 2013, broadened the duties of the board of trustees to include the review of program proposals; in the first sentence, after "call of its chair to", deleted "review proposals submitted to the department by public or private entities and", and in the second sentence, after "children's project", deleted "proposal" and added "or program proposals", and after "capacity of the children's", deleted "project's" and added "projects' or programs'".

**The 2005 amendment,** effective June 17, 2005, changed the reference to "projects" to "children's projects".

## 24-19-8. Children, youth and families department; additional powers and duties.

The department shall:

A. promulgate rules approved by the board;

B. transmit proposals for children's projects and programs to the board and next generation fund projects and programs to the council for evaluation and report on the proposals;

C. enter into contracts approved by the board to carry out the proposed children's project or program or next generation fund project or program, provided that:

(1) not more than fifty percent of the total funds distributed for any one fiscal year from the children's trust fund shall be allocated for any single children's project or program;

(2) not more than fifty percent of the total funds distributed for any one fiscal year from the next generation fund shall be allocated for any single next generation fund project or program;

(3) each children's project or program shall be funded for a specified period, not to exceed four years, and funds shall not be used for maintenance of ongoing or permanent efforts extending beyond the period specified, except that a children's project or program may be extended once for a period not to exceed the original, and the board shall approve rules providing procedures and guidelines for the preparation and approval of proposals for children's projects and programs and providing for any other matter the board deems necessary for the administration of the Children's Trust Fund Act; and

(4) no contract shall be entered into if the department finds it contrary to law;

D. furnish the board and the council with the necessary technical and clerical assistance;

E. adopt standard contract provisions; and

F. report at least annually to the governor and the legislature on the progress of its work and the results of children's projects and programs and next generation fund projects and programs.

**History: Laws 1986, ch. 15, § 8; 2005, ch. 65, § 8; 2013, ch. 25, § 6.**

**The 2013 amendment,** effective June 14, 2013, expanded the powers and duties of the department over children's programs; in Subsection B, after "children's projects", added "and programs" and after "next generation fund projects", added "and programs"; in Subsection C, in the first sentence, after "children's project", added "or program", and after "next generation fund project", added "or program"; in Paragraph (1) of Subsection C, after "children's project", added "or program"; in Paragraph (2) of Subsection C, after "next generation fund project", added "or program"; in Paragraph (3) of Subsection C, at the beginning of the sentence, after "each children's project", added "or program", after "except that a children's project", added "or program", and after "proposals for children's projects", added "and programs"; and in Subsection F, after "children's projects", added "and programs", and after "next generation fund projects", added "and programs".

**The 2005 amendment,** effective June 17, 2005, required the children, youth and families department to adopt rules; transmit next generation fund projects to the next generation council; enter into contracts to carry out next generation fund projects and providing that not more than fifty percent of the children's trust fund may be allocated to a single project and that not more than fifty percent of the total funds distributed in a fiscal year from the next generation fund shall be allocated to a single next generation fund project.

## 24-19-9. Acceptance of federal funds and private donations.

To carry out the provisions of the Children's Trust Fund Act, the department and the children's trust fund may accept any federal matching funds or grants for children's projects and programs or next generation fund projects and programs. The department may accept donations and bequests from private sources for deposit in the children's trust fund or the next generation fund, as applicable. The board shall distribute these funds as specified by the granting entity or donor.



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**History: Laws 1986, ch. 15, § 9; 2005, ch. 65, § 9; 2013, ch. 25, § 7.**

**The 2013 amendment,** effective June 14, 2013, authorized the children's trust fund to accept federal matching funds and grants; authorized the use of funds for children's projects; in the first sentence, after "the department", added "and the children's trust fund", after "children's projects", added "and programs", and after "next generation fund projects", added "and programs"; and added the last sentence.

**The 2005 amendment,** effective June 17, 2005, permitted the children, youth and families department to accept federal matching funds or grants for next generation fund projects and to accept donations and bequests for deposit into the next generation fund.

## 24-19-10. Next generation fund; created; expenditure limitations.

A. The "next generation fund" is created in the state treasury. The next generation fund may be used for any purpose enumerated in Section 24-19-2 NMSA 1978. All income received from investment of the fund shall be credited to the fund. No money appropriated to the fund or otherwise accruing to it shall be disbursed in any manner except as provided in the Children's Trust Fund Act.

B. The fund shall be used to fund next generation fund projects and programs that are approved by the board. Next generation fund projects and programs shall:

(1) provide positive child and youth development activities that support physical, mental and social well-being;

(2) promote strong, healthy families and help to prevent child abuse and neglect;

(3) promote community service, leadership and citizenship; and

(4) provide community coordination of child and youth development programming across the age zero to twenty-four developmental continuum.

C. The next generation fund shall be administered by the department, and the income from investment of the fund is appropriated to the department to carry out the purposes of the fund. None of the income shall be used for capital expenditures. Grants, distributions and transfers of money from the fund shall be made only from the income received from investment of the fund.

D. Up to ten percent of the income received from investment of the fund may be expended for costs of administering the fund and next generation projects and programs. Administrative costs include per diem and mileage, staff salaries and expenses related to administration of the fund.

E. Disbursements from the fund shall be made by warrants drawn by the secretary of finance and administration pursuant to vouchers signed by the secretary of children, youth and families or the secretary's designated representative.

**History: Laws 2005, ch. 65, § 5; 2013, ch. 25, § 8.**

**The 2013 amendment,** effective June 14, 2013, authorized the use of the next generation fund for next generation programs; in Subsection B, in the first sentence, after "next generation fund projects", added "and programs" and in the second sentence, after "Next generation fund projects", added "and programs"; and in Subsection D, in the first sentence, after "next generation projects", added "and programs".

## 24-19-11. Next generation council; created; membership; purpose.

A. The "next generation council" is created. The board shall appoint ten members, at least two from each federal congressional district, who are not employees of the state and who are knowledgeable in the area of positive child and youth development programs. Members serve at the pleasure of the board. Members shall select a member to serve as chair of the council. Members are entitled to per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

B. The council shall evaluate proposed next generation fund projects and programs and make funding recommendations to the board. The board shall approve or disapprove next generation fund projects and programs for funding and transmit those proposals to the department.

**History: Laws 2005, ch. 65, § 7; 2013, ch. 25, § 9.**

**The 2013 amendment,** effective June 14, 2013, required the next generation council to evaluate next generation fund programs; in Subsection A, in the second sentence, after "at least two from each", added "federal"; and in Subsection B, in the first sentence, after "next generation fund projects", added "and programs", and in the second sentence, after "next generation fund projects", added "and programs".



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# ARTICLE 20

# Health Research

Sec.
24-20-1. Medical trust fund for cancer and other medical research; appropriation.
24-20-2. Repealed.
24-20-3. Brain injury advisory council; created; powers and duties.
24-20-4. Amyotrophic lateral sclerosis research fund.

## 24-20-1. Medical trust fund for cancer and other medical research; appropriation.

A. There is created at the university of New Mexico school of medicine a medical trust fund to be administered by the school of medicine. The fund shall consist of balances transferred to the fund from the dedicated health research fund and any other distributions, transfers and deposits that may be made to the fund. Earnings from investment of the medical trust fund are appropriated to the university of New Mexico school of medicine for cancer and other medical research.

B. The university of New Mexico school of medicine shall report annually to the commission on higher education, the department of health and the legislative finance committee regarding the use of the earnings on the medical trust fund.

**History: 1978 Comp., § 24-20-1, enacted by Laws 1993, ch. 358, § 3.**

**Repeals and reenactments.** — Laws 1993, ch. 358, § 3 repealed 24-20-1 NMSA 1978, as enacted by Laws 1986, ch. 13, § 5, creating a dedicated health research fund, and enacted a new section, effective July 1, 1993.

## 24-20-2. Repealed.

**Repeals.** — Laws 1995, ch. 189, § 2 repealed 24-20-2 NMSA 1978, as enacted by Laws 1990, ch. 103, § 1, relating to a head injury task force, effective July 1, 1995. For provisions of former section, *see* the 1994 NMSA 1978 on *NMOneSource.com*.

## 24-20-3. Brain injury advisory council; created; powers and duties.

A. The "brain injury advisory council" is created to advise the governor's commission on disability, the governor, the legislature and other state agencies.

B. The brain injury advisory council shall consist of no fewer than eighteen and no more than twenty-four members appointed by the governor and shall include survivors of brain injuries; family members of persons with brain injuries; and health care professionals and other representatives of private sector organizations and state agencies that provide services and support to persons with brain injuries.

C. Members shall be appointed for staggered terms of three years, so that the terms of one-third of the members shall expire in a given year.

D. Members shall elect annually a chair and vice chair. Staff and other administrative support shall be provided by the governor's commission on disability or other state agency as assigned by the governor. Members shall meet at the call of the chair.

E. Members who are not state employees may receive per diem and travel expenses as provided in the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978] for state employees. Reasonable accommodations shall be made available to permit full participation in council activities by its members, including personal assistance to members who are survivors of brain injuries and respite care for members who are family members of persons with brain injuries.

F. The brain injury advisory council shall:

(1) study and make recommendations to the governor's commission on disability, the governor, the legislature and other state agencies concerning case management, community support systems, long-term care, employment, emergency medical services, rehabilitation and prevention



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and the improvement and coordination of state activities relative to the concerns of persons with brain injuries and their families or other caregivers; and

(2) advise appropriate state agencies and private organizations on the development of services and supports that meet the needs of persons with brain injuries.

**History: Laws 1995, ch. 189, § 1; 2013, ch. 127, § 1.**

**The 2013 amendment,** effective July 1, 2013, moved the brain injury advisory council functions from the developmental disabilities planning council to the governor's commission on disability; in Subsection A, after "is created to advise the", deleted "developmental disabilities planning council" and added "governor's commission on disability"; in Subsection D, in the second sentence, after "provided by the", deleted "developmental disabilities planning council" and added "governor's commission on disability"; and in Paragraph (1) of Subsection F, after "recommendations to the", deleted "developmental disabilities planning council" and added "governor's commission on disability".

**Temporary provisions.** — Laws 2013, ch. 127, § 2 provided that on July 1, 2013:

A. all personnel, appropriations, money, records, equipment, supplies and other personal property of the brain injury advisory council shall be transferred to the governor's commission on disability;

B. all contracts currently binding and effective upon the brain injury advisory council at the developmental disabilities planning council shall be binding and effective upon the brain injury advisory council at the governor's commission on disability; and

C. all programs and all references in law to the brain injury advisory council shall be construed as referring to the governor's commission on disability.

## 24-20-4. Amyotrophic lateral sclerosis research fund.

The "amyotrophic lateral sclerosis research fund" is created in the state treasury. The fund shall consist of distributions made to the fund pursuant to the Tax Administration Act [Chapter 7, Article 1 NMSA 1978]. Money in the fund is appropriated to the board of regents of the university of New Mexico for amyotrophic lateral sclerosis research. Disbursements from the fund shall be by warrant of the secretary of finance and administration upon vouchers signed by the president of the university of New Mexico. Money in the fund shall revert to the general fund at the end of a fiscal year.

**History: Laws 2005, ch. 56, § 3.**

**Applicability.** — Section 24-20-4 NMSA 1978 applies to taxable years beginning on or after January 1, 2005.

# ARTICLE 21

# Genetic Information Privacy

Sec.
24-21-1. Short title.
24-21-2. Definitions.
24-21-3. Genetic analysis prohibited without informed consent; exceptions.
24-21-4. Genetic discrimination prohibited.
24-21-5. Rights of retention.
24-21-6. Penalties.
24-21-7. Application of act.

## 24-21-1. Short title.

Chapter 24, Article 21 NMSA 1978 may be cited as the "Genetic Information Privacy Act".

**History: Laws 1998, ch. 77, § 1; 2015, ch. 156, § 1.**

**The 2015 amendment,** effective June 19, 2015, changed that statutory reference of the Genetic Information Privacy Act from "This act" to "Chapter 24, Article 21 NMSA 1978".

## 24-21-2. Definitions.

As used in the Genetic Information Privacy Act:

A. "DNA" means deoxyribonucleic acid, including mitochondrial DNA, complementary DNA and DNA derived from ribonucleic acid;

B. "gene products" means gene fragments, ribonucleic acids or proteins derived from DNA that would be a reflection of or indicate DNA sequence information;



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C. "genetic analysis" means a test of an individual's DNA, gene products or chromosomes that indicates a propensity for or susceptibility to illness, disease, impairment or other disorders, whether physical or mental; that demonstrates genetic or chromosomal damage due to environmental factors; or that indicates carrier status for disease or disorder; excluded, however, are routine physical measurements, chemical, blood and urine analysis, tests for drugs, tests for the presence of HIV virus and any other tests or analyses commonly accepted in clinical practice at the time ordered;

D. "genetic information" means information about the genetic makeup of an individual or members of an individual's family, including information resulting from genetic testing, genetic analysis, DNA composition, participation in genetic research or use of genetic services;

E. "genetic propensity" means the presence in an individual or members of an individual's family of real or perceived variations in DNA or other genetic material from that of the normal genome that do not represent the outward physical or medical signs of a genetic disease at the time of consideration;

F. "genetic testing" means a test of an individual's DNA, ribonucleic acid, chromosomes or proteins, including carrier status, that are linked with physical or mental disorders, impairments or genetic characteristics or that indicate that an individual may be predisposed to an illness, disease, impairment or other disorder;

G. "insurer" means an insurance company, insurance service or insurance organization that is licensed to engage in the business of insurance in the state and that is subject to state law that regulates insurance within the meaning of Paragraph (2) of Subsection (b) of Section 514 of the federal Employee Retirement Income Security Act of 1974, as amended. "Insurer" does not include an insurance company that is licensed under the Prepaid Dental Plan Law [Chapter 59A, Article 48 NMSA 1978] or a company that is solely engaged in the sale of dental insurance and is not licensed under the Prepaid Dental Plan Law, but under another provision of the New Mexico Insurance Code [Chapter 59A NMSA 1978 except Articles 30A and 42A]; and

H. "laboratory" means a facility accredited pursuant to the federal clinical laboratory improvement amendments for the biological, microbiological, serological, chemical, immunohematological, hematological, biophysical, cytological, pathological or other examination of materials derived from the human body for the purpose of providing information for the diagnosis, prevention or treatment of any disease or impairment of, or the assessment of the health of, human beings and includes procedures to determine, measure or otherwise describe the presence or absence of various substances or organisms in the body.

**History: Laws 1998, ch. 77, § 2; 2005, ch. 204, § 1; 2015, ch. 156, § 2.**

**Cross references.** — For Section 514(b)(2) of the Employee Retirement Income Security Act of 1974, *see* 29 U.S.C. § 1144(b)(2).

**The 2015 amendment,** effective June 19, 2015, added the definition of "laboratory" as used in the Genetic Information Privacy Act; in Subsection C, after "a test of" deleted "a person's" and added "an individual's"; in Subsection D, after "genetic makeup of", deleted "a person" and added "an individual", and after "or member's", deleted "a person's" and added "an individual's"; in Subsection E, after "the presence in", deleted "a person" and added "an individual", after "or members of", deleted "a person's" and added "an individual's"; and added new Subsection H.

**The 2005 amendment,** effective July 1, 2005, added the definition of "genetic testing" in Subsection F to mean a test of DNA, ribonucleic acid, chromosomes or proteins.

## 24-21-3. Genetic analysis prohibited without informed consent; exceptions.

A. Except as provided in Subsection C of this section, no person shall obtain genetic information or samples for genetic analysis from an individual without first obtaining informed and written consent from the individual or the individual's authorized representative.

B. Except as provided in Subsection C of this section, genetic analysis of an individual or collection, retention, transmission or use of genetic information without the informed and written consent of the individual or the individual's authorized representative is prohibited.

C. An individual's DNA, genetic information or the results of genetic analysis may be obtained, retained, transmitted or used without the individual's written and informed consent pursuant to federal or state law or regulations only:



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(1) to identify an individual in the course of a criminal investigation by a law enforcement agency;

(2) if the individual has been convicted of a felony, for purposes of maintaining a DNA database for law enforcement purposes;

(3) to identify a deceased individual;

(4) to establish parental identity;

(5) to screen newborns;

(6) if the DNA, genetic information or results of genetic analysis are not identified with the individual or the individual's family members;

(7) by a court for determination of damage awards pursuant to the Genetic Information Privacy Act;

(8) by medical repositories or registries;

(9) for the purpose of medical or scientific research and education, including retention of gene products, genetic information or genetic analysis if the identity of the individual or the individual's family members is not disclosed;

(10) for the purpose of emergency medical treatment consistent with applicable law; or

(11) by a laboratory conducting an analysis or test of a specified individual pursuant to a written order to the laboratory from a health care practitioner or the health care practitioner's agent, including by electronic transmission.

D. Actions of an insurer and third parties dealing with an insurer in the ordinary course of conducting and administering the business of life, disability income or long-term care insurance are exempt from the provisions of this section if the use of genetic analysis or genetic information for underwriting purposes is based on sound actuarial principles or related to actual or reasonably anticipated experience. However, before or at the time of collecting genetic information for use in conducting and administering the business of life, disability income or long-term care insurance, the insurer shall notify in writing an applicant for insurance or the insured that the information may be used, transmitted or retained solely for the purpose of conducting and administering the business of life, disability income or long-term care insurance.

E. Nothing in Paragraph (5), (8), (9), (10) or (11) of Subsection C of this section authorizes a person to obtain, retain, transmit or use an individual's DNA, genetic information or the results of genetic analysis if the individual or the individual's authorized representative or guardian, or the parent or guardian of a minor child, gives notice to the person of an objection on the basis of religious tenets or practices.

**History: Laws 1998, ch. 77, § 3; 2015, ch. 156, § 3.**

**The 2015 amendment,** effective June 19, 2015, authorized the acquisition, retention, transmission or use of genetic information or the results of genetic analysis without an individual's written and informed consent by a laboratory conducting an analysis or test of a specified individual pursuant to a written order from a health care practitioner or its agent; in Subsection A, after "analysis from", deleted "a person" and added "an individual", and after "consent from the", deleted "person or the person's" and added "individual or the individual's"; in Subsection B, after "genetic analysis of", deleted "a person" and added "an individual", and after "written consent of the", deleted "person or the person's" and added "individual or the individual's"; in Subsection C, deleted "A person's" and added "An individual's", and after "used without the", deleted "person's" and added "individual's"; in Paragraph (1) of Subsection C, after "identify", deleted "a person" and added "an individual"; in Paragraph (2) of Subsection C, after "if the", deleted "person" and added "individual"; in Paragraph (3) of Subsection C, after "identify", added "a", and after "deceased", deleted "persons" and added "individual"; in Paragraph (6) of Subsection C, after "identified with the", deleted "person or person's" and added "individual or the individual's"; in Paragraph (9) of Subsection C, after "identity of the", deleted "person or person's" and added "individual or the individual's"; added new Paragraph (11) of Subsection C; and in Subsection E, after "(5)", deleted "(6)", after "(9)", deleted "or", after "(10)", added "or (11)", after "Subsection C of this", added "this", after "section", deleted "3 of the Genetic Information Privacy Act", after "authorizes", deleted "obtaining, retaining, transmitting or using a person's" and added "a person to obtain, retain, transmit or use an individual's", after "analysis if the", deleted "person, his" and added "individual or the individual's", and after "minor child", deleted "objects" and added "gives notice to the person of an objection".

## 24-21-4. Genetic discrimination prohibited.

A. Discrimination by an insurer against an individual or member of the individual's family on the basis of genetic analysis, genetic information or genetic propensity is prohibited.



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B. The provisions of this section do not require a health insurer to provide particular benefits other than those provided under the terms of the plan or coverage. A health insurer shall not consider a genetic propensity, susceptibility or carrier status as a pre-existing condition for the purpose of limiting or excluding benefits, establishing rates or providing coverage.

C. The provisions of this section do not prohibit use of genetic analysis, genetic propensity or genetic information by an insurer in the ordinary conduct of business in connection with life, disability income or long-term care insurance if use of genetic analysis, genetic propensity or genetic information in underwriting is based on sound actuarial principles or related to actual or reasonably anticipated experience.

D. It is unlawful for a person to use genetic information in employment, recruiting, housing or lending decisions or in extending public accommodations and services.

**History: Laws 1998, ch. 77, § 4; 2005, ch. 204, § 2; 2015, ch. 156, § 4.**

**The 2015 amendment,** effective June 19, 2015, made technical amendments to the section; in Subsection A, after "insurer against", deleted "a person" and added "an individual", and after "member of the", deleted "person's" and added "individual's".

## 24-21-5. Rights of retention.

A. Unless otherwise authorized by Subsection C of Section 24-21-3 NMSA 1978, no person shall retain an individual's genetic information, gene products or samples for genetic analysis without first obtaining informed and written consent from the individual or the individual's authorized representative. This subsection does not affect the status of original medical records of patients, and the rules of confidentiality and accessibility applicable to the records continue in force.

B. An individual's genetic information or samples for genetic analysis shall be destroyed promptly upon the specific request by that individual or that individual's authorized representative unless:

(1) retention is necessary for the purposes of a criminal or death investigation or a criminal or juvenile proceeding;

(2) retention is authorized by order of a court of competent jurisdiction;

(3) retention is authorized under a research protocol approved by an institution review board pursuant to federal law or a medical registry or repository authorized by state or federal law; or

(4) the genetic information or samples for genetic analysis have been obtained pursuant to Subsection C of Section 24-21-3 NMSA 1978.

C. Actions of an insurer and third parties dealing with an insurer in the ordinary course of conducting and administering the business of life, disability income or long-term care insurance are exempt from the provisions of this section. However, before or at the time of collecting genetic information for use in conducting and administering the business of life, disability income or long-term care insurance, the insurer shall notify in writing an applicant for insurance or the insured that the information may be used, transmitted or retained solely for the purpose of conducting and administering the business of life, disability income or long-term care insurance.

D. Nothing in Paragraph (3) or (4) of Subsection B of this section authorizes retention of an individual's genetic information or samples for genetic analysis if the individual or the individual's authorized representative or guardian, or the parent or guardian of a minor child, objects on the basis of religious tenets or practices.

**History: Laws 1998, ch. 77, § 5; 2015, ch. 156, § 5.**

**The 2015 amendment,** effective June 19, 2015, made technical changes to the section; in Subsection A, after "Section", deleted "3 of the Genetic Information Privacy Act" and added "24-21-3 NMSA 1978", after "shall retain", deleted "a person's" and added "an individual's", and after "written consent from", deleted "the person or the person's" and added "the individual or the individual's"; in Subsection B, deleted "A person's" and added "An individual's", and after "request by that", deleted "person or that person's" and added "individual or that individual's"; in Paragraph (4) of Subsection B, after "Section", deleted "3 of the Genetic Information Privacy Act" and added "24-21-3 NMSA 1978"; and in Subsection D, after "Subsection B of", added "this", after "section", deleted "5 of the Genetic Information Privacy Act", after "authorizes retention of", deleted "a person's" and added "an individual's", and after "genetic analysis if the", deleted "person, his" and added "individual or the individual's".



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## 24-21-6. Penalties.

A. The attorney general or a district attorney may bring a civil action against a person for violating the provisions of the Genetic Information Privacy Act or to otherwise enforce those provisions.

B. An individual whose rights under the provisions of the Genetic Information Privacy Act have been violated may bring a civil action for damages or other relief.

C. The court may order a person who violates the provisions of the Genetic Information Privacy Act to comply with those provisions and may order other appropriate relief, including:

(1) directing an insurer who has violated Section 24-21-3 or 24-21-4 NMSA 1978 to provide a policy for hospital and medical expenses, including health insurance, group disability insurance or long-term care coverage, to the injured individual under the same terms and conditions as would have applied had the violation not occurred;

(2) actual damages;

(3) damages of up to five thousand dollars ($5,000) in addition to any economic loss if the violation results from willful or grossly negligent conduct; and

(4) reasonable attorney fees and appropriate court costs.

D. Pursuant to Subsection C of Section 24-21-3 NMSA 1978, the court may use genetic information to determine the cause of damage or injury and penalty awards.

E. Each instance of wrongful collection, analysis, retention, disclosure or use of genetic information constitutes a separate and actionable violation of the Genetic Information Privacy Act.

**History: Laws 1998, ch. 77, § 6; 2015, ch. 156, § 6.**

**The 2015 amendment,** effective June 19, 2015, made technical changes to the section; in Subsection B, deleted "A person" and added "An individual"; in Paragraph (1) of Subsection C, after "violated Section", deleted "3 or 4 of the Genetic Information Privacy Act" and added "24-21-3 or 24-21-4 NMSA 1978", and after "to the injured", deleted "person" and added "individual"; and in Subsection D, after "Section", deleted "3 of the Genetic Information Privacy Act" and added "24-21-3 NMSA 1978".

## 24-21-7. Application of act.

The provisions of the Genetic Information Privacy Act shall apply to genetic analysis performed and genetic information and gene products obtained after May 20, 1998, except that Section 24-21-4 NMSA 1978 and proceedings brought alleging violations of that section shall apply to genetic analysis whenever performed and genetic information and gene products whenever obtained.

**History: Laws 1998, ch. 77, § 7; 1999, ch. 82, § 1.**

**The 1999 amendment,** effective June 18, 1999, substituted "the Genetic Information Privacy Act" for "this act" and "May 20, 1998" for "the effective date of this act" and added the exception at the end.

# ARTICLE 22

# Safe Haven for Infants

Sec.
24-22-1. Short title.
24-22-1.1. Purpose.
24-22-2. Definitions.
24-22-3. Leaving an infant.
24-22-4. Safe haven site procedures.
24-22-5. Responsibilities of the children, youth and families department.
24-22-6. Repealed.
24-22-7. Procedure if reunification is sought.
24-22-8. Immunity.

## 24-22-1. Short title.

Chapter 24, Article 22 NMSA 1978 may be cited as the "Safe Haven for Infants Act".

**History: Laws 2001, ch. 31, § 1; 2001, ch. 132, § 1; 2005, ch. 26, § 1.**

**The 2005 amendment,** effective June 17, 2005, changed the section references of the original enactment to a compiled chapter and article reference.



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## 24-22-1.1. Purpose.

The purpose of the Safe Haven for Infants Act is to promote the safety of infants and to immunize a parent from criminal prosecution for leaving an infant, ninety days of age or less, at a safe haven site. This act is not intended to abridge the rights or obligations created by the federal Indian Child Welfare Act of 1978 or the rights of parents.

**History: Laws 2005, ch. 26, § 2; 2013, ch. 20, § 1.**

**Cross references.** — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901, et seq.

**The 2013 amendment,** effective June 14, 2013, changed terminology to conform to changes in terminology in the act; and in the first sentence, after "age or less, at a", deleted "hospital" and added "safe haven site".

## 24-22-2. Definitions.

As used in the Safe Haven for Infants Act:

A. "fire station" means a fire station that is certified by the state fire marshal's office;

B. "hospital" means an acute care general hospital or health care clinic licensed by the state;

C. "Indian child" means an Indian child as defined by the federal Indian Child Welfare Act of 1978;

D. "infant" means a child no more than ninety days old, as determined within a reasonable degree of medical certainty;

E. "law enforcement agency" means a law enforcement agency of the state or a political subdivision of the state;

F. "safe haven site" means a hospital, law enforcement agency or fire station that has staff on site at the time an infant is left at such a site; and

G. "staff" means an employee, contractor, agent or volunteer performing services as required and on behalf of the safe haven site.

**History: Laws 2001, ch. 31, § 2; 2001, ch. 132, § 2; 2005, ch. 26, § 3; 2013, ch. 20, § 2; 2020, ch. 9, § 28.**

**Cross references.** — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901, et seq.

**The 2020 amendment,** effective July 1, 2021, revised the definition of "fire station" as used in the Safe Haven for Infants Act; and in Subsection A, after "certified by the", deleted "fire marshal division of the public regulation commission" and added "state fire marshal's office".

**The 2013 amendment,** effective June 14, 2013, defined additional terms, including the term "safe haven site"; added Subsection A; designated former Subsections A through C as new Subsections B through D; added Subsections E and F; designated former Subsection D as new Subsection G; and in Subsection G, after "on behalf of the", deleted "hospital" and added "safe haven site".

**The 2005 amendment,** effective June 17, 2005, changed the definition of Indian child to mean an Indian child as defined in the federal Indian Child Welfare Act of 1978.

## 24-22-3. Leaving an infant.

A. A person may leave an infant with the staff of a safe haven site without being subject to criminal prosecution for abandonment or abuse if the infant was born within ninety days of being left at the safe haven site, as determined within a reasonable degree of medical certainty, and if the infant is left in a condition that would not constitute abandonment or abuse of a child pursuant to Section 30-6-1 NMSA 1978.

B. A safe haven site may ask the person leaving the infant for the name of the infant's biological father or biological mother, the infant's name and the infant's medical history, but the person leaving the infant is not required to provide that information to the safe haven site.

C. The safe haven site is deemed to have received consent for medical services provided to an infant left at a safe haven site in accordance with the provisions of the Safe Haven for Infants Act or in accordance with procedures developed between the children, youth and families department and the safe haven site.

**History: Laws 2001, ch. 31, § 3; 2001, ch. 132, § 3; 2005, ch. 26, § 4; 2013, ch. 20, § 3.**

**The 2013 amendment,** effective June 14, 2013, changed terminology to conform to changes in terminology in the act; and in Subsections A through C, deleted "hospital" and inserted "safe haven site".

**The 2005 amendment,** effective June 17, 2005, provided that a person may leaves an infant at a hospital without being subject to criminal prosecution for abandonment or abuse under circumstances stated in this section.



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## 24-22-4. Safe haven site procedures.

A. A safe haven site shall accept an infant who is left at the safe haven site in accordance with the provisions of the Safe Haven for Infants Act.

B. In conjunction with the children, youth and families department, a safe haven site shall develop procedures for appropriate staff to accept and provide necessary medical services to an infant left at the safe haven site and to the person leaving the infant at the safe haven site, if necessary.

C. Upon receiving an infant who is left at a safe haven site in accordance with the provisions of the Safe Haven for Infants Act, the safe haven site may provide the person leaving the infant with:

(1) information about adoption services, including the availability of private adoption services;

(2) brochures or telephone numbers for agencies that provide adoption services or counseling services; and

(3) written information regarding whom to contact at the children, youth and families department if the parent decides to seek reunification with the infant.

D. A safe haven site shall ask the person leaving the infant whether the infant has a parent who is either a member of an Indian tribe or is eligible for membership in an Indian tribe, but the person leaving the infant is not required to provide that information to the safe haven site.

E. Immediately after receiving an infant in accordance with the provisions of the Safe Haven for Infants Act, a safe haven site shall inform the children, youth and families department that the infant has been left at the safe haven site. The safe haven site shall provide the children, youth and families department with all available information regarding the child and the parents, including the identity of the child and the parents, the location of the parents and the child's medical records.

**History: Laws 2001, ch. 31, § 4; 2001, ch. 132, § 4; 2005, ch. 26, § 5; 2013, ch. 20, § 4.**

**The 2013 amendment,** effective June 14, 2013, changed terminology to conform to changes in terminology in the act; in the title of the section, at the beginning of the title, deleted "hospital" and added "safe haven site"; and in Subsections A though E, deleted "hospital" and inserted "safe haven site".

**The 2005 amendment,** effective June 17, 2005, provided that a hospital shall ask the person leaving an infant whether the infant has a parent who is a member of an Indian tribe or is eligible for membership in an Indian tribe, but the person leaving the infant is not required to give the information and requires the hospital to immediately provide the children, youth and families department with all available information about the child and the parents of the child.

## 24-22-5. Responsibilities of the children, youth and families department.

A. The children, youth and families department shall be deemed to have emergency custody of an infant who has been left at a safe haven site according to the provisions of the Safe Haven for Infants Act.

B. Upon receiving a report of an infant left at a safe haven site pursuant to the provisions of the Safe Haven for Infants Act, the children, youth and families department shall immediately conduct an investigation, pursuant to the provisions of the Abuse and Neglect Act [Chapter 32A, Article 4 NMSA 1978].

C. When an infant is taken into custody by the children, youth and families department, the department shall make reasonable efforts to determine whether the infant is an Indian child. If the infant is an Indian child:

(1) the child's tribe shall be notified as required by Section 32A-1-14 NMSA 1978 and the federal Indian Child Welfare Act of 1978; and

(2) pre-adoptive placement and adoptive placement of the Indian child shall be in accordance with the provisions of Section 32A-5-5 NMSA 1978 regarding Indian child placement preferences.

D. The children, youth and families department shall perform public outreach functions necessary to educate the public about the Safe Haven for Infants Act, including developing literature about that act and distributing it to safe haven sites.

E. An infant left at a safe haven site in accordance with the provisions of the Safe Haven for Infants Act shall presumptively be deemed eligible and enrolled for medicaid benefits and services.

**History: Laws 2001, ch. 31, § 5; 2001, ch. 132, § 5; 2005, ch. 26, § 6; 2013, ch. 20, § 5.**

**Cross references.** — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901, et seq.



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**The 2013 amendment,** effective June 14, 2013, changed terminology to conform to changes in terminology in the act; and in Subsections A, B, D and E, deleted "hospital" and inserted "safe haven site".

**The 2005 amendment,** effective June 17, 2005, provided that if the infant is an Indian child, the child's tribe shall be notified as required by 32A-1-14 NMSA 1978 and the federal Indian Child Welfare Act of 1978.

## 24-22-6. Repealed.

**Repeals.** — Laws 2005, ch. 26, § 8 repealed 24-22-6 NMSA 1978, as enacted by Laws 2001, ch. 31, § 6 and Laws 2001, ch. 132, § 6, relating to confidentiality, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

## 24-22-7. Procedure if reunification is sought.

A. A person established as a parent of an infant previously left at a safe haven site shall have standing to participate in all proceedings regarding the child pursuant to the provisions of the Abuse and Neglect Act [Chapter 32A, Article 4 NMSA 1978].

B. If a person not previously established as a parent seeks reunification with an infant previously left at a safe haven site and the person's DNA indicates parentage of the infant, that person shall have standing to participate in all proceedings regarding the infant pursuant to the provisions of the Abuse and Neglect Act.

**History: Laws 2001, ch. 31, § 7; 2001, ch. 132, § 7; 2005, ch. 26, § 7; 2013, ch. 20, § 6.**

**The 2013 amendment,** effective June 14, 2013, changed terminology to conform to changes in terminology in the act; and in Subsections A and B, deleted "hospital" and inserted "safe haven site".

**The 2005 amendment,** effective June 17, 2005, provided that the parent of an infant shall have standing to participate in all proceedings regarding the child pursuant to the Abuse and Neglect Act; provided that if a person not previously established as a parent seeks reunification with an infant and the persons DNA indicated parentage of the infant, then the person has standing to participate in proceedings regarding the infant; and eliminated the provision that provides there is no presumption of abuse or neglect of against a person who seeks reunification.

## 24-22-8. Immunity.

A safe haven site and its staff are immune from criminal liability and civil liability for accepting an infant in compliance with the provisions of the Safe Haven for Infants Act but not for subsequent negligent medical care or treatment of the infant.

**History: Laws 2001, ch. 31, § 8 and Laws 2001, ch. 132, § 8; 2013, ch. 20, § 7.**

**The 2013 amendment,** effective June 14, 2013, changed terminology to conform to changes in terminology in the act; and at the beginning of the sentence, after "A", deleted "hospital" and inserted "safe haven site".

# ARTICLE 23

# Administration of Opioid Antagonists

Sec.
24-23-1. Authority to possess, store, distribute, dispense, prescribe and administer opioid antagonists; release from liability; rulemaking.
24-23-2. Repealed.
24-23-3. Opioid treatment center; opioid overdose education; naloxone.

## 24-23-1. Authority to possess, store, distribute, dispense, prescribe and administer opioid antagonists; release from liability; rulemaking.

A. A person may possess an opioid antagonist, regardless of whether the person holds a prescription for the opioid antagonist.

B. Any person acting under a standing order issued by a licensed prescriber may store or distribute an opioid antagonist.

C. Pursuant to a valid prescription, a pharmacist may dispense an opioid antagonist to a person:



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(1) at risk of experiencing an opioid-related drug overdose; or

(2) in a position to assist another person at risk of experiencing an opioid-related drug overdose.

D. A pharmacist may distribute an opioid antagonist to a registered overdose prevention and education program.

E. A person may administer an opioid antagonist to another person if the person:

(1) in good faith, believes the other person is experiencing a drug overdose; and

(2) acts with reasonable care in administering the drug to the other person.

F. A licensed prescriber may directly or by standing order prescribe, dispense or distribute an opioid antagonist to:

(1) a person at risk of experiencing an opioid-related drug overdose;

(2) a family member, friend or other person in a position to assist a person at risk of experiencing an opioid-related drug overdose;

(3) an employee, volunteer or representative of a community-based entity providing overdose prevention and education services that is registered with the department; or

(4) a first responder.

G. A registered overdose prevention and education program that possesses, stores, distributes or administers an opioid antagonist in accordance with department rules and on standing orders from a licensed prescriber pursuant to this section shall not be subject to civil liability, criminal prosecution or professional disciplinary action arising from the possession, storage, distribution or administration of the opioid antagonist; provided that actions are taken with reasonable care and without willful, wanton or reckless behavior.

H. A person who possesses or who administers, dispenses or distributes an opioid antagonist to another person pursuant to this section shall not be subject to civil liability, criminal prosecution or professional disciplinary action as a result of the possession, administration, distribution or dispensing of the opioid antagonist; provided that actions are taken with reasonable care and without willful, wanton or reckless behavior.

I. The department shall create, collect and maintain any individually identifiable information pursuant to this section in a manner consistent with state and federal privacy laws.

J. The secretary shall promulgate rules relating to overdose prevention and education programs:

(1) establishing requirements and protocols for the registration of overdose prevention and education programs that are not licensed pharmacies;

(2) monitoring registered overdose prevention and education programs' storage and distribution of opioid antagonists;

(3) gathering data from overdose prevention and education programs to inform public health efforts to address overdose prevention efforts; and

(4) authorizing standards for overdose prevention education curricula, training and the certification of individuals to store and distribute opioid antagonists for the overdose prevention and education program.

K. As used in this section:

(1) "administer" means the direct application of a drug to the body of an individual by injection, inhalation, ingestion or any other means;

(2) "department" means the department of health;

(3) "dispense" means to evaluate and implement a prescription for an opioid antagonist, including the preparation and delivery of a drug or device to a patient or patient's agent;

(4) "distribute" means to deliver an opioid antagonist drug or opioid antagonist device by means other than by administering or dispensing;

(5) "first responder" means any public safety employee or volunteer whose duties include responding rapidly to an emergency, including:

(a) a law enforcement officer;

(b) a firefighter or certified volunteer firefighter; or

(c) emergency medical services personnel;

(6) "licensed prescriber" means any individual who is authorized by law to prescribe an opioid antagonist in the state;



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(7) "opioid antagonist" means a drug approved by the federal food and drug administration that, when administered, negates or neutralizes in whole or in part the pharmacological effects of an opioid in the body. "Opioid antagonist" shall be limited to naloxone or other like medications that are indicated for use in reversing an opioid overdose and are approved by the department for such purpose;

(8) "possess" means to have physical control or custody of an opioid antagonist;

(9) "registered overdose prevention and education program" means any community-based organization, law enforcement agency, detention facility or school that has registered with the department in accordance with department rules and uses an approved department curriculum to teach overdose prevention and opioid antagonist administration;

(10) "standing order" means a licensed prescriber's instruction or prescribed procedure that is either patient specific or non-patient specific that can be exercised by other persons until changed or canceled by a licensed prescriber; and

(11) "storage" means possession of an opioid antagonist with the intent to dispense or distribute it.

**History: Laws 2001, ch. 228, § 1; 2016, ch. 45, § 1; 2016, ch. 47, § 1.**

**The 2016 amendment,** effective March 4, 2016, amended the Public Health Act to provide for the authorized possession, storage, distribution, prescribing and administration of opioid antagonists, and provided for immunity from civil and criminal liability; in the catchline, added "possess, store, distribute, dispense, prescribe and", and after "from liability", added "rulemaking"; in Subsection A, in the introductory sentence, after "A person", deleted "authorized under federal, state or local government regulations, other than a licensed health care professional permitted by law to administer an opioid antagonist" and added "may possess an opioid antagonist, regardless of whether the person holds a prescription for the opioid antagonist"; added new Subsections B, C and D; in Subsection E, in the introductory sentence, added "A person", and after "another person if", added "the person", in Paragraphs (1) and (2), deleted "he"; deleted former Subsection B; and added new Subsections F through K.

Laws 2016, ch. 45, § 1 and Laws 2016, ch. 47, § 1 enacted identical amendments to this section. The section was set out as amended by Laws 2016, ch. 47, § 1. *See* 12-1-8 NMSA 1978.

## 24-23-2. Repealed.

**Repeals.** — Laws 2016, ch. 45, § 4 and Laws 2016, ch. 47, § 4 repealed 24-23-2 NMSA 1978, as enacted by Laws 2001, ch. 228, § 2, relating to health care professionals and release from liability, effective March 4, 2016. For provisions of former section, *see* the 2015 NMSA 1978 on *NMOneSource.com*.

## 24-23-3. Opioid treatment center; opioid overdose education; naloxone.

A. As agency funding and agency supplies of naloxone permit, an opioid treatment center agency operating a federally certified program to dispense methadone or other narcotic replacement as part of a detoxification treatment or maintenance treatment shall provide each patient it treats with:

(1) opioid overdose education that:

(a) conforms to department of health or federal substance abuse and mental health services administration guidelines for opioid overdose education;

(b) explains the causes of an opioid overdose;

(c) instructs when and how to administer in accordance with medical best practices: 1) life-saving rescue techniques; and 2) an opioid antagonist; and

(d) explains how to contact appropriate emergency medical services;

(2) two doses of naloxone in either a generic form or in a form approved by the federal food and drug administration; and

(3) a prescription for naloxone.

B. As used in this section, "naloxone" means naloxone hydrochloride, which is an opioid antagonist for the treatment of opioid overdose.

**History: Laws 2017, ch. 59, § 1.**

**Effective dates.** — Laws 2017, ch. 59 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.



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# ARTICLE 24

# Child Care Facility Loan

Sec.
24-24-1. Short title.
24-24-2. Purpose.
24-24-3. Definitions.
24-24-4. Fund created; administration.

## 24-24-1. Short title.

This act [24-24-1 through 24-24-4 NMSA 1978] may be cited as the "Child Care Facility Loan Act".

**History: Laws 2003, ch. 316, § 1.**

**Emergency clauses.** — Laws 2003, ch. 316, § 5 contained an emergency clause and was approved April 8, 2003.

## 24-24-2. Purpose.

The purpose of the Child Care Facility Loan Act is to support the physical improvement, repair, safety and maintenance of licensed child care facilities throughout New Mexico by providing long-term, low-interest funding through a revolving loan fund so as to ensure availability of healthy and safe teaching environments.

**History: Laws 2003, ch. 316, § 2.**

**Emergency clauses.** — Laws 2003, ch. 316, § 5 contained an emergency clause and was approved April 8, 2003.

## 24-24-3. Definitions.

As used in the Child Care Facility Loan Act:

A. "department" means the children, youth and families department;

B. "facility" means a child care facility operated by a provider, including both family home-based and center-based programs, licensed by the department to provide care to infants, toddlers and children;

C. "fund" means the child care facility revolving loan fund; and

D. "provider" means a person licensed by the department to provide child care to infants, toddlers and children pursuant to Section 9-2A-8 NMSA 1978.

**History: Laws 2003, ch. 316, § 3.**

**Emergency clauses.** — Laws 2003, ch. 316, § 5 contained an emergency clause and was approved April 8, 2003.

## 24-24-4. Fund created; administration.

A. The "child care facility revolving loan fund" is created in the New Mexico finance authority to provide low-interest, long-term loans to providers to make health and safety improvements in their facilities. The fund shall consist of appropriations, gifts, grants and donations to the fund, which shall be invested as provided in the New Mexico Finance Authority Act [Chapter 6, Article 21 NMSA 1978]. Money in the fund shall not revert and is appropriated to the department, which shall utilize the fund for the purposes of the Child Care Facility Loan Act. Administrative costs of the authority may be paid from the fund. Expenditures from the fund for loans to providers shall be made upon warrants of the secretary of finance and administration pursuant to vouchers signed by the secretary of children, youth and families or his authorized representative.

B. Money in the fund shall be used to make loans to providers that demonstrate the need to make health and safety improvements, including space expansion, in order to maintain an adequate and appropriate environment for their clients. Loans from the fund are to be made at the



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lowest legally permissible interest rates for the longest amount of time in order to allow the providers the maximum opportunity to maintain the business while repaying the loan.

C. No more than twenty percent of the fund may be loaned to a single provider in a single loan. A provider that has received a loan from the fund in the immediately preceding five years or that has not completed repayment of a previous loan from the fund is ineligible for a new loan. The department shall give priority for loans to facilities of providers that serve proportionately high numbers of state-subsidized clients and low-income families.

D. The department, in conjunction with the New Mexico finance authority, shall adopt rules to administer and implement the Child Care Facility Loan Act . The rules shall become effective when filed in accordance with the State Rules Act [Chapter 14, Article 4 NMSA 1978].

**History: Laws 2003, ch. 316, § 4.**

**Emergency clauses.** — Laws 2003, ch. 316, § 5 contained an emergency clause and was approved April 8, 2003.

# ARTICLE 25

# New Mexico Telehealth Act

Sec.
24-25-1. Short title.
24-25-2. Findings and purpose.
24-25-3. Definitions.
24-25-4. Telehealth authorized; procedure.
24-25-5. Scope of act.

## 24-25-1. Short title.

Chapter 24, Article 25 NMSA 1978 may be cited as the "New Mexico Telehealth Act".

**History: Laws 2004, ch. 48, § 1; 2007, ch. 203, § 1.**

**The 2007 amendment,** effective June 15, 2007, changed the statutory reference to the act.

## 24-25-2. Findings and purpose.

A. The legislature finds that:

(1) lack of primary care, specialty providers and transportation continue to be significant barriers to access to health services in medically underserved rural areas;

(2) there are parts of this state where it is difficult to attract and retain health professionals, as well as to support local health facilities in providing a continuum of health care;

(3) many health care providers in medically underserved areas are isolated from mentors and colleagues and from the information resources necessary to support them personally and professionally;

(4) using information technology to deliver medical services and information from one location to another is part of a multifaceted approach to address the problems of provider distribution and the development of health systems in medically underserved areas by improving communication capabilities and providing convenient access to up-to-date information, consultations and other forms of support;

(5) the use of telecommunications to deliver health services has the potential to reduce costs, improve quality, change the conditions of practice and improve access to health care in rural, medically underserved areas; and

(6) telehealth will assist in maintaining or improving the physical and economic health of medically underserved communities by keeping the source of general health, behavioral health and oral health care in the local area, strengthening the health infrastructure and preserving health-care-related jobs.

B. The purpose of the New Mexico Telehealth Act is to provide a framework for health care providers to follow in providing telehealth services to New Mexico citizens in a manner that provides efficient and effective access to quality health services. Telehealth services include consultations,



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direct patient care and education for health care professionals, support personnel, students, families, patients and other consumers of health care services.

**History: Laws 2004, ch. 48, § 2; 2007, ch. 203, § 2.**

**The 2007 amendment,** effective June 15, 2007, provided that telehealth services include consultations, direct patient care and education for health care professionals, support personnel, students, families, patients and other consumers of health care services.

## 24-25-3. Definitions.

As used in the New Mexico Telehealth Act:

A. "health care provider" means a person licensed to provide health care to patients in New Mexico, including:

(1) an optometrist;
(2) a chiropractic physician;
(3) a dentist;
(4) a physician;
(5) a podiatrist;
(6) an osteopathic physician;
(7) a physician assistant;
(8) a certified nurse practitioner;
(9) a physical therapist;
(10) an occupational therapist;
(11) a speech-language pathologist;
(12) a doctor of oriental medicine;
(13) a nutritionist;
(14) a psychologist;
(15) a certified nurse-midwife;
(16) a clinical nurse specialist;
(17) a registered nurse;
(18) a dental hygienist;
(19) a pharmacist;
(20) a licensed independent social worker;
(21) a licensed counselor;
(22) a community health representative; or
(23) a licensed athletic trainer;

B. "originating site" means a place where a patient may receive health care via telehealth. An originating site may include:

(1) a licensed inpatient center;
(2) an ambulatory surgical or treatment center;
(3) a skilled nursing center;
(4) a residential treatment center;
(5) a home health agency;
(6) a diagnostic laboratory or imaging center;
(7) an assisted living center;
(8) a school-based health program;
(9) a mobile clinic;
(10) a mental health clinic;
(11) a rehabilitation or other therapeutic health setting;
(12) the patient's residence;
(13) a federally qualified health center; or
(14) a community health center; and

C. "telehealth" means the use of electronic information, imaging and communication technologies, including interactive audio, video, data communications as well as store-and-forward technologies, to provide and support health care delivery, diagnosis, consultation, treatment, transfer of medical data and education.



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**History: Laws 2004, ch. 48, § 3; 2007, ch. 203, § 3.**

**The 2007 amendment,** effective June 15, 2007, added Paragraphs (20) through (22) of Subsection A and Paragraphs (13) and (14) of Subsection B.

## 24-25-4. Telehealth authorized; procedure.

The delivery of health care via telehealth is recognized and encouraged as a safe, practical and necessary practice in New Mexico. No health care provider or operator of an originating site shall be disciplined for or discouraged from participating in telehealth pursuant to the New Mexico Telehealth Act. In using telehealth procedures, health care providers and operators of originating sites shall comply with all applicable federal and state guidelines and shall follow established federal and state rules regarding security, confidentiality and privacy protections for health care information.

**History: Laws 2004, ch. 48, § 4.**

## 24-25-5. Scope of act.

A. The New Mexico Telehealth Act does not alter the scope of practice of any health care provider or authorize the delivery of health care services in a setting, or in a manner, not otherwise authorized by law.

B. Because the use of telehealth improves access to quality health care and will generally benefit the citizens of New Mexico, health insurers, health maintenance organizations, managed care organizations and third-party payors offering services to the citizens of New Mexico are encouraged to use and provide coverage for telehealth within the scope of their plans or policies. The state's medical assistance program is also encouraged to include telehealth within the scope of its plan or policy.

**History: Laws 2004, ch. 48, § 5; 2007, ch. 203, § 4.**

**The 2007 amendment,** effective June 15, 2007, deleted former Subsection B and added a new Subsection B.

# ARTICLE 26

# Patient Care Monitoring Act

Sec.
24-26-1. Short title.
24-26-2. Definitions.
24-26-3. Monitoring device; authorization and use.
24-26-4. Monitoring device option; installation; accommodation by facility.
24-26-5. Consent; waiver.
24-26-6. Authorization form; contents.
24-26-7. Immunity; unauthorized use.
24-26-8. Notice to current patients.
24-26-9. Notice.
24-26-10. Rules.
24-26-11. Prohibited acts.
24-26-12. Criminal acts.

## 24-26-1. Short title.

This act [24-26-1 through 24-26-12 NMSA 1978] may be cited as the "Patient Care Monitoring Act".

**History: Laws 2004, ch. 53, § 1.**

## 24-26-2. Definitions.

As used in the Patient Care Monitoring Act:

A. "agency" [department] means the state agency on aging [aging and long-term services department];

B. "facility" means a long-term care facility licensed pursuant to the provisions of Section 24-1-5 NMSA 1978, other than an intermediate care facility for the mentally retarded, and may also include:



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(1) a skilled nursing facility;
(2) an intermediate care nursing facility;
(3) a nursing facility;
(4) an adult residential shelter care home;
(5) a boarding home;
(6) any adult care home or adult residential care facility; and
(7) any swing bed in an acute care facility or extended care facility;

C. "monitoring device" means a surveillance instrument that broadcasts or records activity, but does not include a still camera;

D. "patient" means a person who is a resident of a facility;

E. "program" means the New Mexico long-term care ombudsman program; and

F. "surrogate" means a legal guardian or a legally appointed substitute decision-maker who is authorized to act on behalf of a patient.

**History: Laws 2004, ch. 53, § 2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 2004, ch. 23, § 13 provided that all references to the state agency on aging be deemed references to the aging and long-term services department.

## 24-26-3. Monitoring device; authorization and use.

A. A patient or a surrogate may authorize installation and use of a monitoring device in a facility provided that:

(1) the facility is given notice of the installation;

(2) if the monitoring device records activity visually, such recording shall include a record of the date and time;

(3) the monitoring device and all installation and maintenance costs are paid for by the patient; and

(4) written consent is given by each patient or surrogate of each patient occupying the same room.

B. The patient may establish and the facility shall accommodate limits on the use, including the time of operation, direction, focus or volume, of a monitoring device.

**History: Laws 2004, ch. 53, § 3.**

## 24-26-4. Monitoring device option; installation; accommodation by facility.

A. At the time of admission to a facility, a patient shall be offered the option to have a monitoring device, and a record of the patient's authorization or choice not to have a monitoring device shall be kept by the facility and shall be made accessible to the program.

B. After authorization, consent and notice, a patient or surrogate may install, operate and maintain a monitoring device in the patient's room at the patient's expense.

C. The facility shall cooperate to accommodate the installation of the monitoring device, provided the installation does not place undue burden on the facility.

**History: Laws 2004, ch. 53, § 4.**

## 24-26-5. Consent; waiver.

A. Consent to the authorization for the installation and use of a monitoring device may be given only by the patient or the surrogate.

B. Consent to the authorization for the installation and use of a monitoring device shall include a release of liability for the facility for a violation of the patient's right to privacy insofar as the use of the monitoring device is concerned.



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C. A patient or the surrogate may reverse a choice to have or not have a monitoring device installed and used at any time, after notice to the facility and to the program upon a form prescribed by the agency.

**History: Laws 2004, ch. 53, § 5.**

## 24-26-6. Authorization form; contents.

The form for the authorization of installation and use of a monitoring device shall provide for:

A. consent of the patient or the surrogate authorizing the installation and use of the monitoring device;

B. notice to the facility of the patient's installation of a monitoring device and specifics as to its type, function and use;

C. consent of any other patient or that patient's surrogate sharing the same room;

D. notice of release from liability for privacy violation through the use of the monitoring device; and

E. waiver of the patient's right to privacy in conjunction with the use of the monitoring device.

**History: Laws 2004, ch. 53, § 6.**

## 24-26-7. Immunity; unauthorized use.

A. In any civil action against the facility, material obtained through the use of a monitoring device may not be used if the monitoring device was installed or used without the knowledge of the facility or without the prescribed form.

B. Compliance with the provisions of the Patient Care Monitoring Act shall be a complete defense against any civil or criminal action brought against the patient, surrogate or facility for the use or presence of a monitoring device.

**History: Laws 2004, ch. 53, § 7.**

## 24-26-8. Notice to current patients.

Within six months of the effective date of the Patient Care Monitoring Act, all facilities shall provide to each patient or surrogate a form prescribed by the agency explaining the provisions of the Patient Care Monitoring Act and giving each patient or surrogate a choice to have a monitoring device installed in the patient's room. Copies of the completed form shall be kept by the facility and shall be made accessible to the program.

**History: Laws 2004, ch. 53, § 8.**

## 24-26-9. Notice.

The facility shall post a notice in a conspicuous place at the entrance to a room with a monitoring device that a monitoring device is in use in that room of the facility.

**History: Laws 2004, ch. 53, § 9.**

## 24-26-10. Rules.

The agency shall adopt rules necessary to implement the provisions of the Patient Care Monitoring Act.

**History: Laws 2004, ch. 53, § 10.**



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## 24-26-11. Prohibited acts.

No person or patient shall be denied admission to or discharged from a facility or be otherwise discriminated against or retaliated against because of a choice to authorize installation and use of a monitoring device. Any person who violates this section shall be subject to the provisions of Section 28-17-19 NMSA 1978.

**History: Laws 2004, ch. 53, § 11.**

## 24-26-12. Criminal acts.

Any person other than a patient or surrogate found guilty of intentionally hampering, obstructing, tampering with or destroying a monitoring device or a recording made by a monitoring device installed in a facility pursuant to the Patient Care Monitoring Act is guilty of a fourth degree felony and shall be sentenced pursuant to Section 31-18-15 NMSA 1978.

**History: Laws 2004, ch. 53, § 12.**

# ARTICLE 27

# Umbilical Cord Blood Banking Act

Sec.
24-27-1. Short title.
24-27-2. Purpose of act.
24-27-3. Definitions.
24-27-4. Dissemination of information.
24-27-5. Informational publications.
24-27-6. Donation of umbilical cord blood.
24-27-7. Severability.

## 24-27-1. Short title.

Chapter 24, Article 27 NMSA 1978 may be cited as the "Umbilical Cord Blood Banking Act".

**History: Laws 2005, ch. 43, § 1; 2008, ch. 9, § 1.**

**The 2008 amendment,** effective May 14, 2008, added the statutory reference.

## 24-27-2. Purpose of act.

The purpose of the Umbilical Cord Blood Banking Act is to educate pregnant women regarding the potential benefits of umbilical cord blood donations and to provide opportunities for the donation and storage of umbilical cord blood when desired by a pregnant woman.

**History: Laws 2005, ch. 43, § 2.**

**Effective dates.** — Laws 2005, ch. 43, § 8 made Laws 2005, ch. 43, § 2 effective July 1, 2005.

## 24-27-3. Definitions.

As used in the Umbilical Cord Blood Banking Act:

A. "health care facility" means an institution providing health care services, including a hospital, clinic or other inpatient center, outpatient facility or diagnostic or treatment center, that is licensed by the department of health;

B. "health care provider" means a person who is licensed, certified or otherwise authorized by law to provide or render health care services to pregnant women in New Mexico in the ordinary course of business or practice of a profession, but is limited to a medical physician, osteopathic physician, doctor of oriental medicine, physician assistant, certified nurse practitioner and certified nurse-midwife; and



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C. "umbilical cord blood" means the blood that remains in the umbilical cord and placenta after the birth of a newborn child.

**History: Laws 2005, ch. 43, § 3; 2008, ch. 9, § 2.** **The 2008 amendment,** effective May 14, 2008, added "physician assistant" in Subsection B.

## 24-27-4. Dissemination of information.

A. All health care providers providing health care services to a pregnant woman during the last trimester of her pregnancy, which health care services are directly related to her pregnancy, shall advise her of options to donate umbilical cord blood following the delivery of a newborn child. Provision in a timely manner of publications prepared by the department of health pursuant to Section 5 [24-27-5 NMSA 1978] of the Umbilical Cord Blood Banking Act shall constitute compliance with this subsection.

B. Nothing in this section imposes an obligation upon a health care provider to inform a pregnant woman regarding the option of umbilical cord blood donations if such information conflicts with bona fide religious beliefs of the health care provider.

**History: Laws 2005, ch. 43, § 4.** **Effective dates.** — Laws 2005, ch. 43, § 8 made Laws 2005, ch. 43, § 4 effective January 1, 2006.

## 24-27-5. Informational publications.

The department of health shall, by January 1, 2006, prepare and distribute to health care providers written publications that include the following information:

A. the medical processes involved in the collection of umbilical cord blood;

B. the medical risks to a mother and her newborn child of umbilical cord blood collection;

C. the current and potential future medical uses and benefits of umbilical cord blood collection to a mother, her newborn child and her biological family;

D. the current and potential future medical uses and benefits of umbilical cord blood collection to persons who are not biologically related to a mother or her newborn child;

E. any costs that may be incurred by a pregnant woman who chooses to make an umbilical cord blood donation;

F. options for ownership and future use of the donated material; and

G. the availability in this state of umbilical cord blood donations.

**History: Laws 2005, ch. 43, § 5.** **Effective dates.** — Laws 2005, ch. 43, § 8 made Laws 2005, ch. 43, § 5 effective July 1, 2005.

## 24-27-6. Donation of umbilical cord blood.

A. Unless it is medically inadvisable, all health care facilities and health care providers treating a pregnant woman during the delivery of a newborn child shall, if requested by that woman, permit her to arrange for an umbilical cord blood donation.

B. Nothing in this section imposes an obligation upon a health care facility or health care provider to permit an umbilical cord blood donation if in the professional judgment of a health care provider the donation of umbilical cord blood would threaten the health of the mother or newborn child.

C. Nothing in this section imposes an obligation upon a health care facility or health care provider to permit an umbilical cord blood donation if the donation conflicts with bona fide religious beliefs of the health care facility or health care provider. If a health care facility or health care provider declines to engage in umbilical cord blood donation, that fact shall be made known to pregnant patients of that facility or provider as soon as reasonably feasible.

**History: Laws 2005, ch. 43, § 6.** **Effective dates.** — Laws 2005, ch. 43, § 8 made Laws 2005, ch. 43, § 6 effective January 1, 2006.



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## 24-27-7. Severability.

If any part or application of the Umbilical Cord Blood Banking Act is held invalid, the remainder or its application to other situations or persons shall not be affected.

**History: Laws 2005, ch. 43, § 7.**

**Effective dates.** — Laws 2005, ch. 43, § 8 made Laws 2005, ch. 43, § 7 effective July 1, 2005.

# ARTICLE 28

# Bone Marrow and Organ Donor

Sec.
24-28-1. Short title.
24-28-2. Public education.
24-28-3. State employee leave.

## 24-28-1. Short title.

Chapter 24, Article 28 NMSA 1978 may be cited as the "Bone Marrow and Organ Donor Act".

**History: Laws 2007, ch. 159, § 1; 2019, ch. 112, § 1.**

**The 2019 amendment,** effective June 14, 2019, changed "This act" to "Chapter 24, Article 28 NMSA 1978".

## 24-28-2. Public education.

A. The department of health shall provide information and educational materials to the public regarding bone marrow donation through the national marrow donor program and regarding organ donations. The department shall seek assistance from the national marrow donor program to establish a system to distribute materials, ensure that the materials are updated periodically, fully disclose the risks involved in donating bone marrow and address the education and recruitment of minority populations.

B. The information and educational materials shall include information on:

(1) the need for bone marrow donations;

(2) patient populations that would benefit from bone marrow donations;

(3) how to join the bone marrow registry; and

(4) how to acquire a free buccal swab kit from the bone marrow registry.

C. The department shall establish a system to distribute information and educational materials regarding organ donations and ensure that the materials are updated periodically, fully disclose the risks of donating an organ and address the education and recruitment of minority populations.

**History: Laws 2007, ch. 159, § 2; 2019, ch. 112, § 2.**

**The 2019 amendment,** effective June 14, 2019, specified the information regarding bone marrow donation that must be included in the educational materials that the department of health is required to provide to the public; added subsection designation "A."; added new Subsection B; and added subsection designation "C.".

## 24-28-3. State employee leave.

A. The person in charge of a state agency may grant a leave of absence, not to exceed twenty days, to a state agency employee for the purpose of donating an organ or bone marrow. An employee may request and use donated annual leave or sick leave for the purpose of donating an organ or bone marrow. If an employee requests donations of sick leave or annual leave but does not receive the full amount of leave needed for the donation of an organ or bone marrow, the person in charge of a state agency may grant a paid leave of absence for the remainder of the needed leave up to the maximum total of twenty workdays. The person in charge of a state agency may require verification by a physician regarding the purpose of the leave requested and information from the physician regarding the length of the leave requested. Any paid leave of absence granted pursuant



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to this section shall not result in a loss of compensation, seniority, annual leave, sick leave or accrued overtime for which the employee is otherwise eligible.

B. For the purposes of this section, "state agency" means any department, institution, board, bureau, commission, district or committee of government of the state of New Mexico.

**History: Laws 2007, ch. 159, § 3.** **Effective dates.** — Laws 2007, ch. 159, § 4 made the act effective July 1, 2007.

# ARTICLE 29

# Hospital-Acquired Infection

Sec.
24-29-1. Short title.
24-29-2. Definitions.
24-29-3. Advisory committee created; members; duties.
24-29-4. Participating hospitals; recruitment; training.
24-29-5. Hospital-acquired infections; indicators.
24-29-6. Reports.

## 24-29-1. Short title.

This act [Chapter 24, Article 29 NMSA 1978] may be cited as the "Hospital-Acquired Infection Act".

**History: Laws 2009, ch. 211, § 1.** **Effective dates.** — Laws 2009, ch. 211 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

## 24-29-2. Definitions.

As used in the Hospital-Acquired Infection Act:

A. "advisory committee" means the hospital-acquired infection advisory committee;

B. "department" means the department of health;

C. "hospital-acquired infection" means a localized or systemic condition that results from an infection that occurs in a hospital that was not present or incubating at the time of admission as an inpatient to the hospital, unless the infection was related to a previous admission to the same setting, and that meets the criteria for a specific infection as defined by the national healthcare safety network;

D. "indicator" means a measure of a hospital-acquired infection or other condition, process or serious reportable event identified and defined by the advisory committee that is based on objective, scientific standards and that may be tracked and reported;

E. "national healthcare safety network" means the secure, internet-based surveillance system that integrates patient and health care personnel safety managed by the centers for disease control and prevention of the federal department of health and human services;

F. "participating hospital" means a hospital that meets the criteria specified by the advisory committee or that desires to participate in hospital-acquired infection surveillance; and

G. "surveillance system" means a secure, internet-based system designed for the collection of hospital-acquired infection incidence and prevention data.

**History: Laws 2009, ch. 211, § 2.** **Effective dates.** — Laws 2009, ch. 211 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

## 24-29-3. Advisory committee created; members; duties.

A. The "hospital-acquired infection advisory committee" is created in the department to conduct surveillance of hospital-acquired infections. Members of the advisory committee shall include:



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(1) a consumer of health care services;

(2) a representative of the New Mexico association for professionals in infection control and epidemiology;

(3) a representative of the New Mexico hospital association;

(4) a representative of the New Mexico medical review association;

(5) a local representative of the society for healthcare epidemiology of America; and

(6) the department's infectious disease epidemiology bureau.

B. The advisory committee shall:

(1) establish objectives, definitions, criteria and standards for the reporting of hospital-acquired infections;

(2) work with hospitals to identify and recruit volunteer participating hospitals in surveillance of hospital-acquired infections and other indicators;

(3) develop objectives and action plans for instituting a statewide program of surveillance of hospital-acquired infections and other indicators;

(4) identify the specific infections and indicators that are to be subject to surveillance and reporting;

(5) identify, and make recommendations regarding, training in the use of the surveillance system or in the prevention and control of hospital-acquired infections and infectious disease;

(6) develop and disseminate to the public appropriate reports of the findings of surveillance; and

(7) consult as necessary with technical advisors who have regional or national expertise in the prevention and control of hospital-acquired infections and infectious disease.

**History: Laws 2009, ch. 211, § 3.**
**Effective dates.** — Laws 2009, ch. 211 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

## 24-29-4. Participating hospitals; recruitment; training.

A. The advisory committee shall identify hospitals willing and qualified to participate in surveillance of hospital-acquired infections as identified by the advisory committee. Recruitment of participating hospitals shall begin on a voluntary basis and shall include at least six hospitals representing rural and urban areas of the state. By July 1, 2011, the hospitals identified by the advisory committee as qualified shall participate in the surveillance program.

B. The advisory committee shall identify specific training and educational needs of participating hospitals, and the department shall develop curricula to reflect the training and educational recommendations of the advisory committee. The department shall provide training and educational support to participating hospitals subject to available resources. The department shall collaborate with the higher education department to identify appropriate programs for training and certification of infection control professionals.

**History: Laws 2009, ch. 211, § 4.**
**Effective dates.** — Laws 2009, ch. 211 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

## 24-29-5. Hospital-acquired infections; indicators.

A. The advisory committee shall determine the specific infections and indicators that are to be subject to surveillance and reporting. Indicators of hospital-acquired infections shall be selected based on scientific evidence that the infection or condition can be prevented with implementation and consistent use of evidence-based processes of care and on appropriateness for the state. The advisory committee shall consider the following indicators:

(1) central line associated bloodstream infections;

(2) surgical site wound infections;



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(3) ventilator assisted pneumonia;

(4) catheter associated urinary tract infections; and

(5) other hospital-acquired infections that the advisory committee may determine in consultation with technical advisors who are regionally or nationally recognized experts in the prevention, identification and control of hospital-acquired infections and the public reporting of performance data.

B. Initially, and through calendar year 2009, hospital-acquired infection surveillance shall be conducted on the incidence of central line associated bloodstream infections and health care worker influenza vaccination rates.

C. Beginning on January 1, 2010, the advisory committee shall identify additional hospital-acquired infection, condition or process indicators that will be tracked and reported by participating hospitals. At least annually, the advisory committee shall consider additional indicators that meet the standard for selection identified in Subsection A of this section.

**History: Laws 2009, ch. 211, § 5.**
**Effective dates.** — Laws 2009, ch. 211 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

## 24-29-6. Reports.

A. Participating hospitals shall report to the department the incidence of selected indicators using the national healthcare safety network surveillance system according to a schedule recommended by the advisory committee based on reporting frequencies identified by the national healthcare safety network. Reported data shall be verifiable and actionable.

B. The advisory committee shall determine the content, format, venue and frequency of regular reports to the public. Public reports shall be published no later than July 1, 2011 and periodically thereafter.

**History: Laws 2009, ch. 211, § 6.**
**Effective dates.** — Laws 2009, ch. 211 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

# ARTICLE 30

# Community Health Workers

Sec.
24-30-1. Short title.
24-30-2. Definitions.
24-30-3. Rulemaking; community health worker certification; recertification; fees.
24-30-4. Board of certification of community health workers; creation; membership; duties.
24-30-5. Requirements for certification; recertification.
24-30-6. Use of certified community health worker designation; unauthorized practice.
24-30-7. Criminal history screening.

## 24-30-1. Short title.

This act [24-30-1 through 24-30-7 NMSA 1978] may be cited as the "Community Health Workers Act".

**History: Laws 2014, ch. 49, § 1.**
**Effective dates.** — Laws 2014, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 21, 2014, 90 days after the adjournment of the legislature.

## 24-30-2. Definitions.

As used in the Community Health Workers Act:

A. "applicant" means an individual applying to be certified or recertified as a community health worker;



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B. "board" means the board of certification of community health workers;

C. "certificate" means the document issued by the department to qualified applicants for certification as community health workers;

D. "certification" means the voluntary process by which the department grants recognition and use of a credential to individuals who are eligible to practice as certified community health workers;

E. "certified community health worker" means a community health worker to whom the department has issued a certificate to practice as a certified community health worker;

F. "community health worker" means a public health worker who applies an understanding of the experience, language and culture of the populations that the individual serves and who provides direct services aimed at optimizing individual and family health outcomes, including:

(1) informal and motivational counseling and education;

(2) interventions to maximize social supports;

(3) care coordination;

(4) facilitation of access to health care and social services;

(5) health screenings; and

(6) other services that the secretary defines by rule;

G. "department" means the department of health;

H. "recertification" means a renewal of certification; and

I. "secretary" means the secretary of health.

**History: Laws 2014, ch. 49, § 2.**

**Effective dates.** — Laws 2014, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 21, 2014, 90 days after the adjournment of the legislature.

## 24-30-3. Rulemaking; community health worker certification; recertification; fees.

A. The secretary shall adopt and promulgate rules relating to the following:

(1) establishment and administration of a voluntary program for certification of community health workers, including criteria for:

(a) minimum education;

(b) training;

(c) experience; and

(d) other qualifications that the secretary deems appropriate in accordance with the provisions of the Community Health Workers Act;

(2) forms and procedures for the receipt, review and action upon applications for initial community health worker certification and for biennial recertification;

(3) establishment of standards for continuing education and other requirements that the secretary deems appropriate for biennial recertification;

(4) procedures for disciplinary action relating to applicants or certified community health workers. Department rules shall include guidelines for:

(a) disciplinary action;

(b) reprimands;

(c) probation;

(d) the denial, suspension or revocation of certification or recertification; and

(e) applicants' appeal rights;

(5) the determination, assessment and collection of certification fees, recertification fees and disciplinary fines; and

(6) other matters that the secretary deems appropriate to carry out the provisions of the Community Health Workers Act.

B. The department shall apply any fee it collects pursuant to the Community Health Workers Act to cover the costs of administering the community health worker certification program established pursuant to that act.



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**History: Laws 2014, ch. 49, § 3.**
**Effective dates.** — Laws 2014, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 21, 2014, 90 days after the adjournment of the legislature.

## 24-30-4. Board of certification of community health workers; creation; membership; duties.

A. The "board of certification of community health workers" is created. The board is administratively attached to the department and shall meet at least once quarterly at the call of the chair.

B. The board shall consist of nine members who shall be:

(1) residents of the state;

(2) appointed by and serve at the pleasure of the secretary; and

(3) composed of:

(a) the secretary or the secretary's designee, who shall serve as chair of the board; and

(b) eight additional members, at least three of whom shall be community health workers.

C. In determining the membership of the board, the secretary shall endeavor to appoint community health worker stakeholders such as health care providers, individuals from institutions of higher learning and members of the community from various geographic regions of the state.

D. The secretary shall adopt and promulgate rules that establish the board's membership, duties and the conduct of meetings. At a minimum, the board's duties shall include making recommendations to the secretary on the following matters:

(1) standards and requirements for the establishment of community health worker education and training programs in the state, the successful completion of which shall qualify an individual as eligible to apply to the department for certification as a certified community health worker;

(2) standards and requirements for approval or acceptance of continuing education courses and programs as the board may require for the biennial renewal of a community health worker certificate;

(3) minimum education, training, experience and other qualifications that a certified community health worker shall possess to qualify as a trainer in any education, training or continuing education program for community health workers;

(4) a means to acknowledge, document and assess relevant education, training and experience or other qualifications acquired by community health workers practicing in the state before the effective date of the Community Health Workers Act for purposes of certification while waiving minimum training and experience requirements established pursuant to Paragraph (1) of Subsection A of Section 3 [24-30-3 NMSA 1978] of the Community Health Workers Act; and

(5) the type of certification examination or other means to assess community health worker competency in connection with certification that the department shall require if the secretary determines that a certification examination would enhance the advancement of the practice and profession of community health workers.

**History: Laws 2014, ch. 49, § 4.**
**Effective dates.** — Laws 2014, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 21, 2014, 90 days after the adjournment of the legislature.

## 24-30-5. Requirements for certification; recertification.

A. An applicant for certification or recertification shall submit an application for registration in accordance with department rules.

B. A certified community health worker shall carry the certified community health worker's certificate and present it upon request.

C. The department shall issue certificates that shall be valid for two years to certified community health workers. A certificate may be recertified in accordance with department rules.

**History: Laws 2014, ch. 49, § 5.**



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**Effective dates.** — Laws 2014, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 21, 2014, 90 days after the adjournment of the legislature.

## 24-30-6. Use of certified community health worker designation; unauthorized practice.

A. In order to use the title "certified community health worker", the initials "CCHW" or other designation indicating that the individual is a certified community health worker, an individual shall be certified pursuant to the provisions of the Community Health Workers Act.

B. To ensure compliance with the provisions of the Community Health Workers Act or any rule that the secretary has adopted and promulgated pursuant to that act, the department may issue cease-and-desist orders to persons violating the provisions of the Community Health Workers Act.

C. A certified community health worker shall engage only in those activities authorized pursuant to the Community Health Workers Act and by rules adopted and promulgated pursuant to that act. While engaging in practice as a certified community health worker, an individual shall not engage in or perform any act or service for which another professional certificate, license or other legal authority is required. Nothing in this section shall be construed to prevent or restrict the practice, service or activities of any individual simultaneously certified as a community health worker and licensed, certified, registered or otherwise legally authorized in the state to engage in the practice of another profession if that individual does not, while engaged in the authorized practice of another profession, use any name, title, the initials "CCHW" or other designation indicating that the individual is a certified community health worker.

**History: Laws 2014, ch. 49, § 6.**
**Effective dates.** — Laws 2014, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 21, 2014, 90 days after the adjournment of the legislature.

## 24-30-7. Criminal history screening.

A. The department is authorized to obtain the criminal history records of applicants and to exchange fingerprint data directly with the federal bureau of investigation, the department of public safety and any other law enforcement agency or organization. The department shall require fingerprinting of applicants for the purposes of this section.

B. The secretary shall adopt and promulgate rules to:

(1) require criminal background checks for applicants;

(2) identify the information from a criminal background check that may form the basis of a denial, suspension or revocation of certification or any other disciplinary action; and

(3) otherwise carry out the provisions of this section.

C. The department shall comply with applicable confidentiality requirements of the department of public safety and the federal bureau of investigation regarding the dissemination of criminal background check information.

D. An applicant whose certification or recertification is denied, suspended or revoked, or who is otherwise disciplined based on information obtained in a criminal history background check, shall be entitled to review the information obtained pursuant to this section and to appeal the decision pursuant to rules promulgated by the department.

E. The applicant shall bear any costs associated with ordering or conducting criminal background checks.

F. The provisions of the Criminal Offender Employment Act [28-2-1 through 28-2-6 NMSA 1978] shall govern any consideration of criminal records required or permitted by the Community Health Workers Act.

**History: Laws 2014, ch. 49, § 7.**
**Effective dates.** — Laws 2014, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 21, 2014, 90 days after the adjournment of the legislature.



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# ARTICLE 31

# Emergency Medication In Schools

Sec.
24-31-1. Emergency medication in schools; albuterol; epinephrine; rules; recommendations.

## 24-31-1. Emergency medication in schools; albuterol; epinephrine; rules; recommendations.

A. By July 1, 2014, the department shall promulgate rules and make recommendations to each school district and governing body of a school for the prevention and treatment of respiratory distress and the administration of albuterol, or such other medication as the department deems appropriate, by a school nurse.

B. By July 1, 2014, the department shall promulgate rules and make recommendations to each school district and governing body of a school for the prevention and treatment of anaphylaxis occurring in schools and for the use of epinephrine, or such other medication as the department deems appropriate, by a person who has received training approved by the department and is authorized to administer epinephrine pursuant to the Emergency Medication in Schools Act [22-33-1 through 22-33-4 NMSA 1978]. The rules shall address:

(1) the provision or administration of epinephrine, or such other medication as the department deems appropriate, to a person reasonably believed to be having an anaphylactic reaction;

(2) the requirement that one or more trained persons be available on school premises during operating hours to treat a person reasonably believed to be having an anaphylactic reaction;

(3) the maintenance of a stock supply of standard-dose and pediatric-dose epinephrine auto-injectors, or such other medication as the department deems appropriate, pursuant to a standing order prescribed in the name of the school or school district by a health care practitioner employed or authorized by the department;

(4) the storage of a stock supply of standard-dose and pediatric-dose epinephrine auto-injectors, or such other medication as the department deems appropriate, in a secure location that is unlocked and readily accessible to trained persons and stored pursuant to board of pharmacy regulations; and

(5) the disposal of expired emergency medication pursuant to board of pharmacy regulations or department rules.

C. A health care practitioner employed or authorized by the department may prescribe a stock supply of albuterol aerosol canisters and spacers or a stock supply of standard-dose and pediatric-dose epinephrine auto-injectors in the name of a school or school district for use in accordance with the Emergency Medication in Schools Act.

D. A pharmacist may dispense a stock supply of albuterol aerosol canisters and spacers or a stock supply of standard-dose and pediatric-dose epinephrine auto-injectors pursuant to a standing order prescribed in accordance with this section.

E. A school or school district may maintain a stock supply of albuterol aerosol canisters and spacers or a stock supply of standard-dose and pediatric-dose epinephrine auto-injectors for use in accordance with this section.

F. The department may obtain and receive grants, appropriations, gifts and donations from any source, including the acceptance of epinephrine and albuterol, or such other medication as the department deems appropriate, and albuterol spacers from a manufacturer or wholesaler of such medication in accordance with this section.

**History: Laws 2014, ch. 50, § 5.**

**Effective dates.** — Laws 2014, ch. 50 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 21, 2014, 90 days after the adjournment of the legislature.



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# ARTICLE 32

# Maternal Mortality and Morbidity Prevention

Sec.
24-32-1. Short title.
24-32-2. Definitions.
24-32-3. Maternal mortality review committee; creation; membership; duties.
24-32-4. Access to health information.
24-32-5. Rulemaking.

## 24-32-1. Short title.

Chapter 24, Article 32 NMSA 1978 may be cited as the "Maternal Mortality and Morbidity Prevention Act".

**History: Laws 2019, ch. 41, § 1; 2021, ch. 40, § 1.** **The 2021 amendment,** effective June 18, 2021, deleted "This act" and added "Chapter 24, Article 32 NMSA 1978".

## 24-32-2. Definitions.

As used in the Maternal Mortality and Morbidity Prevention Act:

A. "administrative co-chair" means the chief medical officer of the department or another representative of the department appointed by the secretary of health;

B. "aggregate data" means health care data that exclude any individually identifiable health information, including patient and health care provider identification;

C. "chief medical officer" means the chief medical officer of the department;

D. "clinical co-chair" means a committee member with maternal child health clinical or paraprofessional training nominated by the committee and approved by the department to serve in this position;

E. "committee" means the maternal mortality review committee;

F. "committee member" means a person who has been appointed to sit as a member of the committee and who participates in committee business and votes on committee matters;

G. "critical income" means income lost as a result of uncompensated work time used to attend a committee meeting;

H. "de-identified data" means data from which the following identifiers have been removed:

(1) names;

(2) any geographic subdivision smaller than a state, including street address, city, county, precinct and zip code and their equivalent geocodes;

(3) all elements of dates, except the year of an incident, that are directly related to an individual, including birth date, admission date, date of delivery, discharge date and date of death;

(4) telephone numbers;

(5) fax numbers;

(6) electronic mail addresses;

(7) social security numbers;

(8) medical record numbers;

(9) health plan beneficiary numbers;

(10) account numbers;

(11) certificate and license numbers;

(12) vehicle identifiers and serial numbers, including license plate numbers;

(13) device identifiers and serial numbers;

(14) web universal resource locators, also known as "URLs";

(15) internet protocol address numbers;

(16) biometric identifiers, including finger and voice prints;

(17) full-face photographic images and any comparable images; and

(18) any other unique identifying number, characteristic or code;



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I. "department" means the department of health;

J. "health care provider" means:

(1) an individual licensed, certified or otherwise authorized to provide health care services in the ordinary course of business in the state; or

(2) a health facility that the department licenses;

K. "law enforcement agency" means a law enforcement agency of the state, an Indian nation, tribe or pueblo or a political subdivision of the state;

L. "maternal mortality" means the death of a pregnant woman or a woman within one year postpartum;

M. "medical record" means the written or graphic documentation, sound recording or electronic record relating to medical, behavioral health and health care services that a patient receives from a health care provider or under the direction of a physician or another licensed health care provider. "Medical record" includes diagnostic documentation, including an x-ray, electrocardiogram and electroencephalogram; other test results; data entered into a prescription drug monitoring program; and an autopsy report;

N. "operational staff" means staff or contractors of the department assigned or contracted to support the work of the committee or its executive committee;

O. "qualified invited guest" means a person approved by the co-chairs and invited by the committee to attend a committee meeting to provide technical expertise to the committee, to enhance training in maternal health, to provide insight on maternal mortality or severe maternal morbidity review in other jurisdictions or to provide operational support to the committee; and

P. "severe maternal morbidity" means unexpected outcomes of labor and delivery that result in significant short- or long-term consequences to a woman's health as identified by hospitalizations using administrative hospital discharge data and the world health organization's *International Classification of Diseases* diagnosis and procedure codes.

**History: Laws 2019, ch. 41, § 2; 2021, ch. 40, § 2.**

**The 2021 amendment,** effective June 18, 2021, defined "administrative co-chair", "clinical co-chair", "committee member", "critical income", "operational staff", "qualified invited guest", and revised terms, as used in the Maternal Mortality and Morbidity Prevention Act; added a new Subsection A and redesignated former Subsections A and B as Subsections B and C, respectively; added a new Subsection D and redesignated former Subsection C as Subsection E; in Subsection E, after "maternal mortality", deleted "and severe maternal morbidity", and after "review committee", deleted "including the subcommittee"; added new Subsections F and G, and redesignated former Subsections D through I as Subsections H through M, respectively; in Subsection H, after "means" deleted "removal any of the" and added "data from which the", and after "identifiers", added "have been removed", in Paragraph H(3), after "incident", deleted "for dates" and added "that are", and after "admission date", added "date of delivery"; in Subsection K, after "state", added "an Indian nation, tribe or pueblo"; added Subsections N and O, and redesignated former Subsection J as Subsection P; in Subsection P, after "means", deleted "a condition that occurs in a woman during pregnancy or within one year of the end of pregnancy that results in: (1) admission to the intensive care unit of a health facility; or (2) transfusion of four or more units of red blood cells; and" and added the remainder of the subsection; and deleted former Subsection K, which defined "subcommittee".

## 24-32-3. Maternal mortality review committee; creation; membership; duties.

A. The "maternal mortality review committee" is created in the department. The committee shall be composed of:

(1) the chief medical officer of the department or another representative of the department appointed by the secretary of health, who shall be the ex-officio administrative co-chair;

(2) a clinical co-chair, who shall be nominated by the committee and approved by the department; and

(3) a maximum of thirty additional members, who shall be appointed by the administrative co-chair; provided that four of those members shall include:

(a) two members nominated by the secretary of Indian affairs; and

(b) two members nominated by the director of the office on African American affairs.

B. Each member of the committee, except the administrative co-chair, shall serve a term of three years, with no consecutive terms.



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C. Pursuant to requirements established by the department, each member of the committee shall receive training on trauma and the impacts of trauma, including secondary trauma, trauma of racism and trauma of maternal mortality and morbidity.

D. In appointing members of the committee, the administrative co-chair shall include members that work in and represent communities that are most impacted per the state maternal mortality ratio so that the composition of the committee reflects:

(1) the racial, ethnic and linguistic diversity of the state;

(2) the differing geographic regions within the state, including rural and urban areas; and

(3) communities that are most impacted by pregnancy-related deaths, severe maternal morbidity and a lack of access to relevant perinatal and intrapartum care services.

E. The committee shall meet at the call of the co-chairs. A majority of committee members appointed constitutes a quorum for the transaction of any business. The affirmative vote of at least a majority of a quorum present and approval by the secretary of health or the secretary's designee shall be necessary for any action to be taken by the committee. No vacancy in the membership of the committee shall impair the right of a quorum to exercise all rights and perform all duties of the committee.

F. Operational staff and qualified guests may participate in committee deliberations in an advisory capacity as directed by the co-chairs of the committee. Operational staff and qualified guest presence at a committee meeting shall not convey committee membership.

G. A committee member required to travel in excess of fifty miles to attend a meeting of the committee may, with the approval of the department, receive per diem and mileage for attendance at that meeting pursuant to the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978]. A committee member forsaking critical income to attend a committee meeting may, with the approval of the department and pursuant to rules established by the department, be additionally reimbursed for loss of that income in an amount not to exceed three hundred dollars ($300) per meeting.

H. The committee shall:

(1) review each incident of maternal mortality using a de-identified case summary prepared by operational staff;

(2) review aggregate data relating to severe maternal morbidity;

(3) outline trends and patterns and provide recommendations relating to maternal mortality and severe maternal morbidity in the state;

(4) compile reports using aggregate data on an annual basis in an effort to further study the causes and problems associated with maternal mortality and severe maternal morbidity and distribute these reports to the legislature, government agencies, including the Indian Affairs department and the office on African American affairs, health care providers, community-based organizations working in the interest of maternal and child health and others as necessary to reduce the maternal mortality rate in the state. These reports shall include recommendations to assist health care providers and the health care system in reducing maternal mortality and morbidity;

(5) serve as a link with maternal mortality and morbidity review teams nationwide and participate in national maternal mortality and morbidity review team activities; and

(6) perform any other functions as resources allow to enhance efforts to reduce and prevent maternal mortality and severe maternal morbidity in the state.

I. The co-chairs of the committee may designate an executive committee to conduct business as necessary. The executive committee shall:

(1) consist of the co-chairs of the committee and any other committee members or operational staff that the co-chairs deem necessary. Operational staff and qualified guests may participate in executive committee deliberations in an advisory capacity as directed by the co-chairs of the committee. Operational staff and qualified guest presence at an executive committee meeting shall not convey committee membership;

(2) meet at the call of the co-chairs;

(3) monitor and support the activities of the full committee and recruit committee members for recommendation to the administrative co-chair; and

(4) make final decisions regarding:

(a) committee operations and rules;



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(b) data analysis, data dissemination and evaluation based on findings and recommendations from the full committee; and

(c) any other issues within the scope of decisions that may be made by the committee pursuant to the Maternal Mortality and Morbidity Prevention Act that the full committee or department deems necessary.

**History: Laws 2019, ch. 41, § 3; 2021, ch. 40, § 3.**

**The 2021 amendment,** effective June 18, 2021, changed the name of the "maternal mortality and severe maternal morbidity review committee" to the "maternal mortality review committee", revised the composition of the committee, revised certain powers, duties and privileges of the committee, and clarified the types of cases reviewed by the committee; in the section heading, deleted "and severe maternal morbidity" and added "review"; in Subsection A, after "mortality", deleted "and severe maternal morbidity", after "composed of", deleted "a maximum of twenty-five members that the chief medical officer shall appoint to serve three-year terms", and added Paragraphs A(1) through A(3); added a new Subsection B, and redesignated former Subsection B as Subsection E; in Subsection D, deleted "chief medical officer shall appoint members from geographic areas throughout the state with knowledge of maternal mortality and severe maternal morbidity, including representatives of hospitals and other birthing facilities; obstetrical providers; nursing providers; the office of the state medical investigator; the department; representatives of an association of perinatal health care providers that work in a perinatal health care collaborative; and other professionals that the chief medical officer deems appropriate." and added "administrative co-chair shall include members that work in and represent communities that are most impacted per the state maternal mortality ratio so that the composition of the committee reflects", and added Paragraphs D(1) through D(3); in Subsection E, deleted "Committee members shall serve terms of three years; provided that the initial members' terms shall be staggered in accordance with department rules. The secretary of health shall call the first meeting, at which the committee shall elect a chair. Thereafter", after "call of the", deleted "chair" and added the remainder of the subsection; deleted former Subsection C; added Subsections F and G and redesignated former Subsection D as Subsection H; in Subsection H, Paragraph H(1), after "review each", added "incident of", after "maternal mortality", deleted "and severe maternal morbidity incident in the state related to each maternal mortality", and after "summary", deleted "that the subcommittee provides" and added "prepared by operational staff", in Paragraph H(2), deleted "investigate and", and after "review", deleted "incidents of maternal mortality and" and added "aggregate data relating to", in Paragraph H(3), after "patterns", added "and provide recommendations", in Paragraph H(4), after "aggregate data", deleted "based on the cases that the department identifies for reporting. The committee shall compile these reports", after "government agencies", added "including the Indian Affairs department and the office on African American affairs", after the first occurrence of "health care providers", added "community-based organizations working in the interest of maternal and child health", and after the next occurrence of "health care providers", added "and the health care system"; and added Subsection I.

## 24-32-4. Access to health information.

A. A health care provider, the office of the state medical investigator and the vital records and health statistics bureau of the department shall notify operational staff of any incident of maternal mortality within three months of the incident.

B. Except as otherwise provided by law, the clinical co-chair and operational staff may access medical records and other health information relating to an incident of maternal mortality at any time within five years from the date of the incident. At the request of the clinical co-chair or operational staff with co-chairs or department approval, a health care provider, the office of the state medical investigator and the vital records and health statistics bureau of the department shall provide medical records and other requested health information to the department relating to an incident of maternal mortality. Upon the request of the clinical co-chair or operational staff, a law enforcement agency shall provide any report relating to an incident of maternal mortality to the department. A health care provider or law enforcement agency that provides a medical record, health information or report pursuant to this section with reasonable care and in compliance with the law shall not be held criminally or civilly liable for that release of information.

C. The following shall be confidential and shall not be subject to the Open Meetings Act [Chapter 10, Article 15 NMSA 1978] or the Inspection of Public Records Act [Chapter 14, Article 3 NMSA 1978] or subject to any subpoena, discovery request or introduction into evidence in a civil or criminal proceeding unless obtained from a source separate and apart from the committee or department by valid means as provided by law:

(1) any meeting, part of a meeting or activity of the committee or its executive committee at which data or other information is to be discussed and that may result in disclosure to the public of information protected by law; and



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(2) except as may be necessary in furtherance of the duties of the committee or in response to an alleged violation of a confidentiality agreement pursuant to Subsection E of this section, any information, record, report, notes, memorandum or other data that the department or committee obtains pursuant to the Maternal Mortality and Morbidity Prevention Act.

D. Only the clinical co-chair and operational staff shall collect and have access to medical records, law enforcement reports and vital records data to support the work of the full committee.

E. Each committee member and qualified guest shall sign a confidentiality agreement that indicates the member's or qualified guest's adherence to the provisions of this section.

**History: Laws 2019, ch. 41, § 4; 2021, ch. 40, § 4.**

**The 2021 amendment,** effective June 18, 2021, eliminated the abstractor subcommittee, and transferred certain duties to the clinical co-chair and operational staff; after "information", deleted "abstractor subcommittee"; in Subsection A, after "shall notify", deleted "the chief medical officer" and added "operational staff", and after "any incident of maternal mortality", deleted "or severe maternal morbidity"; in Subsection B, after each occurrence of "maternal mortality", deleted "and severe maternal morbidity", after "provided by law, the", deleted "subcommittee" and added "clinical co-chair and operational staff", after the first occurrence of "request of the", deleted "chief medical officer" and added "clinical co-chair or operational staff with co-chairs or department approval", after "an incident of maternal mortality, deleted "for access by the subcommittee", after the second occurrence of "request of the", deleted "department" and added "clinical co-chair or operational staff", after "maternal mortality to the", deleted "committee" and added "department"; in Subsection C, Paragraph C(1), after "activity of the committee or", deleted "subcommittee" and added "its executive committee"; in Subsection D, deleted the first four sentences of the subsection, which related to the appointment of the three-member abstractor subcommittee and certain duties of the abstractor subcommittee, after "Only", deleted "members of the subcommittee" and added "the clinical co-chair and operational staff", after "shall", added "collect and", after "medical records", added "law enforcement reports", and after "vital records data", added "to support the work of the full committee"; and in Subsection E, after "committee", deleted "subcommittee", after "member", added "and qualified guest", and after "member's", added "or qualified guest's".

## 24-32-5. Rulemaking.

By December 31, 2021, the secretary of health shall adopt and promulgate amended rules to carry out the provisions of the Maternal Mortality and Morbidity Prevention Act.

**History: Laws 2019, ch. 41, § 5; 2021, ch. 40, § 5.**

**The 2021 amendment,** effective June 18, 2021, required the secretary of health, by December 31, 2021, to adopt and promulgate amended rules to carry out the provisions of the Maternal Mortality and Morbidity Prevention Act; and after "December 31", changed "2019" to "2021", after "promulgate", added "amended", and after "Morbidity", added "Prevention".

# ARTICLE 33

# Graduate Medical Education Expansion Grant Program

Sec.
24-33-1. Short title.
24-33-2. Definitions.
24-33-3. Graduate medical education expansion grant program; fund; distributions; application requirements; priorities for awards; reporting requirements.
24-33-4. Graduate medical education expansion review board; created; duties.

## 24-33-1. Short title.

This act [24-33-1 through 24-33-4 NMSA 1978] may be cited as the "Graduate Medical Education Expansion Grant Program Act".

**History: Laws 2019, ch. 141, § 1.**

**Effective dates.** — Laws 2019, ch. 141 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.



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## 24-33-2. Definitions.

As used in the Graduate Medical Education Expansion Grant Program Act:

A. "department" means the human services department;

B. "graduate medical education training program" means a program that has received approval or is in the process of seeking approval to operate as a graduate medical education training program sponsor from the appropriate professional association that evaluates and accredits medical residency and internship programs, including:

(1) a licensed and accredited hospital;

(2) an academic medical education institution;

(3) a new freestanding graduate medical education program;

(4) an established or new graduate medical education training consortium; and

(5) a federally qualified health center; and

C. "secretary" means the secretary of human services.

**History: Laws 2019, ch. 141, § 2.**

**Effective dates.** — Laws 2019, ch. 141 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 24-33-3. Graduate medical education expansion grant program; fund; distributions; application requirements; priorities for awards; reporting requirements.

A. The "graduate medical education expansion grant program fund" is created in the state treasury. The fund consists of money appropriated by the legislature. Money in the fund shall not revert to any other fund at the end of a fiscal year. The secretary shall administer the fund, and money in the fund is appropriated to the department to administer the provisions of the Graduate Medical Education Expansion Grant Program Act. Money in the fund may be utilized to secure federal and private matching funds as determined by the secretary. Money in the fund shall be disbursed on warrants signed by the secretary of finance and administration pursuant to vouchers signed by the secretary of human services or the secretary's authorized representative.

B. To receive a grant, a graduate medical education training program shall apply to the graduate medical education expansion grant program, pursuant to rules adopted by the secretary. Grant amounts will be determined by each entity's grant application. Funds from the graduate medical education expansion grant program fund shall be distributed to graduate medical education training programs to develop and implement graduate medical education training programs. The application must include the applicant's plan to receive accreditation for the positions within the graduate medical education training program.

C. The department may provide one-time planning grants to graduate medical education training programs pursuant to rules adopted by the secretary.

D. The department may provide graduate medical education grants to:

(1) establish new graduate medical education training programs with first-year positions;

(2) fund unfilled, accredited first-year positions within a graduate medical education training program;

(3) expand the number of first-year positions within an existing graduate medical education training program; and

(4) fund existing graduate medical education training programs.

E. The department may prioritize applications that emphasize the following:

(1) developing new or expanded programs with specialties of psychiatry, family medicine, pediatric medicine and internal medicine;

(2) increasing positions for medical specialities having shortages within the state, with preference being given to the primary care specialties of family medicine, pediatric medicine and internal medicine; and

(3) increasing primary care positions in medically underserved areas within the state.



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F. Each award recipient shall report annually to the graduate medical education expansion review board on the:

(1) expenditures of grant funds; and

(2) plans for unexpended funds.

**History: Laws 2019, ch. 141, § 3.**
**Effective dates.** — Laws 2019, ch. 141 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 24-33-4. Graduate medical education expansion review board; created; duties.

A. Prior to October 1, 2019, the department shall create the "graduate medical education expansion review board" to:

(1) develop a state strategic plan for expanding graduate medical education training programs;

(2) review grant applications; and

(3) review the grants awarded pursuant to the Graduate Medical Education Expansion Grant Program Act.

B. The graduate medical education expansion review board shall consist of nine members who shall be appointed by the department. The review board shall include representation from each accredited osteopathic and allopathic medical school and from the following groups:

(1) the department;

(2) the higher education department;

(3) hospitals, primary care consortiums and medical organizations; and

(4) osteopathic and allopathic medical professional societies and associations.

C. The chair of the review board shall be elected by the review board. The review board shall meet at the call of the chair.

D. Members of the review board shall not be paid per diem and mileage or other compensation for their services.

E. The secretary shall provide staff support for the review board in the performance of its duties.

F. A simple majority of the review board members constitutes a quorum. A member of the review board shall abstain from voting or the member's vote shall be disqualified on any matter in which the member has a pecuniary interest.

G. The secretary of human services and the secretary of higher education shall assist the graduate medical education expansion review board in developing a strategic plan for the expansion of graduate medical education training programs, which shall include the following:

(1) a statement describing the objectives and goals of the review board, the strategies by which those goals will be achieved and a time line for achieving those goals;

(2) a summary of the current graduate medical education training programs throughout the state;

(3) a five-year plan for expanding graduate medical education training programs in the state;

(4) an evaluation of the standards and curriculum guidelines for graduate medical education training programs;

(5) an ongoing evaluation process of funds distributed through the graduate medical education expansion grant program that is overseen by the review board; and

(6) a plan to ensure long-term sustainability.

H. The graduate medical education expansion review board shall review applications to the graduate medical education expansion grant program and provide recommendations to the secretary.

**History: Laws 2019, ch. 141, § 4.**
**Effective dates.** — Laws 2019, ch. 141 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.



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# CHAPTER 25

# Food

Art.


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# ARTICLE 1

## Food Service Sanitation

Sec.


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### 25-1-1. Short title.

Chapter 25, Article 1 NMSA 1978 may be cited as the "Food Service Sanitation Act".

**History: 1953 Comp., § 54-3A-1, enacted by Laws 1977, ch. 309, § 1; 1989, ch. 197, § 1.**

**The 1989 amendment,** effective June 16, 1989, substituted "Chapter 25, Article 1 NMSA 1978" for "This act".

### 25-1-2. Definitions.

As used in the Food Service Sanitation Act:

A. "agency" or "division" means the department of environment;

B. "board" means the environmental improvement board;

C. "employee" means any individual employed in a food service establishment who transports food or food containers, who handles food during storage, preparation or serving, who comes in contact with any utensils or who is employed in a room in which food is stored, prepared or served;

D. "food" means any solid or liquid substance intended for human consumption by eating or drinking;

E. "general public" includes beneficiaries of governmental feeding programs and private charitable feeding programs and residents and employees of institutions that provide meals to their



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residents and employees either with or without direct payment to the institution by the residents or employees;

F. "temporary food service establishment" means a food service establishment that operates at a fixed location in conjunction with a single event or celebration for a short period of time not exceeding the event or celebration or not exceeding thirty days;

G. "person" means an individual or any other legal entity;

H. "food service establishment" means:

(1) any fixed or mobile place where food is served and sold for consumption on the premises;

(2) any fixed or mobile place where food is prepared for sale to or consumption by the general public either on or off the premises, including any place where food is manufactured for ultimate sale in a sealed original package, but "prepared" as used in this paragraph does not include the preparation of raw fruits, vegetables or pure honey for display and sale in a grocery store or similar operation. For purposes of this paragraph, "pure honey" means natural liquid or solid honey, extracted from the combs or in the comb, taken from beehives, with no processing or additional ingredients. "Food service establishment" does not mean a dairy establishment; and

(3) meat markets, whether or not operated in conjunction with a grocery store;

I. "utensil" means any implement used in the storage, preparation, transportation or service of food; and

J. "dairy establishment" means a milk processing or milk producing facility.

**History: 1953 Comp., § 54-3A-2, enacted by Laws 1977, ch. 309, § 2; 1989, ch. 197, § 2; 1993, ch. 188, § 31; 1997, ch. 49, § 1.**

**The 1997 amendment,** effective June 20, 1997, in Paragraph H(2), substituted "vegetables or pure honey" for "and vegetables" in the first sentence, and added the second sentence.

**The 1993 amendments,** effective June 18, 1993, substituted "department of environment" for "environmental improvement division of the health and environment department" in Subsection A; deleted "by the food service establishment" following "food is prepared" near the beginning and added "'Food service establishment' does not mean a dairy establishment" at the end of Subsection H(2); added Subsection J; and made a minor stylistic change.

**The 1989 amendment,** effective June 16, 1989, added the present catchline; rewrote Subsection A, which formerly read: ". 'agency' means the environmental improvement agency"; rewrote Subsection F, which formerly read: " 'itinerant food service establishment' means a food service establishment operating for a temporary period of time"; and in Subsection H(2) inserted "by the food service establishment", and substituted "including any place where food is manufactured" for "but 'prepared' as used in this paragraph does not include food processing in which food is processed" and "but 'prepared' as used in this paragraph does not" for "nor does it".

**ANNOTATIONS**

**Kitchen of state hospital deemed excluded.** — Former statute (Section 54-3-1, 1953 Comp.) did not encompass state agencies under the circumstances where a hospital operated a kitchen, primarily to prepare food for patients, and kitchen personnel and other employees were allowed to eat meals prepared at the kitchen, and reimbursement was effected by the hospital, either through payroll deductions or meal tickets sold to the employees at approximate food cost; i.e., a "restaurant," as defined in the statute, was not involved. 1957-58 Op. Att'y Gen. No. 58-161 (opinion rendered under former law).

## 25-1-3. Purpose.

The purpose of the Food Service Sanitation Act is to protect the public health by establishing standards and provisions for the regulation of food service establishments and by appropriate delegations of authority to the board and agency to adopt and enforce regulations covering the environmental health aspects of food service establishments to assure that consumers are not exposed to adverse environmental health conditions arising out of the operations of food service establishments.

**History: 1953 Comp., § 54-3A-3, enacted by Laws 1977, ch. 309, § 3.**

**Cross references.** — For provisions relating to adulterated or misbranded food, *see* 25-2-1 NMSA 1978 et seq.

## 25-1-4. Board; powers and duties.

The board shall promulgate procedural and substantive regulations consistent with the provisions of Section 74-1-9 NMSA 1978 and shall include provisions for:

A. requiring food service establishments to prepare and serve food in a manner safe for human consumption, free from adulteration, spoilage, contamination and unwholesomeness, and,



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to accomplish this standard, the following areas of food service establishment operations shall be covered by the regulations:

(1) disease control;

(2) employee hygiene and sanitation;

(3) food service establishment premises sanitation;

(4) all aspects of food service establishment construction relating to food service sanitation, including requirements for food service establishment construction plans and specifications review and approval by the division;

(5) control of pests and infestation by pests;

(6) lavatory and toilet facility placement and sanitation;

(7) lavatory hygiene;

(8) food equipment and utensil design and construction;

(9) food equipment and utensil storage and handling;

(10) liquid and solid waste disposal;

(11) food and drink preparation, handling, display and storage;

(12) food service establishment ventilation;

(13) water supply;

(14) itinerant food service establishment construction and operation; and

(15) any other facet of food service operations that reasonably may be considered to pose an existing or potential hazard to the health of the consuming public; provided that no regulation shall prohibit food service establishments from allowing pet dogs in designated outdoor dining areas;

B. the issuance, suspension and revocation of permits required under the Food Service Sanitation Act, which regulations shall provide for prior notice to and a hearing for any applicant for or holder of a permit when the division-proposed action is to deny an application for or suspend or revoke a permit, except in those specified instances under the provisions of the Food Service Sanitation Act when the division is authorized to take any of the foregoing actions without prior notice and hearing; and

C. establishing requirements for inspections of food service establishments, which shall include provisions for inspections at a frequency of at least once every twelve months.

**History: 1953 Comp., § 54-3A-4, enacted by Laws 1977, ch. 309, § 4; 2011, ch. 151, § 2.**

**Cross references.** — For provisions of the Environmental Improvement Act, *see* Chapter 74, Article 1 NMSA 1978.

**The 2011 amendment,** effective July 1, 2011, in Subsection A, prohibited the board from adopting regulations that prohibit food service establishments from allowing pet dogs in designated outdoor dining areas.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Liability for injury or death allegedly caused by spoilage, contamination, or other deleterious condition of food or food product, 2 A.L.R.5th 1.

## 25-1-5. Optional powers.

A. The board may establish a system of grading food service establishments for the purpose of certifying compliance with the Food Service Sanitation Act and regulations requiring food service establishments to display in a designated manner a grade as notice of compliance to the public. Such regulations shall include provisions for the revocation and reinstatement of the permit that are consistent with due process of law.

B. The board shall establish a schedule of fees for the issuance and renewal of permits issued by the division under the Food Service Sanitation Act. The board shall set the schedule of fees so that no fee established by such schedule shall be less than one hundred dollars ($100) or more than two hundred dollars ($200) annually for a food service establishment with not more than a twenty-five-dollar ($25.00) incremental increase per fiscal year. The board shall establish a separate schedule of fees not to exceed twenty-five dollars ($25.00) per single event or celebration per temporary food service establishment. Fees shall be waived for all temporary non-potentially hazardous food service operations, for any temporary food service establishment operating no more than two calendar days in any calendar month and for any food service establishment that provides food to the



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general public at no charge. Fees collected for the issuance and renewal of permits pursuant to the Food Service Sanitation Act shall be deposited in the environmental health fund.

**History: 1953 Comp., § 54-3A-5, enacted by Laws 1977, ch. 309, § 5; 1989, ch. 197, § 3; 1991, ch. 94, § 1; 1993, ch. 100, § 1; 2005, ch. 218, § 1; 2020, ch. 32, § 2.**

**The 2020 amendment,** effective May 20, 2020, provided that fees collected for the issuance and renewal of permits pursuant to the Food Service Sanitation Act shall be deposited in the environmental health fund; and in Subsection B, after "deposited in the", deleted "food service sanitation" and added "environmental health fund".

**The 2005 amendment,** effective June 17, 2005, increases limitation on permit fees in Subsection B from not less than $75 or more than $100 annually to not less than $100 or more than $200 annually with not more than a $25 incremental increase per fiscal year.

**The 1993 amendment,** effective March 31, 1993, in Subsection B, substituted "establishment" for "facility" in the fourth sentence and substituted the present fifth sentence, for the former fifth sentence, which read "Effective July 1, 1992, all fees collected for the issuance and renewal of permits under the Food Service Sanitation Act shall be deposited in the general fund."

**The 1991 amendment,** effective April 2, 1991, made minor stylistic changes in Subsection A, and, in Subsection B, added "and for any food service establishment that provides food to the general public at no charge" at the end of the fourth sentence and made a related stylistic change.

**The 1989 amendment,** effective June 16, 1989, designated the formerly undesignated provisions as Subsection A, and added Subsection B.

## 25-1-5.1. Repealed.

**Repeals.** — Laws 2020, ch. 32, § 8 repealed 25-1-5.1 NMSA 1978, as enacted by Laws 1993, ch. 100, § 5, relating to food service sanitation fund, effective May 20, 2020.

For provisions of former section, *see* the 2019 NMSA 1978 on *NMOneSource.com*.

## 25-1-6. Agency; powers and duties.

A. The agency is authorized and has the duty to execute any provisions of the Food Service Sanitation Act delegated to it under that act or by the board under authority of that act and specifically is directed to administer and enforce the provisions of regulations adopted under it.

B. The director of the agency may appoint an advisory council composed of food service technicians to assist in carrying out the objectives of the Food Service Sanitation Act.

**History: 1953 Comp., § 54-3A-6, enacted by Laws 1977, ch. 309, § 6.**

## 25-1-7. Permits; permit required; application; revocation; suspension.

A. No person may operate a food service establishment unless he possesses a valid and unsuspended permit issued by the agency in accordance with the Food Service Sanitation Act and the regulations adopted under it. The permit shall be posted in a conspicuous place within the food service establishment. No person may display a permit unless it has been issued to him by the agency and has not been revoked and is not under suspension.

B. Any person desiring to operate a food service establishment shall apply to the agency for the issuance of a permit. Applications shall be made in a form and in accordance with procedures established by regulations of the board. The agency shall issue a permit to any applicant that complies with the regulations of the board covering the issuance of permits and who demonstrates to the satisfaction of the agency his ability to comply with all the provisions of the Food Service Sanitation Act and all regulations of the board applicable to his proposed food service establishment operation.

C. The board shall promulgate regulations for the revocation or suspension of permits for those food service establishments which fail to come into compliance with a provision of the Food Service Sanitation Act or regulation promulgated under it. No permit shall be suspended or revoked under the provisions of this subsection unless there have been repeated violations of the same standard and without first providing the operator of a food service establishment an opportunity for an agency hearing. The hearing officer shall not be any person previously involved in the suspension or revocation action. No inspection made more than twenty-four months prior to the most recent such inspection shall be used as a basis for suspension or revocation.



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**History: 1953 Comp., § 54-3A-7, enacted by Laws 1977, ch. 309, § 7; 1985, ch. 38, § 1.**

ANNOTATIONS

**Operator ordinarily entitled to opportunity to cure violation.** — In the absence of an emergency, an operator of a food service establishment is entitled to an opportunity to cure a violation prior to revocation of his permit to operate. *Chalamidas v. Environmental Improvement Div.*, 1984-NMCA-109, 102 N.M. 63, 691 P.2d 64.

**Concessions operated by blind deemed excluded.** — Those concessions in public buildings operated by the blind were not required to obtain permits from the department of public health (now department of health) if no food or drink was prepared at the concession. 1957-58 Op. Att'y Gen. No. 58-182 (opinion rendered under former law).

## 25-1-8. Inspection by agency.

A. The agency shall inspect food service establishments to determine compliance or lack of compliance with the Food Service Sanitation Act and regulations of the board. The procedures for inspection shall be in accordance with regulations of the board. Upon request by the agency to a food service establishment operator or to his employee or agent in charge of the food service establishment premises, he shall permit the agency official, upon proper identification, to enter the premises, inspect all parts of the premises and inspect and copy any records of food purchases by the food service establishment. The operator or his employee, or agent in charge of the food service establishment premises shall be given an opportunity to accompany the agency official on his inspection and as soon as possible after the inspection, a report of the inspection shall be furnished to him. Refusal to allow an inspection is grounds for revocation of the permit of the operator, provided that the agency official has tendered proper identification prior to the refusal.

B. During an inspection the agency may take samples of food and other substances found on the premises for the purpose of determining compliance with provisions of the Food Service Sanitation Act and regulations of the board.

**History: 1953 Comp., § 54-3A-8, enacted by Laws 1977, ch. 309, § 8.**

## 25-1-9. Immediate suspension of permit by agency.

The agency may suspend a permit immediately without prior notice to the holder of the permit if it determines, after inspection, that conditions within a food service establishment present a substantial danger of illness, serious physical harm or death to consumers who might patronize the food service establishment. A suspension action taken under this section is effective when communicated to the food service establishment operator or any employee or agent of the operator who is in charge of the premises involved. If there is no designated employee or agent in charge of the premises, communication to any employee physically present on the premises is sufficient communication to make the suspension effective. No suspension action taken under this section shall continue beyond the time that the conditions causing the suspension cease to exist, as determined by an inspection by the agency at the request of the food service operator.

**History: 1953 Comp., § 54-3A-9, enacted by Laws 1977, ch. 309, § 9.**

ANNOTATIONS

**Operator ordinarily afforded opportunity to cure violation.** — In the absence of an emergency, an operator of a food service establishment is entitled to an opportunity to cure a violation prior to revocation of his permit to operate. *Chalamidas v. Environmental Improvement Div.*, 1984-NMCA-109, 102 N.M. 63, 691 P.2d 64.

## 25-1-10. Proceeding under New Mexico Food Act authorized when adulterated or misbranded food found during inspection.

Whenever, during an inspection authorized under the Food Service Sanitation Act, the agency finds or has probable cause to believe that any food on the food service establishment premises is adulterated or so misbranded as to be dangerous or fraudulent within the meaning of the New Mexico Food Act [25-2-1 to 25-2-20 NMSA 1978], it may proceed immediately to have the food detained, embargoed, destroyed or condemned under the provisions of Section 25-2-6 NMSA 1978.



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**History: 1953 Comp., § 54-3A-10, enacted by Laws 1977, ch. 309, § 10.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Federal Food, Drug and Cosmetic Act: construction and application of § 402(a)(3) [21 U.S.C. § 342(a)(3)] as to food deemed "adulterated," if it is filthy or the like, or unfit for food, 45 A.L.R.2d 861.

Coloring matter as forbidden adulteration of food, 56 A.L.R.2d 1129.

## 25-1-11. Judicial review of board and division actions.

A. Rules adopted by the board are subject to judicial review under the provisions of Section 74-1-9 NMSA 1978.

B. Any person to whom the division denies a permit or whose permit is suspended or revoked by the division may appeal to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

**History: 1953 Comp., § 54-3A-11, enacted by Laws 1977, ch. 309, § 11; 1998, ch. 55, § 33; 1999, ch. 265, § 35.**

**The 1999 amendment,** effective July 1, 1999, substituted "Section 39-3-1.1" for "Section 12-8A-1" in Subsection B.

**The 1998 amendment,** effective September 1, 1998, in the section heading, substituted "division" for "agency"; in Subsection A, substituted "Rules" for "Regulations", and substituted "12-12-13 NMSA 1953" for "74-1-9 NMSA 1978"; and rewrote Subsection B.

## 25-1-12. Enforcement.

A. The agency may seek relief in district court to enjoin the operation of any food service establishment not complying with the Food Service Sanitation Act or any regulation adopted under that act.

B. In addition to granting injunctive relief, the district court may impose a civil penalty not exceeding five hundred dollars ($500) on any person who violates any provision of the Food Service Sanitation Act. Each and every violation of the provisions of that act shall constitute a separate offense.

**History: 1953 Comp., § 54-3A-12, enacted by Laws 1977, ch. 309, § 12.**

## 25-1-13. Disease control.

The board shall promulgate regulations to insure that a person with a disease which can reasonably be expected to be transmitted to other persons shall not work in a food service establishment.

**History: 1953 Comp., § 54-3A-13, enacted by Laws 1977, ch. 309, § 13.**

## 25-1-14. Repealed.

**Repeals.** — Laws 1989, ch. 197, § 5 repealed 25-1-14 NMSA 1978, as enacted by Laws 1989, ch. 197, § 4, relating to food service sanitation fund, effective July 1, 1992.

## 25-1-15. Pet dogs in outdoor dining areas; requirements.

A. A food service establishment may allow pet dogs in designated outdoor dining areas of the establishment if the following requirements are met:

(1) no pet dog shall be allowed in any area where food is prepared;

(2) patrons shall keep their pet dogs on a leash at all times and keep their pet dogs under reasonable control;

(3) pet dogs shall not be allowed on chairs, tables or other furnishings; and



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(4) a sign or signs shall be posted to place the public on notice that the designated outdoor dining area is available for the use of patrons with pet dogs. Signs shall be at a minimum eight and one-half inches by eleven inches in size and use type that is uniform in size and no smaller than necessary to fill the sign to within two inches of the borders. The signs shall contain language reasonably designed to inform the public that dogs are permitted and may be present. Signs shall be posted prominently and be easily visible in both the area where dogs are permitted and at the entrance of the establishment. The board shall promulgate by rule the specific language to be included in the signs pursuant to Section 74-1-9 NMSA 1978.

B. Employees shall:

(1) wash their hands immediately after touching, petting or otherwise handling pet dogs; and

(2) immediately clean up accidents involving pet waste and sanitize the area.

C. A food service establishment may in its discretion prohibit pet dogs in outdoor dining areas. If a food service establishment allows pet dogs in a designated outdoor dining area, the food service establishment shall have the right to refuse to serve the owner of a pet dog if the owner fails to exercise reasonable control over the pet dog or the pet dog is otherwise behaving in a manner that compromises or threatens to compromise the health or safety of any person present in the restaurant.

**History: Laws 2011, ch. 151, § 1.**

**Effective dates.** — Laws 2011, ch. 151, § 3 made Laws 2011, ch. 151, § 1 effective July 1, 2011.

## 25-1-16. Homemade food items; exemption.

Other than enforcement actions pursuant to Section 25-1-10 NMSA 1978, the provisions of the Food Service Sanitation Act shall not apply to homemade food items produced or sold pursuant to the Homemade Food Act [25-12-1 to 25-12-5 NMSA 1978].

**History: Laws 2021, ch. 98, § 6.**

**Effective dates.** — Laws 2021, ch. 98, § 9 made Laws 2021, ch. 98, § 6 effective July 1, 2021.

# ARTICLE 2

# Adulterated or Misbranded Food


Sec.

25-2-1. Title of act.
25-2-2. Definitions.
25-2-3. Prohibited acts.
25-2-4. Power to enjoin violations.
25-2-5. Penalties; exceptions.
25-2-6. Detention of food believed adulterated or misbranded; condemnation; destruction or correction of defect.
25-2-7. Attorney general or district attorney to institute prosecution; right to hearing before director prior to criminal prosecutions.
25-2-8. Minor violations of act; warning authorized.
25-2-9. Promulgation of definitions and standards by the board.
25-2-10. When food deemed adulterated.
25-2-11. When food deemed misbranded.
25-2-12. Manufacturing, packing and processing permits for certain classes of food; suspension; inspections.
25-2-13. Promulgating regulations governing the addition of any poisonous or deleterious substances in food.
25-2-14. When advertising deemed false.
25-2-15. Promulgating regulations; procedure.
25-2-16. Power to make inspections and secure samples.
25-2-17. Power of director to publish reports and disseminate information.
25-2-18. Personnel.
25-2-19. New Mexico public health laboratory to serve as testing laboratory.
25-2-20. Dairy establishments exempt.
25-2-21. Homemade food items; exemption.


## 25-2-1. [Title of act.]

This act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978] may be cited as the New Mexico Food Act.

**History: 1941 Comp., § 71-664, enacted by Laws 1951, ch. 169, § 1; 1953 Comp., § 54-1-1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Compiler's notes.** — The term "this act" means Laws 1951, ch. 169 which appeared as 25-2-1 to 25-2-19 NMSA 1978. Laws 1993, ch. 188, § 32 enacted a new section of



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the New Mexico Food Act which was compiled as 25-2-20 NMSA 1978.

Laws 1951, ch. 169, which enacted the New Mexico Food Act, contained a preliminary paragraph which read: "Legislative intent. - The legislative intent is hereby declared to be the enactment of a law which, in its essential provisions, shall be uniform with the food control provisions of the federal food, drug, and cosmetic act and the laws of those states which make similar enactments, and which, through the adoption of regulations conforming to those from time to time promulgated under the said federal act, will maintain uniformity therewith and insure co-ordination of the enforcement hereof with that of the said federal act."

**Cross references.** — For provisions relating to the New Mexico Drug and Cosmetic Act, *see* 26-1-1 NMSA 1978 et seq.

For provisions of the Environmental Improvement Act, *see* Chapter 74, Article 1 NMSA 1978.

For the Organic Commodity Act, *see* Chapter 76, Article 22 NMSA 1978.

**ANNOTATIONS**

**Purpose.** — The New Mexico Food Act and similar statutes of like import have for their objective the protection of public health. *State v. 44 Gunny Sacks of Grain*, 1972-NMSC-033, 83 N.M. 755, 497 P.2d 966.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 Am. Jur. 2d Food §§ 1 to 62.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning food, drugs, and other products intended for ingestion, 58 A.L.R.4th 7.

Products liability of endorser, trade association, certifier, or similar party who expresses approval of product, 1 A.L.R.5th 431.

36A C.J.S. Food §§ 1 to 20.

## 25-2-2. Definitions.

For the purpose of the New Mexico Food Act:

A. "board" means the environmental improvement board;

B. "dairy establishment" means a milk processing or milk producing facility;

C. "division" means the department of environment;

D. "director" means the secretary of environment or his authorized representative;

E. "person" includes individual, partnership, corporation and association;

F. "food" means:

(1) articles used for food or drink for man or animals;

(2) chewing gum; and

(3) articles used for components of food or drink or chewing gum for man or animals;

G. "label" means a display of written, printed or graphic matter upon the immediate container of any article. A requirement made by or under authority of the New Mexico Food Act that any word, statement or other information appear on the label shall not be considered to be complied with unless such word, statement or other information also appears on the outside container or wrapper, if any, of the retail package of such article or is easily legible through the outside container or wrapper;

H. "immediate container" does not include package liners;

I. "labeling" means all labels and other written, printed or graphic matter:

(1) upon an article or any of its containers or wrappers; or

(2) accompanying such article;

J. if an article is alleged to be misbranded because the labeling is misleading or if an advertisement is alleged to be false because it is misleading, then in determining whether the labeling or advertisement is misleading, there shall be taken into account, among other things, not only representations made or suggested by statement, word, design, device, sound or in any combination thereof, but also the extent to which the labeling or advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling or advertisement relates under the conditions of use prescribed in the labeling or advertisement thereof or under such conditions of use as are customary or usual;

K. "advertisement" means all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of food;

L. "contaminated with filth" applies to any food not securely protected from dust, dirt and, so far as may be necessary by all reasonable means, from all foreign or injurious contaminations, or any food found to contain any dust, dirt, foreign or injurious contamination or infestation;

M. the provisions shall be considered to include the manufacture, production, processing, packing, exposure, offer, possession and holding of any such article and the supplying or applying of any such articles in the conduct of any food establishment; and



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N. "federal act" means the Federal Food, Drug and Cosmetic Act, 21 USC § 301 et seq., the Federal Meat Inspection Act, 21 USC § 601 et seq. and the Federal Poultry Products Inspection Act, 21 USC § 451 et seq.

**History: 1941 Comp., § 71-665, enacted by Laws 1951, ch. 169, § 2; 1953 Comp., § 54-1-2; Laws 1959, ch. 15, § 1; 1971, ch. 277, § 35; 1982, ch. 73, § 1; 1993, ch. 188, § 33.**

**Cross references.** — For exemption of environmental improvement board from authority of secretary of environment, *see* 9-7A-12 NMSA 1978.

**The 1993 amendment,** effective June 18, 1993, added current Subsection B; redesignated former Subsections B through M as present Subsections C through N; substituted "department of environment" for "environmental improvement division of the health and environment department" in Subsection C; substituted "secretary of environment" for "director of the division" in Subsection D; and made a minor stylistic change in Subsection G.

ANNOTATIONS

**Meat is food** as defined in the New Mexico Food Act, and, therefore, the state health department (now department of health) has the power to protect the public from violations of the law. Nothing in the New Mexico Livestock Act grants the livestock board the powers granted to the health department in the New Mexico Food Act. 1967 Op. Att'y Gen. No. 67-115.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and effect of laws or regulations requiring merchants to affix sale price to each item of consumer goods, 7 A.L.R.4th 792.

## 25-2-3. [Prohibited acts.]

The following acts and the causing thereof within the state of New Mexico are hereby prohibited:

A. the manufacture, sale or delivery, holding or offering for sale of any food that is adulterated or misbranded.

B. the adulteration or misbranding of any food.

C. the receipt in commerce of any food that is adulterated or misbranded and the delivery or proffered delivery thereof for pay or otherwise.

D. the sale, delivery for sale, holding for sale or offering for sale of any article in violation of Section 12 [25-2-12 NMSA 1978].

E. the dissemination of any false advertisement.

F. the refusal to permit entry or inspection, or to permit the taking of a sample, as authorized by Section 16 [25-2-16 NMSA 1978].

G. the giving of a guaranty or undertaking which guaranty or undertaking is false, except by a person who relied on a guaranty or undertaking to the same effect signed by, and containing the name and address of the person residing in the state of New Mexico from whom he received the food in good faith.

H. the removal or disposal of a detained or embargoed article in violation of Section 6 [25-2-6 NMSA 1978].

I. the alteration, mutilation, destruction, obliteration or removal of the whole or any part of the labeling of, or the doing of any other act with respect to a food, if such act is done while such article is held for sale and results in such article being misbranded.

J. forging, counterfeiting, simulating or falsely representing, or without proper authority using any mark, stamp, tag, label or other identification device authorized or required by regulations promulgated under the provisions of this act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978].

**History: 1941 Comp., § 71-666, enacted by Laws 1951, ch. 169, § 3; 1953 Comp., § 54-1-3.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For meat and meat products, *see* 25-3-1 NMSA 1978 et seq.

For flour and bread, *see* 25-5-1 NMSA 1978 et seq.

For egg grading, *see* 25-6-1 NMSA 1978 et seq.

ANNOTATIONS

**Unwholesome meat.** — The fact that the livestock board may be inspecting meats to determine if they are unwholesome in no way limits the powers of the health department (now department of health) to independently determine whether the meat is unwholesome. 1967 Op. Att'y Gen. No. 67-115.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 Am. Jur. 2d Food §§ 2 to 13.

Ignorance or mistake of fact, lack of criminal intent or presence of good faith, as affecting penal offense predicated upon violation of food law, 152 A.L.R. 755.

Liability of seller of food for personal injuries due to its condition, 168 A.L.R. 1054.

Validity of municipal ordinance imposing requirements on outside producers of milk to be sold in city, 14 A.L.R.2d 103.

Seller's or manufacturer's liability for injuries as affected by buyer's or user's allergy or unusual susceptibility to injury from article, 26 A.L.R.2d 963.

Coloring matter as forbidden adulteration of food, 56 A.L.R.2d 1129.



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Liability of packer, foodstore, or restaurant for causing trichinosis, 96 A.L.R.3d 451.

Liability for injury or death allegedly caused by foreign object in food or food product, 1 A.L.R.5th 1.

Liability for injury or death allegedly caused by spoilage, contamination, or other deleterious condition of food or food product, 2 A.L.R.5th 1.

Liability for injury or death allegedly caused by food product containing object related to, but not intended to be present in, product, 2 A.L.R.5th 189.

Duty of retail establishment, or its employees, to assist patron choking on food, 2 A.L.R.5th 966.

36A C.J.S. Food §§ 3 to 20.

## 25-2-4. Power to enjoin violations.

In addition to the remedies hereinafter provided, the division is hereby authorized to apply to the district court for, and such court shall have jurisdiction upon hearing and for such cause shown to grant, a temporary or permanent injunction restraining any person from violating any provision of Section 25-2-3 NMSA 1978, irrespective of whether or not there exists an adequate remedy at law.

**History: 1941 Comp., § 71-667, enacted by Laws 1951, ch. 169, § 4; 1953 Comp., § 54-1-4; Laws 1982, ch. 73, § 2.**

**Cross references.** — For injunctions, *see* Rule 1-065 NMRA.

## 25-2-5. Penalties; exceptions.

A. Any person who violates any of the provisions of Section 25-2-3 NMSA 1978 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than ninety days or a fine of not more than one hundred dollars ($100) or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final, such person shall be subject to imprisonment for not more than one hundred eighty days or a fine of not more than two hundred dollars ($200) or both such imprisonment and fine.

B. No person shall be subject to the penalties of Subsection A of this section for having violated Subsection A or C of Section 25-2-3 NMSA 1978 if he establishes a guaranty or undertaking signed by and containing the name and address of the person residing in the state of New Mexico from whom he received in good faith the article to the effect that such article is not adulterated or misbranded within the meaning of the New Mexico Food Act, designating that act.

C. No publisher, radio-broadcast licensee or agency or medium for the dissemination of an advertisement, except the manufacturer, packer, distributor or seller of the article to which a false advertisement relates, shall be liable under this section by reason of the dissemination by him of such false advertisement unless he has refused, on the request of the director, to furnish to the director the name and post-office address of the manufacturer, packer, distributor, seller or advertising agency residing in the state of New Mexico who causes him to disseminate such advertisement.

**History: 1941 Comp., § 71-668, enacted by Laws 1951, ch. 169, § 5; 1953 Comp., § 54-1-5; Laws 1982, ch. 73, § 3.**

## 25-2-6. Detention of food believed adulterated or misbranded; condemnation; destruction or correction of defect.

A. Whenever the director finds or has probable cause to believe that any food is adulterated or so misbranded as to be dangerous or fraudulent within the meaning of the New Mexico Food Act, he shall affix to such article a tag or other appropriate marking, giving notice that such article is, or is suspected of being, adulterated or misbranded and has been detained or embargoed and warning all persons not to remove or dispose of such article by sale or otherwise until permission for removal or disposal is given by the director or the court. It shall be unlawful for any person to remove or dispose of such detained or embargoed article by sale or otherwise without such permission.

B. When an article detained or embargoed under Subsection A of this section has been found by the director to be adulterated or misbranded, he shall petition the judge of the district court in whose jurisdiction the article is detained or embargoed for a libel for condemnation of such article. When the director has found that an article so detained or embargoed is not adulterated or misbranded, he shall remove the tag or other marking.



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C. If the court finds that a detained or embargoed article is adulterated or misbranded, such article shall, after entry of the decree, be destroyed at the expense of the claimant thereof under the supervision of the director, and all court costs and fees and storage and other proper expenses shall be taxed against the claimant of such article or his agent; provided that when the adulteration or misbranding can be corrected by proper labeling or processing of the article, the court, after entry of the decree and after such costs, fees and expenses have been paid and a good and sufficient bond, conditioned that such article shall be so labeled or processed, has been executed, may by order direct that such article be delivered to the claimant thereof for such labeling or processing under the supervision of the director. The expense of such supervision shall be paid by the claimant. Such bond shall be returned to the claimant of the article on representation to the court by the director that the article is no longer in violation of the New Mexico Food Act and that the expenses of such supervision have been paid.

D. Whenever the director shall find in any room, building, vehicle of transportation or other structure, any meat, seafood, poultry, vegetable, fruit or other perishable articles which are unsound or contain any filthy, decomposed or putrid substance, or that may be poisonous or deleterious to health or otherwise unsafe, the same being hereby declared to be a nuisance, he shall forthwith condemn or destroy the same or in any other manner render the same unsaleable as human food.

**History: 1941 Comp., § 71-669, enacted by Laws 1951, ch. 169, § 6; 1953 Comp., § 54-1-6; Laws 1982, ch. 73, § 4.**

**ANNOTATIONS**

**Action contemplated by Subsection C is in rem.** It is against the thing wherever found in whatever ownership. *State v. 44 Gunny Sacks of Grain*, 1972-NMSC-033, 83 N.M. 755, 497 P.2d 966.

**Action is predicated upon police power, not eminent domain.** — The right to seize and destroy unfit or impure foods is a reasonable exercise of the right and duty of the state to protect the public health and is predicated upon the police power, and does not fall within N.M. Const., art. II, § 20, which deals with takings "for public use" - which is to say - by eminent domain. *State v. 44 Gunny Sacks of Grain*, 1972-NMSC-033, 83 N.M. 755, 497 P.2d 966.

**State is not required to make compensation** when it seizes and destroys food found to be contaminated within the provisions of the New Mexico Food Act. *State v. 44 Gunny Sacks of Grain*, 1972-NMSC-033, 83 N.M. 755, 497 P.2d 966.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 Am. Jur. 2d Food §§ 63 to 73.

36A C.J.S. Food §§ 50 to 56.

## 25-2-7. Attorney general or district attorney to institute prosecution; right to hearing before director prior to criminal prosecutions.

It shall be the duty of the attorney general or the various district attorneys of this state to whom the director reports any violation of the New Mexico Food Act to cause appropriate proceedings to be instituted in the proper courts without delay and to be prosecuted in the manner required by law. Before any violation of the New Mexico Food Act is reported to any such attorney for the institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views before the director either orally or in writing, in person or by attorney with regard to such contemplated proceeding.

**History: 1941 Comp., § 71-670, enacted by Laws 1951, ch. 169, § 7; 1953 Comp., § 54-1-7; Laws 1982, ch. 73, § 5.**

**Cross references.** — For duties generally of attorney general, *see* 8-5-2 NMSA 1978.

## 25-2-8. Minor violations of act; warning authorized.

Nothing in the New Mexico Food Act shall be construed as requiring the director to report, for the institution of proceedings under the New Mexico Food Act, minor violations of that act whenever he believes that the public interest will be adequately served in the circumstances by a suitable written notice or warning.

**History: 1941 Comp., § 71-671, enacted by Laws 1951, ch. 169, § 8; 1953 Comp., § 54-1-8; Laws 1982, ch. 73, § 6.**



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## 25-2-9. Promulgation of definitions and standards by the board.

A. Whenever in the judgment of the board such action will promote honesty and fair dealing in the interest of consumers, the board shall promulgate regulations fixing and establishing for any food or class of food a reasonable definition and standard of identity or reasonable standard of quality or fill of container or any combination of such requirements. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the board shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. The definitions and standards so promulgated shall conform so far as practicable to the definitions and standards promulgated under the authority of the federal act.

B. In promulgating regulations pursuant to this section, the board shall follow the procedures set forth in Section 74-1-9 NMSA 1978.

**History: 1941 Comp., § 71-672, enacted by Laws 1951, ch. 169, § 9; 1953 Comp., § 54-1-9; Laws 1982, ch. 73, § 7.**

**Cross references.** — For revision of requirements for enriched flour and bread, *see* 25-5-5 NMSA 1978.

For provisions of the Environmental Improvement Act, *see* Chapter 74, Article 1 NMSA 1978.

For meaning of "federal act", *see* 25-2-2N NMSA 1978.

## 25-2-10. When food deemed adulterated.

A food shall be deemed to be adulterated:

A. (1) if it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such good [food] does not ordinarily render it injurious to health; or

(2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of Section 13 [25-2-13 NMSA 1978]; or

(3) if it consists in whole or in part of a diseased, contaminated, filthy, impure or infested ingredient, putrid or decomposed substance, or if it is otherwise unfit for food; or

(4) if it has been produced, prepared, packed or held under insanitary conditions whereby it may have been contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health; or

(5) if it is the product of a diseased animal or an animal which has died otherwise than by slaughter, or that has been fed upon the uncooked offal from a slaughterhouse; or

(6) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.

B. (1) if any valuable constituent has been in whole or in part omitted or abstracted therefrom; or

(2) if any substance has been substituted wholly or in part therefor; or

(3) if damage or inferiority has been concealed in any manner; or

(4) if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength or make it appear better or of greater value than it is.

C. if it is confectionery and it bears or contains any alcohol or nonnutritive article or substance except harmless coloring, harmless flavoring, harmless resinous glaze not in excess of four-tenths of one per centum (4/10%), harmless natural gum and pectin; provided, that this paragraph shall not apply to any confectionery by reason of its containing less than two and one quarter per centum by weight of alcohol derived solely from the use of flavoring extracts, or to any chewing gum by reason of its containing harmless nonnutritive masticatory substances.

D. if it bears or contains a coal-tar color other than one from a batch which has been certified under authority of the federal act.

**History: 1941 Comp., § 71-673, enacted by Laws 1951, ch. 169, § 10; 1953 Comp., § 54-1-10; Laws 1965, ch. 195, § 1.**



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**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 Am. Jur. 2d Food §§ 21 to 24.

Coloring matter as forbidden adulteration of food, 56 A.L.R.2d 1129.

36A C.J.S. Food §§ 3 to 6.

## 25-2-11. [When food deemed misbranded.]

A food shall be deemed to be misbranded:

A. if its labeling is false or misleading in any particular;

B. if it is offered for sale under the name of another food;

C. if it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word, imitation and, immediately thereafter, the name of the food imitated;

D. if its container is so made, formed or filled as to be misleading;

E. if in package form, unless it bears a label containing:

(1) the name and place of business of the manufacturer, packer or distributor;

(2) an accurate statement of the quantity of the contents in terms of weight, measure or numerical count; provided, that under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the board;

F. if any word, statement or other information required by or under authority of this act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978] to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;

G. if it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by Section 9 [25-2-9 NMSA 1978], unless:

(1) it conforms to such definition and standard; and

(2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring and coloring) present in such food;

H. if it purports to be or is represented as:

(1) a food for which a standard of quality has been prescribed by regulations as provided by Section 9 and its quality falls below such standard unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard; or

(2) a food for which a standard or standards of fill of container have been prescribed by regulation as provided by Section 9, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard;

I. if it is not subject to the provisions of Paragraph G of this section, unless it bears labeling clearly giving:

(1) the common or usual name of the food, if any there be; and

(2) in case it is fabricated from two or more ingredients, the common or usual name of each such ingredient; except that spices, flavorings and colorings, other than those sold as such, may be designated as spices, flavorings and colorings, without naming each; provided, that, to the extent that compliance with the requirements of clause (2) of this paragraph is impractical or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the board; provided, further, that the requirements of clause (2) of this paragraph shall not apply to any carbonated beverage, the ingredients of which have been fully and correctly disclosed in an affidavit filed with the board;

J. if it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral and other dietary properties as the board determines to be, and by regulations prescribed, as, necessary in order to fully inform purchasers as to its value for such uses;

K. if it bears or contains any artificial flavoring, artificial coloring or chemical preservative, unless it bears labeling stating that fact; provided, that to the extent that compliance with the



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requirements of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the board.

**History: 1941 Comp., § 71-674, enacted by Laws 1951, ch. 169, § 11; 1953 Comp., § 54-1-11.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 Am. Jur. 2d Food §§ 25 to 31.

Validity, construction, and effect of laws or regulations requiring merchants to affix sale price to each item of consumer goods, 7 A.L.R.4th 792.

36A C.J.S. Food § 12(8).

## 25-2-12. Manufacturing, packing and processing permits for certain classes of food; suspension; inspections.

A. Whenever the board finds after investigation that the distribution in New Mexico of any class of food may, by reason of contamination with microorganisms during manufacture, processing or packing thereof in any locality, be injurious to health and that such injurious nature cannot be adequately determined after such articles have entered commerce, it then and in such case only shall promulgate regulations providing for the issuance by the director to manufacturers, processors or packers of such class of food in such locality of permits to which shall be attached such conditions governing the manufacture, processing or packing of such class of food for such temporary period of time as may be necessary to protect the public health, and after the effective date of such regulations and during such temporary period, no person shall introduce or deliver for introduction into commerce any such food manufactured, processed or packed by any such manufacturer, processor or packer unless such manufacturer, processor or packer holds a permit issued by the director as provided by such regulations. In promulgating regulations pursuant to this section, the board shall follow the procedures set forth in Section 74-1-9 NMSA 1978.

B. The director is authorized to suspend immediately upon notice any permit issued under authority of this section if it is found that any of the conditions of the permit have been violated. The holder of a permit so suspended shall be privileged at any time to apply for the reinstatement of such permit, and the director shall, immediately after prompt hearing and an inspection of the establishment, reinstate such permit if it is found that adequate measures have been taken to comply with and maintain the conditions of the permit as originally issued or as amended.

C. The director shall have access to any factory or establishment, the operator of which holds a permit from the director for the purpose of ascertaining whether or not the conditions of the permit are being complied with, and denial of access for such inspection shall be ground for suspension of the permit until such access is freely given by the operator.

**History: 1941 Comp., § 71-675, enacted by Laws 1951, ch. 169, § 12; 1953 Comp., § 54-1-12; Laws 1982, ch. 73, § 8.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 Am. Jur. 2d Food §§ 11 to 13.

36A C.J.S. Food §§ 11 to 20.

## 25-2-13. Promulgating regulations governing the addition of any poisonous or deleterious substances in food.

A. Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice, shall be deemed to be unsafe for purposes of the application of Paragraph (2) of Subsection A of Section 25-2-10 NMSA 1978; but when such substance is so required or cannot be so avoided, the board shall promulgate regulations limiting the quantity therein or thereon to such extent as the board finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purpose of the application of Paragraph (2) of Subsection A of Section 25-2-10 NMSA 1978. While such a regulation is in effect limiting the quantity of any such substance in the case of any food, such food shall not, by reason of bearing or containing any added



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amount of such substance, be considered to be adulterated within the meaning of Paragraph (1) of Subsection A of Section 25-2-10 NMSA 1978. In determining the quantity of such added substance to be tolerated in or on different articles of food, the board shall take into account the extent to which the use of such substance is required or cannot be avoided in the production of each such article and the other ways in which the consumer may be affected by the same or other poisonous or deleterious substances.

B. In promulgating regulations pursuant to this section, the board shall follow the procedure set forth in Section 74-1-9 NMSA 1978.

**History: 1941 Comp., § 71-676, enacted by Laws 1951, ch. 169, § 13; 1953 Comp., § 54-1-13; Laws 1982, ch. 73, § 9.**

## 25-2-14. [When advertising deemed false.]

An advertisement of a food shall be deemed to be false if it is false or misleading in any particular.

**History: 1941 Comp., § 71-677, enacted by Laws 1951, ch. 169, § 14; 1953 Comp., § 54-1-14.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and effect of laws or regulations requiring merchants to affix sale price to each item of consumer goods, 7 A.L.R.4th 792.

## 25-2-15. Promulgating regulations; procedure.

A. The authority to promulgate regulations for the efficient enforcement of the New Mexico Food Act is hereby vested in the board. The board is hereby authorized to make the regulations promulgated under the federal act.

B. In promulgating regulations pursuant to this section, the board shall follow the procedures set forth in Section 74-1-9 NMSA 1978.

**History: 1941 Comp., § 71-678, enacted by Laws 1951, ch. 169, § 15; 1953 Comp., § 54-1-15; Laws 1982, ch. 73, § 10.**

**Cross references.** — For meaning of "federal act", *see* 25-2-2N NMSA 1978.

## 25-2-16. Power to make inspections and secure samples.

The director shall have free access at all reasonable hours to any factory, warehouse or establishment in which foods are manufactured, processed, packed or held for introduction into commerce or to enter any vehicle being used to transport or hold such foods in commerce for the purpose:

A. of inspecting such factory, warehouse, establishment or vehicle to determine if any of the provisions of the New Mexico Food Act are being violated; and

B. to secure samples or specimens of any food after paying or offering to pay for such sample. It shall be the duty of the director to make or cause to be made examinations of samples secured under the provisions of this section to determine whether or not any provision of the New Mexico Food Act is being violated.

**History: 1941 Comp., § 71-679, enacted by Laws 1951, ch. 169, § 16; 1953 Comp., § 54-1-16; Laws 1982, ch. 73, § 11.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 Am. Jur. 2d Food § 13.

36A C.J.S. Food § 12(7).



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## 25-2-17. Power of director to publish reports and disseminate information.

A. The director may cause to be published from time to time reports summarizing all judgments, decrees and court orders which have been rendered under the New Mexico Food Act, including the nature of the charge and the disposition thereof.

B. The director may also cause to be disseminated such information regarding food as he deems necessary in the interest of public health and the protection of the consumer against fraud. Nothing in this section shall be construed to prohibit the director from collecting, reporting and illustrating the results of his investigations.

**History: 1941 Comp., § 71-680, enacted by Laws 1951, ch. 169, § 17; 1953 Comp., § 54-1-17; Laws 1982, ch. 73, § 12.**

## 25-2-18. Personnel.

The division shall employ such personnel for the administration and enforcement of the provisions of the New Mexico Food Act, in the same manner that other public health personnel are now employed, as may be necessary and required.

**History: 1941 Comp., § 71-681, enacted by Laws 1951, ch. 169, § 19; 1953 Comp., § 54-1-18; Laws 1982, ch. 73, § 13.**

## 25-2-19. [New Mexico public health laboratory to serve as testing laboratory.]

The New Mexico public health laboratory shall serve as the testing laboratory for samples collected for examination pursuant to the provisions of this act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978].

**History: 1941 Comp., § 71-682, enacted by Laws 1951, ch. 169, § 20; 1953 Comp., § 54-1-19.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 25-2-20. Dairy establishments exempt.

The purposes and provisions of the New Mexico Food Act shall not apply to dairy establishments.

**History: Laws 1993, ch. 188, § 32.**

**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 18, 1993, 90 days after adjournment of the legislature.

**Compiler's notes.** — Laws 1993, ch. 188, § 32, was enacted as a new section of the New Mexico Food Act and was compiled as 25-2-20 NMSA 1978.

## 25-2-21. Homemade food items; exemption.

Other than actions pursuant to Section 25-2-6 NMSA 1978, the provisions of the New Mexico Food Act shall not apply to homemade food items produced or sold pursuant to the Homemade Food Act [25-12-1 to 25-12-5 NMSA 1978].

**History: Laws 2021, ch. 98, § 7.**

**Effective dates.** — Laws 2021, ch. 98, § 9 made Laws 2021, ch. 98, § 7 effective July 1, 2021.



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# ARTICLE 3

# Meat and Meat Products

Sec.
25-3-1. Repealed.
25-3-2. Repealed.
25-3-3. Repealed.
25-3-4. Repealed.
25-3-5. Repealed.
25-3-6. Repealed.
25-3-7. Repealed.
25-3-8. Repealed.
25-3-9. Repealed.
25-3-10. Repealed.
25-3-11. Repealed.
25-3-12. Repealed.
25-3-13. Repealed.
25-3-14. Repealed.
25-3-15. Repealed.
25-3-16. Repealed.
25-3-17. Repealed.
25-3-18. Repealed.
25-3-19. Repealed.
25-3-20. Repealed.
25-3-21. Repealed.

## 25-3-1. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-1 NMSA 1978, as enacted by Laws 1965, ch. 10, § 1, relating to the short title for the Imported Meat Act, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

## 25-3-2. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-2 NMSA 1978, as enacted by Laws 1965, ch. 10, § 2, relating to definitions, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOne Source.com*.

## 25-3-3. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-3 NMSA 1978, as enacted by Laws 1965, ch. 10, § 3, relating to prohibited sales, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOne Source.com*.

## 25-3-4. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-4 NMSA 1978, as enacted by Laws 1965, ch. 10, § 4, relating to enforcement, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOne Source.com*.

## 25-3-5. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-5 NMSA 1978, as enacted by Laws 1965, ch. 10, § 5, relating to penalties, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOne Source.com*.

## 25-3-6. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-6 NMSA 1978, as enacted by Laws 1969, ch. 89, § 1, relating to the short title of the Meat Inspection Act, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

## 25-3-7. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-7 NMSA 1978, as enacted by Laws 1969, ch. 89, § 2, relating to definitions, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOne Source.com*.



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## 25-3-8. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-8 NMSA 1978, as enacted by Laws 1969, ch. 89, § 3, relating to office created, deputies, qualifications and compensation, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

## 25-3-9. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-9 NMSA 1978, as enacted by Laws 1969, ch. 89, § 4, relating to immediate inspection stamps and establishment numbers, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

## 25-3-10. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-10 NMSA 1978, as enacted by Laws 1969, ch. 89, § 5, relating to assignment of inspectors, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

## 25-3-11. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-11 NMSA 1978, as enacted by Laws 1969, ch. 89, § 6, relating to ante-mortem and post-mortem inspection required, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

## 25-3-12. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-12 NMSA 1978, as enacted by Laws 1969, ch. 89, § 7, relating to condemnation and appeal, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

## 25-3-13. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-13 NMSA 1978, as enacted by Laws 1969, ch. 89, § 8, relating to rules and regulations, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

## 25-3-14. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-14 NMSA 1978, as enacted by Laws 1969, ch. 89, § 9, relating to application for state meat inspection, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

## 25-3-15. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-15 NMSA 1978, as enacted by Laws 1969, ch. 89, § 10, relating to prohibited acts and penalties, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

## 25-3-16. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-16 NMSA 1978, as enacted by Laws 1969, ch. 89, § 11, relating to exemptions, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOne Source.com*.

## 25-3-17. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-17 NMSA 1978, as enacted by Laws 1969, ch. 89, § 12, relating to interference with board officials and personnel, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.



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## 25-3-18. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-18 NMSA 1978, as enacted by Laws 1969, ch. 89, § 13, relating to cooperation with the department of health and other public health authorities, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

## 25-3-19. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-19 NMSA 1978, as enacted by Laws 1969, ch. 89, § 14, relating to suspension or revocation of inspection service or establishment number, hearings and appeals, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

## 25-3-20. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-20 NMSA 1978, as enacted by Laws 1969, ch. 89, § 15, relating to power to enjoin violations of the Meat Inspection Act, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

## 25-3-21. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-3-21 NMSA 1978, as enacted by Laws 1969, ch. 89, § 16, relating to application of federal laws, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 4

# Peddlers and Itinerant Vendors

Sec.
25-4-1. Repealed.

Sec.
25-4-2. Repealed.

## 25-4-1. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-4-1 NMSA 1978, as enacted by Laws 1901, ch. 45, § 1, relating to peddling fresh meats, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

## 25-4-2. Repealed.

**Repeals.** — Laws 2013, ch. 84, § 2 repealed 25-4-2 NMSA 1978, as enacted by Laws 1901, ch. 45, § 2, relating to peddling beef without a license, penalties, effective June 14, 2013. For provisions of former section, *see* the 2012 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 5

# Flour and Bread

Sec.
25-5-1. Definitions.
25-5-1.1. Short title.
25-5-2. Manufacture or sale of unenriched flour unlawful.
25-5-3. Manufacture or sale of bread and rolls from unenriched flour unlawful.
25-5-4. Division; duty to enforce.
25-5-5. Board; revision of requirements.
25-5-6. Board; power to adjust in case of shortage.
25-5-7. Publication of regulations.
25-5-8. Inspection by director.
25-5-9. Penalty.

## 25-5-1. Definitions.

As used in the Flour and Bread Act [25-5-1 to 25-5-9 NMSA 1978], unless the context otherwise requires:



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A. "flour" means foods commonly known in the milling and baking industries as:

(1) white flour, also known as wheat flour or plain flour;

(2) bromated flour;

(3) self-rising flour, also known as self-rising white flour or self-rising wheat flour; and

(4) phosphated flour, also known as phosphated white flour or phosphated wheat flour, but excludes whole wheat flour and also excludes special flours not used for bread, roll, bun or biscuit baking, such as specialty cake, pancake and pastry flours;

B. "white bread" means any bread made with flour as defined in Subsection A of this section, whether baked in a pan or on a hearth or screen, which is commonly known or usually represented and sold as white bread, including Vienna bread, French bread and Italian bread;

C. "rolls" includes plain white rolls and buns of the semi-bread dough type, namely: soft rolls such as hamburger rolls, hot dog rolls and Parker House rolls and hard rolls such as Vienna rolls and Kaiser rolls, but shall not include yeast-raised sweet rolls or sweet buns made with fillings or coatings such as cinnamon rolls or buns and butterfly rolls;

D. "board" means the environmental improvement board;

E. "director" means the director of the division or his authorized representative;

F. "division" means the environmental improvement division of the health and environment department [department of environment]; and

G. "person" means an individual, corporation, partnership, association, joint stock company, trust or any group of persons whether incorporated or not engaged in the commercial manufacture or sale of flour, white bread or rolls.

**History: 1953 Comp., § 54-1-20, enacted by Laws 1955, ch. 244, § 1; 1971, ch. 277, § 36; 1977, ch. 253, § 59; 1982, ch. 73, § 14.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1991, ch. 25, § 4 established the department of environment and provided that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment.

## 25-5-1.1. Short title.

Sections 25-5-1 through 25-5-9 NMSA 1978 may be cited as the "Flour and Bread Act".

**History: 1978 Comp., § 25-5-1.1, enacted by Laws 1982, ch. 73, § 15.**

## 25-5-2. Manufacture or sale of unenriched flour unlawful.

It shall be unlawful for any person to manufacture, mix, compound, sell or offer for sale, for human consumption in this state, flour (as defined in Section 1 [25-5-1 NMSA 1978]) unless the following vitamins and minerals are contained in each pound of such flour: not less than two milligrams and not more than two and one-half milligrams of thiamine; not less than one and two-tenths milligrams and not more than one and one-half milligrams of riboflavin; not less than sixteen milligrams and not more than twenty milligrams of niacin or niacin-amide; not less than thirteen milligrams and not more than sixteen and one-half milligrams of iron (Fe); except in the case of self-rising flour which in addition to the above ingredients shall contain not less than five hundred milligrams and not more than fifteen hundred milligrams of calcium (Ca); provided, however, that the terms of this section shall not apply to flour sold to distributors, bakers or other processors, if the purchaser furnishes to the seller a certificate in such form as the board shall by regulation prescribe, certifying that such flour will be (1) resold to a distributor, baker or other processor, or (2) used in the manufacture, mixing or compounding of flour, white bread or rolls enriched to meet the requirements of this act [25-5-1 to 25-5-9 NMSA 1978] or (3) used in the manufacture of products other than flour, white bread or rolls. It shall be unlawful for any such purchaser so furnishing any such certificate to use or resell the flour so purchased in any manner other than as prescribed in this section.



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**History: 1953 Comp., § 54-1-21, enacted by Laws 1955, ch. 244, § 2.**

## 25-5-3. Manufacture or sale of bread and rolls from unenriched flour unlawful.

It shall be unlawful for any person to manufacture, bake, sell or offer for sale, for human consumption in this state, any white bread or rolls (as defined in Section 1 [25-5-1 NMSA 1978]) unless the following vitamins and minerals are contained in each pound of such bread or rolls: not less than one and one-tenth milligrams and not more than one and eight-tenths milligrams of thiamine; not less than seven-tenths milligrams and not more than one and six-tenths milligrams of riboflavin; not less than ten milligrams and not more than fifteen milligrams of niacin; not less than eight milligrams and not more than twelve and one-half milligrams of iron (Fe).

**History: 1953 Comp., § 54-1-22, enacted by Laws 1955, ch. 244, § 3.**

## 25-5-4. Division; duty to enforce.

The division is hereby charged with the duty of enforcing the provisions of the Flour and Bread Act and rules, regulations and orders of the board promulgated pursuant to the Flour and Bread Act.

**History: 1953 Comp., § 54-1-23, enacted by Laws 1955, ch. 244, § 4; 1982, ch. 73, § 16.**

**Cross references.** — For provisions of the Environmental Improvement Act, *see* Chapter 74, Article 1 NMSA 1978.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 Am. Jur. 2d Food § 33, 34.

36A C.J.S. Food §§ 6(2), 9(2).

## 25-5-5. Board; revision of requirements.

A. Whenever the vitamin and mineral requirements set forth in Sections 25-5-2 and 25-5-3 NMSA 1978 are no longer in conformity with the legally established standards governing the interstate shipment of enriched flour and enriched white bread or enriched rolls, the board, in order to maintain uniformity between intrastate and interstate vitamin and mineral requirements for the foods within the provisions of the Flour and Bread Act, is authorized and directed to modify or revise such requirements to conform with amended standards governing interstate shipments.

B. In promulgating regulations pursuant to this section, the board shall follow the procedures set forth in Section 74-1-9 NMSA 1978.

**History: 1953 Comp., § 54-1-24, enacted by Laws 1955, ch. 244, § 5; 1982, ch. 73, § 17.**

## 25-5-6. Board; power to adjust in case of shortage.

A. In the event of findings by the board that there is an existing or imminent shortage of any ingredient required by Section 25-5-2 or 25-5-3 NMSA 1978 and that because of such shortage the sale and distribution of flour or white bread or rolls may be impeded by the enforcement of the Flour and Bread Act, the board shall issue an order, to be effective immediately upon issuance, permitting the omission of such ingredient from flour or white bread or rolls and, if it finds it necessary or appropriate, excepting such foods from labeling requirements until the further order of the board. Any such findings may be made without hearings on the basis of an order or of factual



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information supplied by the appropriate federal agency or officer. In the absence of any such order of the appropriate federal agency or factual information supplied by it, the board on its own motion may, and upon receiving the sworn statements of ten or more persons subject to the Flour and Bread Act that they believe such a shortage exists or is imminent shall, within twenty days thereafter hold a public hearing with respect thereto at which any interested person may present evidence and shall make findings based upon the evidence presented. The board shall publish notice of any such hearing at least ten days prior thereto.

B. Whenever the board has reason to believe that such shortage no longer exists, it shall hold a public hearing, after at least ten days' notice shall have been given, at which any interested person may present evidence, and it shall make findings based upon the evidence so presented. If its findings be that such shortage no longer exists, it shall issue an order to become effective not less than thirty days after publication thereof revoking such previous order; provided, however, that undisposed floor stocks of flour on hand at the effective date of such revocation order or flour manufactured prior to such effective date for sale in this state may thereafter be lawfully sold or disposed of.

C. In conducting hearings pursuant to this section, the board shall follow the procedures set forth in Section 74-1-9 NMSA 1978, except for the number of days' notice required for such hearing.

**History: 1953 Comp., § 54-1-25, enacted by Laws 1955, ch. 244, § 6; 1982, ch. 73, § 18.**

## 25-5-7. Publication of regulations.

All orders, rules and regulations adopted by the board pursuant to this act [25-5-1 to 25-5-9 NMSA 1978] shall be published at least twice in at least one daily newspaper of general circulation printed and published in this state, and shall become effective upon such date after publication as the board shall fix.

**History: 1953 Comp., § 54-1-26, enacted by Laws 1955, ch. 244, § 7.**

## 25-5-8. Inspection by director.

For the purpose of the Flour and Bread Act, the director is authorized to take samples for analysis and to conduct examination and investigations and to enter, at reasonable times, any factory, mill, bakery, warehouse, shop or establishment where flour, white bread or rolls are manufactured, processed, packed, sold or held or any vehicle being used for the transportation thereof and to inspect any such place or vehicle and any flour, white bread or rolls therein and all pertinent equipment, materials, containers and labeling.

**History: 1953 Comp., § 54-1-27, enacted by Laws 1955, ch. 244, § 8; 1982, ch. 73, § 19.**

## 25-5-9. Penalty.

Any person who violates any of the provisions of this act [25-5-1 to 25-5-9 NMSA 1978] or the orders, rules or regulations promulgated by the board under authority thereof, shall upon conviction thereof be subjected to fine for each and every offense, in a sum not exceeding five hundred dollars ($500.00) or to imprisonment, not to exceed ninety days.

**History: 1953 Comp., § 54-1-28, enacted by Laws 1955, ch. 244, § 9.**



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# ARTICLE 6

# Egg Grading

Sec.
25-6-1. Short title.
25-6-2. Definitions.
25-6-3. Purpose of the act.
25-6-4. Labeling, marking and advertising eggs.
25-6-5. Standards for eggs.
25-6-6. Exemptions.
25-6-7. Sale of ungraded eggs.
25-6-8. Enforcement; administration.
Sec.
25-6-9. Egg inspection fee.
25-6-10. Payment of the inspection fee.
25-6-11. Powers of the board and department.
25-6-12. Certification of dealers.
25-6-13. Additional violations.
25-6-14. Injunction.
25-6-15. Seizure and holding of eggs.
25-6-16. Penalties.

## 25-6-1. Short title.

This act [25-6-1 to 25-6-16 NMSA 1978] may be cited as the "Egg Grading Act."

**History: 1953 Comp., § 54-2-10, enacted by Laws 1963, ch. 138, § 1.**

## 25-6-2. Definitions.

As used in the Egg Grading Act:

A. "egg dealer" includes any person, firm, partnership or corporation that buys eggs directly from the farmers or from any other sources for the purpose of reselling them at wholesale;

B. "cold storage eggs" means eggs which have been in cold storage for thirty days or more and which meet the grades and standards of qualification set by the board of regents of New Mexico state university;

C. "processor" includes any person, firm, partnership or corporation engaged in the process of breaking eggs for drying, freezing or for other purposes;

D. "consumer" means any person, business establishment or institution which changes the condition of the egg in preparation for human consumption;

E. "board" means the board of regents of New Mexico state university, the board controlling the department;

F. "department" means the New Mexico department of agriculture;

G. "candling" means the holding of an egg, large end up, before a light shining through an opaque shield, with an opening of about one-quarter inch in diameter. Candling is best done in a darkened room, but one may obtain candling devices that may be used in average daylight;

H. "ungraded eggs" means eggs that have not been graded according to quality or weight;

I. "addled" or "white rot" means putrid or rotten;

J. "moldy" means that mold or bacteria has developed in isolated areas within the shell;

K. "black rot" means that the egg has deteriorated to an extent that the whole interior represents a blackened appearance;

L. "blood ring" means that germs have developed to an extent that blood is formed;

M. "stuck yolk" means that the yolk has settled to one side and becomes fastened to the shell; and

N. "incubator reject eggs" means any eggs which have been subjected to heat for the purpose of hatching or for any other purposes whatsoever.

**History: 1953 Comp., § 54-2-11, enacted by Laws 1963, ch. 138, § 2; 1973, ch. 116, § 1.**



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## 25-6-3. Purpose of the act.

The purpose of the Egg Grading Act is to assure that no person, firm or corporation shall sell or have in his possession with the intent to sell, offer or expose for sale, or traffic in, any egg unfit for human food, unless the same is broken in shell and then denatured so that it cannot be used for human food, if it is or has:

A. addled or white rot;
B. moldy;
C. black rot;
D. blood ring;
E. stuck yolk;
F. sour;
G. green whites;
H. musty; or
I. incubator reject eggs.

**History: 1953 Comp., § 54-2-12, enacted by Laws 1963, ch. 138, § 3; 1973, ch. 116, § 2.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 Am. Jur. 2d Food § 38.

## 25-6-4. Labeling, marking and advertising eggs.

It is unlawful:

A. to offer eggs for sale in any newspaper advertisement, circular, radio or other form of advertising without plainly designating in the advertisement the classification as to grade and size to which the eggs being offered for sale properly belong, when price is a factor in the advertisement. The terms "fresh eggs," "strictly fresh eggs," "hennery eggs," "new-laid eggs" or descriptions of similar import shall not be used in connection with the sale or offering for sale or advertising for sale of eggs in New Mexico that do not meet the minimum requirements for the New Mexico grade A eggs or better;

B. to sell eggs by the case without an invoice stating both the correct size and correct grade description accompanying each case of eggs delivered to a retailer or consumer. The invoice shall also include the name and address of both buyer and seller, date of sale and shall otherwise conform to the regulations set forth in the Egg Grading Act. The invoice shall be kept by the receiving dealer for a period of thirty days in case the inspector calls for it;

C. to offer for sale eggs in cartons that do not have the name of the packer or distributor stamped or printed on them; or

D. to sell uncartoned eggs at retail.

**History: 1953 Comp., § 54-2-13, enacted by Laws 1963, ch. 138, § 4; 1973, ch. 116, § 3.**

## 25-6-5. Standards for eggs.

The New Mexico consumer grades for eggs shall be as uniform as possible to those standards established by the United States department of agriculture for consumer grades of eggs. The board shall set all standards for shell eggs for New Mexico.

**History: 1953 Comp., § 54-2-14, enacted by Laws 1963, ch. 138, § 5.**



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## 25-6-6. Exemptions.

The Egg Grading Act shall not apply to any person selling eggs from his own production when produced from a flock of less than three thousand birds, provided they are sold as ungraded.

**History: 1953 Comp., § 54-2-15, enacted by Laws 1963, ch. 138, § 6; 1973, ch. 116, § 4.**

## 25-6-7. Sale of ungraded eggs.

A. Retailers may sell the eggs specified in Section 25-6-6 NMSA 1978 to consumers only when such eggs on hand, offered or placed on sale are clearly marked "ungraded." Ungraded eggs shall be cartoned when sold at retail.

B. Any person proposing to sell ungraded eggs shall, prior to any such sale, notify the department in writing of his intent to sell ungraded eggs, specifying his location, the number of laying hens owned or in his possession, the place of production and the general area of the state in which the eggs are to be sold.

C. It is unlawful for any person selling any portion of his daily production as graded eggs to sell any portion thereof as ungraded eggs, except that any person may change his sales from graded to ungraded if he notifies the department in writing prior to such change.

D. It is unlawful for any person selling any portion of his daily production as ungraded eggs to sell any portion thereof as graded eggs, except that any person may change his sales from ungraded to graded eggs if he notifies the department in writing within five days from the date of change.

**History: 1953 Comp., § 54-2-16, enacted by Laws 1963, ch. 138, § 7; 1973, ch. 116, § 5.**

## 25-6-8. Enforcement; administration.

The department under the guidance and control of the board shall be responsible for administering and enforcing the provisions of the Egg Grading Act.

**History: 1953 Comp., § 54-2-17, enacted by Laws 1973, ch. 116, § 6.**

**Repeals and reenactments.** — Laws 1973, ch. 116, § 6, repealed 54-2-17, 1953 Comp., relating to enforcement and administration of the Egg Grading Act, and enacted a new section.

## 25-6-9. Egg inspection fee.

The Egg Grading Act shall be financed in part by the collection of a fee on all eggs sold to the retailer or consumer. The board shall have authority to establish the fee at their discretion, but in no case shall the fee exceed one-half cent per dozen. The fee shall be paid by the egg dealer or producer who packages the eggs for sale to the retailer or consumer. All money collected under the provisions of the Egg Grading Act shall be deposited with the New Mexico state university for the purposes of administering the provisions of that act and promoting the poultry industry and its products, and shall be expended upon the order of the board in the same manner as other funds of the New Mexico state university.

**History: 1953 Comp., § 54-2-18, enacted by Laws 1963, ch. 138, § 9; 1973, ch. 116, § 7.**

## 25-6-10. Payment of the inspection fee.

Each egg dealer or producer shall make quarterly reports to the department not later than thirty days after the end of March, June, September and December for the previous quarter showing the number of dozen eggs sold and remitting the fee as established by the board. The department is empowered to audit the required sales record of any person, firm or corporation coming



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under the provisions of the Egg Grading Act. These records shall be retained for a period of one year. Failure to submit the sales record on request of the department or its authorized agents is a violation of the Egg Grading Act.

Prior to selling eggs in New Mexico the egg producer or egg dealer shall file his intent to sell eggs with the department.

**History: 1953 Comp., § 54-2-19, enacted by Laws 1963, ch. 138, § 10; 1973, ch. 116, § 8.**

## 25-6-11. Powers of the board and department.

A. The board is empowered to adopt standards and to prescribe rules and regulations relating to the sale of eggs as it may deem necessary to carry into effect the lawful intent and meaning of the Egg Grading Act. The definitions and rules and regulations when adopted and published by the board shall have the same force as law. Violations of the rules and regulations are subject to the same penalties as violations of the Egg Grading Act; provided, that the board shall before adopting rules or regulations first give notice of the general subject thereof by publication of a notice setting forth the substance of proposed rules or regulations and the date upon which the board will hold a hearing on the proposed rules or regulations. Notification of all proposed rules and regulations shall be mailed directly to all egg producers and dealers registered with the department. Publication shall be made once in a newspaper of general circulation in this state. Persons affected by any proposed regulation shall have the right to present to the board their objections to any proposed regulation or rule prior to its adoption.

B. The department through its authorized inspectors or agents is authorized:

(1) to enter, on any business day, during the usual hours of business, any store, market or any other business or place where eggs are sold or offered for sale under the provisions of the Egg Grading Act in this state; and

(2) to issue and enforce a stop-sale notice or order to the owner or custodian of any lot of eggs which the board or their inspectors or agents find are in violation of the Egg Grading Act or any regulation issued thereunder, which shall prohibit any sale, barter, exchange or distribution of eggs until the inspectors are satisfied that the law has been complied with and have written a release or notice to the owners or custodian of the eggs.

**History: 1953 Comp., § 54-2-20, enacted by Laws 1963, ch. 138, § 11; 1973, ch. 116, § 9.**

## 25-6-12. Certification of dealers.

A. A small dealer's license is required of any person, firm or corporation who buys, sells or traffics in more than five cases and less than two hundred cases of eggs in any one week.

B. A medium-sized dealer's license is required of any person, firm or corporation who buys, sells or traffics in over two hundred cases and less than four hundred cases of eggs in any one week.

C. A large dealer's license is required of any person, firm or corporation who buys, sells or traffics in over four hundred cases in any one week.

D. The annual fees for each type of dealer are:

(1) small ..... $10.00
(2) medium ..... $25.00
(3) large ..... $50.00.

E. For the purpose of this section a case shall consist of thirty dozen eggs.

F. All licenses shall be conspicuously posted in the place of business to which they apply. The license is subject to revocation by the inspectors for cause. All licenses issued prior to the effective date of the Egg Grading Act shall expire when the act becomes effective and thereafter all licenses are renewable annually on July 1 of each year and shall expire on June 30 of the succeeding year.

**History: 1953 Comp., § 54-2-21, enacted by Laws 1963, ch. 138, § 12; 1973, ch. 116, § 10.**



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## 25-6-13. Additional violations.

It is unlawful:

A. for any person, with the exception of New Mexico egg producers, to sell eggs as a dealer unless such a person has obtained from the department a license to be issued at a price, varying according to the type of dealer;

B. for a person to refuse to submit any eggs, containers, lot, load or display of eggs to the inspection of any enforcement officer or to refuse to stop, at the request of any enforcement officer, any vehicle transporting eggs; or

C. for a person having eggs marked in accordance with the delivery invoice to keep the eggs for such time or under such conditions after they are purchased so as to cause them to deteriorate to a lower grade or standard and then offer and expose them for sale under the mark of the original invoice grade or standard.

**History: 1953 Comp., § 54-2-22, enacted by Laws 1963, ch. 138, § 13; 1973, ch. 116, § 11.**

## 25-6-14. Injunction.

In addition to the remedies provided in the Egg Grading Act, the department may apply to a district court for an injunction restraining any person from violating or continuing to violate any of the provisions of the Egg Grading Act or from failing or refusing to comply with any rule or regulation promulgated under that act.

**History: 1953 Comp., § 54-2-23, enacted by Laws 1963, ch. 138, § 14; 1973, ch. 116, § 12.**

**Cross references.** — For injunctions, *see* Rule 1-066 NMRA.

## 25-6-15. Seizure and holding of eggs.

The department may seize or hold as evidence any container of eggs or all or any part of any pack, load, lot consignment or shipment of eggs packed, stored, delivered for shipment, loaded, transported or sold in violation of any provisions of the Egg Grading Act.

**History: 1953 Comp., § 54-2-24, enacted by Laws 1963, ch. 138, § 15; 1973, ch. 116, § 13.**

## 25-6-16. Penalties.

A. Any person violating any provisions of the Egg Grading Act or any rule or regulation promulgated by the board or their authorized inspectors is guilty of a misdemeanor and upon conviction thereof shall be imprisoned in the county jail for not more than ninety days, or shall be fined not more than one hundred dollars ($100), or both such fine and imprisonment in the discretion of the court.

B. The licenses of third and subsequent violators may be revoked by the board.

C. In addition to all other fees prescribed by the Egg Grading Act, a penalty fee of ten percent shall be added for delinquent filing of any report or the delinquent paying of any inspection fee, and if the report and payment are not made within ten days of notification of delinquency, penalty shall be twenty-five percent of the inspection fee. Persons filing a false report shall be penalized fifty percent of the amount due for inspection fees.

**History: 1953 Comp., § 54-2-25, enacted by Laws 1963, ch. 138, § 16.**



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# ARTICLE 7

# Dairy Products

Sec.
25-7-1. Short title.
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## 25-7-1. Short title.

This act [25-7-1 to 25-7-8 NMSA 1978] may be cited as the "Dairy Act."

**History: 1953 Comp., § 52-1-30, enacted by Laws 1977, ch. 375, § 1.**

**Cross references.** — For provisions relating to raw milk, *see* 25-8-1 NMSA 1978 et seq.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 Am. Jur. 2d Food §§ 47 to 62.

36A C.J.S. Food §§ 6(4), 9(3).

## 25-7-2. Definitions.

As used in the Dairy Act:

A. "board" means the board of regents of New Mexico state university;

B. "department" means the New Mexico department of agriculture;

C. "person" means any individual, firm, partnership, corporation, society, association, trustee or company;

D. "dairy product" means milk, whether fluid, dried, evaporated, stabilized, condensed or otherwise processed, cream, milk products, ice cream, frozen custard, French custard, ice milk, frozen dessert or any other food product principally derived from milk;

E. "milk" means the whole, clean, lacteal secretion obtained by the complete milking of one or more healthy cows or goats, properly fed and kept, delivered from the dairy farm to any receiving or distributing establishment or factory within a reasonable time, excluding that obtained within fifteen days before and five days after calving or such longer period as may be necessary to render the milk practically colostrum free;

F. "handler" or "processor" means a person other than a retailer who receives or buys for resale or processes or manufactures milk or dairy products to be sold to others for consumption or resale, but does not include those persons engaged in the manufacture of soft-serve frozen desserts for sale directly to consumers; and

G. "retailer" means any person who buys milk or dairy products and who resells the same to consumers without further processing or manufacturing thereof.

**History: 1953 Comp., § 52-1-31, enacted by Laws 1977, ch. 375, § 2.**

## 25-7-3. Administration and enforcement of act.

The Dairy Act shall be administered and enforced by the board through the department.

**History: 1953 Comp., § 52-1-32, enacted by Laws 1977, ch. 375, § 3.**



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## 25-7-4. Standards for testing.

The board shall determine and prescribe the acceptable standards of equipment and methods to be employed in the testing or measuring of milk and dairy products to determine value, quantity or quality.

**History: 1953 Comp., § 52-1-33, enacted by Laws 1977, ch. 375, § 4.**

## 25-7-5. Standards of milk and other dairy products.

The board shall determine and prescribe the standards of physical and chemical composition or content for milk and dairy products as defined in the Dairy Act. The board may also determine what other food products, principally derived from milk, shall be classified as dairy products and establish standards for those products.

**History: 1953 Comp., § 52-1-34, enacted by Laws 1977, ch. 375, § 5.**

## 25-7-6. Adulterated or mislabeled products and stop-sale orders.

It is unlawful for any person to sell or offer for sale adulterated or mislabeled milk or dairy products. Milk or dairy products that contain any unwholesome substance or fail to conform in physical or chemical composition to the definitions or standards prescribed by the Dairy Act or by regulation of the board shall be deemed adulterated. Milk or dairy products as defined by the Dairy Act or by regulation of the board that are labeled with an identifying name other than those so defined, or bear a name that has been defined but contains a food product that does not conform in physical or chemical composition with the definition provided by the Dairy Act or regulation of the board, shall be deemed adulterated. Any milk or dairy product which contains a product differing in content from the product described on its label, or bears an identifying name other than those defined by the Dairy Act or by regulation of the board shall be deemed mislabeled. The department may issue and enforce a stop-sale order on any adulterated or mislabeled product.

**History: 1953 Comp., § 52-1-35, enacted by Laws 1977, ch. 375, § 6.**

**Cross references.** — For provisions relating to adulterated or misbranded food generally, *see* 25-2-1 NMSA 1978 et seq.

## 25-7-7. Regulations.

In order to enforce the Dairy Act, the board may prescribe and, after public hearing following due public notice, adopt regulations to carry out the provisions of the Dairy Act.

**History: 1953 Comp., § 52-1-36, enacted by Laws 1977, ch. 375, § 7.**

## 25-7-8. Penalty.

Any person who violates any of the provisions of the Dairy Act or regulations promulgated by the board is guilty of a misdemeanor and may be fined not less than one hundred dollars ($100) nor more than five hundred dollars ($500).

**History: 1953 Comp., § 52-1-37, enacted by Laws 1977, ch. 375, § 8.**



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# ARTICLE 7A

# Dairy Products

Sec.
25-7A-1. Short title.
25-7A-2. Definitions.
25-7A-3. Prohibited acts.
25-7A-4. Power to enjoin violations.
25-7A-5. Penalties; exceptions.
25-7A-6. Detention of dairy products at a dairy establishment believed adulterated or misbranded; condemnation; destruction or correction of defect.
25-7A-7. Attorney general or district attorney to institute prosecution; right to hearing before director prior to criminal prosecutions.
25-7A-8. Minor violations; warning authorized.
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25-7A-10. Dairy products; adulterated.
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25-7A-12. Manufacturing, packing and processing permits for certain classes of dairy products; suspension; inspections.
25-7A-13. Promulgating regulations governing the addition of any poisonous or deleterious substances in dairy products.
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25-7A-15. Promulgating regulations; procedure.
25-7A-16. Power to make inspections and secure samples within dairy establishments.
25-7A-17. Power of director to publish reports and disseminate information.
25-7A-18. Cooperation.
25-7A-19. Scientific laboratory to serve as testing laboratory.

## 25-7A-1. Short title.

Sections 1 through 19 [25-7A-1 to 25-7A-19 NMSA 1978] of this act may be cited as the "New Mexico Dairy Product Act".

**History: Laws 1993, ch. 188, § 1.**

**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-2. Definitions.

As used in the New Mexico Dairy Product Act:

A. "advertisement" means all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or that are likely to induce, directly or indirectly, the purchase of food;

B. "board" means the board of regents of New Mexico state university;

C. "contaminated with filth" applies to any dairy product not securely protected from dust, dirt and, so far as may be necessary by all reasonable means, from all foreign or injurious contaminations, or any dairy product found to contain any dust, dirt, foreign or injurious contamination or infestation; the provisions shall be considered to include the manufacture, production, processing, packing, exposure, offer, possession and holding of any such dairy product and the supplying or applying of any such dairy product in the conduct of any dairy establishment;

D. "dairy establishment" means a milk producing or milk processing facility;

E. "dairy product" means milk, whether fluid, dried, evaporated, stabilized, condensed or otherwise processed, cream, milk products, ice cream, frozen custard, French custard, ice milk, frozen dessert or any other food product derived principally from milk;

F. "department" means the New Mexico department of agriculture;

G. "director" means the director of agriculture;

H. "federal act" means the Federal Food, Drug and Cosmetic Act;

I. "immediate container" does not include package liners;

J. "label" means a display of written, printed or graphic matter upon the immediate container of any dairy product. A requirement made by or under authority of the New Mexico Dairy Product Act that any word, statement or other information appears on the label shall not be considered to be complied with unless such word, statement or other information also appears on the outside container or wrapper, if any, of the retail package of such dairy product or is easily legible through the outside container or wrapper;



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K. "labeling" means all labels and other written, printed or graphic matter:
(1) upon a dairy product or any of its containers or wrappers; or
(2) accompanying such dairy product;

L. "milk" means the whole, clean, lacteal secretion obtained by the complete milking of one or more healthy cows or goats, properly fed and kept, delivered from the dairy farm to any receiving or distributing establishment or factory within a reasonable time, excluding that obtained within fifteen days before or five days after calving or such longer period as may be necessary to render milk practically colostrum-free; and

M. "person" includes individual, partnership, corporation and association.

**History: Laws 1993, ch. 188, § 2.**

**Cross references.** — For the federal Food, Drug, and Cosmetic Act, *see* 42 U.S.C. § 301 et seq.

**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-3. Prohibited acts.

The following acts and the causing of these acts within the state by any dairy establishment are prohibited:

A. the manufacture, sale or delivery or holding or offering for sale of any dairy product that is adulterated or misbranded;

B. the adulteration or misbranding of any dairy product;

C. the receipt in commerce of any dairy product that is adulterated or misbranded and the delivery or proffered delivery of the adulterated or misbranded dairy product for pay or otherwise;

D. the sale, delivery for sale, holding for sale or offering for sale of any article in violation of Section 12 [25-7A-12 NMSA 1978] of the New Mexico Dairy Product Act;

E. the dissemination of any false advertisement related to a dairy product;

F. the refusal to permit entry or inspection or to permit the taking of a sample as authorized by Section 16 [25-7A-16 NMSA 1978] of the New Mexico Dairy Product Act;

G. the giving of a guarantee or undertaking, which guarantee or undertaking is false, except by a person who relied on a guarantee or undertaking to the same effect signed by and containing the name and address of the person residing in the state from whom he received the dairy product in good faith;

H. the removal or disposal of a detained or embargoed dairy product in violation of Section 6 [25-7A-6 NMSA 1978] of the New Mexico Dairy Product Act;

I. the alteration, mutilation, destruction, obliteration or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a dairy product if such act is done while the dairy product is held for sale and results in the dairy product being misbranded; and

J. forging, counterfeiting, simulating or falsely representing or without proper authority using any mark, stamp, tag, label or other identification device authorized or required by regulations promulgated under the provisions of the New Mexico Dairy Product Act.

**History: Laws 1993, ch. 188, § 3.**

**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-4. Power to enjoin violations.

In addition to the other remedies provided in the New Mexico Dairy Product Act, the department is authorized to apply to the district court for, and such court shall have jurisdiction upon hearing and for such cause shown to grant, a temporary or permanent injunction restraining any person from violating any provision of Section 3 [25-7A-3 NMSA 1978] of the New Mexico Dairy Product Act, irrespective of whether there exists an adequate remedy at law.

**History: Laws 1993, ch. 188, § 4.**

**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const.,



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art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-5. Penalties; exceptions.

A. The board shall establish a system of administrative penalties for violations of the New Mexico Dairy Product Act. The administrative penalties may be assessed by the director in lieu of or in addition to other penalties provided by statute. In establishing the system of administrative penalties, the board, after public notice and public hearing, shall adopt regulations that meet the following minimum requirements:

(1) the maximum amount of any administrative penalty shall not exceed one thousand dollars ($1,000) for any one violation of the New Mexico Dairy Product Act by any person; and

(2) violations for which administrative penalties may be assessed shall be clearly defined, along with a scale of administrative penalties relating the amount of the administrative penalty to the severity and frequency of the violation.

B. No person shall be subject to the penalties of Subsection A of this section for having violated Subsection A or C of Section 3 [25-7A-3 NMSA 1978] of the New Mexico Dairy Product Act if he establishes a guarantee or undertaking, signed by and containing the name and address of the person residing in the state from whom he received in good faith the dairy product, to the effect that such dairy product is not adulterated or misbranded within the meaning of the New Mexico Dairy Product Act, designating that act.

C. No publisher, radio-broadcast licensee or agency or medium for the dissemination of an advertisement, except the manufacturer, packer, distributor or seller of the dairy product to which a false advertisement relates, shall be liable under this section by reason of the dissemination by him of such false advertisement unless he has refused, on the request of the director, to furnish to the director the name and post office address of the manufacturer, packer, distributor, seller or advertising agency residing in the state who causes him to disseminate such advertisement.

**History: Laws 1993, ch. 188, § 5.**

**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-6. Detention of dairy products at a dairy establishment believed adulterated or misbranded; condemnation; destruction or correction of defect.

A. Whenever the director finds or has probable cause to believe that any dairy product within a dairy establishment is adulterated or so misbranded as to be dangerous or fraudulent within the meaning of the New Mexico Dairy Product Act, he shall affix to such dairy product a tag or other appropriate marking giving notice that the dairy product is or is suspected of being adulterated or misbranded and has been detained or embargoed and warning all persons not to remove or dispose of the dairy product by sale or otherwise until permission for removal or disposal is given by the director or the court. It is unlawful for any person to remove or dispose of the detained or embargoed dairy product by sale or otherwise without such permission.

B. When a dairy product detained or embargoed under Subsection A of this section has been found by the director to be adulterated or misbranded, he shall petition the judge of the district court in whose jurisdiction the dairy product is detained or embargoed for a libel for condemnation of the dairy product. When the director has found that a dairy product so detained or embargoed is not adulterated or misbranded, he shall remove the tag or other marking.

C. If the court finds that a detained or embargoed dairy product is adulterated or misbranded, the dairy product shall, after entry of the decree, be destroyed at the expense of the claimant of the dairy product under the supervision of the director, and all court costs and fees and storage and other proper expenses shall be taxed against the claimant of the dairy product or his agent; provided that when the adulteration or misbranding can be corrected by proper labeling or processing of the dairy product, the court, after entry of the decree and after such costs, fees and expenses



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have been paid and a good and sufficient bond, conditioned that the dairy product shall be so labeled or processed, has been executed, may by order direct that the dairy product be delivered to the claimant for such labeling or processing under the supervision of the director. The expense of such supervision shall be paid by the claimant. The bond shall be returned to the claimant of the dairy product on representation to the court by the director that the dairy product is no longer in violation of the New Mexico Dairy Product Act and that the expenses of supervision have been paid.

D. Whenever the director finds in any room, building or vehicle of transportation at a dairy establishment any dairy product that is unsound or contains any filthy, decomposed or putrid substance or that may be poisonous or deleterious to health or otherwise unsafe, the same being hereby declared to be a nuisance, he shall condemn or destroy the dairy product or in any other manner render it unsaleable as human food.

**History: Laws 1993, ch. 188, § 6.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-7. Attorney general or district attorney to institute prosecution; right to hearing before director prior to criminal prosecutions.

It is the duty of the attorney general or the various district attorneys of this state to whom the director reports any violation of the New Mexico Dairy Product Act to cause appropriate proceedings to be instituted in the proper courts without delay and to be prosecuted in the manner required by law. Before any violation of the New Mexico Dairy Product Act is reported to any such district attorney for the institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views before the director, either orally or in writing, in person or by attorney with regard to the contemplated proceeding.

**History: Laws 1993, ch. 188, § 7.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-8. Minor violations; warning authorized.

Nothing in the New Mexico Dairy Product Act shall be construed as requiring the director to report, for the institution of proceedings under the New Mexico Dairy Product Act, minor violations of that act whenever he believes that the public interest will be adequately served in the circumstances by a suitable written notice or warning.

**History: Laws 1993, ch. 188, § 8.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-9. Promulgation of definitions and standards by the board.

Whenever in the judgment of the board such action will promote honesty and fair dealing in the interest of consumers, the board shall after public hearing promulgate regulations fixing and establishing for any dairy product or class of dairy products a reasonable definition and standard of identity or reasonable standard of quality or fill of container or any combination of such requirements. In prescribing a definition and standard of identity for a dairy product or class of dairy products in which optional ingredients are permitted, the board shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients that shall be named on the label. The definitions and standards promulgated shall



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conform so far as practicable to the definitions and standards promulgated under the authority of the federal act.

**History: Laws 1993, ch. 188, § 9.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-10. Dairy products; adulterated.

A dairy product shall be deemed to be adulterated if:

A. it bears or contains any poisonous or deleterious substance that may render it injurious to health, but, in case the substance is not an added substance, the dairy product shall not be considered adulterated under this subsection if the quantity of the substance in the dairy product does not ordinarily render it injurious to health;

B. it bears or contains any added poisonous or added deleterious substance that is unsafe within the meaning of Section 13 [25-7A-13 NMSA 1978] of the New Mexico Dairy Product Act;

C. it consists in whole or in part of a diseased, contaminated, filthy, impure or infested ingredient, putrid or decomposed substance or is otherwise unfit for food;

D. it has been produced, prepared, packed or held under unsanitary conditions whereby it may have been contaminated with filth or whereby it may have been rendered diseased, unwholesome or injurious to health;

E. it is the product of a diseased animal or an animal that has died otherwise than by slaughter or that has been fed upon the uncooked offal from a slaughterhouse;

F. its container is composed in whole or in part of any poisonous or deleterious substance that may render the contents injurious to health;

G. any valuable constituent has been, in whole or in part, omitted or abstracted therefrom;

H. any substance has been substituted wholly or in part therefor;

I. damage or inferiority has been concealed in any manner;

J. any substance has been added or mixed or packed therewith so as to increase its bulk or weight or reduce its quality or strength or make it appear better or of greater value than it is; or

K. it bears or contains a coal-tar color other than one from a batch that has been certified under authority of the federal act.

**History: Laws 1993, ch. 188, § 10.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-11. Misbranded dairy product.

A dairy product within a dairy establishment shall be deemed to be misbranded if:

A. its labeling is false or misleading in any particular manner;

B. it is offered for sale under the name of another dairy product;

C. it is an imitation of another dairy product, unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the dairy product imitated;

D. its container is so made, formed or filled as to be misleading;

E. in package form, unless it bears a label containing:

(1) the name and place of business of the manufacturer, packer or distributor; or

(2) an accurate statement of the quantity of the contents in terms of weight, measure or numerical count; provided that under this paragraph reasonable variations shall be permitted and exemptions as to small packages shall be established by regulations prescribed by the board;

F. any word, statement or other information required by or under authority of the New Mexico Dairy Product Act to appear on the label or labeling is not prominently placed with such conspicuousness, as compared with other words, statements, designs or devices in the labeling, and in such



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terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;

G. it purports to be or is represented as a dairy product for which a definition and standard of identity has been prescribed by regulations as provided by Section 9 [25-7A-9 NMSA 1978] of the New Mexico Dairy Product Act unless:

(1) it conforms to such definition and standard; and

(2) its label bears the name of the dairy product specified in the definition and standard and, insofar as may be required by such regulations, the common names of optional ingredients, other than spices, flavoring and coloring, present in such dairy product;

H. it purports to be or is represented as:

(1) a dairy product for which a standard of quality has been prescribed by regulations as provided by Section 9 of the New Mexico Dairy Product Act and its quality falls below that standard unless its label bears in such manner and form as the regulations specify a statement that it falls below the standard; or

(2) a food for which a standard of fill of container has been prescribed by regulation as provided by Section 9 of the New Mexico Dairy Product Act and it falls below the standard of fill of container applicable to it, unless its label bears in such manner and form as the regulations specify a statement that it falls below the standard;

I. it is not subject to the provisions of Subsection G of this section, unless it bears labeling clearly giving:

(1) the common or usual name of the dairy product, if any; and

(2) in case it is fabricated from two or more ingredients, the common or usual name of each ingredient, except that spices, flavorings and colorings, other than those sold as such, may be designated as spices, flavorings and colorings without naming each; provided that to the extent that compliance with the requirements of this paragraph is impracticable or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the board;

J. it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral and other dietary properties as the board determines to be, and by regulations prescribes as, necessary in order to fully inform purchasers as to its value for such uses; and

K. it bears or contains any artificial flavoring, artificial coloring or chemical preservative, unless it bears labeling stating that fact; provided that to the extent that compliance with the requirements of this subsection is impracticable, exemptions shall be established by regulations promulgated by the board.

**History: Laws 1993, ch. 188, § 11.**

**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-12. Manufacturing, packing and processing permits for certain classes of dairy products; suspension; inspections.

A. Whenever the board finds after investigation that the distribution in New Mexico of any class of dairy product may, by reason of contamination with microorganisms during manufacture, processing or packing in any locality, be injurious to health and that such injurious nature cannot be adequately determined after the dairy product has entered commerce, it then and in such case only shall promulgate regulations providing for the issuance, by the director to manufacturers, processors or packers of such class of dairy product in such locality, of permits to which shall be attached such conditions governing the manufacture, processing or packing of such class of dairy product for such temporary period of time as may be necessary to protect the public health, and after the effective date of the regulations and during the temporary period, no dairy establishment shall introduce or deliver for introduction into commerce any such dairy product manufactured, processed or packed by any such manufacturer, processor or packer



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unless the manufacturer, processor or packer holds a permit issued by the director as provided by such regulations.

B. The director is authorized to suspend immediately upon notice any permit issued under authority of this section if it is found that any of the conditions of the permit have been violated. The holder of a permit so suspended shall be privileged at any time to apply for the reinstatement of the permit, and the director shall, immediately after prompt hearing and an inspection of the establishment, reinstate the permit if it is found that adequate measures have been taken to comply with and maintain the conditions of the permit as originally issued or as amended.

C. The director shall have access to any factory or establishment, the operator of which holds a permit from the director, for the purpose of ascertaining whether or not the conditions of the permit are being complied with, and denial of access for inspection shall be ground for suspension of the permit until access is freely given by the operator.

**History: Laws 1993, ch. 188, § 12.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-13. Promulgating regulations governing the addition of any poisonous or deleterious substances in dairy products.

Any poisonous or deleterious substance added to any dairy product, except where the substance is required in production or cannot be avoided by good manufacturing practice, shall be deemed to be unsafe for purposes of the application of Subsection B of Section 10 [25-7A-10 NMSA 1978] of the New Mexico Dairy Product Act; but when the substance is required or cannot be avoided, the board shall promulgate regulations limiting the quantity therein or thereon to such extent as the board finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of Subsection B of Section 10 of the New Mexico Dairy Product Act. While such a regulation is in effect limiting the quantity of any such substance in the case of any dairy product, the dairy product shall not, by reason of bearing or containing any added amount of the substance, be considered to be adulterated within the meaning of Subsection A of Section 10 of the New Mexico Dairy Product Act. In determining the quantity of the added substance to be tolerated in or on different dairy products, the board shall take into account the extent to which the use of the substance is required or cannot be avoided in the production of each diary product and the other ways in which the consumer may be affected by the same or other poisonous or deleterious substances.

**History: Laws 1993, ch. 188, § 13.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-14. False advertising.

A. An advertisement of a dairy product is deemed to be false if it is false or misleading in any particular manner.

B. If a dairy product is alleged to be misbranded because the labeling is misleading or if an advertisement is alleged to be false because it is misleading, then in determining whether the labeling or advertisement is misleading, there shall be taken into account, among other things, not only representations made or suggested by statement, word, design, device, sound or in any combination thereof, but also the extent to which the labeling or advertisement fails to reveal facts material in the light of such representations or material with respect to consequences that may result from the use of the dairy product to which the labeling or advertisement relates under the conditions of use prescribed in the labeling or advertisement thereof or under such conditions of use as are customary or usual.

**History: Laws 1993, ch. 188, § 14.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.



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## 25-7A-15. Promulgating regulations; procedure.

The authority to promulgate regulations after public hearing for the efficient enforcement of the New Mexico Dairy Product Act is vested in the board. The board is authorized to make the regulations promulgated under the federal act.

**History: Laws 1993, ch. 188, § 15.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-16. Power to make inspections and secure samples within dairy establishments.

The director shall have free access at all reasonable hours to any dairy establishment in which dairy products are manufactured, processed, packed or held for introduction into commerce or to enter any vehicle being used to transport or hold such dairy products in commerce for the purpose:

A. of inspecting the dairy establishment or vehicle to determine if any provision of the New Mexico Dairy Product Act is being violated; and

B. to secure samples or specimens of any dairy product after paying or offering to pay for the sample. The director may make or cause to be made examinations of samples secured under the provisions of this section to determine whether any provision of the New Mexico Dairy Product Act is being violated.

**History: Laws 1993, ch. 188, § 16.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-17. Power of director to publish reports and disseminate information.

A. The director may cause to be published from time to time reports summarizing all judgments, decrees and court orders that have been rendered under the New Mexico Dairy Product Act, including the nature of the charge and the disposition of the charge.

B. The director may also cause to be disseminated such information regarding dairy products as he deems necessary in the interest of public health and the protection of the consumer against fraud. Nothing in this section shall be construed to prohibit the director from collecting, reporting and illustrating the results of his investigations.

**History: Laws 1993, ch. 188, § 17.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-18. Cooperation.

The department may cooperate, receive grants-in-aid and enter into cooperative agreements with any agency of the federal government, of this state or its subdivisions, or with any agency of another state.

**History: Laws 1993, ch. 188, § 18.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7A-19. Scientific laboratory to serve as testing laboratory.

The scientific laboratory division of the department of health shall serve as the testing laboratory for samples collected for examination pursuant to the provisions of the New Mexico Dairy Product Act.



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**History: Laws 1993, ch. 188, § 19.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

# ARTICLE 7B

# Dairy Establishment Sanitation

Sec.
25-7B-1. Short title.
25-7B-2. Purpose.
25-7B-3. Definitions.
25-7B-4. Board; regulations; department; powers and duties.
25-7B-5. Department; powers and duties.
25-7B-6. Permits; permit required; application; revocation; suspension.
25-7B-7. Inspection by department.
25-7B-8. Immediate suspension of permit by department.
25-7B-9. Judicial review of department actions.
25-7B-10. Enforcement; administrative penalties.
25-7B-11. Disease control.

## 25-7B-1. Short title.

Sections 20 through 30 [25-7B-1 to 25-7B-11 NMSA 1978] of this act may be cited as the "Dairy Establishment Sanitation Act".

**History: Laws 1993, ch. 188, § 20.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7B-2. Purpose.

The purpose of the Dairy Establishment Sanitation Act is to protect the public health by establishing standards and provisions for the regulation of dairy establishments and by appropriate delegations of authority to the department to adopt and enforce regulations covering the environmental health aspects of dairy establishments to assure that consumers are not exposed to adverse environmental health conditions arising out of the operations of dairy establishments.

**History: Laws 1993, ch. 188, § 21.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7B-3. Definitions.

As used in the Dairy Establishment Sanitation Act:

A. "board" means the board of regents of New Mexico state university;

B. "dairy establishment" means a milk producing or milk processing facility;

C. "dairy product" means milk, whether fluid, dried, evaporated, stabilized, condensed or otherwise processed, cream, milk products, ice cream, frozen custard, French custard, ice milk, frozen dessert or any other food product derived principally from milk;

D. "department" means the New Mexico department of agriculture;

E. "director" means the director of agriculture;

F. "milk" means the whole, clean, lacteal secretion obtained by the complete milking of one or more healthy cows or goats, properly fed and kept, delivered from the dairy farm to any receiving or distributing establishment or factory within a reasonable time, excluding that obtained within fifteen days before or five days after calving or such longer period as may be necessary to render milk practically colostrum-free; and

G. "person" includes an individual, partnership, corporation and association.

**History: Laws 1993, ch. 188, § 22.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.



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## 25-7B-4. Board; regulations; department; powers and duties.

The board shall promulgate procedural and substantive regulations to provide:

A. for the preparation of dairy products at dairy establishments in a manner safe for human consumption, free from adulteration, spoilage, contamination and unwholesomeness. The regulations shall provide for:

(1) disease control;

(2) employee hygiene and sanitation at dairy establishments;

(3) dairy establishment premises sanitation;

(4) all aspects of dairy establishment construction relating to sanitation;

(5) control of pests and infestation by pests at dairy establishments;

(6) lavatory and toilet facility placement and sanitation at dairy establishments;

(7) lavatory hygiene at dairy establishments;

(8) dairy equipment and utensil design and construction at dairy establishments;

(9) dairy equipment and utensil storage and handling at dairy establishments;

(10) dairy establishment ventilation; and

(11) any other facet of dairy establishment operations that reasonably may be considered to pose an existing or potential hazard to the health of the consuming public;

B. the issuance, suspension and revocation of permits required under the Dairy Establishment Sanitation Act, which regulations shall provide for prior notice to and a hearing for any applicant for or holder of a permit when the department-proposed action is to deny an application for or suspend or revoke a permit, except in those specified instances under the provisions of the Dairy Establishment Sanitation Act when the department is authorized to take any of the foregoing actions without prior notice and hearing;

C. establishing requirements for inspections of dairy establishments, which shall include provisions for inspections at a frequency of at least once every twelve months; and

D. for permitting fees for permits issued pursuant to the Dairy Establishment Sanitation Act.

**History: Laws 1993, ch. 188, § 23.** **Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7B-5. Department; powers and duties.

A. The department is authorized and has the duty to execute any provisions of the Dairy Establishment Sanitation Act delegated to it under that act and specifically is directed to administer and enforce the provisions of regulations adopted pursuant to that act.

B. The director may appoint an advisory council composed of dairy experts to assist in carrying out the objectives of the Dairy Establishment Sanitation Act.

**History: Laws 1993, ch. 188, § 24.** **Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7B-6. Permits; permit required; application; revocation; suspension.

A. No person may operate a dairy establishment unless he possesses a valid and unsuspended permit issued by the department in accordance with the Dairy Establishment Sanitation Act and the regulations adopted pursuant to that act. The permit shall be posted in a conspicuous place within the dairy establishment. No person may display a permit unless it has been issued to him by the department and has not been revoked and is not under suspension.

B. Any person desiring to operate a dairy establishment shall apply to the department for the issuance of a permit. Applications shall be made in a form and in accordance with procedures established by regulations of the department. The department shall issue a permit to any applicant that complies with the regulations of the department covering the issuance of permits and who



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demonstrates to the satisfaction of the department his ability to comply with all the provisions of the Dairy Establishment Sanitation Act and all regulations of the department.

C. The department shall promulgate regulations for the revocation or suspension of permits for those dairy establishments that fail to come into compliance with a provision of the Dairy Establishment Sanitation Act or regulation promulgated pursuant to that act. The hearing officer shall not be any person previously involved in the suspension or revocation action. No inspection made more than twenty-four months prior to the most recent such inspection shall be used as a basis for suspension or revocation.

**History: Laws 1993, ch. 188, § 25.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7B-7. Inspection by department.

A. The department shall inspect dairy establishments to determine compliance or lack of compliance with the Dairy Establishment Sanitation Act and regulations of the department. The procedures for inspection shall be in accordance with regulations of the department. Upon request by the department to a dairy establishment operator or to his employee or agent, he shall permit the department official, upon proper identification, to enter the premises, inspect all parts of the premises and inspect and copy any records of purchases by the dairy establishment. The operator or his employee or agent shall be given an opportunity to accompany the department official on his inspection and, as soon as possible after the inspection, a report of the inspection shall be furnished to him. Refusal to allow an inspection of a dairy establishment is grounds for revocation of the permit of the operator, provided that the department official has tendered proper identification prior to the refusal.

B. During an inspection, the department may take samples of dairy products and other substances found on the premises of a dairy establishment for the purpose of determining compliance with provisions of the Dairy Establishment Sanitation Act and regulations of the department.

**History: Laws 1993, ch. 188, § 26.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7B-8. Immediate suspension of permit by department.

The department may suspend a permit immediately without prior notice to the holder of the permit if it determines, after inspection, that conditions within a dairy establishment present a substantial danger of illness, serious physical harm or death to consumers who might use the products of the dairy establishment. A suspension action taken under this section is effective when communicated to the dairy establishment operator or any employee or agent of the operator who is in charge of the premises involved. If there is no designated employee or agent in charge of the premises, communication to any employee physically present on the premises is sufficient communication to make the suspension effective.

**History: Laws 1993, ch. 188, § 27.**
**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7B-9. Judicial review of department actions.

Any person to whom the department denies a permit or whose permit is suspended or revoked by the department may appeal to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.



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**History: Laws 1993, ch. 188, § 28; 1998, ch. 55, § 36; 1999, ch. 265, § 38.**

**The 1999 amendment,** effective July 1, 1999, substituted "Section 39-3-1.1" for "Section 12-8A-1".

**The 1998 amendment,** effective September 1, 1998, rewrote this section to the extent that a detailed comparison is impracticable.

## 25-7B-10. Enforcement; administrative penalties.

A. The department may seek relief in district court to enjoin the operation of any dairy establishment not complying with the Dairy Establishment Sanitation Act or any regulation adopted under that act.

B. The board shall establish a system of administrative penalties for violations of the Dairy Establishment Sanitation Act. The administrative penalties may be assessed by the director in lieu of or in addition to other penalties provided by statute. In establishing the system of administrative penalties, the board, after public notice and public hearing, shall adopt regulations that meet the following minimum requirements:

(1) the maximum amount of any administrative penalty shall not exceed one thousand dollars ($1,000) for any one violation of the Dairy Establishment Sanitation Act by any person; and

(2) violations for which administrative penalties may be assessed shall be clearly defined, along with a scale of administrative penalties relating the amount of the administrative penalty to the severity and frequency of the violation.

**History: Laws 1993, ch. 188, § 29.**

**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

## 25-7B-11. Disease control.

The department shall promulgate regulations to ensure that a person with a disease that can reasonably be expected to be transmitted to other persons shall not work in a dairy establishment.

**History: Laws 1993, ch. 188, § 30.**

**Effective dates.** — Laws 1993, ch. 188 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1993, 90 days after adjournment of the legislature.

# ARTICLE 8

# Raw Milk

Sec.
25-8-1. Raw milk sold at retail; standards.
25-8-2. Enforcement.
25-8-3. Penalty; civil.

## 25-8-1. Raw milk sold at retail; standards.

Raw milk sold by a retailer must meet all standards established by the board of regents of New Mexico state university and the environmental improvement agency for the retail sale of grade A raw milk and in addition shall:

A. contain no more than twenty thousand bacteria per milliliter;

B. contain no more than fifty coliform bacteria per milliliter; and

C. within two hours after completion of milking, be cooled to a temperature of forty-five degrees fahrenheit or less and maintained at that temperature until sold to the consumer.

**History: 1953 Comp., § 52-2-18, enacted by Laws 1977, ch. 270, § 1.**

**Cross references.** — For provisions relating to dairy products, *see* 25-7-1 NMSA 1978 et seq.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 Am. Jur. 2d Food §§ 47 to 53.

36A C.J.S. Food §§ 12(8), 13, 14(1), 14(2), 15.



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## 25-8-2. Enforcement.

If, as a result of investigation, the environmental improvement agency finds that any person is violating any provision of Section 1 [25-8-1 NMSA 1978] of this act [25-8-1 to 25-8-3 NMSA 1978], or any regulation issued thereunder, the agency may bring an action for injunctive or other appropriate relief in the district court for the county in which the violation is occurring, or in the district court for Santa Fe county.

**History: 1953 Comp., § 52-2-19, enacted by Laws 1977, ch. 270, § 2.**

## 25-8-3. Penalty; civil.

Any person who violates any provision of Section 1 [25-8-1 NMSA 1978] of this act [25-8-1 to 25-8-3 NMSA 1978] or any regulation issued thereunder is liable to a civil penalty not to exceed one hundred dollars ($100) for each violation.

**History: 1953 Comp., § 52-2-20, enacted by Laws 1977, ch. 270, § 3.**

# ARTICLE 9

# Imitation Honey

Sec.
25-9-1. Repealed.
25-9-2. Repealed.
25-9-3. Repealed.
25-9-4. Repealed.
25-9-5. Repealed.

## 25-9-1. Repealed.

**Repeals.** — Laws 2005, ch. 145 repealed 25-9-1 NMSA 1978, as enacted by Laws 1977, ch. 243, § 1, relating to the short title of the Imitation Honey Act, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

## 25-9-2. Repealed.

**Repeals.** — Laws 2005, ch. 145 repealed 25-9-2 NMSA 1978, as enacted by Laws 1977, ch. 243, § 2, relating to definitions, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

## 25-9-3. Repealed.

**Repeals.** — Laws 2005, ch. 145 repealed 25-9-3 NMSA 1978, as enacted by Laws 1977, ch. 243, § 3, relating to unlawful labeling, advertising or selling of products as honey, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

## 25-9-4. Repealed.

**Repeals.** — Laws 2005, ch. 145 repealed 25-9-4 NMSA 1978, as enacted by Laws 1977, ch. 243, § 4, relating to enforcement, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOne Source.com*.

## 25-9-5. Repealed.

**Repeals.** — Laws 2005, ch. 145 repealed 25-9-5 NMSA 1978, as enacted by Laws 1977, ch. 243, § 5, relating to penalties, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.



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# ARTICLE 10

# Pinon Nuts

Sec.
25-10-1. Short title.
25-10-2. Unlawful labeling, advertising or selling of products as pinon nuts.
25-10-3. Enforcement.
25-10-4. Genetic research program initiated.
25-10-5. Penalty.

## 25-10-1. Short title.

This act [25-10-1 to 25-10-5 NMSA 1978] may be cited as the "Pinon Nut Act".

**History: Laws 1987, ch. 43, § 1.**

## 25-10-2. Unlawful labeling, advertising or selling of products as pinon nuts.

A. It is unlawful for any person to package any product and label the product as pinon nuts or as containing pinon nuts or to use the words pinon nuts in any prominent location on the label of such product or to advertise, sell or offer for sale any product which is labeled pinon nuts or as containing pinon nuts unless the product consists of pinon nuts or uses pinon nuts as an ingredient in the product.

B. As used in this section, "pinon nuts" means the edible nut which is the product of the pinon tree, scientifically known as genus "pinus", subgenus "strobus", section "parrya", subsection "cembroides".

**History: Laws 1987, ch. 43, § 2; 1993, ch. 299, § 1.**

**The 1993 amendment,** effective April 7, 1993, substituted the language beginning "genus 'pinus'" for "the pinus edulis and pinus monophylla" at the end of Subsection B and made minor stylistic changes.

## 25-10-3. Enforcement.

A. The board of regents of New Mexico state university shall enforce and administer the Pinon Nut Act through the New Mexico department of agriculture. The board shall have the authority to promulgate regulations necessary for the enforcement of the Pinon Nut Act.

B. The department through its authorized inspectors or agents is authorized to:

(1) audit the purchase and sales records of any person, firm or corporation dealing with pinon nut sales; and

(2) enter, on any business day during the usual hours of business, any store, market or any other business or place where pinon nuts are sold or offered for sale under the provisions of the Pinon Nut Act in this state.

**History: Laws 1987, ch. 43, § 3; 1993, ch. 299, § 2.**

**The 1993 amendment,** effective April 7, 1993, designated the formerly undesignated provision as Subsection A and added Subsection B.

## 25-10-4. Genetic research program initiated.

New Mexico state university shall:

A. devote an appropriate portion of its funding for the purpose of initiating a program of genetic research and procedures for developing a seed source for faster growing pinon trees suitable to New Mexico's climate;

B. study methods to prevent and control diseases that threaten the pinon trees in this state;

C. conduct and publish a nutritional analysis of pinon nuts;



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D. research and recommend storage methods for both shelled and unshelled nuts for periods of up to three years;

E. recommend packaging methods for shelled nuts to preserve freshness;

F. conduct a marketing study to define the potential of exploiting the state's present wild-growing pinon nut crop resource both for in-state consumption and for out-of-state export;

G. conduct research in the development of mechanical means for harvesting pinon nuts from wild trees that will not cause damage to the trees or their surroundings and mechanical means for shelling the pinon nuts; and

H. report annually to the legislature regarding the amount of funding it is devoting and expending for the research, development and marketing programs called for in this section, the funding being devoted to and expended for other agricultural, range, forestry and land stewardship programs and the progress being made towards fulfilling the research, development and marketing programs called for in this section.

**History: Laws 1987, ch. 43, § 4; 1993, ch. 299, § 3.**

**The 1993 amendment,** effective April 7, 1993, rewrote this section to the extent that a detailed comparison is impracticable.

## 25-10-5. Penalty.

Any person who violates the provisions of the Pinon Nut Act or any regulation promulgated pursuant to that act is guilty of a misdemeanor and each violation shall constitute a separate offense.

**History: Laws 1987, ch. 43, § 5.**

**Cross references.** — For sentencing for misdemeanors, *see* 31-19-1 NMSA 1978.

# ARTICLE 11

# New Mexico Chile Advertising

Sec.
25-11-1. Short title.
25-11-2. Definitions.
25-11-3. Unlawful advertising, labeling or selling of non-New Mexico chile.
25-11-4. Administration; audit; inspection.
25-11-5. Injunction.

## 25-11-1. Short title.

Chapter 25, Article 11 NMSA 1978 may be cited as the "New Mexico Chile Advertising Act".

**History: Laws 2011, ch. 57, § 1; 2013, ch. 85, § 1; 2013, ch. 211, § 1.**

**The 2013 amendment,** effective July 1, 2013, added the NMSA chapter and article for the New Mexico Chile Advertising Act; and at the beginning of the sentence, deleted "This act" and added "Chapter 25, Article 11 NMSA 1978".

Laws 2013, ch. 85, § 1 and Laws 2013, ch. 211, § 1, both effective July 1, 2013, enacted identical amendments to this section. The section was set out as amended by Laws 2013, ch. 211, § 1. *See* 12-1-8 NMSA 1978.

## 25-11-2. Definitions.

As used in the New Mexico Chile Advertising Act:

A. "board" means the board of regents of New Mexico state university; and

B. "chile pepper" means the fruit from Capsicum annuum.

**History: Laws 2011, ch. 57, § 2.**

**Effective dates.** — Laws 2011, ch. 57 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2011, 90 days after the adjournment of the legislature.



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## 25-11-3. Unlawful advertising, labeling or selling of non-New Mexico chile.

A. It is unlawful for a person to:

(1) knowingly advertise, describe, label or offer for sale chile peppers as New Mexico chile, or to advertise, describe, label or offer for sale a product as containing New Mexico chile, unless the chile peppers or chile peppers in the product were grown in New Mexico; or

(2) knowingly advertise, describe, label or offer for sale chile peppers, or a product containing chile peppers, using the name of any city, town, county, village, pueblo, mountain, river or other geographic feature or features located in New Mexico in a misleading or deceptive manner that states or reasonably implies that the chile peppers are, or the product contains, New Mexico chile, unless the chile peppers or chile peppers in the product were grown in New Mexico.

B. The prohibitions in this section do not apply to a person whose business name, brand name or trademark was used in advertising, product descriptions, labels or offers for sale and was established prior to the effective date of the New Mexico Chile Advertising Act; provided that, on and after July 1, 2013, the person, in all advertising, descriptions and labels containing that business name, brand name or trademark, shall include in a prominent location and in a prominent typeface a disclaimer stating "NOT GROWN IN NEW MEXICO" if the product contains chile peppers that were not grown in New Mexico.

C. The prohibitions in this section do not apply to a restaurant that describes a menu item using a geographic name provided for in Paragraph (2) of Subsection A of this section; provided that the origin of any chile in the menu item is not misrepresented.

**History: Laws 2011, ch. 57, § 3; 2013, ch. 85, § 2; 2013, ch. 211, § 2.**

**The 2013 amendment,** effective July 1, 2013, expanded violations of the act; provided exceptions to the application of the act; and added Paragraph (2) of Subsection A and Subsections B and C.

Laws 2013, ch. 85, § 2 and Laws 2013, ch. 211, § 2, both effective July 1, 2013, enacted identical amendments to this section. The section was set out as amended by Laws 2013, ch. 211, § 2. *See* 12-1-8 NMSA 1978.

## 25-11-4. Administration; audit; inspection.

A. The board may:

(1) enforce and administer the New Mexico Chile Advertising Act through the New Mexico department of agriculture; and

(2) promulgate rules, in consultation with the New Mexico chile industry, necessary for the administration of the New Mexico Chile Advertising Act.

B. Sales of twenty thousand pounds or less of chile peppers per calendar year by the person that grew the chile peppers are exempt from any recordkeeping requirement that the board may establish by rule. For the purposes of this subsection, "farmers' market" means a physical retail market open to the public at which farmers sell produce.

C. The New Mexico department of agriculture through its authorized inspectors or agents is authorized to:

(1) audit the purchase and sales records of a person dealing with the sale of chile peppers or products containing chile peppers that are advertised, described, labeled or offered for sale as New Mexico chile;

(2) enter, on a business day during the usual hours of business, a store, market or other business or place for the limited purpose of inspecting the establishment's records related to chile peppers or products containing chile peppers being advertised, described, labeled or offered for sale as New Mexico chile or as containing New Mexico chile; and

(3) issue stop-sale, use or removal orders with respect to any violation of the New Mexico Chile Advertising Act.

**History: Laws 2011, ch. 57, § 4; 2013, ch. 85, § 3; 2013, ch. 211, § 3.**

**2013 Multiple Amendments.** — Laws 2013, ch. 85, § 3 and Laws 2013, ch. 211, § 3 enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2013, ch. 211, § 3, which was last signed by the governor, is set out above and incorporates both amendments. The amendments enacted by Laws



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2013, ch. 85, § 3 and Laws 2013, ch. 211, § 3 are described below. To view the session laws in their entirety, *see* the 2013 session laws on *NMOneSource.com*.

The nature of the difference between the amendments is that Laws 2013, ch. 211, § 3 defined "farmers' market" in Subsection B and Laws 2013, ch. 85, § 5 did not.

Laws 2013, ch. 211, § 3, effective July 1, 2013, eliminated the authority of the board to issue cease and desist orders; authorized the department of agriculture to issue stop-sale, use or removal orders; provided exemptions from record keeping requirements; deleted former Paragraph (3) of Subsection A, which authorized the board to issue cease and desist orders; added Subsection B; and added Paragraph (3) of Subsection C.

Laws 2013, ch. 85, § 3, effective July 1, 2013, eliminated the authority of the board to issue cease and desist orders; authorized the department of agriculture to issue stop-sale, use or removal orders; provided exemptions from record keeping requirements; deleted former Paragraph (3) of Subsection A, which authorized the board to issue cease and desist orders; added Subsection B; and added Paragraph (3) of Subsection C.

## 25-11-5. Injunction.

In addition to any other remedy under law, the board may apply to the district court for an injunction, and the district court may issue a temporary or permanent injunction, or both, restraining any person from violating or continuing to violate any of the provisions of the New Mexico Chile Advertising Act or any rule promulgated pursuant to that act by the board. In issuing an injunction on the application of the board, the court shall not require a bond.

**History: Laws 2011, ch. 57, § 5.**

**Effective dates.** — Laws 2011, ch. 57 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2011, 90 days after the adjournment of the legislature.

# ARTICLE 12

# Homemade Food

Sec.
25-12-1. Short title.
25-12-2. Definitions.
25-12-3. Homemade food items; licensing, permitting, inspection and labeling exemptions; requirements; investigations.
25-12-4. Interpretation of act; consultations.
25-12-5. State preemption.

## 25-12-1. Short title.

Sections 1 through 5 [25-12-1 to 25-12-5 NMSA 1978] of this act may be cited as the "Homemade Food Act".

**History: Laws 2021, ch. 98, § 1.**

**Effective dates.** — Laws 2021, ch. 98, § 9 made Laws 2021, ch. 98, § 1 effective July 1, 2021.

## 25-12-2. Definitions.

As used in the Homemade Food Act:

A. "department" means the department of environment; provided that when a class A county and a home rule municipality that have established a combined local health department pursuant to the Joint Powers Agreements Act [11-1-1 to 11-1-7 NMSA 1978] for the purpose of local health regulation, "department" means the combined local health department;

B. "homemade food item" means a food item or non-alcoholic beverage that is produced at the private farm, ranch or residence of a processor, including homemade food items that are packaged at the processor's private farm, ranch or residence;

C. "label" means a display of written, printed or graphic matter upon the immediate container of any article;

D. "not time and temperature control" refers to food items that do not require time and temperature control to ensure safety;

E. "person" includes an individual, partnership, corporation and association;



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F. "processor" means a person who produces a homemade food item;

G. "seller" means a person who sells a not-time-and-temperature-control homemade food item to a consumer;

H. "time and temperature control" means a control requirement for certain foods to ensure safety and limit pathogenic microorganism growth; and

I. "to produce" means to prepare a homemade food item by baking, cooking, cutting, dehydrating, drying, fermenting, growing, mixing, preserving, raising or other process designated by the environmental improvement board by rule.

**History: Laws 2021, ch. 98, § 2.** **Effective dates.** — Laws 2021, ch. 98, § 9 made Laws 2021, ch. 98, § 2 effective July 1, 2021.

## 25-12-3. Homemade food items; licensing, permitting, inspection and labeling exemptions; requirements; investigations.

A. The production and sale of homemade food items shall be regulated pursuant to the provisions of the Homemade Food Act and are exempt from other requirements pursuant to the Food Service Sanitation Act [Chapter 25, Article 1 NMSA 1978 ] and the New Mexico Food Act [25-2-1 to 25-2-19 and 25-2-20 NMSA 1978]; provided that:

(1) the food items are not-time-and-temperature-control food items;

(2) the seller sells directly to consumers within the state, including at farmers' markets, at festivals, on the internet, at roadside stands, at the seller's home for pick-up or delivery or through mail delivery;

(3) the seller completes a food handler certification course approved by the department;

(4) the seller maintains a sanitary kitchen, practices good hygiene, protects the kitchen from rodents and pests and keeps pets and children out of the kitchen while producing food;

(5) if the seller transports food items pursuant to the Homemade Food Act, the seller ensures that the food is transported in a sanitary manner and is protected from pets, children and other hazards; and

(6) the seller labels or otherwise provides to the consumer the information required by Subsection C of this section.

B. A seller shall provide to the consumer the information required by Subsection C of this section in the following manner:

(1) on a label affixed to a package of a homemade food item when the package is the unit of sale;

(2) on a label affixed to a container when the homemade food item is offered for sale from a bulk container;

(3) on a placard displayed at the point of sale when the homemade food item is neither packaged nor offered for sale from a bulk container;

(4) on a webpage on which the homemade food item is offered for sale; and

(5) when a homemade food item is sold by telephone or custom order, a label is not required for the homemade food item; however, the seller shall disclose to the consumer that the homemade food item is produced at a private residence that is exempt from state licensing and inspection and may contain allergens.

C. A seller shall provide the following information about the seller's homemade food items to the consumer:

(1) the name, home address, telephone number and email address of the processor of the food item;

(2) the common or usual name of the food item;

(3) the ingredients of the food item in descending order of predominance; and

(4) the following statement: "This product is home produced and is exempt from state licensing and inspection. This product may contain allergens.".

D. A seller shall have the information required by Subsection C of this section readily available and shall provide it to a consumer upon request.



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E. The department may operate a voluntary permit system for the sale of homemade food items. A seller may apply for such a permit from the department.

F. A class A county and a home rule municipality that have established a combined local health department pursuant to the Joint Powers Agreements Act [11-1-1 to 11-1-7 NMSA 1978] for the purpose of local health regulation may operate a mandatory or a voluntary permit system for the sale of homemade food items within the jurisdictions of the respective county and municipality; provided that such permit system allows the sale of all food items at all locations authorized by the Homemade Food Act.

G. The department shall enforce the Homemade Food Act and may investigate any suspected food-borne illness or stop the sale of any suspected contaminated foods; provided that the department shall first issue a written warning regarding any violation before imposing a fine. Failure to comply with a written warning shall be a misdemeanor, and upon conviction the violator shall be subject to a fine not to exceed one hundred dollars ($100) per violation.

**History: Laws 2021, ch. 98, § 3.**

**Effective dates.** — Laws 2021, ch. 98, § 9 made Laws 2021, ch. 98, § 3 effective July 1, 2021.

## 25-12-4. Interpretation of act; consultations.

No provision of the Homemade Food Act shall be construed so as to:

A. preclude the department from providing assistance, consultation or inspection at the request of the processor of a homemade food item;

B. preclude the production or sale of homemade food items otherwise allowed by law;

C. change the regulation of other goods and services where homemade food items are also produced or sold;

D. exempt sellers from applicable business registration or tax law;

E. require private farmers' markets or other private venues to allow the sale of homemade foods; or

F. conflict with federal law.

**History: Laws 2021, ch. 98, § 4.**

**Effective dates.** — Laws 2021, ch. 98, § 9 made Laws 2021, ch. 98, § 4 effective July 1, 2021.

## 25-12-5. State preemption.

Except as otherwise provided in the Homemade Food Act, a political subdivision of the state, including a home rule municipality, or an institution of the state shall not adopt a law, policy or resolution that regulates or attempts to regulate the production or sale of homemade food items.

**History: Laws 2021, ch. 98, § 5.**

**Effective dates.** — Laws 2021, ch. 98, § 9 made Laws 2021, ch. 98, § 5 effective July 1, 2021.



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# CHAPTER 26

# Drugs and Cosmetics

Art.


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# ARTICLE 1

# General Provisions

Sec.


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## 26-1-1. Short title.

Chapter 26, Article 1 NMSA 1978 may be cited as the "New Mexico Drug, Device and Cosmetic Act".

**History: 1953 Comp., § 54-6-26, enacted by Laws 1967, ch. 23, § 1; 1987, ch. 270, § 1.**

**Compiler's notes.** — Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For drug product selection, *see* Article 3 of this chapter.

For provisions of the Controlled Substances Act, *see* 30-31-1 NMSA 1978 et seq.

**The 1987 amendment,** effective June 19, 1987, substituted the present catchline for the former catchline, which read "Title of act"; substituted "Chapter 26, Article 1 NMSA 1978" for "This act"; and inserted "Device."

**ANNOTATIONS**

**Objective of article,** in general, is to help establish a closed regulatory system for the legitimate handlers of controlled drugs. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics, and Poisons §§ 1, 2, 8, 9, 10, 14, 15, 17, 19, 33, 69, 72, 75, 76, 98, 100, 130, 141, 191, 206.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning food, drugs, and other products intended for ingestion, 58 A.L.R.4th 7.

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Products liability of endorser, trade association, certifier, or similar party who expresses approval of product, 1 A.L.R.5th 431.

28 C.J.S. Supp. Drugs and Narcotics §§ 1 to 9.



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## 26-1-2. Definitions.

As used in the New Mexico Drug, Device and Cosmetic Act:

A. "board" means the board of pharmacy or its duly authorized agent;

B. "person" includes an individual, partnership, corporation, association, institution or establishment;

C. "biological product" means any of the following that is applicable to the prevention, treatment or cure of a disease or condition of human beings:

(1) a virus;

(2) a therapeutic serum;

(3) a toxin;

(4) an antitoxin;

(5) a vaccine;

(6) blood;

(7) a blood component or derivative;

(8) an allergenic product;

(9) a protein, except any chemically synthesized polypeptide;

(10) a product that is analogous to any of the products listed in Paragraphs (1) through (9) of this subsection; or

(11) arsphenamine, a derivative of arsphenamine or any other trivalent organic arsenic compound;

D. "biosimilar" or "biosimilarity" means, in reference to a biological product that the federal food and drug administration has licensed, that:

(1) the biological product is highly similar to the reference product notwithstanding minor differences in clinically inactive components; and

(2) there are no clinically meaningful differences between the biological product and the reference product in terms of the safety, purity and potency of the product;

E. "controlled substance" means a drug, substance or immediate precursor enumerated in Schedules I through V of the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978];

F. "drug" means articles:

(1) recognized in an official compendium;

(2) intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in humans or other animals and includes the domestic animal biological products regulated under the federal Animal Virus, Serum, Toxin, Antitoxin Act, 37 Stat 832-833, 21 U.S.C. 151-158, and the biological products applicable to humans regulated under Federal 58 Stat 690, as amended, 42 U.S.C. 216, Section 351, 58 Stat 702, as amended, and 42 U.S.C. 262;

(3) other than food, that affect the structure or any function of the human body or the bodies of other animals; and

(4) intended for use as a component of Paragraph (1), (2) or (3) of this subsection, but "drug" does not include devices or their component parts or accessories;

G. "dangerous drug" means a drug, other than a controlled substance enumerated in Schedule I of the Controlled Substances Act, that because of a potentiality for harmful effect or the method of its use or the collateral measures necessary to its use is not safe except under the supervision of a practitioner licensed by law to direct the use of such drug and hence for which adequate directions for use cannot be prepared. "Adequate directions for use" means directions under which the layperson can use a drug or device safely and for the purposes for which it is intended. A drug shall be dispensed only upon the prescription or drug order of a practitioner licensed by law to administer or prescribe the drug if it:

(1) is a habit-forming drug and contains any quantity of a narcotic or hypnotic substance or a chemical derivative of such substance that has been found under the federal act and the board to be habit forming;

(2) because of its toxicity or other potential for harmful effect or the method of its use or the collateral measures necessary to its use is not safe for use except under the supervision of a practitioner licensed by law to administer or prescribe the drug;



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(3) is limited by an approved application by Section 505 of the federal act to the use under the professional supervision of a practitioner licensed by law to administer or prescribe the drug;

(4) bears the legend: "Caution: federal law prohibits dispensing without prescription.";

(5) bears the legend: "Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian."; or

(6) bears the legend "Rx only";

H. "counterfeit drug" means a drug that is deliberately and fraudulently mislabeled with respect to its identity, ingredients or sources. Types of such pharmaceutical counterfeits may include:

(1) "identical copies", which are counterfeits made with the same ingredients, formulas and packaging as the originals but not made by the original manufacturer;

(2) "look-alikes", which are products that feature high-quality packaging and convincing appearances but contain little or no active ingredients and may contain harmful substances;

(3) "rejects", which are drugs that have been rejected by the manufacturer for not meeting quality standards; and

(4) "relabels", which are drugs that have passed their expiration dates or have been distributed by unauthorized foreign sources and may include placebos created for late-phase clinical trials;

I. "device", except when used in Subsection R of this section and in Subsection G of Section 26-1-3, Subsection L and Paragraph (4) of Subsection A of Section 26-1-11 and Subsection C of Section 26-1-24 NMSA 1978, means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent or other similar or related article, including any component, part or accessory, that is:

(1) recognized in an official compendium;

(2) intended for use in the diagnosis of disease or other conditions or in the cure, mitigation, treatment or prevention of disease in humans or other animals; or

(3) intended to affect the structure or a function of the human body or the bodies of other animals and that does not achieve any of its principal intended purposes through chemical action within or on the human body or the bodies of other animals and that is not dependent on being metabolized for achievement of any of its principal intended purposes;

J. "prescription" means an order given individually for the person for whom prescribed, either directly from a licensed practitioner or the practitioner's agent to the pharmacist, including by means of electronic transmission, or indirectly by means of a written order signed by the prescriber, and bearing the name and address of the prescriber, the prescriber's license classification, the name and address of the patient, the name and quantity of the drug prescribed, directions for use and the date of issue;

K. "practitioner" means a certified advanced practice chiropractic physician, physician, doctor of oriental medicine, dentist, veterinarian, euthanasia technician, certified nurse practitioner, clinical nurse specialist, pharmacist, pharmacist clinician, certified nurse-midwife, physician assistant, prescribing psychologist, dental hygienist, optometrist, naturopathic doctor or other person licensed or certified to prescribe and administer drugs that are subject to the New Mexico Drug, Device and Cosmetic Act. "Practitioner" also means a registered lay midwife licensed by the department of health who is certified or licensed in accordance with department of health rules to procure, carry and administer drugs that are subject to the New Mexico Drug, Device and Cosmetic Act;

L. "cosmetic" means:

(1) articles intended to be rubbed, poured, sprinkled or sprayed on, introduced into or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness or altering the appearance; and

(2) articles intended for use as a component of any articles enumerated in Paragraph (1) of this subsection, except that the term shall not include soap;

M. "interchangeable biological product" means a biological product that the federal food and drug administration has licensed and:

(1) has determined that the biological product is biosimilar to the reference product and can be expected to produce the same clinical result as the reference product in any given patient;

(2) for a biological product that is administered more than once to an individual and:



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(a) has determined to have been administered more than once to the individual; or

(b) for which the risk in terms of safety or diminished efficacy of alternating or switching between use of the biological product and the reference product is not greater than the risk of using the reference product without alternation or switching; or

(3) has determined to be therapeutically equivalent as set forth in the latest edition or supplement to the federal food and drug administration's approved drug products with therapeutic equivalence evaluations;

N. "official compendium" means the official United States pharmacopeia and national formulary or the official homeopathic pharmacopoeia of the United States or any supplement to either of them;

O. "label" means a display of written, printed or graphic matter upon the immediate container of an article. A requirement made by or under the authority of the New Mexico Drug, Device and Cosmetic Act that any word, statement or other information appear on the label shall not be considered to be complied with unless the word, statement or other information also appears on the outside container or wrapper, if any, of the retail package of the article or is easily legible through the outside container or wrapper;

P. "immediate container" does not include package liners;

Q. "labeling" means all labels and other written, printed or graphic matter:

(1) on an article or its containers or wrappers; or

(2) accompanying an article;

R. "misbranded" means a label to an article that is misleading. In determining whether the label is misleading, there shall be taken into account, among other things, not only representations made or suggested by statement, word, design, device or any combination of the foregoing, but also the extent to which the label fails to reveal facts material in the light of such representations or material with respect to consequences that may result from the use of the article to which the label relates under the conditions of use prescribed in the label or under such conditions of use as are customary or usual;

S. "advertisement" means all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or that are likely to induce, directly or indirectly, the purchase of drugs, devices or cosmetics;

T. "antiseptic", when used in the labeling or advertisement of an antiseptic, shall be considered to be a representation that it is a germicide, except in the case of a drug purporting to be or represented as an antiseptic for inhibitory use as a wet dressing, ointment, dusting powder or such other use as involves prolonged contact with the body;

U. "new drug" means a drug:

(1) the composition of which is such that the drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and efficacy of drugs, as safe and effective for use under the conditions prescribed, recommended or suggested in the labeling thereof; or

(2) the composition of which is such that the drug, as a result of investigation to determine its safety and efficacy for use under such conditions, has become so recognized, but that has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions;

V. "contaminated with filth" applies to a drug, device or cosmetic not securely protected from dirt, dust and, as far as may be necessary by all reasonable means, from all foreign or injurious contaminations, or a drug, device or cosmetic found to contain dirt, dust, foreign or injurious contamination or infestation;

W. "selling of drugs, devices or cosmetics" shall be considered to include the manufacture, production, processing, packing, exposure, offer, possession and holding of any such article for sale and the sale and the supplying or applying of any such article in the conduct of a drug or cosmetic establishment;

X. "color additive" means a material that:

(1) is a dye, pigment or other substance made by a process of synthesis or similar artifice or extracted, isolated or otherwise derived, with or without intermediate or final change of identity, from a vegetable, mineral, animal or other source; or



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(2) when added or applied to a drug or cosmetic or to the human body or a part thereof, is capable, alone or through reaction with other substances, of imparting color thereto; except that such term does not include any material that has been or hereafter is exempted under the federal act;

Y. "federal act" means the Federal Food, Drug, and Cosmetic Act;

Z. "restricted device" means a device for which the sale, distribution or use is lawful only upon the written or oral authorization of a practitioner licensed by law to administer, prescribe or use the device and for which the federal food and drug administration requires special training or skills of the practitioner to use or prescribe. This definition does not include custom devices defined in the federal act and exempt from performance standards or premarket approval requirements under Section 520(b) of the federal act;

AA. "prescription device" means a device that, because of its potential for harm, the method of its use or the collateral measures necessary to its use, is not safe except under the supervision of a practitioner licensed in this state to direct the use of such device and for which "adequate directions for use" cannot be prepared, but that bears the label: "Caution: federal law restricts this device to sale by or on the order of a _____", the blank to be filled with the word "physician", "physician assistant", "certified advanced practice chiropractic physician", "doctor of oriental medicine", "dentist", "veterinarian", "euthanasia technician", "certified nurse practitioner", "clinical nurse specialist", "pharmacist", "pharmacist clinician", "certified nurse-midwife", "dental hygienist", registered lay midwife, "optometrist" or "naturopathic doctor" or with the descriptive designation of any other practitioner licensed in this state to use or order the use of the device;

BB. "valid practitioner-patient relationship" means a professional relationship, as defined by the practitioner's licensing board, between the practitioner and the patient;

CC. "pedigree" means the recorded history of a drug;

DD. "drug order" means an order either directly from a licensed practitioner or the practitioner's agent to the pharmacist, including by means of electronic transmission or indirectly by means of a written order signed by the licensed practitioner or the practitioner's agent, and bearing the name and address of the practitioner and the practitioner's license classification and the name and quantity of the drug or device ordered for use at an inpatient or outpatient facility; and

EE. "reference product" means the single biological product against which a biosimilar was evaluated in its marketing application to the federal food and drug administration.

**History: 1953 Comp., § 54-6-27, enacted by Laws 1967, ch. 23, § 2; 1971, ch. 245, § 2; 1972, ch. 84, § 43; 1977, ch. 117, § 1; 1987, ch. 270, § 2; 1997, ch. 240, § 1; 1997, ch. 244, § 1; 1997, ch. 253, § 2; 1999, ch. 298, § 1; 2001, ch. 50, § 1; 2002, ch. 100, § 1; 2005, ch. 152, § 1; 2008, ch. 9, § 3; 2008, ch. 44, § 4; 2009, ch. 102, § 1; 2011, ch. 113, § 1; 2013, ch. 157, § 1; 2015, ch. 131, § 6; 2017, ch. 48, § 1; 2019, ch. 11, § 1; 2019, ch. 244, § 14.**

**Cross references.** — For the Federal Food, Drug and Cosmetic Act, *see* 21 U.S.C.S. §§ 301 to 393.

For Section 505 of the federal act, *see* 21 U.S.C.S. § 355.

For Section 520(b) of the federal act, *see* 21 U.S.C.S. § 360j(b).

**2019 Multiple Amendments.** — Laws 2019, ch. 11, § 1 and Laws 2019, ch. 244, § 14, both effective June 14, 2019, enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2019, ch. 244, § 14, as the last act signed by the governor, is set out above and incorporates both amendments. The amendments enacted by Laws 2019, ch. 11, § 1 and Laws 2019, ch. 244, § 14 are described below. To view the session laws in their entirety, *see* the 2019 session laws on *NMOneSource.com*.

The nature of the difference between the amendments is that Laws 2019, ch. 11, § 1, added registered lay midwives licensed by the department of health to the list of "practitioners" subject to all the privileges and responsibilities conferred by the New Mexico Drug, Device and Cosmetic Act, and made certain technical amendments, and Laws 2019, ch. 244, § 14, added "naturopathic doctor" within the definition of "practitioner", and included "naturopathic doctor" in the provision related to the use of a prescription device.

**Laws 2019, ch. 244, § 14,** effective June 14, 2019, added "naturopathic doctor" within the definition of "practitioner", and included "naturopathic doctor" in the provision related to the use of a prescription device; in Subsection F, in Paragraph F(2), after "federal", deleted "Virus-Serum Toxin" and added "Animal Virus, Serum, Toxin, Antitoxin"; in Subsection K, after "optometrist", added "naturopathic doctor"; and in Subsection AA, after "optometrist", added "or 'naturopathic doctor'".

**Laws 2019, ch. 11, § 1,** effective June 14, 2019, added registered lay midwives licensed by the department of health to the list of "practitioners" subject to all the privileges and responsibilities conferred by the New Mexico Drug, Device and Cosmetic Act, and made certain technical amendments; in Subsection F, after "federal", deleted "Virus-Serum Toxin" and added "Animal Virus, Serum, Toxin, Antitoxin"; in Subsection K, added the last sentence; in Subsection N, after "United States" deleted "pharmacopoeia" and added "pharmacopeia and"; and in Subsection AA, after "dental hygienist", added "registered lay midwife".

**The 2017 amendment,** effective June 16, 2017, defined "biosimilar", "biosimilarity", "interchangeable biological product", and "reference product", and rewrote the definition for "biological product"; deleted former Subsection C, which defined "biological product", added new Subsections C and D, and redesignated former Subsections D through



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K as Subsections E through L, respectively; added a new Subsection M and redesignated former Subsections L through BB as Subsections N through DD, respectively; in Subsection AA, after "'certified nurse-midwife'", deleted "or", and after "'dental hygienist'", added "or"; and added Subsection EE.

**The 2015 amendment,** effective June 19, 2015, included "optometrist" within the meanings of "practitioner" and "prescription device" as used in the New Mexico Drug, Device and Cosmetic Act; in Subsection J, after "dental hygienist", added "optometrist"; and in Subsection Y, after "'dental hygienist'", added "'optometrist'".

**The 2013 amendment,** effective June 14, 2013, added terms to allow pharmacists to fill a practitioner's drug order; in Subsection F, in the third sentence, after "upon the prescription", added "or drug order"; and added Subsection BB.

**The 2011 amendment,** effective June 17, 2011, in Subsection Y, permitted dental hygienists to order prescription devices.

**The 2009 amendment,** effective June 19, 2009, in Subsection J, added "euthanasia technician" and in Subsection Y, added "euthanasia technician".

**The 2008 amendment,** effective May 14, 2008, added "certified advanced practice chiropractic physician" in Subsection J and added "physician assistant" and "certified advanced practice chiropractic physician" in Subsection Y.

**The 2005 amendment,** effective June 17, 2005, redefined "counterfeit drug" in Subsection G to mean a drug that is deliberately and fraudulently mislabeled with respect to its identity, ingredients or sources and gives examples of counterfeits included in the definition; replaced "prescriber" with "a licensed practitioner or practitioner's agent" and provided that a prescription may include an order given by means of electronic transmission in the definition of "prescription" in Subsection I; added the definition of "valid practitioner-patient relationship" in Subsection Z to mean the relationship defined by the practitioner's licensing board; and added the definition of "pedigree" in Subsection AA to mean the recorded history of a drug.

**The 2002 amendment,** effective July 1, 2002, inserted "physician assistant, prescribing psychologist" in Subsection J.

**The 2001 amendment,** effective June 15, 2001, inserted "pharmacist" in the definition of "practitioner" in Subsection J and inserted "'pharmacist'" near the end of Subsection Y.

**The 1999 amendment,** effective June 18, 1999, deleted "but is not limited to" before "filterable viruses" in Subsection C(1), added Subsection F(6), added doctors of oriental medicine, certified nurse practitioners, clinical nurse specialists, and pharmacist clinicians to the definition of "practitioner" in Subsection J and to the list of practitioners allowed to use or order the use of prescription devices in Subsection Y.

**The 1997 amendment,** effective June 20, 1997, inserted "certified nurse-midwife" in Subsections J and Y and "or certified" following "licensed" in Subsection J, and made stylistic changes throughout the section.

**The 1987 amendment,** effective June 19, 1987, substituted "New Mexico Drug, Device and Cosmetic Act" for "New Mexico Drug and Cosmetic Act" in the introductory language and in Subsection J; in Subsection E deleted "Title 21 Part 600" from the end; in the third sentence in Subsections F(2) and F(3) inserted "or prescribe" following "administer"; in Subsection F(1) deleted "of pharmacy" following "board"; rewrote Subsection H; in Subsection K(2) inserted "enumerated in Paragraph (1) of this subsection"; in Subsection L inserted "national formulary or the" and deleted "official national formulary" preceding "or any supplement"; in Subsections S(1) and (2) inserted "and efficacy"; in Subsection S(1) inserted "and effective"; added Subsections X and Y; and made minor stylistic changes throughout the section.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Products liability: liability of manufacturer or seller as affected by failure of subsequent party in distribution chain to remedy or warn against defect of which he knew, 45 A.L.R.4th 777.

Products liability: perfumes, colognes, or deodorants, 46 A.L.R.4th 1197.

Liability of manufacturer of oral live polio (Sabin) vaccine for injury or death from its administration, 66 A.L.R.4th 83.

What is "device" within the meaning of § 201(h) of Federal Food, Drug and Cosmetic Act (21 U.S.C.S. § 321(h)), 129 A.L.R. Fed. 343.

What is "new drug" within meaning of § 201(p) of Federal Food, Drug, and Cosmetic Act (21 U.S.C.S. § 321(p)), 133 A.L.R. Fed. 229.

## 26-1-3. Prohibited acts.

The following acts are prohibited:

A. the sale of any drug or device that is adulterated, misbranded or a counterfeit drug which is not a controlled substance;

B. the adulteration or misbranding of any drug or device;

C. the receipt or delivery in commerce of any drug or device that is adulterated, misbranded or a counterfeit drug which is not a controlled substance;

D. the dissemination of any false advertisement;

E. the giving of a false guaranty or undertaking, except by a person who relied on a guaranty or undertaking as attested by label or labeling from whom he received in good faith the drug or device for sale;

F. any act with respect to a drug or device when the act is done while the drug or device is held for sale and results in the drug or device being misbranded or adulterated;

G. the creation, sale, disposition, possession or concealment of any punch, die, plate, stone or other thing designed to print, imprint or reproduce the trademark, trade name or other identifying mark, imprint, device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render the drug a counterfeit drug;



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H. concealment, disposition or possession with intent to sell or preparation with intent to defraud of a counterfeit drug;

I. in the case of a dangerous drug distributed or offered for sale in this state, the failure of the manufacturer or repackager to transmit, to any practitioner licensed to administer the drug who makes a written request for information, true and correct copies of all printed matter which is required to be included in any package in which that drug is distributed or sold or such other printed matter as is approved under the federal act. Nothing in this subsection shall be construed to exempt any person from any labeling requirement imposed under other provisions of the New Mexico Drug, Device and Cosmetic Act [26-1-1 NMSA 1978] and the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978]; and

J. except as provided in Sections 26-3-1 through 26-3-3 NMSA 1978, dispensing or causing to be dispensed a different drug or brand of drug in place of the drug or brand of drug ordered or prescribed without the express permission in each case of the person ordering or prescribing.

**History: 1953 Comp., § 54-6-28, enacted by Laws 1967, ch. 23, § 3; 1972, ch. 84, § 44; 1976, ch. 60, § 1; 1987, ch. 270, § 3.**

**Cross references.** — For definitions, *see* 26-1-2 NMSA 1978.

For adulteration of drug or device, *see* 26-1-10 NMSA 1978.

For adulteration of cosmetics, *see* 26-1-25 NMSA 1978.

For penalties, *see* 26-1-26 NMSA 1978.

For the definition of "federal act", *see* 26-1-2W NMSA 1978.

**The 1987 amendment,** effective June 19, 1987, deleted "or cosmetic" following "drug or device" throughout the section; in the last sentence in Subsection I inserted "Device"; in Subsection J substituted "Sections 26-3-1 through 26-3-3 NMSA 1978" for "Sections 54-6-28.1 through 54-6-28.3 NMSA 1953"; and made minor stylistic changes throughout the section.

## 26-1-3.1. Repealed.

**Repeals.** — Laws 2005, ch. 152, § 11, repealed 26-1-3.1 NMSA 1978, as enacted by Laws 1987, ch. 270, § 4, relating to other prohibited acts, effective June 30, 2007. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

## 26-1-3.2. Prescription drug donation.

A. As used in this section:

(1) "clinic" means a facility licensed pursuant to Section 61-11-14 NMSA 1978 in which one or more licensed practitioners diagnose and treat patients and in which drugs are stored, dispensed or administered for the diagnosis and treatment of the facility's patients; provided that "clinic" does not include the privately owned practice of a licensed practitioner or group of licensed practitioners exempt under Section 61-11-22 NMSA 1978;

(2) "donor" means an individual who donates unused prescription drugs to a clinic or a participating practitioner for the purpose of redistribution to established patients of that clinic or practitioner;

(3) "participating practitioner" means a licensed practitioner who is authorized to prescribe drugs and who registers with the board, and is subject to rules promulgated by the board, to participate in the collection of donated drugs, prescribed for use by established patients of that practitioner and donated for the purpose of redistribution to established patients of that practitioner;

(4) "recipient" means an individual who voluntarily receives donated prescription drugs; and

(5) "tamper-evident" means a device or process that makes unauthorized access to protected pharmaceutical packaging easily detected.

B. Unused prescription drugs may be donated to a clinic or a participating practitioner and a clinic or a participating practitioner may accept and redistribute the donated prescription drugs in accordance with rules promulgated by the board.

C. The board shall promulgate rules to establish:

(1) procedures to allow the donation and redistribution of certain prescription drugs, including refrigerated drugs, that:

(a) ensure that the redistribution process is consistent with public health and safety standards; and

(b) exclude controlled substances;



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(2) standards and procedures for accepting, storing, labeling and redistributing donated prescription drugs;

(3) standards and procedures for inspecting donated prescription drugs to determine that the packaging is tamper-evident and that the donated prescription drugs are unadulterated, safe and suitable for redistribution;

(4) a form to be signed by the recipient specifying:

(a) knowledge that the donor is not a pharmacist and took reasonable care of the donated prescription drug;

(b) knowledge that the donor is known to the clinic or the participating practitioner and that there is no reason to believe that the donated prescription drug was improperly handled or stored;

(c) that any person who exercises reasonable care in donating, accepting or redistributing pursuant to this section shall be immune from civil or criminal liability or professional disciplinary action of any kind for any related injury, death or loss; and

(d) that the immunity provided by this section shall not decrease or increase the civil or criminal liability of a drug manufacturer, distributor or dispenser that would have existed but for the donation;

(5) a form to be signed by the donor verifying that:

(a) the donated prescription drug has been properly stored and the container has not been opened or tampered with;

(b) the donated prescription drug has not been adulterated or misbranded; and

(c) the donor is voluntarily donating the prescription drug;

(6) a handling fee not to exceed twenty dollars ($20.00) that may be charged to the recipient by the clinic or the participating practitioner to cover the costs of inspecting, storing, labeling and redistributing the donated prescription drug; and

(7) any other standards deemed necessary by the board.

D. The board shall maintain and publish a current listing of clinics and participating practitioners.

E. Before redistributing donated prescription drugs, the clinic or the participating practitioner shall:

(1) comply with all applicable federal laws and the laws of the state that deal with the inspection, storage, labeling and redistribution of donated prescription drugs; and

(2) examine the donated prescription drug to determine that it has not been adulterated or misbranded and certify that the drug has been stored in compliance with the requirements of the product label.

F. Any person who exercises reasonable care in donating, accepting or redistributing prescription drugs pursuant to this section shall be immune from civil or criminal liability or professional disciplinary action of any kind for any related injury, death or loss.

G. The immunity provided by this section shall not decrease or increase the civil or criminal liability of a drug manufacturer, distributor or dispenser that would have existed but for the donation.

H. A manufacturer shall not be liable for failure to transfer or communicate product consumer information or the expiration date of the donated prescription drug pursuant to this section.

I. This section does not restrict the authority of an appropriate governmental agency to regulate or ban the use of any prescription drugs.

**History: Laws 2011, ch. 119, § 1.**

**Effective dates.** — Laws 2011, ch. 119 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2011, 90 days after the adjournment of the legislature.

## 26-1-4. Power to enjoin violations.

In addition to the remedies provided the board is authorized to apply to the district court for, and the court shall have jurisdication [jurisdiction] upon hearing and for cause shown, to grant a temporary or permanent injunction restraining any other person from violating any provision



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of Section 3 [26-1-3 NMSA 1978] of the New Mexico Drug and Cosmetic Act [New Mexico Drug Device and Cosmetic Act], irrespective of whether or not there exists an adequate remedy at law.

**History: 1953 Comp., § 54-6-29, enacted by Laws 1967, ch. 23, § 4.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For warnings for minor violations, *see* 26-1-8 NMSA 1978.

For penalties generally, *see* 26-1-26 NMSA 1978.

**ANNOTATIONS**

**No authority to charge at board meeting and then collect fine.** — The pharmacy board has no authority to charge druggists or wholesalers at a meeting of the board and then set out and collect a fine for any violation or violations of the pharmacy laws at said meeting from said druggists or wholesalers. 1953-54 Op. Att'y Gen. No. 53-5865 (opinion rendered under former law).

## 26-1-5. Penalty; exemptions.

No publisher, radio-broadcast licensee, or agency or medium for the dissemination of an advertisement, except the manufacturer, packer, distributor or seller of the article to which a false advertisement relates, shall be liable under this section [act] by reason of dissemination by him of such false advertisement, unless he has refused, on the request of the board, to furnish the board the name and post-office address of the manufacturer, packer, distributor, seller or advertising agency, who cause [caused] him to disseminate such advertisement.

**History: 1953 Comp., § 54-6-30, enacted by Laws 1967, ch. 23, § 5.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

The words "this section" apparently refer to "this act," the New Mexico Drug, Device and Cosmetic Act, which is compiled as this article.

**Cross references.** — For definition of "advertisement", *see* 26-1-2Q NMSA 1978.

**ANNOTATIONS**

**No authority to charge at board meeting and then collect fine.** — The pharmacy board has no authority to charge druggist or wholesalers at a meeting of the board and then set out and collect a fine for any violation or violations of the pharmacy laws at said meeting from said druggists or wholesalers. 1953-54 Op. Att'y Gen. No. 53-5865 (opinion rendered under former law).

## 26-1-6. Detection of drugs, devices or cosmetic believed adulterated, misbranded or counterfeit; condemnation; destruction or correction of defect; forfeiture and sale.

A. Whenever an authorized agent of the board has probable cause to believe that any drug, device or cosmetic is adulterated, misbranded or counterfeit, he shall affix to such article appropriate marking, giving notice that the article is suspected of being adulterated, misbranded or counterfeit and has been detained or embargoed, and warning all persons not to remove or dispose of such article until permission for removal or disposal is given by the agent or the court. It is unlawful for any person to remove or dispose of such detained or embargoed article without such permission.

B. When an article detained or embargoed has been found by the agent to be adulterated, misbranded or counterfeit he shall petition the judge of the district court in whose jurisdiction the article is detained or embargoed for a libel for condemnation of such article. When the agent has found that an article so detained or embargoed is not adulterated, misbranded or counterfeit he shall remove the marking.

C. If the court finds that a detained or embargoed article is adulterated or misbranded or counterfeit, the article shall, after entry of the decree, be destroyed at the expense of the claimant under the supervision of the agent, and all court costs and fees, and storage and other proper expenses shall be taxed against the claimant of the article or his agent. However, when the adulteration or misbranding can be corrected by proper labeling or processing of the article, the court, after entry of the decree and after costs, fees and expenses have been paid and a sufficient bond has been executed, conditioned that the article shall be so labeled or processed, may by order direct that the article be delivered to the claimant for labeling or processing under the supervision of an agent of the board. The expense of the supervision shall be paid by the claimant. The bond shall be returned to the claimant of the article on representation to the court by the board that the article



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is no longer in violation of the New Mexico Drug and Cosmetic Act [New Mexico Drug Device and Cosmetic Act] and that the expenses of the supervision have been paid.

D. The following may be seized by a duly authorized law enforcement official of the state whenever he has reasonable grounds to believe they are:

(1) a drug other than a controlled substance, that is counterfeit;

(2) a container of a counterfeit drug;

(3) any punch, die, plate, stone, labeling, container or other thing used or designed for use in making a counterfeit drug or drugs.

E. When an article, equipment or other thing is seized under Section 6D [26-1-6D NMSA 1978] of the New Mexico Drug and Cosmetic Act [New Mexico Drug Device and Cosmetic Act], the proceedings shall be brought in the name of the state by the prosecuting attorney of the county in which the article was seized, and the libel shall be verified by a duly authorized agent of the state in a manner required by the law of this state. The libel shall describe the merchandise, state its location, state the name of the person in actual possession, state the name of the owner, if known to the duly authorized agent of the state, allege the essential elements of the violation which is claimed to exist and shall conclude with a prayer of due process to enforce the forfeiture. Upon the filing of libel the court shall properly cause process to issue to the authorized law enforcement official commanding him to seize the goods described in the libel and to hold the same for further order of the court. The authorized law enforcement official shall at the time of seizure serve a copy of said process upon the owner of said merchandise. Such service may be made personally, by mail or by publication according to the rules governing the service of civil process in this state. At the expiration of twenty days after such seizure, if no claimant has appeared to defend the libel, the court shall order the authorized law enforcement official to dispose of said merchandise.

F. Any person having an interest in the alleged article, equipment or other thing proceeded against, or any person against whom a civil or criminal liability would exist if said merchandise is in violation of Section 3 [26-1-3 NMSA 1978] of the New Mexico Drug and Cosmetic Act [New Mexico Drug Device and Cosmetic Act] may, within twenty days following the authorized law enforcement official's seizure, appear and file answer or demurrer to the libel. The answer or demurrer shall allege the interest or liability of the party filing it. In all other respects the issue shall be made up as in other civil actions.

G. Any article, equipment or other thing condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds, if sold, less the legal costs and charges, shall be paid to the general fund; but such article, equipment or other thing shall not be sold under such decree contrary to provisions of the New Mexico Drug and Cosmetic Act [New Mexico Drug Device and Cosmetic Act]. Whenever in any proceedings under this section the condemnation of any equipment or other thing, other than a drug, is decreed, the court shall allow the claim of any claimant, to the extent of such claimant's interest, for remission or mitigation of such forfeiture if such claimant proves to the satisfaction of the court that he has not committed or caused to be committed any prohibited act referred to in this section and has no interest in any drug referred to therein; that he has an interest in such equipment or other thing as owner or lienor or otherwise, acquired by him in good faith; and that he at no time had any knowledge or reason to believe that such equipment or other thing was being or would be used in, or to facilitate, the violation of the laws of this state relating to counterfeit drugs.

H. When a decree of condemnation is entered against the article, equipment or other thing, court costs and fees and storage and other proper expenses may be awarded against the person, if any, intervening as claimant of the article.

**History: 1953 Comp., § 54-6-31, enacted by Laws 1967, ch. 23, § 6; 1971, ch. 241, § 1; 1972, ch. 84, § 45.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For definition of "counterfeit drug", *see* 26-1-2G NMSA 1978.

For definition of "misbranded", *see* 26-1-2P NMSA 1978.

For adulteration, *see* 26-1-10 and 26-1-25 NMSA 1978.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 2 C.J.S. Adulteration §§ 3 to 5.



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## 26-1-7. Attorney general or district attorney to institute prosecutions.

It is the duty of the attorney general or the various district attorneys of this state to whom the board reports any violation of the New Mexico Drug, Device and Cosmetic Act to cause appropriate proceedings to be instituted in the proper courts without delay and to be prosecuted in the manner required by law.

**History: 1953 Comp., § 54-6-32, enacted by Laws 1967, ch. 23, § 7; 2005, ch. 152, § 2.**

**Cross references.** — For duties generally of attorney general, *see* 8-5-2 NMSA 1978.

**The 2005 amendment,** effective June 17, 2005, deleted the provision that requires the board to permit the person against whom criminal proceedings are contemplated to present his or her views to the board before a violation is reported to the district attorney.

ANNOTATIONS

**No authority to charge at board meeting and then collect fine.** — The pharmacy board has no authority to charge druggist or wholesalers at a meeting of the board and then set out and collect a fine for any violation or violations of the pharmacy laws at said meeting from said druggists or wholesalers. 1953-54 Op. Att'y Gen. No. 53-5865 (opinion rendered under former law).

## 26-1-8. Minor violations of act; warnings authorized.

Nothing in the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] shall be construed as requiring the board to report for the institution of proceedings, minor violations of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act], whenever the board believes that the public interest will be adequately served in the circumstances by a suitable written notice or warning.

**History: 1953 Comp., § 54-6-33, enacted by Laws 1967, ch. 23, § 8.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

## 26-1-9. Addition of poisonous or deleterious substances; color additives.

A. The board may adopt regulations authorizing color additives.

B. Any added poisonous or deleterious substance or any color additive, shall with respect to any particular use or intended use be deemed unsafe for the purpose of application of Section 10A [26-1-10 NMSA 1978] of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] with respect to any drug or device or Section 25A [26-1-25 NMSA 1978] of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] with respect to any cosmetic unless there is in effect a regulation pursuant to Subsection C of this section limiting the quantity of such substance, and the use or intended use of such substance conform [conforms] to the terms prescribed by such regulation. While such regulation relating to such substance is in effect, drug or cosmetic shall not, by reason of bearing or containing such substance in accordance with the regulation be considered adulterated within the meaning of Section 10 or Section 25 of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act].

C. The board, whenever public health or other considerations in the state so require, is authorized to adopt, amend or repeal regulations whether or not in accordance with regulations promulgated under the federal act, prescribing the conditions under which a color additive may be safely used and exemptions where such color additive is to be used solely for investigational or experimental purposes, upon its own motion or upon the petition of any interested party requesting that such a regulation be established, and it shall be incumbent upon the petitioner to establish by data submitted to the board of pharmacy that a necessity exists for such regulation, and that its effect will not be detrimental to public health. If the data furnished by the petitioner is not sufficient to allow the board to determine whether such regulation should be promulgated, the board may require additional data to be submitted and failure to comply with the request shall be sufficient grounds to deny the request. In adopting, amending or repealing regulations relating to such substances, the board shall consider among other relevant factors, the following which the petitioner, if any, shall furnish:



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(1) the name and all pertinent information concerning such substance including where available, its chemical identity and composition, a statement of conditions of the proposed use, including directions, recommendations and suggestions and including specimens of proposed labeling, all relevant data bearing on the physical or other technical effect and the quantity required to produce such effect;

(2) the probable composition of, or the relevant exposure from the article and of any substance formed in or on a drug or cosmetic resulting from the use of such substance;

(3) safety factors which, in the opinion of experts qualified by scientific training and experience to evaluate the safety of such substances for the use or uses for which they are proposed to be used, are generally recognized as appropriate for the use of animal experimentation data;

(4) the availability of any needed practicable methods of analysis for determining the identity and quantity of:

(a) such substance in or on an article;

(b) any substance formed in or on such article because of the use of such substance; and

(c) the pure substance and all intermediates and impurities; and

(5) facts supporting a contention that the proposed use of such substance will serve a useful purpose.

**History: 1953 Comp., § 54-6-34, enacted by Laws 1967, ch. 23, § 9.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For the definition of "federal act", *see* 26-1-2W NMSA 1978 and notes thereto.

## 26-1-10. Drug or device adulteration.

A drug or device shall be deemed to be adulterated:

A. if it consists in whole or in part of any filthy, putrid or decomposed substance; or if it has been produced, prepared, packed or held under insanitary conditions whereby it may have been contaminated with filth, or whereby it may have been rendered injurious to health; or if it is a drug and the methods used in, or the facilities of controls used for, its manufacture, processing, packing or holding do not conform to or are not operated or administered in conformity with current good manufacturing practice to assure that such drug meets the requirements of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] as to safety and has the identity and strength, and meets the quality and purity characteristics which it purports or is represented to possess; or if it is a drug and its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or if it is a drug and it bears or contains for purposes of coloring only a color additive which is unsafe within the meaning of the federal act or it is a color additive the intended use of which in drugs is for the purposes of coloring only, and is unsafe within the meaning of the federal act;

B. if it purports to be or is represented as a drug the name of which is recognized in an official compendium, and its strength differs from, or its quality or purity falls below, the standard set forth in such compendium. Such determination as to strength, quality and purity shall be made in accordance with the tests or methods of assay set forth in such compendium or in the absence of or inadequacy of such tests or methods of assay, those prescribed under the authority of the federal act. No drug defined in an official compendium shall be deemed to be adulterated under this paragraph because it differs from the standard of strength, quality or purity therefor set forth if such standard is plainly stated on its label. Whenever a drug is recognized both in the United State [States] Pharmacopoeia and the Homeopathic Pharmacopoeia of the United States it shall be subject to the requirements of the United States Pharmacopoeia unless it is labeled and offered for sale as a homeopathic drug, in which case it shall be subject to the provisions of the Homeopathic Pharmacopoeia of the United States and not those of the United States Pharmacopoeia;

C. if it is not subject to the provisions of Subsection B of this section and its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess; or



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D. if it is a drug and any substance has been mixed or packed therewith so as to reduce its quality or strength; or substituted wholly or in part therefor.

**History: 1953 Comp., § 54-6-35, enacted by Laws 1967, ch. 23, § 10.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For definition of "contaminated with filth", *see* 26-1-2T NMSA 1978.

For definition of "color additive", *see* 26-1-2V NMSA 1978.

For definition of "federal act", *see* 26-1-2W NMSA 1978.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 2 C.J.S. Adulteration § 2; 28 C.J.S. Drugs and Narcotics § 9.

## 26-1-11. Drug or device; misbranding.

A. A drug or device shall be deemed to be misbranded:

(1) if its labeling is false or misleading in any particular;

(2) if in package form, unless it bears a label containing the name and place of the business of the manufacturer, packer or distributor and an accurate statement of the quantity of the contents in terms of weight, measure or numerical count; provided that reasonable variations shall be permitted and exemptions as to small packages shall be allowed in accordance with regulations prescribed by the board or issued under the federal act;

(3) if it is a drug subject to the restrictions on sale contained in Subparagraph 1 of Subsection (b) of 21 U.S.C. Section 353, which provisions describe those substances commonly referred to as "legend drugs", and if the drug is in package form, unless it bears a label on its immediate container, and on any outer container if such there be, including the name and place of the business of the manufacturer of the finished dosage form and the name and place of business of the packer or distributor and an accurate statement of the quantity of the contents in terms of weight, measure or numerical count;

(4) if any word, statement or other information required by or under authority of the New Mexico Drug, Device and Cosmetic Act to appear on the label or labeling is not prominently placed with such conspicuousness, as compared with other words, statements, designs or devices in the labeling, and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;

(5) if it is for use by man and contains any quantity of a narcotic or hypnotic substance or any chemical derivative of such substance, which derivative after investigation has been found to be and designated as habit-forming by regulations issued pursuant to Section 502(d) or 511 of the federal act, unless its label bears the name and quantity or proportion of such substance or derivative and in juxtaposition therewith the statement "Warning - May be habit-forming" and meets labeling requirements of the federal Comprehensive Drug Abuse Prevention and Control Act of 1970; or

(6) if it is a drug, unless the label bears, to the exclusion of any other nonproprietary name except the applicable systematic chemical name or the chemical formula, the established name, as defined in this section, of the drug, and in case it is fabricated from two or more active ingredients, the established name and quantity of each active ingredient, including the kind and quantity or proportion of any alcohol and also including the established name and quantity or proportion of any bromides, ether, chloroform, acetanilid, acetphenetidin, antipyrine, amidropyrine, atropine, hyoscine, hyoscyamine, arsenic, digitalis, digitalis glycosides, mercury, ouabain, strophanthin, strychnine, thyroid or any derivative or preparation of any such substances contained therein; provided that the requirements for stating the quantity of the active ingredients, other than the quantity of those specifically named in this section, shall apply only to prescription drugs; provided, further, that to the extent that compliance with the requirements of this section is impracticable, exemptions shall be allowed under regulations promulgated by the board or under the federal act.

B. As used in this section, the term "established name" with respect to a drug or ingredient means:



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(1) the applicable official name designated pursuant to Section 508 of the federal act; or

(2) if there is no such name and such drug or such ingredient is an article recognized in an official compendium, then the official title in such compendium or if neither applies, then the common or usual name, if any, of such drug or of such ingredient; provided that where an article is recognized in the United States pharmacopoeia and in the homeopathic pharmacopoeia under different official titles, the official title used in the United States pharmacopoeia shall apply unless it is labeled and offered for sale as a homeopathic drug, in which case the official title used in the homeopathic pharmacopoeia shall apply.

C. A drug or device shall be deemed to be misbranded unless its labeling bears adequate directions for use and such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health or against unsafe dosage or methods or duration of administration or application, in such manner and form as are necessary for the protection of users; provided that where adequate directions for use as applied to any drug or device are not necessary for the protection of the public health, the board shall promulgate regulations exempting such drug or device from such requirements; provided, further, that articles exempted under regulations issued under Section 502(f) of the federal act may also be exempt.

D. A drug or device shall be deemed to be misbranded if it purports to be a drug the name of which is recognized in an official compendium unless it is packed and labeled as prescribed therein; provided that the method of packing may be modified with the consent of the board. Whenever a drug is recognized in both the United States pharmacopoeia and the homeopathic pharmacopoeia of the United States, it shall be subject to the requirements of the United States pharmacopoeia with respect to packaging and labeling unless it is labeled and offered for sale as a homeopathic drug, in which case it shall be subject to the provisions of the homeopathic pharmacopoeia of the United States and not those of the United States pharmacopoeia; provided, further, that in the event of inconsistency between the requirements of this subsection and those of Paragraph (6) of Subsection A of this section as to the name by which the drug or its ingredients shall be designated, the requirements of Paragraph (6) of Subsection A of this section shall prevail.

E. A drug or device shall be deemed to be misbranded if it has been found by the board or under the federal act to be a drug liable to deterioration unless it is packaged in such form and manner and its label bears the statement of such precautions as the regulations issued by the board or under the federal act require as necessary for the protection of public health. No regulation shall be established for any drug recognized in an official compendium until the board has informed the appropriate body charged with the revision of such compendium of the need for such packaging or labeling requirements and such body has failed within a reasonable time to prescribe such requirements.

F. A drug or device shall be deemed to be misbranded if it is a drug and its container is so made, formed or filled as to be misleading or if it is an imitation of another drug or if it is offered for sale under the name of another drug or if it bears a copy, counterfeit or colorable imitation of a trademark, label, container or identifying name or design of another drug.

G. A drug or device shall be deemed to be misbranded if it is dangerous to health when used in the dosage or with the frequency or duration prescribed, recommended or suggested in the labeling.

H. A drug or device shall be deemed to be misbranded if it is or purports to be or is represented as a drug composed wholly or partly of insulin unless it is from a batch with respect to which a certificate or release has been issued pursuant to Section 506 of the federal act and such certificate or release is in effect with respect to such drug.

I. A drug or device shall be deemed to be misbranded if it is or purports to be or is represented as a drug composed wholly or partly of any kind of penicillin, streptomycin, chlortetracycline, chloramphenicol, bacitracin or any other antibiotic drug or any derivative thereof unless it is from a batch with respect to which a certificate or release has been issued pursuant to Section 507 of the federal act and such certificate or release is in effect with respect to such drug; provided that this subsection shall not apply to any drug or class of drugs exempted by regulations promulgated under Section 507(c) or (d) of the federal act. For the purpose of this subsection, the term "antibiotic drug" means any drug intended for use by man containing any quantity of any chemical substance which is produced by a microorganism and which has the capacity to inhibit or destroy



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microorganisms in dilute solution, including the chemically synthesized equivalent of any such substance.

J. A drug or device shall be deemed to be misbranded if it is a color additive, the intended use of which in or on drugs is for the purpose of coloring only, unless its packaging and labeling are in conformity with such packaging and labeling requirements applicable to such color additive, prescribed under the provisions of Subsection C of Section 26-1-9 NMSA 1978 or of the federal act.

K. A drug or device shall be deemed to be misbranded, in the case of any dangerous drug distributed or offered for sale in this state, unless the manufacturer, packer, distributor or retailer thereof includes in all advertisements and other descriptive printed matter issued or caused to be issued by the manufacturer, packer or distributor or retailer with respect to that drug a true statement of:

(1) the established name as defined in Paragraph (6) of Subsection A of this section;

(2) the formula showing quantitatively each ingredient of the drug to the extent required for labels under Section 502(e) of the federal act; and

(3) such other information in brief summary relating to side effects and contraindications as are required in regulations issued under the federal act.

L. A drug or device shall be deemed to be misbranded if a trademark, trade name or other identifying mark, imprint or device of another or any likeness of the foregoing has been placed thereon or upon its container with intent to defraud.

M. Drugs and devices which are, in accordance with the practice of the trade, to be processed, labeled or repacked in substantial quantities at establishments other than those where originally packaged in accordance with requirements of the New Mexico Drug, Device and Cosmetic Act shall be deemed to be misbranded unless such drugs or devices are being delivered, manufactured, processed, labeled, repacked or otherwise held in compliance with regulations issued by the board or under the federal act.

N. A dangerous drug, except for drugs declared dangerous pursuant to Subsection B of Section 26-1-18 NMSA 1978, shall be deemed to be misbranded if, at any time prior to dispensing, its label fails to bear either of the following legends:

(1) "Caution: federal law prohibits dispensing without prescription."; or

(2) "RX only".

**History: 1953 Comp., § 54-6-36, enacted by Laws 1967, ch. 23, § 11; 1972, ch. 84, § 46; 1975, ch. 103, § 1; 1999, ch. 298, § 2.**

**Cross references.** — For definition of "misbranded", *see* 26-1-2 NMSA 1978.

For the definition of "federal act", *see* 26-1-2W NMSA 1978.

For the federal Comprehensive Drug Abuse Prevention and Control Act of 1970, *see* 21 U.S.C. § 801 et seq.

**The 1999 amendment,** effective June 18, 1999, substituted "New Mexico Drug, Device and Cosmetic Act" for "New Mexico Drug and Cosmetic Act" in Subsections A(4) and M, added "A drug or device shall be deemed to be misbranded" to the beginning of Subsections C to L, substituted "Section 507 of" for "Section 507 or" in Subsection I, substituted "Subsection C of Section 26-1-9 NMSA 1978" for "Section 9C of the New Mexico Drug and Cosmetic Act" in Subsection J, substituted "shall be deemed to be misbranded unless such" for "provided, that such" in Subsection M, and inserted "except for drugs declared dangerous pursuant to Subsection B of Section 26-1-18 NMSA 1978," and rewrote Subsection N, adding the exception near the beginning of the subsection and adding the legend, "RX only".

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 28 C.J.S. Drugs and Narcotics § 9.

## 26-1-12. False advertising.

A. An advertisement of a drug, device or cosmetic shall be deemed to be false if it is false or misleading in any particular.

B. For the purpose of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] the advertisement of a drug or device representing it to have any effect in albuminuria, appendicitis, arteriosclerosis, blood poison, bone disease, Bright's disease, cancer, carbuncles, cholecystitis, diabetes, diphtheria, dropsy, erysipelas, gallstones, heart and vascular diseases, high blood pressure, mastoiditis, measles, meningitis, mumps, nephritis, otitis media, paralysis, pneumonia, poliomyelitis (infantile paralysis), prostate gland disorders, pyelitis, scarlet fever, sexual impotence, sinus infection, small pox [smallpox], tuberculosis, tumors, typhoid, uremia, venereal [venereal] disease, shall also be deemed to be false, except that no advertisement not in violation



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of Subsection A shall be deemed to be false under this subsection if it is disseminated only to members of the pharmacy, medical, dental or veterinary profession or appears only in the scientific periodicals of those professions or is disseminated only for the purpose of public health education by persons not commercially interested, directly or indirectly, in the sale of such drugs or devices; provided, that whenever the board determines that an advance in medical science has made any type of self-medication safe as to any of the diseases named above, [the] board shall by regulation authorize the advertisement of drugs having curative or therapeutic effect for such disease, subject to such conditions and restrictions as the board may deem necessary in the interests of public health; provided, that this subsection shall not be construed as indicating that self-medication for diseases other than those named herein is safe or efficacious.

C. In the case of any dangerous drug distributed or offered for sale in this state by a manufacturer, packer, distributor or retailer, all advertisement with respect to that drug shall contain a true statement of the established or official name, together with any trade or brand name; the formula as represented on the label, in the same order of listing and with all listed warnings and cautions; the dosage form and strength; such other information in brief summary relating to its use, side effects, contraindications and the name of the manufacturer, packer or distributor; provided, that no advertisement prepared in accordance with Section 502(n) of the federal act and disseminated only to practitioners and dispensers shall be in violation of this subsection.

**History: 1953 Comp., § 54-6-37, enacted by Laws 1967, ch. 23, § 12.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For definition of "advertisement", *see* 26-1-2 Q NMSA 1978.

For the definition of "federal act", *see* 26-1-2W NMSA 1978.

## 26-1-13. Packaging and labeling requirements; proprietary preparations.

A. The principal display panel of an over-the-counter packaged drug or device shall bear as one of its principal features a statement of the identity of the commodity. The statement shall include the established name of the drug or the common name of the device and an accurate statement of the general pharmacological category of the drug or the principal intended action of the drug or device in terms meaningful to the layman.

B. In the case of an over-the-counter drug that is a mixture with no established name, a conspicuous enumeration of each active ingredient that is a mixture with no established name and a conspicuous enumeration of each active ingredient immediately followed by an accurate statement of the general pharmacological category of the ingredients or of its principal intended action in terms that are meaningful to the layman.

C. This section shall not apply to any drug or class of drugs exempted by regulations promulgated under the federal Fair Packaging and Labeling Act.

D. The label of an over-the-counter packaged drug or device shall bear a declaration of the net quantity of its contents.

E. Dangerous drugs or over-the-counter preparations subject to the federal Poison Prevention Packaging Act of 1970 shall meet the safety closure standards and regulations promulgated pursuant to the federal Poison Prevention Packaging Act of 1970.

**History: 1953 Comp., § 54-6-38, enacted by Laws 1972, ch. 84, § 47.**

**Repeals and reenactments.** — Laws 1972, ch. 84, § 47 repealed 54-6-38, 1953 Comp., relating to depressant, stimulant and hallucinogenic drugs, and enacted a new section.

**Cross references.** — For the federal Fair Packaging and Labeling Act, *see* 15 U.S.C. § 1451 et seq.

For the federal Poison Prevention Packaging Act of 1970, *see* 15 U.S.C. § 1471.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Liability of manufacturer or seller for injury or death allegedly caused by failure to warn regarding danger in use of vaccine or prescription drug, 94 A.L.R.3d 748.

Promotional efforts directed toward prescribing physician as affecting prescription drug manufacturer's liability for product-caused injury, 94 A.L.R.3d 1080.

Strict products liability: liability for failure to warn as dependent on defendant's knowledge of danger, 33 A.L.R.4th 368.



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## 26-1-14. New drugs and devices; prerequisites to sale, delivery or giving away; exceptions.

A. No person shall sell, deliver, offer for sale, hold for sale or give away any new drug or device unless:

(1) an application has been approved for the drug and approval has not been withdrawn under Section 505 of the federal act;

(2) when the drug is not subject to the federal act, the drug has been tested and has been found to be safe for use under the conditions prescribed, recommended or suggested in the labeling, and, prior to selling or offering for sale, there has been filed with the board an application setting forth full reports of investigations which have been made to show whether or not the drug is safe for use; a full list of the articles used as components of the drug; a full statement of the composition of the drug; a full description of the methods used in and the facilities and controls used for the manufacture, processing and packing of the drug; such samples of the drug and of the articles used as components of the drug as the board may require; and specimens of the labeling proposed to be used for the drug; or

(3) the device has met the requirements of classification, performance standards and premarket approval, where applicable, under Sections 513 through 520 of the federal act.

B. An application provided for in Paragraph (2) of Subsection A of this section shall become effective on the one hundred eightieth day after filing except that if the board finds, after due notice to the applicant and giving him an opportunity for a hearing, that the drug is not safe for the use under the conditions prescribed, recommended or suggested in the proposed labeling, it shall, prior to the effective date of application, issue an order refusing to permit the application to become effective.

C. An order refusing to permit an application under this section to become effective may be revoked by the board.

D. This section shall not apply:

(1) to a drug intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety of drugs, provided the drug is plainly labeled in compliance with the regulations issued by the board or pursuant to Section 505(i) or 507(d) of the federal act;

(2) to any drug which is subject to Subsection I of Section 26-1-11 NMSA 1978;

(3) to any device for use pursuant to the order of an individual practitioner qualified by law in this state to use or prescribe the device, which device:

(a) is not generally available in finished form for purchase or for dispensing upon prescription and is not offered through labeling or advertising by the manufacturer for commercial distribution;

(b) is intended for use by an individual patient named in the order of the prescribing practitioner and is to be made in a specific form for the patient or is intended to meet the special needs of the practitioner in the course of the practitioner's professional practice; and

(c) is not generally available to or generally used by other practitioners; or

(4) is exempt under Section 520(g) of the federal act for investigational use by experts qualified by scientific training and experience to test the safety and effectiveness of the device by controlled investigation and evaluation.

**History: 1953 Comp., § 54-6-39, enacted by Laws 1967, ch. 23, § 14; 1977, ch. 117, § 2; 1987, ch. 270, § 5.**

**Cross references.** — For definition of "new drug", *see* 26-1-2 NMSA 1978.

For the definition of "federal act", *see* 26-1-1W NMSA 1978.

For Sections 505, 507 and 513 through 520 of the federal act, *see* 21 U.S.C. §§ 355, 357 and 360c to 360j.

**The 1987 amendment,** effective June 19, 1987, inserted "or device" near the beginning of Subsection A; in Subsection A(1) deleted "with respect thereto" following "an application" and inserted "for the drug"; added Subsection A(3); in Subsection B inserted "Paragraph (2) of" near the beginning; in Subsection D(2) substituted "is subject to Subsection I of Section 26-1-11 NMSA 1978" for "is subject to Section 11I of the New Mexico Drug and Cosmetic Act"; added Subsections D(3) and (4); and made minor stylistic changes throughout the section.

### ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — What is "new drug" within meaning of § 201(p) of Federal Food, Drug, and Cosmetic Act (21 USCS § 321(p)), 133 A.L.R. Fed. 229.



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## 26-1-15. Dangerous drugs; veterinary use; limitations.

A. A dangerous drug intended for veterinary use which is not safe for animal use except under the direct supervision of a licensed veterinarian and for which adequate directions for use cannot be prepared, shall bear the legend "CAUTION: federal law restricts this drug to use by or on the order of a licensed veterinarian" and the label shall meet the requirements of the federal act. Such drugs may be sold or distributed by a person possessing a limited license issued by the board under Subsection B of Section 61-11-14 NMSA 1978, on the order of a licensed veterinarian, provided adequate records of receipt and distribution are kept as required in the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act].

B. Drugs which are exempted by the federal act for veterinary use without a prescription shall be labeled to indicate that the drug is for veterinary use and the label shall meet the requirements of the federal act.

**History: 1953 Comp., § 54-6-40, enacted by Laws 1972, ch. 84, § 48; 1973, ch. 217, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Repeals and reenactments.** — Laws 1972, ch. 84, § 48, repealed 54-6-40, 1953 Comp., relating to enumeration of dangerous drugs, and enacted a new 26-1-15 NMSA 1978.

**Cross references.** — For definition of dangerous drugs under the New Mexico Drug, Device and Cosmetic Act, *see* 26-1-2F NMSA 1978.

For definition of federal act, *see* 26-1-2W NMSA 1978.

## 26-1-16. Dangerous drugs; conditions for sale; prescription refilling; limitations.

A. It is unlawful for a person to sell, dispose of or possess any dangerous drugs, except:

(1) manufacturers, wholesalers or distributors, their agents or employees licensed by the board to ship dangerous drugs into the state; or

(2) distributors, wholesalers, hospitals, nursing homes, clinics or pharmacies and other authorized retailers of dangerous drugs in this state licensed by the board, and appropriate records of dangerous drugs receipt and disposition are kept. These records shall be open to inspection by any enforcement officer of this state.

B. Practitioners licensed in this state may prescribe, provide samples of and dispense any dangerous drug to a patient where there is a valid practitioner-patient relationship. A record of all such dispensing shall be kept showing the date the drug was dispensed and bearing the name and address of the patient to whom dispensed. It is the duty of every licensed physician, dentist, veterinarian, pharmacist or person holding a limited license issued under Subsection B of Section 61-11-14 NMSA 1978, when dispensing any dangerous drug, to mark on the dispensing container the name of the patient, the date dispensed, the name and address of the person dispensing the drug, the name and strength of the drug, expiration date where applicable, adequate directions for use and the prescription number when applicable. All official compendium requirements for the preservation, packaging, labeling and storage of dangerous drugs are applicable where drugs are held for dispensing to the public, whether by a pharmacy, clinic, hospital or practitioner.

C. Pharmacists are prohibited from selling or dispensing a dangerous drug except on prescription or drug order of a practitioner and except as such sale or possession is authorized under Subsection A of this section. It is the duty of all pharmacists to keep an accurate record of all disposals, which record shall be open to inspection by an enforcement officer of this state.

D. No enforcement officer having knowledge by virtue of office of a prescription, order or record shall divulge such knowledge except in connection with a prosecution or proceeding in court or before a licensing or registration board or officer, to which prosecution or proceeding the person to whom such prescriptions, orders or records relate is a party.

E. It is unlawful, except as otherwise authorized under Subsection A of this section or the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978] and except for the college of pharmacy of the university of New Mexico or a public health laboratory, for a person to possess any



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dangerous drug unless such substance has been dispensed to the person either directly by a practitioner or on a prescription.

F. All records required to be kept under the provisions of the New Mexico Drug, Device and Cosmetic Act shall be preserved for a period of three years, provided that records requirements do not apply to the administration of a drug to a patient upon whom the practitioner personally attends, and provided that records of controlled substances shall be kept in accordance with the provisions of the Controlled Substances Act.

G. A prescription shall not be filled:

(1) as a refill if it is marked by the issuing practitioner to indicate that the prescription is not to be refilled;

(2) except in compliance with the provisions of the Controlled Substances Act if the drug is a controlled substance;

(3) unless the fill is made in accordance with the provisions of this section; and

(4) when the practitioner does not indicate fill instructions on the original prescription calling for a dangerous drug, unless:

(a) the practitioner is contacted orally, by telephone or other means of communication for instruction; and

(b) if authorization to fill is given the pharmacist, the following information will be immediately transferred to the original prescription: 1) date; 2) name of person authorizing the fill; 3) pharmacist's initials; and 4) amount dispensed if different from the amount indicated on the original prescription.

H. Nothing in this section shall prevent the owner of livestock or the owner's consignee or their employees to be in possession of drugs for their use in performing routine, accepted livestock management practices in the care of livestock belonging to the owner, and the drugs are labeled as being restricted to animal use only; provided, that if such drugs bear the legend: "CAUTION: federal law restricts this drug to use by or on the order of a licensed veterinarian", the drugs may be used or distributed only as provided in Subsection A of Section 26-1-15 NMSA 1978.

I. When, on the original prescription calling for a dangerous drug that is not a controlled substance, a practitioner indicates a specific number of fills or a specific period of time during which a prescription may be filled, a drug may be filled the number of times or for the period of time that the prescription indicates if the following information is provided with the prescription:

(1) the date of fill;

(2) the initials of the pharmacist filling the prescription; and

(3) the amount of drug dispensed, if it differs from the amount called for on the original prescription.

J. A pharmacist may dispense a quantity not to exceed a ninety-day supply of a dangerous drug by combining valid fills when:

(1) an indication on the prescription or label does not specifically prohibit a combined fill; and

(2) the dangerous drug to be filled is not a controlled substance.

K. When the practitioner indicates on the original prescription calling for dangerous drugs that it may be filled "prn", the pharmacist may fill it within the limits of the dosage directions for a period of twelve months, provided the date of filling and the initials of the pharmacist are recorded on the original prescription. At the expiration of the twelve-month period, the practitioner must be contacted for a new prescription; provided that this is not to be construed to apply to those drugs regulated by the Controlled Substances Act.

L. The board may adopt and promulgate regulations to permit the use of computer systems for the storage and retrieval of prescriptions, records for the purpose of filling prescriptions, receipt records, drug distribution records, drug withdrawals from stock, drug compounding records, drug disposition records and drug disposal records.

M. As used in this section, "fill" means a dispensing of a drug for the first time or as a refill.

**History: 1953 Comp., § 54-6-41, enacted by Laws 1967, ch. 23, § 16; 1972, ch. 84, § 49; 1973, ch. 217, § 2; 1979, ch. 41, § 1; 1987, ch. 270, § 6; 2005, ch. 152, § 3; 2013, ch. 157, § 2.**



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**Cross references.** — For definition of "dangerous drugs", *see* 26-1-2 NMSA 1978.

**The 2013 amendment,** effective June 14, 2013, allowed pharmacists to fill a practitioner's drug order; in Subsection C, in the first sentence, after "prohibited from selling or", deleted "disposing of any" and added "dispensing a"; and added Subsections G through M.

**The 2005 amendment,** effective June 17, 2005, added wholesalers to the list of persons who may lawfully sell, dispose of or possess dangerous drugs in Subsections A(1) and (2); changed "physician" to "practitioner" in Subsection B; and authorized the board to adopt rules and regulations to permit the use of computers for the storage and retrieval of receipt records, drug distribution records drug withdrawals from stock, drug compounding records drug disposition records and drug disposal records Subsection G(5).

**The 1987 amendment,** effective June 19, 1987, rewrote Subsection B; deleted former Subsection F, relating to the duty of persons dispensing dangerous drugs to mark certain information on the dispensing container; redesignated subsequent subsections accordingly; in Subsection F inserted "Device" near the beginning and added the proviso at the end of the subsection; and made minor stylistic changes throughout the section.

ANNOTATIONS

**Denial of equal protection not substantiated.** — Since there are no New Mexico drug manufacturers, there is no factual basis for the claim that Subsection A(1) denies state residents equal protection. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**Applicability of article.** — This article applies to legitimate handlers of controlled drugs, but also to others similarly situated who are not involved in the authorized use of such substances. *State v. Reams*, 1981-NMCA-158, 98 N.M. 372, 648 P.2d 1185, *aff'd in part, rev'd in part*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

**Licensing of detailmen allowed.** — Reviewing courts overturn the administrative interpretation of statute by appropriate agencies only if they are clearly incorrect. Since detailmen handle controlled drugs and are part of the interstate drug shipment operation, even though they do not ship drugs themselves, the interpretation by the board of pharmacy of this section to allow licensing of detailmen is not clearly erroneous and will not be overturned by a reviewing court. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**Methaqualone.** — The legislature has not specifically designated methaqualone (the generic name for quaalude) as a "controlled substance" or "dangerous drug" under either the Controlled Substances Act or this article, but has authorized the board of pharmacy to add this substance by administrative regulation to the list of substances controlled under these acts. *State v. Reams*, 1981-NMCA-158, 98 N.M. 372, 648 P.2d 1185, *aff'd in part, rev'd in part*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

Section 30-31-22 NMSA 1978, and not this section, is the appropriate legislation under which defendants are to be prosecuted for allegedly unauthorized distribution of quaalude. *State v. Reams*, 98 N.M. 215, 647 P.2d 417 (1982).

**Requirements applicable to providing drug "samples".** — This section should not be construed as allowing a physician to provide a drug "sample" without complying with the recordkeeping and labeling requirements that apply to "dispensing". 1988 Op. Att'y Gen. No. 88-50.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Right of medical patient to obtain, or physician to prescribe, laetrile for treatment of illness - State cases, 5 A.L.R.4th 219.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 A.L.R.5th 1.

## 26-1-16.1. Opioids; requiring practitioners to obtain and review reports from the prescription monitoring program.

A. For purposes of this section:

(1) "opioid" means the class of drugs that includes the natural derivatives of opium, which are morphine and codeine, and related synthetic and semi-synthetic compounds that act upon opioid receptors;

(2) "practitioner" does not include a pharmacist, veterinarian or euthanasia technician;

(3) "prescription monitoring program" means a program that includes a centralized system to collect, monitor and analyze electronically, for Schedule II through V controlled substances, prescribing and dispensing data submitted by dispensers; and

(4) "Schedule II through V controlled substance" means a substance listed in Schedule II, III, IV or V pursuant to the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978] or the federal controlled substances regulation, pursuant to 21 U.S.C. 812.

B. Before a practitioner prescribes or dispenses an opioid for the first time to a patient, the practitioner shall obtain and review a report from the state's prescription monitoring program for such patient for the previous twelve calendar months. If the practitioner has access to a similar report from an adjacent state for the patient, the practitioner shall also obtain and review that report. The provisions of this subsection shall not apply to the prescription or dispensing of an opioid for a supply of four days or less.

C. A practitioner shall obtain and review a report from the state's prescription monitoring program and similar reports from an adjacent state, if any, no less than once every three months for each established patient for whom the practitioner continuously prescribes or dispenses opioids.

D. A practitioner shall document the receipt and review of reports required by this section in the patient's medical record.



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E. Nothing in this section shall be construed to prevent a practitioner from obtaining and reviewing a report regarding a practitioner's patient from the state's prescription monitoring program or a similar report from another state with greater frequency than that required by this section, in accordance with the practitioner's professional judgment.

F. Nothing in this section shall be construed to require a practitioner to obtain a prescription monitoring report when prescribing an opioid to a patient in a nursing facility or in hospice care.

G. The professional licensing board of each category of practitioner that is licensed or otherwise authorized to prescribe or dispense an opioid shall promulgate rules to implement the provisions of this section. Nothing in this section shall be construed to prevent a professional licensing board from requiring by rule that practitioners obtain prescription monitoring program reports with greater frequency than that required by this section.

**History: Laws 2016, ch. 46, § 1.**

**Effective dates.** — Laws 2016, ch. 46, § 2 makes Laws 2016, ch. 46, § 1 effective January 1, 2017.

## 26-1-17. Testing laboratory.

The college of pharmacy of the university of New Mexico shall serve as the testing laboratory for samples collected for examination pursuant to the provisions of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act].

**History: 1953 Comp., § 54-6-42, enacted by Laws 1967, ch. 23, § 17.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

## 26-1-18. Promulgating regulations; procedure.

A. The board may promulgate regulations for the efficient enforcement of the New Mexico Drug, Device and Cosmetic Act. The board shall conform the regulations promulgated under the New Mexico Drug, Device and Cosmetic Act, insofar as practical, with regulations promulgated under the federal act as defined in Section 26-1-2 NMSA 1978.

B. The board shall, by regulation, declare a substance a "dangerous drug" when necessary, and notification shall be sent to all registered pharmacies in the state within sixty days of the adoption of the regulation.

C. The board shall promulgate the requirements for a pedigree.

D. All regulations promulgated by the board shall be in accordance with the Uniform Licensing Act.

**History: 1953 Comp., § 54-6-43, enacted by Laws 1972, ch. 84, § 50; 2005, ch. 152, § 6.**

**Repeals and reenactments.** — Laws 1972, ch. 84, § 50, repealed 54-6-43, 1953 Comp., relating to procedure for promulgating regulations, and enacted a new section.

**Cross references.** — For the definition of federal act, *see* 26-1-2 NMSA 1978 and notes thereto.

For the definition of "dangerous drug", *see* 26-1-2 NMSA 1978.

**The 2005 amendment,** effective June 17, 2005, added Subsection C to require the board to promulgate requirement for pedigree as defined in Section 26-1-2AA NMSA 1978.

### ANNOTATIONS

**Due process not violated.** — The regulations propounded under this section and Section 30-31-11 NMSA 1978 of the Controlled Substances Act do not violate due process since New Mexico has a legitimate interest in the control of dangerous drugs sold or distributed in the state and New Mexico has not brought within the orbit of state power matters unrelated to any local interests. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**Commerce clause not violated.** — Although the regulations adopted pursuant to this section and Section 30-31-11 NMSA 1978 of the Controlled Substances Act include a license fee to cover administrative costs, their primary purpose is the protection of the public from dangerous drugs, a purpose within the traditional definition of police power; and where the burden of a small fee does not outweigh the substantial state benefit derived from the control, and the regulations do not discriminate against interstate commerce since there are no drug manufacturers within the state, there is no violation of the commerce clause. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**Licensing of detailmen allowed.** — Reviewing courts overturn the administrative interpretation of statute by appropriate agencies only if they are clearly incorrect.



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Since detailmen handle controlled drugs and are part of the interstate drug shipment operation, even though they do not ship drugs themselves, the interpretation by the board of pharmacy of Section 26-1-16 NMSA 1978 to allow licensing of detailmen is not clearly erroneous and will not be overturned by a reviewing court. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**In propounding regulations board of pharmacy need not make formal findings.** The only requirements which it must meet are that the public and the reviewing courts are informed as to the reasoning behind the regulation. The comments of the one board member suffice in this regard. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**Methaqualone.** — The legislature has not specifically designated methaqualone as a "controlled substance" or "dangerous drug" under either the Controlled Substances Act or this article, but has authorized the board of pharmacy to add this substance by administrative regulation to the list of substances controlled under these acts. *State v. Reams*, 1981-NMCA-158, 98 N.M. 372, 648 P.2d 1185, *aff'd in part, rev'd in part*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Right of medical patient to obtain, or physician to prescribe, laetrile for treatment of illness - State cases, 5 A.L.R.4th 219.

## 26-1-18.1. Prescription drug prior authorization protocols.

A. After January 1, 2014, a prescribing practitioner seeking prior authorization from a health insurer may use the uniform prior authorization form developed pursuant to Sections 2 [59A-2-9.8 NMSA 1978] and 3 [61-11-6.2 NMSA 1978] of this 2013 act.

B. As used in this section:

(1) "health insurer" means a health insurer; a nonprofit health service provider; a health maintenance organization; a managed care organization; or a provider service organization. "Health insurer" does not include:

(a) a person that delivers, issues for delivery or renews an individual policy intended to supplement major medical group-type coverages such as medicare supplement, long-term care, disability income, specified disease, accident-only, hospital indemnity or other limited-benefit health insurance policy;

(b) a physician or a physician group to which a health insurer has delegated financial risk for prescription drugs and that does not use a prior authorization process for prescription drugs; or

(c) a health insurer or its affiliated providers if the health insurer owns and operates its pharmacies and does not use a prior authorization process for prescription drugs; and

(2) "prescribing practitioner" means a person that is licensed or certified to prescribe and administer drugs that are subject to the New Mexico Drug, Device and Cosmetic Act.

**History: Laws 2013, ch. 170, § 4.**

**Effective dates.** — Laws 2013, ch. 170 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

## 26-1-19. Power to make inspections and secure samples.

The board or its duly authorized agent shall have free access at all reasonable hours to any factory, warehouse or establishment in which drugs, devices or cosmetics are manufactured, processed, packed or held for introduction into commerce, or to enter any vehicle being used to transport or hold such drugs, devices or cosmetics in commerce, for the purpose of inspecting such factory, warehouse, establishment or vehicle to determine if any of the provisions of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] are being violated, and to secure samples or specimens of any drug, device or cosmetic after paying or offering to pay for such sample. It shall be the duty of the board to make or cause to be made examinations of samples secured under the provisions of this section to determine whether or not any provision of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] is being violated.

**History: 1953 Comp., § 54-6-44, enacted by Laws 1967, ch. 23, § 19.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.



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## 26-1-20. Personnel.

The board shall employ such personnel for the administration and enforcement of the provisions of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] as may be necessary.

**History: 1953 Comp., § 54-6-45, enacted by Laws 1967, ch. 23, § 20.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

## 26-1-21. Power of board to publish reports and disseminate information.

A. The board may cause to be published from time to time reports summarizing all judgments, decrees and court orders which have been rendered, including the nature of the charge and the disposition thereof.

B. The board may also cause to be disseminated such information regarding drugs, devices and cosmetics as the board deems necessary in the interest of the public health and the protection of the consumer against fraud. Nothing in this section shall be construed to prohibit the board from collecting, reporting and illustrating the results of the investigations of the board.

**History: 1953 Comp., § 54-6-46, enacted by Laws 1967, ch. 23, § 21.**

**ANNOTATIONS**

**Generally.** — A statute such as this one authorizes or permits the pharmacy board to make public, through the pharmaceutical association drug store "El Boticario," an item pertaining to the sale of a legendary drug to a nondrug store, if a conviction or convictions have been obtained in the courts of the state of New Mexico, but not otherwise. 1953-54 Op. Att'y Gen. No. 53-5865 (opinion rendered under former law).

The board is permitted and authorized to disseminate all reports and other information, and the fact that the firms, persons or agencies named in said item are published in an outside publication would not incriminate the board or agency mentioned in all cases where conviction or convictions have been obtained in the courts of this state, but not otherwise. 1953-54 Op. Att'y Gen. No. 53-5865 (opinion rendered under former law).

## 26-1-22. Unlawful means of obtaining dangerous drugs enumerated.

It shall be unlawful for any person to obtain or attempt to obtain any dangerous drug or to procure or attempt to procure the administration of any dangerous drugs other than a controlled substance:

A. by fraud, deceit, misrepresentation or subterfuge; or

B. by forgery or alteration of a prescription or of any written order; or

C. by the concealment of a material fact; or

D. by the use of a false name or the giving of a false name or the giving of a false address.

**History: 1953 Comp., § 54-6-47, enacted by Laws 1967, ch. 23, § 22; 1972, ch. 84, § 51.**

**Cross references.** — For definition of "dangerous drugs", *see* 26-1-2 NMSA 1978.

## 26-1-23. False statements; false pretenses; forgery of labels or prescriptions prohibited.

It shall be unlawful for any person to:

A. willfully make a false statement in any prescription, order, report or record required by the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act];

B. falsely assume the title of or represent himself to be a manufacturer, wholesaler, pharmacist, physician, dentist, veterinarian or other authorized person for the purpose of obtaining any of the dangerous drugs;

C. make or utter any false or forged label to a package containing any of the dangerous drugs; or



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D. make or utter any false or forged prescription or false or forged written order for dangerous drugs other than controlled substances.

**History: 1953 Comp., § 54-6-48, enacted by Laws 1967, ch. 23, § 23; 1972, ch. 84, § 52.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For definition of "prescription", *see* 26-1-2I NMSA 1978.

For definition of "label", *see* 26-1-2M NMSA 1978.

## 26-1-24. Cosmetics; misbranding.

A cosmetic shall be deemed to be misbranded:

A. if its labeling is false or misleading in any particular;

B. if in package form unless it bears a label containing:

(1) the name and place of business of the manufacturer, packer or distributor; and

(2) an accurate statement of the quantity of the contents in terms of weight, measure or numerical count; provided, that reasonable variations shall be permitted, and exemptions made for information pertaining to weight, measure or numerical count as to small packages, shall be established by regulations prescribed by the board;

C. if any word, statement or other information required by or under the authority of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] to appear on the label or labeling is not prominently placed thereon with such conspicuousness as compared with other words, statements, designs or devices, in the labeling, and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of the purchase and use;

D. if its container is so made, formed or filled as to be misleading; or

E. if it is a color additive, unless its packaging and labeling are in conformity with such packaging and labeling requirements applicable to such color additive prescribed under the provisions of the federal act. This section shall not apply to packages of color additives which, with respect to their use for cosmetics, are marketed and intended for use only in or on hair dyes bearing required label.

**History: 1953 Comp., § 54-6-49, enacted by Laws 1967, ch. 23, § 24.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For definition of "misbranded", *see* 26-1-2 NMSA 1978.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Products liability: perfumes, colognes, or deodorants, 46 A.L.R.4th 1197.

## 26-1-25. Cosmetics; adulteration.

A cosmetic shall be deemed to be adulterated:

A. if it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling or advertisements thereof, or under such conditions of use as are customary or usual; provided, that this provision shall not apply to coal-tar dye, the label of which bears the following legend conspicuously displayed thereon: "CAUTION: This product contains ingredients which may cause skin irritations on certain individuals and a preliminary test according to accompanying directions should first be made. This product must not be used for dyeing the eyelashes or eyebrows; to do so may cause blindness," and the labeling of which bears adequate directions for such preliminary testing. For the purpose of this paragraph and Subsection E the term "hair dye" shall not include eyelash dyes or eyebrow dyes;

B. if it consists in whole or in part of any filthy, putrid or decomposed substance;

C. if it has been produced, prepared, packed or held under unsanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;

D. if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or



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E. if it is not a hair dye, and it bears or contains a color additive which is unsafe within the meaning of the federal act.

**History: 1953 Comp., § 54-6-50, enacted by Laws 1967, ch. 23, § 25.**

**Cross references.** — For definition of "contaminated with filth", *see* 26-1-2 NMSA 1978.

For definition of "color additive", *see* 26-1-2 NMSA 1978.

For definition of "federal act", *see* 26-1-2 NSMA 1978 and notes thereto.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Products liability: perfumes, colognes, or deodorants, 46 A.L.R.4th 1197.

2 C.J.S. Adulteration § 2.

## 26-1-26. Penalties.

A. Any person who knowingly violates any of the provisions of Subsection A, B, C, F, G or H of Section 26-1-3, Section 26-1-14, 26-1-16, 26-1-22 or 26-1-23 NMSA 1978 is guilty of a fourth degree felony and shall be punished by a fine of not less than one thousand dollars ($1,000) or more than five thousand dollars ($5,000) or by imprisonment for not less than one year or both.

B. Except as provided in Subsection A of this section, any person violating any of the provisions of the New Mexico Drug, Device and Cosmetic Act is guilty of a misdemeanor for the first offense and for second and subsequent offenses is guilty of a fourth degree felony.

**History: 1953 Comp., § 54-6-51, enacted by Laws 1967, ch. 23, § 26; 1971, ch. 245, § 4; 1972, ch. 84, § 53; 1987, ch. 270, § 7.**

**The 1987 amendment,** effective June 19, 1987, in Subsection A, updated the statutory references, deleted "a misdemeanor and shall be punished by a fine of not more than one thousand dollars ($1,000) or by imprisonment for not more than one year for the first offense and for second and subsequent offenses is guilty of" following "is guilty of," and added the language at the end of the subsection following "fourth degree felony"; and, in Subsection B, inserted "Device," deleted "petty" preceding "misdemeanor," and made a minor stylistic change.

ANNOTATIONS

**Methaqualone.** — The legislature has not specifically designated methaqualone as a "controlled substance" or "dangerous drug" under either the Controlled Substances Act or this article, but has authorized the board of pharmacy to add this substance by administrative regulation to the list of substances controlled under these acts. *State v. Reams*, 1981-NMCA-158, 98 N.M. 372, 648 P.2d 1185, *aff'd in part, rev'd in part*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

# ARTICLE 2

# Drug Abuse

Sec.
26-2-1 to 26-2-4. Repealed.
26-2-4.1. Recompiled.
Sec.
26-2-5 to 26-2-14. Repealed.

## 26-2-1 to 26-2-4. Repealed.

**Repeals.** — Laws 1999, ch. 270, § 10 repealed 26-2-1 to 26-2-4 NMSA 1978, as enacted by Laws 1971, ch. 244, §§ 1 to 3 and as amended by Laws 1987, ch. 265, § 4, relating to the Drug Abuse Act, effective July 1, 1999. For provisions of former sections, *see* the 1998 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 9-7-6.1 to 9-7-6.3 NMSA 1978.

## 26-2-4.1. Recompiled.

**Recompilations.** — Laws 1999, ch. 270, § 9 recompiled 26-2-4.1 NMSA 1978, relating to the substance abuse education fund, as 9-7-17 NMSA 1978, effective July 1, 1999.

## 26-2-5 to 26-2-14. Repealed.

**Repeals.** — Laws 1999, ch. 270, § 10 repealed 26-2-5 to 26-2-14 NMSA 1978, as enacted by Laws 1971, ch. 244, §§ 5 to 12, Laws 1971, ch. 296, § 1 and Laws 1972, ch. 10, § 1, and as amended by Laws 1972, ch. 84, § 54, relating to drug abuse services, effective July 1, 1999. For provisions of former sections, *see* the 1998 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see 9-7-6.1 to 9-7-6.3 NMSA 1978.



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# ARTICLE 2A

# Controlled Substances Therapeutic Research

Sec.
26-2A-1. Short title.
26-2A-2. Purpose.
26-2A-3. Definitions.
26-2A-4. Lynn Pierson therapeutic research program established; participation.
26-2A-5. Patient qualification review board; composition; powers and duties.
26-2A-6. Lynn Pierson therapeutic research program; distribution.
26-2A-7. Report.

## 26-2A-1. Short title.

Sections 1 through 7 [26-2A-1 through 26-2A-7 NMSA 1978] of this act may be cited as the "Controlled Substances Therapeutic Research Act".

**History: 1953 Comp., § 54-15-1, enacted by Laws 1978, ch. 22, § 1.**

## 26-2A-2. Purpose.

The legislature finds that recent research has shown that the use of marijuana may alleviate the nausea and ill-effects of cancer chemotherapy, and, additionally, may alleviate the ill-effects of glaucoma. The legislature further finds that there is a need for further research and experimentation with regards to the use of marijuana under strictly controlled circumstances. It is for this purpose that the Controlled Substances Therapeutic Research Act is hereby enacted.

**History: 1953 Comp., § 54-12-2, enacted by Laws 1978, ch. 22, § 2.**

## 26-2A-3. Definitions.

As used in the Controlled Substances Therapeutic Research Act:

A. "administrator" means the secretary, or his designee, of health and environment;

B. "marijuana" means marijuana, tetrahydrocannabinols or a chemical derivative of tetrahydrocannabinol; and

C. "practitioner" means a physician licensed to prescribe and administer drugs which are subject to the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978].

**History: 1953 Comp., § 54-12-3, enacted by Laws 1978, ch. 22, § 3.**

**Compiler's notes.** — Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department, and enacted a new 9-7-4 NMSA 1978, creating the department of health. Laws 1991, ch. 25, § 4 created the department of environment. Under 9-7-5 NMSA 1978, the administrative head of the department of health is the secretary of health. Under 9-7A-5 NMSA 1978, the administrative head of the department of environment is the secretary of environment.

## 26-2A-4. Lynn Pierson therapeutic research program established; participation.

A. There is established in the health and environment department [department of health] the "Lynn Pierson therapeutic research program". The program shall be administered by the administrator. The department shall promulgate rules and regulations necessary for the proper administration of the Controlled Substances Therapeutic Research Act. In such promulgation, the department shall take into consideration those pertinent rules and regulations promulgated by the drug enforcement administration, food and drug administration and the national institute on drug abuse.



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B. Except as provided in Subsection C of Section 5 [26-2A-5 NMSA 1978] of the Controlled Substances Therapeutic Research Act, the Lynn Pierson therapeutic research program shall be limited to cancer chemotherapy patients and glaucoma patients, who are certified to the patient qualification review board by a physician as being involved in a life-threatening or sense-threatening situation and who are not responding to conventional controlled substances or where the conventional controlled substances administered have proven to be effective but where the patient has incurred severe side effects.

**History: 1953 Comp., § 54-12-4, enacted by Laws 1978, ch. 22, § 4; 1979, ch. 11, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1991, ch. 25, § 16 repealed former 9-7-4 MNSA 1978, relating to the health and environment department, and enacted a new 9-7-4 NMSA 1978, creating the department of health.

## 26-2A-5. Patient qualification review board; composition; powers and duties.

A. The administrator, upon the recommendation of the New Mexico medical society, shall appoint a patient qualification review board to serve at his pleasure. The patient qualification review board shall be comprised of:

(1) a physician licensed to practice medicine in New Mexico and certified by the American board of ophthalmology;

(2) a physician licensed to practice medicine in New Mexico and certified by the American board of internal medicine and also certified in the subspecialty of medical oncology; and

(3) a physician licensed to practice medicine in New Mexico and certified in psychiatry by the American board of psychiatry and neurology.

Members of the board may be reimbursed for their attendance at meetings at the rate of forty dollars ($40.00) per day.

B. The patient qualification review board shall review all applicants for the Lynn Pierson therapeutic research program and their licensed physicians and certify their participation in the program.

C. The patient qualification review board may include other disease groups for participation in the Lynn Pierson therapeutic research program after pertinent medical data have been presented by a physician to both the administrator and the board and after receiving the necessary approval of the food and drug administration, the drug enforcement administration and the national institute on drug abuse.

**History: 1953 Comp., § 54-12-5, enacted by Laws 1978, ch. 22, § 5; 1979, ch. 11, § 2.**

## 26-2A-6. Lynn Pierson therapeutic research program; distribution.

A. The administrator shall obtain marijuana through whatever means he deems most appropriate, consistent with regulations promulgated by the national institute on drug abuse, the food and drug administration and the drug enforcement administration and pursuant to the provisions of the Controlled Substances Therapeutic Research Act.

B. The administrator shall cause such marijuana to be transferred to a certified state-operated licensed pharmacy for distribution to the certified patient pursuant to the Controlled Substances Therapeutic Research Act.

**History: 1953 Comp., § 54-12-6, enacted by Laws 1978, ch. 22, § 6; 1979, ch. 11, § 3.**



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## 26-2A-7. Report.

The administrator, in conjunction with the patient qualification review board, shall each year report his findings and recommendations to the governor and the legislature regarding the effectiveness of the Lynn Pierson therapeutic research program.

**History: 1953 Comp., § 54-12-7, enacted by Laws 1978, ch. 22, § 7; 1979, ch. 11, § 4.**

**Compiler's notes.** — Laws 1979, ch. 11, § 5, effective March 7, 1979, repealed Laws 1978, ch. 22, § 10, which would have repealed the Controlled Substances Therapeutic Research Act (26-2A-1 to 26-2A-7 NMSA 1978) effective July 1, 1979.

# ARTICLE 2B

# Lynn and Erin Compassionate Use Act

Sec.
26-2B-1. Short title.
26-2B-2. Purpose of act.
26-2B-3. Definitions.
26-2B-4. Exemption from criminal and civil penalties for the medical use of cannabis.
26-2B-5. Prohibitions, restrictions and limitations on the medical use of cannabis; criminal penalties.
26-2B-6. Advisory board created; duties.
26-2B-6.1. Assessment reporting.
26-2B-7. Registry identification cards; department rules; duties; reciprocity.
26-2B-7.1. Registry identification card; registration; renewal; written certification.
26-2B-8. THC content; no limitation.
26-2B-9. Employment protections.
26-2B-10. Persons under state supervision; protections.

## 26-2B-1. Short title.

Chapter 26, Article 2B NMSA 1978 may be cited as the "Lynn and Erin Compassionate Use Act" in honor of Lynn Pierson and Erin Armstrong."

**History: Laws 2007, ch. 210, § 1; 2019, ch. 247, § 2.**

**The 2019 amendment,** effective June 14, 2019, provided the statutory citation for the Lynn and Erin Compassionate Use Act; after the section heading, deleted "Sections 1 through 7 of this act" and added "Chapter 26, Article 2B NMSA 1978".

**Severability.** — Laws 2007, ch. 210, §11 provided for the severability of the Lynn and Erin Compassionate Use Act if any part or application thereof is held invalid.

## 26-2B-2. Purpose of act.

The purpose of the Lynn and Erin Compassionate Use Act is to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments.

**History: Laws 2007, ch. 210, § 2.**

**Effective dates.** — Laws 2007, ch. 210, § 12 made the Lynn and Erin Compassionate Use Act effective July 1, 2007.

**Severability.** — Laws 2007, ch. 210, §11 provided for the severability of the Lynn and Erin Compassionate Use Act if any part or application thereof is held invalid.

## 26-2B-3. Definitions.

As used in the Lynn and Erin Compassionate Use Act:

A. "adequate supply" means an amount of cannabis, in any form approved by the department, possessed by a qualified patient or collectively possessed by a qualified patient and the qualified patient's primary caregiver that is determined by rule of the department to be no more than reasonably necessary to ensure the uninterrupted availability of cannabis for a period of three months and that is derived solely from an intrastate source;

B. "cannabis":

(1) means all parts of the plant Cannabis containing a delta-9-tetrahydrocannabinol concentration of more than three-tenths percent on a dry weight basis, whether growing or not; the seeds of the plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or its resin; and



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(2) does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks, fiber, oil or cake; the sterilized seed of the plant that is incapable of germination; the weight of any other ingredient combined with cannabis to prepare topical or oral administrations, food, drink or another product; or hemp;

C. "cannabis extract":

(1) means a product obtained by separating resins from cannabis by solvent extraction using solvents other than vegetable glycerin, such as butane, hexane, isopropyl alcohol, ethanol or carbon dioxide; and

(2) does not include the weight of any other ingredient combined with cannabis extract to prepare topical or oral administrations, food, drink or another product;

D. "cannabis flowers" means only the flowers of a cannabis plant;

E. "cannabis product":

(1) means a product that contains cannabis, including edible or topical products that may also contain other ingredients; and

(2) does not include the weight of any other ingredient combined with cannabis or cannabis extract to prepare topical or oral administrations, food, drink or another product;

F. "debilitating medical condition" means:

(1) cancer;

(2) glaucoma;

(3) multiple sclerosis;

(4) damage to the nervous tissue of the spinal cord, with objective neurological indication of intractable spasticity;

(5) seizure disorder, including epilepsy;

(6) positive status for human immunodeficiency virus or acquired immune deficiency syndrome;

(7) admitted into hospice care in accordance with rules promulgated by the department;

(8) amyotrophic lateral sclerosis;

(9) Crohn's disease;

(10) hepatitis C infection;

(11) Huntington's disease;

(12) inclusion body myositis;

(13) inflammatory autoimmune-mediated arthritis;

(14) intractable nausea or vomiting;

(15) obstructive sleep apnea;

(16) painful peripheral neuropathy;

(17) Parkinson's disease;

(18) posttraumatic stress disorder;

(19) severe chronic pain;

(20) severe anorexia or cachexia;

(21) spasmodic torticollis;

(22) ulcerative colitis; or

(23) any other medical condition, medical treatment or disease as approved by the department;

G. "department" means the department of health;

H. "division" means the cannabis control division of the regulation and licensing department;

I. "dry weight basis" means a process by which delta—9-tetrahydrocannabinol concentration is measured relative to the aggregate weight of all parts of the plant genus Cannabis, whether growing or not, including the leaves of the plant, the flowers and buds of the plant, the seeds of the plant, the resin of the plant and the stalks of the plant, at the point of harvest and with no moisture added to the harvested plant;

J. "hemp" means the plant genus Cannabis and any part of the plant, whether growing or not, containing a delta-9-tetrahydrocannabinol concentration of no more than three-tenths percent on a dry weight basis;



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K. "medical cannabis program" means the program established pursuant to the Lynn and Erin Compassionate Use Act for authorization and regulation of the medical use of cannabis in the state;

L. "practitioner" means a person licensed in New Mexico to prescribe and administer drugs that are subject to the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978];

M. "primary caregiver" means a resident of New Mexico who is at least eighteen years of age and who has been designated by the patient's practitioner as being necessary to take responsibility for managing the well-being of a qualified patient with respect to the medical use of cannabis pursuant to the provisions of the Lynn and Erin Compassionate Use Act;

N. "qualified patient" means a resident of New Mexico who has been diagnosed by a practitioner as having a debilitating medical condition and has received written certification and a registry identification card pursuant to the Lynn and Erin Compassionate Use Act on the basis of having been diagnosed, in person or via telemedicine, by a practitioner as having a debilitating medical condition;

O. "reciprocal participant" means a person who is not a resident of New Mexico and who holds proof of enrollment by a governmental regulatory authority to participate in the medical cannabis program of another state of the United States, the District of Columbia or a territory or commonwealth of the United States in which the person resides or a person who holds proof of enrollment by a governmental regulatory authority of a New Mexico Indian nation, tribe or pueblo to participate in its medical cannabis program;

P. "registry identification card" means a document that the department issues:

(1) to a qualified patient that identifies the bearer as a qualified patient and authorizes the qualified patient to use cannabis for a debilitating medical condition; or

(2) to a primary caregiver that identifies the bearer as a primary caregiver authorized to engage in the intrastate possession and administration of cannabis for the sole use of a qualified patient who is identified on the document;

Q. "safety-sensitive position" means a position in which performance by a person under the influence of drugs or alcohol would constitute an immediate or direct threat of injury or death to that person or another;

R. "telemedicine" means the use of telecommunications and information technology to provide clinical health care from a site apart from the site where the patient is located, in real time or asynchronously, including the use of interactive simultaneous audio and video or store-and-forward technology, or off-site patient monitoring and telecommunications in order to deliver health care services;

S. "THC" means delta-9-tetrahydrocannabinol, a substance that is the primary psychoactive ingredient in cannabis; and

T. "written certification" means a statement made on a department-approved form and signed by a patient's practitioner that indicates, in the practitioner's professional opinion, that the patient has a debilitating medical condition and the practitioner believes that the potential health benefits of the medical use of cannabis would likely outweigh the health risks for the patient.

**History: Laws 2007, ch. 210, § 3; 2019, ch. 247, § 3; 2020, ch. 4, § 1; 2021 (1st S.S.), ch. 4, § 58.**

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, defined "cannabis extract", "cannabis flowers", "division", and "dry weight basis", revised the definitions of "qualified patient" and "reciprocal participant", and removed the definitions of "cannabis consumption area", "cannabis courier", "cannabis establishment", "cannabis manufacturer", "cannabis producer", "cannabis testing facility", "license", "licensee", "licensee representative", "manufacture", "personal production license" and "produce", as used in the Lynn and Erin Compassionate Use Act; deleted former Subsections C through G; added new Subsections C and D and redesignated former Subsection H as Subsection E; deleted former Subsection I and redesignated former Subsections J and K as Subsections F and G, respectively; added new Subsections H and I and redesignated former Subsection L as Subsection J; deleted former Subsections M through P and redesignated former Subsection Q as Subsection K; deleted former Subsection R and redesignated former Subsections S and T as Subsections L and M, respectively; deleted former Subsection U and redesignated former Subsections V through BB as Subsections N through T, respectively; in Subsection N, after "debilitating medical condition", deleted "provided that a practitioner may only issue a written certification on the basis of an evaluation conducted via telemedicine if the practitioner has previously examined the patient in person"; and in Subsection O, after "means", deleted "an individual who holds proof of authorization to participate in the medical cannabis program of another state of the United States, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe or pueblo" and added the remainder of the subsection.



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**The 2020 amendment,** effective February 20, 2020, limited the definition of "qualified patient," as used in the Lynn and Erin Compassionate Use Act, to residents of New Mexico; and in Subsection V, after "means a", deleted "person" and added "resident of New Mexico".

**The 2019 amendment,** effective June 14, 2019, defined certain terms related to medical cannabis and medical cannabis programs as used in the Lynn and Erin Compassionate Use Act; added new Subsections B through I and redesignated former Subsections B and C as Subsections J and K, respectively; in Subsection J, in Paragraph J(5), after the paragraph designation, added "seizure disorder, including", added new Paragraphs J(8) through J(22) and redesignated former Paragraph J(8) as Paragraph J(23); deleted Subsection D, which defined "licensed producer"; added new Subsections L through R and redesignated former Subsections E and F as Subsections S and T, respectively; added new Subsection U and redesignated former Subsection G as Subsection V; in Subsection V, after "means a", deleted "resident of New Mexico" and added "person", and after "Lynn and Erin Compassionate Use Act", deleted "and" and added "on the basis of having been diagnosed, in person or via telemedicine, by a practitioner as having a debilitating medical condition; provided that a practitioner may only issue a written certification on the basis of an evaluation conducted via telemedicine if the practitioner has previously examined the patient in person;"; added new Subsections W through AA and redesignated former Subsection H as Subsection BB; and in Subsection BB, after "means a statement", deleted "in a patient's medical records or a statement" and added "made on a department-approved form and", and after "health risks for the patient", deleted "A written certification is not valid for more than one year from the date of issuance".

**Temporary provisions.** — Laws 2019, ch. 247, § 15 provided that a licensed producer, as defined in the Lynn and Erin Compassionate Use Act prior to the enactment of this 2019 act, that is licensed as of June 14, 2019 shall be considered to be a cannabis producer, as defined by Laws 2019, ch. 247.

**ANNOTATIONS**

**Written certification is the functional equivalent of a prescription.** — Under the Lynn and Erin Compassionate Use Act, the written certification required by a person licensed in New Mexico to prescribe and administer controlled substances is the functional equivalent of a prescription as defined in the Worker's Compensation Act, 52-1-1 NMSA 1978 et seq. *Maez v. Riley Industrial*, 2015-NMCA-049.

## 26-2B-4. Exemption from criminal and civil penalties for the medical use of cannabis.

A. A qualified patient or a qualified patient's primary caregiver shall not be subject to arrest, prosecution or penalty in any manner for the possession of or the medical use of cannabis if the quantity of cannabis does not exceed an adequate supply; provided that a qualified patient or the qualified patient's primary caregiver may possess that qualified patient's harvest of cannabis.

B. A reciprocal participant shall not be subject to arrest, prosecution or penalty in any manner for the possession of or the medical use of cannabis if the quantity of cannabis does not exceed the limit identified by department rule.

C. The following conduct is lawful and shall not constitute grounds for detention, search or arrest of a person or for a violation of probation or parole, and cannabis products that relate to the conduct are not contraband or subject to seizure or forfeiture pursuant to the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978] or the Forfeiture Act [Chapter 31, Article 27 NMSA 1978]:

(1) a qualified patient or primary caregiver possessing or transporting not more than an adequate supply or a reciprocal participant possessing or transporting not more than the limit identified by department rule;

(2) a qualified patient or primary caregiver purchasing or obtaining not more than an adequate supply from a lawful source or a reciprocal participant purchasing or obtaining not more than the limit identified by department rule;

(3) a qualified patient or reciprocal participant using or being under the influence of cannabis; provided that the qualified patient or reciprocal participant is acting consistent with law; or

(4) a qualified patient, primary caregiver or reciprocal participant transferring, without financial consideration, to a qualified patient, primary caregiver or reciprocal participant not more than two ounces of cannabis, sixteen grams of cannabis extract and eight hundred milligrams of edible cannabis.

D. Subsection A of this section shall not apply to a qualified patient under the age of eighteen years, unless:

(1) the qualified patient's practitioner has explained the potential risks and benefits of the medical use of cannabis to the qualified patient and to a parent, guardian or other person having legal custody of the qualified patient; and

(2) a parent, guardian or other person having legal custody consents in writing to:

(a) allow the qualified patient's medical use of cannabis;



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(b) serve as the qualified patient's primary caregiver; and

(c) control the dosage and the frequency of the medical use of cannabis by the qualified patient.

E. A qualified patient or a primary caregiver shall be granted the full legal protections provided in this section if the qualified patient or primary caregiver is in possession of a registry identification card. If the qualified patient or primary caregiver is not in possession of a registry identification card, the qualified patient or primary caregiver shall be given an opportunity to produce the registry identification card before any arrest or criminal charges or other penalties are initiated.

F. A practitioner shall not be subject to arrest or prosecution, penalized in any manner or denied any right or privilege for recommending the medical use of cannabis or providing written certification for the medical use of cannabis pursuant to the Lynn and Erin Compassionate Use Act.

G. Any property interest that is possessed, owned or used in connection with the medical use of cannabis, or acts incidental to such use, shall not be harmed, neglected, injured or destroyed while in the possession of state or local law enforcement officials. Such property interest shall not be forfeited under any state or local law providing for the forfeiture of property except as provided in the Forfeiture Act. Cannabis, paraphernalia or other property seized from a qualified patient, primary caregiver or reciprocal participant in connection with the claimed medical use of cannabis shall be returned immediately upon the determination by a court or prosecutor that the qualified patient, primary caregiver or reciprocal participant is entitled to the protections of the provisions of the Lynn and Erin Compassionate Use Act, as may be evidenced by a failure to actively investigate the case, a decision not to prosecute, the dismissal of charges or acquittal.

H. A person shall not be subject to arrest or prosecution for a cannabis-related offense for simply being in the presence of the medical use of cannabis as allowed under the provisions of the Lynn and Erin Compassionate Use Act.

**History: Laws 2007, ch. 210, § 4; 2019, ch. 247, § 4; 2021 (1st S.S.), ch. 4, § 59.**

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, made amendments to conform the Lynn and Erin Compassionate Use Act with the newly enacted Cannabis Regulation Act; in Subsection C, Paragraph C(3), added "or reciprocal participant" after each occurrence of "qualified patient", in Paragraph C(4), added "or reciprocal participant" after each occurrence of "primary caregiver", after "two ounces of cannabis", added "sixteen grams of cannabis extract and eight hundred milligrams of edible cannabis", and deleted former Paragraph C(5); deleted former Subsection G and redesignated former Subsection H as new Subsection G; in Subsection G, added "or reciprocal participant" after each occurrence of "primary caregiver"; and deleted former Subsection I and redesignated former Subsection J as Subsection H.

**The 2019 amendment,** effective June 14, 2019, revised provisions related to the exemption of the medical use of cannabis from criminal and civil penalties; in Subsection A, after "qualified patient", added "or a qualified patient's primary caregiver", and after "adequate supply;", added "provided that a qualified patient or the qualified patient's primary caregiver may possess that qualified patient's harvest of cannabis."; deleted former Subsection B, added new Subsections B and C and redesignated former Subsections C through G as Subsections D through H, respectively; in Subsection E, added "qualified" preceding each occurrence of "patient" and added "primary" preceding each occurrence of "caregiver"; in Subsection G, after "A", deleted "licensed producer" and added "licensee or licensee representative", after "possession,", added "manufacture", after "dispensing", added "testing", and after "Lynn and Erin Compassionate Use Act.", added the last sentence of the subsection; and added new Subsection I and redesignated former Subsection H as Subsection J.

## 26-2B-5. Prohibitions, restrictions and limitations on the medical use of cannabis; criminal penalties.

A. Participation in a medical use of cannabis program by a qualified patient, primary caregiver or reciprocal participant does not relieve the qualified patient, primary caregiver or reciprocal participant from:

(1) criminal prosecution or civil penalties for activities not authorized in the Lynn and Erin Compassionate Use Act;

(2) liability for damages or criminal prosecution arising out of the operation of a vehicle while under the influence of cannabis; or

(3) criminal prosecution or civil penalty for possession or use of cannabis:



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(a) in the workplace of the qualified patient's, primary caregiver's or reciprocal participant's employment; or

(b) at a public park, recreation center, youth center or other public place.

B. A person who makes a fraudulent representation to a law enforcement officer about the person's participation in a medical use of cannabis program to avoid arrest or prosecution for a cannabis-related offense is guilty of a petty misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

**History: Laws 2007, ch. 210, § 5; 2019, ch. 247, § 5; 2019, ch. 247, § 5; 2019, ch. 261, § 2; 2021 (1st S.S.), ch. 4, § 60.**

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, made amendments to conform the Lynn and Erin Compassionate Use Act with the newly enacted Cannabis Regulation Act; in Subsection A, added "or reciprocal participant" after each occurrence of "primary caregiver"; and deleted former Subsection C, which related to criminal penalties for selling, distributing, dispensing or transferring cannabis.

**2019 Amendments.** — Laws 2019, ch. 247, § 5, effective June 14, 2019, removed certain restrictions related to the use or possession of cannabis; in Subsection A, Paragraph A(3), deleted Subparagraphs A(3)(a) and A(3)(b) and redesignated former Subparagraphs A(3)(c) and A(3)(d) as Subparagraphs A(3)(a) and A(3)(b), respectively; and in Subsection C, after "If a", deleted "licensed producer" and added "licensee or the licensee's representative", and after "outside New Mexico", deleted "in violation of federal law, the licensed producer" and added "the licensee or the licensee's representative".

Laws 2019, ch. 261, § 2, effective June 14, 2019, removed certain restrictions related to the use or possession of cannabis; and in Subsection A, Paragraph A(3), deleted Subparagraphs A(3)(a) and A(3)(b) and redesignated former Subparagraphs A(3)(c) and A(3)(d) as Subparagraphs A(3)(a) and A(3)(b), respectively.

## 26-2B-6. Advisory board created; duties.

The secretary of health shall establish an advisory board consisting of nine practitioners knowledgeable about the medical use of cannabis. The members shall be chosen for appointment by the secretary from a list proposed by the New Mexico medical society, the New Mexico nurses association, the New Mexico academy of family physicians, the New Mexico academy of physician assistants, the New Mexico pharmacists association or the New Mexico Hispanic medical association. A quorum of the advisory board shall consist of five members. The advisory board shall:

A. review and recommend to the department for approval additional debilitating medical conditions that would benefit from the medical use of cannabis;

B. accept and review petitions to add medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis;

C. convene at least twice per year to conduct public hearings and to evaluate petitions, which shall be maintained as confidential personal health information, to add medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis;

D. issue recommendations concerning rules to be promulgated for the issuance of the registry identification cards;

E. recommend quantities of cannabis that are necessary to constitute an adequate supply for qualified patients and primary caregivers;

F. recommend formulation or preparations of cannabis or cannabis products; and

G. recommend quantities of cannabis that a reciprocal participant may obtain and possess.

**History: Laws 2007, ch. 210, § 6; 2019, ch. 247, § 6.**

**The 2019 amendment,** effective June 14, 2019, increased the number of members of the advisory board, provided that additional entities may propose members to be appointed to the advisory board, and required the advisory board to recommend formulation or preparations of cannabis and to recommend quantities of cannabis that a reciprocal participant may obtain and possess; in the introductory paragraph, after "consisting of", deleted "eight" and added "nine", after "practitioners", deleted "representing the fields of neurology, pain management, medical oncology, psychiatry, infectious disease, family medicine and gynecology. The practitioners shall be nationally board-certified in their area of specialty and", after "New Mexico medical society,", added "the New Mexico nurses association, the New Mexico academy of family physicians, the New Mexico academy of physician assistants, the New Mexico pharmacists association or the New Mexico Hispanic medical association", and after "shall consist of", deleted "three" and added "five"; and added new Subsections F and G.

**Severability.** — Laws 2007, ch. 210, §11 provided for the severability of the Lynn and Erin Compassionate Use Act if any part or application thereof is held invalid.



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## 26-2B-6.1. Assessment reporting.

In consultation with qualified patients and primary caregivers, the department shall produce an assessment report annually, which shall be published to the public and that includes at a minimum an evaluation of:

A. the affordability of and accessibility to medical cannabis pursuant to the Lynn and Erin Compassionate Use Act; and

B. the needs of qualified patients who live in rural areas, federal subsidized housing or New Mexico Indian nations, tribes or pueblos.

**History: Laws 2019, ch. 247, § 8; 2021 (1st S.S.), ch. 4, § 61.**

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, made amendments to conform the Lynn and Erin Compassionate Use Act with the newly enacted Cannabis Regulation Act; in the section heading, deleted "Program regulation and administration; fees; limitations; rulemaking; licensure; issuance" and added "Assessment"; deleted former Subsections A through E; deleted subsection designation "F" and placed the language from former Subsection F as the introductory clause and redesignated former Paragraphs F(1) and F(2) as Subsections A and B, respectively; and deleted former Subsection G.

**Temporary provisions.** — Laws 2021 (1st S.S.), ch. 4, § 70 provided:

A. On June 29, 2021, all functions, personnel, money, appropriations, records, furniture, equipment and other property of the department of health's medical cannabis program that are not part of the department's medical cannabis registry powers and duties shall be transferred to the regulation and licensing department.

B. On June 29, 2021, all contractual obligations and other agreements of the department of health as they pertain to the department's medical cannabis program that are not part of the department's medical cannabis registry powers and duties are binding on the regulation and licensing department.

C. Statutory references to the department of health that pertain to the department's medical cannabis program that are not part of the department's medical cannabis registry powers and duties shall be deemed to be references to the cannabis control division of the regulation and licensing department.

D. On June 29, 2021, any unexpended or unencumbered balance in the medical cannabis fund is transferred to the cannabis regulation fund.

E. Except to the extent any administrative rules are inconsistent with the provisions of this act, any administrative rules adopted by an officer, agency or other entity whose responsibilities have been transferred pursuant to the provisions of this act to another officer, agency or other entity remain in force until amended by the officer, agency or other entity to which the responsibility for the adoption of the rules has been transferred. To the extent any administrative rules are inconsistent with the provisions of this act, such rules are null and void.

## 26-2B-7. Registry identification cards; department rules; duties; reciprocity.

A. After consultation with the advisory board, the department shall promulgate rules in accordance with the State Rules Act [Chapter 14, Article 4 NMSA 1978] to implement the purpose of the Lynn and Erin Compassionate Use Act. The rules shall:

(1) govern the manner in which the department will consider applications for registry identification cards and for the renewal of identification cards for qualified patients and primary caregivers;

(2) define the amount of cannabis that is necessary to constitute an adequate supply, including amounts for topical treatments;

(3) identify criteria and set forth procedures for including additional medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis. Procedures shall include a petition process and shall allow for public comment and public hearings before the advisory board;

(4) set forth additional medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis as recommended by the advisory board;

(5) determine additional duties and responsibilities of the advisory board; and

(6) be revised and updated as necessary.

B. The department shall issue registry identification cards to a patient and to the primary caregiver for that patient, if any, who submit the following, in accordance with the department's rules:

(1) a written certification;

(2) the name, address and date of birth of the patient;

(3) the name, address and telephone number of the patient's practitioner; and



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(4) the name, address and date of birth of the patient's primary caregiver, if any.

C. The department shall verify the information contained in an application submitted pursuant to Subsection B of this section and shall approve or deny an application within thirty days of receipt. The department may deny an application only if the applicant did not provide the information required pursuant to Subsection B of this section or if the department determines that the information provided is false. A person whose application has been denied shall not reapply for six months from the date of the denial unless otherwise authorized by the department.

D. The department shall issue a registry identification card within five days of approving an application, and a card shall expire three years after the date of issuance.

E. A registry identification card shall contain:

(1) the name and date of birth of the qualified patient and primary caregiver, if any;

(2) the date of issuance and expiration date of the registry identification card; and

(3) other information that the department may require by rule.

F. A person who possesses a registry identification card shall notify the department of any change in the person's name, qualified patient's practitioner, qualified patient's primary caregiver or change in status of the qualified patient's debilitating medical condition within ten days of the change.

G. Possession of or application for a registry identification card shall not constitute probable cause or give rise to reasonable suspicion for a governmental agency to search the person or property of the person possessing or applying for the card.

H. The department shall maintain a confidential file containing the names and addresses of the persons who have either applied for or received a registry identification card. Individual names on the list shall be confidential and not subject to disclosure, except:

(1) to authorized employees or agents of the department as necessary to perform the duties of the department pursuant to the provisions of the Lynn and Erin Compassionate Use Act;

(2) to authorized employees of state or local law enforcement agencies, but only for the purpose of verifying that a person is lawfully in possession of a registry identification card;

(3) to the division; or

(4) as provided in the federal Health Insurance Portability and Accountability Act of 1996.

I. By March 1, 2020, the secretary of health shall adopt and promulgate rules relating to medical cannabis program reciprocity. The department may identify requirements for the granting of reciprocity, including provisions limiting the period of time in which a reciprocal participant may participate in the medical cannabis program.

J. A reciprocal participant:

(1) may participate in the medical cannabis program in accordance with department rules;

(2) shall not be required to comply with the registry identification card application and renewal requirements established pursuant to this section and department rules;

(3) shall at all times possess proof of authorization to participate in the medical cannabis program of another state, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe or pueblo and shall present proof of that authorization when purchasing cannabis from a person licensed pursuant to the Cannabis Regulation Act [26-2C-1 to 26-2C-42 NMSA 1978]; and

(4) shall register with a person licensed pursuant to the Cannabis Regulation Act for the purpose of tracking sales to the reciprocal participant in an electronic system that is accessible to the department.

**History: Laws 2007, ch. 210, § 7; 2019, ch. 247, § 7; 2021 (1st S.S.), ch. 4, § 62.**

**Cross references.** — For the Federal Health Insurance Portability and Accountability Act of 1996, *see* 42 U.S.C. § 300gg et seq.

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, revised rule requirements and duties of the department of health due to the newly enacted Cannabis Regulation Act; in Subsection A, deleted former Paragraphs A(5) through A(7) and redesignated former Paragraphs A(8) and A(9) as Paragraphs A(5) and A(6), respectively; in Subsection H, added a new Paragraph H(3) and redesignated former Paragraph H(3) as Paragraph H(4); and in Subsection J, Paragraphs J(3) and J(4), deleted "licensee" and added "person licensed pursuant to the Cannabis Regulation Act".

**The 2019 amendment,** effective June 14, 2019, provided additional duties for the department of health; in the section heading, added "reciprocity"; in Subsection A, in the introductory paragraph, after the subsection designation, deleted "No later than October 1, 2007, and", in Paragraph A(5), after "licensure of", added "cannabis",



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and after "production facilities,", added "cannabis couriers, cannabis manufacturers, cannabis testing facilities and any other cannabis establishments that the department may license", in Paragraph A(6), after "medical cannabis", added "program", in Subparagraph A(6)(b), after "daycare center", added "that were in existence in that location before the licensee distributing medical cannabis nearby was licensed; provided that this distance requirement shall not apply to distribution at the home of the qualified patient or primary caregiver;", added new Paragraph A(7) and redesignated former Paragraphs A(7) and A(8) as Paragraphs A(8) and A(9), respectively; in Subsection D, after "shall expire", deleted "one year" and added "three years"; added new subsection designation "E." and redesignated former Subsections E through G as Subsections F through H, respectively; and added new Subsections I and J.

## 26-2B-7.1. Registry identification card; registration; renewal; written certification.

The department shall require a qualified patient to reapply for a registry identification card no sooner than two years and eleven months from the date the patient's current registry identification card is issued; provided that, in order to remain eligible for participation in the medical cannabis program established pursuant to the Lynn and Erin Compassionate Use Act, a qualified patient shall submit annually to the department a statement from a practitioner indicating that:

A. the practitioner has examined the qualified patient during the preceding twelve months;

B. the qualified patient continues to have a debilitating medical condition; and

C. the practitioner believes that the potential health benefits of the medical use of cannabis would likely outweigh the health risks for the qualified patient.

**History: Laws 2019, ch. 247, § 9.**

**Effective dates.** — Laws 2019, ch. 247 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 26-2B-8. THC content; no limitation.

The department shall not limit the amount of THC concentration in a cannabis product; provided that the department may by rule adopt requirements for apportionment and packaging of cannabis products.

**History: Laws 2019, ch. 247, § 10.**

**Effective dates.** — Laws 2019, ch. 247 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 26-2B-9. Employment protections.

A. Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations, it is unlawful to take an adverse employment action against an applicant or an employee based on conduct allowed under the Lynn and Erin Compassionate Use Act.

B. Nothing in this section shall:

(1) restrict an employer's ability to prohibit or take adverse employment action against an employee for use of, or being impaired by, medical cannabis on the premises of the place of employment or during the hours of employment; or

(2) apply to an employee whose employer deems that the employee works in a safety-sensitive position.

**History: Laws 2019, ch. 247, § 11.**

**Effective dates.** — Laws 2019, ch. 247 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

ANNOTATIONS

**Medical marijuana is not an accommodation that must be provided for by employer.**—Where plaintiff filed a complaint with the New Mexico human rights division alleging unlawful discrimination by defendant tractor supply company, and where evidence at trial established that plaintiff applied for a management position with defendant, and where, during the interview process, plaintiff advised defendant's hiring manager of his diagnosis of HIV/AIDS and of his participation in the medical cannabis program, and where, after being hired for the job, defendant was required to report to a testing facility



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to undergo a drug test, the results of which indicated a positive test for cannabis metabolites, and where defendant discharged plaintiff on the basis of the positive drug test, defendant's motion to dismiss was granted because the Lynn and Erin Compassionate Use Act, §§ 26-2B-1 to -10 NMSA 1978, which authorizes New Mexico's medical cannabis program, combined with the New Mexico Human Rights Act, §§ 28-1-1 to -14 NMSA 1978, does not provide a cause of action for plaintiff, as medical marijuana is not an accommodation that must be provided for by the employer. *Garcia v. Tractor Supply Company*, 154 F.Supp.3d 1225 (D.N.M. 2016).

## 26-2B-10. Persons under state supervision; protections.

A person who is serving a period of probation or parole or who is in the custody or under the supervision of the state or a local government pending trial as part of a community supervision program shall not be penalized for conduct allowed under the Lynn and Erin Compassionate Use Act.

**History: Laws 2019, ch. 247, § 12.**

**Effective dates.** — Laws 2019, ch. 247 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

# ARTICLE 2C

# Cannabis Regulation

Sec.
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26-2C-39. Cannabis regulation fund.
26-2C-40. Plant limit. (Repealed effective December 31, 2025.)
26-2C-41. Indian nations, tribes and pueblos; intergovernmental agreements.
26-2C-42. Cooperation of agencies.

## 26-2C-1. Short title.

Sections 1 through 42 [26-2C-1 to 26-2C-42 NMSA 1978] of this act may be cited as the "Cannabis Regulation Act".

**History: Laws 2021 (1st S.S.), ch. 4, § 1.**

**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

**Temporary provisions.** —

**Laws 2021 (1st S.S.), ch. 4, § 70** provided:

A. On June 29, 2021, all functions, personnel, money, appropriations, records, furniture, equipment and other property of the department of health's medical cannabis program that are not part of the department's medical



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cannabis registry powers and duties shall be transferred to the regulation and licensing department.

B. On June 29, 2021, all contractual obligations and other agreements of the department of health as they pertain to the department's medical cannabis program that are not part of the department's medical cannabis registry powers and duties are binding on the regulation and licensing department.

C. Statutory references to the department of health that pertain to the department's medical cannabis program that are not part of the department's medical cannabis registry powers and duties shall be deemed to be references to the cannabis control division of the regulation and licensing department.

D. On June 29, 2021, any unexpended or unencumbered balance in the medical cannabis fund is transferred to the cannabis regulation fund.

E. Except to the extent any administrative rules are inconsistent with the provisions of this act, any administrative rules adopted by an officer, agency or other entity whose responsibilities have been transferred pursuant to the provisions of this act to another officer, agency or other entity remain in force until amended by the officer, agency or other entity to which the responsibility for the adoption of the rules has been transferred. To the extent any administrative rules are inconsistent with the provisions of this act, such rules are null and void.

**Laws 2021 (1st S.S.), ch. 4, § 71** provided that:

A. The legislative finance committee shall study the fiscal and economic impacts of the Cannabis Regulation Act for fiscal years 2023 through 2027 and provide a report to the revenue stabilization and tax policy committee on or before December 1, 2027.

B. The report shall include:

(1) the impacts on budgets and staffing of the regulation and licensing department and the department of health;

(2) the impacts on general fund revenue and expenses;

(3) the impacts on potential funds created by the Cannabis Regulation Act;

(4) the impacts on the medical cannabis program;

(5) the impacts on local and state law enforcement; and

(6) the economic impact on the state, including:

(a) job creation;

(b) tourism; and

(c) other economic impacts.

## 26-2C-2. Definitions.

As used in the Cannabis Regulation Act:

A. "advertisement":

(1) means a statement or a depiction that is intended to induce the purchase of cannabis products and that is displayed in printed material or on a sign or other outdoor display or presented in a radio, television or other media broadcast or in digital media; and

(2) does not include:

(a) a sign or outdoor display or other statement permanently affixed to a licensed premises that is intended to induce the sale of a cannabis product produced or sold on the premises;

(b) a label affixed to a cannabis product or the covering, wrapper or container of a cannabis product; or

(c) an editorial or other material printed in a publication when the publication of the editorial or material was not paid for by a licensee and was not intended to promote the sale of cannabis products by a particular brand or company;

B. "cannabis":

(1) means all parts of the plant genus Cannabis containing a delta-9-tetrahydrocannabinol concentration of more than three-tenths percent on a dry weight basis, whether growing or not; the seeds of the plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or its resin; and

(2) does not include:

(a) the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks, fiber, oil or cake; or the sterilized seed of the plant that is incapable of germination; or

(b) the weight of any other ingredient combined with cannabis products to prepare topical or oral administrations, food, drink or another product;

C. "cannabis consumption area" means an area where cannabis products may be served and consumed;

D. "cannabis courier" means a person that transports cannabis products to qualified patients, primary caregivers or reciprocal participants or directly to consumers;

E. "cannabis establishment" means:

(1) a cannabis testing laboratory;

(2) a cannabis manufacturer;

(3) a cannabis producer;



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(4) a cannabis retailer;

(5) a cannabis research laboratory;

(6) a vertically integrated cannabis establishment;

(7) a cannabis producer microbusiness; or

(8) an integrated cannabis microbusiness;

F. "cannabis extract":

(1) means a product obtained by separating resins, tetrahydrocannabinols or other substances from cannabis by extraction methods approved by the division; and

(2) does not include the weight of any other ingredient combined with cannabis extract to prepare topical or oral administrations, food, drink or another product;

G. "cannabis flowers" means only the flowers of a cannabis plant;

H. "cannabis manufacturer" means a person that:

(1) manufactures cannabis products;

(2) packages cannabis products;

(3) has cannabis products tested by a cannabis testing laboratory; or

(4) purchases, acquires, sells or transports wholesale cannabis products to other cannabis establishments;

I. "cannabis producer" means a person that:

(1) cultivates cannabis plants;

(2) has unprocessed cannabis products tested by a cannabis testing laboratory;

(3) transports unprocessed cannabis products only to other cannabis establishments; or

(4) sells cannabis products wholesale;

J. "cannabis producer microbusiness" means a cannabis producer at a single licensed premises that possesses no more than two hundred total mature cannabis plants at any one time;

K. "cannabis product" means a product that is or that contains cannabis or cannabis extract, including edible or topical products that may also contain other ingredients;

L. "cannabis research laboratory" means a facility that produces or possesses cannabis products and all parts of the plant genus Cannabis for the purpose of studying cannabis cultivation, characteristics or uses;

M. "cannabis retailer" means a person that sells cannabis products to qualified patients, primary caregivers or reciprocal participants or directly to consumers;

N. "cannabis server permit" means an authorization that allows a person to directly offer, sell or serve cannabis or cannabis products as part of commercial cannabis activity in a cannabis consumption area;

O. "cannabis server permit education provider" means a person that provides cannabis server education courses and examinations;

P. "cannabis testing laboratory" means a person that samples, collects and tests cannabis products and transports cannabis products for the purpose of testing;

Q. "cannabis training and education program" means a practical or academic curriculum offered by a New Mexico public post-secondary educational institution designed to prepare students for participation in the cannabis industry;

R. "commercial cannabis activity":

(1) means the cultivation, production, possession, manufacture, storage, testing, researching, labeling, transportation, couriering, purchase for resale, sale or consignment of cannabis products; and

(2) does not include activities related only to the medical cannabis program, to cannabis training and education programs or to the personal cultivation or use of cannabis;

S. "consumer" means a person twenty-one years of age or older who purchases, acquires, owns, possesses or uses a cannabis product for a purpose other than resale;

T. "contaminant" means pesticides and other foreign material, such as hair, insects or other similar adulterants, in harvested cannabis;

U. "controlling person":

(1) means a person that controls a financial or voting interest of ten percent or more of, or an officer or board member of, a cannabis establishment; and

(2) does not include a bank or licensed lending institution;



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V. "cultivation" means any activity involving the planting, growing, harvesting, drying, curing, grading or trimming of cannabis;

W. "department" means the regulation and licensing department;

X. "director" means the director of the division;

Y. "division" means the cannabis control division of the department;

Z. "dry weight basis", when used in the context of regulation of commercial cannabis activity, means a process by which delta-9-tetrahydrocannabinol concentration is measured relative to the aggregate weight of all parts of the plant genus Cannabis, whether growing or not, including the leaves of the plant, the flowers and buds of the plant, the seeds of the plant, the resin of the plant and the stalks of the plant at the point of harvest by a licensee and with no moisture added to the harvested plant;

AA. "facility" means a building, space or grounds licensed for the production, possession, testing, manufacturing or distribution of cannabis, cannabis extracts or cannabis products;

BB. "financial consideration" means value that is given or received, directly or indirectly, through sales, barter, trade, fees, charges, dues, contributions or donations;

CC. "homegrown" or "homemade" means grown or made for purposes that are not dependent or conditioned upon the provision or receipt of financial consideration;

DD. "household" means a housing unit and includes any place in or around the housing unit at which an occupant of the housing unit produces, manufactures, keeps or stores homegrown cannabis or homemade cannabis products;

EE. "immature cannabis plant" means a cannabis plant that has no observable flowers or buds;

FF. "industry standards" means the prevailing customary standards of business practice in the cannabis industry in jurisdictions within the United States;

GG. "integrated cannabis microbusiness" means a person that is authorized to conduct one or more of the following:

(1) production of cannabis at a single licensed premises; provided that the person shall not possess more than two hundred total mature cannabis plants at any one time;

(2) manufacture of cannabis products at a single licensed premises;

(3) sales and transportation of only cannabis products produced or manufactured by that person;

(4) operation of only one retail establishment; and

(5) couriering of cannabis products to qualified patients, primary caregivers or reciprocal participants or directly to consumers;

HH. "licensed premises" means a location that includes:

(1) all enclosed public and private areas at the location that are used in the business and includes offices, kitchens, restrooms and storerooms;

(2) all areas outside of a building that are specifically included in the license for the production, manufacturing, wholesale sale or retail sale of cannabis products; and

(3) with respect to a location that is specifically licensed for the production of cannabis outside of a building, the entire unit of land that is created by subsection or partition of land that the licensee owns, leases or has a right to occupy;

II. "local jurisdiction" means a municipality, home rule municipality or county;

JJ. "manufacture" means to compound, blend, extract, infuse, package or otherwise prepare a cannabis product;

KK. "medical cannabis" means cannabis products used by a qualified patient or reciprocal participant in accordance with the Lynn and Erin Compassionate Use Act [Chapter 26, Article 2B NMSA 1978];

LL. "medical cannabis program" means the program created pursuant to the Lynn and Erin Compassionate Use Act;

MM. "medical cannabis registry" means the system by which the department of health approves or denies applications and issues and renews registry identification cards for qualified patients;

NN. "primary caregiver" means a resident of New Mexico who is at least eighteen years of age and who is responsible for managing the well-being of a qualified patient with respect to the medical use of cannabis pursuant to the Lynn and Erin Compassionate Use Act;



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OO. "public place" means a place to which the general public has access and includes hallways, lobbies and other parts of apartment houses and hotels that do not constitute rooms or apartments designed for actual residence; highways; streets; schools; places of amusement; parks; playgrounds; and places used in connection with public passenger transportation;

PP. "qualified patient" means a resident of New Mexico who holds a registry identification card pursuant to the Lynn and Erin Compassionate Use Act;

QQ. "reciprocal participant" means a person who is not a resident of New Mexico and who holds proof of enrollment by a governmental regulatory authority to participate in the medical cannabis program of another state of the United States, the District of Columbia or a territory or commonwealth of the United States in which the person resides or a person who holds proof of enrollment by a governmental regulatory authority of a New Mexico Indian nation, tribe or pueblo to participate in its medical cannabis program;

RR. "retail establishment" means a location at which cannabis products are sold to qualified patients, primary caregivers and reciprocal participants and directly to consumers;

SS. "superintendent" means the superintendent of regulation and licensing;

TT. "unprocessed" means unaltered from an original, raw or natural state; and

UU. "vertically integrated cannabis establishment" means a person that is authorized to act as any of the following:

(1) a cannabis courier;

(2) a cannabis manufacturer;

(3) a cannabis producer; and

(4) a cannabis retailer.

**History: Laws 2021 (1st S.S.), ch. 4, § 2.** **Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-3. Division; powers and duties; rulemaking; advisory committee created; membership; duties.

A. The "cannabis control division" is created in the department to administer the Cannabis Regulation Act and the licensing provisions of the Lynn and Erin Compassionate Use Act [Chapter 26, Article 2B NMSA 1978] and rules promulgated in accordance with those acts. Rules shall be adopted and promulgated as provided in the State Rules Act [Chapter 14, Article 4 NMSA 1978].

B. No later than January 1, 2022, the division shall promulgate rules that are consistent with industry standards necessary for the division to carry out its duties pursuant to the Cannabis Regulation Act as follows:

(1) qualifications and procedures for licensure; provided that qualifications shall be directly and demonstrably related to the operation of the applicable cannabis establishment;

(2) security requirements for a cannabis establishment;

(3) requirements related to:

(a) inspection and monitoring of a cannabis establishment;

(b) a cannabis establishment's recordkeeping and tracking of cannabis from seed until sale;

(c) prevention of the sale or diversion of cannabis products in commercial cannabis activity to a person under the age of twenty-one;

(d) labeling of cannabis products packaged, sold or distributed by a cannabis establishment; and

(e) language for labels of cannabis products regarding potential adverse effects;

(4) rules providing that:

(a) a person who is twenty-one years old or older shall not purchase more than two ounces of cannabis, sixteen grams of cannabis extract and eight hundred milligrams of edible cannabis at one time; and

(b) as to commercial cannabis activity: 1) a consumer shall not possess more than two ounces of cannabis, sixteen grams of cannabis extract and eight hundred milligrams of edible



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cannabis outside the consumer's private residence; 2) any cannabis in excess of the amounts described in Item 1) of this subparagraph shall be stored in the person's residence and shall not be visible from a public place; and 3) the division shall not limit the amount of tetrahydrocannabinol concentration in a cannabis product; provided that the division may adopt requirements for apportionment and packaging of cannabis products;

(5) rules on advertising and marketing of cannabis products;

(6) rules on how a licensee may display cannabis products for sale;

(7) procedures that promote and encourage full participation in the cannabis industry governed by the Cannabis Regulation Act by representatives of communities that have been disproportionately harmed by rates of arrest through the enforcement of cannabis prohibitions in law and policy, rural communities likely to be impacted by cannabis production and agricultural producers from economically disadvantaged communities;

(8) procedures that promote and encourage racial, ethnic, gender and geographic diversity and New Mexico residency among license applicants, licensees and cannabis industry employees;

(9) rules for a certification process to identify cannabis products for consumers from integrated cannabis microbusinesses or cannabis producer microbusinesses or owned by representatives of communities that have been disproportionately harmed by rates of arrest through the enforcement of cannabis prohibitions in law and policy and underserved communities that include tribal, acequia, land grant-merced and other rural historic communities;

(10) in consultation with the economic development department, development of a technical assistance resource guide for rural New Mexico residents who are seeking to establish vertically integrated cannabis establishments, cannabis producer microbusinesses or integrated cannabis microbusinesses;

(11) in consultation with the department of environment, rules to establish:

(a) health and safety standards applicable to the research, production and manufacture of cannabis products;

(b) standards for food and product safety applicable to cannabis products; and

(c) which additives are approved for and prohibited from inclusion in cannabis products; provided that nicotine shall be prohibited;

(12) in consultation with the New Mexico department of agriculture and the department of environment, rules to establish standards for quality control, inspection and testing of cannabis products for potency and contaminants, except for cannabis produced or harvested for research purposes and not for ingestion; provided that all such rules and standards shall be consistent with the rules and standards for testing of medical cannabis products; and

(13) in consultation with the state fire marshal's office of the homeland security and emergency management department, rules with regard to health and safety.

C. No later than January 1, 2022, the division shall promulgate rules that are consistent with industry standards relating to cannabis training and education programs, including:

(1) qualifications and procedures for licensure; and

(2) physical security, cybersecurity and, if applicable, security of information collected under the federal Health Insurance Portability and Accountability Act of 1996 requirements.

D. No later than January 1, 2022, the division shall promulgate rules in consultation with the New Mexico department of agriculture, the department of environment and the office of the state engineer to establish:

(1) environmental protections; and

(2) protocols to ensure licensees' compliance with state and local laws and ordinances governing food and product safety, occupational health and safety, environmental impacts, natural resource protection, water use and quality, water supply, hazardous materials, pesticide use and wastewater discharge.

E. No later than January 1, 2022, the division shall adopt rules in consultation with the department of health to establish standards and determinations on requirements for reserving cannabis products for sale to qualified patients, primary caregivers and reciprocal participants.

F. The division shall collect and publish annually on the division's website, and present to the appropriate interim committee of the legislature, a report describing demographic data on license applicants, controlling persons and employees of cannabis establishments, including race,



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ethnicity, gender, age, residential status and whether the applicants, persons, employees or the locations where the cannabis products are produced, manufactured, sold, tested or researched are located in an underserved rural community, including tribal, acequia, land grant-merced or other rural historic communities.

G. The "cannabis regulatory advisory committee" shall be created no later than September 1, 2021. The committee shall advise the division on the development of rules pursuant to the Cannabis Regulation Act, including best practices and the promotion of economic and cultural diversity in licensing and employment opportunities and protection of public health and safety while ensuring a regulated environment for commercial cannabis activity that does not impose unreasonable barriers that would perpetuate, rather than reduce and eliminate, the illicit market for cannabis. A person appointed to the cannabis regulatory advisory committee shall not hold any ownership interest or investment in a licensed person pursuant to the Cannabis Regulation Act; provided that the superintendent may appoint a person who holds an ownership interest in a licensed person as a nonvoting member. The committee shall consist of the following members:

(1) the chief public defender or the chief public defender's designee;

(2) a district attorney appointed by the New Mexico district attorney association;

(3) a municipal police chief appointed by the New Mexico association of chiefs of police;

(4) a county sheriff appointed by the executive director of the New Mexico association of counties; and

(5) one member for each of the following groups or professional qualifications, appointed by the superintendent:

(a) a cannabis policy advocacy organization;

(b) a labor organization;

(c) a qualified patient;

(d) a state or local agency with relevant expertise as the director and the superintendent deem appropriate;

(e) an Indian nation, tribe or pueblo with relevant expertise as the director and the superintendent deem appropriate;

(f) expertise in public health;

(g) expertise in regulating commercial activity for adult-use intoxicating substances;

(h) expertise and experience in cannabis laboratory science;

(i) expertise in environmental science;

(j) expertise in small business development;

(k) expertise in water resources;

(l) expertise in other relevant areas as the director and the superintendent deem appropriate; and

(m) previous experience as a cannabis retailer, cannabis producer or cannabis manufacturer and who is a nonvoting member.

H. The cannabis regulatory advisory committee shall elect from among its members a chair and such other officers as it deems necessary. The committee shall meet at the call of the chair, the director or the superintendent. A majority of members currently serving constitutes a quorum for the conduct of business. Members shall serve at the pleasure of the superintendent.

I. Public voting members of the cannabis regulatory advisory committee are entitled to receive per diem and mileage as provided for state employees pursuant to the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

J. The division shall:

(1) monitor the supply and demand of cannabis products produced in New Mexico by licensees and present annually to the appropriate interim committee of the legislature the impacts of supply on illicit cannabis products markets and adequate supply of cannabis products for qualified patients and reciprocal participants;

(2) request the department of public safety to enforce the provisions of the Cannabis Regulation Act as deemed necessary; and

(3) undertake studies and conduct courses of instruction for division employees that will improve the operations of the division and advance its purposes.



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**History: Laws 2021 (1st S.S.), ch. 4, § 3.**

**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

**Temporary provisions.** — Laws 2021 (1st S.S.), ch. 4, § 70 provided:

A. On June 29, 2021, all functions, personnel, money, appropriations, records, furniture, equipment and other property of the department of health's medical cannabis program that are not part of the department's medical cannabis registry powers and duties shall be transferred to the regulation and licensing department.

B. On June 29, 2021, all contractual obligations and other agreements of the department of health as they pertain to the department's medical cannabis program that are not part of the department's medical cannabis registry powers and duties are binding on the regulation and licensing department.

C. Statutory references to the department of health that pertain to the department's medical cannabis program that are not part of the department's medical cannabis registry powers and duties shall be deemed to be references to the cannabis control division of the regulation and licensing department.

D. On June 29, 2021, any unexpended or unencumbered balance in the medical cannabis fund is transferred to the cannabis regulation fund.

E. Except to the extent any administrative rules are inconsistent with the provisions of this act, any administrative rules adopted by an officer, agency or other entity whose responsibilities have been transferred pursuant to the provisions of this act to another officer, agency or other entity remain in force until amended by the officer, agency or other entity to which the responsibility for the adoption of the rules has been transferred. To the extent any administrative rules are inconsistent with the provisions of this act, such rules are null and void.

## 26-2C-4. Department of health; duties; public health and safety advisory committee.

A. The department of health shall monitor emerging scientific and medical information relevant to the health effects associated with the use of cannabis products and shall monitor changes in cannabis product use, opioid use and alcohol use patterns for children and adults within the state, broken down by county, race and ethnicity.

B. No later than September 1, 2021, the secretary of health shall appoint a "public health and safety advisory committee" composed of no more than fifteen professionals with expertise related to cannabis products through work, training or research in public health, epidemiology, medicine, medical toxicology, poison control, road safety, occupational safety, environmental safety and emergency medicine.

C. Beginning December 1, 2024, the public health and safety advisory committee shall provide to the legislature, and the department of health shall publish on its website, an annual report on the health effects of legalizing cannabis products for adult use. The report shall include the following elements relating to cannabis product use and, as applicable, the demographics of persons who are the subject of an element:

(1) child access;
(2) road safety and driving while impaired;
(3) workplace safety;
(4) the percentage of emergency room visits and outcomes;
(5) educational needs for children and adults;
(6) consumer and product safety;
(7) the percentage of poison control center calls; and
(8) the impact of cannabis use on rates of alcohol, opioid and other substance abuse.

D. In consultation with qualified patients and primary caregivers, the department of health shall publish an annual assessment report that shall include at a minimum an evaluation of the affordability and accessibility of medical cannabis.

E. Public members of the public health and safety advisory committee are entitled to per diem and mileage as provided for state employees pursuant to the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

**History: Laws 2021 (1st S.S.), ch. 4, § 4.**

**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

**Temporary provisions.** — Laws 2021 (1st S.S.), ch. 4, § 70 provided:

A. On June 29, 2021, all functions, personnel, money, appropriations, records, furniture, equipment and other property of the department of health's medical cannabis program that are not part of the department's medical cannabis registry powers and duties shall be transferred to the regulation and licensing department.

B. On June 29, 2021, all contractual obligations and other agreements of the department of health as they pertain to the department's medical cannabis program that are not part of the department's medical cannabis registry



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powers and duties are binding on the regulation and licensing department.

C. Statutory references to the department of health that pertain to the department's medical cannabis program that are not part of the department's medical cannabis registry powers and duties shall be deemed to be references to the cannabis control division of the regulation and licensing department.

D. On June 29, 2021, any unexpended or unencumbered balance in the medical cannabis fund is transferred to the cannabis regulation fund.

E. Except to the extent any administrative rules are inconsistent with the provisions of this act, any administrative rules adopted by an officer, agency or other entity whose responsibilities have been transferred pursuant to the provisions of this act to another officer, agency or other entity remain in force until amended by the officer, agency or other entity to which the responsibility for the adoption of the rules has been transferred. To the extent any administrative rules are inconsistent with the provisions of this act, such rules are null and void.

## 26-2C-5. Department of health; duties; transfer of licensing duties.

Except for administration of the medical cannabis registry, the power, duty and authority of the department of health related to the medical cannabis program shall be transferred to the division on the effective date of the Cannabis Regulation Act.

**History: Laws 2021 (1st S.S.), ch. 4, § 5.**

**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

**Temporary provisions.** — Laws 2021 (1st S.S.), ch. 4, § 70 provided:

A. On June 29, 2021, all functions, personnel, money, appropriations, records, furniture, equipment and other property of the department of health's medical cannabis program that are not part of the department's medical cannabis registry powers and duties shall be transferred to the regulation and licensing department.

B. On June 29, 2021, all contractual obligations and other agreements of the department of health as they pertain to the department's medical cannabis program that are not part of the department's medical cannabis registry powers and duties are binding on the regulation and licensing department.

C. Statutory references to the department of health that pertain to the department's medical cannabis program that are not part of the department's medical cannabis registry powers and duties shall be deemed to be references to the cannabis control division of the regulation and licensing department.

D. On June 29, 2021, any unexpended or unencumbered balance in the medical cannabis fund is transferred to the cannabis regulation fund.

E. Except to the extent any administrative rules are inconsistent with the provisions of this act, any administrative rules adopted by an officer, agency or other entity whose responsibilities have been transferred pursuant to the provisions of this act to another officer, agency or other entity remain in force until amended by the officer, agency or other entity to which the responsibility for the adoption of the rules has been transferred. To the extent any administrative rules are inconsistent with the provisions of this act, such rules are null and void.

## 26-2C-6. Licensing cannabis activities; limitations; medical cannabis legacy licensing; cannabis shortage for medical program.

A. The division shall regulate and administer and may collect fees in connection with the administration of:

(1) commercial cannabis activity and licensing related to commercial cannabis activity;

(2) the medical cannabis program, except for the medical cannabis registry; and

(3) all aspects of cannabis relating to cannabis training and education programs.

B. The division shall follow the provisions of the Uniform Licensing Act [Chapter 61, Article 1 NMSA 1978] when licensing or permitting the following:

(1) cannabis consumption areas;

(2) cannabis couriers;

(3) cannabis manufacturers;

(4) cannabis producer microbusinesses;

(5) cannabis producers;

(6) cannabis research laboratories;

(7) cannabis retailers;

(8) cannabis servers;

(9) cannabis testing laboratories;

(10) cannabis training and education programs;

(11) integrated cannabis microbusinesses; and

(12) vertically integrated cannabis establishments.



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C. The division shall include a clear designation on all licenses and permits that indicates whether the license or permit is for medical cannabis activity, commercial cannabis activity or both or for cannabis training and education programs.

D. The division shall issue a license to a cannabis retailer applicant at a discount if the applicant provides documentation of an agreement to accept cannabis products on consignment from a cannabis producer microbusiness or an integrated cannabis microbusiness licensed pursuant the Cannabis Regulation Act.

E. A license is valid for twelve months from the date the license is issued and may be renewed annually, except that a license issued for a cannabis training and education program is valid until terminated by the licensee or suspended or revoked by the division.

F. The director shall not renew a license issued pursuant to the provisions of the Cannabis Regulation Act until the director receives notification from the secretary of taxation and revenue or the secretary's designee that on a certain date:

(1) the licensee is not a delinquent taxpayer; and

(2) there are no unfiled tax returns due from engaging in business authorized by the license.

G. No license shall be transferable or assignable from a licensee to another person. The division shall not allow a person that is licensed as any type of cannabis establishment other than a cannabis research laboratory to hold, directly or indirectly, a cannabis testing laboratory license.

H. Except for verification of age, the division shall not require licensees to request information from consumers or impose any residency requirement upon consumers for the purchase of cannabis products pursuant to the commercial cannabis activity authorized by the Cannabis Regulation Act. The division may require licensees to request information from consumers for the purchase of cannabis products pursuant to the medical cannabis program, which may include the presentation of legal identification issued by an authorized governmental entity or other documents as required by the medical cannabis program.

I. Except as otherwise provided in the Cannabis Regulation Act, the division shall not limit the number of licensed premises a licensee may occupy or operate under a license. Multiple licensees may occupy a single licensed premises, and the division shall not place any restriction or prohibition on the number of licensees occupying a single licensed premises or on the number of licensed premises of a cannabis establishment except as otherwise specifically provided for by the Cannabis Regulation Act. A licensee may conduct any lawful activity or any combination of lawful activities at a licensed premises; provided that the licensee is not a licensee pursuant to the Liquor Control Act [60-3A-1 NMSA 1978]. Smoking in a cannabis consumption area on a licensed premises shall be allowed only if the cannabis consumption area is in a designated smoking area or in a standalone building from which smoke does not infiltrate other indoor workplaces or other indoor public places where smoking is otherwise prohibited pursuant to the Dee Johnson Clean Indoor Air Act [Chapter 24, Article 16 NMSA 1978].

J. Licensees are specifically allowed to conduct other licensed activities, including activities pursuant to the Hemp Manufacturing Act [Chapter 76, Article 24 NMSA 1978], except for sales of alcoholic beverages.

K. A person properly licensed and in good standing pursuant to the Lynn and Erin Compassionate Use Act [Chapter 26, Article 2B NMSA 1978] on the effective date of the Cannabis Regulation Act may continue to operate under that license for medical cannabis until comparable licenses for commercial cannabis activity are available. The division shall determine when retail sales of commercial cannabis products begin, but no later than April 1, 2022. A facility of such a licensee, upon issuance of the applicable cannabis establishment license, shall constitute licensed premises of the licensee and the licensee shall be entitled to continued and uninterrupted operations of the licensed premises. As to activity under the medical cannabis program, the licensee shall continue to operate under rules promulgated for the medical cannabis program until the division promulgates rules for medical cannabis activity, except that a qualified patient, a primary caregiver and a reciprocal participant shall not be prohibited from purchasing and obtaining cannabis products pursuant to the medical cannabis program.

L. To address a shortage of cannabis supply in the medical cannabis program, the division may:



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(1) require all cannabis establishment licensees to ensure that at least ten percent of their cannabis in stock on a monthly basis is designated for sale to qualified patients, primary caregivers and reciprocal participants;

(2) initially take reasonable measures to expeditiously incentivize increased production of cannabis plants to remedy a shortage of cannabis supply in the medical cannabis program;

(3) after having first exhausted measures to increase production of cannabis plants to address the shortage of cannabis supply in the medical cannabis program, exclude commercial cannabis activity from the scope of new licenses issued to initial applicants for a vertically integrated cannabis establishment, cannabis producer, integrated cannabis microbusiness, cannabis producer microbusiness or cannabis manufacturer license, which limitation shall be in force for a period of at least six months; and

(4) require licensees who are licensed to produce cannabis to produce a specified quota of mature cannabis plants to be designated for use in the medical cannabis program; provided that:

(a) the division may require a licensee to devote no more than twenty-five percent of the licensee's cultivated cannabis plants on a monthly basis for use in the medical cannabis program; and

(b) the division may require specific tracking of cannabis plants.

M. As used in this section, "shortage of cannabis supply in the medical cannabis program" means that the average number of cannabis plants in production in the medical cannabis program per qualified patient after the effective date of the Cannabis Regulation Act is substantially less than the average number of cannabis plants in production in the medical cannabis program per qualified patient as of the effective date of the Cannabis Regulation Act, where:

(1) the average number of cannabis plants in production after the effective date of the Cannabis Regulation Act is measured over a period of three consecutive months; and

(2) the average number of cannabis plants in production as of the effective date of the Cannabis Regulation Act is measured over a period of three consecutive months immediately preceding the effective date of the Cannabis Regulation Act.

N. A person who is a member of the New Mexico senate or the New Mexico house of representatives on the effective date of the Cannabis Regulation Act shall not apply for or be granted a license to engage in any commercial cannabis activity prior to July 1, 2026.

**History: Laws 2021 (1st S.S.), ch. 4, § 6.**

**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-7. Commercial cannabis activity licensing; application; issuance and denial of a license.

A. A license issued pursuant to the Cannabis Regulation Act shall not be subject to execution, attachment, a security transaction, liens or receivership.

B. In carrying out its commercial cannabis activity licensing duties, the division shall:

(1) no later than September 1, 2021, accept and begin processing license applications for cannabis producers, cannabis producer microbusinesses and any person properly licensed and in good standing as a licensed cannabis producer pursuant to the Lynn and Erin Compassionate Use Act [Chapter 26, Article 2B NMSA 1978];

(2) no later than January 1, 2022, accept and begin processing license applications for all license types;

(3) require as a condition of licensing pursuant to the Cannabis Regulation Act that the applicant demonstrate that the applicant has a legal right to a commercial water supply, water rights or another source of water sufficient to meet the water needs as determined by the division related to the license as evidenced by documentation from the office of the state engineer of a valid water right or from a water provider that the use of water for cannabis production is compliant with that water provider's rules;

(4) if an applicant applies for a cannabis producer license or a cannabis manufacturer license, in addition to the requirements in Paragraph (3) of this subsection, require that the



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applicant submit a plan to use, or demonstrate to the division that the applicant cannot feasibly use, energy and water reduction opportunities, including:

(a) for a cannabis producer, drip irrigation and water collection;

(b) natural lighting and energy efficiency measures; and

(c) renewable energy generation; and

(5) allow commercial cannabis activity retail sales no later than April 1, 2022 and otherwise allow activities authorized by the Cannabis Regulation Act or the medical cannabis program as of the time of licensure of a licensee, so long as a minimum of twenty-five percent of monthly cannabis sales are to qualified patients, primary caregivers and reciprocal participants or sold wholesale to other licensees that meet or exceed the twenty-five percent sales to qualified patients, primary caregivers and reciprocal participants until December 31, 2022.

C. Once the division deems an application complete, the division has ninety days to issue or deny a license application.

D. The division shall deny an application for an initial license or renewal if:

(1) the application does not include information required by the division; or

(2) the applicant or a controlling person of the applicant has been convicted of an offense that is substantially related to the qualifications, functions or duties of the applicant's business; provided that if the division determines that the applicant or controlling person is otherwise qualified for a license and that issuing a license to the applicant would not compromise public safety, the division shall conduct a thorough review of the conviction, including the nature of the offense, surrounding circumstances and any evidence of the applicant's or controlling person's rehabilitation following the conviction, and based on that review, determine whether the applicant should be issued a license.

E. For purposes of Subsection D of this section, the following are considered substantially related to the qualifications, functions or duties of a person seeking a license:

(1) a felony conviction involving fraud, deceit or embezzlement;

(2) a felony conviction for hiring, employing or otherwise using a person younger than eighteen years of age to:

(a) prepare for sale, transport or carry a controlled substance; or

(b) sell, give away or offer to sell a controlled substance to any person; and

(3) any other offense as determined by the division.

F. A conviction for which the related sentence, including any term of probation or parole, is completed for the possession, use, manufacture, distribution or dispensing or the possession with the intent to manufacture, distribute or dispense cannabis is not considered substantially related to the qualifications, functions or duties of a person seeking a license and shall not be the sole ground on which an application is denied. The division shall comply with the provisions of the Criminal Offender Employment Act [Chapter 28, Article 2 NMSA 1978].

G. The division shall deny an application if an applicant, a controlling person or the premises for which a license is sought does not qualify for licensure pursuant to the Cannabis Regulation Act.

H. The division shall not license a person who has had a license that was issued pursuant to the Cannabis Regulation Act or the Lynn and Erin Compassionate Use Act revoked by the division or the department of health in the three years immediately preceding the date on which the person filed a new application.

I. Unless otherwise provided in the Cannabis Regulation Act, a person whose license has been revoked may reapply for a license after a period of three years. The division may consider all of the circumstances resulting in the revocation in determining whether to issue a new license.

J. The division shall adopt rules providing for submission of an applicant's fingerprints to the federal bureau of investigation to conduct a national criminal history background check and to the department of public safety to conduct a state criminal history check for the following licensees:

(1) cannabis manufacturer;

(2) cannabis producer;

(3) cannabis producer microbusiness;

(4) cannabis research laboratory;

(5) cannabis retailer;



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(6) cannabis testing laboratory;

(7) integrated cannabis microbusiness; and

(8) vertically integrated cannabis establishment.

K. The division shall conduct national criminal history background checks and state criminal history checks on the following:

(1) if an applicant is a limited partnership, each partner of the limited partnership;

(2) if the applicant is a limited liability company, each member of the limited liability company;

(3) if the applicant is a corporation, each director and officer of the corporation; and

(4) any controlling person of the applicant.

L. Arrest record information received from the federal bureau of investigation and the department of public safety shall be confidential, shall not be considered a public record pursuant to the Public Records Act [Chapter 14, Article 3 NMSA 1978] and shall not be disclosed to persons not directly involved in the decision affecting the applicant.

M. Electronic live fingerprint scans may be used when conducting criminal history background checks.

**History: Laws 2021 (1st S.S.), ch. 4, § 7.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-8. Licensees; disciplinary actions; sanctions; civil penalty.

A. A violation of the provisions of the Cannabis Regulation Act by a licensee is grounds for disciplinary action.

B. The division may:

(1) impose an intermediate sanction established by rule;

(2) impose a directed plan of correction;

(3) assess a civil monetary penalty established by rule; provided that a civil monetary penalty shall not exceed ten thousand dollars ($10,000) per violation; and provided further that penalties and interest recovered pursuant to the Cannabis Regulation Act on behalf of the state shall be remitted to the state treasurer for deposit in the current school fund; or

(4) suspend or revoke the license.

C. The division shall promulgate rules specifying the criteria for imposition of sanctions and civil monetary penalties.

D. The provisions of this section do not apply to occupational health and safety rules promulgated pursuant to Section 3 [26-2C-3 NMSA 1978] of the Cannabis Regulation Act.

E. A person aggrieved by an action taken by the division pursuant to this section may request and receive a hearing with the superintendent for the purpose of reviewing the action in accordance with the Uniform Licensing Act [Chapter 61, Article 1 NMSA 1978].

**History: Laws 2021 (1st S.S.), ch. 4, § 8.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-9. Application and licensing fees.

A. Every application for the issuance or renewal of the following licenses shall be accompanied by a license fee in the following specified amounts:

(1) a cannabis courier license, up to one thousand five hundred dollars ($1,500) per year and an additional fee of up to one thousand dollars ($1,000) per year for each additional licensed premises of the licensee;

(2) a cannabis testing laboratory license, up to two thousand five hundred dollars ($2,500) per year and an additional fee of up to one thousand dollars ($1,000) per year for each additional licensed premises of the licensee;



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(3) a cannabis manufacturer license, two thousand five hundred dollars ($2,500) per year and an additional fee of one thousand dollars ($1,000) per year for each additional licensed premises of the licensee;

(4) a cannabis producer license, two thousand five hundred dollars ($2,500) per year and an additional fee of one thousand dollars ($1,000) per year for each additional licensed premises of the licensee;

(5) a cannabis retailer license, two thousand five hundred dollars ($2,500) per year and an additional fee of one thousand dollars ($1,000) per year for each additional licensed premises of the licensee;

(6) a cannabis research laboratory license, two thousand five hundred dollars ($2,500) per year and an additional fee of one thousand dollars ($1,000) per year for each additional licensed premises of the licensee;

(7) a vertically integrated cannabis establishment license, seven thousand five hundred dollars ($7,500) per year and an additional fee of one thousand dollars ($1,000) per year for each licensed premises of the licensee;

(8) a cannabis producer microbusiness license, up to one thousand dollars ($1,000) per year;

(9) an integrated cannabis microbusiness license, up to two thousand five hundred dollars ($2,500) per year and an additional fee of five hundred dollars ($500) per year for each licensed premises of the licensee; and

(10) a cannabis consumption area, up to two thousand five hundred dollars ($2,500) per year.

B. Except for cannabis producer microbusinesses and integrated cannabis microbusinesses, a licensee cultivating cannabis plants shall be assessed an additional annual fee no greater than fifty dollars ($50.00) per mature cannabis plant at the time of licensing or renewal.

C. A licensee may increase the number of mature plants licensed at the time of renewal and one other time per year in increments of five hundred mature plants. Fees may be prorated for the remainder of the licensing year.

D. The initial application fee and the annual renewal fee for a vertically integrated cannabis establishment license shall not exceed one hundred twenty-five thousand dollars ($125,000) for a license for both medical cannabis activity and commercial cannabis activity. The initial application fee and the annual renewal fee for a license or renewal of a license that authorizes only medical cannabis activity shall be one-half the fee applicable to a license authorizing both medical cannabis activity and commercial cannabis activity.

E. If a cannabis producer microbusiness or an integrated cannabis microbusiness enters into a business arrangement with another licensee with the purpose or having the effect of evading the limitations of the licensee's license, such licensee shall not be eligible for the lower fee prescribed in Subsection A of this section and shall pay the per-plant fee prescribed in Subsection B of this section.

F. The division shall collect all renewal fees, including the renewal fees for all licensed premises, at the time of renewal of a license.

G. The fee for the issuance of a cannabis server permit shall not exceed thirty-five dollars ($35.00).

H. The division shall deposit all fees collected pursuant to the Cannabis Regulation Act in the cannabis regulation fund.

**History: Laws 2021 (1st S.S.), ch. 4, § 9.**

**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-10. Cannabis training and education program licensing; sanctions.

A. The division shall begin licensing cannabis training and education programs no later than January 1, 2022.



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B. The division may suspend a license for repeated violations of the same serious and substantial rule promulgated pursuant to the Cannabis Regulation Act pertaining to public health and safety.

**History: Laws 2021 (1st S.S.), ch. 4, § 10.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-11. Cannabis server permits; cannabis servers; permit required; applications; education program approval required; issuance or denial of a permit or approval; penalties.

A. The division shall promulgate rules consistent with this section and industry standards for issuance of a cannabis server permit and licenses for a cannabis consumption area. A cannabis research laboratory or an employee of the laboratory is not required to obtain or possess a cannabis server permit while performing activities authorized pursuant to a cannabis research laboratory.

B. The division shall issue cannabis server permits to persons twenty-one years of age or older who satisfy the requirements of this section and rules promulgated by the division. An applicant shall provide proof of satisfactory completion of a program provided by a cannabis server permit education provider approved by the division. A person shall not be employed as a cannabis server on a licensed premises unless that person obtains a cannabis server permit within thirty days of employment.

C. The cannabis server education program curriculum shall include the following subjects:

(1) the effect cannabis products have on the body and behavior, including the effect on a person's ability to operate a motor vehicle when under the influence of cannabis products;

(2) the effect cannabis products have on a person when used in combination with alcohol or legal or illegal drugs;

(3) state laws concerning cannabis licensure, cannabis liability issues and driving under the influence of cannabis;

(4) methods of recognizing problem cannabis product users and techniques for intervening with problem cannabis product users;

(5) methods of identifying false driver's licenses and other documents used as evidence of age and identity to prevent the sale of cannabis products to a person under twenty-one years of age pursuant to the Cannabis Regulation Act; and

(6) harm reduction practices related to cannabis use.

D. A cannabis server permit is the property of the state and shall be immediately returned to the division upon suspension or revocation or denial of renewal of a permit.

E. Cannabis server permits shall be valid for a period of three years from the date the permit is issued and may be renewed upon providing proof that the permit holder has successfully completed up to four and one-half hours of continuing education and an examination as determined by the division.

F. In addition to any other penalties provided by law, the following penalties may be imposed for sales, service or dispensing a cannabis product to a person under twenty-one years of age in violation of the provisions of the Cannabis Regulation Act or rules of the division:

(1) the division may suspend a cannabis server permit for a period of thirty days if the director finds that the cannabis server is guilty of a first offense of selling, serving or dispensing a cannabis product to a person under twenty-one years of age;

(2) the division shall suspend a cannabis server permit for a period of one year when the division finds that the cannabis server is guilty of a second offense of selling, serving or dispensing a cannabis product to a person under twenty-one years of age in violation of the Cannabis Regulation Act arising separately from the incident giving rise to the cannabis server's first offense;

(3) the division shall permanently revoke a cannabis server permit when it finds that the cannabis server is guilty of a third offense of selling, serving or dispensing a cannabis product to



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a person under twenty-one years of age in violation of the Cannabis Regulation Act arising separately from the incidents giving rise to the cannabis server's first and second offenses; and

(4) no person whose cannabis server permit is suspended pursuant to the provisions of this section shall offer, sell, serve or dispense a cannabis product as part of commercial cannabis activity in a cannabis consumption area during the period of suspension.

**History: Laws 2021 (1st S.S.), ch. 4, § 11.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-12. Local control.

A. A local jurisdiction may:

(1) adopt time, place and manner rules that do not conflict with the Cannabis Regulation Act or the Dee Johnson Clean Indoor Air Act [Chapter 24, Article 16 NMSA 1978], including rules that reasonably limit density of licenses and operating times consistent with neighborhood uses; and

(2) allow for the smoking, vaporizing and ingesting of cannabis products within an indoor or outdoor cannabis consumption area if:

(a) unless licensed pursuant to the Lynn and Erin Compassionate Use Act [Chapter 26, Article 2B NMSA 1978], access to the cannabis consumption area is restricted to persons twenty-one years of age and older; and

(b) the cannabis establishment or integrated cannabis microbusiness is located at a minimum distance from a school or daycare center as determined by the local jurisdiction, but which minimum distance shall not be set at any more than three hundred feet from a school or daycare center that was in existence at the time the establishment or microbusiness was licensed.

B. A local jurisdiction shall not:

(1) prevent transportation of cannabis products on public roads by a licensee that transports cannabis products in compliance with the Cannabis Regulation Act;

(2) completely prohibit the operation of a licensee;

(3) prohibit or limit signage attached to or located on licensed premises that identifies the premises as a cannabis establishment;

(4) require a licensed premises or a cannabis consumption area to be any more than three hundred feet from a school or daycare center that was in existence at the time the cannabis establishment or integrated cannabis microbusiness was licensed;

(5) require an existing licensee at a licensed premises to relocate; or

(6) prohibit a person from producing homegrown cannabis as provided for in the Cannabis Regulation Act.

**History: Laws 2021 (1st S.S.), ch. 4, § 12.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-13. Licensee protections.

A. Conduct by a licensee or a licensee representative that is allowed pursuant to a license and conduct by a person that allows property to be used by a licensee or a licensee representative for conduct allowed pursuant to a license is lawful, not a violation of state or local law and is not a basis for seizure or forfeiture of any property or assets under state or local law.

B. The state or a local jurisdiction shall not impose a criminal, civil or administrative penalty on a licensee, a licensee representative or a person that allows property to be used by a licensee or a licensee representative pursuant to a license, solely for conduct allowed pursuant to a license.

**History: Laws 2021 (1st S.S.), ch. 4, § 13.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.



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## 26-2C-14. Protection of underage persons; providing cannabis products to minors; penalties.

A. Except as allowed pursuant to the Cannabis Regulation Act, it is a violation of that act for a person, including a person licensed pursuant to the provisions of that act, or an employee, agent or lessee of that person, if the person knows or has reason to know that the person is violating the provisions of this section, to knowingly and intentionally:

(1) sell, serve or give cannabis products to a person under twenty-one years of age or allow a person under twenty-one years of age to consume cannabis products on the licensed premises;

(2) buy cannabis products for or procure the sale or service of cannabis products to a person under twenty-one years of age;

(3) deliver cannabis products to a person under twenty-one years of age; or

(4) aid or assist a person under twenty-one years of age to buy, otherwise procure or be served cannabis products.

B. A licensee shall not employ a person younger than twenty-one years of age to engage in a commercial cannabis activity.

C. The division shall suspend or revoke the license and may fine the licensee in an amount not to exceed ten thousand dollars ($10,000), or both, when the division finds that a licensee or the licensee's employee or agent knowingly has sold, served or given any cannabis product to a person under twenty-one years of age.

D. The establishment of all of the following facts by a licensee prosecuted for a violation of Subsection D of this section and a cannabis server for a violation of Subsection F of Section 11 [26-2C-11 NMSA 1978] of the Cannabis Regulation Act shall constitute a defense:

(1) that the purchaser falsely represented in writing; by producing a driver's license bearing the purchaser's photograph; by producing a photographic identification card issued by the motor vehicle division of the taxation and revenue department; or by producing a similar identification card issued pursuant to the laws of this state, another state, the federal government or the government of an Indian nation, tribe or pueblo that the person was twenty-one years of age or older;

(2) that the purchaser's appearance was such that an ordinary, prudent person would believe that the purchaser was twenty-one years of age or older; and

(3) that the sale was made in good faith, relying upon the purchaser's false written representation, driver's license or identification card produced as provided in Paragraph (1) of this subsection, and with the reasonable belief that the purchaser was actually twenty-one years of age or older.

E. Nothing in this section shall be construed or interpreted to prevent:

(1) the division from enforcing its rules against a licensee;

(2) a state agency from enforcing a law or rule that does not conflict with the Cannabis Regulation Act or rules promulgated pursuant to that act; or

(3) a local jurisdiction from enforcing a local ordinance that does not conflict with the Cannabis Regulation Act or rules promulgated pursuant to that act.

**History: Laws 2021 (1st S.S.), ch. 4, § 14.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-15. Transport via courier.

A. A vertically integrated cannabis establishment, cannabis retailer or integrated cannabis microbusiness may courier cannabis products.

B. A courier may accept payment for services using any legal method of payment or payment on delivery.

**History: Laws 2021 (1st S.S.), ch. 4, § 15.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.



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## 26-2C-16. Packaging and labeling.

Before sale or transport via cannabis courier of a cannabis product, the cannabis product shall be labeled and packaged as provided in Section 17 [26-2C-17 NMSA 1978] of the Cannabis Regulation Act.

**History: Laws 2021 (1st S.S.), ch. 4, § 16.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-17. Cannabis products; packaging and labeling; division rulemaking.

A. Cannabis or cannabis extract included in a cannabis product that is manufactured in compliance with applicable law is not considered to be an adulterant under state law.

B. The division shall promulgate rules consistent with industry standards for cannabis products that establish labeling and packaging requirements, including that:

(1) packages shall be resealable, child-resistant, compostable and recyclable or made from recycled materials;

(2) packages and labels shall not be designed to be appealing to a child; and

(3) labels shall include:

(a) for a package containing only cannabis leaf or flower, the net weight of cannabis in the package;

(b) identification of the licensee or licensees that produced or manufactured the cannabis product, the date on which the cannabis was harvested, the type of cannabis product and the date on which the cannabis product was manufactured and packaged;

(c) potency and pesticide use;

(d) a list of pharmacologically active ingredients;

(e) for cannabis products containing non-cannabis ingredients, a list of all ingredients and a disclosure of nutritional information for the product or cannabis extract disclosed in the same manner required under federal law for nutritional labeling for food for human consumption;

(f) a warning if nuts or other known allergens are used in the item or in its manufacture;

(g) a logo designed by the division that is distinctive in design, color, size and location such that the logo notifies a reasonable person that the package contains cannabis;

(h) a warning of possible adverse effects of consumption and the New Mexico poison and drug information center phone number;

(i) an expiration date; and

(j) other information as required by rules promulgated pursuant to the Cannabis Regulation Act.

**History: Laws 2021 (1st S.S.), ch. 4, § 17.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-18. Testing cannabis products; health and safety of employees.

A. A cannabis testing laboratory's testing of cannabis products shall comply with the requirements set forth in applicable law and rules.

B. In consultation with the department of environment and consistent with industry standards, the division shall promulgate rules to:

(1) ensure that testing of cannabis products occurs prior to distribution to cannabis retailers or sales by integrated cannabis microbusinesses;

(2) specify how often licensees shall test cannabis products;

(3) specify which persons bear the cost of testing cannabis products and medical cannabis;



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(4) provide for recordkeeping;

(5) establish chain of custody protocols for testing sample transportation;

(6) ensure that testing samples are transported and stored in a manner that prevents degradation, contamination, tampering or diversion;

(7) specify protocols for testing sample collection that ensure accurate test results, including requiring that testing samples be collected by laboratory staff trained in testing sample collection; and

(8) require destruction of a tested batch of cannabis products if the testing samples from the tested batch indicate noncompliance with applicable health and safety standards promulgated by the division, unless remedial measures can bring the cannabis products into compliance with the standards or the cannabis products can be used for research purposes.

C. Beginning no later than April 1, 2022, the division shall identify, in consultation with the department of environment, a set of updated certified reference materials for laboratory testing to be measured against.

D. The division shall work cooperatively with the department of environment to implement inspection of cannabis establishments to ensure the health and safety of employees in accordance with the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] and to determine compliance with rules promulgated by the environmental improvement board.

**History: Laws 2021 (1st S.S.), ch. 4, § 18.**

**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-19. Researching cannabis; recordkeeping.

A. A cannabis research laboratory's research of cannabis shall comply with the requirements set forth in applicable law and rules.

B. The division shall develop rules and procedures consistent with industry standards to provide for recordkeeping to ensure that cannabis products are not removed from the cannabis research laboratory premises.

**History: Laws 2021 (1st S.S.), ch. 4, § 19.**

**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-20. Advertising and marketing restrictions.

The division shall promulgate rules consistent with industry standards that:

A. prohibit the advertisement and marketing of cannabis products:

(1) on radio, television or other broadcast media, internet pop-ups and mass transit vehicles; provided that the division shall not prohibit advertising and marketing to:

(a) subscribers of subscription-based radio, television or other broadcast media who are twenty-one years of age or older; or

(b) persons twenty-one years of age or older who have solicited the advertising or marketing;

(2) that are false, deceptive or misleading, including making unproven health benefit claims;

(3) that are on billboards, posters, handbills or other visual media that are located or can be viewed within three hundred feet of a school, daycare center or church;

(4) that depict consumption by children or other persons who appear to be younger than twenty-one years of age;

(5) that use predatory marketing and advertising practices targeting minors; or

(6) that are designed using cartoon characters or to mimic any other product brand; and

B. require:

(1) all advertisements and marketing to accurately and legibly identify all persons responsible for its content; and



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(2) advertisements in print and digital communications to be placed only where the audience is reasonably expected to be twenty-one years of age or older as determined by reliable, current audience composition data.

**History: Laws 2021 (1st S.S.), ch. 4, § 20.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-21. Contracts.

A contract related to the operation of a license is enforceable, and a contract entered into by a licensee or a licensee representative for conduct allowed pursuant to a cannabis establishment license or entered into by a person who allows property to be used by a licensee or a licensee representative for conduct allowed pursuant to a license shall not be deemed unenforceable on the basis that the conduct allowed pursuant to the license is prohibited by federal law.

**History: Laws 2021 (1st S.S.), ch. 4, § 21.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-22. Provision of professional services.

An attorney, accountant, insurance agent, real estate agent, security guard or other person engaged in a profession subject to state licensure shall not be subject to disciplinary action by a professional association, a state professional board or a state licensing entity because the professional provides professional services or assistance to prospective or licensed cannabis establishments or another person in connection with activity that the professional reasonably believes complies with the Cannabis Regulation Act and rules promulgated pursuant to that act.

**History: Laws 2021 (1st S.S.), ch. 4, § 22.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-23. Medical cannabis provisions unaffected.

Nothing in the Cannabis Regulation Act shall be construed to limit a privilege or right of a qualified patient, a primary caregiver or a reciprocal participant participating in the medical cannabis program or the use, dispensing, possession, prescribing, storage or transport of a prescription drug containing cannabis that is approved pursuant to the Federal Food, Drug, and Cosmetic Act.

**History: Laws 2021 (1st S.S.), ch. 4, § 23.**
**Cross references.** — For the Federal Food, Drug and Cosmetic Act, *see* 21 U.S.C.S.
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-24. Protections for the use of cannabis.

A. Conduct allowed pursuant to the Cannabis Regulation Act shall not in itself constitute grounds for a holder of a professional or occupational license to be subject to professional discipline for providing advice or services related to cannabis establishments or applications to operate cannabis establishments on the basis that cannabis is illegal under federal law.

B. An applicant for a professional or occupational license shall not be denied a license based solely on previous employment related to cannabis establishments.

C. A person shall not be denied parental rights or custody of or visitation with a minor child by the state or local government based solely on conduct that is lawful pursuant to the Cannabis



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Regulation Act. Nothing in this subsection prevents law enforcement, the children, youth and families department or the courts from acting in the best interests of the minor child.

D. A person currently under parole, probation or other state supervision or released awaiting trial or other hearing shall not be punished or otherwise penalized based solely on conduct that is lawful pursuant to the Cannabis Regulation Act unless prohibition on the use or possession of cannabis has been a specific condition of parole, probation or other state supervision or release awaiting trial or other hearing.

E. A person shall not be denied eligibility in public assistance programs or denied health care based solely on conduct that is lawful pursuant to the Cannabis Regulation Act unless required by federal law.

**History: Laws 2021 (1st S.S.), ch. 4, § 24.**

**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-25. Personal use of cannabis.

A. The following conduct is lawful for a person who is twenty-one years of age or older and shall not constitute grounds for detention, search or arrest of a person or search of property, and cannabis products that relate to the conduct are not contraband or subject to seizure or forfeiture pursuant to the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978] or the Forfeiture Act [Chapter 31, Article 27 NMSA 1978]:

(1) possessing, using, being under the influence of, displaying, purchasing, obtaining or transporting not more cannabis than authorized by the Cannabis Regulation Act or the medical cannabis program;

(2) possessing in excess of two ounces of cannabis, sixteen grams of cannabis extract and eight hundred milligrams of edible cannabis if the excess is stored in the person's private residence and not visible from a public place;

(3) transferring, without financial consideration, to a person who is twenty-one years of age or older not more than the amount of cannabis lawfully purchased and obtained pursuant to the Cannabis Regulation Act or the medical cannabis program;

(4) ingesting or otherwise consuming cannabis or cannabis products purchased and obtained pursuant to the Cannabis Regulation Act or the medical cannabis program;

(5) possessing, using, displaying, purchasing, obtaining or manufacturing cannabis extract using nonvolatile solvents, alcohol or carbon dioxide or no solvents;

(6) manufacturing, transporting or giving away to a person twenty-one years of age or older cannabis paraphernalia;

(7) assisting another person who is twenty-one years of age or older in, or allowing property to be used in, any of the acts described in Paragraphs (1) through (6) of this subsection;

(8) smoking cannabis or cannabis products in an area authorized pursuant to the Cannabis Regulation Act or a local jurisdiction;

(9) possessing, planting, cultivating, harvesting, drying, manufacturing cannabis products using nonvolatile solvents, alcohol or carbon dioxide or no solvents or transporting not more than six mature cannabis plants and six immature cannabis plants per person; provided that despite a household having multiple residents, no more than twelve mature cannabis plants may be present in one household; and provided further that if the person does not exceed the maximum number of cannabis plants, the person may possess the cannabis produced by the cannabis plants notwithstanding any weight limits; and

(10) transporting homegrown cannabis or mature or immature cannabis plants when the person is moving the person's residence to another location or for purposes of testing or manufacturing.

B. Paragraph (6) of Subsection A of this section is intended to meet the requirements of 21 U.S.C. Section 863(f) by authorizing under state law any person in compliance with this section to manufacture, possess or distribute cannabis paraphernalia.

C. None of the following shall, individually or in combination with each other, constitute reasonable articulable suspicion of a crime and is not a basis to stop, detain or search a person:



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(1) the odor of cannabis or cannabis extract or of burnt cannabis or cannabis extract;

(2) the possession of or the suspicion of possession of cannabis without evidence of quantity in excess of two ounces of cannabis, sixteen grams of cannabis extract or eight hundred milligrams of edible cannabis; or

(3) the possession of multiple containers of cannabis without evidence of quantity in excess of two ounces of cannabis, sixteen grams of cannabis extract or eight hundred milligrams of edible cannabis.

D. Paragraph (1) of Subsection A and Subsection C of this section shall not apply when a law enforcement officer is investigating whether a person is operating a vehicle or watercraft while intoxicated or under the influence of or impaired by alcohol or a drug or any combination thereof in violation of Section 66-8-102 or 66-13-3 NMSA 1978.

**History: Laws 2021 (1st S.S.), ch. 4, § 25.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-26. Limits on personal use; penalties.

A. Nothing in Section 25 [26-2C-25 NMSA 1978] of the Cannabis Regulation Act shall be construed to:

(1) allow a person to smoke cannabis products in a public place, except in a cannabis consumption area; or

(2) restrict the ability of a person to prohibit conduct otherwise allowed in the Cannabis Regulation Act on the person's privately owned property.

B. A person who violates Paragraph (1) of Subsection A of this section shall be subject to a civil penalty of fifty dollars ($50.00).

C. As used in this section, "smoke" means to inhale, exhale, burn or carry any lighted or heated device or pipe or any other lighted or heated cannabis products intended for inhalation, whether natural or synthetic, in any manner or in any form.

D. A person less than eighteen years of age, the family of a person less than eighteen years of age or a person legally obligated to care for and support a person less than eighteen years of age who is subject to the fines pursuant to Subsection B of this section shall not be required to pay any fees or fines pursuant to the Cannabis Regulation Act.

**History: Laws 2021 (1st S.S.), ch. 4, § 26.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-27. Personal production of cannabis; penalties.

A. Unless otherwise provided in the Cannabis Regulation Act, it is unlawful for a person without a license to intentionally produce cannabis products except as provided in this section.

B. A person twenty-one years of age or older who intentionally produces:

(1) more than six and up to twelve mature or immature cannabis plants shall be issued a penalty assessment pursuant to Section 31-19A-1 NMSA 1978 and is subject to a fine of fifty dollars ($50.00); and

(2) more than twelve mature or immature cannabis plants is guilty of a fourth degree felony and may be sentenced as provided in Section 31-18-15 NMSA 1978.

C. A person who is eighteen years of age or older but less than twenty-one years of age who intentionally produces:

(1) up to six mature or immature cannabis plants shall be issued a penalty assessment pursuant to Section 31-19A-1 NMSA 1978 and is subject to a fine of fifty dollars ($50.00);

(2) more than six mature or immature cannabis plants and up to twelve mature or immature cannabis plants is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978; and



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(3) more than twelve mature or immature cannabis plants is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

D. A person who is less than eighteen years of age who intentionally produces cannabis products is guilty of a civil violation and shall be subject to:

(1) attendance at a four-hour evidence-based drug education and legal rights program at no cost to the minor; or

(2) four hours of community service.

**History: Laws 2021 (1st S.S.), ch. 4, § 27.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-28. Unlicensed sales of cannabis; penalties.

A. As used in this section, "traffic" means the:

(1) distribution, sale, barter or giving away of cannabis products; or

(2) possession with intent to distribute, sell, barter or give away cannabis products.

B. Unless otherwise provided in the Cannabis Regulation Act or the Lynn and Erin Compassionate Use Act [Chapter 26, Article 2B NMSA 1978], it is unlawful for a person without a license to intentionally traffic cannabis products.

C. A person under eighteen years of age who violates Subsection B of this section shall be subject to:

(1) attendance at a four-hour evidence-based drug education and legal rights program at no cost to the person; or

(2) four hours of community service.

D. Except as otherwise provided in Section 14 [26-2C-14 NMSA 1978] of the Cannabis Regulation Act, a person eighteen years of age or older who violates Subsection B of this section is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

E. A person eighteen years of age or older who violates Subsection B of this section and who conducts unlicensed cannabis product sales from a building, room or other area open to the public in a manner that would lead a reasonable person to believe that the area is a cannabis establishment licensed pursuant to the Cannabis Regulation Act is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: Laws 2021 (1st S.S.), ch. 4, § 28.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-29. Cannabis within restricted area; penalty.

Unless otherwise allowed in the Cannabis Regulation Act or the Lynn and Erin Compassionate Use Act [Chapter 26, Article 2B NMSA 1978], a person shall not possess or intentionally distribute any amount of a cannabis product on the premises of a school or daycare center unless the person is a qualified patient, a primary caregiver or a reciprocal participant; provided that this section shall not apply to a person who possesses a cannabis product for authorized purposes on the premises of a licensed cannabis training and education program. A person who violates this section is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

**History: Laws 2021 (1st S.S.), ch. 4, § 29.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.



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## 26-2C-30. Unlawful possession of cannabis; penalties.

Except as allowed in the Cannabis Regulation Act and the Lynn and Erin Compassionate Use Act [Chapter 26, Article 2B NMSA 1978]:

A. a person under twenty-one years of age shall not possess cannabis products. A person who violates this subsection is guilty of a civil violation and shall be subject to:

(1) attendance at a four-hour evidence-based drug education and legal rights program at no cost to the person; or

(2) four hours of community service; and

B. a person twenty-one years of age or older shall not possess more than two ounces of cannabis, sixteen grams of cannabis extract and eight hundred milligrams of edible cannabis in public. A person who violates this subsection with respect to:

(1) more than two but not more than eight ounces of cannabis, more than sixteen grams of cannabis extract and more than eight hundred milligrams of edible cannabis is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978; or

(2) more than eight ounces of cannabis, sixty-four grams of cannabis extract or three thousand two hundred milligrams of edible cannabis is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: Laws 2021 (1st S.S.), ch. 4, § 30.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-31. Unlicensed manufacturing of cannabis extract; penalty.

It is unlawful for a person to manufacture cannabis extract without a license issued pursuant to the Cannabis Regulation Act unless the person produces and manufactures cannabis extract from homegrown cannabis using nonvolatile solvents, alcohol or carbon dioxide or no solvents. The use of any other solvent or process is expressly prohibited unless it is approved by the division. A person who violates this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: Laws 2021 (1st S.S.), ch. 4, § 31.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-32. Exemption from criminal and civil penalties; researchers.

A person shall not be subject to arrest or prosecution, penalized in any manner or denied any right or privilege solely because the person produced, possessed, distributed, dispensed or purchased cannabis products if the person produced, possessed, distributed, dispensed or purchased the cannabis products solely for the purpose of research conducted pursuant to the Lynn and Erin Compassionate Use Act [Chapter 26, Article 2B NMSA 1978] or the Cannabis Regulation Act.

**History: Laws 2021 (1st S.S.), ch. 4, § 32.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-33. Reporting requirements for cannabis-related violations.

A. Within sixty days following the end of each fiscal year, every police and sheriff's department shall report on a form approved by the department of public safety the total number of arrests, citations and penalty assessments for cannabis-related violations broken down by:

(1) category and penalty level; and

(2) race, ethnicity, age and gender.



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B. Each law enforcement agency shall submit its annual report to the department of public safety.

C. The department of public safety shall compile the reports submitted and shall issue by November 1 of each year an annual report of all cannabis-related violations in the state. The report shall aggregate the data for the state and shall disaggregate the data by agency, race, ethnicity, age and gender. The department of public safety shall make all annual reports submitted for previous fiscal years available on the department of public safety's website.

D. For purposes of this section, "cannabis-related violation" means a violation of any of Sections 27 through 31 [26-2C-27 to 26-2C-31 NMSA 1978] of the Cannabis Regulation Act or a violation of Section 66-8-102 or 66-13-3 NMSA 1978 if the basis for the arrest or citation is impairment due to the use of cannabis products.

**History: Laws 2021 (1st S.S.), ch. 4, § 33.**

**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-34. Employer protections; exemptions.

A. Unless there is an agreement between the employer and employee, nothing in the Cannabis Regulation Act shall:

(1) restrict an employer's ability to prohibit or take an adverse employment action against an employee for impairment by or possession or use of intoxicating substances at work or during work hours;

(2) require an employer to commit any act that would cause the employer to be noncompliant with or in violation of federal law or federal regulations or that would result in the loss of a federal contract or federal funding; or

(3) prevent or infringe upon the rights of an employer to adopt and implement a written zero-tolerance policy regarding the use of cannabis products. A zero-tolerance policy may permit the discipline or termination of an employee on the basis of a positive drug test that indicates any amount of delta-9-tetrahydrocannabinol or delta-9-tetrahydrocannabinol metabolite.

B. The Cannabis Regulation Act does not apply to an employee of an employer subject to the provisions of Title 2 of the federal Railway Labor Act.

C. Nothing in the Cannabis Regulation Act shall be construed to invalidate, diminish or otherwise interfere with any collective bargaining agreement nor shall it be construed to invalidate, diminish or otherwise interfere with any party's power to collectively bargain such an agreement, or to an employer or employee.

D. As used in this section, "adverse employment action" means refusing to hire or employ a person; barring or discharging a person from employment; requiring a person to retire from employment; or discriminating against an employee in compensation or in terms, conditions or privileges of employment.

**History: Laws 2021 (1st S.S.), ch. 4, § 34.**

**Cross references.** — For the federal Railway Labor Act, *see* 15 U.S.C. §§ 21, 45; 18 U.S.C. § 373; 28 U.S.C. §§ 1291 to 1294 and 45 U.S.C. §§ 151 to 163, 181 to 188.

**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-35. Appeal of rules.

A person who is or may be affected by a rule promulgated by the division or other state agency pursuant to the Cannabis Regulation Act may appeal to the district court.

**History: Laws 2021 (1st S.S.), ch. 4, § 35.**

**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.



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## 26-2C-36. Public records and open meetings.

Records of the division are subject to the Inspection of Public Records Act [Chapter 14, Article 3 NMSA 1978]. Rulemaking and other hearings of the division are subject to the Open Meetings Act [Chapter 10, Article 15 NMSA 1978].

**History: Laws 2021 (1st S.S.), ch. 4, § 36.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-37. Intrastate source.

Except as provided in Section 38 [26-2C-38 NMSA 1978] of the Cannabis Regulation Act, all cannabis products shall be derived from a source originating within New Mexico.

**History: Laws 2021 (1st S.S.), ch. 4, § 37.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-38. Imports and exports.

A. Notwithstanding the provisions of Section 37 [26-2C-37 NMSA 1978] of the Cannabis Regulation Act or any other provision of law, the governor shall enter into agreements with other jurisdictions within or outside of the United States for the purposes of cross-jurisdictional delivery of cannabis products between this state and the other jurisdictions. Such agreements shall:

(1) ensure enforceable public health and safety standards;

(2) include a system to regulate and track the interstate or international delivery of cannabis products; and

(3) ensure that any cannabis products delivered into this state, prior to sale to a consumer, are tested, packaged and labeled pursuant to New Mexico laws and rules.

B. Notwithstanding any other provision of law and in accordance with an agreement described in Subsection A of this section, a person licensed to:

(1) courier cannabis products may deliver cannabis products to a person located in, and authorized to receive cannabis products by, another jurisdiction in the United States; and

(2) receive cannabis products may receive cannabis products from a person located in, and authorized to export cannabis products by, another jurisdiction in the United States or internationally.

C. This section shall take effect on the earlier date on which:

(1) federal law is amended to allow for the interstate or international transfer of cannabis products between authorized cannabis-related businesses; or

(2) the United States department of justice issues an opinion or memorandum allowing or tolerating the interstate or international transfer of cannabis products between cannabis-related businesses as authorized by state law.

**History: Laws 2021 (1st S.S.), ch. 4, § 38.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-39. Cannabis regulation fund.

A. The "cannabis regulation fund" is created in the state treasury. The fund consists of appropriations, gifts, grants, donations and fees collected by the division pursuant to the Cannabis Regulation Act and the medical cannabis program administered by the division. Any unexpended or unencumbered balance remaining at the end of a fiscal year shall revert to the general fund.

B. Money in the cannabis regulation fund is subject to appropriation by the legislature to fund the division, the department of health, the department of environment, the New Mexico



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department of agriculture, the taxation and revenue department and the department of public safety for the purposes of carrying out the provisions of the Cannabis Regulation Act and the Lynn and Erin Compassionate Use Act [Chapter 26, Article 2B NMSA 1978].

**History: Laws 2021 (1st S.S.), ch. 4, § 39.**

**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

**Temporary provisions.** — Laws 2021 (1st S.S.), ch. 4, § 70 provided:

A. On June 29, 2021, all functions, personnel, money, appropriations, records, furniture, equipment and other property of the department of health's medical cannabis program that are not part of the department's medical cannabis registry powers and duties shall be transferred to the regulation and licensing department.

B. On June 29, 2021, all contractual obligations and other agreements of the department of health as they pertain to the department's medical cannabis program that are not part of the department's medical cannabis registry powers and duties are binding on the regulation and licensing department.

C. Statutory references to the department of health that pertain to the department's medical cannabis program that are not part of the department's medical cannabis registry powers and duties shall be deemed to be references to the cannabis control division of the regulation and licensing department.

D. On June 29, 2021, any unexpended or unencumbered balance in the medical cannabis fund is transferred to the cannabis regulation fund.

E. Except to the extent any administrative rules are inconsistent with the provisions of this act, any administrative rules adopted by an officer, agency or other entity whose responsibilities have been transferred pursuant to the provisions of this act to another officer, agency or other entity remain in force until amended by the officer, agency or other entity to which the responsibility for the adoption of the rules has been transferred. To the extent any administrative rules are inconsistent with the provisions of this act, such rules are null and void.

## 26-2C-40. Plant limit. (Repealed effective December 31, 2025.)

No later than September 1, 2021, and each September 1 thereafter, the division shall by rule limit, by plant count, canopy or square footage, the number of cannabis plants that a licensee that is not an integrated cannabis microbusiness or a cannabis producer microbusiness may produce. The rule shall set the number of allowed cannabis plants per licensee to meet an average national market demand for cannabis products in states where adult and medical cannabis are authorized during the preceding year using a consumer base of no less than twenty percent of the adult population of New Mexico.

**History: Laws 2021 (1st S.S.), ch. 4, § 40.**

**Delayed repeals.** — Laws 2021 (1st S.S.), ch. 4, § 73 repealed 26-2C-40 NMSA 1978, effective December 31, 2025.

**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-41. Indian nations, tribes and pueblos; intergovernmental agreements.

A. The department may enter into one or more intergovernmental agreements with any tribal government to efficiently coordinate the cross-jurisdictional administration of the laws of this state and the laws of tribal governments relating to the use of cannabis products set forth in the Cannabis Regulation Act and the Lynn and Erin Compassionate Use Act [Chapter 26, Article 2B NMSA 1978]. The agreements may include, without limitation, provisions relating to:

(1) criminal and civil law enforcement;

(2) regulatory issues relating to the possession, delivery, production, processing or use of cannabis products;

(3) the administration of laws relating to taxation;

(4) any immunity, preemption or conflict of law relating to the possession, delivery, production, processing or use of cannabis products; and

(5) the resolution of any disputes between a tribal government and the state, which may include, without limitation, the use of mediation or other nonjudicial processes.

B. An agreement entered into pursuant to this section shall:

(1) provide for the preservation of public health and safety;

(2) ensure the security of cannabis establishments and the corresponding facilities on tribal land;



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(3) establish provisions regulating business involving cannabis that passes between tribal land and non-tribal land in New Mexico; and

(4) be negotiated in good faith, which shall respect and protect state and tribal sovereign immunity.

C. As used in this section, "tribal government" means a federally recognized Indian nation, tribe or pueblo located wholly or partially in the state.

**History: Laws 2021 (1st S.S.), ch. 4, § 41.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

## 26-2C-42. Cooperation of agencies.

All state agencies shall cooperate with the division in carrying out the provisions of the Cannabis Regulation Act.

**History: Laws 2021 (1st S.S.), ch. 4, § 42.**
**Effective dates.** — Laws 2021 (1st S.S.), ch. 4 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.

# ARTICLE 3

# Drug Product Selection

Sec.
26-3-1. Short title.
26-3-2. Purpose.
26-3-3. Drug and biological product selection permitted; conditions; exception for prohibition; labeling.

## 26-3-1. Short title.

Sections 26-3-1 through 26-3-3 NMSA 1978 may be cited as the "Drug Product Selection Act."

**History: 1953 Comp., § 54-6-28.1, enacted by Laws 1976, ch. 60, § 2.**

## 26-3-2. Purpose.

It is the purpose of the Drug Product Selection Act to assure that all New Mexico citizens continue to receive high quality drugs at a reasonable cost.

**History: 1953 Comp., § 54-6-28.2, enacted by Laws 1976, ch. 60, § 3.**

**Cross references.** — For provisions relating to the New Mexico Drug Device and Cosmetic Act, *see* 26-1-1 NMSA 1978.

## 26-3-3. Drug and biological product selection permitted; conditions; exception for prohibition; labeling.

A. Upon receipt of a prescription written by a licensed practitioner who may prescribe drugs or biological products for a drug or biological product for which one or more multiple-source drugs or interchangeable biological products are recognized, listed as final determinations and published in the federal register by the federal department of health and human services, a pharmacist may dispense any one of the drugs or interchangeable biological products that satisfies the final determinations so recognized and listed by the federal department of health and human services and is sold at a lower cost than the drug or biological product listed in the prescription.



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B. Upon receipt of a prescription written by a licensed practitioner for a drug or biological product that appears on the federal food and drug administration's approved prescription drug products with therapeutic equivalence evaluation list as supplemented, or for a biological product that is listed as interchangeable on the lists of the federal food and drug administration's lists of licensed biological products with reference product exclusivity and biosimilarity or interchangeability evaluations, as supplemented, a pharmacist may dispense any of the listed therapeutically equivalent drugs or interchangeable biological products that is lower in cost than the prescribed drug or biological product.

C. Drug and biological product selection shall be permitted only under circumstances and conditions set forth in Subsections A and B of this section unless the licensed practitioner prescribing prohibits drug or biological product selection. A licensed practitioner shall prohibit drug or biological product selection by making an entry that is electronically accessible that includes the words "no substitution" or the diminution "no sub" on a prescription.

D. If drug or biological product selection occurs as permitted in Subsections A and B of this section, the pharmacist shall indicate on the label of the dispensed container the brand of drug or the specific biological product prescribed and the name of the drug or interchangeable biological product dispensed.

E. A pharmacist who selects an interchangeable biological product shall inform the patient or the patient's representative.

F. A pharmacist shall not select a therapeutically equivalent drug or interchangeable biological product unless the substitution is in accordance with the provisions of Subsection A of this section.

G. Within five business days following the dispensing of a biological product, the dispensing pharmacist or the pharmacist's designee shall make an entry of the specific product provided to the patient, including the name of the product and the manufacturer. The communication shall be conveyed by making an entry that is electronically accessible to the prescriber through:

(1) an interoperable electronic medical records system;

(2) an electronic prescribing technology;

(3) a pharmacy benefit management system; or

(4) a pharmacy record.

H. Entry into an electronic medical records system pursuant to Subsection G of this section is presumed to provide notice to the prescriber. Otherwise, the pharmacist shall communicate to the prescriber what biological product was dispensed, using facsimile, telephone, electronic transmission or other prevailing means; provided that communication shall not be required when:

(1) there is no interchangeable biological product that has been approved by the federal food and drug administration for the product prescribed; or

(2) a refill prescription is not changed from the product dispensed on the prior filling of the prescription.

I. The board shall maintain a link on its website to the current lists of all biological products that the federal food and drug administration has determined to be interchangeable biological products.

J. For purposes of this section:

(1) "multiple-source drug" means a drug marketed or sold by two or more manufacturers, formulators or labelers; and

(2) "therapeutically equivalent" means drug products that have the same amount of the active drug in the same dosage form that when administered can be expected to provide the same therapeutic effect.

**History: 1953 Comp., § 54-6-28.3, enacted by Laws 1976, ch. 60, § 4; 1982, ch. 26, § 1; 2005, ch. 152, § 4; 2017, ch. 48, § 2.**

**The 2017 amendment,** effective June 16, 2017, provided for the regulation of biosimilar products, including authorizing pharmacists to substitute biosimilar and interchangeable biosimilar biologic products for another biologic product that has been prescribed by a physician, placed certain duties on pharmacists who select an interchangeable biological product, required the board of pharmacy to maintain a link on its website to the current lists of all biological products that the federal food and drug administration has determined to be interchangeable biological products, and redefined "therapeutically equivalent"; added "and biological", "or biological", "or biological products" and "or interchangeable biological products" throughout the section; in the catchline, added "and biological"; in Subsection B, after "supplemented", added "or for a biological product that is listed as interchangeable on the lists of the federal food and drug administration's



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lists of licensed biological products with reference product exclusivity and biosimilarity or interchangeability evaluations, as supplemented", after "a pharmacist may dispense any of the", added "listed", after "that", deleted "appears on that list and which", after "lower in cost than the", added "prescribed", and after the next occurrence of "drug", deleted "listed in the prescription"; in Subsection C, after "product selection by", deleted "writing with his hand" and added "making an entry that is electronically accessible that includes", and after "'no sub' on", deleted "the face of"; in Subsection D, after "brand of drug", added "or the specific biological product"; deleted former Subsection E; added new Subsections E through I, and redesignated former Subsection F as Subsection J; in Subsection J, added the paragraph designation "(1)", and added Paragraph J(2); and deleted former Paragraph G, which defined "therapeutically equivalent".

**The 2005 amendment,** effective June 17, 2005, deleted Subsection E, which required a pharmacist to notify the prescribing practitioner if the pharmacist changes the drug dispensed after the drug selection has occurred and relettered the subsequent subsections.

# ARTICLE 4

# Wholesale Prescription Drug Importation

Sec.
26-4-1. Short Title.
26-4-2. Definitions.
26-4-3. Advisory committee created; membership; duties.
26-4-4. Wholesale prescription drug importation program created.
26-4-5. Monitoring for anti-competitive behavior.
26-4-6. Federal compliance.
26-4-7. Implementation.
26-4-8. Annual reporting.
26-4-9. Wholesale prescription drug importation fund.
26-4-10. Countries other than Canada allowed by federal law.

## 26-4-1. Short title.

This act [26-4-1 to 26-4-10 NMSA 1978] may be cited as the "Wholesale Prescription Drug Importation Act".

**History: Laws 2020, ch. 45, § 1.**

**Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-2. Definitions.

As used in the Wholesale Prescription Drug Importation Act:

A. "Canadian supplier" means a manufacturer, wholesale distributor or pharmacy that is appropriately licensed or permitted under Canadian federal or provincial laws and rules to manufacture, distribute or dispense prescription drugs;

B. "committee" means the prescription drug importation advisory committee;

C. "department" means the department of health;

D. "eligible prescription drug" means a drug eligible for importation that:

(1) meets the United States federal food and drug administration's standards related to safety, effectiveness, misbranding and adulteration;

(2) does not violate federal patent laws;

(3) is expected to generate cost savings; and

(4) is not a controlled substance;

E. "program" means the wholesale prescription drug importation program; and

F. "state drug wholesaler" means a licensed wholesale drug distributor that contracts with the state to import eligible prescription drugs from a Canadian supplier.

**History: Laws 2020, ch. 45, § 2.**

**Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-3. Advisory committee created; membership; duties.

A. The "prescription drug importation advisory committee" is created as an interagency advisory committee of the department. The committee consists of:



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(1) the secretary of health, who shall serve as the chair of the committee;
(2) the executive director of the board of pharmacy;
(3) the superintendent of insurance;
(4) the secretary of human services; and
(5) the secretary of general services.

B. Members may appoint designees.

C. The committee shall advise the department in developing and implementing the program. The committee shall consult with interested stakeholders and appropriate federal officials as necessary in shaping its advice to the department. The department shall hold a public hearing on the proposed program prior to submitting the program for federal approval.

**History: Laws 2020, ch. 45, § 3.**

**Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-4. Wholesale prescription drug importation program created.

The department, in consultation with the committee, shall design a "wholesale prescription drug importation program" that complies with the applicable requirements of 21 U.S.C. Section 384, including the requirements regarding safety and cost savings. The department shall explore all potential mechanisms, to the extent allowable under law, for the importation of eligible prescription drugs. The program design shall:

A. contract with one or more state drug wholesalers to seek federal certification and approval to import safe, eligible prescription drugs from Canadian suppliers and provide significant prescription drug cost savings to New Mexico consumers;

B. allow the importation of eligible prescription drugs sold by Canadian suppliers;

C. ensure that only eligible prescription drugs meeting the United States food and drug administration's safety, effectiveness and other standards are imported by or on behalf of the state;

D. import only those eligible prescription drugs expected to generate substantial savings for New Mexico consumers;

E. ensure that, with respect to eligible prescription drugs to be imported pursuant to the program, the program and the state drug wholesaler comply with the tracking, tracing, verification and identification requirements of 21 U.S.C. Sections 360eee and 360eee-1;

F. prohibit the distribution, dispensing or sale of eligible prescription drugs imported pursuant to the Wholesale Prescription Drug Importation Act outside the exterior boundaries of the state;

G. recommend a charge per prescription or another method of support to ensure that the program is funded adequately in a manner that does not jeopardize significant consumer savings; and

H. include an audit function.

**History: Laws 2020, ch. 45, § 4.**

**Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-5. Monitoring for anti-competitive behavior.

The department shall consult with the attorney general to identify the potential, and to monitor, for anti-competitive behavior in industries that would be affected by the program.

**History: Laws 2020, ch. 45, § 5.**

**Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-6. Federal compliance.

On or before December 15, 2020, the department shall submit a formal request to the secretary of the United States department of health and human services for certification of the state's program.



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**History: Laws 2020, ch. 45, § 6.** **Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-7. Implementation.

Upon certification of approval by the secretary of the United States department of health and human services, the department shall begin implementing the program and begin operating the program within six months of that approval. As part of the implementation process, the department shall:

A. enter into contracts in accordance with the Procurement Code [13-1-28 to 13-1-199 NMSA 1978] with one or more state drug wholesalers and New Mexico licensed drug distributors and contract with one or more approved Canadian suppliers;

B. consult with interested stakeholders, including the committee, the legislature, health insurance plans, employers, pharmacies, health care providers and consumers;

C. develop a registration process for health insurance plans, pharmacies and prescription drug administering health care providers who choose to participate in the program;

D. make a list of imported eligible prescription drugs and their prices and make that list available to all participating entities and the general public;

E. create an outreach and marketing plan to generate program awareness;

F. create and staff a helpline to answer questions and address the needs of consumers, employers, health insurance plans, pharmacies, health care providers and other affected sectors;

G. require annual and special audits of the program; and

H. carry out other duties in accordance with the Wholesale Prescription Drug Importation Act that the department, in consultation with the board of pharmacy, determines to be necessary for successful implementation of the program.

**History: Laws 2020, ch. 45, § 7.** **Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-8. Annual reporting.

Annually, after implementation, the department shall report to the governor and the legislature regarding the operation of the program during the previous year, including:

A. which eligible prescription drugs and Canadian suppliers are included in the program;

B. the number of participating pharmacies, health care providers and health insurance plans;

C. the number of prescriptions dispensed through the program;

D. the estimated savings to consumers, health plans, employers and the state during the previous year and to date;

E. information regarding implementation of the audit plan and the correction plans for audit findings; and

F. any other information requested by the governor or the legislature or that the secretary of health deems relevant.

**History: Laws 2020, ch. 45, § 8.** **Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-9. Wholesale prescription drug importation fund.

The "wholesale prescription drug importation fund" is created as a nonreverting fund in the state treasury. The fund consists of money received by the state through the implementation of the program pursuant to the Wholesale Prescription Drug Importation Act and appropriations, gifts, grants, donations to the fund and income from investment of the fund. The department shall



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administer the fund, and money in the fund is subject to appropriation by the legislature and shall be expended only as provided in the appropriation. Expenditures shall be by warrant of the secretary of finance and administration pursuant to vouchers signed by the secretary of health or the secretary's authorized representative.

**History: Laws 2020, ch. 45, § 9.**

**Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-10. Countries other than Canada allowed by federal law.

The provisions of the Wholesale Prescription Drug Importation Act may be extended to any other country allowed by federal law to import prescription drugs into the United States, at the discretion of the department.

**History: Laws 2020, ch. 45, § 10.**

**Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.



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# CHAPTER 27

# Public Assistance

Art.


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# ARTICLE 1

# General Provisions

Sec.


27-1-1. Definitions.
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27-1-3. Activities of human services department.
27-1-3.1. Acute care bed usage; funding authorization.
27-1-4. Status of assistance payments.
27-1-5 to 27-1-7. Repealed.
27-1-8. State case registry.
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27-1-10. Collection and use of social security numbers for use in child support enforcement.
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27-1-13. Financial institution data matches.
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27-1-15. Repealed.
27-1-16. Brain injury services fund created.


## 27-1-1. Definitions.

As used in Articles 1 and 2 of Chapter 13 NMSA 1953, "department," "department of public welfare," "state department of public welfare," "New Mexico department of public welfare," "state board of public welfare," "board of public welfare," "state board," "state department," "health and social services department," "department of health and social services," "health and social services board" and "board" mean the human services department.

**History: 1953 Comp., § 13-1-1, enacted by Laws 1977, ch. 252, § 16.**

**Compiler's notes.** — The provisions formerly appearing in Chapter 13, Articles 1 and 2, 1953 Comp., are compiled as 24-13-1 to 24-13-8, 27-1-1 to 27-1-3, 27-1-4, 27-2-15, 27-2-17 to 27-2-26, 27-2-30 to 27-2-36, 27-5-1 to 27-5-12, 27-5-13 to 27-5-18 and 28-4-1 to 28-4-3 NMSA 1978.



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For definitions of "department" and "board" applicable to some of the provisions listed in the previous note, *see* 27-2-2 NMSA 1978.

The powers, duties and property of the department of public welfare were transferred to the department of health and social services by Laws 1968, ch. 37, § 3. Laws 1977, ch. 252, § 5, abolished the department of health and social services, and § 4 of said act created the human services department.

## 27-1-2. Powers of human services department.

A. The human services department is an agency of the state and shall at all times be under the exclusive control of this state. The management and control of the human services department is vested in the secretary of human services.

B. Subject to the constitution of New Mexico, the human services department has the power to:

(1) sue and, with the consent of the legislature, be sued;

(2) adopt and use a corporate seal;

(3) have succession in its corporate name;

(4) make contracts as authorized in Chapter 27 NMSA 1978 to carry out the purposes of that chapter;

(5) adopt, amend and repeal bylaws, rules and regulations;

(6) purchase, lease and hold real and personal property necessary or convenient for the carrying out of its powers and duties, to exercise the right of eminent domain to acquire such real property in the same manner as the state now exercises that right and to dispose of any property acquired in any manner;

(7) have such powers as may be necessary or appropriate for the exercise of the powers specifically conferred upon it in Chapter 27 NMSA 1978;

(8) receive and have custody for protection and administration, disburse, dispose of and account for funds, commodities, equipment, supplies and any kind of property given, granted, loaned or advanced to the state for public assistance, public welfare, social security or any other similar purpose;

(9) enter into reciprocal agreements with public welfare agencies of other states relative to the provision for relief or assistance to transients and nonresidents;

(10) establish and administer programs of old age assistance and aid to dependent children and persons with a visual impairment;

(11) establish and administer a program of services for children with a disability or who have a condition that may lead to a disability, and to supervise the administration of those services that are not administered directly by it;

(12) establish, extend and strengthen public welfare services for children; and

(13) establish and administer a program for general relief.

**History: Laws 1937, ch. 18, § 3; 1941 Comp., § 73-103; 1953 Comp., § 13-1-3; 2007, ch. 46, § 16.**

**Compiler's notes.**— The powers, duties and property of the department of public welfare were transferred to the department of health and social services by Laws 1968, ch. 37, § 3. Laws 1977, ch. 252, § 5, abolished the department of health and social services, and § 4 created the human services department.

Laws 1977, ch. 252, §§ 6 and 7, provided for the appointment and powers of the secretary of human services, the administrative head of the human services department.

**Cross references.** — For public assistance programs generally, *see* 27-2-1 NMSA 1978 et seq.

For programs for persons with special medical needs, *see* 27-4-1 NMSA 1978 et seq.

For crippled children's services generally, *see* 24-2-1 NMSA 1978.

For abandonment or abuse of child, *see* 30-6-1 NMSA 1978.

For eminent domain generally, *see* Chapter 42A NMSA 1978.

**The 2007 amendment,** effective June 15, 2007, changed the name of the department from the "state department of public welfare" to the "human services department" and made other non-substantive language changes.

### ANNOTATIONS

**Acquisition and disposition of real property.** — This section clearly gives the department of public welfare (now human services department) full and complete authority to hold real property in its name, and full and complete authority to transfer such property. 1955-56 Op. Att'y Gen. No. 55-6286.

**Rehabilitation and leasing of real property.** — The public welfare department (now human services department) can rehabilitate buildings, then lease them to the New Mexico boys' school. 1959-60 Op. Att'y Gen. No. 59-85.

**Adoption of rules and regulations required under federal legislation.** — The state welfare department (now human services department) has authority to adopt rules and regulations providing for "welfare standards" required under federal legislation. 1953-54 Op. Att'y Gen. No. 53-5631.

**Contract for provision of child welfare services.** — The public welfare department (now human services



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department) can enter into a contract with the New Mexico boys' school to provide child welfare services to children in need of these services. 1959-60 Op. Att'y Gen. No. 59-85.

**Law reviews.** — For comment, "Undocumented Aliens: Education, Employment and Welfare in the United States and in New Mexico," see 9 N.M.L. Rev. 99 (1978-79).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Welfare Laws §§ 45 to 74.

81 C.J.S. Social Security and Public Welfare §§ 9, 18, 32, 96.

## 27-1-3. Activities of human services department.

The department shall be charged with the administration of all the welfare activities of the state as provided in Chapter 27 NMSA 1978, except as otherwise provided for by law. The department shall, except as otherwise provided by law:

A. administer old age assistance, aid to dependent children, assistance to persons with a visual impairment or other physical disability and general relief;

B. administer all aid or services to children with a disability, including the extension and improvement of services for children with such a disability, insofar as practicable under conditions in this state, provide for locating children who have a disability or a condition that may become a disability, provide corrective and any other services and care and facilities for diagnosis, hospitalization and after-care for such children and supervise the administration of those services that are not administered directly by the department;

C. administer and supervise all child welfare activities, service to children placed for adoption, service and care of homeless, dependent and neglected children, service and care for children in foster family homes or in institutions because of dependency or delinquency and care and service to a child who because of a physical or mental disability may need such service;

D. formulate detailed plans, make rules and regulations and take action deemed necessary or desirable to carry out the provisions of Chapter 27 NMSA 1978 and that is not inconsistent with the provisions of that chapter;

E. cooperate with the federal government in matters of mutual concern pertaining to public welfare and public assistance, including the adoption of such methods of administration as are found by the federal government to be necessary for the efficient operation of the plan for public welfare and assistance;

F. assist other departments, agencies and institutions of local, state and federal governments when so requested, cooperate with such agencies when expedient in performing services in conformity with the purposes of Chapter 27 NMSA 1978 and cooperate with medical, health, nursing and welfare groups, any state agency charged with the administration of laws providing for vocational rehabilitation of persons with a physical disability and organizations within the state;

G. act as the agent of the federal government in welfare matters of mutual concern in conformity with the provisions of Chapter 27 NMSA 1978 and in the administration of any federal funds granted to this state, to aid in furtherance of any such functions of the state government;

H. establish in counties or in districts, which may include two or more counties, local units of administration to serve as agents of the department;

I. at its discretion, establish local boards of public welfare for such territory as it may see fit and by rule and regulation prescribe the duties of the local board;

J. administer such other public welfare functions as may be assumed by the state after June 19, 1987;

K. carry on research and compile statistics relative to the entire public welfare program throughout the state, including all phases of dependency, defectiveness, delinquency and related problems, and develop plans in cooperation with other public and private agencies for the prevention as well as treatment of conditions giving rise to public welfare problems; and

L. inspect and require reports from all private institutions, boarding homes and agencies providing assistance, care or other direct services to persons who are elderly, who have a visual impairment, who have a physical or developmental disability or who are otherwise dependent.



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Nothing contained in this section shall be construed to authorize the department to establish or prescribe standards or regulations for or otherwise regulate programs or services to children in group homes as defined in Section 9-8-13 NMSA 1978.

**History: Laws 1937, ch. 18, § 4; 1941 Comp., § 73-104; 1953 Comp., § 13-1-4; Laws 1987, ch. 31, § 3; 2007, ch. 46, § 17.**

**Cross references.** — For public assistance programs generally, *see* Chapter 27, Article 2 NMSA 1978.

For programs for persons with special medical needs, *see* Chapter 27, Article 4 NMSA 1978.

For responsibility of human services department concerning the abuse or neglect of individual children, *see* 9-8-14 NMSA 1978.

For crippled children's services generally, *see* 24-2-1 NMSA 1978.

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

ANNOTATIONS

**Executive public assistance program unconstitutional.** — Governor's implementation of public assistance policy through the human services department violated the separation of powers doctrine, because, in changing eligibility requirements, it constituted executive creation of substantive law. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768.

**Denial of benefits supported by substantial evidence.** — Substantial evidence in the record as a whole supported the human services department's denial of aid to families with dependent children benefits where the natural father could provide support. *N.M. Human Servs. Dep't v. Garcia*, 1980-NMSC-025, 94 N.M. 175, 608 P.2d 151.

**Durational limit on receipt of benefits.** — The human services department had the implied authority to limit the receipt of general assistance to twelve continuous months by regulation. *Howell v. Heim*, 1994-NMSC-103, 118 N.M. 500, 882 P.2d 541.

**Adoption of rules and regulations required under federal legislation.** — The state welfare department (now human services department) has authority to adopt rules and regulations providing for "welfare standards" required under federal legislation. 1959-60 Op. Att'y Gen. No. 60-200. *See also* 1953-54 Op. Att'y Gen. No. 53-5631, 1951-52 Op. Att'y Gen. No. 51-5470.

**Law reviews.** — For symposium, "The Equal Rights Amendment and the Administration of Income Assistance Programs in New Mexico," see 3 N.M.L. Rev. 84 (1973).

For article, "Welfare Reform and the 1973 New Mexico Legislation," see 4 N.M.L. Rev. 1 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Welfare Laws §§ 45 to 74.

Judicial questions regarding federal Social Security Act and state legislation adopted in anticipation of or after the passage of that act, to set up "state plan" contemplated by it, 106 A.L.R. 243, 108 A.L.R. 613, 109 A.L.R. 1346, 118 A.L.R. 1220, 121 A.L.R. 1002.

Construction and application of state social security or unemployment compensation act as affected by terms of the federal act or judicial or administrative rulings thereunder, 139 A.L.R. 892.

Actions under 42 USCS § 1983 for violations of Adoption Assistance and Child Welfare Act (42 USCS §§ 620 et seq. and 670 et seq.), 93 A.L.R. Fed. 314.

81 C.J.S. Social Security and Public Welfare §§ 9, 18, 32, 96.

## 27-1-3.1. Acute care bed usage; funding authorization.

The human services department is authorized to accept and use federal grants or matching funds for the purpose of reimbursement to certain rural hospitals for using empty acute care beds for intermediate care and skilled nursing care, as defined in federal statutes and regulations, subject to federal approval and the availability of funds. The department is authorized to use funds from existing appropriations for matching federal funds for the purposes of this act.

**History: Laws 1980, ch. 83, § 1.**

## 27-1-4. Status of assistance payments.

Payments received by a displaced person under the Relocation Assistance Act [42-3-1 NMSA 1978] shall not be considered as income or resources to any recipient of public assistance, and such payments shall not be deducted from the amount of aid to which the recipient would otherwise be entitled under the laws of this state.

**History: 1953 Comp., § 13-1-20.2, enacted by Laws 1972, ch. 41, § 22.**

## 27-1-5 to 27-1-7. Repealed.

**Repeals.** — Laws 1985, ch. 101, § 9 repealed 27-1-5 through 27-1-7 NMSA 1978, as enacted by Laws 1983, ch. 74, §§ 1 through 3, the Citizen Substitute Care Review Act, effective April 2, 1985. For present comparable provisions, *see* 32A-8-1 to 32A-8-6 NMSA 1978.



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## 27-1-8. State case registry.

A. The human services department, acting as the state's child support enforcement agency pursuant to Title IV-D of the Social Security Act, shall establish a state case registry by October 1, 1998 that contains records with respect to:

(1) each case in which services are being provided on or after October 1, 1998 by the state Title IV-D agency; and

(2) each support order established or modified in the state on or after October 1, 1998, whether or not the order was obtained by the Title IV-D agency.

B. The records maintained by the state case registry shall use standardized data elements for parents such as names, social security numbers and other uniform identification numbers like dates of birth and case identification numbers, and contain such other information such as on case status as the secretary of the United States department of health and human services may require.

C. The Title IV-D agency and the administrative office of the courts shall work cooperatively to ensure that the requirements of this act are implemented in an effective, efficient and timely manner. The human services department shall reimburse the administrative office of the courts for all costs incurred in furnishing the information. A cooperative agreement between the Title IV-D agency and the administrative office of the courts shall include costs to be charged by the administrative office of the courts for all work performed to conform to these requirements. The human services department shall promptly provide the administrative office of the courts the data elements and formats required under Subsection B of this section as soon as they become available to the department.

D. The state case registry shall extract information from its automated system to share and compare information with and to receive information from, other databases and information comparison services in order to obtain or provide information necessary to enable the Title IV-D agency or the United States health and human services department secretary or other state or federal agencies to carry out the Title IV-D program, subject to Section 6103 of the Internal Revenue Code of 1986. Such information comparison activities shall include the following:

(1) furnishing to the federal case registry of child support orders established (and update as necessary with information including notice of expiration of orders) the minimum amount of information on child support cases recorded in the state case registry that is necessary to operate the registry, as specified by the United States health and human services department secretary in regulations;

(2) exchanging information with the federal parent locator service for the purposes specified in the State Directory of New Hires Act [50-13-1 NMSA 1978];

(3) exchanging information with state agencies of the state and of other states administering programs of temporary assistance for needy families and medicaid, and other programs designated by the United States health and human services secretary, as necessary to perform state agency responsibilities under this part and under such programs; and

(4) exchanging information with other agencies of the state, agencies of other states and interstate information networks, as necessary and appropriate to carry out or assist other states to carry out purposes of the Title IV-D program.

**History: Laws 1997, ch. 237, § 1.**

**Cross references.** — For single state agency designation for Title IV-D, *see* 27-2-27 NMSA 1978.

For the Support Enforcement Act, *see* Chapter 40, Article 4A NMSA 1978.

For the State Directory of New Hires Act, *see* 50-13-1 NMSA 1978.

For Title IV-D of the federal Social Security Act, *see* 42 U.S.C. § 651 et seq.

For Section 6103 of the federal Internal Revenue Code, *see* 26 U.S.C. § 6103.

## 27-1-9. Locator information from interstate networks.

The state Title IV-D agency is authorized to have access to any system used by the state to locate an individual for purposes relating to motor vehicle or law enforcement.

**History: Laws 1997, ch. 237, § 14.**



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## 27-1-10. Collection and use of social security numbers for use in child support enforcement.

A. For applicants or persons who have been assigned a social security number, the state shall have and use procedures requiring that the social security number of any:

(1) applicant for a professional license, commercial driver's license or occupational license be recorded on the application;

(2) applicant for a marriage license be collected and placed in the records maintained by the county clerk;

(3) person who is subject to a divorce decree, support order or paternity determination or acknowledgment be placed in the records relating to the matter; and

(4) person who has died be placed in the records relating to the death and be recorded on the death certificate.

B. The collection and use of social security numbers shall be made available to the human services department for use in child support enforcement.

**History: Laws 1997, ch. 237, § 15; 2013, ch. 144, § 1.**

**The 2013 amendment,** effective June 14, 2013, required counties to obtain social security numbers from applicants for marriage licenses; in Subsection A, in the introductory sentence, at the beginning of the sentence, added "For applicants or persons who have been assigned a social security number", in Paragraph (1), after "occupational license", deleted "or marriage license", and added Paragraph (2); and in Subsection B, after "made available to the" deleted "state Title IV-D agency" and added "human services department".

## 27-1-11. Expedited procedure.

The state Title IV-D agency shall have the authority to take the following actions relating to establishment of paternity or to establishment, modification or enforcement of support orders, without the necessity of obtaining an order from any other judicial or administrative tribunal, and to recognize and enforce the authority of state Title IV-D agencies of other states to take the following actions:

A. to order genetic testing for the purpose of paternity establishments;

B. to subpoena any financial or other information needed to establish, modify or enforce a support order and to impose penalties for failure to respond to such a subpoena. A subpoena issued by the state Title IV-D agency under this section shall be served upon the person to be subpoenaed or, at the option of the secretary of human services or the secretary's authorized representative, by certified mail addressed to the person at his last known address. The service of the subpoena shall be at least ten days prior to the required production of the information. If the subpoena is served by certified mail, proof of service is the affidavit of mailing. After service of a subpoena upon a person, if the person neglects or refuses to comply with the subpoena, the state Title IV-D agency may apply to the district court of the county where the subpoena was served or the county where the subpoena was responded to for an order compelling compliance. Failure of the person to comply with the district court's order shall be punishable as contempt;

C. to require all entities in the state, including for-profit, nonprofit and governmental employers to provide promptly, in response to a request by the state Title IV-D agency of that or any other state administering a program under this part, information on the employment compensation, and benefits of any person employed by such entity as an employee or contractor and to sanction failure to respond to any such request;

D. to obtain access, subject to safeguards on privacy and information security, and subject to the nonliability of entities that afford such access, to information contained in the following records, including automated access in the case of records maintained in automated databases:

(1) records of other states and local government agencies, including:

(a) vital statistics, including records of marriage, birth and divorce;

(b) state and local tax and revenue records, including information on residence address, employer, income and assets;

(c) records concerning real and titled personal property;



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(d) records of occupational and professional licenses and records concerning the ownership and control of corporations, partnerships and other business entities;

(e) employment security records;

(f) records of agencies administering public assistance programs;

(g) records of the motor vehicle division of the taxation and revenue department; and

(h) corrections records; and

(2) certain records held by private entities with respect to persons who owe or are owed support, or against or with respect to whom a support obligation is sought, consisting of:

(a) the names and addresses of such persons and the names and addresses of the employers of such persons, as appearing in customer records of public utilities and cable television companies, pursuant to an administrative subpoena; and

(b) information including information on assets and liabilities on such individuals held by financial institutions;

E. in cases in which support is subject to an assignment in order to comply with a requirement imposed pursuant to temporary assistance for needy families or medicaid, or to a requirement to pay through the state disbursement unit established pursuant to Section 454B of the Social Security Act, upon providing notice to obligor and obligee to direct the obligor or other payor to change the payee to the appropriate government entity;

F. to order income withholding;

G. in cases in which there is a support arrearage, to secure assets to satisfy the arrearage by:

(1) intercepting or seizing periodic or lump-sum payments from:

(a) a state or local agency, including unemployment compensation, workers' compensation and other benefits; and

(b) judgments, settlements and lotteries;

(2) attaching and seizing assets of the obligor held in financial institutions;

(3) attaching public and private retirement funds; and

(4) imposing liens and, in appropriate cases, to force sale of property and distribution of proceeds;

H. for the purpose of securing overdue support, to increase the amounts for arrearages, subject to such conditions or limitations as the state Title IV-D agency may provide;

I. the expedited procedures required shall include the following rules and authority, applicable with respect to all proceedings to establish paternity or to establish, modify or enforce support orders:

(1) each party to any paternity or child support proceeding is required, subject to privacy safeguards, to file with the tribunal and the state case registry upon entry of an order, and to update, as appropriate, information on location and identity of the party, including social security number, residential and mailing addresses, telephone number and driver's license number, and name, address and telephone number of employer; and

(2) in any subsequent child support enforcement action between the parties, upon sufficient showing that diligent effort has been made to ascertain the location of such a party, the tribunal may deem state due process requirements for notice and service of process to be met with respect to the party, upon delivery of written notice to the most recent residential or employer address filed with the tribunal;

J. procedures under which:

(1) the state agency and administrative or judicial tribunal with authority to hear child support and paternity cases exerts statewide jurisdiction over the parties; and

(2) in a state in which orders are issued by courts or administrative tribunals, a case may be transferred between local jurisdictions in the state without need for any additional filing by the petitioner, or service of process upon the respondent, to retain jurisdiction over the parties; and

K. the authority of the Title IV-D agency with regard to Subsections A through J of this section shall be subject to due process safeguards, including, as appropriate, requirements for notice, opportunity to contest the action and opportunity for an appeal on the record to an independent administrative or judicial tribunal. Such due process safeguards shall be developed and implemented by the Title IV-D agency in accordance with the administrative office of the courts and



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other affected agencies and individuals consistent with current policies and procedures for implementation of the human services department's regulations.

**History: Laws 1997, ch. 237, § 16.**

**Cross references.** — For Section 454B of the federal Social Security Act, *see* 42 U.S.C. § 654b.

## 27-1-12. Work requirement for persons owing past-due child support.

The state Title IV-D agency must have and use procedures under which the state has the authority, in any case in which an individual owes past-due support with respect to a child receiving assistance under a state program funded under temporary assistance for needy families, to issue an order or to request that a court or an administrative process established pursuant to state law issue an order that requires the individual to:

A. pay such support in accordance with a plan approved by the court, or at the option of the state, a plan approved by the state Title IV-D agency; or

B. if the individual is subject to such a plan and is not incapacitated, participate in such work activities as the court, or at the option of the state, the state Title IV-D agency, deems appropriate.

**History: Laws 1997, ch. 237, § 22.**

## 27-1-13. Financial institution data matches.

A. "Financial institution" means:

(1) a depository institution, as defined in Section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c));

(2) an institution-affiliated party, as defined in Section 3(u) of such act (12 U.S.C. 1813(u));

(3) any federal credit union or state credit union, as defined in Section 101 of the Federal Credit Union Act (12 U.S.C. 1752), including an institution-affiliated party of such a credit union, as defined Section 206(r) of such act (12 U.S.C. 1786(r)); and

(4) any benefit association, insurance company, safe deposit company, money-market mutual fund or similar entity authorized to do business in the state.

B. "Account" means a demand deposit account, checking or negotiable withdrawal order account, savings account, time deposit account or money-market mutual fund account.

C. "Past-due support" means the amount of support determined under a court order or an order of an administrative process established under state law for support and maintenance of a child or of a child and the parent with whom the child is living, which has not been paid.

D. The human services department, acting as the state's child support enforcement agency pursuant to Title IV-D of the Social Security Act, shall enter into agreements with financial institutions doing business in the state to develop and operate, in coordination with such financial institutions, a data match system to be operational by October 1, 2000, using automated data exchanges to the maximum extent feasible, in which each such financial institution is required to provide the information.

E. The human services department shall establish standard procedures and formats for the financial institutions. Such procedures shall include administrative due process for child support obligors before funds or assets may be seized by the department.

F. Each financial institution in New Mexico shall provide to the human services department for each calendar quarter the name, record address, social security number or other taxpayer identification number and other identifying information for each noncustodial parent who maintains an account at such institution and who owes past-due support, as identified by the human services department, by name and social security number or other taxpayer identification number.

G. Upon receipt of a notice of lien or levy from the human services department, financial institutions shall encumber and surrender assets held by the institution on behalf of any noncustodial parent who is subject to a child support lien.



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H. The human services department may establish and pay a reasonable fee to a financial institution for conducting the data match provided for in this act, not to exceed the actual costs incurred by such financial institutions.

I. A financial institution shall not be liable under any state law to any person for disclosing of information to the human services department under this section; or for freezing or surrendering any assets held by such financial institution in response to a notice of lien or seizure issued by the human services department, or for any other action taken in good faith to comply with the requirements of this section.

J. A state child support enforcement agency that obtains a financial record of a person from a financial institution may disclose such financial record only for the purpose of, and to the extent necessary in, establishing, modifying or enforcing a child support obligation of such person.

**History: Laws 1997, ch. 237, § 33.**

**Compiler's notes.** — The term "this act," referred to in Subsection H, refers to Laws 1997, ch. 237, compiled as 27-1-8 to 27-1-14 NMSA 1978, and 40-11-5, 40-11-11.5, 40-11-12, 40-11-14, 40-11-15, 40-4A-2, 40-4A-4 to 40-4A-9, 40-5A-2 to 40-5A-7, 40-5A-10 and 40-5A-13 NMSA 1978.

**Cross references.** — For Title IV-D of the federal Social Security Act, *see* 42 U.S.C. § 651 et seq.

## 27-1-14. Enforcement of orders for health care.

A. All Title IV-D agency cases shall include a provision for the health care coverage of each child. In the case in which a medical support obligor parent provides such coverage and changes employment and the new employer provides such coverage, the state Title IV-D agency shall transfer notice of the provision to the employer, which notice shall operate to enroll each child in the medical support obligor's health plan unless the medical support obligor successfully contests the notice.

B. For purposes of this section, "medical support obligor" means a person owing a duty to provide health support, or against whom a proceeding for the enforcement of such a duty of support is commenced or for registration of a support order that includes provisions for such support for each minor child.

**History: Laws 1997, ch. 237, § 34; 2007, ch. 165, § 1.**

**The 2007 amendment,** effective June 15, 2007, added Subsection B defining "medical support obligor".

**Severability.** — Laws 1997, ch. 237, § 35 provides for the severability of the act if any part or application thereof is held invalid.

## 27-1-15. Repealed.

**Repeals.** — Laws 2006, ch. 26, § 4 repealed 27-1-15 NMSA 1978, as enacted by Laws 2005, ch. 160, § 1, relating to the prescription drug discount card program, effective May 17, 2006. For provisions of former section, *see* the 2005 NMSA 1978 on *NMOneSource.com*.

## 27-1-16. Brain injury services fund created.

A. There is created in the state treasury the "brain injury services fund". The fund shall be invested in accordance with the provisions of Section 6-10-10 NMSA 1978, and all income earned on the fund shall be credited to the fund.

B. The brain injury services fund shall be used to institute and maintain a statewide brain injury services program designed to increase the independence of persons with brain injuries.

C. The human services department shall adopt all rules, regulations and policies necessary to administer a statewide brain injury services program. The human services department shall coordinate with and seek advice from the brain injury advisory council to ensure that the statewide brain injury services program is appropriate for persons with brain injuries.

D. All money credited to the brain injury services fund shall be appropriated to the human services department for the purpose of carrying out the provisions of this section and shall not revert to the general fund.

E. Disbursements from the brain injury services fund shall be made upon warrant drawn by the secretary of finance and administration pursuant to vouchers signed by the secretary of human services.



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F. For the purposes of this section, "brain injury":

(1) means an injury to the brain of traumatic or acquired origin, including an open or closed head injury caused by:

(a) an insult to the brain from an outside physical force;

(b) anoxia;

(c) electrical shock;

(d) shaken baby syndrome;

(e) a toxic or chemical substance;

(f) near-drowning;

(g) infection;

(h) a tumor;

(i) a vascular lesion; or

(j) an event that results in either temporary or permanent, partial or total impairments in one or more areas of the brain that results in total or partial functional disability, including: 1) cognition; 2) language; 3) memory; 4) attention; 5) reasoning; 6) abstract thinking; 7) judgment; 8) problem solving; 9) sensory perception and motor abilities; 10) psychosocial behavior; 11) physical functions; 12) information processing; or 13) speech; and

(2) does not apply to an injury that is:

(a) congenital;

(b) degenerative;

(c) induced by birth trauma;

(d) induced by a neurological disorder related to the aging process; or

(e) a chemically caused brain injury that is a result of habitual substance abuse.

**History: Laws 2013, ch. 44, § 1; 2014, ch. 36, § 1.**

**The 2014 amendment,** effective May 21, 2014, defined "brain injury"; eliminated "traumatic"; in Subsection B, after "persons with", deleted "traumatic"; in Subsection C, in the second sentence, after "persons with", deleted "traumatic"; and added Subsection F.

**Temporary provisions.** — Laws 2013, ch. 44, § 2 provided that on July 1, 2013:

A. the brain injuries services fund and all appropriations, money, records, equipment, supplies, and other property of the aging and long-term services department directly related to the brain injury services fund or the provision of a statewide brain injury services program shall be transferred to the human services department;

B. all contracts directly related to the programs listed in Subsection A of this section currently binding and effective upon the aging and long-term services department or on the brain injury services fund shall be binding and effective on the human services department; and

C. all references in law to the brain injury services fund or the statewide brain injury services program shall be deemed to be references to the brain injury services fund and the statewide brain injury services program established and maintained by the human services department.

# ARTICLE 2

# Public Assistance Act

Sec.
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27-2-2. Definitions.
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27-2-47. Department; regulations.

## 27-2-1. Short title.

Sections 27-2-1 through 27-2-34 NMSA 1978 may be cited as the "Public Assistance Act".

**History: 1953 Comp., § 13-17-1, enacted by Laws 1973, ch. 376, § 1; 2013, ch. 139, § 1.**

**Cross references.** — For public assistance appeals, *see* Chapter 27, Article 3 NMSA 1978.

For programs for persons with special medical needs, *see* Chapter 27, Article 4 NMSA 1978.

**The 2013 amendment,** effective June 14, 2013, after "Section", added "27-2-1 through 27-2-34 NMSA 1978".

**ANNOTATIONS**

**Law reviews.** — For symposium, "The Equal Rights Amendment and the Administration of Income Assistance Programs in New Mexico," see 3 N.M.L. Rev. 84 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Welfare Laws §§ 1 to 74.

81 C.J.S. Social Security and Public Welfare § 1 et seq.

## 27-2-2. Definitions.

As used in the Public Assistance Act:

A. "department" means the human services department;

B. "board" means the human services department;

C. "director" means the secretary of human services;

D. "local office" means the county or district office of the human services department;

E. "public welfare" or "public assistance" means any aid or relief granted to or on behalf of an eligible person under the Public Assistance Act and regulations issued pursuant to that act;

F. "applicant" means a person who has applied for assistance or services under the Public Assistance Act;



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G. "recipient" means a person who is receiving assistance or services under the Public Assistance Act;

H. "federal act" means the federal Social Security Act, as may be amended from time to time, and regulations issued pursuant to that act; and

I. "secretary" means the secretary of human services.

**History: 1953 Comp., § 13-17-2, enacted by Laws 1973, ch. 376, § 2; 1977, ch. 252, § 21; 1987, ch. 78, § 1; 1991, ch. 155, § 1.**

**Compiler's notes.** — Laws 1937, ch. 18, § 1 enacted definitions for a public welfare act. Laws 1937, ch. 18, § 1 was repealed by Laws 1968, ch. 37, § 7. Laws 1968, ch. 37, § 2 enacted the health and social services department. Laws 1973, ch. 376, § 19 also repealed Laws 1937, ch. 18, § 1.

**Cross references.** — For the federal Social Security Act, *see* 42 U.S.C. § 301 et seq.

**The 1991 amendment,** effective June 14, 1991, added "or services" following "assistance" in Subsections F and G.

## 27-2-3. Standard of need; income determination.

A. Consistent with the federal act and subject to the availability of federal and state funds, the board shall adopt a standard of need which shall establish a reasonable level of subsistence.

B. Consistent with the federal act, the board shall define by regulation exempt and nonexempt income and resources. Medical expenses shall not be deducted from either income or resources in determining eligibility.

**History: 1953 Comp., § 13-17-3, enacted by Laws 1973, ch. 376, § 3; 1975, ch. 187, § 3.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 79 Am. Jur. 2d Welfare Laws §§ 15, 33, 35, 40, 53 to 60.

81 C.J.S. Social Security and Public Welfare §§ 37 to 44, 97 to 112.

## 27-2-4. Eligibility requirements.

Consistent with the federal act, a person is eligible for public assistance grants under the Public Assistance Act if:

A. pursuant to Section 27-2-3 NMSA 1978, the total amount of the person's nonexempt income is less than the applicable standard of need;

B. nonexempt specific and total resources are less than the level of maximum permissible resources established by the department;

C. the person meets all qualifications for one of the public assistance programs authorized by the Public Assistance Act;

D. within two years immediately prior to the filing of an application for assistance, the person has not made an assignment or transfer of real property unless the person has received a reasonable return for the real property or, if the person has not received a reasonable return, the person is willing to attempt to obtain such return and, if that attempt proves futile, the person is willing to attempt to regain title to the property;

E. the person is not an inmate of any public nonmedical institution at the time of receiving assistance, except that an inmate may be eligible for medical assistance programs administered by the medical assistance division of the department; and

F. the person is a resident of New Mexico.

**History: 1953 Comp., § 13-17-4, enacted by Laws 1973, ch. 376, § 4; 1975, ch. 187, § 4; 2015, ch. 127, § 1.**

**Cross references.** — For qualifications for general assistance program, *see* 27-2-7 NMSA 1978.

For medical assistance programs generally, *see* 27-2-12 NMSA 1978.

**The 2015 amendment,** effective June 19, 2015, provided that an inmate may be eligible for medical assistance programs administered by the medical assistance division of the human services department; in Subsection A, after "the total amount of", deleted "his" and added "the person's", and after "standard of need;", deleted "and"; in Subsection B, after "established by the", deleted "board; and", and added "department"; in Subsection C, deleted "he" and added "the person", and after "Act;", deleted "and"; in Subsection D, after "application for assistance", deleted "he" and added "the person", after "property unless", deleted "he" and added "the person", after "real property or, if", deleted "he" and added "the person", after "has not received", deleted "such" and added "a", after "reasonable



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return", deleted "he" and added "the person", after "such return and, if", deleted "such" and added "that", after "attempt proves futile", deleted "he" and added "the person", and after "title to the property;", deleted "and"; in Subsection E, deleted "he" and added "the person", and after "receiving assistance", added "except that an inmate may be eligible for medical assistance programs administered by the medical assistance division of the department"; and in Subsection F, deleted "he" and added "the person".

**ANNOTATIONS**

**Executive public assistance program unconstitutional.** — Governor's implementation of public assistance policy through the human services department violated the separation of powers doctrine, because, in changing eligibility requirements, it constituted executive creation of substantive law. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768.

**When real estate contract included in determining eligibility.** — Where a real estate contract is not readily negotiable, it cannot be included in determining eligibility for public assistance. *Frazier v. N.M. Dep't of Human Servs.*, 1982-NMCA-084, 98 N.M. 98, 645 P.2d 454.

**Law reviews.** — For note, "Medical Benefits Awarded to an Illegal Alien: Perez v. Health and Social Services," see 9 N.M.L. Rev. 89 (1978-79).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Welfare Laws §§ 15, 33, 35, 40, 50 to 60.

Status of one as poor person for purpose of statute entitling him to relief as affected by extent of his financial resources, 98 A.L.R. 870.

Alcoholic as entitled to public assistance under poor laws, 43 A.L.R.3d 554.

Eligibility for welfare benefits, under maximum-assets limitations, as affected by expenditures or disposal of assets, 19 A.L.R.4th 146.

Eligibility for welfare benefits as affected by claimant's status as trust beneficiary, 21 A.L.R.4th 729.

Validity of statutes or regulations denying welfare benefits to claimants who transfer property for less than its full value, 24 A.L.R.4th 215.

Unearned income affecting eligibility for supplemental security income benefits under 42 USCS § 1382a(a)(2), 61 A.L.R. Fed. 230.

81 C.J.S. Social Security and Public Welfare §§ 37 to 44, 97 to 112.

## 27-2-5, 27-2-6. Repealed.

**Repeals.** — Laws 1998, ch. 8, § 28 and Laws 1998, ch. 9, § 28 repealed 27-2-5 and 27-2-6 NMSA 1978, as enacted by Laws 1973, ch. 376, §§ 5 and 9, and amended by Laws 1982, ch. 24, §§ 1 and 2, relating to amount of grant and aid to families with dependent children, effective February 18, 1998. For provisions of former sections, *see* the 1997 NMSA 1978 on *NMOneSource.com*.

## 27-2-6.1. Supplemental postnatal assistance.

The health and social services department shall establish a program of supplemental postnatal assistance for those mentally retarded persons who during pregnancy received aid to families with dependent children but whose aid was revoked upon relinquishment of the newly born child for adoption. The supplemental postnatal assistance provided for in this section shall be at the same rate as aid to families with dependent children, but such supplemental postnatal assistance shall not exceed a period of sixty days. The health and social services department shall promulgate rules and regulations in order to carry out the provisions of this section.

**History: 1978 Comp., § 27-2-6.1, enacted by Laws 1978, ch. 30, § 1.**

## 27-2-6.2. Repealed.

**Repeals.** — Laws 1998, ch. 8, § 28 and Laws 1998, ch. 9, § 28, repealed 27-2-6.2 NMSA 1978, enacted by Laws 1988, ch. 122, § 1, relating to public assistance, employment and training requirements, effective February 18, 1998. For provisions of former section, *see* the 1997 NMSA 1978 on *NMOneSource.com*.

## 27-2-7. General assistance program; qualifications and payments.

A. Subject to the availability of state funds, public assistance shall be provided under a general assistance program to or on behalf of eligible persons who:

(1) are under eighteen years of age and meet all eligibility conditions for the New Mexico Works Act [27-2B-1 NMSA 1978] except the relationship to the person with whom they are living;

(2) are over the age of eighteen and are disabled, according to rules of the department, and are not receiving cash assistance or services pursuant to the New Mexico Works Act;

(3) meet the qualifications under other rules for the general assistance program as the department shall establish; or



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(4) are lawful resident immigrants who would otherwise be eligible for cash assistance or services pursuant to the New Mexico Works Act except that they began residing in the United States after August 22, 1996.

B. General assistance program payments may be made directly to the recipient or to the vendor of goods or services provided to the recipient. The department may by rule limit the grants that are made to general assistance recipients.

C. Whenever the department makes an adjustment in the standard of need for the New Mexico Works Act, subject to the availability of state funds, it shall make a commensurate adjustment in the standard of need for the general assistance program.

**History: 1953 Comp., § 13-17-10, enacted by Laws 1973, ch. 376, § 10; 1977, ch. 201, § 1; 1998, ch. 8, § 27; 1998, ch. 9, § 27.**

**Cross references.** — For liability for repayment of public assistance, *see* 27-2-28 NMSA 1978.

**The 1998 amendment,** effective February 18, 1998, substituted "rules" for "regulations" and "department" for "board" throughout the section; in Paragraph A(1), substituted "the New Mexico Works Act" for "aid to families with dependent children"; in Paragraph A(2), substituted "cash assistance or services pursuant to the New Mexico Works Act" for "aid to families with dependent children; in Paragraph A(3), deleted "from time to time" at the end of the paragraph; added Paragraph A(4); in Subsection B, substituted "rule" for "regulation"; in Subsection C, "substituted New Mexico Works Act, subject to the availability of state funds" for "aid to families with dependent children program pursuant to Section 13-17-3 NMSA 1953", and made stylistic changes throughout the section.

Laws 1998, ch. 8, § 27 and Laws 1998, ch. 9, § 27 enacted identical amendments to this section, effective February 18, 1998. The section was set out as amended by Laws 1998, ch. 9, § 27. *See* 12-1-8 NMSA 1978.

ANNOTATIONS

**Maximum period of eligibility held unconstitutional.** — Regulation of the human services department imposing a maximum period of eligibility for disabled adults receiving benefits under the general assistance program violated Title II of the federal Americans with Disabilities Act, 42 U.S.C. § 12132. *Weaver v. N.M. Human Servs. Dep't*, 1997-NMSC-039, 123 N.M. 705, 945 P.2d 70.

**Refusal to comply with regulations terminates eligibility.** — Where an applicant for public assistance refuses to comply with regulations requiring assignment of support rights, she may not maintain her eligibility for aid to families with dependent children benefits. The department's refusal to provide such benefits on that basis is in accordance with applicable law and regulations. *Melton v. N.M. Dep't of Human Servs.*, 1981-NMCA-130, 97 N.M. 102, 637 P.2d 52.

**Validity of regulation limiting duration of cash assistance payments.** — This section did not prevent state health and social services department (now human services department) from enacting regulation placing a six-month limitation on general assistance benefits paid to temporarily disabled needy persons with no minor children, since the limitation contemplated by the legislature was not confined to the amount of the periodic payments, but also applied to the length of time such payments were made. *Health & Social Servs. Dep't v. Garcia*, 1976-NMSC-003, 88 N.M. 640, 545 P.2d 1018.

## 27-2-7.1. Eligible person entitled to information.

A recipient shall be provided with information about expiration of medicaid or general assistance benefits when the recipient or the recipient's guardian, custodian or other authorized representative files a request for such information with the human services department. The department shall respond to the request within five business days of receipt of the request made on a form the department shall devise and make available to a recipient. The response shall be by physical mail, electronic mail or facsimile or by access into a department-authorized web site.

**History: Laws 2007, ch. 88, § 1.**

**Cross references.** — For medical assistance programs, *see* 27-2-12 NMSA 1978.

**Effective dates.** — Laws 2007, ch. 88, contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

## 27-2-8. Repealed.

**Repeals.** — Laws 1998, ch. 8, § 28 and Laws 1998, ch. 9, § 28 repealed 27-2-8 NMSA 1978, amended by Laws 1975, ch. 187, § 5, relating to granting of assistance, effective February 18, 1998. For provisions of former section, *see* the 1997 NMSA 1978 on *NMOneSource.com*.

## 27-2-9. Payment for hospital care.

A. Consistent with the federal act, the department shall provide necessary hospital care for recipients of public assistance other than those eligible under the general assistance program



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authorized by Section 10 [27-2-7 NMSA 1978] of the Public Assistance Act. The rate of payment for in-patient hospital services shall be based either on the reasonable cost or the customary cost of such services, whichever is less. In determining reasonable cost under this section, the board shall adopt regulations establishing a formula consistent with the federal act. The department shall apply that formula to determine the amount to which each hospital is entitled as reimbursement for providing in-patient hospital services.

B. To receive reimbursement for providing in-patient hospital services, a hospital shall file annually with the department such information as the department may reasonably require to determine reasonable costs or the hospital's customary cost of in-patient hospital services.

C. Any hospital entitled to reimbursement for in-patient hospital services shall be entitled to a hearing, pursuant to regulations of the board consistent with applicable state law, if the hospital disagrees with the department's determination of the reimbursement the hospital is to receive.

**History: 1953 Comp., § 13-17-12, enacted by Laws 1973, ch. 376, § 13.**

**Cross references.** — For medical assistance programs generally, *see* 27-2-12 NMSA 1978.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Welfare Laws §§ 4, 32, 38 to 41, 87, 88, 105.

Medical or surgical services rendered to poor person in emergency, without express authority, liability of governmental agency for, 93 A.L.R. 900.

Nature of care contemplated by statute imposing general duty to care for indigent relatives, 92 A.L.R.2d 348.

Limitation on right of chiropractors and osteopathic physicians to participate in public medical welfare programs, 8 A.L.R.4th 1056.

81 C.J.S. Social Security and Public Welfare §§ 102, 122, 128, 133.

## 27-2-9.1. Administration of shelter care supplement.

A. A shelter care supplement shall be provided to those individuals who are recipients of supplemental security income under Title 16 of the federal Social Security Act and who reside in shelter care homes licensed pursuant to regulations of the health and environment department [department of health].

B. The human services department is authorized to determine eligibility, compute payment, make payments and otherwise administer the shelter care supplement program.

C. The amount of the shelter care supplement payment shall be established by the secretary of human services subject to the availability of general funds.

**History: Laws 1979, ch. 401, § 1; 1983, ch. 174, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department, and enacted a new 9-7-4 NMSA 1978, creating the department of health.

**Cross references.** — For Title 16 of the federal Social Security Act, *see* 42 U.S.C. § 1381 et seq.

## 27-2-10. Food stamp program.

The income support division of the human services department:

A. is authorized to establish a food stamp program to carry out the federal Food Stamp Act, as may be amended from time to time, and regulations issued pursuant to that act, subject to the continuation of the federal food stamp program and the availability of federal funds; and

B. shall by January 30 of each calendar year notify the taxation and revenue department of the location of food stamp offices in New Mexico for inclusion in a notice sent with an income tax refund or other notice to a taxpayer whose income is within one hundred thirty percent of federal poverty guidelines.

**History: 1953 Comp., § 13-17-13, enacted by Laws 1973, ch. 376, § 14; 2005, ch. 138, § 2.**

**Cross references.** — For the federal Food Stamp Act, *see* 7 U.S.C. § 2011 et seq.

**The 2005 amendment,** effective June 17, 2005, added Subsection B to require the income support division of the human services department to notify the taxation and revenue department of the location of food stamp offices in New Mexico.



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**Equitable estoppel can be asserted as a defense** to bar enforcement of a food stamp overpayment claim. *Waters-Haskins v. N.M. Human Servs. Dep't*, 2009-NMSC-031, 146 N.M. 391, 210 P.3d 817, *rev'g* 2008-NMCA-127, 144 N.M. 853, 192 P.3d 1230.

**Departmental error alone does not warrant barring a food stamp overpayment claim.** *Waters-Haskins v. N.M. Human Servs. Dep't*, 2009-NMSC-031, 146 N.M. 391, 210 P.3d 817, *rev'g* 2008-NMCA-127, 144 N.M. 853, 192 P.3d 1230.

**Equitable estoppel to enforce a food stamp overpayment claim.** — Where the appellant adopted a foster child, the appellant received a foster parent subsidy before the adoption and an adoptive parent subsidy after the adoption; both before and after the adoption, the appellant received food stamp assistance; the appellant correctly reported the subsidies and the change in the status of the subsidies following the adoption; prior to the adoption, HSD properly excluded the foster parent subsidy from the appellant's income to determine eligibility for food stamp benefits; for a period of eight years after the adoption, HSD erroneously excluded the adoptive parent subsidy from the appellant's income to determine the adoptive parent's eligibility for food stamp benefits; the payment of the adoptive parent subsidy to the appellant made the appellant ineligible to receive food stamp benefits; and the appellant had neither actual nor constructive knowledge that the appellant was ineligible for food stamp benefits; the appellant detrimentally relied on HSD's representation that the appellant was eligible for food stamps, the doctrine of equitable estoppel barred HSD's food stamp overpayment claim against the appellant. *Waters-Haskins v. N.M. Human Servs. Dep't*, 2009-NMSC-031, 146 N.M. 391, 210 P.3d 817, *rev'g* 2008-NMCA-127, 144 N.M. 853, 192 P.3d 1230.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Eligibility for food stamps under Food Stamp Act of 1964 (7 USC § 2011 et seq.), 118 A.L.R. Fed. 473.

Violations and enforcement of Food Stamp Act of 1964 (7 USC § 2011 et seq.), 120 A.L.R. Fed. 331.

Selection and suspension or disqualification of participating stores under Food Stamp Act of 1964 (7 USC § 2011 et seq.), 121 A.L.R. Fed. 653.

## 27-2-11. Scope of assistance programs.

Any public assistance program conducted by the department under the federal act is effective in all political subdivisions if the federal act so requires.

**History: 1953 Comp., § 13-17-14, enacted by Laws 1973, ch. 376, § 15.**

**Cross references.** — For meaning of "federal act", *see* 27-2-2 NMSA 1978.

## 27-2-12. Medical assistance programs.

A. Consistent with the federal act and subject to the appropriation and availability of federal and state funds, the medical assistance division of the department may by rule provide medical assistance, including the services of licensed doctors of oriental medicine, licensed chiropractic physicians, licensed dental therapists and licensed dental hygienists in collaborating practice, to persons eligible for public assistance programs under the federal act.

B. Subject to appropriation and availability of federal, state or other funds received by the state from public or private grants or donations, the medical assistance division of the department may by rule provide medical assistance, including assistance in the payment of premiums for medical or long-term care insurance, to children up to the age of twelve if not part of a sibling group; children up to the age of eighteen if part of a sibling group that includes a child up to the age of twelve; and pregnant women who are residents of the state of New Mexico and who are ineligible for public assistance under the federal act. The department, in implementing the provisions of this subsection, shall:

(1) establish rules that encourage pregnant women to participate in prenatal care; and

(2) not provide a benefit package that exceeds the benefit package provided to state employees.

**History: 1953 Comp., § 13-17-15, enacted by Laws 1973, ch. 376, § 16; 1991, ch. 144, § 1; 1993, ch. 158, § 1; 2003, ch. 343, § 1; 2006, ch. 2, § 1; 2019, ch. 107, § 15.**

**Cross references.** — For meaning of "federal act", *see* 27-2-2 NMSA 1978.

For payment for hospital care, *see* 27-2-9 NMSA 1978.

**The 2019 amendment,** effective June 14, 2019, included the services of licensed dental therapists within the provisions of the medical assistance programs; in Subsection A, added "licensed dental therapists".

**The 1991 amendment,** effective June 14, 1991, substituted "medical assistance division of the human services department" for "board" and inserted "including the services of licensed oriental medical doctors and licensed chiropractors".

**The 2006 amendment,** effective May 17, 2006, added Subsection B to provide for medical assistance, including payment of insurance premiums, for children and pregnant women ineligible for federally funded public assistance.

**The 2003 amendment,** effective June 20, 2003, inserted "chiropractic physicians and licensed dental hygienists in collaborative practice" near the end.



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**The 1993 amendment,** effective June 18, 1993, substituted "licensed doctors of oriental medicine" for "licensed oriental medical doctors".

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**Abortions.** — Rule prohibiting the use of state funds to pay for abortions for medicaid-eligible women, except when necessary to save the life of the mother, to end an ectopic pregnancy, or when the pregnancy resulted from rape or incest violates the equal rights amendment to N.M. Const., art. II, § 18. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841, cert. denied, 526 U.S. 1020, 119 S. Ct. 1256, 143 L. Ed. 2d 352 (1999).

**Chiropractors' services not required under state medicaid program.** — Chiropractors' services are not physicians' services under the medicaid program. Chiropractors' services thus are not included in the general categories of medical treatment which must be included in the state plan. *Katz v. N.M. Dep't of Human Servs.*, 1981-NMSC-012, 95 N.M. 530, 624 P.2d 39 (decided prior to 1991 amendment).

**Services of a physical therapist** are not required to be included in the state plan. *Katz v. N.M. Dep't of Human Servs.*, 1981-NMSC-012, 95 N.M. 530, 624 P.2d 39.

**Denial of services not denial of equal protection.** — The denial of medicaid benefits for the services of chiropractors and physical therapists is not so arbitrary and unreasonable as to constitute a denial of equal protection. *Katz v. N.M. Dep't of Human Servs.*, 1981-NMSC-012, 95 N.M. 530, 624 P.2d 39 (decided prior to 1991 amendment).

**Medical assistance division does not have the authority to resolve discrimination claims.** — Where petitioner, a member of a managed care organization (MCO) that contracts with the human services department (HSD) to administer the provision of medicaid benefits and services, including non-emergency medical transportation, to eligible members, made requests of the MCO, pursuant to Title II of the Americans with Disabilities Act of 1990 (ADA Title II) and Section 504 of the federal Rehabilitation Act, for certain accommodations in the provision of transportation services, and where the MCO denied petitioner's request for reasonable accommodations in accessing medicaid services, and where petitioner requested a fair hearing to appeal the failure of the MCO and HSD to grant her reasonable accommodations in medicaid transportation services, the district court did not err in affirming HSD's medical assistance division's (division) dismissal of the matter, because neither the Public Assistance Act nor the Medicaid Act relied on by petitioner expressly grants the division the power to resolve discrimination claims raised by a medicaid beneficiary challenging an agency's denial or inaction in response to a request for accommodation, nor is any such power vested in the division by any regulation promulgated under state law. *Law v. N.M. Human Servs. Dep't*, 2019-NMCA-066, cert. denied.

**Law reviews.** — For article, "Freedom at Home – State Constitutions and Medicaid Funding for Abortions", see 26 N. M. L. Rev. 433 (1996).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Transsexual surgery as covered operation under state medical assistance program, 2 A.L.R.4th 775.

Limitation on right of chiropractors and osteopathic physicians to participate in public medical welfare programs, 8 A.L.R.4th 1056.

## 27-2-12.1. Repealed.

**Repeals.** — Laws 1979, ch. 330, § 1, repealed 27-2-12.1 NMSA 1978, enacted by Laws 1978, ch. 94, § 1, relating to medicaid institutional care computation.

## 27-2-12.2. Medical assistance program; eligibility of married individuals.

For the purpose of determining medical assistance for institutional care program eligibility under the Public Assistance Act, the community spouse resource allowance for a community spouse as defined and authorized by the federal Medicare Catastrophic Coverage Act of 1988 shall be a minimum of thirty thousand dollars ($30,000).

**History: Laws 1987, ch. 16, § 1; 1989, ch. 74, § 1.**

**Cross references.** — For the federal Medicare Catastrophic Coverage Act of 1988 (Public Law 100-360), *see* Titles 26 and 42 of the United States Code.

## 27-2-12.3. Medicaid reimbursement; equal pay for equal physicians', dentists', optometrists', podiatrists' and psychologists' services.

The human services department shall establish a rate for the reimbursement of physicians, dentists, optometrists, podiatrists and psychologists for services rendered to medicaid patients that provides equal reimbursement for the same or similar services rendered without respect to the date on which such physician, dentist, optometrist, podiatrist or psychologist entered into practice in New Mexico, the date on which the physician, dentist, optometrist, podiatrist or psychologist entered into an agreement or contract to provide such services or the location in which such services are to be provided in the state; provided, however, that the requirements of this section shall not apply when the human services department contracts with entities pursuant to Section 27-2-12.6 NMSA 1978 to negotiate a rate for the reimbursement for services rendered to medicaid patients in the medicaid managed care system.



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**History: 1978 Comp., § 27-2-12.2, enacted by Laws 1987, ch. 269, § 1; 1996, ch. 70, § 1.**

**Cross references.** — For the Medicaid Fraud Act, *see* Chapter 30, Article 44 NMSA 1978.

**The 1996 amendment,** effective May 15, 1996, added the provisio at the end of the section.

## 27-2-12.4. Long-term care facilities; noncompliance with standards and conditions; sanctions.

A. In addition to any other actions required or permitted by federal law or regulation, the human services department shall impose a hold on state medicaid payments to a long-term care facility thirty days after the health and environment department [department of health] notifies the human services department in writing pursuant to an on-site visit that the long-term care facility is not in substantial compliance with the standards or conditions of participation promulgated by the federal department of health and human services pursuant to which the facility is a party to a medicaid provider agreement, unless the substantial noncompliance has been corrected within that thirty-day period or the facility's medicaid provider agreement is terminated or not renewed based in whole or in part on the noncompliance. The written notice shall cite the specific deficiencies that constitute noncompliance.

B. The human services department shall remove the payment hold imposed under Subsection A of this section when the health and environment department [department of health] pursuant to an on-site visit certifies in writing to the human services department that the long-term care facility is in substantial compliance with the standards or conditions of participation pursuant to which the facility is a party to a medicaid provider agreement.

C. The human services department shall not reimburse any long-term care facility during the payment hold period imposed pursuant to Subsection A of this section for any medicaid recipient-patients who are new admissions and who are admitted on or after the day the hold is imposed and prior to the day the hold is removed.

D. If a long-term care facility is certified in writing to be in noncompliance pursuant to Subsection A of this section for the second time in any twelve-month period, the human services department shall cancel or refuse to execute the long-term care facility's medicaid provider agreement for a two-month period, unless it can be demonstrated that harm to the patients would result from this action or that good cause exists to allow the facility to continue to participate in the medicaid program. The provisions of this subsection are subject to appeal procedures set forth in federal regulations for nonrenewal or termination of a medicaid provider agreement.

E. A long-term care facility shall not charge medicaid recipient-patients, their families or their responsible parties to recoup any payments not received because of a hold on medicaid payments imposed pursuant to this section.

F. This section shall not be construed to affect any other provisions for medicaid provider agreement termination, nonrenewal, due process and appeal pursuant to federal law or regulation.

G. As used in this section:

(1) "day" means a twenty-four hour period beginning at midnight and ending one second before midnight;

(2) "long-term care facility" means any intermediate care facility or skilled nursing facility which is licensed by the health and environment department [department of health] and which is medicaid certified;

(3) "new admissions" means medicaid recipients who have never been in the long-term care facility or, if previously admitted, had been discharged or had voluntarily left the facility. The term does not include:

(a) individuals who were in the long-term care facility before the effective date of the hold on medicaid payments and became eligible for medicaid after that date; and

(b) individuals who, after a temporary absence from the facility, are readmitted to beds reserved for them in accordance with federal regulations; and

(4) "substantial compliance" means the condition of having no cited deficiencies or having only those cited deficiencies which:



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(a) are not inconsistent with any federal statutory requirement;
(b) do not interfere with adequate patient care;
(c) do not represent a hazard to the patients' health or safety;
(d) are capable of correction within a reasonable period of time; and
(e) are ones which the long-term care facility is making reasonable plans to correct.

**History: Laws 1987, ch. 214, § 1.**
**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department, and enacted a new 9-7-4 NMSA 1978, creating the department of health.

## 27-2-12.5. Medicaid-certified nursing facilities; retroactive eligibility; refunds; penalty.

A. Medicaid payment for a medicaid-eligible patient shall be accepted by a medicaid-certified nursing facility from the first month of medicaid eligibility, regardless of whether the eligibility is retroactive. The nursing facility shall refund to the patient or responsible party all out-of-pocket money except for required medical-care credits paid to the nursing facility for that patient's care on and after the date of medicaid eligibility for services covered by the medicaid program. Within thirty days after notification by the human services department of the patient's medicaid eligibility, the nursing facility shall make any necessary refund to the patient or responsible party required under this section.

B. In any cause of action brought against a nursing facility because of its failure to make a refund to the patient or responsible party as required under Subsection A of this section, the patient or responsible party may be awarded triple the amount of the money not refunded or three hundred dollars ($300), whichever is greater, and reasonable attorneys' fees and court costs.

**History: Laws 1989, ch. 83, § 1; 1991, ch. 211, § 1.**
**The 1991 amendment,** effective June 14, 1991, added "Penalty" in the section heading; designated the formerly undesignated provision as Subsection A; and added Subsection B.

## 27-2-12.6. Medicaid payments; managed care.

A. The department shall provide for a statewide, managed care system to provide cost-efficient, preventive, primary and acute care for medicaid recipients by July 1, 1995.

B. The managed care system shall ensure:

(1) access to medically necessary services, particularly for medicaid recipients with chronic health problems;

(2) to the extent practicable, maintenance of the rural primary care delivery infrastructure;

(3) that the department's approach is consistent with national and state health care reform principles; and

(4) to the maximum extent possible that medicaid-eligible individuals are not identified as such except as necessary for billing purposes.

C. The department may exclude nursing homes, intermediate care facilities for the mentally retarded, medicaid in-home and community-based waiver services and residential and community-based mental health services for children with serious emotional disorders from the provisions of this section.

**History: Laws 1994, ch. 62, § 22.**
**Cross references.** — For Money Follows the Person in New Mexico Act, *see* 27-15-1 NMSA 1978.

**ANNOTATIONS**

**Subsection B of Section 27-1-16 does not apply to New Mexico's managed health care system or managed care organizations.** *Starko, Inc. v. N.M. Human Servs. Dep't*, 2014-NMSC-033, *rev'g* 2012-NMCA-053, 276 P.3d 252.



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## 27-2-12.7. Medicaid; human services department employees; standards of conduct; enforcement.

A. As used in this section:

(1) "business" means a corporation, partnership, sole proprietorship, firm, organization or individual carrying on a business;

(2) "department" means the human services department;

(3) "employee" means any person who has been appointed to or hired for any department office connected with the administration of medicaid funds and who receives compensation in the form of salary;

(4) "employee with responsibility" means an employee who is directly involved in or has a significant part in the medicaid decision-making, regulatory, procurement or contracting process; and

(5) "financial interest" means an interest held by an individual, his spouse or minor child which is:

(a) an ownership interest in business; or

(b) any employment or prospective employment for which negotiations have already begun.

B. No employee with responsibility shall for twenty-four months following the date on which he ceases to be an employee act as agent or attorney for any other person or business in connection with a judicial or administrative proceeding, application, ruling, contract, claim or other matter relating to the medicaid program with respect to which the employee made any investigation, rendered any ruling or was otherwise substantially and directly involved during the last year he was an employee and which was actually pending under his responsibility within that period.

C. No department secretary, income support division director or medical assistance bureau chief or their deputies shall for twelve months following the date on which he ceases to be an employee participate in any manner with respect to a judicial or administrative proceeding, application, ruling, contract, claim or other matter relating to the medicaid program and pending before the department.

D. No employee with responsibility shall participate in any manner with respect to a judicial or administrative proceeding, application, ruling, contract, claim or other matter relating to the medicaid program and involving his spouse, minor child or any business in which he has a financial interest unless prior to such participation:

(1) full disclosure of his relationship or financial interest is made in writing to the secretary of the department; and

(2) a written determination is made by the secretary that the disclosed relationship or financial interest is too remote or inconsequential to affect the integrity of the services of the employee.

E. Violation of any of the provisions of this section by an employee is grounds for dismissal, demotion or suspension. A former employee who violates any of the provisions of this section shall be subject to assessment by the department of a civil money penalty of two hundred fifty dollars ($250) for each violation. The department shall promulgate regulations to provide for an administrative appeal of any assessment imposed.

**History: Laws 1980, ch. 86, § 1; 1978 Comp., § 10-16-16, recompiled as 1978 Comp., § 27-2-12.7 by Laws 1997, ch. 112, § 10.**

**Cross references.** — For state assistance to individuals eligible for medicaid, *see* 27-2-16 NMSA 1978.

**Recompilations.** — Laws 1997, ch. 112, § 10 recompiled former 10-16-16 NMSA 1978, relating to medicaid and department of human services employees, as 27-2-12.7 NMSA 1978, effective June 20, 1997.

## 27-2-12.8. Mammograms for medicaid recipients.

In providing coverage for mammograms under the medicaid program, the department shall ensure that:

A. patients will not be routinely solicited for mammograms; and that mammograms will only be performed based on nationally recognized standards; and



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B. any fee for service payment that shall be made on behalf of the medicaid program for a mammogram of a medicaid recipient shall be consistent with and not exceed the usual and customary charge that reflects the reasonable fair market value of the cost of a mammogram.

**History: Laws 1997, ch. 264, § 1.**

## 27-2-12.9. Medicaid; personal spending allowances; increases.

For fiscal year 2001, the medicaid personal spending allowance shall be forty-five dollars ($45.00) per month for each eligible recipient. Thereafter, the medicaid personal spending allowance shall be increased at the beginning of each fiscal year by the annual percentage increase in the consumer price index for all urban consumers for all items for the preceding calendar year.

**History: Laws 2000, ch. 9, § 1.**

## 27-2-12.10. Clinical nurse specialists.

The department shall recognize clinical nurse specialists as mid-level providers in the medicaid program provided that the clinical nurse specialists comply with the requirements for licensure pursuant to the Nursing Practice Act [Chapter 61, Article 3 NMSA 1978] and that the services provided by the clinical nurse specialists are covered and reimbursable in accordance with Title 19 or Title 21 of the federal act.

**History: Laws 2001, ch. 304, § 1.**

**Compiler's notes.** — Titles 19 and 21 of the federal act, referred to at the end of the section, are Titles 19 and 21 of the Social Security Act, codified as 42 U.S.C.S. § 1396 et seq. and 42 U.S.C.S. § 1397 et seq., respectively.

## 27-2-12.11. Prescription drug waiver program; purpose; eligibility.

Subject to the availability of state funds and consistent with the federal Social Security Act, the human services department shall create a medicaid waiver program and may by regulation provide prescription drugs to persons whose incomes are less than one hundred eighty-five percent of the federal poverty level and who:

A. are sixty-five years of age or older; or

B. have been determined to be disabled under the criteria established under the federal social security administration's disability determination rules as applied by the department.

**History: Laws 2003, ch. 34, § 1 and by Laws 2003, ch. 278, § 1.**

**Cross references.** — For the federal Social Security Act, *see* 7 U.S.C. § 301 et seq.

**Compiler's notes.** — Laws 2003, ch. 34, § 1 and Laws 2003, ch. 278, § 1 enacted identical new sections, both effective June 20, 2003.

## 27-2-12.12. Human services department; managed care contract credentialing provisions.

The human services department shall negotiate with medicaid contractors to ensure that the contractors' credentialing requirements are coordinated with other credentialing processes required of individual providers.

**History: Laws 2003, ch. 235, § 4.**

**Effective dates.** — Laws 2003, ch. 235 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 20, 2003, 90 days after adjournment of the legislature.

**Legislative findings.** — Laws 2003, ch. 235, § 1, effective June 20, 2003, provided: "The legislature finds that licensed professionals in New Mexico, particularly those in the health care field are severely burdened by multiple layers of mandatory credentialing obligations, costing them, their patients and third-party payers needless expense and wasted time. Further, the legislature notes that New Mexico's health care licensure provisions may be contributing to harmful delays in access to health care throughout the



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state, particularly in areas with acute professional shortages. The legislature believes that efforts begun pursuant to House Joint Memorial 61 of the second session of the forty-fifth legislature and the continued cooperation among respective licensing boards, the regulation and licensing department, various statewide professional associations and societies, insurers and national accrediting and standard setting organizations will produce a system satisfactory to all concerned while maintaining the primary goal of ensuring the health and safety of New Mexico residents".

## 27-2-12.13. Medicaid reform; program changes.

A. The department shall carry out the medicaid program changes as recommended by the medicaid reform committee that was established pursuant to Laws 2002, Chapter 96, as follows:

(1) develop a uniform preferred drug list for the state's medicaid prescription drug benefit and integrate all medicaid programs or services administered by the medical assistance division of the department to its use;

(2) work with other agencies to integrate the use of the uniform preferred drug list as described in Paragraph (1) of this subsection to other health care programs, including the department of health, the publicly funded health care agencies of the Health Care Purchasing Act [13-7-1 NMSA 1978], state agencies that purchase prescription drugs and other public or private purchasers of prescription drugs with whom the state can enter into an agreement for the use of a uniform preferred drug list;

(3) identify entities that are eligible to participate in the federal drug pricing program under Section 340b of the federal Public Health Service Act. The department shall make a reasonable effort to assist the eligible entities to enroll in the program and to purchase prescription drugs under the federal drug pricing program. The department shall ensure that entities enrolled in the federal drug pricing program are reimbursed for drugs purchased for use by medicaid recipients at acquisition cost and that the purchases are not included in a rebate program;

(4) work toward the development of a prescription drug purchasing cooperative to combine the buying power of the state's medicaid program, the publicly funded health care agencies of the Health Care Purchasing Act, the department of health, the corrections department and other potential public or private purchasers, including other states, to obtain the best price for prescription drugs. The administration and price negotiation of the prescription drug purchasing cooperative shall be consolidated under a single agency as determined by the governor;

(5) in consultation and collaboration with the department of health and medicaid providers and contractors, develop a program to expand the use of community health promoters. The community health promoters shall assist selected medicaid recipients in understanding the requirements of the medicaid program; ensuring that recipients are seeking and receiving primary and preventive health care services; following health care providers' orders or recommendations for medication, diet and exercise; and keeping appointments for examinations and diagnostic examinations;

(6) require that the managed care organizations provide or strengthen disease management programs for medical assistance recipients through closer coordination with and assistance to primary care and safety net providers and seek to adopt uniform key health status indicators. The department shall ensure that the managed care organizations make reasonable efforts and actively seek the expanded participation in disease management programs of primary care providers and other health care providers, particularly in underserved areas;

(7) ensure that case management services are provided to assist medicaid recipients in accessing needed medical, social and other services. The department shall require that managed care organizations provide or strengthen case management services through closer coordination with and assistance to primary care and safety net providers. The case management services shall be targeted to specific classes of individuals or individuals in specific areas where medicaid costs or utilization demonstrate a lack of health care management or coordination;

(8) design a pilot disease management program for the fee-for-service population. The department shall ensure that the disease management program is based on key health status indicators, accountability for clinical benefits and demonstrated cost savings;

(9) continue the personal care option with increased consumer awareness of consumer-directed services as a choice in addition to consumer-delegated services;

(10) expand the program of all-inclusive care for the elderly to a rural or urban area with a population less than four hundred thousand to the extent resources are available;



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(11) in conjunction with the department of health, the children, youth and families department and the state agency on aging [aging and long-term services department], coordinate the state's long-term care services, including health and social services and assessment and information and referral development for recipients through an appropriate transition process;

(12) develop a fraud and abuse detection and recovery plan that ensures cooperation, sharing of information and general collaboration among the medicaid fraud control unit of the attorney general, the managed care organizations, medicaid providers, consumer groups and the department to identify, prevent or recover medicaid reimbursement obtained through fraudulent or inappropriate means;

(13) work with other agencies to identify other state-funded health care programs and services that may be reimbursable under medicaid and to ensure that the programs and services meet the requirements for federal funding;

(14) in conjunction with Indian health service facilities or tribally operated health care facilities pursuant to Section 638 of the Indian Self-Determination and Education Assistance Act, medicaid managed care organizations and medicaid providers, ensure that Indian health service facilities and tribally operated facilities are utilized to the extent possible for services that are eligible for a one hundred percent federal medical assistance percentage match;

(15) review the payment methodologies for eligible federally qualified health centers that provide the maximum allowable medicaid reimbursement;

(16) ensure that primary care clinics engaged in medicaid-related outreach and enrollment activities are appropriately reimbursed under medicaid;

(17) assess a premium on selected medicaid recipients who meet criteria as determined by the department;

(18) assess tiered co-payments on emergency room services in amounts comparable to those assessed for the same services by commercial health insurers or health maintenance organizations, except that no co-payment shall be imposed if the patient is admitted as a hospital inpatient as a result of the emergency room evaluation. The emergency room provider shall make a good faith effort to collect the co-payment from the patient. The co-payment shall apply to medicaid recipients in the managed care system or the fee-for-service system;

(19) assess tiered co-payments on selected higher-cost prescription drugs to provide incentives for greater use of generic prescription drugs when there is a generic or lower-cost equivalent available;

(20) assess a co-payment on the purchase of selected prescription drugs that are not on the uniform preferred drug list as described in Paragraph (1) of this subsection;

(21) consider the impact of cost-sharing requirements on medicaid recipients' access to health care. The department shall ensure that premiums and co-payments described in Paragraphs (17) through (20) of this subsection are in compliance with federal requirements;

(22) provide vision benefits for adults that do not exceed one routine eye exam and one set of corrective lenses in a twelve-month period or more than one frame for corrective lenses in a twenty-four-month period, except as medically warranted;

(23) review its prescription drug policies to ensure that pharmacists have the flexibility for and are not discouraged from using generic prescription drugs when there is a generic or lower-cost equivalent available; and

(24) review its nursing home eligibility criteria to ensure that consideration of income, trusts and other assets are the maximum permissible under federal law.

B. The department shall, to the extent possible, combine or coordinate similar initiatives in this section or in other medicaid reform committee recommendations to avoid duplication or conflict. The department shall give preference to those initiatives that provide significant cost savings while protecting the quality and access of medicaid recipients' health care services.

C. The department shall ensure compliance with federal requirements for implementation of the medicaid reform committee's recommendations. The department shall request a federal waiver as may be necessary to comply with federal requirements.

D. As used in this section:

(1) "case management" means services that ensure care coordination among the patient, the primary care provider and other providers involved in addressing the patient's health care needs, including care plan development, communication and monitoring;



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(2) "community health promoters" means persons trained to promote health and health care access among low-income persons and medically underserved communities;

(3) "disease management" means health care services, including patient education, monitoring, data collection and reporting, designed to improve health outcomes of medicaid recipients in defined populations with selected chronic diseases;

(4) "drug purchasing cooperative" means a collaborative procurement process designed to secure prescription drugs at the most advantageous prices and terms;

(5) "fee-for-service" means a traditional method of paying for health care services under which providers are paid for each service rendered;

(6) "managed care system" refers to the program for medicaid recipients required by Section 27-2-12.6 NMSA 1978;

(7) "medicaid" means the joint federal-state health coverage program pursuant to Title 19 or Title 21 of the federal act;

(8) "preferred drug list" means a list of prescription drugs for which the state will make payment without prior authorization or additional charge to the medicaid recipient and that is based on clinical evidence for efficacy and meets the department's cost-effectiveness criteria;

(9) "primary care clinics" means facilities that provide the first level of basic or general health care for an individual's health needs, including diagnostic and treatment services, and includes federally qualified health centers or federally qualified health center look-alikes as defined in Section 1905 of the federal act and designated by the federal department of health and human services, community-based health centers, rural health clinics and other eligible programs under the Rural Primary Health Care Act [24-1A-1 NMSA 1978];

(10) "primary care provider" means a health care practitioner acting within the scope of his license who provides the first level of basic or general health care for a person's health needs, including diagnostic and treatment services, initiates referrals to other health care practitioners and maintains the continuity of care when appropriate; and

(11) "waiver" means the authority granted by the secretary of the federal department of health and human services, upon the request of the state, that allows exceptions to the state medicaid plan requirements and allows a state to implement innovative programs or activities.

**History: Laws 2003, ch. 315, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 2004, ch. 23, § 13 provided that all references to the "state agency on aging" be deemed references to the "aging and long-term services department".

**Emergency clauses.** — Laws 2003, ch. 315, § 2 contained an emergency clause and was approved April 8, 2003.

**Cross references.** — For the children, youth and families department, *see* Chapter 9, § 2A NMSA 1978.

For the department of health, *see* Chapter 9, § 7, NMSA 1978.

For the aging and long-term services department, *see* Chapter 28, § 4 NMSA 1978.

For Section 340B of the federal Public Health Service Act, *see* 42 U.S.C. § 256b.

For Section 1905 of the federal Social Security Act, *see* 42 U.S.C. § 1396d.

For the Indian Self-Determination and Education Assistance Act, enacted by P.L. 93-638, *see* 25 U.S.C.S. § 450 et seq.

**Compiler's notes.** — Laws 2003, ch. 279, § 1, effective April 8, 2003, and Laws 2003, ch. 314, § 1, effective June 20, 2003, are identical, and direct the human services department to initiate the studies, analyses, pilot projects and recommendations of the medicaid reform committee, created by Laws 2002, ch. 96. Among other things, the department is to conduct a cost-beneficial analysis of the replacement of the managed care system with a statewide primary care case management model; to complete the analysis necessary for the global funding waiver; and to identify options for revising, limiting, reducing or eliminating medicaid services.

**ANNOTATIONS**

**Governor entitled to legislative immunity.** — Actions of the governor recommending state appropriations for medicaid waivers, revamping the state personnel system and plan for growth in the medicaid programs were legislative in nature and therefore the governor is entitled to legislative immunity. *Lewis v. N.M. Dep't of Health*, 275 F.Supp.2d 1319 (D.N.M. 2003).

## 27-2-12.14. Brain injury; services authorized.

Subject to the availability of state funds and consistent with Title 19 of the federal Social Security Act, the department shall provide services to persons with brain injuries, with emphasis on long-term disability services provided through home- and community-based programs.



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**History: Laws 2005, ch. 243, § 1.** **Effective dates.** — Laws ch. 243, § 3 made the act effective April 6, 2005.
**Cross reference.** — For Title 19 of the Social Security Act, *see* 42 USC Sections 1901 *et seq.*

## 27-2-12.15. Medicaid, state children's health insurance program and state coverage initiative program medical home waiver; rulemaking; application for waiver or state plan amendment.

A. Subject to the availability of state funds and consistent with the federal Social Security Act, the department shall work with its contractors that administer the state's approved waiver programs to promote and, if practicable, develop a program called the "medical home program". The "medical home" is an integrated care management model that emphasizes primary medical care that is continuous, comprehensive, coordinated, accessible, compassionate and culturally appropriate. Care within the medical home includes primary care, preventive care and care management services and uses quality improvement techniques and information technology for clinical decision support. Components of the medical home model may include:

(1) assignment of recipients to a primary care provider, clinic or practice that will serve as a medical home;

(2) promotion of the health commons model of service delivery, whereby the medical home tracks recipients' primary care, specialty, behavioral health, dental health and social services needs as much as practicable;

(3) health education, health promotion, peer support and other services that may integrate with health care services to promote overall health;

(4) health risk or functional needs assessments for recipients;

(5) a method for reporting on the effectiveness of the medical home model and its effect upon recipients' utilization of health care services and the associated cost of utilization of those services;

(6) mechanisms to reduce inappropriate emergency department utilization by recipients;

(7) financial incentives for the provision of after-hours primary care;

(8) mechanisms that ensure a robust system of care coordination for assessing, planning, coordinating and monitoring recipients with complex, chronic or high-cost health care or social support needs, including attendant care and other services needed to remain in the community;

(9) implementation of a comprehensive, community-based initiative to educate recipients about effective use of the health care delivery system, including the use of community health workers or promotoras;

(10) strategies to prevent or delay institutionalization of recipients through the effective utilization of home- and community-based support services;

(11) a primary care provider for each recipient, who advocates for and provides ongoing support, oversight and guidance to implement an integrated, coherent, cross-disciplinary plan for ongoing health care developed in partnership with the recipient and including all other health care providers furnishing care to the recipient;

(12) implementation of evidence-based medicine and clinical decision support tools to guide decision-making at the point-of-care based upon recipient-specific factors;

(13) use of comparative effectiveness to make a cost-benefit analysis of health care practices;

(14) use of health information technology, including remote supervision, recipient monitoring and recipient registries, to monitor and track the health status of recipients;

(15) development and use of safe and secure health information technology to promote convenient recipient access to personal health information, health services and web sites with tools for patient self-management;

(16) implementation of training programs for personnel involved in the coordination of care for recipients;

(17) implementation of equitable financial incentive and compensation systems for primary care providers and other staff engaged in care management and the medical home model; and

(18) any other components that the secretary determines will improve a recipient's health outcome and that are cost-effective.



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B. For the purposes of this section, "primary care provider" means a medical doctor or physician assistant licensed under the Medical Practice Act [61-6-1 NMSA 1978] to practice medicine in New Mexico, an osteopathic physician licensed pursuant to Chapter 61, Article 10 NMSA 1978, an osteopathic physician's assistant licensed pursuant to the Osteopathic Physicians' Assistants Act [repealed], a pharmacist clinician licensed or certified to prescribe and administer drugs that are subject to the New Mexico Drug, Device and Cosmetic Act [26-1-1 NMSA 1978]; or a certified nurse practitioner as defined in the Nursing Practice Act [61-3-1 NMSA 1978] who provides first contact and continuous care and who has the staff and resources to manage the comprehensive and coordinated health care of each individual under the primary care provider's care.

**History: Laws 2009, ch. 143, § 1; 2010, ch. 43, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2016, ch. 90, § 29 repealed the Osteopathic Physicians' Assistants Act, §§ 61-10A-1 to 61-10A-7 NMSA 1978, effective July 1, 2016.

**The 2010 amendment,** effective May 19, 2010, in Subsection B, added new language between "practice medicine in New Mexico" and "or a certified nurse practitioner"; and after "first contact and continuous care", deleted "for individuals under the physician's care".

## 27-2-12.16. Medicaid recipients; cost-sharing payments for emergency medical services when non-emergency services are indicated.

A. Consistent with the federal act and subject to the appropriation and availability of federal and state funds, the department shall promulgate rules that require a recipient who chooses a high-cost medical service provided through a hospital emergency room to pay a co-payment, premium payment or other cost-sharing payment for the high-cost medical service if:

(1) the hospital from which the recipient seeks service:

(a) performs an appropriate medical screening and determines that the recipient does not have a condition requiring emergency medical services;

(b) informs the recipient that the recipient does not have a condition requiring emergency medical services;

(c) informs the recipient that if the hospital provides the non-emergency service, the hospital may require the recipient to pay a co-payment, premium payment or other cost-sharing payment in advance of providing the service;

(d) informs the recipient of the name and address of a non-emergency medicaid provider that can provide the appropriate medical service without imposing a cost-sharing payment; and

(e) offers to provide the recipient with a referral to the non-emergency provider to facilitate scheduling of the service;

(2) after receiving the information and assistance from the hospital described in Paragraph (1) of this subsection, the recipient chooses to obtain emergency medical services despite having access to medically acceptable, lower-cost non-emergency medical services; and

(3) the recipient's household income is at least one hundred percent of the federal poverty level.

B. The cost-sharing payment for a high-cost medical service made pursuant to this section shall be:

(1) for a child whose household income is one hundred to one hundred fifty percent of the federal poverty level, six dollars ($6.00);

(2) for an adult whose household income is one hundred to one hundred fifty percent of the federal poverty level, twenty-five dollars ($25.00);

(3) for a child whose household income is greater than one hundred fifty percent of the federal poverty level, twenty dollars ($20.00); and

(4) for an adult whose household income is greater than one hundred fifty percent of the federal poverty level, fifty dollars ($50.00).

C. The department shall not seek a federal waiver or other authorization to carry out the provisions of Subsection A of this section that would prevent a medicaid recipient who has a condition



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requiring emergency medical services from receiving care through a hospital emergency room or waive any provision under Section 1867 of the federal act.

D. The department shall not reduce hospital payments to reflect the potential receipt of a co-payment or other payment from a recipient receiving medical services provided through a hospital emergency room.

E. The secretary shall apply for a grant pursuant to Subsection 1903(y) of the federal Deficit Reduction Act to establish a program to provide for non-emergency services to serve as an alternative to emergency rooms as providers of health care. This program shall establish partnerships with local community hospitals and shall focus on providing alternatives to emergency services for primary care for rural and underserved areas where medicaid recipients do not have regular access to primary care. As used in this section, "primary care" means the first level of basic physical or behavioral health care for an individual's health needs, including diagnostic and treatment services.

**History: Laws 2009, ch. 263, § 1.**
**Effective dates.** — Laws 2009, ch. 263 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

## 27-2-12.17. Qualified state long-term care insurance partnership program; establishment; rulemaking.

A. Consistent with the federal act and subject to the appropriation and availability of federal and state funds, the secretary shall amend the state medicaid plan to establish a qualified state long-term care insurance partnership program pursuant to Section 1917(b) of the federal act. The program shall:

(1) provide incentives for an individual to obtain or maintain qualified insurance to cover the cost of long-term care; and

(2) provide a mechanism for an individual to qualify for medical assistance for institutional care or a medical assistance home- and community-based long-term care program on the basis of countable resources. Pursuant to the qualified state long-term care insurance partnership program:

(a) an individual who otherwise qualifies for medical assistance for institutional care or a medical assistance home- and community-based long-term care program shall qualify on the basis of countable resources when the individual is the beneficiary of a qualified insurance policy, insurance plan, certificate of insurance or rider; and

(b) for purposes of determining eligibility, the individual's total countable resources shall be reduced by an amount equal to the qualified insurance benefits that are made to or on behalf of the individual.

B. The secretary shall consult with the superintendent of insurance in the adoption and promulgation of rules regarding the implementation and operation of the qualified state long-term care partnership insurance program. These rules shall provide for reciprocity with respect to individuals who have purchased qualified insurance in another state participating in a qualified state long-term care insurance partnership program and shall provide that the amount of that individual's countable resources shall be disregarded with respect to that qualified insurance.

C. As used in this section:

(1) "qualified insurance" means an insurance policy, insurance plan, certificate of insurance or rider that the superintendent has certified as qualified long-term care partnership program insurance pursuant to Section 4 [59A-23A-12 NMSA 1978] of this 2013 act; and

(2) "rider" means a long-term care coverage provision added to any type of insurance plan, insurance policy or certificate of insurance.

**History: Laws 2013, ch. 139, § 2.**
**Effective dates.** — Laws 2013, ch. 139 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.



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## 27-2-12.18. Medical assistance; prescription drugs; prior authorization request form; prior authorization protocols.

A. Beginning January 1, 2014, the department shall require its medicaid contractors to accept the uniform prior authorization form developed pursuant to Sections 2 [59A-2-9.8 NMSA 1978] and 3 [61-11-6.2 NMSA 1978] of this 2013 act. The department shall require its medicaid contractors to accept the uniform prior authorization form as sufficient to request prior authorization for prescription drug benefits on behalf of recipients.

B. The department shall require its medicaid contractors to respond within three business days upon receipt of a uniform prior authorization form. The department shall require each of its medicaid contractors to deem a prior authorization as having been granted if the contractor has failed to respond to the prior authorization request within three business days.

**History: Laws 2013, ch. 170, § 1.**

**Effective dates.** — Laws 2013, ch. 170 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

## 27-2-12.19. Former foster-care recipients; medical assistance coverage until age twenty-six.

The department shall cover individuals who are residents of New Mexico and who are former recipients of foster care, regardless of the state where the foster care was received, until those individuals reach the age of twenty-six years.

**History: Laws 2015, ch. 31, § 1.**

**Effective dates.** — Laws 2015, ch. 31 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2015, 90 days after the adjournment of the legislature.

## 27-2-12.20. Crisis triage center; medical assistance reimbursement.

A. In accordance with federal law, the secretary shall adopt and promulgate rules to establish a reimbursement rate for services provided to recipients of state medical assistance at a crisis triage center.

B. As used in this section, "crisis triage center" means a health facility that:

(1) is licensed by the department of health; and

(2) provides stabilization of behavioral health crises and may include residential and nonresidential stabilization.

**History: Laws 2015, ch. 61, § 2; 2018, ch. 34, § 2.**

**The 2018 amendment,** effective March 1, 2018, revised the definition of "crisis triage center"; in Subsection B, at the end of Paragraph B(1), added "and", deleted former Paragraph B(2) and redesignated former Paragraph B(3) as Paragraph B(2), and in Paragraph B(2), after "health crises", deleted "including" and added "and may include residential and nonresidential".

**Temporary provisions.** — Laws 2015, ch. 61, § 3 provided that by July 1, 2016, the department of health shall adopt and promulgate rules relating to the licensure of crisis triage centers pursuant to Laws 2015, ch. 61, §§ 1 and 2.

## 27-2-12.21. Medical assistance; pharmacy benefits; prescription synchronization.

A. In accordance with federal law, the secretary shall adopt and promulgate rules that allow a recipient to fill or refill a prescription for less than a thirty-day supply of a prescription drug and apply a prorated daily copayment or coinsurance, if applicable, for the fill or refill, if:

(1) the prescribing practitioner or the pharmacist determines the fill or refill to be in the best interest of the patient;

(2) the recipient requests or agrees to receive less than a thirty-day supply of the prescription drug; and

(3) the reduced fill or refill is made for the purpose of synchronizing the recipient's prescription drug fills.



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B. Medical assistance coverage shall not:

(1) deny coverage for the filling of a chronic medication when the fill is made in accordance with a plan to synchronize multiple prescriptions for the recipient pursuant to Subsection A of this section established among the department or the recipient's managed care plan, the prescribing practitioner and a pharmacist. The medical assistance coverage shall allow a pharmacy to override any denial indicating that a prescription is being refilled too soon for the purposes of medication synchronization; and

(2) prorate a dispensing fee to a pharmacy that fills a prescription with less than a thirty-day supply of prescription drug pursuant to Subsection A of this section. The medical assistance coverage shall pay in full a dispensing fee for a partially filled or refilled prescription for each prescription dispensed, regardless of any prorated copayment or coinsurance that the recipient may pay for prescription synchronization services.

**History: Laws 2015, ch. 65, § 2.**

**Effective dates.** — Laws 2015, ch. 65 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2015, 90 days after the adjournment of the legislature.

## 27-2-12.22. Incarcerated individuals; medicaid eligibility; county jail technical assistance; presumptive eligibility determiner training and certification.

A. Incarceration shall not be a basis to deny or terminate eligibility for medicaid.

B. Upon release from incarceration, a formerly incarcerated individual shall remain eligible for medicaid until the individual is determined to be ineligible for medicaid on grounds other than incarceration.

C. An incarcerated individual who was not enrolled in medicaid upon the date that the individual became incarcerated shall be permitted to submit an application for medicaid during the incarcerated individual's period of incarceration.

D. The provisions of this section shall not be construed to abrogate:

(1) any deadline that governs the processing of applications for medicaid pursuant to existing federal or state law; or

(2) requirements under federal or state law that the human services department be notified of changes in income, resources, residency or household composition.

E. The provisions of this section shall not require the human services department to pay for services on behalf of any incarcerated individual, except as permitted by federal law.

F. A correctional facility shall:

(1) inform the human services department when an eligible individual is incarcerated;

(2) facilitate, with assistance from the department, eligibility determinations for medicaid during the incarcerated individuals' incarceration or upon release;

(3) notify the department upon an eligible individual's release; and

(4) facilitate the department's or any department contractor's provision of care coordination pursuant to the provisions of Section 2 of this 2018 act [33-1-22 NMSA 1978].

G. Upon the written request of a county, the department shall provide a behavioral health screening tool to facilitate screenings performed in accordance with the provisions of Subsection A of Section 2 of this 2018 act, technical assistance and training and certification of county jail presumptive eligibility determiners to a county jail.

H. The secretary of human services shall adopt and promulgate rules consistent with this section.

I. As used in this section:

(1) "care coordination" means an assessment for health risks and the creation of a plan of care to address an individual's comprehensive health needs, including access to physical health care and mental health services; substance use disorder treatment; and transportation services;

(2) "eligibility" means a finding by the human services department that an individual has met the criteria established in state and federal law and the requirements established by department rules to enroll in medicaid;



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(3) "incarcerated individual" means an individual, the legal guardian or conservator of an individual or, for an individual who is an unemancipated minor, the parent or guardian of the individual, who is confined in any of the following correctional facilities:

(a) a state correctional facility;

(b) a privately operated correctional facility;

(c) a county jail;

(d) a privately operated jail;

(e) a detention facility that is operated under the authority of the children, youth and families department and that holds the individual pending a court hearing; or

(f) a facility that is operated under the authority of the children, youth and families department and that provides for the care and rehabilitation of an individual who is under eighteen years of age and who has committed an act that would be designated as a crime under the law if committed by an individual who is eighteen years of age or older;

(4) "medicaid" means the joint federal-state health coverage program pursuant to Title 19 or Title 21 of the federal Social Security Act and rules promulgated pursuant to that act; and

(5) "unemancipated minor" means an individual who is under eighteen years of age and who:

(a) is not on active duty in the armed forces; and

(b) has not been declared by court order to be emancipated.

**History: Laws 2015, ch. 127, § 2; 2018, ch. 74, § 1.**

**Cross references.** — For the federal Social Security Act, *see* 42 U.S.C.S. § 301 et seq.

**The 2018 amendment,** effective July 1, 2018, provided correctional facilities with additional duties related to incarcerated individual's medicaid eligibility determinations, required the human services department to provide to county jails, in connection with medicaid eligibility determinations, behavioral health screening tools, technical assistance and training and certification for counties, and defined "care coordination" as used in this section; in the catchline, added "county jail technical assistance; presumptive eligibility determiner training and certification"; in Subsection F, added paragraph designation "(1)"; in Paragraph F(1), after "incarcerated", deleted "and shall notify the department upon that eligible individual's release", added paragraphs F(2) through F(4); added a new Subsection G and redesignated former Subsections G and H as Subsections H and I, respectively; and in Subsection I, added a new Paragraph I(1) and redesignated former Paragraphs I(1) through I(4) as Paragraphs I(2) through I(5), respectively.

## 27-2-12.23. Medical assistance; prescription drug coverage; step therapy protocols; clinical review criteria; exceptions.

A. By January 1, 2019, the secretary shall require any medical assistance plan for which any step therapy protocols are required to establish clinical review criteria for those step therapy protocols. The clinical review criteria shall be based on clinical practice guidelines that:

(1) recommend that the prescription drugs subject to step therapy protocols be taken in the specific sequence required by the step therapy protocol;

(2) are developed and endorsed by an interdisciplinary panel of experts that manages conflicts of interest among the members of the panel of experts by:

(a) requiring members to: 1) disclose any potential conflicts of interest with health care plans, medical assistance plans, health maintenance organizations, pharmaceutical manufacturers, pharmacy benefits managers and any other entities; and 2) recuse themselves if there is a conflict of interest; and

(b) using analytical and methodological experts to work to provide objectivity in data analysis and ranking of evidence through the preparation of evidence tables and facilitating consensus;

(3) are based on high-quality studies, research and medical practice;

(4) are created pursuant to an explicit and transparent process that:

(a) minimizes bias and conflicts of interest;

(b) explains the relationship between treatment options and outcomes;

(c) rates the quality of the evidence supporting recommendations; and

(d) considers relevant patient subgroups and preferences; and

(5) take into account the needs of atypical patient populations and diagnoses.

B. In the absence of clinical guidelines that meet the requirements of Subsection A of this section, peer-reviewed publications may be substituted.



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C. When a medical assistance plan restricts coverage of a prescription drug for the treatment of any medical condition through the use of a step therapy protocol, a recipient and the practitioner prescribing the prescription drug shall have access to a clear, readily accessible and convenient process to request a step therapy exception determination. A medical assistance plan may use its existing medical exceptions process in accordance with the provisions of Subsections D through I of this section to satisfy this requirement. The process shall be made easily accessible for recipients and practitioners on the medical assistance plan's publicly accessible website.

D. A medical assistance plan shall expeditiously grant an exception to the medical assistance plan's step therapy protocol, based on medical necessity and a clinically valid explanation from the patient's prescribing practitioner as to why a drug on the plan's formulary that is therapeutically equivalent to the prescribed drug should not be substituted for the prescribed drug, if:

(1) the prescription drug that is the subject of the exception request is contraindicated or will likely cause an adverse reaction by or physical or mental harm to the patient;

(2) the prescription drug that is the subject of the exception request is expected to be ineffective based on the known clinical characteristics of the patient and the known characteristics of the prescription drug regimen;

(3) while under the recipient's current medical assistance plan, or under the recipient's previous health coverage, the recipient has tried the prescription drug that is the subject of the exception request or another prescription drug in the same pharmacologic class or with the same mechanism of action as the prescription drug that is the subject of the exception request and that prescription drug was discontinued due to lack of efficacy or effectiveness, diminished effect or an adverse event; or

(4) the prescription drug required pursuant to the step therapy protocol is not in the best interest of the patient, based on clinical appropriateness, because the patient's use of the prescription drug is expected to:

(a) cause a significant barrier to the patient's adherence to or compliance with the patient's plan of care;

(b) worsen a comorbid condition of the patient; or

(c) decrease the patient's ability to achieve or maintain reasonable functional ability in performing daily activities.

E. Upon the granting of an exception to a medical assistance plan's step therapy protocol, a medical assistance plan shall authorize coverage for the prescription drug that is the subject of the exception request.

F. A medical assistance plan shall respond with its decision on a recipient's exception request within seventy-two hours of receipt. In cases where exigent circumstances exist, a medical assistance plan shall respond within twenty-four hours of receipt of the exception request. In the event the medical assistance plan does not respond to an exception request within the time frames required pursuant to this subsection, the exception request shall be granted.

G. A medical assistance plan's denial of a request for an exception for step therapy protocols shall be subject to review and appeal pursuant to department rules.

H. After a recipient has made an exception request in accordance with the provisions of this section, a medical assistance plan shall authorize continued coverage of a prescription drug that is the subject of the exception request pending the determination of the exception request.

I. The provisions of this section shall not be construed to prevent:

(1) a medical assistance plan from requiring a patient to try a generic equivalent of a prescription drug before providing coverage for the equivalent brand-name prescription drug; or

(2) a practitioner from prescribing a prescription drug that the practitioner has determined to be medically necessary.

J. As used in this section, "medical necessity" or "medically necessary" means health care services determined by a practitioner, in consultation with the medical assistance plan, to be appropriate or necessary, according to:

(1) any applicable, generally accepted principles and practices of good medical care;

(2) practice guidelines developed by the federal government or national or professional medical societies, boards or associations; or



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(3) any applicable clinical protocols or practice guidelines developed by the medical assistance plan consistent with federal, national and professional practice guidelines. These standards shall be applied to decisions related to the diagnosis or direct care and treatment of a physical or behavioral health condition, illness, injury or disease.

**History: Laws 2018, ch. 9, § 2.**
**Effective dates.** — Laws 2018, ch. 9 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 16, 2018, 90 days after the adjournment of the legislature.

## 27-2-12.24. Medical assistance; plan of care; participation required.

A. By January 1, 2020, the secretary shall require medical assistance plans to establish, in consultation with the department, hospitals, birthing centers, the children, youth and families department and the department of health, a process for the creation and implementation of a plan of care for a substance-exposed newborn and the relatives, parents, guardians or caretakers of a substance-exposed newborn as provided for in the Children's Code [Chapter 32A NMSA 1978].

B. As used in this section, "plan of care" means a plan created by a health care professional pursuant to the Children's Code that is intended to ensure the safety and well-being of a substance-exposed newly born child by addressing the treatment needs of the child and any of the child's parents, relatives, guardians, family members or caregivers to the extent those treatment needs are relevant to the safety of the child.

**History: 1978 Comp., § 27-2-12.24, enacted by Laws 2019, ch. 190, § 5.**
**Effective dates.** — Laws 2019, ch. 190 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 27-2-12.25. Prior authorization for gynecological or obstetrical ultrasounds prohibited.

A. The department shall prohibit its medicaid managed care and fee-for-service contractors from requiring prior authorization for gynecological or obstetrical ultrasounds.

B. Nothing in this section shall be construed to require payment for a gynecological or obstetrical ultrasound that is not:

(1) medically necessary; or

(2) a covered benefit.

C. As used in this section, "prior authorization" means advance approval that is required as a condition precedent to payment for medical care or related benefits rendered to a covered person, including prospective or utilization review conducted prior to the provision of covered medical care or related benefits.

**History: Laws 2019, ch. 182, § 2.**
**Emergency clauses.** — Laws 2019, ch. 182, § 7 contained an emergency clause and was approved April 3, 2019.

## 27-2-12.26. Qualified medicare beneficiary recipients; medicare part B coverage automatic enrollment.

A. The department shall provide for the automatic enrollment into medicare part B coverage of individuals:

(1) whom it deems eligible for participating in the qualified medicare beneficiary program; and

(2) who are not enrolled in medicare part B coverage.

B. By August 1, 2019, the secretary shall adopt and promulgate rules to provide for informing, in writing, applicants for and recipients of qualified medicare beneficiary coverage that, if they are enrolled in the qualified medicare beneficiary program and, at the time of enrollment they are not enrolled in medicare part B, they are eligible for automatic enrollment in medicare part B



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coverage, regardless of whether general or "open" enrollment of medicare part B beneficiaries is allowed under federal law at the time a qualified medicare beneficiary program recipient enrolls in the qualified medicare beneficiary program.

C. As used in this section:

(1) "medicare part B" means the supplemental medical insurance program provided under part B of Title 18 of the federal Social Security Act; and

(2) "qualified medicare beneficiary program" means the joint state-federal medical assistance program that provides for payment of recipients' premiums under part A of Title 18 of the federal Social Security Act and recipients' coinsurance and deductible amounts on services covered under medicare part B.

**History: Laws 2019, ch. 136, § 1.**

**Cross references.** — For Title 18 of the federal Social Security Act, *see* 42 U.S.C.A. § 1395 et seq.

**Effective dates.** — Laws 2019, ch. 136 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 27-2-12.27. Medical assistance; managed care organization contracts; applicability of Prior Authorization Act.

The secretary shall ensure that contracts with managed care organizations to provide medical assistance to medicaid recipients are subject to and comply with the Prior Authorization Act [59A-22B-1 through 59A-22B-5 NMSA 1978].

**History: Laws 2019, ch. 187, § 2.**

**Effective dates.** — Laws 2019, ch. 187 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 27-2-12.28. Medical assistance; autism spectrum disorder.

A. The secretary shall ensure that medical assistance coverage provides coverage, which shall not be subject to age restrictions or dollar limits, for:

(1) well-baby and well-child screening for diagnosing the presence of autism spectrum disorder; and

(2) treatment of autism spectrum disorder through speech therapy, occupational therapy, physical therapy and applied behavioral analysis.

B. Coverage required pursuant to Subsection A of this section:

(1) shall be limited to treatment that is prescribed by the recipient's treating physician in accordance with a treatment plan;

(2) shall not be denied on the basis that the services are habilitative or rehabilitative in nature;

(3) may be subject to other general exclusions and limitations of medical assistance coverage, including coordination of benefits, participating provider requirements, restrictions on services provided by family or household members and utilization review of health care services, including the review of medical necessity, case management and other managed care provisions; and

(4) may be limited to exclude coverage for services received under the federal Individuals with Disabilities Education Improvement Act of 2004 and related state laws that place responsibility on state and local school boards for providing specialized education and related services to children three to twenty-two years of age who have autism spectrum disorder.

C. The coverage required pursuant to Paragraph (1) of Subsection A of this section shall not be subject to any recipient cost-sharing.

D. The coverage required pursuant to Paragraph (2) of Subsection A of this section shall not be subject to cost-sharing provisions that are less favorable to a recipient than the cost-sharing provisions that apply to physical illnesses that are generally covered through medical assistance coverage, except as otherwise provided in Subsection B of this section.



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E. The treatment plan required pursuant to Subsection B of this section shall include all elements necessary for the health insurance plan to pay claims appropriately. These elements include the:

(1) diagnosis;

(2) proposed treatment by types;

(3) frequency and duration of treatment;

(4) anticipated outcomes stated as goals;

(5) frequency with which the treatment plan will be updated; and

(6) signature of the treating physician.

F. This section shall not be construed as limiting benefits and coverage otherwise available to a recipient through medical assistance coverage.

G. As used in this section:

(1) "autism spectrum disorder" means:

(a) a condition that meets the diagnostic criteria for autism spectrum disorder published in the current edition of the *Diagnostic and Statistical Manual of Mental Disorders* published by the American psychiatric association; or

(b) a condition diagnosed as autistic disorder, Asperger's disorder, pervasive development disorder not otherwise specified, Rett's disorder or childhood disintegrative disorder pursuant to diagnostic criteria published in a previous edition of the *Diagnostic and Statistical Manual of Mental Disorders* published by the American psychiatric association;

(2) "cost-sharing" means any deductible, copayment, coinsurance or other payment that a recipient is required to pay for medical assistance items or services provided through medical assistance coverage; and

(3) "habilitative or rehabilitative services" means treatment programs that are necessary to develop, maintain or restore to the maximum extent practicable the functioning of an individual.

**History: Laws 2019, ch. 119, § 2.**
**Effective dates.** — Laws 2019, ch. 119 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 27-2-12.29. Medical assistance; reimbursement for a one-year supply of covered prescription contraceptive drugs or devices.

A. In providing coverage for family planning services and supplies under the medical assistance program, the department shall ensure that a recipient is permitted to fill or refill a prescription for a one-year supply of a covered, self-administered contraceptive at one time, as prescribed.

B. Nothing in this section shall be construed to limit a recipient's freedom to choose or change the method of family planning to be used, regardless of whether the recipient has exhausted a previously dispensed supply of contraceptives.

**History: Laws 2019, ch. 263, § 2.**
**Effective dates.** — Laws 2019, ch. 263 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 27-2-12.30. Pharmacist prescriptive authority services; reimbursement parity.

A medical assistance program or its contractor shall reimburse a participating provider that is a certified pharmacist clinician or pharmacist certified to provide a prescriptive authority service who provides a service at the standard contracted rate that the medical assistance program reimburses, for the same service under that program, any licensed physician or physician assistant licensed pursuant to the Medical Practice Act [Chapter 41, Article 5 NMSA 1978] or any advanced practice certified nurse practitioner licensed pursuant to the Nursing Practice Act [Chapter 61, Article 3 NMSA 1978].



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**History: Laws 2020, ch. 58, § 2; 2021, ch. 54, § 10.**

**The 2021 amendment,** effective June 18, 2021, after "Medical Practice Act", deleted "or the Osteopathic Medicine Act".

## 27-2-12.31. Heart artery calcium scan coverage.

A. In accordance with federal law, the secretary shall adopt and promulgate rules that provide medical assistance coverage for eligible enrollees to receive a heart artery calcium scan.

B. Medical assistance coverage provided pursuant to this section shall:

(1) be limited to the provision of a heart artery calcium scan to an eligible enrollee to be used as a clinical management tool;

(2) be provided every five years if an eligible enrollee has previously received a heart artery calcium score of zero; and

(3) not be required for future heart artery calcium scans if an eligible enrollee receives a heart artery calcium score greater than zero.

C. At its discretion or as required by law, a managed care organization providing medical assistance may offer or refuse coverage for further cardiac testing or procedures for eligible enrollees based upon the results of a heart artery calcium scan.

D. The provisions of this section shall not apply to short-term travel, accident-only or limited or specified-disease policies, plans or certificates of health insurance.

E. As used in this section:

(1) "eligible enrollee" means an enrollee who:

(a) is a person between the ages of forty-five and sixty-five; and

(b) has an intermediate risk of developing coronary heart disease as determined by a health care provider based upon a score calculated from an evidence-based algorithm widely used in the medical community to assess a person's ten-year cardiovascular disease risk, including a score calculated using a pooled cohort equation;

(2) "health care provider" means a physician, physician assistant, nurse practitioner or other health care professional authorized to furnish health care services within the scope of the professional's license; and

(3) "heart artery calcium scan" means a computed tomography scan measuring coronary artery calcium for atherosclerosis and abnormal artery structure and function.

**History: Laws 2020, ch. 79, § 2.**

**Effective dates.** — Laws 2020, ch. 79 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

**Applicability.** — Laws 2020, ch. 79, § 6 provided that the provisions of Laws 2020, ch. 79, are applicable to group health insurance policies, health care plans or certificates of health insurance, other than small group health plans, that are delivered, issued for delivery or renewed in this state on or after January 1, 2021.

## 27-2-13. Conflict in federal and state laws.

Any section of the NMSA 1978 relating to public assistance which is in conflict with the provisions of the federal act or the federal Food Stamp Act, as may be amended from time to time, and federal regulations issued pursuant thereto, shall be suspended in its operation if the attorney general certifies that such conflict exists.

**History: 1953 Comp., § 13-17-16, enacted by Laws 1973, ch. 376, § 17.**

**Cross references.** — For the federal Food Stamp Act, *see* 7 U.S.C. § 2011 et seq.

## 27-2-14. Continuing effect of regulations and standards.

Regulations and standards of the board and department adopted prior to the effective date of the Public Assistance Act are continued in full force and effect, unless modified or revoked.

**History: 1953 Comp., § 13-17-17, enacted by Laws 1973, ch. 376, § 18.**



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## 27-2-15. Cooperation with United States.

The state department is hereby designated as the state agency to cooperate with the federal government in the administration of the provisions of Title 1, Title 4, Part 2 and 3 of Title 5, and Title 10 of the federal Social Security Act. The state board is hereby authorized and directed to cooperate with the proper departments of the federal government, and with all other departments of the state and local governments in the enforcement and administration of such provisions of the federal Social Security Act, and any amendments thereto and the rules and regulations issued thereunder, and in compliance therewith in the manner prescribed in this act, or as otherwise provided by law.

The department shall also make reports in such form and containing such information as any agency or instrumentality of the United States, with which it is cooperating, may from time to time require, and shall comply with such provisions as any such agency or instrumentality may from time to time find necessary to assure the correctness and verification of such reports.

**History: Laws 1937, ch. 18, § 9; 1941 Comp., § 73-109; 1953 Comp., § 13-1-9.**

**Compiler's notes.** — The words "this act", referred to near the end of the first paragraph, refer to Laws 1937, ch. 18.

**Cross references.** — For Titles 1, 4, 5 and 10 of the federal Social Security Act, *see* 42 U.S.C. §§ 301 et seq., 601 et seq., 701 et seq., and 1201 et seq., respectively.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Welfare Laws §§ 15, 32 to 41, 43.

Constitutionality of old-age pension or assistance acts, 37 A.L.R. 1524, 86 A.L.R. 912, 101 A.L.R. 1215.

Old-age assistance benefits under federal and state Social Security Act, 121 A.L.R. 1002.

Reimbursement of public for financial assistance to aged persons, 29 A.L.R.2d 731.

Residence required for purposes of old-age assistance, 43 A.L.R.2d 1427.

What constitutes "disability" within federal Social Security Act, 77 A.L.R.2d 641.

81 C.J.S. Social Security and Public Welfare §§ 94 to 112.

## 27-2-16. Compliance with federal law.

A. Subject to the availability of state funds, the human services department may provide assistance to aged, blind or disabled individuals in the amounts consistent with federal law to enable the state to be eligible for medicaid funding. Individuals shall be determined to be aged, blind or disabled according to regulations of the human services department.

B. If drug product selection is permitted by Section 26-3-3 NMSA 1978, reimbursement by the medicaid program shall be limited to the wholesale cost of the lesser expensive therapeutic equivalent drug generally available in New Mexico plus a reasonable dispensing fee of at least three dollars sixty-five cents ($3.65).

**History: 1953 Comp., § 13-17-18, enacted by Laws 1974, ch. 31, § 1; 1982, ch. 26, § 2; 1984, ch. 27, § 1.**

**Cross references.** — For medical assistance programs generally, *see* 27-2-12 NMSA 1978.

For programs for persons with special medical needs generally, *see* Chapter 27, Article 4 NMSA 1978.

ANNOTATIONS

**Subsection B of Section 27-1-16 does not apply to New Mexico's managed health system or to managed care organizations.** *Starko, Inc. v. N.M. Human Servs. Dep't*, 2014-NMSC-033, *rev'g* 2012-NMCA-053, 276 P.3d 252.

**Subsection B of Section 27-2-16 NMSA 1978 applies to managed care organizations** and the medicaid managed care program. *Starko, Inc. v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053, 276 P.3d 252, cert. granted, 2012-NMCERT-003.

**Subsection B of Section 27-2-16 NMSA 1978 creates a private right of enforcement** against managed care organizations. *Starko, Inc. v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053, 276 P.3d 252, cert. granted, 2012-NMCERT-003.

**Subsection B applies whenever a substitution is possible.** — Subsection B of Section 27-2-16 NMSA 1978 applies whenever a pharmacist has the discretion to issue a lesser expensive drug that is the therapeutic equivalent to the prescribed drug even if a substitution does not occur. *Starko, Inc. v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053, 276 P.3d 252, cert. granted, 2012-NMCERT-003.

**Statutory rights not waived by entering into managed care contracts.** — Where, in a class action, pharmacists sued to enforce their rights to reimbursement under Subsection B of Section 27-2-16 NMSA 1978; when the state converted the medicaid program from a fee-for-service program to a managed care program, pharmacists were required to enter into new contracts with managed care organizations; the new contracts required the organizations to reimburse pharmacists at the current and applicable medicaid reimbursement rates which were less than the required rates under Subsection B; pharmacists who refused to participate in the new contracts were terminated from the active provider list by the human services department; and when the state converted the medicaid program to a managed care program, pharmacists sought a temporary restraining order to determine the effect of entering into the new contracts and pursuant to the court's order, the department entered into provider contracts with the organizations which provided that the new contracts with pharmacists did not waive pharmacists'



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statutory rights to sue under Subsection B, pharmacists did not waive their statutory rights to sue pursuant to Subsection B by entering into the new contracts. *Starko, Inc. v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053, 276 P.3d 252, cert. granted, 2012-NMCERT-003.

**Reduction of reimbursement rates without federal approval.** — Where, in a class action, pharmacists sued to enforce their rights to reimbursement under Subsection B of Section 27-2-16 NMSA 1978, alleging that the human services department failed to reimburse pharmacists in accordance with medicaid legislation for drug ingredient costs; from January 1, 1991 through June 30, 1997, the department reimbursed pharmacists at the rate of the average wholesale price, minus ten and one-half percent; effective June 30, 1997, the department reduced the ingredient cost to the average wholesale price, minus twelve and one-half percent; federal approval of the reduction, which was necessary, was given in April 1998, retroactive to January 1, 1998; and pharmacists claimed that the department did not have authority to reduce the reimbursement rate during the six-month period prior to federal approval, the federal statute did not require prior approval of state plans, retroactive approval was sufficient, and pharmacists did not have a cause of action against the department for reimbursement for the six-month period when reimbursement rates had been reduced without federal approval. *Starko, Inc. v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053, 276 P.3d 252, cert. granted, 2012-NMCERT-003.

**Breach of contract claim against the Human Services Department.** — Where, in a class action, pharmacists sued to enforce their rights to reimbursement under Subsection B of Section 27-2-16 NMSA 1978; when the state converted the medicaid program from a fee-for-service program to a managed care program, the human services department entered into provider contracts with managed care organizations that required the organizations to provide medical care and pharmacy services, explicitly incorporated all applicable statutes, and provided that contracts between the organizations and pharmacists would not waive pharmacists' statutory rights to sue pursuant to Subsection B; Subsection B's requirement that pharmacists be reimbursed with the average wholesale price, plus a reasonable dispensing fee when pharmacists dispense lesser expensive, therapeutic equivalent drug, was a term of the provider agreements and pharmacists could bring a breach of contract action against the department for the medicaid program's failure to reimburse pharmacists in accordance with Subsection B. *Starko, Inc. v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053, 276 P.3d 252, cert. granted, 2012-NMCERT-003.

**Unjust enrichment claim against managed care organizations.** — Where, in a class action, pharmacists sued to enforce their rights to reimbursement under Subsection B of Section 27-2-16 NMSA 1978; the human services department entered into provider contracts with managed care organizations that required the organizations to pay pharmacists in accordance with Subsection B; and pharmacists alleged that the department paid the organizations in compliance with the statute and that the payments were partially retained by the organizations, pharmacists stated a claim in equity for unjust enrichment. *Starko, Inc. v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053, 276 P.3d 252, cert. granted, 2012-NMCERT-003.

**Class certification was proper.** — Where, in a class action, pharmacists sued the human services department and managed care organizations to enforce pharmacists' rights to reimbursement under Subsection B of Section 27-2-16 NMSA 1978; the department entered into provider contracts with the organizations to provide medical care and pharmacy services; the organizations entered into contracts with pharmacists to provide pharmacy services; the number of pharmacist who were class members was between two and three hundred; the pharmacists were widely dispersed across the state; the relationship of each pharmacist to the department and the organizations and the facts necessary to decide the case as to each class member were essentially the same; each class member sought an interpretation of Subsection B that required either the department or the organizations to pay; there was no evidence that the interests of any individual class member were contrary to those of the entire class; to prevail, each class member needed a holding on all critical issues common to all class members; judicial resources would be saved by certification; the number of class members was manageable; and the damages of each class member could be calculated in a similar manner, the court did not abuse its discretion in finding that the requirements of Paragraph A of Rule 1-023 NMRA were met. *Starko, Inc. v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053, 276 P.3d 252, cert. granted, 2012-NMCERT-003.

**No denial of due process.** — Where human services department executives contracted with managed care organizations in such a way that resulted in pharmacists being paid a dispensing fee of less than the statutory amount of $3.65, the pharmacists were not denied due process by the state because the pharmacists were being paid the dispensing fee under contracts the pharmacists voluntarily entered into with the managed care organizations and because the violation of the substance of the state law is not a violation of a procedural guarantee. *Starko, Inc. v. Gallegos*, 2006-NMCA-085, 140 N.M. 136, 140 P.3d 1085, cert. denied, 2006-NMCERT-007, 140 N.M. 279, 142 P.3d 360.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Welfare Laws §§ 15, 32 to 41, 43.

Residence required for purpose of old-age assistance, 43 A.L.R.2d 1427.

What constitutes "disability" within federal Social Security Act, 77 A.L.R.2d 641.

Use of medical-vocational guidelines (20 CFR Part 404, Subpart P, Appendix 2) in determining disability of social security benefits claimant, 60 A.L.R. Fed. 796.

81 C.J.S. Social Security and Public Welfare §§ 94 to 112.

## 27-2-17. Custodian of funds.

The state department is hereby designated as the custodian, subject to the provisions of Section 21 [repealed] of this act, of any and all monies which may be received by the state of New Mexico, which the state board of public welfare is authorized to administer, from any appropriations made by the congress of the United States for the purpose of cooperating with the several states in the enforcement and administration of the provisions of the federal Social Security Act, referred to in Section 9 [27-2-15 NMSA 1978], and all monies received from any other source for the purposes set forth in this act. The state department is hereby authorized to receive such monies, provide for the proper custody thereof, and to make disbursements therefrom under such rules and regulations as the state board may prescribe.



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**History: Laws 1937, ch. 18, § 10; 1941 Comp., § 73-110; 1953 Comp., § 13-1-10.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Section 21 of Laws 1937, ch. 18, formerly compiled as 27-2-33 NMSA 1978, was repealed by Laws 1998, ch. 9, § 28, effective February 18, 1998.

**Cross references.** — For the federal Social Security Act, *see* 42 U.S.C. § 301 et seq.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Welfare §§ 15, 32 to 41, 50, 67, 103, 111 to 113.

Unemployment or other unusual conditions, power of state or municipality to appropriate funds or incur indebtedness, in excess of poor funds, for relief of distress due to, 87 A.L.R. 371.

81 C.J.S. Social Security and Public Welfare §§ 2, 6, 9, 94 to 112, 116.

## 27-2-18 to 27-2-20. Repealed.

**Repeals.** — Laws 1998, ch. 8, § 28 and Laws 1998, ch. 9, § 28, repealed 27-2-18 through 27-2-20 NMSA 1978, amended by Laws 1963, ch. 220, § 1, relating to application for public assistance, effective February 18, 1998. For provisions of former sections, *see* the 1997 NMSA 1978 on *NMOneSource.com*.

## 27-2-21. Assistance not assignable.

Assistance granted under this act shall not be transferable or assignable, at law or in equity, and none of the money paid or payable under this act shall be subject to execution, levy, attachment, garnishment or other legal process, or to the operation of any bankruptcy or insolvency law.

**History: Laws 1937, ch. 18, § 11g; 1941 Comp., § 73-118; 1953 Comp., § 13-1-19.**

**Cross references.** — For rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, *see* Rules 1-065.1, 2-801, and 3-801 NMRA, respectively.

For form for claim of exemptions on executions, *see* Rule 4-803 NMRA.

For form for order on claim of exemption and order to pay in execution proceedings, *see* Rule 4-804 NMRA.

For form for application for writ of garnishment and affidavit, *see* Rule 4-805 NMRA.

For form for notice of right to claim exemptions from execution, *see* Rule 4-808A NMRA.

For form for claim of exemption from garnishment, *see* Rule 4-809 NMRA.

**Compiler's notes.** — The words "this act" refer to Laws 1937, ch. 18.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Welfare Laws § 101.

81 C.J.S. Social Security and Public Welfare §§ 100, 202, 222.

## 27-2-22. Repealed.

**Repeals.** — Laws 1998, ch. 8, § 28 and Laws 1998, ch. 9, § 28 repealed 27-2-22 NMSA 1978, as enacted by Laws 1937, ch. 18, § 11h, relating to recovery from a recipient, effective February 18, 1998. For provisions of former section, *see* the 1997 NMSA 1978 on *NMOneSource.com*.

## 27-2-23. Third party liability.

A. The income support division of the department shall make reasonable efforts to ascertain any legal liability of third parties who are or may be liable to pay all or part of the medical cost of injury, disease or disability of an applicant for or recipient of medical assistance pursuant to the provisions of Chapter 27 NMSA 1978.

B. When the department makes medical assistance payments on behalf of a recipient, the department is subrogated to any right of the recipient against a third party for recovery of medical expenses to the extent that the department has made payment.

C. Health insurers, including self-insured plans, group health plans, service benefit plans, managed care organizations, pharmacy benefit managers or other parties, that are, by statute, contract or agreement, legally responsible for payment of a claim for a health care item or service, as a condition of doing business with New Mexico, shall:

(1) provide, with respect to individuals who are eligible for or are provided medical assistance under the medicaid program, upon the request of the state, information to determine during what period the individual, the individual's spouse or the individual's dependents may be, or may have been, covered by a health insurer and the nature of the coverage provided by the health insurer, including the name, address and identifying number of the plan;



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(2) accept New Mexico's right of recovery and the assignment to New Mexico of any right of an individual or other entity to payment from the party for an item or service for which payment has been made under the medicaid program;

(3) respond to any inquiry by New Mexico regarding a claim for payment for any health care item or service that is submitted no later than three years after the date of the provision of such health care item or service; and

(4) agree not to deny a claim submitted by New Mexico solely on the basis of the date of submission of the claim by the provider, the type of the claim form or a failure to present proper documentation at the point-of-sale that is the basis of the claim, if:

(a) the claim is submitted by New Mexico within the three-year period beginning on the date on which the item or service was furnished; and

(b) any action by New Mexico to enforce its rights with respect to such claim is commenced within six years of New Mexico's submission of such claim.

D. Nothing in this section shall be construed to preclude the application of common law principles in determining equitable reimbursement from any third-party source for New Mexico or a health insurer, including self-insured plans, group health plans, service benefit plans, managed care organizations, pharmacy benefit managers or other parties.

**History: 1953 Comp., § 13-1-20.1, enacted by Laws 1969, ch. 232, § 1; 2007, ch. 246, § 1.**

**Cross references.** — For medical assistance programs generally, *see* 27-2-12 NMSA 1978.

For liability for repayment of public assistance, *see* 27-2-28 NMSA 1978.

**The 2007 amendment,** effective June 15, 2007, added Subsections C and D.

ANNOTATIONS

**Department's subrogation** is right of recovery subject to equitable principles. *White v. Sutherland*, 1978-NMCA-076, 92 N.M. 187, 585 P.2d 331, cert. denied, 92 N.M. 79, 582 P.2d 1292.

**Circumstances held not to justify complete reimbursement.** — Although this section shows an intent that medical assistance payments be repaid, it says nothing as to 100 percent repayment regardless of the facts. Where the settlement proceeds in a medical malpractice suit would constitute but a small fraction of a medical assistance recipient's actual damages and any money which the department might recover would be due to a very large extent to the energies expended in pursuing the malpractice claim by the recipient and her attorneys, who were charging a contingent fee of 25 percent of the recovery, the department was not equitably entitled to complete reimbursement for its payments to the recipient. *White v. Sutherland*, 1978-NMCA-076, 92 N.M. 187, 585 P.2d 331, cert. denied, 92 N.M. 79, 582 P.2d 1292.

**Equitable reduction.** — Subsection G of Section 27-2-28 NMSA 1978, providing for assignment to the department of a recipient's right to recovery against a tortfeasor, as reconciled with this section and federal law, does not convey the right to full reimbursement in every case, but permits an equitable reduction. *Kahrs v. Sanchez*, 1998-NMCA-037, 125 N.M. 1, 956 P.2d 132, cert. denied, 124 N.M. 589, 953 P.2d 1087.

## 27-2-23.1. Employee Retirement Income Security Act employee health benefit plans; clauses to exclude medicaid coverage prohibited.

No employee health benefit plan established under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1144, that provides payments for health care on behalf of individuals residing in the state shall contain any provisions excluding or limiting coverage or payment for any health care for an individual who would otherwise be covered or entitled to benefits or services under the terms of the employee health benefit plan, because that individual is provided, or is eligible for, benefits under the medicaid program of this state pursuant to Title XIX of the federal Social Security Act, 42 U.S.C. 1396, et seq.

**History: 1978 Comp., § 27-2-23.1, enacted by Laws 1989, ch. 184, § 1.**

## 27-2-24. [Federal government entitled to share recovery.]

The federal government shall be entitled to a share of any amounts recovered under the preceding two sections [27-2-22, 27-2-23 NMSA 1978] if required as a condition to federal financial participation. The federal government's share shall be limited to a percentage of the net recovery equal to the percentage of federal participation claimed by the state for the payments when



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originally made. The amount due the United States shall be paid promptly from the funds so collected to the United States government.

**History: Laws 1937, ch. 18, § 11i; 1941, ch. 116, § 6; 1941 Comp., § 73-120; 1953 Comp., § 13-1-21; Laws 1969, ch. 232, § 2.**

**Compiler's notes.** — The words "preceding two sections," which first appeared in this section as amended by Laws 1969, ch. 232, § 2, apparently were intended to refer to 13-1-20 and 13-1-20.1, 1953 Comp., which at that time were the two sections immediately preceding this section in the 1953 Compilation. Sections 13-1-20 and 13-1-20.1, 1953 Comp., were compiled as 27-2-22 and 27-2-23 NMSA 1978.

Section 27-2-22 was repealed by Laws 1998, ch. 9, § 28, effective February 28, 1998.

## 27-2-25. Funeral expenses.

A. On the death of:

(1) a recipient of financial assistance under Section 27-2-6 NMSA 1978 [repealed] or Section 27-2-7 NMSA 1978 or under the federal supplemental security income program; or

(2) an individual living in a nursing home or an intermediate care facility the payment for whose care is made in whole or in part pursuant to Title 19 of the federal act; funeral expenses up to two hundred dollars ($200) shall be paid by the health and social services department if the deceased's available resources, as defined by regulation of the board, are insufficient to pay the funeral expenses, the persons legally responsible for the support of the deceased are unable to pay the funeral expenses, and no other person will undertake to pay said expenses.

B. No payment shall be made by the department when resources available from all sources to pay the funeral expenses total six hundred dollars ($600) or more. When the resources are less than six hundred dollars ($600), the department shall pay the difference between six hundred dollars ($600) and the resources, or two hundred dollars ($200), whichever is less.

**History: Laws 1937, ch. 18, § 11j; 1941 Comp., § 73-121; 1953 Comp., § 13-1-22; Laws 1959, ch. 49, § 1; 1969, ch. 234, § 1; 1975, ch. 220, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Section 27-2-6 NMSA 1978 was repealed by Laws 1998, ch. 9, § 28, effective February 28, 1998.

**Cross references.** — For burial of indigents, *see* 24-13-1 NMSA 1978 et seq.

**Compiler's notes.** — "Title 19 of the federal act," referred to in Subsection A(2), means Title XIX of the federal Social Security Act, which appears as 42 U.S.C. § 1396 et seq. *See* 27-2-2 NMSA 1978.

ANNOTATIONS

**Funeral expenses of a child of the recipient are not covered by this section.** 1943-44 Op. Att'y Gen. No. 43-4389.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Welfare Laws §§ 41, 101.

81 C.J.S. Social Security and Public Welfare § 36.

## 27-2-26. Money received from other sources; duty and liability of funeral director.

Should any funeral director accept payment from sources other than the department for burial of a deceased person for whom a claim for burial expenses has been made to the department, he shall immediately notify the department of said payment. The department will consider said payment in determining the amount of any funeral expense payment it makes. If the department has already made payment, the funeral director shall refund to the department any excess over the amount which the department would have paid had it known of the payment from other sources. If any funeral director shall fail to notify the department of any such payment from other sources, he shall be liable to the department in an amount double the amount paid or to be paid by the department.

**History: 1953 Comp., § 13-1-22.1, enacted by Laws 1975, ch. 220, § 2.**

## 27-2-27. Single state agency; powers and duties.

A. The department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV D of the federal act with the following duties and powers to:



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(1) establish the paternity of a child in the case of the child born out of wedlock with respect to whom an assignment of support rights has been executed in favor of the department;

(2) establish an order of support for children receiving aid to families with dependent children and, at the option of the department, for the spouse or former spouse with whom such children are living, but only if a support obligation has been established with respect to such spouse or former spouse, for whom no order of support currently exists and seek modification, based upon the noncustodial parent's ability to pay, of existing orders in which the support order is inadequate to properly care for the child and the spouse or former spouse with whom the child is living;

(3) enforce as the real party in interest any existing order for the support of children who are receiving aid to families with dependent children or of the spouse or former spouse with whom such children are living;

(4) provide services to non-aid families with dependent children in the establishment and enforcement of paternity and child support obligations, including locating the absent parent. For these services, the department is authorized to establish and collect fees, costs and charges permitted or required by federal law or by regulations adopted pursuant to that federal law; and

(5) adopt regulations for the disposition of unclaimed child, spousal or medical support payments.

B. In all cases handled by the department pursuant to the provisions of this section, the child support enforcement division or an attorney employed by the division represent the department, to the exclusion of any other party, in establishing, modifying and enforcing support obligations.

C. An attorney employed to provide the Title IV D services represents only the department's interests and no attorney-client relationship shall exist between the attorney and another party.

D. The department shall, at the time an application for child support services is made, inform the applicant that neither the Title IV D agency nor the attorney who provides services under this section is the applicant's attorney and that the attorney who provides services under this section shall not provide legal representation to the applicant.

E. The department may initiate an action or may intervene in an action involving child support.

F. The attorney employed by the department pursuant to this section shall not act as a guardian ad litem for the applicant.

G. A court shall not disqualify the department in a legal action filed pursuant to the Support Enforcement Act of the federal Social Security Act because the department has previously provided services to a party whose interests are now adverse to the relief requested.

**History: 1978 Comp., § 27-2-27, enacted by Laws 1981, ch. 90, § 1; 1982, ch. 12, § 1; 1984, ch. 98, § 1; 1995, ch. 46, § 1; 2003, ch. 283, § 2; 2004, ch. 41, § 1.**

**Repeals and reenactments.** — Laws 1969, ch. 182, § 1 repealed 13-1-27, 1953 Comp., relating to notice to law enforcement officials of furnishing of aid to deserted or abandoned child, and enacted a former 27-2-27 NMSA 1978.

Laws 1981, ch. 90, § 1 repealed former 27-2-27 NMSA 1978, as enacted by Laws 1969, ch. 182, § 1, relating to duties of the department of health and social services regarding an absent parent of a dependent child, and enacted a new 27-2-27 NMSA 1978.

**Cross references.** — For state case registry of child support obligors and other enforcement procedures, *see* 27-1-8 NMSA 1978 et seq.

For provision requiring welfare payments be disregarded in making award of child support, *see* 40-4-11 NMSA 1978.

For child support guidelines, *see* 40-4-11.1 NMSA 1978.

For Mandatory Medical Support Act, *see* Chapter 40, Article 4C NMSA 1978.

**Compiler's notes.** — Title IV D of the federal act, referred to in the introductory paragraph, means Title IV D of the federal Social Security Act, which appears as 42 U.S.C. § 651 et seq. *See* 27-2-2 NMSA 1978.

**The 2004 amendment,** effective May 19, 2004, amended Subsection B to add "to the exclusion of any other party" and added new Subsections C through G.

**The 2003 amendment,** effective June 20, 2003, added the Subsection A designation; redesignated former Subsections A to D as Paragraphs A(1) to (4) and Subsection E as present Subsection B; substituted "currently" for "presently" following "order of support" in Paragraph A(2); and added Paragraph A(5).

**The 1995 amendment,** effective June 16, 1995, deleted "human services" preceding "department" in four places; in Subsection D, substituted "provide services to" for "represent" at the beginning of the first sentence and "For these services" for "For such representation" at the beginning of the second sentence; and added Subsection E.

**ANNOTATIONS**

**Paternity action on behalf of child past majority.** — The child support enforcement division could not bring paternity and past child support action on behalf of twenty-year-old child; although such action could be maintained by the child under the Uniform Parentage Act, its outcome had no bearing upon the department, and, therefore, department had no standing. *State ex rel. Salazar v. Roybal*, 1998-NMCA-093, 125 N.M. 471, 963 P.2d 548, cert. denied, 125 N.M. 322, 961 P.2d 167.

**Substitution of child as real party in interest.** — Where it was held that human services department was without standing to maintain action on behalf of twenty-year-old child, child could be substituted as real party



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in interest with no effect on his substantive rights, if, on remand, it was determined that the department's error was an honest mistake. *State ex rel. Salazar v. Roybal*, 1998-NMCA-093, 125 N.M. 471, 963 P.2d 548, cert. denied, 125 N.M. 322, 961 P.2d 167.

**State not barred by laches in determining paternity.** — Where a determination of the paternity of a child is in the public interest, as when the state is seeking reimbursement for payments it has made in the past, as well as future support payments for so long as the child receives public assistance, absent proof of inexcusable neglect, the state will not be barred by the doctrine of laches from maintaining such an action. *State ex rel. Dep't of Human Servs. v. Davis*, 1982-NMSC-139, 99 N.M. 138, 654 P.2d 1038.

**Law reviews.** — For article, "Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings," see 14 N.M.L. Rev. 275 (1984).

## 27-2-28. Liability for repayment of public assistance.

A. In cases where the department has provided cash assistance to children in a household, the court shall award judgment in favor of the department and against the noncustodial parents of the children for child support, calculated pursuant to Section 40-4-11.1 NMSA 1978, for all months in which the children received cash assistance benefits.

B. Equitable defenses available to the noncustodial parent in claims by the custodian for retroactive support or past due support shall not operate to deprive the department of its right to request retroactive support or past due support for months during which the noncustodial parent's children received cash assistance benefits.

C. Amounts of support collected that are in excess of the amounts specified in Subsections A and B of this section shall be paid by the department to the custodian of the child.

D. No agreement between any custodian of a child and a parent of that child, either relieving the parent of any duty of child or spousal support or responsibility or purporting to settle past, present or future support obligations, either as a settlement or prepayment, shall act to reduce or terminate any rights of the department to recover from that parent for support provided, unless the department has consented to the agreement in writing.

E. The noncustodial parent shall be given credit for any support actually provided, including housing, clothing, food or funds paid prior to the entry of any order for support. The noncustodial parent has the burden to prove that the noncustodial parent has provided any support.

F. An application for public assistance by any person constitutes an assignment by operation of law of any support rights the person is entitled to during the time the person's household receives public assistance, whether the support rights are owed to the applicant or to any family member for whom the applicant is applying for or receiving assistance. The assignment includes all support rights that accrue as long as the applicant receives public assistance.

G. By operation of law, an assignment to the department of any and all rights of an applicant for or recipient of medical assistance under the medicaid program in New Mexico or supplemental security income through the social security administration:

(1) is deemed to be made of;

(a) any payment for medical care from any person, firm or corporation, including an insurance carrier; and

(b) any recovery for personal injury, whether by judgment or contract for compromise or settlement;

(2) shall be effective to the extent of the amount of medical assistance actually paid by the department under the medicaid program; and

(3) shall be effective as to the rights of any other individuals who are eligible for medical assistance and whose rights can legally be assigned by the applicant or recipient.

An applicant or recipient is required to cooperate fully with the department in its efforts to secure the assignment and to execute and deliver any instruments and papers deemed necessary to complete the assignment by the department.

**History: 1978 Comp., § 27-2-28, enacted by Laws 1981, ch. 90, § 2; 1982, ch. 12, § 2; 1991, ch. 223, § 1; 1995, ch. 202, § 1; 2009, ch. 32, § 1.**

**Repeals and reenactments.** — Laws 1981, ch. 90, § 2, repealed former 27-2-28 NMSA 1978, as amended by Laws 1973, ch. 376, § 12, relating to actions brought by the department of health and social services against the person responsible for the support of a spouse or minor children who are recipients of public assistance, and enacted a new 27-2-28 NMSA 1978.

**The 2009 amendment,** effective June 19, 2009, deleted former Subsection A, which provided for the liability of a noncustodial parent for repayment of public assistance; deleted former Subsection B, which provided for payment of support for the period prior to the granting of public assistance; added new Subsections A and B; in Subsection



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E, at the end of the sentence, deleted "on the issue of any payment" and added "to prove that the noncustodial parent has provided any support"; in Subsection F, deleted "from any other person" and added "during the time the person's household receives public assistance" and deleted the former provision in the last sentence that limited support rights to those that had accrued at the time of application for public assistance and that provided that the assignment continues as an assignment of all support rights the applicant is entitled to receive.

**The 1995 amendment,** effective June 16, 1995, deleted a proviso relating to claims for reimbursement by the human services department six years prior to filing an action from the end of Subsection A and made a minor stylistic change in Subsection C.

**The 1991 amendment,** effective June 14, 1991, inserted "human services" preceding "department" throughout the section; added Subsections F and G; and made a minor stylistic change in Subsection C.

ANNOTATIONS

**Contempt proceeding brought to enforce child support order is civil** in nature. *State ex rel. Dep't of Human Servs. v. Rael*, 1982-NMSC-042, 97 N.M. 640, 642 P.2d 1099.

**State brings action as assignee of claim for nonsupport.** — Where the state brings an action under this section, it is merely acting as an assignee of the minor's mother's claim for nonsupport rather than exercising its police power, and is therefore acting as a private party. *State ex rel. Dep't of Human Servs. v. Rael*, 1982-NMSC-042, 97 N.M. 640, 642 P.2d 1099.

**State not barred by laches.** — Where a determination of the paternity of a child is in the public interest, as when the state is seeking reimbursement for payments it has made in the past, as well as future support payments for so long as the child receives public assistance, absent proof of inexcusable neglect, the state will not be barred by the doctrine of laches from maintaining such an action. *State ex rel. Dep't of Human Servs. v. Davis*, 1982-NMSC-139, 99 N.M. 138, 654 P.2d 1038.

**Court cannot relieve parent of duty to support child.** — In adopting a valid decree, a judge cannot discharge a parent of his or her duty to support his or her child and thereby place the burden on the taxpayers. *Martinez v. Martinez*, 1982-NMSC-097, 98 N.M. 535, 650 P.2d 819.

Parents cannot enter into an agreement to extinguish a parent's duty to support their children before executing an assignment of support rights to a state agency. Parents have a duty to support their children and cannot rid themselves of it by transferring the duty to someone else. *Martinez v. Martinez*, 1982-NMSC-097, 98 N.M. 535, 650 P.2d 819.

**Court cannot relieve parent from obligation to department for public assistance paid,** in the past and in the future, on behalf of the children. *Martinez v. Martinez*, 1982-NMSC-097, 98 N.M. 535, 650 P.2d 819.

**Noncustodial parent's repayment of public assistance.** — A noncustodial parent's obligation for repayment of public assistance spent on children may be ascertained without regard to the obligations of any other parent, including other noncustodial parents. *State ex rel. Human Servs. Dep't v. Barela*, 1994-NMCA-036, 117 N.M. 526, 873 P.2d 272.

**Parent's pro se status does not relieve parent of statutory burden** to prove affirmatively her contribution to her children's support. *State ex rel. Human Servs. Dep't v. Barela*, 1994-NMCA-036, 117 N.M. 526, 873 P.2d 272.

**Equitable reduction.** — This section aids in the implementation of the subrogation provisions of Section 27-2-23 NMSA 1978 and provides the same equitable remedy; the human services department is not entitled to full reimbursement in every case where an injured recipient of medicaid recovers from a tortfeasor. *Kahrs v. Sanchez*, 1998-NMCA-037, 125 N.M. 1, 956 P.2d 132, cert. denied, 124 N.M. 589, 953 P.2d 1087.

**Law reviews.** — For article, "Child Support Enforcement: The New Mexico Experience," see 9 N.M.L. Rev. 25 (1978-79).

For article, "Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings," see 14 N.M.L. Rev. 275 (1984).

## 27-2-29. Repealed.

**Repeals.** — Laws 1981, ch. 90, § 4 repealed 27-2-29 NMSA 1978, as enacted by Laws 1969, ch. 182, § 2, relating to procedure for the enforcement of support by the district attorney, effective March 21, 1981.

## 27-2-29.1. Compensation under contingent fee contracts; suspense fund created.

A. For the purpose of making disbursements and distributions pursuant to this section, the "human services department reimbursement suspense fund" is created in the state treasury.

B. When pursuing a claim arising under Section 27-2-23 or 27-2-28 NMSA 1978, in addition to other available alternatives, the department may contract with a person to represent the department on a contingent fee basis if the contract:

(1) is approved by the attorney general;

(2) provides that all amounts received by the contractor as satisfaction of the claim shall be transferred to the department and deposited into the human services department reimbursement suspense fund to the credit of the department; and

(3) provides that, upon the direction of the secretary of human services, the compensation due to the contractor shall be disbursed from the suspense fund to the contractor.

C. After a disbursement to a contractor pursuant to Paragraph (3) of Subsection B of this section, the balance of each deposit into the human services department reimbursement suspense fund shall be distributed to the general fund and shall be appropriated to the department for the



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purpose of reimbursing the department for the public assistance from which the claim arose and, if required, for reimbursing the federal government.

**History: Laws 2010, ch. 80, § 1.**

**Emergency clauses.** — Laws 2010, ch. 80, § 21 contained an emergency clause and was approved March 8, 2010.

## 27-2-30. [Enforcement of support;] orders.

The court in term time or judge in vacation may make and enforce by attachment or otherwise such order to restrain the use or disposition of the property of the defendant to provide for the support of the dependents during the pendency of the suit as in his discretion may seem just and proper.

**History: 1953 Comp., § 13-1-27.3, enacted by Laws 1965, ch. 66, § 3.**

## 27-2-31. Judgments and proceeds.

Upon final hearing, judgment for the department shall include all sums expended during the pendency of the action. When the department of public welfare [human services department] recovers judgments under this act [27-2-30, 27-2-31 NMSA 1978], it may enforce, compromise or settle the judgments in any way considered by the board of public welfare to be in the public interest. Any proceeds of judgments or settlements shall be retained by the department for its authorized activities and required reimbursements to the federal government.

**History: 1953 Comp., § 13-1-27.4, enacted by Laws 1965, ch. 66, § 4.**

**Bracketed material.** — The bracketed material was inserted by the compiler and it is not part of the law.

Laws 1968, ch. 37, § 3 transferred the powers, duties and property of the department of public welfare to the department of health and social services. Laws 1977, ch. 252, § 5, abolished the department of health and social services, and § 4 of said act created the human services department. *See* 27-1-1 NMSA 1978.

## 27-2-32. Duty of agencies to cooperate.

All state, county and municipal agencies, departments, bureaus and divisions shall cooperate in the location of absent parents who are not fulfilling their obligation to support their children and shall on request supply the department with all information on hand relative to the location, social security number, income and property of such absent parents, notwithstanding any other provision of law making the information confidential. The department shall use such information only for the purpose of enforcing the support liability of such absent parents and shall not use the information or disclose it for any other purpose.

**History: 1953 Comp., § 13-1-28, enacted by Laws 1969, ch. 182, § 3; 1981, ch. 90, § 3; 1985, ch. 105, § 14.**

## 27-2-33. Repealed.

**Repeals.** — Laws 1998, ch. 8, § 28 and Laws 1998, ch. 9, § 28 repealed 27-2-33 NMSA 1978, as enacted by Laws 1937, ch. 18, § 21, relating to method of handling funds, effective February 18, 1998. For provisions of former section, *see* the 1997 NMSA 1978 on *NMOneSource.com*.

## 27-2-34. Limitations of act.

All assistance granted under this act shall be deemed to be granted and to be held subject to the provisions of any amending or repealing act that may hereafter be passed, and no recipient shall have any claim for compensation, or otherwise, by reason of his assistance being affected in any way by any amending or repealing act.



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**History: Laws 1937, ch. 18, § 22; 1941, ch. 116, § 7; 1941 Comp., § 73-132; 1953 Comp., § 13-1-35.**

**Compiler's notes.** — The words "this act" refer to Laws 1937, ch. 18.

## 27-2-35 to 27-2-40. Repealed.

**Repeals.** — Laws 1998, ch. 8, § 28 and Laws 1998, ch. 9, § 28 repealed 27-2-35 through 27-2-40 NMSA 1978, amended by Laws 1995 (S.S.), ch. 2, § 1, relating to custody of records and disclosure of information, effective February 18, 1998. For provisions of former sections, *see* the 1997 NMSA 1978 on *NMOneSource.com*.

## 27-2-41. Short title.

This act [27-2-41 to 27-2-47 NMSA 1978] may be cited as the "Indigent Catastrophic Illness Hospital Funding Act".

**History: Laws 1990, ch. 93, § 1.**

## 27-2-42. Legislative findings; purpose.

A. The legislature finds that twenty-five percent of New Mexicans have no health insurance. When such individuals suffer a catastrophic illness, the large hospital bills that are incurred can often result in indigency for that sick person and his family.

B. The purpose of the Indigent Catastrophic Illness Hospital Funding Act [27-2-41 to 27-2-47 NMSA 1978] is to reduce the impact of medical indigency on the cost of health care in New Mexico by providing for payment of some portion of large hospital bills incurred by medically indigent patients.

**History: Laws 1990, ch. 93, § 2.**

## 27-2-43. Definitions.

As used in the Indigent Catastrophic Illness Hospital Funding Act [27-2-41 to 27-2-47 NMSA 1978]:

A. "department" means the human services department;

B. "fund" means the indigent catastrophic illness hospital fund;

C. "hospital" means any general or special hospital that is licensed by the health and environment department [department of health] and that has annual gross charges for medicare, medicaid and indigent patients greater than ten percent of the hospital's total annual gross charges; and

D. "medically indigent patient" means an individual who is a New Mexico resident who incurs hospital charges, who is not eligible for medicaid or medicare and whose family or household income does not exceed two hundred fifty percent of the federal poverty level.

**History: Laws 1990, ch. 93, § 3.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the department of health and environment, and enacted a new 9-7-4 NMSA 1978, creating the department of health.

## 27-2-44. Indigent catastrophic illness hospital fund created.

There is created in the state treasury the "indigent catastrophic illness hospital fund". Money in the fund is appropriated to the department for the purpose of reimbursing hospitals for eligible claims for hospital charges incurred by medically indigent patients and for paying administrative costs of the department not to exceed three percent of the annual appropriation or other distribution or transfer to the fund. Money in the fund shall be invested as provided for other state funds and income earned on the fund shall be credited to the fund. No balance remaining at the end of any fiscal year shall revert to the general fund.

**History: Laws 1990, ch. 93, § 4.**



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## 27-2-45. Hospitals; claims for payment.

A. A hospital may submit eligible claims to the department on or before April 1 of each year for payment from the fund by June 30 of each year in an amount determined pursuant to this section.

B. A claim submitted by a hospital for payment from the fund shall be deemed an eligible claim if it is for:

(1) uncovered hospital charges of five thousand dollars ($5,000) or more for an illness of a medically indigent patient;

(2) hospital charges incurred within the twelve months immediately prior to the applicable April 1 closing deadline; and

(3) an amount determined by subtracting from the base claim the medically indigent patient's deductible and then reducing the resulting balance, based on the hospital's medicare cost-to-charge ratio, to an amount equal to medicare allowable costs.

C. The department shall pay from the fund to each hospital the amount of each eligible claim if there is sufficient money in the fund. If there is not sufficient money in the fund to pay all eligible claims of hospitals for that year, the amount of each claim that shall be paid shall be an amount derived from multiplying the full amount of the eligible claim by the percentage derived from dividing the balance in the fund, after administrative costs have been subtracted, by the sum of the eligible claims.

**History: Laws 1990, ch. 93, § 5.**

## 27-2-46. Medically indigent patient deductible.

A medically indigent patient's deductible shall be an amount determined by the hospital that the medically indigent patient is able to pay the hospital in monthly installments over an eighteen-month period. That determination shall be made pursuant to department rules and regulations and shall include, but not be limited to, consideration of the medically indigent patient's family size, household income and obligations.

**History: Laws 1990, ch. 93, § 6.**

## 27-2-47. Department; regulations.

The department shall adopt and promulgate by September 30, 1990 rules and regulations necessary to implement and administer the Indigent Catastrophic Illness Hospital Funding Act [27-2-41 to 27-2-47 NMSA 1978].

**History: Laws 1990, ch. 93, § 7.**

# ARTICLE 2A

# Medicaid Estate Recovery


Sec.
27-2A-1. Short title.
27-2A-2. Purpose of act.
27-2A-3. Definitions.
27-2A-4. Department to seek recovery of medical assistance payments restriction.
27-2A-5. Administration; recovery from estates.
27-2A-6. Hardship waiver.
27-2A-7. Restrictions on recovery from estates.
27-2A-8. Due process.
27-2A-9. Department exempt from bond requirement for personal representative.


## 27-2A-1. Short title.

This act [27-2A-1 to 27-2A-9 NMSA 1978] may be cited as the "Medicaid Estate Recovery Act".

**History: Laws 1994, ch. 87, § 1.**



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## 27-2A-2. Purpose of act.

The purpose of the Medicaid Estate Recovery Act is to authorize and require the department to seek recovery of medical assistance payments made by the department for certain individuals, under certain circumstances, as provided in Title XIX of the Social Security Act.

**History: Laws 1994, ch. 87, § 2.**

**Cross references.** — For Title XIX of the federal Social Security Act, *see* 42 U.S.C. § 1396 et seq.

## 27-2A-3. Definitions.

As used in the Medicaid Estate Recovery Act:

A. "department" means the human services department;

B. "estate" means real and personal property and other assets of the individual subject to probate or administration pursuant to the provisions of the Uniform Probate Code [45-1-1 NMSA 1978]; and

C. "medical assistance" means amounts paid by the department as medical assistance pursuant to Title XIX of the Social Security Act.

**History: Laws 1994, ch. 87, § 3.**

**Cross references.** — For Title XIX of the federal Social Security Act, *see* 42 U.S.C. § 1396 et seq.

## 27-2A-4. Department to seek recovery of medical assistance payments restriction.

A. The department shall seek recovery from the estate of an individual:

(1) for medical assistance paid on behalf of an individual who was an inpatient in a nursing facility, intermediate care facility for the mentally retarded or other medical institution if the individual was required, as a condition of receiving services in the facility or institution pursuant to the state plan, to spend for costs of services all but a minimal amount of the individual's income required for personal needs, and with respect to whom the department determined, after opportunity for a hearing in accordance with procedures established by the department, could not reasonably have been expected to have been discharged from the facility or institution to return home; and

(2) for medical assistance payments made for nursing facility services, home- and community-based services and related hospital and prescription drug services on behalf of an individual who was fifty-five years of age or older when the individual received medical assistance.

B. In the case of an individual who has participated in the state's qualified state long-term care insurance partnership program pursuant to Section 2 of this 2013 act [27-2-12.17 NMSA 1978], the department shall seek recovery of medical assistance paid on behalf of the individual only of the value of the individual's estate that exceeds the amount that the department has disregarded from the individual's countable resources pursuant to Paragraph (2) of Subsection A of Section 2 of this 2013 act in making its eligibility determination for medical assistance for institutional care or a medical assistance home- and community-based long-term care program.

**History: Laws 1994, ch. 87, § 4; 2013, ch. 139, § 3.**

**The 2013 amendment,** effective June 14, 2013, provided a restriction on the recovery of medical assistance payments; in the title, added "restriction"; and added Subsection B.

## 27-2A-5. Administration; recovery from estates.

A. The department shall administer the estate recovery program.

B. The department shall adopt and promulgate rules and regulations to implement the provisions of the Medicaid Estate Recovery Act.

C. The department may compromise, settle or waive recovery pursuant to the Medicaid Estate Recovery Act when deemed by the department to be in the best interests of the state.

**History: Laws 1994, ch. 87, § 5.**



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## 27-2A-6. Hardship waiver.

The department shall waive the application of the provisions of the Medicaid Estate Recovery Act if application of the provisions would work an undue hardship as determined pursuant to regulations adopted and promulgated by the secretary of human services. The regulations shall include a provision for special consideration when an asset subject to recovery is the sole income-producing asset or is a homestead of modest value.

**History: Laws 1994, ch. 87, § 6.**

## 27-2A-7. Restrictions on recovery from estates.

Any recovery from an estate may be made only after the death of the decedent's surviving spouse, if any, and only at a time when the decedent has no surviving child who is less than twenty-one years of age or is blind or disabled as defined in 42 U.S.C. 1383C.

**History: Laws 1994, ch. 87, § 7.**

## 27-2A-8. Due process.

When the department determines it will seek to recover from an estate, it shall give written notice of that intent to the personal representative or successor in interest of the estate or the individual.

**History: Laws 1994, ch. 87, § 8.**

## 27-2A-9. Department exempt from bond requirement for personal representative.

If the department seeks appointment as a personal representative of a decedent to enforce its rights as a creditor of the decedent pursuant to the provisions of the Medicaid Estate Recovery Act, it is exempt from any requirement for posting a bond.

**History: Laws 1994, ch. 87, § 9.**

**Cross references.** — For personal representative bond requirements, *see* 45-3-603 NMSA 1978.

# ARTICLE 2B

# New Mexico Works Act

Sec.
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27-2B-17. Records; confidentiality.
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## 27-2B-1. Short title.

Chapter 27, Article 2B NMSA 1978 may be cited as the "New Mexico Works Act".

**History: Laws 1998, ch. 8, § 1; 1998, ch. 9, § 1; 2009, ch. 186, § 1.**

**Cross references.** — For liability for repayment of public assistance, *see* 27-2-28 NMSA 1978.

**The 2009 amendment,** effective June 19, 2009, changed the reference to the act to the chapter and article of NMSA 1978.

**Applicability.** — Laws 2009, ch. 186, § 7 provided that the provisions of Laws 2009, ch. 186 apply beginning August 1, 2009.

## 27-2B-2. Legislative findings; purpose of act.

A. The legislature finds that:

(1) the poverty rate in New Mexico is the highest in the nation and has exceeded more than twenty percent of the population for most of the past twenty-five years;

(2) having a job does not provide a guarantee of avoiding poverty as demonstrated by the high percentage of persons in the civilian labor force over sixteen years of age with reported incomes in 1989 that were below the poverty level; and

(3) the diversity of the state, with its residents living in rural and metropolitan areas, reservations and border areas, requires the state to adjust state policies governing economic and social programs for the poor and the working poor to reflect the particular needs of particular locales, not just to create a generic one-size-fits-all program.

B. The legislature finds that education and training are essential to long-term career development.

C. The legislature finds that employment improves the quality of life for parents and children by increasing family income, developing the discipline necessary for self-sufficiency and improving self-esteem, and thus, it is in the public interest to fundamentally alter the state's financial assistance program for needy families with children so both cash and services, including education, job training, child care and transportation provided in accordance with the New Mexico Works Act assist recipients to obtain and keep employment that is sufficient to sustain their families, ensure the dignity of those who receive assistance and strengthen families and families' support for their children.

D. The legislature finds that although most New Mexicans want to work, and in fact New Mexico has been cited as a "like to work" state, not all families can move quickly into the labor force and that regular assessments and key intervention and follow-up can help persons connect to the work force to obtain meaningful work and achieve self-sufficiency.

E. The legislature further finds that the federal act envisions that state and tribal governments will work together to serve participants residing in Indian country, and it is important that the state and the tribal governments work, government to government, to address the issues of availability and delivery of service to the twenty-two tribes and pueblos.

F. The purpose of the New Mexico Works Act is to increase family income through family employment and child support and, by viewing financial assistance as a support service to enable and assist parents to participate in employment rather than as an entitlement, to enable New Mexico to change the culture of the welfare office, both on the part of the department and on the part of the recipients, so that all parties can focus on addressing the barriers to participation in work activities and putting New Mexicans to work.

**History: Laws 1998, ch. 8, § 2 and Laws 1998, ch. 9, § 2.**

**Duplicate laws.** — Laws 1998, ch. 8, § 2 and Laws 1998, ch. 9, § 2 enacted identical new sections.

## 27-2B-3. Definitions.

As used in the New Mexico Works Act:

A. "applicant" means a person applying for cash assistance on behalf of a benefit group;



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B. "benefit group" means a pregnant woman or a group of people that includes a dependent child, all of that dependent child's full, half or adopted siblings or stepsiblings living with the dependent child's parent or relative within the fifth degree of consanguinity and the parent with whom the children live;

C. "cash assistance" means cash payments funded by the temporary assistance for needy families block grant pursuant to the federal act and by state funds;

D. "department" means the human services department;

E. "dependent child" means a natural child, adopted child, stepchild or ward who is:

(1) seventeen years of age or younger;

(2) eighteen years of age and is enrolled in high school; or

(3) between eighteen and twenty-two years of age and is receiving special education services regulated by the public education department;

F. "director" means the director of the income support division of the department;

G. "earned income" means cash or payment in kind that is received as wages from employment or payment in lieu of wages; and earnings from self-employment or earnings acquired from the direct provision of services, goods or property, production of goods, management of property or supervision of services;

H. "federal act" means the federal Social Security Act and rules promulgated pursuant to the Social Security Act;

I. "federal poverty guidelines" means the level of income defining poverty by family size published annually in the federal register by the United States department of health and human services;

J. "immigrant" means alien as defined in the federal act;

K. "parent" means natural parent, adoptive parent or stepparent;

L. "participant" means a recipient of cash assistance or services or a member of a benefit group who has reached the age of majority;

M. "person" means an individual;

N. "secretary" means the secretary of the department;

O. "services" means child care assistance; payment for employment-related transportation costs; job search assistance; employment counseling; employment, education and job training placement; one-time payment for necessary employment-related costs; case management; or other activities whose purpose is to assist transition into employment;

P. "unearned income" means old age, survivors and disability insurance; railroad retirement benefits; veterans administration compensation or pension; military retirement; pensions, annuities and retirement benefits; lodge or fraternal benefits; shared shelter payments; settlement payments; individual Indian money; child support; unemployment compensation benefits; union benefits paid in cash; gifts and contributions; and real property income;

Q. "vehicle" means a conveyance for the transporting of individuals to or from employment, for the activities of daily living or for the transportation of goods; "vehicle" does not include any boat, trailer or mobile home used as a principal place of residence; and

R. "vocational education" means an organized educational program that is directly related to the preparation of a person for employment in a current or emerging occupation requiring training other than a baccalaureate or advanced degree. Vocational education must be provided by an educational or a training organization, such as a vocational-technical school, community college, post-secondary educational institution or proprietary school.

**History: Laws 1998, ch. 8, § 3; 1998, ch. 9, § 3; 1999, ch. 273, § 1; 2001, ch. 295, § 1; 2001, ch. 326, § 1; 2003, ch. 311, § 2; 2003, ch. 432, § 2; 2007, ch. 350, § 1; 2009, ch. 186, § 2.**

**Cross references.** — For the federal Social Security Act, *see* 42 U.S.C.S. § 301 et seq.

**The 2009 amendment,** effective June 19, 2009, in Subsection K, deleted "or legal guardian".

**Applicability.** — Laws 2009, ch. 186, § 7 provided that the provisions of Laws 2009, ch. 186 apply beginning August 1, 2009.

**The 2007 amendment,** effective June 15, 2007, adds the definition of "applicant" and "vocational education" in Subsections A and R.

**The 2003 amendment,** effective April 10, 2003, inserted Paragraph D(3), added paragraph designations, and added Subsection P.

**The 2001 amendment,** effective June 15, 2001, substituted the current definition in Subsection A for "a group of people that includes at least one dependent child living with his parent, legal guardian or relative within the fifth degree of consanguinity; or a pregnant woman";



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in Subsection D, inserted "or step-child" and deleted "a household group member" preceding "who is eighteen years of age"; in Subsection F, substituted "means" for "includes", inserted "and" preceding "earnings from self-employment" and deleted "and all other income not classified as earned income" from the end of the subsection; deleted former Subsection I, which defined "household group"; redesignated former Subsection J as I; deleted former Subsection K, which defined "landlord"; redesignated former Subsections L to P as J to N; deleted former Subsection Q, which defined "tenant"; redesignated former Subsection R as O; in Subsection O, substituted "means" for "includes", deleted "and similar kinds of income" from the end of the former version and added the language beginning "child support" to the end of current subsection.

**The 1999 amendment,** effective June 18, 1999, in Subsection D, substituted "seventeen years" for "eighteen years" and added "or a household group member who is eighteen years of age and is enrolled in high school", and in Subsection I, substituted "of people that consists of a benefit group and any other person who resides" for "including the benefit group of people".

## 27-2B-4. Application; resource planning session; individual responsibility plans; participation agreement; review periods.

A. Application for cash assistance or services shall be made to the department. The application shall be in writing or reduced to writing in the manner and on the form prescribed by the department. The application shall be made under oath by an applicant having custody of or residing with a dependent child who is a benefit group member and shall contain a statement of the age of the child, residence, a complete statement of the amount of property in which the applicant has an interest, a statement of all income that the applicant and other benefit group members have at the time of the filing of the application and other information required by the department.

B. The department shall assist an applicant in completing the application for cash assistance or services and shall evaluate an applicant to determine eligibility for all department programs for which the applicant is eligible. The department shall process all expedited food stamp applications within two business days of submission, and the department shall deliver expedited food stamps to an eligible applicant within seven days of the application.

C. At the time of application for cash assistance and services, an applicant and the department shall identify everyone who is to be counted in the benefit group. Once an application is approved, the participant shall advise the department if there are any changes in the membership of the benefit group.

D. No later than thirty days after an application is filed, the department shall provide to an applicant a resource planning session to ascertain the applicant's immediate needs, assess financial and nonfinancial options, make referrals and act on the application.

E. No later than five days after an application is approved, the department shall provide reimbursement for child care.

F. Whenever the department receives an application for assistance, a verification and record of the applicant's circumstances shall promptly be made to ascertain the facts supporting the application and to obtain other information required by the department. The verification may include a visit to the home of the applicant, as long as the department gives adequate prior notice of the visit to the applicant.

G. No later than fifteen days after an application is approved, the department shall assess the education, skills, prior work experience and employability of the participant.

H. After the initial assessment of skills, the department shall work with the participant to develop an individual responsibility plan that:

(1) sets forth an employment goal for the participant and a plan for moving the participant into employment;

(2) sets forth obligations of the participant that may include a requirement that the participant attend school, maintain certain grades and attendance, keep the participant's school-age children in school, immunize the participant's children or engage in other activities that will help the participant become and remain employed;

(3) is designed to the greatest extent possible to move the participant into whatever employment the participant is capable of handling and to provide additional services as necessary to increase the responsibility and amount of work the participant will handle over time;



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(4) describes the services the department may provide so that the participant may obtain and keep employment; and

(5) may require the participant to participate in appropriate services, such as substance abuse, domestic violence or mental health services.

I. The participant and the department shall sign the participant's individual responsibility plan. The department shall not allow a participant to decline to participate in developing an individual responsibility plan. The department shall not waive the requirement that a participant develop an individual responsibility plan. The department shall emphasize the importance of the individual responsibility plan to the participant.

J. If a participant does not develop an individual responsibility plan, refuses to sign an individual responsibility plan or refuses to attend semiannual reviews of an individual responsibility plan, the participant shall be required to enter into a conciliation process pursuant to Subsection C of Section 27-2B-14 NMSA 1978. If the participant persists in noncompliance with the individual responsibility plan process after the conciliation process, the participant shall be subject to sanctions pursuant to Section 27-2B-14 NMSA 1978.

K. The participant shall also sign a participation agreement that designates the number of hours that the participant must participate in work activities to meet participation standards.

L. The department shall review the current financial eligibility of a benefit group when the department reviews food stamp eligibility.

M. The department shall meet semiannually with a participant to review and revise the participant's individual responsibility plan.

N. The department shall develop a complaint procedure to address issues pertinent to the delivery of services and other issues relating to a participant's individual responsibility plan.

**History: Laws 1998, ch. 8, § 4 and Laws 1998, ch. 9, § 4; 1999, ch. 71, § 1; 1999, ch. 273, § 2; 1999, ch. 280, § 1; 2001, ch. 295, § 2; 2001, ch. 326, § 2; 2007, ch. 350, § 2.**

**The 2007 amendment,** effective June 15, 2007, in Subsection B, increased the expedited process for food stamps from 24 hours to 2 business days; and in Subsection H, provided that individual responsibility plans may require a participant to participate in appropriate services, including domestic violence and mental health services.

**The 2001 amendment,** effective June 15, 2001, in Subsection A, substituted "benefit group member" for "household group member" twice; in Subsection C, substituted "everyone" for "household group members" and deleted "household group or" preceding "benefit group" at the end of the subsection and substituting "thirty days" for "forty-five days" in Subsection D.

**The 1999 amendment,** effective June 18, 1999, substituted "custody of or residing with a dependent child who is a household group member" for "custody of a dependent child" in the last sentence of Subsection A, added the last three sentences of Subsection I, added Subsection J, and redesignated former Subsections J to M as Subsections K to N.

## 27-2B-5. Work requirements; work participation rates.

A. The following qualify as work activities:

(1) unsubsidized employment, including self-employment;

(2) subsidized private sector employment, including self-employment;

(3) subsidized public sector employment;

(4) work experience;

(5) on-the-job training;

(6) job search and job readiness;

(7) community service programs;

(8) vocational education;

(9) job skills training activities directly related to employment;

(10) education directly related to employment;

(11) satisfactory attendance at a secondary school or course of study leading to a high school equivalency credential in the case of a participant who has not completed secondary school or received such a certificate; and

(12) the provision of child care services to a participant who is participating in a community service program.

B. The department shall recognize community service programs and job training programs that are operated by an Indian nation, tribe or pueblo.



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C. The department may not require a participant to work more than four hours per week over the work requirement rate set pursuant to the federal act.

D. The department shall require a parent, caretaker or other adult who is a member of a benefit group to engage in a work activity.

E. Where best suited for the participant to address barriers, the department may require the following work activities:

(1) participating in parenting classes, money management classes or life skills training;

(2) participating in a certified alcohol or drug addiction program;

(3) in the case of a homeless benefit group, finding a home;

(4) in the case of a participant who is a victim of domestic violence residing in a domestic violence shelter or receiving counseling or treatment or participating in criminal justice activities directed at prosecuting the domestic violence perpetrator for no longer than twenty-four weeks; and

(5) in the case of a participant who does not speak English, participating in a course in English as a second language.

F. Subject to the availability of funds, the department in cooperation with the workforce solutions department, Indian affairs department and other appropriate state agencies may develop projects to provide for the placement of participants in work activities, including the following:

(1) participating in unpaid internships with private and government entities;

(2) refurbishing publicly assisted housing;

(3) volunteering at a head start program or a school;

(4) weatherizing low-income housing; and

(5) restoring public sites and buildings, including monuments, parks, fire stations, police buildings, jails, libraries, museums, auditoriums, convention halls, hospitals, buildings for administrative offices and city halls.

G. If a participant is engaged in full-time vocational education studies or an activity set out in Paragraphs (9) through (11) of Subsection A of this section, the participant shall engage in another work activity at the same time. Additionally, for two-parent families that receive federally funded child-care assistance, the participant's spouse shall engage in a work activity set out in Paragraphs (1) through (5) or (7) of Subsection A of this section unless the participant suffers from a temporary or complete disability that bars the participant from engaging in a work activity or the participant is barred from engaging in a work activity because the participant provides sole care for a person with a disability.

H. A participant engaged in vocational education studies shall make reasonable efforts to obtain a loan, scholarship, grant or other assistance to pay for costs and tuition, and the department shall disregard those amounts in the eligibility determination.

I. For as long as the described conditions exist, the following are exempt from the work requirement:

(1) a participant barred from engaging in a work activity because the participant has a temporary or permanent disability;

(2) a participant over age sixty;

(3) a participant barred from engaging in a work activity because the participant provides the sole care for a person with a disability;

(4) a single custodial parent caring for a child less than twelve months old for a lifetime total of twelve months;

(5) a single custodial parent caring for a child under six years of age if the parent is unable to obtain child care for one or more of the following reasons:

(a) unavailability of appropriate child care within a reasonable distance from the parent's home or work as defined by the children, youth and families department;

(b) unavailability or unsuitability of informal child care by a relative under other arrangements as defined by the children, youth and families department; or

(c) unavailability of appropriate and affordable formal child-care arrangements as defined by the children, youth and families department;

(6) a pregnant woman during her last trimester of pregnancy;

(7) a participant prevented from working by a temporary emergency or a situation that precludes work participation for thirty days or less;



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(8) a participant who demonstrates by reliable medical, psychological or mental reports, court orders or police reports that family violence or threat of family violence effectively bars the participant from employment; and

(9) a participant who demonstrates good cause of the need for the exemption.

J. As a condition of the exemptions identified in Subsection I of this section, the department may establish participation requirements specific to the participant's condition or circumstances, such as substance abuse services, mental health services, domestic violence services, pursuit of disability benefits, job readiness or education directly related to employment. The activities are established to improve the participant's capacity to improve income and strengthen family support.

**History: Laws 1998, ch. 8, § 5 and Laws 1998, ch. 9, § 5; 1999, ch. 269, § 1; 2007, ch. 46, § 18; 2007, ch. 350, § 3; 2015, ch. 122, § 14.**

**The 2015 amendment,** effective July 1, 2015, replaced the term "certificate of general equivalency" with "high school equivalency credential" and "labor department" with "workforce solutions department" in the provision relating to work requirements for participants in the New Mexico Works Act; in Paragraph (11) of Subsection A, after "study leading to a", deleted "certificate of general" and added "high school", and after "equivalency", added "credential"; in Subsection F, after "cooperation with the", deleted "labor" and added "workforce solutions"; and in Subsection G, after "provides sole care for a", deleted "disabled", and after "person" added "with a disability".

**The 2007 amendment,** effective June 15, 2007, eliminated the qualifying language in Subsection A relating to work experience, job search and job readiness, vocational education and education directly related to employment; eliminated the qualifying language in Subsection D relating to readiness for work or receipt of cash assistance or services; changed the list in Subsection E from temporary alternative work activities that may be established for no longer than twelve weeks to work activities that may be suited to address barriers; changed "post-secondary education" to "vocational education"; and added Subsection J.

**The 1999 amendment,** effective June 18, 1999, inserted "including self-employment" at the end of Subsections A(1) and A(2).

**ANNOTATIONS**

**Refusal to comply with regulations terminates eligibility.** — Where an applicant for public assistance refuses to comply with regulations requiring assignment of support rights, she may not maintain her eligibility for aid to families with dependent children benefits. The department's refusal to provide such benefits on that basis is in accordance with applicable law and regulations. *Melton v. N.M. Dep't of Human Servs.*, 1981-NMCA-130, 97 N.M. 102, 637 P.2d 52.

**Denial of benefits where natural father could provide support.** — Substantial evidence in the record as a whole supported the human services department's denial of aid to families with dependent children benefits where the natural father could provide support. *N.M. Human Servs. Dep't v. Garcia*, 1980-NMSC-025, 94 N.M. 175, 608 P.2d 151.

## 27-2B-5.1. Work activities; workers' compensation coverage.

A. For the purposes of the Workers' Compensation Act [52-1-1 NMSA 1978]:

(1) cash assistance and services paid to participants engaged in any work activity described in Section 27-2B-5 NMSA 1978 shall not be considered wages and shall not be deemed to create an employer-employee or co-employer-employee relationship between the participant and the state; and

(2) payment of a wage subsidy to an employer of a participant shall not be deemed to be payment of wages by the state and shall not be deemed to create an employer-employee or co-employer-employee relationship between the participant and the state.

B. Workers' compensation claims by participants shall be separately recorded and maintained in the calculation of the experience modification factor used to calculate premiums for the participating employer so that the experience modification factor attributable to claims by participants can be separated from the remainder of the employer's experience modification factor.

C. The separately calculated experience modification factor for the first year of employment of each participant shall not be considered as part of the experience modification factor of any employer. The superintendent of insurance shall promulgate rules to implement this section.

D. The department shall ensure that participants undergo safety training prior to employment.

E. Participants in an unpaid work activity described in Section 27-2B-5 NMSA 1978 shall be considered trainees and shall not be eligible for workers' compensation benefits.

**History: Laws 1999, ch. 181, § 2.**

**Compiler's note.** — Sections 27-2B-5.1 and 27-2B-5.2 NMSA 1978 were enacted as new sections of the New Mexico Works Act.



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## 27-2B-5.2. Work program; public schools.

The department and the state department of public education may establish a work program for participants to engage in a work activity pursuant to Subsection A of Section 27-2B-5 NMSA 1978 at public schools.

**History: Laws 1999, ch. 27, § 1.**

**Compiler's note.** — Sections 27-2B-5.1 and 27-2B-5.2 NMSA 1978 were enacted as new sections of the New Mexico Works Act.

## 27-2B-6. Durational limits.

A. Pursuant to the federal act, on or after July 1, 1997 a participant may receive federally funded cash assistance or state-funded cash assistance and services pursuant to the New Mexico Works Act for up to sixty months.

B. During a participant's semiannual review, the department shall examine the participant's progress to determine if the participant has successfully completed an educational or training program or increased the number of hours the participant is working as required by the federal act. The department may refer the participant to alternative work activities or provide additional services to address barriers to employment facing the participant.

C. Up to twenty percent of the population of participants may be exempted from the sixty-month durational limit set out in Subsection A of this section because of hardship or because those participants are battered or subject to extreme cruelty.

D. For the purposes of this section, a participant has been battered or subjected to extreme cruelty if the participant can demonstrate by reliable medical, psychological or mental reports, court orders or police reports that the participant has been subjected to and currently is affected by:

(1) physical acts that result in physical injury;

(2) sexual abuse;

(3) being forced to engage in nonconsensual sexual acts or activities;

(4) threats or attempts at physical or sexual abuse;

(5) mental abuse; or

(6) neglect or deprivation of medical care except when the deprivation is based by mutual consent on religious grounds.

E. For the purposes of this section, a hardship exception applies to a person who demonstrates through reliable medical, psychological or mental reports, social security administration records, court orders, police reports or department records that the person is a person:

(1) who is barred from engaging in a work activity because the person has a temporary or permanent disability;

(2) who is the sole provider of home care to a family member who is ill or has a disability;

(3) whose ability to be gainfully employed is affected by domestic violence;

(4) whose application for supplemental security income is pending in the application or appeals process and who:

(a) meets the criteria of Paragraph (1) of this subsection; or

(b) was granted a waiver from the work requirement or was granted a limited participation requirement pursuant to Paragraph (1) of Subsection I of Section 27-2B-5 NMSA 1978 in the last twenty-four months; or

(5) who otherwise qualifies for a hardship exception as defined by the department.

F. Pursuant to the federal act, the department shall not count a month of receipt of cash assistance or services toward the sixty-month durational limit if during the time of receipt the participant:

(1) was a minor and was not the head of a household or married to the head of a household; or

(2) lived in Indian country, as defined in the federal act, if the most reliable data available with respect to the month indicate that at least fifty percent of the adults living in Indian country or in the village were not employed.



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**History: Laws 1998, ch. 8, § 6 and Laws 1998, ch. 9, § 6; 2001, ch. 295, § 3; 2001, ch. 326, § 3; 2003, ch. 311, § 3; 2003, ch. 432, § 3; 2007, ch. 46, § 19; 2007, ch. 350, § 4.**

**Cross references.** — For the definition of "federal act", *see* 27-2B-3 NMSA 1978.

**2007 Multiple Amendments.** — Laws 2007, ch. 46, § 19 and Laws 2007, ch. 350, § 4 enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2007, ch. 350, § 4, as the act last signed by the governor, is set out above and incorporates both amendments. The amendments enacted by Laws 2007, ch. 46, § 19 and Laws 2007, ch. 350, § 4 are described below. To view the session laws in their entirety, *see* the 2007 session laws on *NMOneSource.com*.

Laws 2007, ch. 350, § 4, effective June 15, 2007, provided that a participant may receive state-funded cash assistance pursuant to the New Mexico Works Act; and provided that a hardship exception applies to a person whose application for supplemental security is pending or on appeal and who was granted a limited participation requirement.

Laws 2007, ch. 46, § 19, effective June 15, 2007, in Subsection E(1) changed "he is temporarily or completely disabled" to "the person has a temporary or permanent disability", and in Subsection E(2) changed "an ill or disabled" to "who is ill or has a disability".

**The 2003 amendment,** effective April 10, 2003, inserted "or department records" in the undesignated paragraph of Subsection E, and added Subparagraph E(4)(a) and (b) and Paragraph E(5).

**The 2001 amendment,** effective June 15, 2001, in Subsection E, inserted "social security administration records" and added Paragraph 4.

## 27-2B-7. Financial standard of need.

A. The secretary shall adopt a financial standard of need based upon the availability of federal and state funds and based upon appropriations by the legislature of the available federal temporary assistance for needy families grant made pursuant to the federal act in the following categories:

(1) cash assistance;

(2) child care services;

(3) other services; and

(4) administrative costs.

The legislature shall determine the actual percentage of each category to be used annually of the federal temporary assistance for needy families grant made pursuant to the federal act. Within the New Mexico works program, the department may provide cash assistance or services to specific categories of benefit groups from general funds appropriated to cash assistance or services. The department may exclude these funds from temporary assistance for needy families maintenance of effort. The department shall identify alternative state spending to claim as maintenance of effort and make necessary arrangements to allow reporting of that spending.

B. The following income sources are exempt from the gross income test, the net income test and the cash payment calculation:

(1) medicaid;

(2) food stamps;

(3) government-subsidized foster care payments if the child for whom the payment is received is also excluded from the benefit group;

(4) supplemental security income;

(5) government-subsidized housing or housing payments;

(6) federally excluded income;

(7) educational payments made directly to an educational institution;

(8) government-subsidized child care;

(9) earned income that belongs to a person seventeen years of age or younger who is not the head of household;

(10) child support passed through to the participant by the child support enforcement division of the department in the following amounts:

(a) fifty dollars ($50.00) per month through December 31, 2008; and

(b) no later than January 1, 2009, a minimum of one hundred dollars ($100) for one child and two hundred dollars ($200) for two or more children as based on the availability of state or federal funds;

(11) earned income deposited in an individual development account by a member of the benefit group or money received as matching funds for allowable uses by the owner of the individual development account pursuant to the Individual Development Account Act [58-30-1 NMSA 1978]; and

(12) other income sources as determined by the department.



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C. The total countable gross earned and unearned income of the benefit group cannot exceed eighty-five percent of the federal poverty guidelines for the size of the benefit group.

D. For a benefit group to be eligible to participate:

(1) gross countable income that belongs to the benefit group must not exceed eighty-five percent of the federal poverty guidelines for the size of the benefit group; and

(2) net countable income that belongs to the benefit group must not equal or exceed the financial standard of need after applying the disregards set out in Paragraphs (1) through (4) of Subsection E of this section.

E. Subject to the availability of state and federal funds, the department shall determine the cash payment of the benefit group by applying the following disregards to the benefit group's earned income and then subtracting that amount from the benefit group's financial standard of need:

(1) one hundred twenty-five dollars ($125) of monthly earned income and one-half of the remainder, or for a two-parent family, two hundred twenty-five dollars ($225) of monthly earned income and one-half of the remainder for each parent;

(2) monthly payments made for child care at a maximum of two hundred dollars ($200) for a child under two years of age and at a maximum of one hundred seventy-five dollars ($175) for a child two years of age or older;

(3) costs of self-employment income; and

(4) business expenses.

F. In addition to the disregards specified in Subsection E of this section, and between June 28, 2007 and June 30, 2008, or until implementation of the employment retention and advancement bonus program described in Subsection G of this section, the department shall apply the following income disregards to the benefit group's earned income and then subtract that amount from the benefit group's financial standard of need:

(1) for the first two years of receiving cash assistance or services, if a participant works over the work requirement rate set by the department pursuant to the New Mexico Works Act, one hundred percent of the income earned by the participant beyond that rate; and

(2) for the first two years of receiving cash assistance or services, for a two-parent benefit group in which one parent works more than thirty-five hours per week and the other works more than twenty-four hours per week, one hundred percent of income earned by each participant beyond the work requirement rate set by the department.

G. No later than July 1, 2008, New Mexico employment incentives shall be as follows:

(1) the department shall implement an employment retention and advancement bonus program based on availability of state or federal funds that includes financial incentives to encourage a participant to:

(a) leave the New Mexico works program and move into an employment retention and advancement bonus incentive program;

(b) maintain a minimum of thirty hours per week employment; and

(c) leave the employment retention and advancement bonus incentive program due to increased earnings above the income eligibility standard and continue employment;

(2) the employment retention and advancement bonus incentive program shall provide a cash bonus and employment services to a former participant who, upon application:

(a) is currently engaged in paid work for a minimum of thirty hours per week;

(b) has received cash assistance for at least three months and one of the last three months;

(c) has had a gross income of less than one hundred fifty percent of the federal poverty guidelines; and

(d) has participated in the employment retention and advancement bonus incentive program for no longer than eighteen months;

(3) for continued eligibility in the employment retention and advancement bonus incentive program, a participant shall:

(a) be engaged in paid work for thirty hours per week for at least one of the past three months;

(b) be engaged in paid work for thirty hours per week for at least four of the past six months;



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(c) have had gross income less than one hundred fifty percent of the federal poverty guidelines; and

(d) have participated in the program no more than eighteen months;

(4) the department shall provide employment services to assist participants in gaining access to available work supports, maintain employment and advance to higher-paying employment; and

(5) the department shall:

(a) establish the amount of bonus to be paid to participants in the employment retention and advancement bonus program based on availability of state and federal funds;

(b) propose rules to implement the employment retention and advancement bonus incentive program of this subsection no later than January 1, 2008; and

(c) begin implementation of the employment retention and advancement bonus incentive program of this subsection no later than July 1, 2008.

H. The department may recover overpayments of cash assistance on a monthly basis not to exceed fifteen percent of the financial standard of need applicable to the benefit group.

I. Based upon the availability of funds and in accordance with the federal act, the secretary may establish a separate temporary assistance for needy families cash assistance program that may waive certain New Mexico Works Act requirements due to a specific situation.

J. Subject to the availability of state and federal funds, the department may limit the eligibility of benefit groups that are eligible because a legal guardian is not included in the benefit group.

**History: Laws 1998, ch. 8, § 7; 1998, ch. 9, § 7; 1999, ch. 54, § 1; 2001, ch. 295, § 4; 2001, ch. 326, § 4; 2003, ch. 362, § 13; 2006, ch. 96, § 14; 2007, ch. 349, § 14; 2007, ch. 350, § 5; 2009, ch. 186, § 3.**

**Cross references.** — For "federal act", *see* 27-2B-3 NMSA 1978.

For the secretary of human services referred to in Subsection A, *see* 9-8-5 NMSA 1978.

**The 2009 amendment,** effective June 19, 2009, in Subsection F, after "and between", deleted "the effective date of this 2007 act" and added "June 28, 2007"; in Paragraph (2) of Subsection F, after "one parent works" deleted "over" and added "more than" and after "the other works", deleted "over" and added "more than"; and added Subsection J.

**Applicability.** — Laws 2009, ch. 186, § 7 provided that the provisions of Laws 2009, ch. 186 apply beginning August 1, 2009.

**The 2007 amendment,** effective June 15, 2007, permited the department to provide cash assistance or services within the New Mexico works program to specific categories of benefit groups and to exclude the funds from temporary assistance for needy families; in Paragraph (10) of Subsection B, provided for an increase in child support no later than January, 2009; eliminated the disregards in Subsection E for work over the work requirement rate and for a two-parent benefit group; and added Subsections F, G and I.

**The 2006 amendment,** effective July 1, 2006, in Paragraph (11) of Subsection B, changed "individual development account" to "family opportunity account" and changed "Individual Development Account Act" to "Family Opportunity Accounts Act".

**The 2003 amendment,** effective July 1, 2003, redesignated former Paragraph B(11) as Paragraph B(12) and added Paragraph B(11).

**The 2001 amendment,** effective June 15, 2001, rewrote the section to the extent that a detailed comparison was impracticable.

**The 1999 amendment,** effective March 17, 1999, in Subsection B substituted "Only" for "The cash benefit level for", inserted the language beginning "receiving a cash" and ending "and who are", and substituted "receive an additional housing allowance of fifty dollars ($50.00)" for "be increased by one hundred dollars ($100)"; in Subsection C substituted "seventeen" for "eighteen" in Paragraph (9), added Paragraph (13), redesignated former Paragraph (13) as Paragraph (14); in Subsection F added "and then subtracting that amount from the benefit group's financial standard of need" at the end of the introductory language, deleted former Paragraph (5), which read "fifty dollars ($50.00) of collected child support passed through to the participant by the department's child support enforcement program; and then subtracting that amount from the financial standard of need"; and made minor stylistic changes.

## 27-2B-7.1. Repealed.

**Repeals.** — Laws 2007, ch. 350, § 11 repealed 27-2B-7.1 NMSA 1978, as enacted by Laws 2003, ch. 160, § 1, providing for the use of head start funds, effective June 15, 2007.

For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com*.

## 27-2B-8. Resources.

A. Liquid and nonliquid resources owned by the benefit group shall be counted in the eligibility determination.

B. A benefit group may at a maximum own the following resources:



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(1) two thousand dollars ($2,000) in nonliquid resources;

(2) one thousand five hundred dollars ($1,500) in liquid resources, excluding funds deposited in an individual development account established pursuant to the Individual Development Account Act or a qualified tuition program, as defined in Section 529 of the Internal Revenue Code of 1986;

(3) the value of the principal residence of the participant;

(4) the value of burial plots and funeral contracts for family members; and

(5) the value of work-related equipment up to one thousand dollars ($1,000).

C. Vehicles owned by the benefit group shall not be considered in the determination of resources attributed to the benefit group.

**History: Laws 1998, ch. 8, § 8 and Laws 1998, ch. 9, § 8; 2001, ch. 295, § 5; 2001, ch. 326, § 5; 2003, ch. 311, § 4; 2003, ch. 432, § 4; 2006, ch. 96, § 15; 2007, ch. 349, § 15; 2019, ch. 225, § 1.**

**Cross references.** — For Section 529 of the Internal Revenue Code of 1986, see 26 U.S.C. § 529.

**The 2019 amendment,** effective January 1, 2020, provided that funds in an individual development account shall not be considered in eligibility calculations for benefits; in Subsection B, in Paragraph B(2), after "liquid resources,", added "excluding funds deposited in an individual development account established pursuant to the Individual Development Account Act or a qualified tuition program, as defined in Section 529 of the Internal Revenue Code of 1986", and deleted former Paragraph B(5) and redesignated former Paragraph B(6) as Paragraph B(5).

**The 2007 amendment,** effective July 1, 2007, changed "family opportunity account" to "individual development account".

**The 2006 amendment,** effective July 1, 2006, in Paragraph (5) of Subsection B, changed "individual development account" to "family opportunity account".

**The 2003 amendment,** effective April 10, 2003, deleted former Paragraphs B(7) and (8), concerning the maximum allowable resources in areas without and with public transportation, and added Subsection C.

**The 2001 amendment,** effective June 15, 2001, deleted "household group but not by the" preceding "benefit group" and deleted "not" following "shall" in Subsection A.

## 27-2B-9. Mandatory school attendance.

If a minor member of a benefit group has three unexcused absences from school during a grading period, his parent shall notify the department of the absences within fourteen days. The department may impose a sanction on the benefit group that reduces the cash assistance by the amount the minor member would otherwise receive only after the department refers the minor member to the appropriate state agency, counselor or community program for appropriate resolution of the attendance problem. The department shall not consider participation in cultural and religious activities an unexcused absence, as long as the student has parental consent.

**History: Laws 1998, ch. 8, § 9 and Laws 1998, ch. 9, § 9.**

**Duplicate laws.** — Laws 1998, ch. 8, § 9 and Laws 1998, ch. 9, § 9 enacted identical new sections.

## 27-2B-10. Individual development accounts.

A participant may establish an individual development account pursuant to the Individual Development Account Act [58-30-1 NMSA 1978].

**History: Laws 1998, ch. 8, § 10 and Laws 1998, ch. 9, § 10; 2003, ch. 362, § 14; 2006, ch. 96, § 16; 2007, ch. 349, § 16.**

**The 2007 amendment,** effective July 1, 2007, changes the title of the act and changes "family opportunity account" to "individual development account".

**The 2006 amendment,** effective July 1, 2006, changes "individual development account" to "family opportunity account" and "Individual Development Account Act" to "Family Opportunity Accounts Act".

**The 2003 amendment,** effective July 1, 2003, rewrote this section to the extent that a detailed comparison is impracticable.

## 27-2B-11. Ineligibility.

A. The following are ineligible to be members of a benefit group:

(1) an inmate or patient of a nonmedical institution;

(2) a person who, in the two years preceding application, assigned or transferred real property unless the person:

(a) received or receives a reasonable return;



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(b) attempted to or attempts to receive a reasonable return; or

(c) attempted to or attempts to regain title to the real property;

(3) a minor unmarried parent who has not successfully completed a high school education and who has a child at least twelve weeks of age in the minor unmarried parent's care unless the minor unmarried parent:

(a) participates in educational activities directed toward the attainment of a high school diploma or its equivalent; or

(b) participates in an alternative educational or training program that has been approved by the department;

(4) a minor unmarried parent who is not residing in a place of residence maintained by a parent, legal guardian or other adult relative unless the department:

(a) refers or locates the minor unmarried parent to a second-chance home, maternity home or other appropriate adult-supervised supportive living arrangement, and takes into account the needs and concerns of the minor unmarried parent;

(b) determines that the minor unmarried parent has no parent, legal guardian or other appropriate adult relative who is living or whose whereabouts are known;

(c) determines that a minor unmarried parent is not allowed to live in the home of a living parent, legal guardian or other appropriate adult relative;

(d) determines that the minor unmarried parent is or has been subjected to serious physical or emotional harm, sexual abuse or exploitation in the home of the parent, legal guardian or other appropriate adult relative;

(e) finds that substantial evidence exists of an act or a failure to act that presents an imminent or serious harm to the minor unmarried parent and the child of the minor unmarried parent if they live in the same residence with the parent, legal guardian or other appropriate adult relative; or

(f) determines that it is in the best interest of the unmarried minor parent to waive this requirement;

(5) a minor child who has been absent or is expected to be absent from the home for forty-five days;

(6) a person who does not provide a social security number or who refuses to apply for one;

(7) a person who is not a resident of New Mexico;

(8) a person who fraudulently misrepresented residency to receive assistance in two or more states simultaneously, except that the person shall be ineligible only for ten years;

(9) a person who is a fleeing felon or a probation and parole violator; and

(10) a person concurrently receiving supplemental security income, tribal temporary assistance for needy families or bureau of Indian affairs general assistance.

B. For the purposes of this section, "second-chance home" means an entity that provides a supportive and supervised living arrangement to a minor unmarried parent where the minor unmarried parent is required to learn parenting skills, including child development, family budgeting, health and nutrition, and other skills to promote long-term economic independence and the well-being of children.

C. Pursuant to the authorization provided to the states in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 21 U.S.C. Section 862a(d)(1)(A), New Mexico elects to exempt all persons domiciled in the state from application of 21 U.S.C. Section 862a(d)(1)(A) concerning the restriction of eligibility for benefits on the basis of a conviction for distribution of a controlled substance.

**History: Laws 1998, ch. 8, § 11 and Laws 1998, ch. 9, § 11; 2001, ch. 295, § 6; 2001, ch. 326, § 6; 2002, ch. 5, § 1; 2002, ch. 6, § 1; 2007, ch. 350, § 6.**

**Cross references.** — For definition of "federal act", *see* 27-2B-3 NMSA 1978 and notes thereto.

**The 2007 amendment,** effective June 15, 2007, eliminated ineligibility for failure to assist in establishing paternity or obtaining child support or to assign support rights to New Mexico and described the exemption from application of federal law as the restriction of eligibility for benefits on the basis of a conviction for distribution of a controlled substance.

**The 2002 amendment,** effective May 15, 2002, deleted former Paragraph A(9) and former Subsections B and C, pertaining to persons convicted of a drug-related felony; added present Subsection C; and redesignated former Subsection D as present Subsection B.

**The 2001 amendment,** effective June 15, 2001, deleted "or adoption subsidies" following "Indian affairs general assistance" in Subsection A(11).



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**ANNOTATIONS**

**Limitation on duration of benefits.** — Regulation limiting the duration of cash assistance payments to six months was valid. *Health & Social Servs. Dep't v. Garcia*, 1976-NMSC-003, 88 N.M. 640, 545 P.2d 1018, *rev'g* 1975-NMCA-090, 88 N.M. 419, 540 P.2d 1038.

The human services department had the implied authority to limit the receipt of general assistance to twelve continuous months by regulation. *Howell v. Heim*, 1994-NMSC-103, 118 N.M. 500, 882 P.2d 541.

## 27-2B-12. Services.

Subject to the availability of federal and state funds, a benefit group that is not receiving cash assistance but has an income less than one hundred percent of the federal poverty guidelines may be eligible to receive services.

**History: Laws 1998, ch. 8, § 12 and Laws 1998, ch. 9, § 12; 1999, ch. 273, § 3.**

**The 1999 amendment,** effective June 18, 1999, substituted "benefit group that is" for "group of people that includes at least one dependent child living with a parent, legal guardian or relative within the fifth degree of consanguinity or a pregnant woman who is".

## 27-2B-13. Fair hearing; review and appeal.

A. A participant may request a hearing if:

(1) an application is not acted on within a reasonable time after the filing of the application;

(2) an application is denied in whole or in part; or

(3) the cash assistance or services are modified, terminated or not provided.

B. The department shall notify the participant of his rights under this section.

C. The department shall by rule establish procedures for the filing of a request for a hearing and the time limits within which a request may be filed; provided, however, that the department may grant reasonable extensions of the time limits. If the request is filed in a timely manner, cash assistance and services shall be provided until the appeal is resolved. If the request is not filed within the specified time for appeal or within whatever extension the department may grant, the department action shall be final. Upon receipt of a timely request, the department shall give the participant reasonable notice of an opportunity for a fair hearing in accordance with the rules of the department.

D. The hearing shall be conducted by a hearing officer designated by the director. The powers of the hearing officer shall include administering oaths or affirmations to witnesses called to testify, taking testimony, examining witnesses, admitting or excluding evidence and reopening a hearing to receive additional evidence. The technical rules of evidence and the rules of civil procedure shall not apply. The hearing shall be conducted so that the contentions or defenses of each party to the hearing are amply and fairly presented. Either party may be represented by counsel or other representative of his designation, and he or his representative may conduct cross-examination. Oral or documentary evidence may be received but the hearing officer may exclude irrelevant, immaterial or unduly repetitious evidence.

E. The director shall review the record of the proceedings and shall make his decision on the record. The participant or his representative shall be notified in writing of the director's decision and the reasons for the decision. The written notice shall inform the participant of his right to judicial review. The department shall be responsible for ensuring that the decision is enforced.

F. Within thirty days after receiving written notice of the decision of the director, a participant may file a notice of appeal with the court of appeals together with a copy of the notice of the decision. The clerk of the court shall transmit a copy of the notice of appeal to the director.

G. The filing of a notice of appeal shall not stay the enforcement of the decision of the director, but the department may grant, or the court upon motion and good cause shown may order, a stay.

H. Within twenty days after receipt of the notice of appeal, the department shall file with the clerk of the court three copies and furnish to the appellant one copy of the written transcript of the record of the proceedings.

I. If, before the date set for argument, application is made to the court for leave to present additional evidence and the court is satisfied that the additional evidence is material and there was



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good reason for not presenting it in the hearing, the court may order the additional evidence taken before the department. If the application to present additional evidence is filed by the department and is approved by the court, the department's decision that is being appealed shall be stayed. The director may modify his findings and decision by reason of the additional evidence and shall file with the court a transcript of the additional evidence together with any modified or new findings or decision.

J. The review of the court shall be made upon the decision and the record of the proceedings.

K. The court shall set aside a decision and order of the director only if found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the record as a whole; or

(3) otherwise not in accordance with law.

L. The department shall not authorize or allow expenditures for the affected programs in excess of the amounts previously appropriated by the legislature.

**History: Laws 1998, ch. 8, § 13 and Laws 1998, ch. 9, § 13.**

**Duplicate laws.** — Laws 1998, ch. 8, § 13 and Laws 1998, ch. 9, § 13 enacted identical new sections.

## 27-2B-14. Sanctions.

A. The department shall sanction a member of a benefit group for noncompliance with work requirements or child support requirements.

B. The sanction shall be applied at the following levels:

(1) twenty-five percent reduction of cash assistance for the first occurrence of noncompliance;

(2) fifty percent reduction of cash assistance for the second occurrence of noncompliance; and

(3) termination of cash assistance and ineligibility to reapply for six months for the third occurrence of noncompliance.

C. Prior to imposing the first sanction, if the department determines that a participant is not complying with the work participation requirement or child support requirements, the participant shall be required to enter into a conciliation process established by the department to address the noncompliance and to identify good cause for noncompliance or barriers to compliance. The conciliation process shall occur only once prior to the imposition of the sanction. The participant shall have ten working days from the date a conciliation notice is mailed to contact the department to initiate the conciliation process. A participant who fails to initiate the conciliation process shall have a notice of adverse action mailed to him after the tenth working day following the date on which the conciliation notice is mailed. Participants who begin but do not complete the conciliation process shall be mailed a notice of adverse action thirty days from the date the original conciliation notice was mailed.

D. Reestablishing compliance shall allow full payment to resume.

E. Noncompliance with reporting requirements may subject a participant to other sanctions, except that an adult member of the benefit group shall not be sanctioned for the failure of a dependent child to attend school.

F. Effective October 1, 2001, the department shall not terminate the medicaid benefits of any member of a benefit group due to imposition of a sanction pursuant to the provisions of this section.

**History: Laws 1998, ch. 8, § 14 and Laws 1998, ch. 9, § 14; 2001, ch. 295, § 7; 2001, ch. 326, § 7; 2003, ch. 311, § 5; 2003, ch. 432, § 5.**

**2003 amendments.** — Identical amendments to this section were enacted by Laws 2003, ch. 311, § 5, effective April 8, 2003, and Laws 2003, ch. 432, § 5, effective April 10, 2003, that added the exception in Subsection E. The section was set out as amended by Laws 2003, ch. 432, § 5. *See* 12-1-8 NMSA 1978.

**The 2001 amendment,** effective June 15, 2001, in Subsection A, substituted "a member of a benefit group" for "member of the benefit group" and substituted "or" for "and" preceding "child support requirements"; in Subsection C, inserted "established by the department" and "or barriers to compliance" in the first sentence, deleted the former third sentence concerning failure to participate after notice and added the last two sentences; substituted "shall" for "will" in Subsection D; deleted former Subsection E concerning notice of action; redesignated former Subsection F as E; and added current Subsection F.



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## 27-2B-15. Medicaid eligibility.

A. The following are eligible for medicaid:

(1) a participant who is in transition to self-sufficiency due to employment or child support;

(2) a pregnant woman who meets the income and resource requirements for New Mexico's aid to families with dependent children as they existed on July 16, 1996;

(3) a member of a benefit group who is eighteen years of age or younger if the benefit group's income is below one hundred eighty-five percent of the federal poverty guidelines;

(4) a pregnant woman whose income is below one hundred eighty-five percent of the federal poverty guidelines;

(5) participants receiving federal supplemental security income;

(6) an aged, blind or disabled person in an institution who meets all the supplemental security income standards except for income;

(7) a person who meets all standards for institutional care but is cared for at home and meets eligibility standards for medicaid;

(8) a qualified medicare beneficiary, qualified disabled working person or specified low-income medicare beneficiary; and

(9) a foster child in the custody of the state or of an Indian pueblo, tribe or nation who meets eligibility standards for medicare.

B. Effective October 1, 2001, for the medicaid category designated "JUL medicaid" by the department, the income eligibility criteria shall be the same as the income eligibility criteria set forth in the New Mexico Works Act [27-2B-1 to 27-2B-20 NMSA 1978].

**History: Laws 1998, ch. 8, § 15 and Laws 1998, ch. 9, § 15; 2001, ch. 295, § 8; 2001, ch. 326, § 8.**

**2001 amendments.** — Identical amendments to this section were enacted by Laws 2001, ch. 295, § 8 and Laws 2001, ch. 326, § 8, effective June 15, 2001, that deleted former Subsection A describing a benefit group; redesignated the former preliminary language as current Subsection A; redesignated the former Subsections B to J as Paragraphs 1 to 9; and added Subsection B. The section was set out as amended by Laws 2001, ch. 326, § 8. *See* 12-1-8 NMSA 1978.

## 27-2B-16. Immigrant eligibility.

An immigrant may be eligible to receive cash assistance and services if the immigrant is:

A. from one of the classes of immigrants defined in the federal act who entered the United States prior to August 22, 1996; or

B. a qualified immigrant as defined in the federal act who entered the United States after August 22, 1996.

**History: Laws 1998, ch. 8, § 16 and Laws 1998, ch. 9, § 16.**

**Cross references.** — For meaning of "federal act", *see* 27-2B-3 NMSA 1978.

**Duplicate laws.** — Laws 1998, ch. 8, § 16 and Laws 1998, ch. 9, § 16 enacted identical new sections.

## 27-2B-17. Records; confidentiality.

A. Pursuant to the federal act, the department shall establish and enforce rules governing the custody, use and preservation of the records, papers, files and communications to restrict the use or disclosure of information contained in those documents concerning participants.

B. It is unlawful for a person, body, association, firm, corporation or other agency outside the department to solicit, disclose, receive or make use of or authorize, knowingly permit, participate in or acquiesce in the use of a name or list of names of participants for commercial or political purposes.

C. A person, body, association, firm, corporation or other agency that willfully or knowingly violates a provision of this section is guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars ($25.00) nor more than one thousand dollars ($1,000) or by imprisonment in the county jail for a definite term not to exceed sixty days or both.



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**History: Laws 1998, ch. 8, § 17 and Laws 1998, ch. 9, § 17.**

**Cross references.** — For meaning of "federal act", *see* 27-2B-3 NMSA 1978.

**Duplicate laws.** — Laws 1998, ch. 8, § 17 and Laws 1998, ch. 9, § 17 enacted identical new sections.

## 27-2B-18. Certification.

The governor shall make the certifications mandated by the federal act.

**History: Laws 1998, ch. 8, § 18 and Laws 1998, ch. 9, § 18.**

**Cross references.** — For meaning of "federal act", *see* 27-2B-3 NMSA 1978.

**Duplicate laws.** — Laws 1998, ch. 8, § 18 and Laws 1998, ch. 9, § 18 enacted identical new sections.

## 27-2B-19. Subsidized employment.

A. The department may administer a wage subsidy program based on availability of federal and state funds.

B. The wage subsidy program shall include the following requirements:

(1) participating employers shall hire participants who receive cash assistance for subsidized job slots that are full time and that offer a reasonable possibility of unsubsidized employment after the subsidy period;

(2) participating employers shall receive a subsidy for up to twelve months;

(3) subsidized employees shall not be required to work in excess of forty hours per week;

(4) subsidized employees shall be paid a wage that is substantially like the wage paid for similar jobs with the employer with appropriate adjustments for experience and training but not less than the federal minimum hourly wage;

(5) subsidized employment does not impair an existing contract or collective bargaining agreement;

(6) subsidized employment does not displace currently employed workers or fill positions that are vacant due to a layoff;

(7) wage subsidy employers shall:

(a) maintain health, safety and working conditions at or above levels generally acceptable in the industry and not less than those of comparable jobs offered by the employer;

(b) provide on-the-job training necessary for subsidized employees to perform their duties;

(c) sign an agreement for each placement outlining the specific job offered to a subsidized employee and agree to abide by all of the requirements of the program;

(d) provide workers' compensation coverage for each subsidized employee; and

(e) provide the subsidized employee with benefits equal to those for new employees or as required by state and federal law, whichever is greater;

(8) the department shall determine whether a participant is eligible to be a subsidized employee by establishing:

(a) that the participant has sufficient work experience to obtain unsubsidized employment;

(b) that the participant has completed an employment preparation program; or

(c) that the department or participant may benefit from this employment strategy;

(9) a disregard of income earned by the subsidized employee in the subsidized job shall be applied in the eligibility determination for services;

(10) the department shall suspend regular payments of cash assistance to the benefit group for the calendar month in which an employer makes the first subsidized wage payment to a subsidized employee who is otherwise eligible for cash assistance and food stamps;

(11) the department shall pay employers each month, from cash assistance;

(12) a subsidized employee shall be eligible for supplemental payments if the net monthly full-time wage paid to the subsidized employee is less than the monthly total of the cash assistance the participant is eligible to receive. The department shall authorize issuance of a supplemental



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cash payment to compensate for the deficit. To determine if a deficit exists, the department shall adopt an equivalency scale that is adjustable to household size and other factors; and

(13) the department shall determine monthly and pay in advance supplemental payments to eligible subsidized employees. In calculating the payment, the department shall assume that the subsidized employee will work forty hours per week during the month unless an employer provides information that the number of hours to be worked by the subsidized employee will be reduced.

C. For the purposes of this section, "benefits" includes health care coverage, paid sick leave and holiday and vacation pay.

D. For the purposes of this section, "subsidized employee" means a participant engaged in a subsidized employment activity.

E. For the purposes of this section, "net monthly full-time wage" means a subsidized employee's wages after the required payroll deductions.

**History: Laws 1998, ch. 8, § 19 and Laws 1998, ch. 9, § 19; 2007, ch. 350, § 7.**

**Duplicate laws.** — Laws 1998, ch. 8, § 19 and Laws 1998, ch. 9, § 19 enacted identical new sections.

**The 2007 amendment,** effective June 15, 2007, changed the program from a "pilot project" to a wage subsidy program based on availability of federal and state funds and extended the time participating employers may receive a subsidy from six to twelve months; and eliminated provisions relating to food stamps and the extension of the subsidy for employers operating in areas that have a higher unemployment rate than the state average.

## 27-2B-20. Repealed.

**Repeals.** — Laws 1999, ch. 151 § 1 repealed 27-2B-20 NMSA 1978, as enacted by Laws 1998, ch. 8, § 20 and Laws 1998, ch. 9, § 20, relating to child support trusts, effective June 18, 1999. For provisions of former section, *see* the 1998 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 2C

# Pharmaceutical Supplemental Rebate

Sec.

27-2C-1. Short title.
27-2C-2. Definitions.
27-2C-3. Medicaid formulary for prescription drugs.
27-2C-4. Negotiated drug discounts and rebates.
27-2C-5. Reporting.
27-2C-6. Coordination with other programs.
27-2C-7. Rulemaking.
27-2C-8. Waivers.

## 27-2C-1. Short title.

This act [27-2C-1 to 27-2C-8 NMSA 1978] may be cited as the "Pharmaceutical Supplemental Rebate Act".

**History: Laws 2002, ch. 105, § 1.**

**Effective dates.** — Laws 2002, ch. 105, § 9 made the act effective July 1, 2002.

## 27-2C-2. Definitions.

As used in the Pharmaceutical Supplemental Rebate Act:

A. "department" means the human services department;

B. "labeler" means a person that receives prescription drugs from a manufacturer or wholesaler and repackages those drugs for later retail sale, and that has a labeler code from the federal food and drug administration;

C. "manufacturer" means a manufacturer of prescription drugs as defined in 42 U.S.C. 1396r-8(k)(5), including a subsidiary or affiliate of a manufacturer;

D. "medicaid" means the joint federal-state health coverage program pursuant to Title 19 or Title 21 of the federal Social Security Act;

E. "participating retail pharmacy" means a retail pharmacy or other business licensed to dispense prescription drugs that participates in the state medicaid program;



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F. "secretary" means the secretary of human services; and

G. "wholesaler" means a business licensed to distribute prescription drugs in the state.

**History: Laws 2002, ch. 105, § 2.**

**Effective dates.** — Laws 2002, ch. 105, § 9 made the act effective July 1, 2002.

**Cross references.** — For Titles XIX and XXI of the Social Security Act, *see* 42 U.S.C.S. §§ 1396 et seq. and 1397 et seq., respectively.

## 27-2C-3. Medicaid formulary for prescription drugs.

A. The department shall develop or implement a formulary or preferred drug list, taking into consideration the clinical efficacy, safety and cost effectiveness of a product.

B. The department shall ensure that the administration or delivery of health care services and products under the medicaid program includes a formulary that will provide medically appropriate drug therapies for patients.

C. The department shall require a prior authorization before a drug not listed on the medicaid program formulary may be dispensed unless otherwise provided pursuant to Subsection C of Section 27-2C-4 NMSA 1978.

D. The department shall ensure that atypical antipsychotic medications are available in the same manner as conventional antipsychotic medications for medicaid patients for the treatment of severe mental illnesses that are listed in a current national diagnostic and statistical manual of mental disorders published by a national psychiatric association, including schizophrenia, clinical depression, bipolar disorder, anxiety-panic attack disorder and obsessive compulsive disorder.

**History: Laws 2002, ch. 105, § 3; 2003, ch. 344, § 1.**

**The 2003 amendment,** effective June 20, 2003, added Subsection D.

## 27-2C-4. Negotiated drug discounts and rebates.

A. The secretary shall negotiate discount prices or rebates for prescription drugs from drug manufacturers and labelers that include supplemental rebates for the medicaid program over and above those required under 42 U.S.C. 1396r-8.

B. In negotiating rebate terms, the secretary shall consider the rebate calculated under the medicaid rebate program pursuant to 42 U.S.C. 1396r-8, the price provided to eligible entities under 42 U.S.C. 256b and other available information on prescription drug prices, discounts and rebates.

C. The secretary shall prompt a review of whether to place a manufacturer's or labeler's products on the prior authorization list for the medicaid program if:

(1) the secretary and a drug manufacturer or labeler fail to reach agreement on the terms of a supplemental medicaid rebate or discount; and

(2) the discounts or rebates offered by the manufacturer or labeler are not as favorable to the state as the prices provided to eligible entities under 42 U.S.C. 256b.

D. Any prior authorization shall meet the requirements of 42 U.S.C. 1396r-8(d)(5) and be done in accordance with the Public Assistance Act [27-2-1 NMSA 1978] or department rules.

E. The names of manufacturers and labelers that do not enter into rebate agreements are public information, and the department shall release this information to the public and actively distribute it to physicians, pharmacists and other health care professionals.

**History: Laws 2002, ch. 105, § 4.**

**Effective dates.** — Laws 2002, ch. 105, § 9 made the act effective July 1, 2002.

## 27-2C-5. Reporting.

The department shall report the savings from the pharmaceutical supplemental rebates for the preceding fiscal year to the legislative health and human services committee by November 1 of each year.



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**History: Laws 2002, ch. 105, § 5.** **Effective dates.** — Laws 2002, ch. 105, § 9 made the act effective July 1, 2002.

## 27-2C-6. Coordination with other programs.

When the secretary finds that it is beneficial to the medicaid program and another state program to combine drug pricing negotiations to maximize drug rebates, the secretary may do so.

**History: Laws 2002, ch. 105, § 6.** **Effective dates.** — Laws 2002, ch. 105, § 9 made the act effective July 1, 2002.

## 27-2C-7. Rulemaking.

The department shall adopt rules to implement the provisions of the Pharmaceutical Supplemental Rebate Act [27-2C-1 NMSA 1978].

**History: Laws 2002, ch. 105, § 7.** **Effective dates.** — Laws 2002, ch. 105, § 9 made the act effective July 1, 2002.

## 27-2C-8. Waivers.

The department shall seek any waivers of federal law or rule necessary to implement the provisions of the Pharmaceutical Supplemental Rebate Act [27-2C-1 NMSA 1978].

**History: Laws 2002, ch. 105, § 8.** **Effective dates.** — Laws 2002, ch. 105, § 9 made the act effective July 1, 2002.

# ARTICLE 2D

# Education Works

Sec.
27-2D-1. Short title.
27-2D-2. Definitions.
27-2D-3. Application; resource planning session; individual education plan; review periods.
27-2D-4. Education works program; eligibility; restrictions; requirements.
27-2D-5. Financial standard of need.
27-2D-6. Resources.
27-2D-7. Ineligibility.
27-2D-8. Fair hearing; review and appeal.
27-2D-9. Satisfactory participation.

## 27-2D-1. Short title.

Chapter 27, Article 2D NMSA 1978 may be cited as the "Education Works Act".

**History: Laws 2003, ch. 317, § 1; 2009, ch. 186, § 4.** **The 2009 amendment,** effective June 19, 2009, changed the reference to the act to the chapter and article of NMSA 1978.

**Applicability.** — Laws 2009, ch. 186, § 7 provided that the provisions of Laws 2009, ch. 186 apply beginning August 1, 2009.

## 27-2D-2. Definitions.

As used in the Education Works Act:

A. "applicant" means a person applying for cash assistance on behalf of a benefit group;

B. "benefit group" means a pregnant woman or a group of people that includes a dependent child, all of that dependent child's full, half, step- or adopted siblings living with the dependent child's parent or relative within the fifth degree of consanguinity and the parent with whom the children live;



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C. "cash assistance" means cash payments distributed by the department pursuant to the Education Works Act;

D. "department" means the human services department;

E. "dependent child" means a natural, adopted step-child or ward who is:

(1) seventeen years of age or younger;

(2) eighteen years of age and is enrolled in high school; or

(3) between eighteen and twenty-two years of age and is receiving special education services regulated by the public education department;

F. "director" means the director of the income support division of the department;

G. "earned income" means cash or payment in kind that is received as wages from employment or payment in lieu of wages; and earnings from self-employment or earnings acquired from the direct provision of services, goods or property, production of goods, management of property or supervision of services;

H. "education works program" means the cash assistance, activities and services available to a recipient pursuant to the Education Works Act;

I. "federal act" means the federal Social Security Act and rules promulgated pursuant to the Social Security Act;

J. "federal poverty guidelines" means the level of income defining poverty by family size published annually in the federal register by the United States department of health and human services;

K. "parent" means natural parent, adoptive parent or stepparent;

L. "person" means an individual;

M. "recipient" means a person who receives cash assistance or services or a member of a benefit group who has reached the age of majority;

N. "secretary" means the secretary of human services;

O. "services" means child-care assistance; payment for education- or employment-related transportation costs; job search assistance; employment counseling; employment, education and job training placement; an annual payment for education-related costs; case management; or other activities whose purpose is to assist transition into employment;

P. "unearned income" means old age, survivors and disability insurance; railroad retirement benefits; veterans administration compensation or pension; military retirement; pensions, annuities and retirement benefits; lodge or fraternal benefits; shared shelter payments; settlement payments; individual Indian money; child support; unemployment compensation benefits; union benefits paid in cash; gifts and contributions; and real property income; and

Q. "vehicle" means a conveyance for the transporting of persons to or from employment or education for the activities of daily living or for the transportation of goods; "vehicle" does not include boats, trailers or mobile homes used as a principal place of residence.

**History: Laws 2003, ch. 317, § 2; 2007, ch. 350, § 8; 2009, ch. 186, § 5.**

**Cross references.** — For provisions regarding the human services department, *see* Chapter 9, Article 8.

For the Social Security Act, *see* 42 U.S.C. § 301 et seq.

**The 2009 amendment,** effective June 19, 2009, in Subsection K, deleted "or legal guardian".

**Applicability.** — Laws 2009, ch. 186, § 7 provided that the provisions of Laws 2009, ch. 186 apply beginning August 1, 2009.

**The 2007 amendment,** effective June 15, 2007, added the definition of "applicant" in Subsection A and revised the definition of "cash assistance" to eliminate the qualification in the definition of "cash payment" that payments be funded by maintenance of effort funds appropriated in compliance with the Personal Responsibility and Work Opportunity Act of 1996, Title 42 of the U.S. Code.

## 27-2D-3. Application; resource planning session; individual education plan; review periods.

A. Application for cash assistance or services shall be made to the department. The application shall be in writing or reduced to writing in the manner and on the form prescribed by the department. The application shall be made under oath by an applicant with whom a dependent child resides and shall contain a statement of the age of the child, residence, a complete statement of the



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amount of property in which the applicant has an interest, a statement of all income that the applicant and other benefit group members have at the time of the filing of the application and other information required by the department.

B. The department shall assist applicants in completing the application for cash assistance or services and shall evaluate applicants to determine all department programs for which the applicant may be eligible. The department shall process all expedited food stamp applications within two business days of submission, and the department shall deliver expedited food stamps to eligible applicants within seven days of the application.

C. At the time of application for cash assistance and services, an applicant shall identify everyone who is to be counted in the benefit group. Once an application is approved, the recipient shall advise the department if there are any changes in the membership of the benefit group.

D. No later than thirty days after an application is filed, the department shall make referrals and act on the application.

E. No later than five days after an application is approved, the department shall provide reimbursement for child care.

F. Whenever the department receives an application for assistance, a verification and record of the applicant's circumstances shall promptly be made to ascertain the facts supporting the application and to obtain other information required by the department. The verification may include a visit to the home of the applicant, as long as the department gives adequate prior notice of the visit to the applicant.

G. The department shall work with the recipient to develop an individual educational plan that:

(1) sets forth the educational goal for the recipient, identifies barriers to that goal and identifies the steps to be taken by the recipient to achieve that goal;

(2) describes the services the department may provide so that the recipient may complete the recipient's educational goal; and

(3) provides for meetings with the recipient every six months or at the end of each academic term to review the eligibility of the benefit group and to review and revise the recipient's individual education plan.

H. The recipient and the department shall sign the recipient's individual education plan. The department shall:

(1) not allow a recipient to decline to participate in developing an individual education plan;

(2) not waive the requirement that a recipient develop an individual education plan; and

(3) emphasize the importance of the individual education plan to the recipient.

**History: Laws 2003, ch. 317, § 3; 2007, ch. 350, § 9.**

**Cross references.** — For provisions regarding the human services department, *see* Chapter 9, Article 8.

For the Social Security Act, *see* 42 U.S.C. § 301 et seq.

**The 2007 amendment,** effective June 15, 2007, revised Subsection B to extend the expedited food stamp applications from 24 hours to two business days.

## 27-2D-4. Education works program; eligibility; restrictions; requirements.

A. A person is eligible to receive education works services or cash assistance if the person demonstrates that:

(1) the person has been accepted or has been determined to be eligible to enroll in a two- or four-year post-secondary or graduate or post-graduate degree program; and

(2) the degree the person will receive will increase the person's ability to engage in full-time paid employment.

B. A recipient shall not receive cash assistance funded by the temporary assistance for needy families block grant during the period in which the recipient is receiving cash assistance pursuant to the Education Works Act.

C. A recipient shall apply for all financial aid available from the post-secondary, graduate or post-graduate educational institution that the recipient attends.

D. During the twenty-four months of participation in the education works program, a recipient shall engage in at least twenty hours per week of class time, studying, work, work-study or



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volunteering. The department shall assume that a recipient spends one and one-half hours studying for every hour of class time.

E. A recipient may participate in the education works program for no more than twenty-four months, except that a recipient may participate in the education works program for one additional academic term following the twenty-four-month participation limit, or for two additional academic terms following the twenty-four-month participation limit at the discretion of the director, if doing so will result in the recipient earning a degree.

F. The number of recipients enrolled in the education works program is limited to the number of recipients who can be served by the funds available.

G. For purposes of this section, "work" means work-study, training-related practicums, internships, paid employment, volunteering or any other activity approved by the department.

**History: Laws 2003, ch. 317, § 4; 2005, ch. 265, § 1; 2006, ch. 84, § 1.**

**The 2006 amendment,** effective May 17, 2006, deleted Paragraph (1) of Subsection A, which provided that a person must demonstrate at the time of application the person does not have a bachelor's degree; provided in Paragraph (1) (formerly Paragraph (2)) of Subsection A that the person has been accepted or is eligible to enroll in a graduate or post-graduate program; provided in Subsection C that a recipient shall apply for aid from the graduate or post-graduate institution; and deleted from Subsection G the requirement that a recipient may earn only one degree through the education works program.

**The 2005 amendment,** effective June 17, 2005, provided in Subsection E that a recipient may participate in the education works program for two additional academic terms following the twenty-four month participation limit at the discretion of the director.

## 27-2D-5. Financial standard of need.

A. The secretary shall adopt a financial standard of need based upon the availability of state funds.

B. The following income sources are exempt from the gross income test, the net income test and the cash payment calculation:

(1) medicaid;

(2) food stamps;

(3) government-subsidized foster care payments if the child for whom the payment is received is also excluded from the benefit group;

(4) supplemental security income;

(5) government-subsidized housing or housing payments;

(6) federally excluded income;

(7) educational payments made directly to an educational institution;

(8) government-subsidized child care;

(9) earned income that belongs to a person seventeen years of age or younger who is not the head of household;

(10) child support passed through to the participant by the child support enforcement division of the department in the following amounts:

(a) fifty dollars ($50.00) per month through December 31, 2008; and

(b) no later than January 1, 2009, a minimum of one hundred dollars ($100) for one child and two hundred dollars ($200) for two or more children as based on availability of state and federal funds; and

(11) other income sources as determined by the department.

C. The total countable gross earned and unearned income of the benefit group shall not exceed eighty-five percent of the federal poverty guidelines for the size of the benefit group.

D. For a benefit group to be eligible to participate:

(1) earned and unearned income that belongs to the benefit group shall not exceed eighty-five percent of the federal poverty guidelines for the size of the benefit group; and

(2) earned and unearned income that belongs to the benefit group shall not equal or exceed the financial standard of need after applying the disregards set out in Paragraphs (1) through (4) of Subsection E of this section.

E. Subject to the availability of state funds, the department shall determine the cash payment of the benefit group by applying the following disregards to the benefit group's earned income and then subtracting that amount from the benefit group's financial standard of need:



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(1) one hundred twenty-five dollars ($125) of monthly earned income and one-half of the remainder, or for a two-parent family, two hundred twenty-five dollars ($225) of monthly earned income and one-half of the remainder for each parent;

(2) monthly payments made for child care at a maximum of two hundred dollars ($200) for a child under two years of age and a maximum of one hundred seventy-five dollars ($175) for a child two years of age or older;

(3) costs of self-employment income; and

(4) business expenses.

F. In addition to the disregards specified in Subsection E of this section, and between June 28, 2007 and June 30, 2008, or until implementation of the employment retention and advancement bonus program in the New Mexico Works Act [27-2B-1 NMSA 1978], the department shall apply the following income disregards to the benefit group's earned income and then subtract that amount from the benefit group's financial standard of need:

(1) for the first two years of receiving cash assistance or services, if a participant works over the work requirement rate set by the department pursuant to the New Mexico Works Act, one hundred percent of the income earned by the participant beyond that rate; and

(2) for the first two years of receiving cash assistance or services, for a two-parent benefit group in which one parent works more than thirty-five hours per week and the other works more than twenty-four hours per week, one hundred percent of income earned by each participant beyond the work requirement rate set by the department.

G. The department may recover overpayments of cash assistance on a monthly basis not to exceed fifteen percent of the financial standard of need applicable to the benefit group.

H. Subject to the availability of state and federal funds, the department may limit the eligibility of benefit groups that are eligible because a legal guardian is not included in the benefit group.

**History: Laws 2003, ch. 317, § 5; 2007, ch. 350, § 10; 2009, ch. 186, § 6.**

**The 2009 amendment,** effective June 19, 2009, in Subsection F, after "and between", deleted "the effective date of this 2007 act" and added "June 28, 2007"; in Paragraph (2) of Subsection F, after "one parent works" deleted "over" and added "more than" and after "the other works", deleted "over" and added "more than"; and added Subsection H.

**Applicability.** — Laws 2009, ch. 186, § 7 provided that the provisions of Laws 2009, ch. 186 apply beginning August 1, 2009.

**The 2007 amendment,** effective June 15, 2007, amended Paragraph (10) of Subsection B; eliminated the disregards in Subsection E for work over the work requirement rate and for a two-parent benefit group; and added Subsection F.

## 27-2D-6. Resources.

A. Liquid and nonliquid resources owned by the benefit group shall be counted in the eligibility determination.

B. A benefit group may at a maximum own the following resources:

(1) two thousand dollars ($2,000) in nonliquid resources;

(2) one thousand five hundred dollars ($1,500) in liquid resources, excluding funds deposited in an individual development account established pursuant to the Individual Development Account Act or a qualified tuition program, as defined in Section 529 of the Internal Revenue Code of 1986;

(3) the value of the principal residence of the participant;

(4) the value of burial plots and funeral contracts for family members; and

(5) the value of work-related equipment up to one thousand dollars ($1,000).

C. Vehicles owned by the benefit group shall not be considered in the determination of resources attributed to the benefit group.

**History: Laws 2003, ch. 317, § 6; 2006, ch. 96, § 17; 2007, ch. 349, § 17; 2019, ch. 225, § 2.**

**Cross references.** — For Section 529 of the Internal Revenue Code of 1986, *see* 26 U.S.C. § 529.

**The 2019 amendment,** effective January 1, 2020, provided that funds in an individual development account shall not be considered in eligibility calculations for benefits; in Subsection B, in Paragraph B(2), after "liquid resources,", added "excluding funds deposited in an individual development account established pursuant to the Individual Development Account Act or a qualified tuition program, as defined in Section 529 of the Internal Revenue Code of 1986", and deleted former Paragraph B(5) and redesignated former Paragraph B(6) as Paragraph B(5).



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**The 2007 amendment,** effective July 1, 2007, changed "family opportunity account" to "individual development account".

**The 2006 amendment,** effective July 1, 2006, in Paragraph (5) of Subsection B, changed "individual development account" to "family opportunity account".

## 27-2D-7. Ineligibility.

A. The following are ineligible to be members of a benefit group:

(1) an inmate or patient of a nonmedical institution;

(2) a person who, in the two years preceding application, assigned or transferred real property unless he:

(a) received or receives a reasonable return;

(b) attempted to or attempts to receive a reasonable return; or

(c) attempted to or attempts to regain title to the real property;

(3) a minor unmarried parent who has not successfully completed a high school education and who has a child at least twelve weeks of age in his care unless the minor unmarried parent:

(a) participates in educational activities directed toward the attainment of a high school diploma or its equivalent; or

(b) participates in an alternative educational or training program that has been approved by the department;

(4) a minor unmarried parent who is not residing in a place of residence maintained by his parent, legal guardian or other adult relative unless the department:

(a) refers or locates the minor unmarried parent to a second-chance home, maternity home or other appropriate adult-supervised supportive living arrangement and takes into account the needs and concerns of the minor unmarried parent;

(b) determines that the minor unmarried parent has no parent, legal guardian or other appropriate adult relative who is living or whose whereabouts are known;

(c) determines that a minor unmarried parent is not allowed to live in the home of a living parent, legal guardian or other appropriate adult relative;

(d) determines that the minor unmarried parent is or has been subjected to serious physical or emotional harm, sexual abuse or exploitation in the home of the parent, legal guardian or other appropriate adult relative;

(e) finds that substantial evidence exists of an act or a failure to act that presents an imminent or serious harm to the minor unmarried parent and the child of the minor unmarried parent if they live in the same residence with the parent, legal guardian or other appropriate adult relative; or

(f) determines that it is in the best interest of the unmarried minor parent to waive this requirement;

(5) a minor child who has been absent or is expected to be absent from the home for forty-five days;

(6) a person who does not provide a social security number or who refuses to apply for one;

(7) a person who is not a resident of New Mexico;

(8) a person who fraudulently misrepresented residency to receive assistance in two or more states simultaneously, except that the person shall be ineligible only for ten years;

(9) a person who is a fleeing felon or a probation and parole violator;

(10) a person concurrently receiving supplemental security income, tribal temporary assistance for needy families or bureau of Indian affairs general assistance; and

(11) unless he demonstrates good cause, a parent who does not assist the department in establishing paternity or obtaining child support or who does not assign support rights to New Mexico as required pursuant to the federal act.

B. For the purposes of this section, "second-chance home" means an entity that provides a supportive and supervised living arrangement to a minor unmarried parent where the minor unmarried parent is required to learn parenting skills, including child development, family budgeting, health and nutrition and other skills to promote long-term economic independence and the well-being of children.



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C. Pursuant to the authorization provided to the states in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 21 U.S.C. Section 862a(d)(1)(A), New Mexico elects to exempt all persons domiciled in the state from application of 21 U.S.C. Section 862a(a).

**History: Laws 2003, ch. 317, § 7.**

**Cross references.** — For provisions regarding the human services department, *see* Chapter 9, Article 8.

For the Personal Responsibility and Work Opportunity Act of 1996, *see* Title 42.

For the Social Security Act, *see* 42 U.S.C. § 301 et seq.

**Emergency clauses.** — Laws 2003, ch. 317, § 10 contained an emergency clause and was approved April 8, 2003.

## 27-2D-8. Fair hearing; review and appeal.

A. A recipient may request a hearing if:

(1) an application is not acted on within a reasonable time after the filing of the application;

(2) an application is denied in whole or in part; or

(3) the cash assistance or services are modified, terminated or not provided.

B. The department shall notify the recipient of his rights under this section.

C. The department shall by rule establish procedures for the filing of a request for a hearing and the time limits within which a request may be filed; provided, however, that the department may grant reasonable extensions of the time limits. If the request is filed in a timely manner, cash assistance and services shall be provided until the appeal is resolved. If the request is not filed within the specified time for appeal or within whatever extension the department may grant, the department action shall be final. Upon receipt of a timely request, the department shall give the recipient reasonable notice of an opportunity for a fair hearing in accordance with the rules of the department.

D. The hearing shall be conducted by a hearing officer designated by the director. The powers of the hearing officer shall include administering oaths or affirmations to witnesses called to testify, taking testimony, examining witnesses, admitting or excluding evidence and reopening a hearing to receive additional evidence. The technical rules of evidence and the rules of civil procedure shall not apply. The hearing shall be conducted so that the contentions or defenses of each party to the hearing are amply and fairly presented. Each party may be represented by counsel or other representative and may conduct cross-examination. Oral or documentary evidence may be received, but the hearing officer may exclude irrelevant, immaterial or unduly repetitious evidence.

E. The director shall review the record of the proceedings and shall make his decision on the record. The recipient or his representative shall be notified in writing of the director's decision and the reasons for the decision. The written notice shall inform the recipient of his right to judicial review. The department shall be responsible for ensuring that the decision is enforced.

F. Within thirty days after receiving written notice of the decision of the director, a recipient may file a notice of appeal with the court of appeals together with a copy of the notice of the decision. The clerk of the court shall transmit a copy of the notice of appeal to the director.

G. The filing of a notice of appeal shall not stay the enforcement of the decision of the director, but the department may grant, or the court upon motion and good cause shown may order, a stay.

H. Within twenty days after receipt of the notice of appeal, the department shall file with the clerk of the court three copies and furnish to the appellant one copy of the written transcript of the record of the proceedings.

I. If, before the date set for argument, application is made to the court for leave to present additional evidence and the court is satisfied that the additional evidence is material and there was good reason for not presenting it in the hearing, the court may order the additional evidence taken before the department. If the application to present additional evidence is filed by the department and is approved by the court, the department's decision that is being appealed shall be stayed. The director may modify his findings and decision by reason of the additional evidence and shall file with the court a transcript of the additional evidence together with any modified or new findings or decision.

J. The review of the court shall be made upon the decision and the record of the proceedings.



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K. The court shall set aside a decision and order of the director only if the decision is found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the record as a whole; or

(3) otherwise not in accordance with law.

L. The department shall not authorize or allow expenditures in excess of the amounts previously appropriated by the legislature.

**History: Laws 2003, ch. 317, § 8.**

**Emergency clauses.** — Laws 2003, ch. 317, § 10 contained an emergency clause and was approved April 8, 2003.

## 27-2D-9. Satisfactory participation.

A. To maintain satisfactory participation in the education works program, a recipient shall be a full-time student as defined by the school that the recipient attends.

B. A recipient may demonstrate good cause for failure to maintain satisfactory participation in the education works program, and must work with the department to address the barrier, in any month of participation for the following reasons:

(1) extended illness or injury of the recipient;

(2) the recipient is the primary caretaker for a special needs child or an ill or aging parent; or

(3) the recipient has been assessed to have a learning disability or a mental or physical health problem.

C. If a recipient falls below the academic standard of the school in one academic term, he shall be placed on probationary status for one academic term to improve his grades. If a recipient's overall grade point average falls below 2.0 based on a four-point system, the department shall place him on probation for a maximum of two academic terms to allow him to bring up his overall grade point average.

D. A recipient shall:

(1) attend classes as scheduled and participate as required by the standard of the school;

(2) report to the department a change that may affect the benefit group's eligibility for or anything that may affect the recipients ability to participate in the education works program;

(3) provide the department with copies of any financial aid award letters; and

(4) provide the department with copies of his grades as they become available.

E. If a recipient does not comply with Subsection C of this section or with the provisions of the Education Works Act, the department may require the recipient to apply for public assistance pursuant to the New Mexico Works Act [27-2B-1 NMSA 1978]. This decision shall be made in writing and the recipient shall have the opportunity to appeal the decision.

**History: Laws 2003, ch. 317, § 9.**

**Emergency clauses.** — Laws 2003, ch. 317, § 10 contained an emergency clause and was approved April 8, 2003.

# ARTICLE 2E

# Prescription Drug Pricing

Sec.

27-2E-1. Average manufacturer price; filing; reporting.
27-2E-2. Unlawful disclosure; penalties.
27-2E-3. Enforcement.

## 27-2E-1. Average manufacturer price; filing; reporting.

A. A person who manufactures a prescription drug, including a generic prescription drug, that is sold in New Mexico shall file with the human services department:



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(1) the average manufacturer price for the drug;

(2) the price that each wholesaler or pharmacy benefit manager doing business in this state pays the manufacturer to purchase the drug; and

(3) the price paid to the manufacturer by any entity in an arrangement or contract that sells or provides prescription drugs in New Mexico without the services of a wholesaler.

B. The information required under Subsection A of this section shall be filed annually or more frequently, as determined by the human services department. The information required under Subsection A of this section is confidential and shall not be disclosed pursuant to Section 3 [27-2E-3 NMSA 1978] of this act and shall not be subject to public inspection pursuant to the provisions of Section 14-2-1 NMSA 1978.

C. A person who engages in the wholesale distribution of prescription drugs in New Mexico shall file with the human services department information showing the actual price at which the wholesaler or distributor sells a particular drug to a pharmacy.

D. As used in this section, "average manufacturer price" means the average price paid to the manufacturer for the drug in New Mexico, including rebates, discounts and market incentives, after deducting customary prompt-pay discounts.

**History: Laws 2003, ch. 381, § 1.**

**Effective dates.** — Laws 2003, ch. 381, § 5 made this act effective January 1, 2004.

## 27-2E-2. Unlawful disclosure; penalties.

A. It is unlawful for an employee, former employee, contractor or former contractor of the human services department to reveal to another person, except to another employee or contractor of the department as required by the employee's or contractor's duties or responsibilities or by state or federal court order, information acquired pursuant to Section 1 [27-2E-1 NMSA 1978] of this act or any other information about a prescription drug manufacturer acquired as a result of his employment or contract by the department and not available from public sources.

B. An employee, former employee, contractor or former contractor of the human services department who reveals to another person information that he is prohibited from lawfully revealing is guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than one thousand dollars ($1,000) or imprisoned not more than one year, or both, together with costs of prosecution, and shall not be employed by the state for a period of five years after the date of the conviction.

**History: Laws 2003, ch. 381, § 2.**

**Effective dates.** — Laws 2003, ch. 381, § 5 made this section effective January 1, 2004.

## 27-2E-3. Enforcement.

The office of the attorney general may take action to investigate and enforce the requirements of Sections 1 and 2 [27-2E-1 and 27-2E-2 NMSA 1978] of this act.

**History: Laws 2003, ch. 381, § 3.**

**Effective dates.** — Laws 2003, ch. 381, § 5 made this section effective January 1, 2004.

**Severability.** — Laws 2003, ch. 381, § 4 provided for the severability of the act if any part or application thereof is held invalid.

# ARTICLE 3

# Public Assistance Appeals

Sec.
27-3-1. Short title.
27-3-2. Definitions.
27-3-3. Fair hearing.
27-3-4. Appeal.
27-3-5. Expenditures for programs.



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## 27-3-1. Short title.

This act [27-3-1 to 27-3-4 NMSA 1978] may be cited as the "Public Assistance Appeals Act".

**History: 1953 Comp., § 13-18-1, enacted by Laws 1973, ch. 256, § 1.**

**ANNOTATIONS**

**Law reviews.** — For article, "The Use of the Substantial Evidence Rule to Review Administrative Findings of Fact in New Mexico," see 10 N.M.L. Rev. 103 (1979-1980).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Propriety of telephone testimony or hearings in public welfare proceedings, 88 A.L.R.4th 1094.

## 27-3-2. Definitions.

As used in the Public Assistance Appeals Act:

A. "department" means the income support division, the medical assistance division or the social services division of the human services department;

B. "board" means the income support division, the medical assistance division or the social services division of the human services department; and

C. "director" means the director of the income support division, the medical assistance division or the social services division of the human services department.

**History: 1953 Comp., § 13-18-2, enacted by Laws 1973, ch. 256, § 2; 1977, ch. 252, § 22; 1991, ch. 155, § 2.**

**The 1991 amendment,** effective June 14, 1991, inserted "the medical assistance division" in Subsections A and C and "the medical assistance division or the social services division" in Subsection B.

## 27-3-3. Fair hearing.

A. An applicant for or recipient of assistance or services under any provisions of the Public Assistance Act [27-2-1 NMSA 1978], Social Security Act or Special Medical Needs Act [27-4-1 NMSA 1978] or regulations of the board adopted pursuant to those acts may request a hearing in accordance with regulations of the board if:

(1) an application is not acted upon within a reasonable time after the filing of the application;

(2) an application is denied in whole or in part; or

(3) the assistance or services are modified, terminated or not provided.

The department shall notify the recipient or applicant of his rights under this section.

B. The board shall by regulation establish procedures for the filing of a request for a hearing and the time limits within which a request may be filed; provided, however, that the department may grant reasonable extensions of the time limits. If the request is not filed within the specified time for appeal or within whatever extension the department may grant, the department action shall be final. Upon receipt of a timely request, the department shall give the applicant or recipient reasonable notice of an opportunity for a fair hearing in accordance with the regulations of the board.

C. The hearing shall be conducted by a hearing officer designated by the director. The powers of the hearing officer shall include administering oaths or affirmations to witnesses called to testify, taking testimony, examining witnesses, admitting or excluding evidence and reopening any hearing to receive additional evidence. The technical rules of evidence and the rules of civil procedure shall not apply. The hearing shall be conducted so that the contentions or defenses of each party to the hearing are amply and fairly presented. Either party may be represented by counsel or other representative of his designation, and he or his representative may conduct cross-examination. Any oral or documentary evidence may be received, but the hearing officer may exclude irrelevant, immaterial or unduly repetitious evidence.

D. The director shall review the record of the proceedings and shall make a decision thereon. The applicant or recipient or his representative shall be notified in writing of the director's decision and the reasons for the decision. The written notice shall inform the applicant or recipient



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of his right to judicial review. The department shall be responsible for assuring that the decision is enforced.

**History: 1953 Comp., § 13-18-3, enacted by Laws 1973, ch. 256, § 3; 1991, ch. 155, § 3.**

**Cross references.** — For the federal Social Security Act, *see* 42 U.S.C.S. § 301 et seq.

**The 1991 amendment,** effective June 14, 1991, in Subsection A, substituted "Social Security Act" for "Social Services Act" near the beginning and added "or not provided" at the end of Paragraph (3) and made minor stylistic changes in Subsections A and D.

## ANNOTATIONS

**Judicial review.** — In reviewing an administrative decision, the courts must view the evidence in the light most favorable to the decision. *N.M. Dep't of Human Servs. v. Tapia*, 1982-NMSC-033, 97 N.M. 632, 642 P.2d 1091.

**Consideration of evidence not presented to the original caseworker.** — Regardless of whether the original caseworker had access to the evidence, a hearing officer should consider new evidence that tends to establish eligibility at the time of the original denial of benefits. *Carter v. N.M. Human Servs. Dep't*, 2009-NMCA-063, 146 N.M. 422, 211 P.3d 219.

**Consideration of evidence not presented to the original caseworker.** — Where a case worker formally denied the petitioner's application for medicaid benefits on February 9, 2006, because the petitioner's bank statements for November and December 2005 showed that the petitioner was financially ineligible to receive benefits; at the administrative hearing on the petitioner's appeal, the petitioner introduced the petitioner's bank statement for February 2006, which showed that the petitioner was financially eligible for benefits; the hearing officer did not consider the February statement because the bank statement had not been considered by the case worker; and the hearing officer affirmed the caseworker's denial of the petitioner's application for benefits, the hearing officer should have considered the petitioner's February bank statement, because the bank statement tended to establish the petitioner's eligibility for benefits on February 1, 2006, as provided by 8.281.500.10 NMAC, prior to the denial of the petitioner's application on February 9, 2006. *Carter v. N.M. Human Servs. Dep't*, 2009-NMCA-063, 146 N.M. 422, 211 P.3d 219.

**Right to hearing.** — Medicaid recipient's allegations of both a past lack of success with the type of conventional therapy offered by her HMO and a history of successful treatment by licensed physicians employing non-conventional therapy were sufficient to entitle her to a fair hearing to determine whether her HMO in fact has contracted with providers having the necessary qualifications to provide her with appropriate treatment. *Hyden v. Human Servs. Dep't*, 2000-NMCA-107, 130 N.M. 19, 16 P.3d 444.

**Medical assistance division does not have the authority to resolve discrimination claims.** — Where petitioner, a member of a managed care organization (MCO) that contracts with the human services department (HSD) to administer the provision of medicaid benefits and services, including non-emergency medical transportation, to eligible members, made requests of the MCO, pursuant to Title II of the Americans with Disabilities Act of 1990 (ADA Title II) and Section 504 of the federal Rehabilitation Act, for certain accommodations in the provision of transportation services, and where the MCO denied petitioner's request for reasonable accommodations in accessing medicaid services, and where petitioner requested a fair hearing to appeal the failure of the MCO and HSD to grant her reasonable accommodations in medicaid transportation services, the district court did not err in affirming HSD's medical assistance division's (division) dismissal of the matter, because neither the Public Assistance Act nor the Medicaid Act relied on by petitioner expressly grants the division the power to resolve discrimination claims raised by a medicaid beneficiary challenging an agency's denial or inaction in response to a request for accommodation, nor is any such power vested in the division by any regulation promulgated under state law. *Law v. N.M. Human Servs. Dep't*, 2019-NMCA-066, cert. denied.

**Requirement that medical reports evidence be available for examination.** — Since medical reports are written information, they cannot be made a part of a hearing record or be used in making a decision on the case unless they have been made available for examination prior to or during the hearing. *Hillman v. Health & Soc. Servs. Dep't*, 1979-NMCA-007, 92 N.M. 480, 590 P.2d 179.

**Consideration of report not properly admitted into evidence held harmless error.** — Where a report is not available to recipient before the hearing is concluded, and is not properly admitted into evidence, consideration of this report by the hearing officer violates the program manual but where the report does no more than agree with previous reports of specialists, which were properly in evidence and which provide substantial support for the decision to terminate benefits, consideration of the report is harmless error. *State ex rel. Human Servs. Dep't v. Gomez*, 1982-NMSC-153, 99 N.M. 261, 657 P.2d 117.

**Termination of benefits cannot be based upon information outside record.** *Hillman v. Health & Soc. Servs. Dep't*, 1979-NMCA-007, 92 N.M. 480, 590 P.2d 179.

**Termination hearing must protect claimant's opportunity to present case.** — Any decision terminating a claimant's benefits must be based on a hearing which fully protects the claimant's opportunity to present his case; specifically, the option to examine all medical reports prior to or during the hearing. *Hillman v. Health & Soc. Servs. Dep't*, 1979-NMCA-007, 92 N.M. 480, 590 P.2d 179.

**Hearing conducted by telephone not denial of due process.** — A recipient of welfare benefits is not deprived of due process because his termination hearing is conducted by telephone and not in the presence of a hearing officer who can observe his demeanor. *State ex rel. Human Servs. Dep't v. Gomez*, 1982-NMSC-153, 99 N.M. 261, 657 P.2d 117.

**Reasons for decision.** — Although the director signed a form paragraph entitled "Final Decision" and inserted a check mark indicating "[d]ecided in favor of Dept.," his signature and the check mark failed to comply with Subsection D because they did not indicate the reason for his decision. Specifically, the director failed to indicate whether he adopted or approved the findings and conclusions of the hearing officer or whether he reached his decision on some other basis. *Green v. N.M. Human Servs. Dep't*, 1988-NMCA-083, 107 N.M. 628, 762 P.2d 915.

**Burden on department to inform about subsequent hearing opportunities.** — The burden of informing an applicant/recipient of the opportunity to present his case in light of new medical reports and social summaries at subsequent hearings is placed upon the department. *Hillman v. Health & Soc. Servs. Dep't*, 1979-NMCA-007, 92 N.M. 480, 590 P.2d 179.

**No duty to inform of right to reapply.** — There is nothing in the statutes or regulations that would impose upon the department the duty to inform an applicant to reapply for benefits. *Landavazo v. N.M. Dep't of Human Servs.*, 1988-NMCA-002, 106 N.M. 715, 749 P.2d 538.



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**Subsequent change of circumstance.** — Where an applicant's application for food stamp benefits was originally denied by the county office because the resource maximum for his household was exceeded by the value of his vehicle, and he then modified his vehicle to accommodate his physical handicap, so as to exclude it from consideration as a resource, this modification constituted a changed condition or circumstance subsequent to the original denial of his application, so that the hearing officer did not err in refusing to consider this evidence. The applicant's proper remedy was to reapply for benefits. *Landavazo v. N.M. Dep't of Human Servs.*, 1988-NMCA-002, 106 N.M. 715, 749 P.2d 538.

**Department is bound by its own regulations.** *Hillman v. Health & Soc. Servs. Dep't*, 1979-NMCA-007, 92 N.M. 480, 590 P.2d 179.

**Notice of right of review.** — This section provides for joint notice of decision and notice of the right of review, and, consequently, the notice of the right of review can be sent to a representative who has represented the applicant at the hearing and who receives notice of the director's decision. *James v. N.M. Human Serv. Dep't*, 1987-NMCA-105, 106 N.M. 318, 742 P.2d 530, cert. quashed, 106 N.M. 353, 742 P.2d 1058.

**Tardy notice of appeal.** — An applicant may not rely on inaccurate information in her notification from the director under this section as to the time for taking an appeal to excuse the tardy filing of her notice of appeal. *James v. N.M. Human Serv. Dep't*, 1987-NMCA-105, 106 N.M. 318, 742 P.2d 530, cert. quashed, 106 N.M. 353, 742 P.2d 1058.

**Scope of judicial review of "fair hearing" decision.** — A judicial review of a "fair hearing" decision is not limited to whether the department's representative proceeded properly on the basis of information known prior to the "fair hearing". On the contrary, the evidence that is considered is the evidence contained in the record of the entire "fair hearing." *Cruz v. N.M. Dep't of Human Servs.*, 1983-NMCA-080, 100 N.M. 133, 666 P.2d 1280 (decided prior to 1999 amendment to Section 27-3-4 NMSA 1978).

**Law reviews.** — For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Representation by attorney of social security benefit claimant in administrative proceeding, 59 A.L.R. Fed. 595.

## 27-3-4. Appeal.

Within thirty days after receiving written notice of the decision of the director pursuant to Section 27-3-3 NMSA 1978, an applicant or recipient may file a notice of appeal with the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

**History: 1953 Comp., § 13-18-4, enacted by Laws 1973, ch. 256, § 4; 1998, ch. 55, § 37; 1999, ch. 265, § 39.**

**The 1999 amendment,** effective July 1, 1999, substituted "Section 39-3-1.1" for "Section 12-8A-1".

**The 1998 amendment,** effective September 1, 1998, rewrote this section to the extent that a detailed comparison is impracticable.

ANNOTATIONS

**Time for filing notice of appeal.** — Because the requirement of the time for filing notice of an appeal from a decision of an administrative board or agency lies within the supreme court's rule-making authority, and because such timing is now covered by Rule 12-601A NMRA, requiring filing notice within 30 days of the decision appealed from, not this section, requiring filing notice within 30 days of receipt of written notice of the decision, governs. *James v. N.M. Human Serv. Dep't*, 1987-NMCA-105, 106 N.M. 318, 742 P.2d 530 (decided prior to 1999 amendment).

**Review of administrative decisions where whole record considered.** — Because of the minor departure from the customary substantial evidence rule in reviewing administrative decisions where the record as a whole must be considered, the reviewing court may act on other convincing evidence in the record and may make its own findings based thereon. *N.M. Human Servs. Dep't v. Garcia*, 1980-NMSC-025, 94 N.M. 175, 608 P.2d 151 (decided prior to 1999 amendment).

In reviewing an administrative decision, the courts must view the evidence in the light most favorable to the decision. *N.M. Dep't of Human Servs. v. Tapia*, 1982-NMSC-033, 97 N.M. 632, 642 P.2d 1091 (decided prior to 1999 amendment).

In order to determine whether a decision by the human services department is supported by substantial evidence in the record as a whole, the court must view the evidence in the light most favorable to the decision by the human services department; this does not permit accepting part of the evidence and totally disregarding other convincing evidence in the record considered as a whole. *N.M. Human Servs. Dep't v. Garcia*, 1980-NMSC-025, 94 N.M. 175, 608 P.2d 151 (decided prior to 1999 amendment).

**The court of appeals does not reweigh the evidence** nor resolve any conflicts in evidence. If there is substantial evidence on which a reasonable mind would have made such a decision, the court should affirm the administrative officer's decision. *Montoya v. N.M. Human Servs. Dep't*, 1989-NMCA-017, 108 N.M. 263, 771 P.2d 196 (decided prior to 1999 amendment).

**Nonincome producing property not bar to benefits.** — When the evidence shows that the property cannot be utilized to produce income and a sale of the property would produce no income, the applicants for public assistance are eligible for benefits; therefore, the department's decision to deny aid to families with dependent children benefits has no support in the record. *Robnett v. N.M. Dep't of Human Servs. Income Support Div.*, 1979-NMCA-099, 93 N.M. 245, 599 P.2d 398 (decided prior to 1999 amendment).

**Denial of benefits based upon substantial evidence.** — Substantial evidence in the record as a whole supported the human services department's denial of aid to families with dependent children benefits where the natural father could provide support. *N.M. Human Servs. Dep't v. Garcia*, 1980-NMSC-025, 94 N.M. 175, 608 P.2d 151 (decided prior to 1999 amendment).

**Arbitrary and capricious action by administrative agency** is evident when it can be said that such action is unreasonable or does not have a rational basis and is the result of an unconsidered, willful and irrational choice of conduct, and not the result of a winnowing and sifting process. *Garcia v. N.M. Human Servs. Dep't*, 1979-NMCA-071, 94 N.M. 178, 608 P.2d 154, *rev'd on other grounds*, 1980-NMSC-025, 94 N.M. 175, 608 P.2d 151 (decided prior to 1999 amendment).

**Failure to give notice of reason for reduction in benefits.** — The action of the department in not giving



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notice to a recipient of the reason why her benefits were reduced invalidates the decision of the department. *Taylor v. Department of Human Servs.*, 1982-NMCA-107, 98 N.M. 314, 648 P.2d 353 (decided prior to 1999 amendment).

**Failure of department to consider certain relevant medical evidence** found to be arbitrary, capricious and not in accordance with law. *Saenz v. New Mexico Dep't of Human Servs.*, 1982-NMCA-159, 98 N.M. 805, 653 P.2d 181 (decided prior to 1999 amendment).

**Correct decision reached for wrong reason not reversed.** — A correct decision of the department will not be reversed because the result was reached for the wrong reason where the court finds another valid basis for that result. *Melton v. N.M. Dep't of Human Servs.*, 1981-NMCA-130, 97 N.M. 102, 637 P.2d 52 (decided prior to 1999 amendment).

**Law reviews.** — For article, "The Use of the Substantial Evidence Rule to Review Administrative Findings of Fact in New Mexico," see 10 N.M.L. Rev. 103 (1979-80).

For article, "Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions for Their Resolution," see 18 N.M.L. Rev. 525 (1988).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Welfare Laws §§ 105 to 108.

Sufficiency of notice or hearing required prior to termination of welfare benefits, 47 A.L.R.3d 277.

81 C.J.S. Social Security and Public Welfare §§ 13, 26, 27, 62, 72.

## 27-3-5. [Expenditures for programs.]

Nothing in the Public Assistance Act [27-2-1 NMSA 1978] or the Fair Hearing Act shall be construed as authorizing or allowing expenditures for the affected programs in excess of the amounts previously appropriated by the legislature for such programs.

**History: Laws 1991, ch. 155, § 4.**

**Compiler's notes.** — The reference to the Fair Hearing Act appears to be a reference to the Public Assistance Appeals Act, 27-3-1 to 27-3-4 NMSA 1978, and specifically 27-3-3 NMSA 1978.

ANNOTATIONS

**Durational limit on receipt of benefits.** — The human services department had the implied authority to limit the receipt of general assistance to twelve continuous months by regulation. *Howell v. Heim*, 1994-NMSC-103, 118 N.M. 500, 882 P.2d 541, but *see Weaver v. N.M. Human Servs. Dep't*, 1997-NMSC-039, 123 N.M. 705, 945 P.2d 70.

# ARTICLE 4

# Special Medical Needs

Sec.
27-4-1. Short title.
27-4-2. Definitions.
27-4-3. Persons with special needs.
27-4-4. Standard of need; income determination.
27-4-5. Eligibility requirements.

## 27-4-1. Short title.

Sections 1 through 7 of this act [27-4-1 to 27-4-5 NMSA 1978] may be cited as the "Special Medical Needs Act".

**History: 1953 Comp., § 13-15-1, enacted by Laws 1973, ch. 311, § 1.**

**Cross references.** — For public assistance generally, *see* Chapter 27, Article 2 NMSA 1978.

ANNOTATIONS

**Law reviews.** — For note, "Medical Benefits Awarded to an Illegal Alien: Perez v. Health and Social Services," see 9 N.M.L. Rev. 89 (1978-79).

## 27-4-2. Definitions.

As used in the Special Medical Needs Act [27-4-1 NMSA 1978]:

A. "department" or "division" means the income support division of the human services department;

B. "board" means the division;

C. "aged person" means a person who has attained the age of sixty-five years and does not have a spouse financially able, according to regulations of the division, to furnish support;



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D. "person with a disability" means a person who has attained the age of eighteen years and is determined to have a permanent and total disability, according to regulations of the division; and

E. "blind person" means a person who is determined to be blind according to regulations of the division.

**History: 1953 Comp., § 13-15-2, enacted by Laws 1973, ch. 311, § 2; 1977, ch. 252, § 20; 2007, ch. 46, § 20.**

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

## 27-4-3. Persons with special needs.

A. The division shall by regulation establish a program to provide essential medical care for persons who are elderly or blind or who have a disability and who are not eligible for public assistance under the Public Assistance Act [27-2-1 NMSA 1978] and who have a serious medical condition that will as a reasonable medical probability lead to death in the near future.

B. Such medical condition shall be certified by an individual licensed under state law to practice medicine or osteopathy. The medical care shall be reviewed and approved according to regulations of the division.

**History: 1953 Comp., § 13-15-3, enacted by Laws 1973, ch. 311, § 3; 2007, ch. 46, § 21.**

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 79 Am. Jur. 2d Welfare Laws §§ 32 to 41.

81 C.J.S. Social Security and Public Welfare §§ 97, 102, 103, 126.

ANNOTATIONS

**Law reviews. —** For note, "Medical Benefits Awarded to an Illegal Alien: Perez v. Health and Social Services," see 9 N.M.L. Rev. 89 (1978-79).

## 27-4-4. Standard of need; income determination.

A. Standard of need for purposes of the Special Medical Needs Act [27-4-1 NMSA 1978] shall be determined in accordance with regulations adopted by the board.

B. The board shall define by regulation exempt and nonexempt income and resources. Medical expenses shall not be deducted from either income or resources in determining eligibility.

**History: 1953 Comp., § 13-15-4, enacted by Laws 1973, ch. 311, § 4; 1975, ch. 187, § 1.**

ANNOTATIONS

**Community property principles should determine definition of income** under section, as property acquired during marriage by either husband or wife, or both, is presumed to be community property pursuant to Section 40-3-12A NMSA 1978. *Herrera v. Health & Soc. Servs.*, 1978-NMCA-118, 92 N.M. 331, 587 P.2d 1342, cert. denied, 92. N.M. 353, 588 P.2d 554.

**Law reviews. —** For note, "Medical Benefits Awarded to an Illegal Alien: Perez v. Health and Social Services," see 9 N.M.L. Rev. 89 (1978-79).

## 27-4-5. Eligibility requirements.

A person is eligible for medical care under the Special Medical Needs Act [27-4-1 NMSA 1978] if:

A. pursuant to Section 27-4-4 NMSA 1978, the total amount of his nonexempt income is less than the applicable standard of need; and

B. nonexempt specific and total resources are less than the level of maximum permissible resources established by the board; and

C. he meets all qualifications for persons with special needs, pursuant to Section 27-4-3 NMSA 1978; and

D. within two years immediately prior to the filing of an application for assistance, he has not made an assignment or transfer of real property unless he has received a reasonable return for the real property; or, if he has not received such reasonable return, he is willing to attempt to obtain such return and, if such attempt proves futile, he is willing to attempt to regain title to the property; and



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E. he is not an inmate of any public nonmedical institution at the time of receiving assistance; and

F. he is a resident of New Mexico.

**History: 1953 Comp., § 13-15-5, enacted by Laws 1973, ch. 311, § 5; 1975, ch. 187, § 2.**

ANNOTATIONS

**Undocumented alien living in state is resident** and is entitled to the benefits of the Special Medical Needs Act, provided he meets the statutory eligibility requirements. *Perez v. Health & Soc. Servs.*, 1977-NMCA-140, 91 N.M. 334, 573 P.2d 689, cert. denied, 91 N.M. 491, 576 P.2d 297.

**Law reviews.** — For note, "Medical Benefits Awarded to an Illegal Alien: Perez v. Health and Social Services," see 9 N.M.L. Rev. 89 (1978-79).

# ARTICLE 5

# Indigent Hospital and County Health Care

Sec.
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## 27-5-1. Short title.

Chapter 27, Article 5 NMSA 1978 may be cited as the "Indigent Hospital and County Health Care Act".

**History: 1953 Comp., § 13-2-12, enacted by Laws 1965, ch. 234, § 1; 1993, ch. 321, § 1.**

**The 1993 amendment,** effective July 1, 1993, substituted "Chapter 27, Article 5 NMSA 1978" for "This act" and "and County Health Care" for "Claims".

**Compiler's notes.** — Section 13-2-21, 1953 Comp., authorizing suit against a county on hospital claim with judgment to be collected through a levy, was held unconstitutional in *Board of Dirs. of Mem. Gen. Hosp. v. County Indigent Hosp. Claims Bd.*, 77 N.M. 475, 423 P.2d 994 (1967). The court held that the provision was an unconstitutional attempt to circumvent N.M. Const., art. VIII, § 2 since such a judgment would not create a "public debt" and thus did not fall within exception to constitutional limitation on property tax levies. *See also* 1968 Op. Att'y Gen. No. 68-107.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Welfare Laws §§ 38 to 41.

## 27-5-2. Purpose of Indigent Hospital and County Health Care Act.

The purpose of the Indigent Hospital and County Health Care Act is:

A. to recognize that each individual county of this state is the responsible agency for ambulance transportation, hospital care or the provision of health care to indigent patients domiciled in that county, as determined by resolution of the board of county commissioners, in addition to providing support for the state's medicaid program;

B. to recognize that the counties of the state are responsible for supporting indigent patients by providing local revenues to match federal funds for the state medicaid program pursuant to Section 7-20E-9 NMSA 1978 and the transfer of funds to the county-supported medicaid fund pursuant to the Statewide Health Care Act [27-10-1 through 27-10-4 NMSA 1978]; and



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C. to recognize that the counties of the state can improve the provision of health care to indigent patients by providing local revenues for countywide or multicounty health planning.

**History: 1953 Comp., § 13-2-13, enacted by Laws 1965, ch. 234, § 2; 1971, ch. 72, § 1; 1983, ch. 234, § 1; 1987, ch. 88, § 1; 1993, ch. 321, § 2; 1997, ch. 51, § 1; 2014, ch. 79, § 4.**

**The 2014 amendment,** effective March 12, 2014, clarified the obligations of counties to support the state's medicaid program; in Subsection A, after "ambulance transportation", deleted "or the", after "domiciled in that county", deleted "for at least three months or for such period of time, not in excess of three months", after "board of county commissioners", deleted language which provided that a county had a responsibility to discharge its responsibilities by payment to providers, hospitals and health care providers for the care and treatment of indigent patients, and added "in addition to providing for the state's medicaid program"; and in Subsection B, after "state medicaid program", deleted "including the provision of matching funds for payments to sole community provider hospitals" and added "pursuant to Section 7-20E-9 NMSA 1978".

**The 1997 amendment,** effective June 20, 1997, rewrote Subsection A and added Subsection C.

**The 1993 amendment,** effective July 1, 1993, substituted "and County Health Care" for "Claims" in the section heading and near the beginning of the section; added the Subsection A designation in the existing provisions and added Subsection B, making a related grammatical change; and in Subsection A, substituted "or the provision of the health care to" for "of the" near the beginning and "hospitals or health care providers for actual cost incurred for" for "or hospitals for actual cost incurred as the result of ambulance transportation provided for or" near the end.

**ANNOTATIONS**

**Insurance for indigent patients.** — A county lacks the authority, either expressly or by necessary implication, under the Indigent Hospital and County Health Care Act to purchase individual health insurance policies for indigent patients using revenues from the county indigent hospital claims fund [county health care assistance fund] or to enroll indigent patients in the state coverage insurance program and pay premiums and co-payment amounts from the county indigent fund. 2007 Op. Att'y Gen. No. 07-05.

**"Hospital care".** — The term "hospital care", as referred to in Subsection A, encompasses mental health treatment provided by a county hospital to indigent residents of the county. 1988 Op. Att'y Gen. No. 88-64.

**Individuals committed under statutory involuntary commitment.** — Individuals committed to private or county-operated facilities under statutory involuntary commitment procedures are responsible for their hospital expenses, and eligible hospitals treating indigent patients may look to the applicable county for reimbursement under the Indigent Hospital Claims Act. 1989 Op. Att'y Gen. No. 89-35.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Welfare Laws §§ 38 to 41.

## 27-5-3. Public assistance provisions.

A. A hospital shall not be paid from the fund under the Indigent Hospital and County Health Care Act for costs of an indigent patient for services that have been determined by the department to be eligible for medicaid reimbursement.

B. No action for collection of claims under the Indigent Hospital and County Health Care Act shall be allowed against an indigent patient who is medicaid eligible for medicaid covered services, nor shall action be allowed against the person who is legally responsible for the care of the indigent patient during the time that person is medicaid eligible.

**History: 1953 Comp., § 13-2-14, enacted by Laws 1965, ch. 234, § 3; 1984, ch. 101, § 1; 1993, ch. 321, § 3; 2003, ch. 413, § 1; 2014, ch. 79, § 5.**

**The 2014 amendment,** effective March 12, 2014, eliminated the authority to transfer funds to the sole community provider fund or the county-supported medicaid fund; and in Subsection A, deleted the former second sentence which permitted counties to transfer funds to the sole community provider fund or the county-supported medicaid fund.

**The 2003 amendment,** effective June 20, 2003, in Subsection A, deleted "county indigent hospital claims" following "from the" twice, deleted "any" following "Care Act for", deleted "human services" following "determined by the", and deleted "from that department" following "for Medicaid reimbursement".

**The 1993 amendment,** effective on the date that the human services department is notified in writing that the amendment to the state medicaid plan has been approved by the federal health care financing administration, rewrote the section heading and Subsection A, and substituted "and County Health Care" for "Claims"and "medicaid eligible for medicaid covered services" and "medicaid eligible" for "a welfare recipient" in Subsection B.

**Compiler's notes.** — Subsection A of § 22, Laws 1993, ch. 321, provides that §§ 3, 6, 10, 15, 16 and 18 (27-5-3, 27-5-6, 27-5-6.1, 27-5-7.1, 27-5-11 and 27-5-12.2 NMSA 1978) are effective the date that the human services department is notified in writing that the amendment to the state medicaid plan has been approved by the federal health care financing administration. The human services department was advised by letter dated May 20, 1993, that the United States Department of Health and Human Services had approved the amendment of New Mexico's medicaid plan "to add a payment provision for sole community hospitals (SCH), effective July 1, 1993, and a payment provision for indirect medical education (IME) costs incurred by teaching hospitals, effective August 1, 1992". Chapter 321, Laws 1993, contained an emergency clause. The human services department published notice of the approval in the *New Mexican* on June 21, 1993.

**ANNOTATIONS**

**Contribution to state medicaid program.** — A county does not have authority under the Indigent Hospital and County Health Care Act to contribute, directly, money from its county indigent hospital claims fund [county health care assistance fund] to the indigent



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hospital claims funds of other counties. However, nothing in the Indigent Hospital and County Health Care Act prohibits a county from transferring money from its indigent fund to the sole community provider fund to match federal funds for the state medicaid program. A county may, therefore, indirectly benefit other counties by utilizing the resources of its indigent fund to augment the funds necessary to match federal funds for the support of the state medicaid program. 2007 Op. Att'y Gen. No. 07-05.

## 27-5-4. Definitions.

As used in the Indigent Hospital and County Health Care Act:

A. "ambulance provider" or "ambulance service" means a specialized carrier based within the state authorized under provisions and subject to limitations as provided in individual carrier certificates issued by the public regulation commission to transport persons alive, dead or dying en route by means of ambulance service. The rates and charges established by public regulation commission tariff shall govern as to allowable cost. Also included are air ambulance services approved by the county. The air ambulance service charges shall be filed and approved pursuant to Subsection D of Section 27-5-6 NMSA 1978 and Section 27-5-11 NMSA 1978;

B. "cost" means all allowable costs of providing health care services, to the extent determined by resolution of a county, for an indigent patient. Allowable costs shall be based on medicaid fee-for-service reimbursement rates for hospitals, licensed medical doctors and osteopathic physicians;

C. "county" means a county except a class A county with a county hospital operated and maintained pursuant to a lease or operating agreement with a state educational institution named in Article 12, Section 11 of the constitution of New Mexico;

D. "department" means the human services department;

E. "fund" means a county health care assistance fund;

F. "health care services" means treatment and services designed to promote improved health in the county indigent population, including primary care, prenatal care, dental care, behavioral health care, alcohol or drug detoxification and rehabilitation, hospital care, provision of prescription drugs, preventive care or health outreach services, to the extent determined by resolution of the county;

G. "indigent patient" means a person to whom an ambulance service, a hospital or a health care provider has provided medical care, ambulance transportation or health care services and who can normally support the person's self and the person's dependents on present income and liquid assets available to the person but, taking into consideration the person's income, assets and requirements for other necessities of life for the person and the person's dependents, is unable to pay the cost of the ambulance transportation or medical care administered or both; provided that if a definition of "indigent patient" is adopted by a county in a resolution, the definition shall not include any person whose annual income together with that person's spouse's annual income totals an amount that is fifty percent greater than the per capita personal income for New Mexico as shown for the most recent year available in the survey of current business published by the United States department of commerce. "Indigent patient" includes a minor who has received ambulance transportation or medical care or both and whose parent or the person having custody of that minor would qualify as an indigent patient if transported by ambulance, admitted to a hospital for care or treated by a health care provider;

H. "medicaid eligible" means a person who is eligible for medical assistance from the department;

I. "planning" means the development of a countywide or multicounty health plan to improve and fund health services in the county based on the county's needs assessment and inventory of existing services and resources and that demonstrates coordination between the county and state and local health planning efforts;

J. "public entity" means a state, local or tribal government or other political subdivision or agency of that government; and

K. "qualifying hospital" means an acute care general hospital licensed by the department of health that is qualified to receive payments from the safety net care pool pursuant to an agreement with the federal centers for medicare and medicaid services.



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**History: 1953 Comp., § 13-2-15, enacted by Laws 1965, ch. 234, § 4; 1975, ch. 44, § 1; 1977, ch. 253, § 43; 1978, ch. 123, § 1; 1979, ch. 146, § 1; 1983, ch. 234, § 2; 1987, ch. 50, § 1; 1987, ch. 88, § 2; 1990, ch. 37, § 1; 1991, ch. 171, § 1; 1991, ch. 212, § 19; 1993, ch. 321, § 4; 1997, ch. 51, § 2; 1999, ch. 37, § 1; 1999, ch. 270, § 4; 2001, ch. 30, § 1; 2001, ch. 272, § 1; 2001, ch. 280, § 1; 2003, ch. 413, § 2; 2004, ch. 94, § 1; 2012, ch. 18, § 1; 2014, ch. 79, § 6.**

**The 2014 amendment,** effective March 12, 2014, eliminated terms to comply with changes in federal regulations regarding the replacement of sole community providers with qualifying hospitals; deleted former Subsection A, which defined "alcohol rehabilitation center"; deleted former Subsection C, which defined "board"; deleted former Subsection D, which defined "commission"; deleted former Subsection H, which defined "drug rehabilitation center"; deleted former Subsection J, which defined "health care provider"; deleted former Subsection L, which defined "hospital"; deleted former Subsection O, which defined "mental health center"; deleted former Subsection R, which defined "sole community provider"; deleted former Subsection S, which defined "tribal"; in Subsection A, in the third sentence, after "approved by the", deleted "board" and added "county"; in Subsection B, in the first sentence, after "resolution of a", deleted "board" and added "county"; in Subsection C, after "pursuant to a lease", added "or operating agreement"; in Subsection E, after "means a county", deleted "indigent hospital claims" and added "health care assistance"; in Subsection F, after "dental care", added "behavioral health care, alcohol or drug detoxification and rehabilitation, hospital care", and after "resolution of the", deleted "board" and added "county"; in Subsection G, in the first sentence, after "adopted by a", deleted "board" and added "county", and deleted the former second sentence, which provided that "Every board that has a balance remaining in the fund at the end of a given fiscal year shall consider and may adopt at the first meeting of the succeeding fiscal year a resolution increasing the standard for indigence"; and added a new Subsection K.

**The 2012 amendment,** effective March 1, 2012, alphabetically arranged defined terms and added definitions of new terms; added a new Subsection A and deleted former Subsection L to define "alcohol rehabilitation center"; added a new Subsection D and deleted former Subsection Q to define "commission"; added a new Subsection I and deleted former Subsection F to define "fund"; added a new Subsection L and deleted former Subsection D to define "hospital"; added a new Subsection M and deleted former Subsection C to define "indigent patient"; added a new Subsection N and deleted former Subsection G to define "medicaid eligible"; added a new Subsection O and deleted former Subsection M to define "mental health center"; added a new Subsection Q to define "public entity"; added Subsection R and deleted former Subsection J to define "sole community provider hospital"; added Subsection S to define "tribal"; and relettered the following: former Subsections A and B as Subsections B and C; former Subsections H and I as Subsections F and G; former Subsection K as Subsection H; former Subsection N as Subsection J; and former Subsection O as Subsection K.

**The 2004 amendment,** effective July 1, 2004, amended Subsection N to add new Paragraph (10).

**The 2003 amendment,** effective June 20, 2003, in Subsection C, deleted "or" following "transported by ambulance", deleted "or all three" at the end; rewrote Subsection E; deleted "established in 42 C.F.R. 412.92 pursuant to Title 18 of the federal Social Security Act" near the end of Paragraph J(1); and substituted "providing emergency services, as determined by the board, in a hospital to an indigent patient" for "providing services in a hospital or outpatient setting that are necessary for conditions that endanger the life of or threaten permanent disability to an indigent patient" at the end of Paragraph N(9).

**The 2001 amendment,** effective June 15, 2001, added Paragraphs J(2), N(9), and added Subsection Q.

**The 1999 amendment,** effective July 1, 1999, substituted "public regulation commission" for "state corporation commission" twice in Subsection A; substituted "set by the department of health" for "pursuant to the Drug Abuse Act" in Subsection K; deleted "pursuant to the Alcoholism and Alcohol Abuse Prevention, Screening and Treatment Act" at the end of Subsection L; and deleted "pursuant to the Community Mental Health Act" at the end of Subsection M.

**The 1997 amendment,** effective June 20, 1997, made minor stylistic changes throughout the section; in Subsection C, inserted "or health care services" following "ambulance transportation" in the first sentence; in Subsection E, substituted "or costs of providing health care services" for "including the costs of prenatal care" in the first sentence; and added Subsections O and P.

**The 1993 amendment,** effective July 1, 1993, substituted "and County Health Care" for "Claims" in the introductory language; substituted "and county health care" for "claims" in Subsection B; in Subsection C, substituted "a hospital or a health care provider" for "or a hospital" in the first sentence and "or treated by a health care provider or all three" for "or both" in the last sentence, and made a stylistic change in the second sentence; in Subsection D, rewrote the introductory language and deleted former Paragraphs (3) and (5) through (8), the provisions of which may now be found in Subsection N, renumbering former Paragrph (4) as Paragraph (3) and making a related grammatical change; substituted "health care provider" for "nursing home" near the end of Subsection E; rewrote Subsections G and H, and added Subsections J through N.

**The 1991 amendment,** effective July 1, 1991, in Subsection C, added the third sentence; and, in Subsection D, added the exception at the end of the introductory paragraph, deleted a sentence at the end of Paragraph (7) which read "All hospitals, as defined in this subsection, must comply with the provisions of the Indigent Hospital Claims Act and be licensed by the health and environment department", and added Paragraph (8).

**ANNOTATIONS**

**Definition of "indigent patient" was not unconstitutional** under N.M. Const., art. IX, § 14. *Humana of N.M., Inc. v. Board of Cnty. Comm'rs*, 1978-NMSC-036, 92 N.M. 34, 582 P.2d 806.

**Validity of amendment by Laws 1999, ch. 37, § 1.** — Although the amendment of this section by Laws 1999, ch. 37, § 1, was not codified pursuant to Section 12-1-8 NMSA 1978, the amendment is valid and in effect. 2000 Op. Att'y Gen. No. 00-05.

## 27-5-4.1. Repealed.

**Repeals.** — Laws 2012, ch. 18, § 4 repealed 27-5-4.1 NMSA 1978, as enacted by Laws 1978, ch. 123, § 2, relating to applicability, effective March 1, 2012. For provisions of former section, *see* the 2011 NMSA 1978 on *NMOneSource.com*.



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## 27-5-5. Repealed.

**Repeals.** — Laws 2014, ch. 79, § 22 repealed 27-5-5 NMSA 1978, as enacted by Laws 1965, ch. 234, § 5, relating to county indigent hospital and county health care board, effective March 12, 2014. For provisions of former section, *see* the 2013 NMSA 1978 on *NMOneSource.com*.

## 27-5-5.1. Indigent health care report; required.

Every county in New Mexico shall file an annual report on all indigent health care funding by the county with the commission. The report shall contain the county's eligibility criteria for indigent patients, services provided to indigent patients, restrictions on services provided to indigent patients, conditions for reimbursement to providers of health care, revenue sources used to pay for indigent health care and other related information as determined by the commission. The report shall be submitted by October 1 of each year on a form provided by the commission. The commission shall make the report available to interested parties.

**History: Laws 1993, ch. 321, § 17; 1999, ch. 37, § 2.**

**The 1999 amendment,** effective June 18, 1999, in the first sentence inserted "all", substituted "funding" for "funded in whole or in part" and "commission" for "local government division of the department of finance and administration"; substituted "commission" for "local government division" at the end of the second sentence; in the third sentence substituted "October 1" for "July 31" and substituted "commission" for "local government division and shall provide information from the previous fiscal year" at the end of the sentence; and in the last sentence substituted "commission" for "local government division" and "to" for "for analysis by".

## 27-5-5.2. Nondiscrimination; indigent patients.

Qualifying hospitals and hospitals with which a county contracts to provide for the services of indigent patients shall provide those services for indigent patients, including financial assistance, to all non-citizens, regardless of immigration status, if they meet all other qualifying criteria for such services.

**History: Laws 2021, ch. 127, § 4.**

**Effective dates.** — Laws 2021, ch. 127 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 27-5-6. Powers and duties of counties relating to indigent care.

A county:

A. may budget for expenditure on ambulance services, burial expenses, hospital or medical expenses for indigent residents of that county and for costs of development of a countywide or multicounty health plan. The combined costs of administration and planning shall not exceed the following percentages of revenues based on the previous fiscal year revenues for a fund that has existed for at least one fiscal year or based on projected revenues for the year being budgeted for a fund that has existed for less than one fiscal year. The percentage of the revenues in the fund that may be used for such combined administrative and planning costs is equal to the sum of the following:

(1) ten percent of the amount of the revenues in the fund not over five hundred thousand dollars ($500,000);

(2) eight percent of the amount of the revenues in the fund over five hundred thousand dollars ($500,000) but not over one million dollars ($1,000,000); and

(3) four and one-half percent of the amount of the revenues in the fund over one million dollars ($1,000,000);

B. may accept contributions of public funds for county health care services, which shall be deposited in the fund;

C. may hire personnel to carry out the provisions of the Indigent Hospital and County Health Care Act;



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D. shall transfer to the state by the last day of March, June, September and December of each year an amount equal to one-fourth of the county's payment pursuant to Section 27-5-6.2 NMSA 1978. This money shall be deposited in the safety net care pool fund;

E. shall, in carrying out the provisions of the Indigent Hospital and County Health Care Act, comply with the standards of the federal Health Insurance Portability and Accountability Act of 1996;

F. may provide for the transfer of money from the fund to the county-supported medicaid fund to meet the requirements of the Statewide Health Care Act [27-10-1 to 27-10-4 NMSA 1978]; and

G. may contract with ambulance providers, hospitals or health care providers for the provision of services for indigent patients domiciled within the county; such services shall be provided to all non-citizens, regardless of immigration status, if they meet all other qualifying criteria for such services.

**History: 1953 Comp., § 13-2-17, enacted by Laws 1965, ch. 234, § 6; 1979, ch. 146, § 2; 1983, ch. 234, § 3; 1987, ch. 88, § 3; 1991, ch. 212, § 20; 1993, ch. 321, § 6; 1997, ch. 51, § 3; 1999, ch. 37, § 3; 2003, ch. 413, § 3; 2014, ch. 79, § 7; 2021, ch. 127, § 3.**

**Cross references.** — For the federal Health Insurance Portability and Accountability Act of 1996, *see* 42 U.S.C. 300gg et seq.

For payment of claims, *see* 27-5-12 NMSA 1978.

For provisions regarding the human services department, *see* Chapter 9, Article 8.

For the Social Security Act, *see* 42 U.S.C. § 301 et seq.

**The 2021 amendment,** effective June 18, 2018, provided that counties authorized to provide ambulance, hospital or health care services for indigent patients domiciled within the county, shall provide these services to all non-citizens regardless of immigration status; in Subsection D, after "pursuant to Section", deleted "16 of this 2014 act" and added "27-5-6.2 NMSA 1978"; and in Subsection G, after "domiciled within the county", added "such services shall be provided to all non-citizens regardless of immigration status, if they meet all other qualifying criteria for such services".

**The 2014 amendment,** effective March 12, 2014, simplified the powers and duties of counties relating to indigent care; deleted former Subsection A, which required counties to administer indigent claims; deleted former Subsection B, which required counties to prepare a budget for indigent claims and to pay the cost of administration; deleted former Subsection C, which required counties to make rules to carry out the Indigent Hospital and County Health Care Act; deleted former Subsection D, which required counties to set criteria and cost limitations for medial care; deleted former Subsection E, which required counties to cooperate with state agencies to efficiently use funds; deleted former Subsection F, which required counties to cooperate with the department in investigating the validity of claims; deleted former Subsection I, which required counties to review the validity of claims; deleted former Subsection J, which required counties to support rejection of claims in writing; deleted former Subsection K, which required counties to pay claims that are not matched with federal funds; deleted former Subsection L, which required counties to determine by ordinance the types of providers that are eligible to submit claims; deleted former Subsection F, which required counties to approve medicaid sole community provider hospital payment requests; in Subsection A, in the first sentence, added "may budget for expenditure on ambulance services, burial expenses, hospital or medical expenses for indigent residents of that county and for"; in Subsection B, after "contributions", deleted "or other county revenues" and added "of public funds for county health care services"; in Subsection D, in the first sentence, after "county's payment", deleted "for support of sole community provider payments as calculated by the department for that county for the current fiscal year" and added "pursuant to Section 16 of this 2014 act", and in the second sentence, after "deposited in the", deleted "sole community provider" and added "safety net care pool" and in Subsection G, after "for the provision of", deleted "health care", and after "provision of services", added "for indigent patients domiciled within the county".

**The 2003 amendment,** effective June 20, 2003, substituted "not" for "in no event" following "and planning shall" in Subsection B; deleted "and regulations" following "rules" in Subsections C, I, and M; substituted "furnished by" for "in" following "for medical care" in Subsection D; deleted "treasurer" following "to the state" in Subsection N; added Subsection O and redesignated Subsections O and P as Subsection P and Q; and deleted "county indigent hospital claims" following "money from the" in present Subsection P.

**The 1999 amendment,** effective June 18, 1999, substituted "thirty days" for "sixty days" in Subsection K.

**The 1997 amendment,** effective June 20, 1997, in Subsection B, substituted "and costs of development of a countywide or multicounty health plan. The combined" for "which" following "Indigent Hospital and County Health Care Act", inserted "and planning" following "costs of administration", and made minor stylistic changes; in Subsection I, inserted "or health care services" following "ambulance service" and made a related stylistic change; in Subsection J, added "within sixty days after submission of the claim" at the end of the section; in Subsection K, added "and shall make payment within sixty days after approval of a claim by the board"; and added Subsection P.

**The 1993 amendment,** effective on the date that the human services department is notified in writing that the amendment to the state medicaid plan has been approved by the federal health care financing administration, added Subsections E and L through O, redesignating former Subsections E through J as Subsections F through K and making a related grammatical change; substituted "and County Health Care" for "Claims" in Subsections A, B, C, H, and I; rewrote Paragraphs (1) through (3) of Subsection B, adding new introductory language for these paragraphs and closing off the former introductory language as the first sentence of the subsection; added the proviso at the end of Subsection C; substituted "ambulance services or health care providers" for "or ambulance service" in Subsection D; substituted "ambulance service or health care provider" for "or ambulance service" in two places in Subsection I and in Subsection J; and inserted "that are not matched with federal funds under the state medicaid program and" in Subsection K.

**Compiler's notes.** — Subsection A of § 22, Laws 1993, ch. 321, provides that §§ 3, 6, 10, 15, 16 and 18 (27-5-3, 27-5-6, 27-5-6.1, 27-5-7.1, 27-5-11 and 27-5-12.2 NMSA 1978) are effective the date that the human services



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department is notified in writing that the amendment to the state medicaid plan has been approved by the federal health care financing administration. The human services department was advised by letter dated May 20, 1993, that the United States Department of Health and Human Services had approved the amendment of New Mexico's medicaid plan "to add a payment provision for sole community hospitals (SCH), effective July 1, 1993, and a payment provision for indirect medical education (IME) costs incurred by teaching hospitals, effective August 1, 1992". Chapter 321, Laws 1993, contained an emergency clause. The human services department published notice of the approval in the *New Mexican* on June 21, 1993.

**The 1991 amendment,** effective July 1, 1991, rewrote Subsection B and deleted "human services" preceding "department" in Subsection E.

ANNOTATIONS

**Payment for alcohol and drug abuse treatment.** — A county has authority under the Indigent Hospital and County Health Care Act to contract with health care providers to provide services associated with alcohol or drug abuse treatment, which could include bed reservation. 2007 Op. Att'y Gen. No. 07-05.

## 27-5-6.1. Safety net care pool fund created.

A. The "safety net care pool fund" is created in the state treasury. The safety net care pool fund, which shall be administered by the department, shall consist of public funds provided through intergovernmental transfers from counties or other public entities and transferred from counties pursuant to Section 16 of this 2014 act [27-5-6.2 NMSA 1978]. Money in the fund shall be invested by the state treasurer as other state funds are invested. Any unexpended or unencumbered balance remaining in the fund at the end of any fiscal year shall not revert.

B. Money in the safety net care pool fund is appropriated to the department to make payments to qualifying hospitals. No safety net care pool fund payments or money in the safety net care pool fund shall be used to supplant any general fund support for the state medicaid program.

**History: Laws 1993, ch. 321, § 18; 2012, ch. 18, § 2; 2014, ch. 79, § 8.**

**The 2014 amendment,** effective March 12, 2014, replaced the sole community provider fund with the safety net care pool fund; in the catchline, deleted "Sole community provider" and added "Safety net care pool"; in Subsection A, in the first sentence, after "The", deleted "sole community provider" and added "safety net care pool", in the second sentence, after "The", deleted "sole community provider" and added "safety net care pool", after "shall consist of", added "public", after "funds provided", deleted "by counties", and after "or other public funds or expenditures determined by the department and the federal government as allowable to match federal funds for medicaid sole community provider hospital payments" and added "and transferred from counties pursuant to Section 16 of this 2014 act"; in Subsection B, in the first sentence, after "Money in the", deleted the "sole community provider" and added "safety net care pool", and after "department to make", deleted "sole community provider hospital", after "department to make payments", deleted "pursuant to the state medicaid program" and added "to qualifying hospitals", and in the second sentence, after "No", deleted "sole community provider hospital" and added "safety net care pool fund", and after "money in the", deleted "sole community provider" and added "safety net pool"; and deleted former Subsection C, which provided for the return of money in the sole community provider fund if federal medicaid matching funds were not received for medicaid sole community provider hospital payments.

**Temporary provisions.** — Laws 2014, ch. 79, § 19, provided that on March 12, 2014, all money in the sole community provider fund shall be transferred to the safety net care pool fund and all money in a county's indigent hospital claims fund shall be transferred to the county's health care assistance fund.

Laws 2014, ch. 79, § 21, provided that the human services department seek funds to fully fund the safety net care pool fund.

**The 2012 amendment,** effective March 1, 2012, provided for funds that may be counted in the county contribution for support of sole community provider payments; in Subsection A, in the second sentence added "sole community provider"; changed "human services department" to "department"; and after "funds provided by counties", added "through intergovernmental transfers from counties, other public entities or other public funds or expenditures determined by the department and the federal government as allowable"; and in Subsection B, changed "human services department" to "department".

## 27-5-6.2. Transfer to safety net care pool fund.

A. A county shall, by ordinance to be effective July 1, 2014, dedicate to the safety net care pool fund an amount equal to a gross receipts tax rate of one-twelfth percent applied to the taxable gross receipts reported during the prior fiscal year by persons engaging in business in the county. For purposes of this subsection, a county may use public funds from any existing authorized revenue source of the county.

B. A county enacting an ordinance pursuant to Subsection A of this section shall transfer to the safety net care pool fund by the last day of March, June, September and December of each year an amount equal to one-fourth of the county's payment to the safety net care pool fund.



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**History: Laws 2014, ch. 79, § 16.**

**Emergency clauses.** — Laws 2014, ch. 79, § 23, contained an emergency clause and was approved March 12, 2014.

**Compiler's notes.** — The governor partially vetoed Laws 2014, ch. 79, § 16. In the first sentence of Subsection A, after "July 1, 2014", the governor vetoed "through June 30, 2017".

To view the chaptered bill in its entirety, *see* the 2014 session laws on *NMOneSource.com*.

## 27-5-7. Health care assistance fund.

A. There is created in the county treasury of each county a "health care assistance fund".

B. Collections under the levy made pursuant to the Indigent Hospital and County Health Care Act and all payments shall be placed into the fund, and the amount placed in the fund shall be budgeted and expended only for the purposes specified in the Indigent Hospital and County Health Care Act, by warrant upon vouchers approved by the county. Payments for indigent hospitalizations shall not be made from any other county fund.

C. The fund shall be audited in the manner that other state and county funds are audited, and all records of payments and verified statements of qualification upon which payments were made from the fund shall be open to the public.

D. Any balance remaining in the fund at the end of the fiscal year shall carry over into the ensuing year, and that balance shall be taken into consideration in the determination of the ensuing year's budget and certification of need for purposes of making a tax levy.

E. Money may be transferred to the fund from other sources, but no transfers may be made from the fund for any purpose other than those specified in the Indigent Hospital and County Health Care Act.

**History: 1953 Comp., § 13-2-18, enacted by Laws 1965, ch. 234, § 7; 1991, ch. 212, § 21; 1992, ch. 31, § 1; 1993, ch. 321, § 7; 1996, ch. 29, § 4; 1998, ch. 71, § 1; 1999, ch. 188, § 1; 2014, ch. 79, § 9.**

**The 2014 amendment,** effective March 12, 2014, changed the name of the fund from the county indigent hospital claims fund to the health care assistance fund; in the catchline, deleted "County indigent hospital claim" and added "Health care assistance"; in Subsection A, after the "each county a", deleted "county indigent hospital claims" and added "health care assistance"; in Subsection B, in the first sentence, after "vouchers approved by", deleted "a majority of the board and signed by the chairman of the board" and added "the county".

**Temporary provisions.** — Laws 2014, ch. 79, § 19, provided that on March 12, 2014, all money in the sole community provider fund shall be transferred to the safety net care pool fund and all money in a county's indigent hospital claims fund shall be transferred to the county's health care assistance fund.

**The 1999 amendment,** effective June 18, 1999, deleted "pursuant to Subsection F of this section" following "fiscal year" in Subsection D and deleted former Subsection F, relating to the transfer of excessive medicaid funds.

**The 1998 amendment,** effective May 20, 1998, in Subsection F, substituted "2000" for "1998" in the first sentence and deleted the former second sentence which read: "Beginning in 1998, the transfer shall be made by September 1 of each fiscal year".

**The 1996 amendment,** effective May 15, 1996, substituted "Subsection F" for "Subsections F and G", in Subsection D and substituted "1998" for "1996" twice in Subsection F.

**The 1993 amendment,** effective July 1, 1993, substituted "and County Health Care" for "Claims" in two places in the first sentence of Subsection B and in Subsection E; substituted "Payments" for "Contributions" in the first sentence of Subsection B; inserted "pursuant to Subsections F and G of this section" in Subsection D and deleted the former second and third sentences of that subsection, which related to transfers and payments from the fund in the eightieth and eighty-first fiscal years; and added Subsection F.

**The 1992 amendment,** effective May 20, 1992, deleted "county indigent hospital claims" preceding "fund" at the second instance of that term in Subsection B and at the first instance of that term in Subsections C, D, and E; and in Subsection D, made a section reference substitution and inserted "except voluntary contributions made during the eightieth and eighty-first fiscal years" and added the last sentence.

**The 1991 amendment,** effective July 1, 1991, added the second sentence in Subsection D and made minor stylistic changes throughout the section.

### ANNOTATIONS

**Mill levy funds used for indigent medical care.** — Colfax County could not use mill levy funds to provide indigent medical care for its non-miner residents admitted to miners' hospital, a state-owned and operated facility, where such funds were not proceeds in the county indigent hospital claims fund [county health care assistance fund] but instead were proceeds from another county fund. The county could, however, use any proceeds in the indigent hospital claims fund to provide medical care for indigent patients at the miners' hospital if they otherwise qualify. 1988 Op. Att'y Gen. No. 88-41.

## 27-5-7.1. County health care assistance fund; authorized uses of the fund.

A. The fund may be used to pay for:

(1) expenses of burial or cremation of an indigent person;



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(2) ambulance transportation, hospital care and health care services for indigent patients; or

(5) [(3)] county administrative expenses associated with fund expenditures authorized in Paragraphs of this subsection.

B. The fund may be used to meet a county's obligation under Section 27-10-4 NMSA 1978.

**History: Laws 1993, ch. 321, § 16; 2001, ch. 307, § 2; 2014, ch. 79, § 10.**

**The 2014 amendment,** effective March 12, 2014, specified the health care costs that may be paid from the health care assistance fund; in the catchline, after "County", deleted "indigent hospital claims" and added "health care assistance"; in Subsection A, after "The fund", deleted "shall" and added "may"; in Subsection A, deleted former Paragraph (1), which required money in the fund to be used to meet the county's contribution for support of sole community provider payments; in Subsection A, deleted former Paragraph (3), which required money in the fund be used to pay approved claims that are not matched with federal funds under the state medicaid program; and in Subsection A, added new Paragraphs (2) and (5)[(3)].

**Compiler's notes.** — The bracketed material was inserted by the compiler and is not part of the law.

The governor partially vetoed Laws 2014, ch. 79, § 10. In Subsection A, the governor vetoed Paragraphs (3) and (4) which provided:

"(3) all or a portion of the monthly premiums of health insurance policies for indigent patients;

(4) all or a portion of the out-of-pocket costs, including copayments and deductibles, incurred by indigent patient insureds pursuant to the terms of a health insurance policy;"

In Subsection A, Paragraph (5), after "Paragraphs", the governor vetoed "(1) through (4)".

To view the chaptered bill in its entirety, *see* the 2014 session laws on *NMOneSource.com*.

**The 2001 amendment,** effective June 15, 2001, inserted the current Paragraph A(2), redesignated the subsequent paragraph; and deleted Subsection C.

**Compiler's notes.** — Subsection A of § 22, Laws 1993, ch. 321, provides that §§ 3, 6, 10, 15, 16 and 18 (27-5-3, 27-5-6, 27-5-6.1, 27-5-7.1, 27-5-11 and 27-5-12.2 NMSA 1978) are effective the date that the human services department is notified in writing that the amendment to the state medicaid plan has been approved by the federal health care financing administration. The human services department was advised by letter dated May 20, 1993, that the United States Department of Health and Human Services had approved the amendment of New Mexico's medicaid plan "to add a payment provision for sole community hospitals (SCH), effective July 1, 1993, and a payment provision for indirect medical education (IME) costs incurred by teaching hospitals, effective August 1, 1992". Chapter 321, Laws 1993, contained an emergency clause. The human services department published notice of the approval in the *New Mexican* on June 21, 1993.

## 27-5-8. Repealed.

**Repeals.** — Laws 2014, ch. 79, § 22 repealed 27-5-8 NMSA 1978, as enacted by Laws 1965, ch. 234, § 8, relating to board certification to county commissioners, effective March 12, 2014. For provisions of former section, *see* the 2013 NMSA 1978 on *NMOneSource.com*.

## 27-5-9. Tax levies authorized.

A. Subject to the provisions of Subsection B of this section, the board of county commissioners, upon the certification of the county as to the amount needed to provide health care to indigent residents of the county or to support the state's medicaid program, shall impose a levy against the net taxable value, as that term is defined in the Property Tax Code [Articles 35 through 38 of Chapter 7 NMSA 1978], of the property in the county sufficient to raise the amount certified by the county.

B. The question of imposing an indigent and medicaid health care levy for the purpose of the Indigent Hospital and County Health Care Act shall be submitted to the electors and voted upon as a separate question at the next subsequent general election or any special election called prior thereto for such purpose.

C. Upon finding by the board of county commissioners that an election will be necessary, the board of county commissioners shall meet and order an election to be held at a designated time in the county upon the question of imposing an indigent and medicaid health care levy for the purpose of the Indigent Hospital and County Health Care Act in the county. If the question is to be voted upon at a special election, the election shall be held not less than thirty nor more than fifty days after the finding, but in no event shall the election be held within fifty days preceding or succeeding any general election held in the county. The order for the election shall be made a part of the official minutes of the board of county commissioners. A copy of the order shall be published in a newspaper of general circulation in the county at least fifteen days before the date set for the election, and an affidavit of publication shall be obtained. At least five days prior to the date for holding the election, the board of county commissioners shall publish in a newspaper of general



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circulation in the county and post in five conspicuous places in the county a notice of election, which shall be in substantially the following form:

"NOTICE OF ELECTION ON SPECIAL INDIGENT AND MEDICAID HEALTH CARE LEVY

Notice is given on the _____ day of _____, 20____, there will be held in _____ county of New Mexico an election on the question of imposing an indigent and medicaid health care levy to provide health care to indigent residents of the county or to support the state's medicaid program, such levy to be made annually against the taxable value of the property in the county and limited to an amount sufficient to provide funds necessary to support the state's medicaid program or to provide health care to indigent residents of the county who do not qualify for medicaid.

_____
Official Title of the Authority".

The election shall be held on the date specified in the notice and shall be, if a special election, conducted and canvassed in substantially the same manner as general elections are conducted and canvassed in the county; provided that the ballot used in any election shall be a special and separate ballot and shall be in substantially the following form:

"BALLOT

On the question of imposing an indigent and medicaid health care levy for the purposes of the Indigent Hospital and County Health Care Act, such levy to be made annually against the taxable value of the property in _____ county of New Mexico, and limited to an amount sufficient to provide funds budgeted and certified as necessary for health care for indigent residents of the county in addition to those services provided by the state or to support the state's medicaid program:

FOR THE LEVY.....____

AGAINST THE LEVY.....____".

D. If the electors vote in favor of an indigent and medicaid health care levy, the levy shall become effective in the same manner prescribed by law for all levies upon property within that county, and a levy for those purposes in such an amount as will provide sufficient money for the fund shall be made for each year thereafter.

E. Any board of county commissioners that has, prior to the effective date of this section, made a valid imposition of a property tax for the purpose of the Indigent Hospital and County Health Care Act shall not be required to hold an election on the existing tax, and that tax may be imposed and continue to be imposed in accordance with the provisions of law existing at the time of its imposition. However, if any such tax is not imposed in a given property tax year or if the authorization for its imposition terminates or expires, the election requirements of Subsections B and C of this section shall apply to any subsequent proposed imposition of a property tax for indigent health care for county residents or to support the state's medicaid program.

**History: 1953 Comp., § 13-2-20, enacted by Laws 1965, ch. 234, § 9; 1981, ch. 37, § 85; 1993, ch. 321, § 9; 2014, ch. 79, § 11; 2015, ch. 145, § 99.**

**Cross references.** — For constitutional provisions relating to limits on taxation, *see* N.M. Const., art. VIII, § 2.

For class B county levy for providing health care to sick and indigent persons, *see* 4-38-17.1 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, prohibited an election authorizing a tax levy to be held within fifty days preceding or succeeding any general election held in the county; and in Subsection C, after "election be held within", deleted "five" and added "fifty".

**The 2014 amendment,** effective March 12, 2014, authorized the imposition of a property tax to support the state's medicaid program; in Subsection A, after "certification of the", deleted "board" and added "county", after "as to the amount needed", deleted "in the fund" and added "to provide health care to indigent residents of the county or to support the state's medicaid program", and after "certified by the", deleted "board" and added "county"; in Subsection B, after "imposing an indigent", deleted "hospital" and added "and medicaid health care"; in Subsection C, in the first sentence, after "question of imposing an indigent", deleted "hospital" and added "and medicaid health care"; after the fifth sentence, in the title of the form for the notice of election, after "INDIGENT", deleted "HOSPITAL" and added "AND MEDICAID HEALTH CARE"; in the notice of election, in the first sentence, after "question of imposing an indigent", deleted "hospital" and added "and medicaid health care", after "medicaid health care levy", deleted "for the purposes of the Indigent Hospital and County Health Care Act" and



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added "to provide health care to indigent residents of the county or to support the state's medicaid program", and after "provide funds necessary to", deleted "pay claims pursuant to such act" and added "support the state's medicaid program or to provide health care to indigent residents of the county who do not qualify for medicaid"; in the form for the ballot, after "question of imposing an indigent", deleted "hospital" and added "and medicaid health care", after "budgeted and certified as necessary", deleted "to pay claims pursuant to such act" and added "for health care for indigent residents of the county in addition to those services provided by the state or to support the state's medicaid program"; in Subsection D, after "in favor of an indigent", deleted "hospital" and added "and medicaid health care"; and in Subsection E, in the second sentence, after "imposition of a property tax for" deleted "the purpose of the Indigent Hospital and County Health Care Act", and added "indigent health care for county residents or to support the state's medicaid program".

**Temporary provisions.** — Laws 2014, ch. 79, § 20 provided that a tax levied pursuant to Section 27-5-9 NMSA 1978 prior to January 1, 2014 shall remain in effect until the tax expires or is terminated.

**The 1993 amendment,** effective July 1, 1993, substituted "and County Health Care" for "Claims" in Subsection B, the first sentence of Subsection C, in the two forms in Subsection C, and in the first and second sentences of Subsection E; divided the former third sentence of Subsection C into the present third and fourth sentences by deleting "and"; and made stylistic changes throughout Subsections C, D, and E.

**ANNOTATIONS**

**Compiler's notes.** — Some of the annotations appearing below were taken from a case decided prior to the 1981 amendment of this section, which deleted references to the constitutional limitation of twenty mills on levies for public debt.

**It is required that the amount needed to care for the indigent in any year shall be estimated** and that a levy shall be made to raise sufficient money to cover the amounts estimated. *Board of Dirs. of Mem. Gen. Hosp. v. Cnty. Indigent Hosp. Claims Bd.*, 1967-NMSC-042, 77 N.M. 475, 423 P.2d 994.

**Limitations upon tax levy.** — The county commissioners are required to make a tax levy sufficient to raise the amount certified as needed by the county indigent hospital claims board provided the levy for that purpose and for all other purposes authorized by law does not exceed 20 mills. *Board of Dirs. of Mem. Gen. Hosp. v. Cnty. Indigent Hosp. Claims Bd.*, 1967-NMSC-042, 77 N.M. 475, 423 P.2d 994.

Constitutional provision permitting levies for public debts in excess of 20-mill limitation does not contemplate judgment for hospital against board of county commissioners for cost of care of indigent persons. *Board of Dirs. of Mem. Gen. Hosp. v. Cnty. Indigent Hosp. Claims Bd.*, 1967-NMSC-042, 77 N.M. 475, 423 P.2d 994.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Power of state or municipality to appropriate funds or incur indebtedness, in excess of poor fund, for relief of distress due to general unemployment or other unusual conditions, 73 A.L.R. 255.

## 27-5-10. Repealed.

**Repeals.** — Laws 2014, ch. 79, § 22 repealed 27-5-10 NMSA 1978, as enacted by Laws 1965, ch. 234, § 11, relating to subrogation of claim, effective March 12, 2014. For provisions of former section, *see* the 2013 NMSA 1978 on *NMOneSource.com*.

## 27-5-11. Qualifying hospital duties and reporting.

A. A qualifying hospital shall accept every indigent patient who seeks health care services from the qualifying hospital.

B. Qualifying hospitals shall:

have written financial assistance policies that are publicized.

D. [C.] Within thirty days of receiving a payment from the safety net care pool, a qualifying hospital shall report the amount of such payment to the county within which it is located.

E. [D.] In addition to the report required in Subsection D of this section, a qualifying hospital shall annually report to the county within which it is located the total costs of health care services provided in the previous calendar year.

**History: 1953 Comp., § 13-2-23, enacted by Laws 1965, ch. 234, § 12; 1983, ch. 234, § 4; 1993, ch. 321, § 10; 2003, ch. 413, § 4; 2014, ch. 79, § 12.**

**The 2014 amendment,** effective March 12, 2014, replaced sole community providers with qualifying hospitals to comply with changes in federal regulations; in the catchline, deleted "Hospitals and ambulance services; health care providers; required to file data; sole community provider" and added "Qualifying", and after "duties" added "and reporting"; deleted former Subsection A, which required ambulance services, hospitals and health care providers to file information required by the board to determine the cost of all patients served by the provider and proof that the provider was licensed in New Mexico; relettered former Subsection B as Subsection A; in Subsection A, after "A", deleted "sole community provider" and added "qualifying", after "A qualifying hospital", deleted "requesting or receiving medicaid sole community provider hospital payments", after "qualifying hospital shall", deleted "(1)" for former Paragraph (1) of former Subsection B, after "shall accept", added "every", and after "accept every indigent", deleted "patients and request reimbursement for those patients through the appropriate county indigent fund" and added "patient who seeks health care services from the qualifying hospital"; in former Subsection B, deleted the second sentence in Paragraph (1), which required the county to approve requests that met the county eligibility standards; in former Subsection B, deleted Paragraph (2), which required the sole community provider to confirm the amount of



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payment authorized by the county; in former Subsection B, deleted Paragraph (3), which required the sole community provider to negotiate with the county the amount of indigent hospital payments anticipated for the following fiscal year; in former Subsection B, deleted Paragraph (4), which required the sole community provider to provide the department the amount of indigent hospital payments anticipated for the following fiscal year; and added Subsections B, D and E.

**Compiler's notes.** — The bracketed material was inserted by the compiler and is not part of the law.

The governor partially vetoed Laws 2014, ch. 79, § 12. In Subsection B, the governor vetoed Paragraphs (1) through and (3), and vetoed Subsection C, which provided:

"(1) provide financial counseling to patients about their hospital bills;

(2) have written financial assistance policies consistent with this section that are publicized and consistently applied; and

(3) make reasonable efforts to determine whether patients are eligible for financial assistance before initiating collections actions."

"C. No action for collection of claims shall be allowed against an indigent patient with a household income under two hundred percent of the federal poverty level."

To view the chaptered bill in its entirety, *see* the 2014 session laws on *NMOneSource.com*.

**Temporary provisions.** — Laws 2014, ch. 79, § 18 provided that references in law to a sole community provider hospital shall be deemed to be references to a qualifying hospital pursuant to the Indigent Hospital and County Health Care Act, and references in law to a county indigent hospital claims fund shall be deemed to be references to a county health care assistance fund.

**The 2003 amendment,** effective June 20, 2003, deleted "where required" following "provider is licensed" in Paragraph A(2); deleted "any" at the beginning of Paragraph A(3); and substituted "A" for "Every" at the beginning of Subsection B.

**The 1993 amendment,** effective on the date that the human services department is notified in writing that the amendment to the state medicaid plan has been approved by the federal health care financing administration, inserted "health care providers" and added "sole community provider hospital duties" to the end in the catchline; designated the existing introductory language as Subsection A, redesignating former Subsections A through C as Paragraphs (1) through (3); in Subsection A, substituted "hospital or health care provider" for "or hospital", inserted "cared for by that health care provider or" in Paragraph (1), and substituted "ambulance service or health care provider" for "or ambulance service" in Paragraph (2); and added Subsection B.

**Compiler's notes.** — Subsection A of § 22, Laws 1993, ch. 321, provides that §§ 3, 6, 10, 15, 16 and 18 (27-5-3, 27-5-6, 27-5-6.1, 27-5-7.1, 27-5-11 and 27-5-12.2 NMSA 1978) are effective the date that the human services department is notified in writing that the amendment to the state medicaid plan has been approved by the federal health care financing administration. The human services department was advised by letter dated May 20, 1993, that the United States Department of Health and Human Services had approved the amendment of New Mexico's medicaid plan "to add a payment provision for sole community hospitals (SCH), effective July 1, 1993, and a payment provision for indirect medical education (IME) costs incurred by teaching hospitals, effective August 1, 1992". Chapter 321, Laws 1993, contained an emergency clause. The human services department published notice of the approval in the *New Mexican* on June 21, 1993.

## 27-5-12. Payment of claims.

A. A hospital, ambulance service or health care provider filing a claim with the county shall:

(1) file the claim with the county in which the indigent patient is domiciled;

(2) file the claim for each patient separately, with an itemized detail of the total cost; and

(3) file with the claim a verified statement of qualification for ambulance service, indigent hospital care or care from a health care provider signed by the patient or by the parent or person having custody of the patient to the effect that the patient qualifies under the provisions of the Indigent Hospital and County Health Care Act as an indigent patient and is unable to pay the cost for the care administered and listing all assets owned by the patient or any person legally responsible for the patient's care. The statement shall constitute an oath of the person signing it, and any false statements in the statement made knowingly constitute a felony.

B. A hospital, ambulance service or health care provider that has contracted with a county for provision of health care services shall provide evidence of health care services rendered for payment for services in accordance with the procedures specified in the contract.

**History: 1953 Comp., § 13-2-24, enacted by Laws 1965, ch. 234, § 13; 1983, ch. 234, § 5; 1984, ch. 101, § 2; 1993, ch. 321, § 11; 1997, ch. 51, § 4; 2014, ch. 79, §13.**

**The 2014 amendment,** effective March 12, 2014, clarified that the county, not the board, administers payment of claims; in Subsection A, in the introductory sentence, after "claim with the", deleted "board" and added "county"; in Subsection A, Paragraph (1), after "claim with the", deleted "board of the"; and in Subsection B, after "contracted with a", deleted "board" and added "county".

**The 1997 amendment,** effective June 20, 1997, designated the introductory paragraph as Subsection A; redesignated former Subsections A, B, and C as Paragraphs A(1), A(2), and A(3); and added Subsection B.

**The 1993 amendment,** effective July 1, 1993, substituted "ambulance service or health care provider" for "or ambulance service" in the introductory language and "ambulance service, indigent hospital care or care from a health care provider" for "indigent hospital care" and "and County health Care" for "Claims" in Subsection C.



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## 27-5-12.1. Appeal.

Any hospital or ambulance service aggrieved by any decision of the county may appeal to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

**History: 1978 Comp., § 27-5-12.1, enacted by Laws 1979, ch. 146, § 3; 1983, ch. 234, § 6; 1998, ch. 55, § 38; 1999, ch. 265, § 40; 2014, ch. 79, § 14.**

**Cross references.** — For procedures governing administrative appeals to the district court, *see* Rule 1-074 NMRA.

**The 2014 amendment,** effective March 12, 2014, clarified that appeals are from the decision of the county, not the board; and after "decision of the", deleted "board" and added "county".

**The 1999 amendment,** effective July 1, 1999, substituted "Section 39-3-1.1" for "Section 12-8A-1".

**The 1998 amendment,** effective September 1, 1998, rewrote this section to the extent that a detailed comparison is impracticable.

## 27-5-12.2. Repealed.

**Repeals.** — Laws 2014, ch. 79, § 22 repealed 27-5-12.2 NMSA 1978, as enacted by Laws 1993, ch. 321, § 15, relating to duties of the county, sole community provider hospital payments, effective March 12, 2014. For provisions of former section, *see* the 2013 NMSA 1978 on *NMOneSource.com*.

## 27-5-13. Repealed.

**Repeals.** — Laws 2014, ch. 79, § 22 repealed 27-5-13 NMSA 1978, as enacted by Laws 1965, ch. 234, § 14, relating to claims not to expire because of lack of funds, priority of claims, effective March 12, 2014. For provisions of former section, *see* the 2013 NMSA 1978 on *NMOneSource.com*.

## 27-5-14. Repealed.

**Repeals.** — Laws 2014, ch. 79, § 22 repealed 27-5-14 NMSA 1978, as enacted by Laws 1965, ch. 234, § 15, relating to board to recover costs, presumption of payment, effective March 12, 2014. For provisions of former section, *see* the 2013 NMSA 1978 on *NMOneSource.com*.

## 27-5-15. Repealed.

**Repeals.** — Laws 2014, ch. 79, § 22 repealed 27-5-15 NMSA 1978, as enacted by Laws 1971, ch. 72, § 2, relating to limitation on liens, effective March 12, 2014. For provisions of former section, *see* the 2013 NMSA 1978 on *NMOneSource.com*.

## 27-5-16. Department; payments; cooperation; reporting.

A. The department shall not decrease the amount of any assistance payments made to the hospitals or health care providers of this state pursuant to law because of any financial reimbursement made to ambulance services, hospitals or health care providers for indigent or medicaid eligible patients as provided in the Indigent Hospital and County Health Care Act.

B. The department shall cooperate with each county in furnishing information or assisting in the investigation of any person to determine whether the person meets the qualifications of an indigent patient as defined in the Indigent Hospital and County Health Care Act.

C. The department shall provide an annual report to each county and each qualifying hospital on the previous calendar year's payments from the safety net care pool for uncompensated care to qualifying hospitals and estimated payments of enhanced medicaid base rates. The annual report for the previous year shall be provided by July 1 of the succeeding year.

**History: 1953 Comp., § 13-2-27, enacted by Laws 1965, ch. 234, § 16; 1987, ch. 88, § 5; 1993, ch. 321, § 13; 2013, ch. 151, § 1; 2014, ch. 79, § 15.**

**The 2014 amendment,** effective March 12, 2014, required the department to give an annual report to each county and qualifying hospital on the previous year's payments from the safety net care pool fund; in the catchline, after "cooperation", added "reporting"; in Subsection B, after "cooperate with each", deleted "board" and added "county"; and in Subsection C, deleted all of the former language which required the department to ensure that payments did not exceed amounts that would be paid under medicare payment principles and if payments exceeded medicare payment principles, to reduce the sole community provider payment prior to any reduction in



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payments to hospitals under the state medicaid program, and added the current language of the subsection.

**Compiler's notes.** — The governor partially vetoed Laws 2014, ch. 79, § 15. In the first sentence of Subsection C, the governor vetoed the word "fund" after "safety net care pool".

To view the chaptered bill in its entirety, *see* the 2014 session laws on *NMOneSource.com*.

**The 2013 amendment,** effective June 14, 2013, provided additional sources of assistance payments; in Subsection C, in the second sentence, at the end of the sentence, after "state medicaid program" added the remainder of the sentence.

**The 1993 amendment,** effective July 1, 1993, deleted "human services" before "department" near the beginning and substituted "and County Health Care" for "Claims" near the end in Subsections A and B; inserted "or health care providers" before "of this state" and substituted "ambulance services, hospitals or health care providers for indigent or medicaid eligible patients" for "hospitals for indigent or welfare patients" in Subsection A; and added Subsection C.

## 27-5-17. Repealed.

**Repeals.** — Laws 1986, ch. 20, § 136A repealed 27-5-17 NMSA 1978, as amended by Laws 1975, ch. 44, § 2, relating to exclusion of class A counties from the provisions of the Indigent Hospital Claims Act, effective July 1, 1986.

## 27-5-18. Repealed.

**Repeals.** — Laws 2014, ch. 79, § 22 repealed 27-5-18 NMSA 1978, as enacted by Laws 1965, ch. 234, § 20, relating to date of implementation, effective March 12, 2014.

For provisions of former section, *see* the 2013 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 6

# Utility Supplements and Assistance

Sec.
27-6-1 to 27-6-10. Deleted.
27-6-11. Short title.
27-6-12. Legislative intent and purpose.
27-6-13. Administration of Low Income Utility Assistance Act.
27-6-14. Persons eligible for utility assistance.
27-6-15. Utility assistance supplement program established; distribution to eligible recipients.
27-6-16. Fund created.
27-6-17. Utility service; procedures to follow prior to service being discontinued.
27-6-18. Repealed.
27-6-18.1. Prohibition on discontinuance or disconnection of utility service during the winter heating season; minimum payments; payment plans; exceptions.

## 27-6-1 to 27-6-10. Deleted.

**Compiler's notes.** — Sections 27-6-1 to 27-6-10, the Utility Supplement Act, were enacted by Laws 1975, Chapter 300, contingent upon the passage and approval of the Electrical Energy Tax Act. The Electrical Energy Tax Act was enacted by Laws 1975, Chapter 263 and approved April 10, 1975. Laws 1975, ch. 300, § 10, compiled as 27-6-10 NMSA 1978, provides that no payments shall be made under the Utility Supplement Act if the Electrical Energy Tax Act is held invalid in any suit. The Electrical Energy Tax Act was held invalid under the Supremacy Clause of the United States Constitution in *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141, 99 S. Ct. 1629, 60 L. Ed. 2d 106 (1979). Laws 1982, ch. 18, § 27 later repealed the Electrical Energy Tax Act, effective July 1, 1982. The provisions of 27-6-1 to 27-6-10 NMSA 1978, the Utility Supplement Act, have been deleted from the statutes compilation as they no longer have any force or effect.

## 27-6-11. Short title.

Chapter 27, Article 6 NMSA 1978 may be cited as the "Low Income Utility Assistance Act".

**History: Laws 1979, ch. 290, § 1; 2009, ch. 232, § 1.**

**The 2009 amendment,** effective June 19, 2009, changed the reference of the act to the chapter and article of NMSA 1978.

## 27-6-12. Legislative intent and purpose.

It is the intent of the legislature and the purpose of the Low Income Utility Assistance Act to assist indigent residents to meet the increased costs for gas and electrical utilities, liquefied



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petroleum fuel, wood and coal to the maximum extent possible, particularly the cost of fuel adjustments and the cost of service indexing.

**History: Laws 1979, ch. 290, § 2; 1980, ch. 118, § 1.**

## 27-6-13. Administration of Low Income Utility Assistance Act.

A. As used in the Low Income Utility Assistance Act:

(1) "department" means the agency of the state designated by the governor; and

(2) "utility" means a publicly, privately or municipally owned utility or a distribution cooperative utility for the rendition of electric power or gas.

B. The department shall determine eligibility, establish payment amounts, make utility assistance payments to or on behalf of eligible recipients and otherwise administer the Low Income Utility Assistance Act.

C. The department shall use funds appropriated under the Low Income Utility Assistance Act to the maximum extent to generate available federal and local government funds and to mobilize other resources that may be applied to the concepts of the Low Income Utility Assistance Act.

**History: Laws 1979, ch. 290, § 3; 1980, ch. 118, § 2; 2009, ch. 232, § 2.**

**The 2009 amendment,** effective June 19, 2009, added Paragraph (2) of Subsection A.

## 27-6-14. Persons eligible for utility assistance.

A. Utility assistance supplements shall be paid to or on behalf of those individuals who are determined to be eligible by regulation of the department.

B. The department shall determine the amount of payment to be made; provided that no payment shall be made if a payment for the same services or incurred bills has been made to the household under a federal program for a similar purpose.

**History: Laws 1979, ch. 290, § 4; 1980, ch. 118, § 3; 1984, ch. 94, § 1.**

## 27-6-15. Utility assistance supplement program established; distribution to eligible recipients.

A. The department is authorized to establish a utility assistance supplement program for purposes of the Low Income Utility Assistance Act.

B. Beginning on July 1, 1980 and each year thereafter the department shall pay utility assistance supplement payments, subject to the availability of funds from the low income utility assistance fund created under the provisions of Section 27-6-16 NMSA 1978.

**History: Laws 1979, ch. 290, § 5; 1980, ch. 118, § 4.**

## 27-6-16. Fund created.

There is created in the state treasury the "low income utility assistance fund." Payments shall be made from the low income utility assistance fund upon warrants drawn by the secretary of finance and administration pursuant to vouchers signed by the head of the department. Such payments shall be made for the costs and administration of the Low Income Utility Assistance Act.

**History: Laws 1979, ch. 290, § 6; 1980, ch. 118, § 5.**

**ANNOTATIONS**

**Partial veto valid.** — Governor's partial veto of the provision in Laws 1981, ch. 168, designating the income support division of the human services department as the agency responsible for administering this fund, is valid. 1981 Op. Att'y Gen. No. 81-12.



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## 27-6-17. Utility service; procedures to follow prior to service being discontinued.

A. Unless requested by the customer, no gas or electric utility shall discontinue service to any residential customer for nonpayment during the period from November 15 through March 15 unless the following procedures are followed:

(1) at least fifteen days prior to the date scheduled for utility service to be discontinued, unless the New Mexico public utility commission [public regulation commission] provides for a shorter period, the utility shall mail or hand-deliver to the customer a notice printed in both English and Spanish and in simple language, which notice clearly explains that:

(a) utility service shall stop on a specific date;

(b) the customer may be eligible for financial assistance to pay for the utility service; and

(c) for assistance, the customer should contact the utility or the department;

(2) any utility subject to this section shall attempt to advise customers who contact the utility seeking financial assistance of the program administered under the Low Income Utility Assistance Act and of assistance programs the utility may administer on its own or in conjunction with others;

(3) the utilities subject to this section and the department shall provide application forms for utility service payment assistance at billing and agency offices; and

(4) before the service is actually discontinued, the utility shall attempt to make contact in person or by telephone to remind the customer of the pending date of discontinuance of service and that financial assistance for utility payments may be available.

B. Unless requested by the customer, no gas or electric utility shall discontinue service to any residential customer for nonpayment during the period from November 15 through March 15 until at least fifteen days after the date scheduled for discontinuance of service if the department has certified to the utility that a customer is eligible for utility payment assistance under the Low Income Utility Assistance Act and that payment for the utility service provided to the customer will be made within the fifteen-day period.

C. The department and the New Mexico public utility commission [public regulation commission] shall coordinate and adopt, as they deem appropriate, either separate or joint rules and regulations necessary to implement the provisions of this section; provided that nothing in this section authorizes the department to revise tariffs or rate filings subject to the jurisdiction of the New Mexico public utility commission.

**History: Laws 1991, ch. 81, § 1; 1993, ch. 282, § 17.**

**Bracketed material.** — The bracketed material was inserted by the compiler. It was not enacted by the legislature and is not part of the law.

Laws 1998, ch. 108, § 80 provided that references to the public utility commission be construed as references to the public regulation commission.

**The 1993 amendment,** effective June 18, 1993, substituted "New Mexico public utility commission" for "New Mexico public service commission" in Subsection A(1) and Subsection C.

## 27-6-18. Repealed.

**Repeals.** — Laws 2007, ch. 231, § 2 repealed 27-6-18 NMSA 1978, as enacted by Laws 2005 (1st.S.S.), ch. 2, § 2, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com*.

## 27-6-18.1. Prohibition on discontinuance or disconnection of utility service during the winter heating season; minimum payments; payment plans; exceptions.

A. Except as provided in Subsection C of this section, unless requested by the customer, no utility shall discontinue or disconnect service to a residential customer during the heating season for nonpayment of the customer's utility bill if the customer meets the qualifications to receive assistance pursuant to the low-income home energy assistance program from the administering authority during the program's current heating season.



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B. The utility shall make payment plan options available to the customer pursuant to rules adopted by the public regulation commission.

C. If the customer does not pay the past due charges from the customer's utility bill before the beginning of the next heating season, the customer shall not be eligible for protection from discontinued or disconnected utility service pursuant to this section during that next heating season until the past due charges are paid in full.

D. A customer who has defaulted on the customer's chosen payment plan and whose utility service has been discontinued or disconnected during the nonheating season can be reconnected and maintain the protection afforded by this section by paying reconnection charges, if any, and by paying the amount due pursuant to the payment plan by the date on which service is reconnected.

E. If a customer notifies the utility that the customer needs payment assistance and if the customer requests, the utility shall promptly report the customer's request for assistance to the administering authority. The administering authority shall take prompt action to evaluate the customer's eligibility for the low-income home energy assistance program.

F. Utilities subject to this section shall make the following information available to the public regarding:

(1) the low-income home energy assistance program's:

(a) application forms;

(b) requirements for qualifying for the program;

(c) procedures for making an application; and

(d) location to which an application may be submitted; and

(2) the protection against discontinued and disconnected service set forth in this section for customers seeking assistance paying utility bills during a heating season, including:

(a) payment options; and

(b) circumstances under which disconnection or discontinuance of service may occur.

G. As used in this section:

(1) "administering authority" means the human services department or a tribal entity that administers its own low-income home energy assistance program;

(2) "current season" means the period beginning in September and continuing through August of the subsequent year;

(3) "heating season" means the period beginning November 15 and continuing through March 15 of the subsequent year;

(4) "nonheating season" means the period beginning on March 16 and continuing through November 14 of the same year; and

(5) "tribal entity" means the governing body or an agency of a federally recognized Indian nation, tribe or pueblo located in whole or in part in New Mexico.

**History: Laws 2007, ch. 231, § 1.**

**Effective dates.** — Laws 2007, ch. 231 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

# ARTICLE 6A

# Low Income Water, Sewer and Solid Waste Service Assistance

Sec.
27-6A-1. Short title.
27-6A-2. Purpose.
27-6A-3. Definitions.
27-6A-4. Low income assistance rates.
27-6A-5. Department cooperation.

## 27-6A-1. Short title.

This act [27-6A-1 to 27-6A-5 NMSA 1978] may be cited as the "Low Income Water, Sewer and Solid Waste Service Assistance Act".

**History: Laws 1993, ch. 206, § 1.**



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## 27-6A-2. Purpose.

It is the purpose of the Low Income Water, Sewer and Solid Waste Service Assistance Act:

A. to assure that water, sewer or solid waste user rate increases do not force many low-income individuals to discontinue necessary water, sewer or solid waste service; and

B. to increase the availability or affordability of basic water, sewer and solid waste service to low-income individuals by providing assistance to meet the cost of basic water, sewer and solid waste service.

**History: Laws 1993, ch. 206, § 2.**

## 27-6A-3. Definitions.

As used in the Low Income Water, Sewer and Solid Waste Service Assistance Act:

A. "department" means the human services department; and

B. "utility" means any individual, firm, partnership, company, district, including but not limited to solid waste district, water and sanitation district and special district, cooperative, association, public or private corporation, lessee, trustee or receiver appointed by any court, municipality and municipal utility as defined in the Municipal Code [3-3-1 NMSA 1978], incorporated county or county that may or does own, operate, lease or control any plant, property or facility for:

(1) the supply, storage, distribution or furnishing of water to or for the public;

(2) the supply and furnishing of sanitary sewer service to or for the public; or

(3) the supply and furnishing of collection, transportation, treatment or disposal of solid waste to or for the public. "Utility" does not include a public utility subject to the jurisdiction of the New Mexico public service commission [public regulation commission].

**History: Laws 1993, ch. 206, § 3.**

**Bracketed material.** — The bracketed material was inserted by the compiler. It was not enacted by the legislature and is not part of the law.

The New Mexico public service commission was a predecessor of the public utility commission, which was succeeded by the public regulation commission. Laws 1998, ch. 108, § 80 provided that references to the public utility commission be construed as references to the public regulation commission.

## 27-6A-4. Low income assistance rates.

A utility may provide assistance in the form of reduced or subsidized rates to or on behalf of those individuals who meet the eligibility criteria of one or more need-based assistance programs administered by the department and who are not living in nursing homes or intermediate care facilities or not living in circumstances that do not require them to pay, directly or indirectly, for water, sewer or solid waste service.

**History: Laws 1993, ch. 206, § 4.**

## 27-6A-5. Department cooperation.

Subject to state and federal statutes and regulations governing the sharing of confidential information, the department shall cooperate with a participating utility in identifying those persons eligible for assistance pursuant to the Low Income Water, Sewer and Solid Waste Service Assistance Act.

**History: Laws 1993, ch. 206, § 5.**



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# ARTICLE 7

# Adult Protective Services

Sec.
27-7-1 to 27-7-13. Repealed.
27-7-14. Short title.
27-7-15. Legislative findings; purpose.
27-7-16. Definitions.
27-7-17. Adult protective services system.
27-7-18. Repealed.
27-7-19. Department; duties; penalty.
27-7-20. Repealed.
27-7-21. Nature of protective services; costs.
27-7-22. Repealed.
27-7-23. Voluntary protective services; protective placement; penalty.
27-7-24. Involuntary protective services and protective placement; penalty.
27-7-25. Ex-parte orders for emergency protective services or emergency protective placement; notice; petition.
27-7-25.1. Emergency protective placement by a law enforcement officer without a court order.
27-7-26. Nonemergency protective services or protective placement; findings; petition; order.
27-7-27. Hearing on petition.
27-7-28. Legal proceedings; filing.
27-7-29. Confidentiality of records; penalty.
27-7-30. Duty to report; penalty.
27-7-31. Immunity.

## 27-7-1 to 27-7-13. Repealed.

**Repeals.** — Laws 1989, ch. 389, § 20 repealed 27-7-1 through 27-7-13 NMSA 1978, as enacted by Laws 1982, ch. 36, §§ 1, 2, and 4 to 13, and as amended by Laws 1987, ch. 72, § 1, relating to adult protective services, effective June 16, 1989. For present comparable provisions, *see* 27-7-14 NMSA 1978 et seq.

## 27-7-14. Short title.

Sections 27-7-14 through 27-7-31 NMSA 1978 may be cited as the "Adult Protective Services Act".

**History: Laws 1989, ch. 389, § 1; 1990, ch. 79, § 1.**

**Cross references.** — For criminal records screening for caregivers employed by care providers, *see* 29-17-2 to 29-17-5 NMSA 1978.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 41 Am. Jur. 2d Incompetent Persons § 31 et seq.
57 C.J.S. Mental Health §§ 45 et seq., 108 et seq.

## 27-7-15. Legislative findings; purpose.

A. The legislature recognizes that many adults in the state are unable to manage their own affairs or protect themselves from abuse, neglect or exploitation. The legislature further recognizes that the state should protect adults by providing for the detection, correction and elimination of abuse, neglect or exploitation through a program of short-term services for adults in need of protective services or protective placement.

B. It is the purpose of the Adult Protective Services Act to establish a system of protective services and protective placement and to ensure the availability of those services or placement to all adults in need of them. It is also the purpose of the Adult Protective Services Act to authorize only the least possible restriction on the exercise of personal and civil rights and religious beliefs consistent with the adult's need for protective services or protective placement and to require that due process be followed in imposing those restrictions.

C. Nothing in the Adult Protective Services Act shall be construed to mean an adult, including an incapacitated adult or a protected adult, is abused, neglected, or exploited if the adult relies upon or is being furnished with spiritual treatment through prayer alone in accordance with the express or implied intent of the adult; nor shall anything in that act be construed to authorize or require any medical care or treatment in contravention of the express or implied wish of that adult.

**History: Laws 1989, ch. 389, § 2; 1997, ch. 132, § 1; 2007, ch. 91, § 1.**

**The 1997 amendment,** effective June 20, 1997, inserted "and religious beliefs" in Subsection B and added Subsection C.



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**The 2007 amendment,** effective July 2, 2007, recognizes that the state should protect adults by providing for the detection, correction and elimination of abuse, neglect or exploitation and for protective placement.

## 27-7-16. Definitions.

As used in the Adult Protective Services Act:

A. "ability to consent" means an adult's ability to understand and appreciate the nature and consequences of proposed protective services or protective placement, including benefits, risks and alternatives to the proposed services or placement and to make or communicate an informed decision;

B. "abuse" means:

(1) knowingly, intentionally or negligently and without justifiable cause inflicting physical pain, injury or mental anguish;

(2) the intentional deprivation by a caretaker or other person of services necessary to maintain the mental and physical health of an adult; or

(3) sexual abuse, including criminal sexual contact, incest and criminal sexual penetration;

C. "adult" means a person eighteen years of age or older;

D. "caretaker" means a facility, provider or individual that has assumed the responsibility for the care of an adult;

E. "conservator" means a person who is appointed by a court to manage the property or financial affairs, or both, of an incapacitated adult;

F. "court" means the district court having jurisdiction;

G. "department" means the aging and long-term services department;

H. "emergency" means that an adult is living in conditions that present a substantial risk of death or immediate and serious physical harm to the adult or others;

I. "exploitation" means an unjust or improper use of an adult's money or property for another person's profit or advantage, pecuniary or otherwise;

J. "facility" means a hospital, nursing home, residential care facility, group home, foster care home, assisted living facility or other facility licensed by the state, but does not include a jail, prison or detention facility;

K. "guardian" means a person who has qualified to provide for the care, custody or control of an incapacitated adult pursuant to testamentary or court appointment, but excludes one who is a guardian ad litem;

L. "incapacitated adult" means any adult with a mental, physical or developmental condition that substantially impairs the adult's ability to provide adequately for the adult's own care or protection;

M. "multidisciplinary team" means a team composed of diverse professionals who meet periodically to consult on or enhance appropriate community responses to abuse, neglect or exploitation of adults;

N. "neglect" means the failure of the caretaker of an adult to provide for the basic needs of the adult, such as clothing, food, shelter, supervision and care for the physical and mental health of that adult; "neglect" includes self-neglect;

O. "protected adult" means an adult for whom a guardian or conservator has been appointed or other protective order has been made or an abused, neglected or exploited adult who has consented to protective services or protective placement;

P. "protective placement" means the placement of an adult with a provider or in a facility or the transfer of an adult from one provider or facility to another;

Q. "protective services" means the services furnished by the department or its delegate, as described in Section 27-7-21 NMSA 1978;

R. "provider" means a private-residence or health care worker or an unlicensed residential or nonresidential entity that provides personal, custodial or health care;

S. "self-neglect" means an act or omission by an incapacitated adult that results in the deprivation of essential services or supports necessary to maintain the incapacitated adult's minimal mental, emotional or physical health and safety;



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T. "substantiated" means a determination, based on a preponderance of collected and assessed credible information, that abuse, neglect or exploitation of an incapacitated or protected adult has occurred; and

U. "surrogate" means a person legally authorized to act on an adult's behalf.

**History: Laws 1989, ch. 389, § 3; 1990, ch. 79, § 2; 1997, ch. 132, § 2; 2007, ch. 91, § 2.**

**The 2007 amendment,** effective July 2, 2007, revised the defined terms that are used in the Adult Protective Services Act; defined "abuse" to include sexual abuse; defined "caretaker" to include a facility and provider; defined "conservator" to mean a person appointed to manage property or affairs of an adult; defined "ability to consent", "facility", "multidisciplinary team", "provider", "self-neglect", "substantiated" and "surrogate".

**The 1997 amendment,** effective June 20, 1997, substituted the language beginning "property or financial" for "estate of a protected adult" in Subsection E; substituted "children, youth and families" for "human services" in Subsection G; substituted "money or property for another person's" for "resources for another's" in Subsection I; substituted the language beginning "has qualified" for "is a guardian of an incapacitated adult pursuant to a court order" in Subsection J; added Subsections K and L, and redesignated the remaining subsections accordingly; in Subsection M, substituted "affairs" for "care", substituted "estate or" for "personal property and", and added the language beginning "but does"; and added the language beginning "or an abused" in Subsection Q.

## 27-7-17. Adult protective services system.

A. Subject to the availability of funds, the department shall develop a coordinated system of protective services or protective placement for incapacitated or protected adults who have been abused, neglected or exploited. In planning this system, the department shall obtain the advice of agencies, corporations, boards and associations involved in the provision of social, health, legal, nutritional and other services to adults, as well as of organizations of adults.

B. The department shall ensure that the adult protective services system for incapacitated or protected adults who have been abused, neglected or exploited includes:

(1) a process for the collection and analysis of data relating to adult protective services or protective placement and for the provision of an annual findings and recommendations report to the governor and the appropriate interim committee;

(2) the establishment and use of multidisciplinary teams to develop treatment strategies, ensure maximum coordination with existing community resources and provide comprehensive assessment and case consultation on difficult or complex cases, provided that the adults' privacy and confidentiality rights in such cases are protected;

(3) coordination among the various state or local agencies that serve incapacitated or protected adults; and

(4) an emphasis on the need for prevention of abuse, neglect or exploitation of adults.

C. Upon establishment of the adult protective services system, the department shall be responsible for continuing coordination and supervision of the system. In carrying out these duties, the department shall:

(1) adopt rules necessary to implement and operate the system;

(2) monitor and evaluate the effectiveness of the system; and

(3) use to the extent available grants from federal, state and other public and private sources to support the system.

D. The department shall administer a public information program regarding the problem of abuse, neglect and exploitation of adults; reporting and prevention of adult abuse, neglect or exploitation; and the availability of treatment and protective services or protective placement for those adults.

**History: Laws 1989, ch. 389, § 4; 1997, ch. 132, § 3; 2007, ch. 91, § 3.**

**The 2007 amendment,** effective July 2, 2007, added a new Subsection B that required the department to develop a system of protective placement for adults who have been abused, neglected or exploited and to ensure that the protective services system includes information gathering, use of multidisciplinary teams to develop treatment and coordination of resource and agencies, and prevention of abuse, neglect and exploitation of adults.

**The 1997 amendment,** effective June 20, 1997, inserted "or protected" in the first sentence of Subsection A.



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## 27-7-18. Repealed.

**Repeals.** — Laws 2005, ch. 321, § 14 repealed 27-7-18 NMSA 1978, as enacted by Laws 1989, ch. 389, § 5, relating to creation of adult protective services advisory board, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

## 27-7-19. Department; duties; penalty.

A. The department shall:

(1) develop, maintain and update as needed a process to receive a report or referral of suspected abuse, neglect or exploitation of an adult;

(2) assess an adult and the adult's situation to determine what immediate protective services or protective placement may be required;

(3) conduct an investigation to determine if the report or referral of abuse, neglect or exploitation is substantiated;

(4) document evidence, observations and other information obtained in the course of an investigation;

(5) develop a plan to provide an adult with or refer an adult for protective services, protective placement or other intervention services, unless the department determines that the adult is knowingly and voluntarily refusing services; and

(6) ensure that the protective services or protective placement provided by or through the department is short term and has a termination date; provided that appropriate arrangements have been made for follow-up care if needed, including any long-term services for which the adult may qualify.

B. Upon request, the department, in accordance with federal or state laws that protect an adult's right to privacy and confidentiality, shall have immediate access to and may reproduce any record, including medical, personal, psychological and financial records, of the adult that the department determines is necessary to pursue an investigation mandated by this section or by the Resident Abuse and Neglect Act [30-47-1 NMSA 1978] if:

(1) the adult has the ability to consent and has given written consent;

(2) the adult is unable to consent in writing, and gives oral consent in the presence of a third party as a witness;

(3) the adult has a guardian, conservator or surrogate with the authority to approve review of the records and the department obtains the permission of the guardian, conservator or surrogate for review of the record;

(4) the adult is unable to give consent and:

(a) has no guardian, conservator or surrogate;

(b) the department is unaware of and has no reasonable grounds for believing that there is a guardian, conservator or surrogate; or

(c) the department is unable to contact the guardian, conservator or surrogate within three working days of the initiation of the investigation; or

(5) the department obtains from the district court an order granting access upon a showing that:

(a) consent is being withheld due to coercion, extortion or justifiable fear of future abuse, neglect, exploitation or abandonment of the adult; or

(b) there is reasonable cause to believe that the adult has been or is being abused, neglected or exploited and that after notice by the department of the alleged abuse, neglect or exploitation, the guardian, conservator or surrogate has refused to give consent.

C. Upon request by the department, the provider or a facility in which an adult is or has been residing shall provide to the department the name, address and telephone number of the guardian, conservator, surrogate, attorney-in-fact, legal representative or next of kin of the adult.

D. The department shall have immediate access to an adult, whether in a facility or provider setting, who is alleged to be abused, neglected or exploited to determine the accuracy of the report and the necessity of protective services or protective placement, to evaluate the adult's needs and develop a service plan to meet those needs and to provide for the services or placement by or



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through the department. If the department is denied access to the adult alleged to be abused, neglected or exploited, the department may gain access upon petition to the court for an order requiring appropriate access if the department can demonstrate that a facility, provider or individual has interfered with the department's attempts to access the adult under investigation.

E. Anyone willfully interfering with an investigation of adult abuse, neglect or exploitation, pursuant to this section, is guilty of a misdemeanor. Interference under this section shall not include efforts by a facility, provider or individual to establish whether there is reasonable cause to believe that there is adult abuse, neglect or exploitation, provided that the department is notified as soon as reasonable cause is established, whether or not the internal investigation has been concluded.

F. The department may assess a civil penalty not to exceed ten thousand dollars ($10,000) per violation against a facility, provider or individual who violates the provisions of Subsection B, C or D of this section. The department may assess and collect the penalty, after notice and an opportunity for hearing before a hearing officer designated by the department to hear the matter, upon a determination that a facility, provider or individual willfully interfered with the department or discriminated, disciplined or retaliated against a person who communicated or disclosed information to the department in good faith pursuant to this section. The hearing officer has the power to administer oaths on request of any party and issue subpoenas and subpoenas duces tecum. Additionally, if the violation is against a person covered by the Personnel Act [10-9-1 NMSA 1978], the department shall refer the matter to the agency employing the person for disciplinary action. Any party may appeal a final decision by the department to the court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

**History: Laws 1989, ch. 389, § 6; 1997, ch. 132, § 5; 2007, ch. 91, § 4.**

**The 2007 amendment,** effective July 2, 2007, required the department to develop a process to receive reports of and to investigate abuse, neglect and exploitation of adults, develop plans to provide protective services and placements, and ensure that protective services and placement is short term; provideds for access to records of an adult who is unable to consent and who has no guardian, conservator or surrogate or by application to the district court for an order granting access; and authorized the department, after a hearing, to assess a civil penalty not to exceed $10,000 against a facility, provider or individual who violates provisions of this section.

**The 1997 amendment,** effective June 20, 1997, in Subsection A, in the second sentence, inserted "abused, neglected or exploited and" and "adult is knowingly and voluntarily refusing services or that the", substituted "gather information from" for "consult with" and inserted "and recommendations" in the third sentence; and added Subsections D through G.

## 27-7-20. Repealed.

**Repeals.** — Laws 2007, ch. 91, § 14 repealed 27-7-20 NMSA 1978, as enacted by Laws 1989, ch. 389, § 7, relating to protective services agencies, effective July 2, 2007.

For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com*.

## 27-7-21. Nature of protective services; costs.

A. Protective services are short-term services furnished by the department or under arrangement through the department to an incapacitated or protected adult who has been abused, neglected or exploited and with the adult's consent or appropriate legal authority.

B. The protective services furnished in a protective services system may include social, psychiatric, health, legal and other services provided on a short-term basis that, if appropriate, transition to other ongoing or long-term services outside the protective services system and that detect, correct or eliminate abuse, neglect or exploitation consistent with the Adult Protective Services Act. The adult protective services system established by the department may include outreach, public information and education, prevention programs, referral for health or legal services and other activities consistent with the Adult Protective Services Act.

C. The costs of providing protective services shall be borne by the department or other appropriate agency, unless the adult agrees to pay for them or a court authorizes the provider or the department or other agency to receive reasonable reimbursement from the adult's assets after a finding that the adult is financially able to make payment. As appropriate and as permitted by



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law, the department may bill the adult or a third party to receive reasonable reimbursement for protective services rendered.

**History: Laws 1989, ch. 389, § 8; 1990, ch. 79, § 4; 1997, ch. 132, § 7; 2007, ch. 91, § 5.**

**The 2007 amendment,** effective July 2, 2007, provided that protective services are short-term services that detect, correct or eliminate abuse, neglect or exploitation and authorizes the department to bill the adult or a third party for reimbursement for protective services.

**The 1997 amendment,** effective June 20, 1997, deleted "but are not limited to" preceding "social case" in Subsection B; deleted "but is not limited to" preceding "outreach" in Subsection C; and inserted "or the department or other agency" in Subsection D.

## 27-7-22. Repealed.

**Repeals.** — Laws 2007, ch. 91, § 14 repealed 27-7-22 NMSA 1978, as enacted by Laws 1989, ch. 389, § 9, relating to protective placement evaluations, effective July 2, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com*.

## 27-7-23. Voluntary protective services; protective placement; penalty.

A. Any adult who has been abused, neglected or exploited and is in need of protective services or protective placement as determined by the department and who consents to those services or placement shall receive them. If the adult withdraws or refuses consent, voluntary protective services or protective placement shall not be provided. No legal rights are relinquished as a result of acceptance of voluntary protective services or protective placement.

B. A person who interferes with the provision of protective services or protective placement to an adult who consents to receive those services or placement is guilty of a misdemeanor. In the event that interference occurs, the department may petition the court to enjoin that interference, may impose a civil penalty or, at the department's discretion, may request criminal prosecution.

C. The department may assess a civil penalty not to exceed ten thousand dollars ($10,000) per violation against a person that violates the provisions of Subsection B of this section. The department may assess and collect the penalty after notice and an opportunity for hearing, before a hearing officer designated by the department to hear the matter, upon a determination that a person willfully interfered with the department pursuant to this subsection. The hearing officer has the power to administer oaths on request of any party and issue subpoenas and subpoenas duces tecum. Additionally, if the violation is against a person covered by the Personnel Act [10-9-1 NMSA 1978], the department shall refer the matter to the agency employing the person for disciplinary action. Any party may appeal a final decision by the department to the court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

**History: Laws 1989, ch. 389, § 10; 1997, ch. 132, § 8; 2007, ch. 91, § 6.**

**The 2007 amendment,** effective July 2, 2007, added a new Subsection C that authorized the department, after a hearing, to assess a civil penalty not to exceed $10,000 against a person who violates provisions of this section.

**The 1997 amendment,** effective June 20, 1997, added "Protective Placement" in the section heading; in Subsection A, inserted "or protective placement" in the first and second sentences, and added the third sentence; in Subsection B, in the first sentence, inserted "or protective placement" and added "or placement", and added the language beginning "or, at the" in the second sentence.

## 27-7-24. Involuntary protective services and protective placement; penalty.

A. If an adult lacks the ability to consent to receive protective services or protective placement, those services or placement may be ordered by a court on an involuntary basis through an emergency order pursuant to the Adult Protective Services Act or through appointment of a guardian or conservator.

B. In ordering involuntary protective services or protective placement, the court shall authorize only that intervention that it finds to be least restrictive of the adult's liberty and rights



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consistent with the adult's welfare and safety. The basis for such a finding shall be stated in the record by the court.

C. The incapacitated or protected adult shall not be required to pay for involuntary protective services or protective placement unless that payment is authorized by the court upon a showing that the adult is financially able to pay. In this event, the court shall provide for reimbursement of the reasonable costs of the services or placement.

D. A person who interferes with the provision of involuntary protective services or protective placement to an adult is guilty of a misdemeanor. In the event that interference occurs, the department may petition the court to enjoin interference, may impose a civil penalty or, at the department's discretion, may request criminal prosecution.

E. The Adult Protective Services Act does not affect other state statutes governing treatment of an adult admitted to a mental health care institution for mental illness or involuntary commitment of an adult to a mental health care institution for mental illness or any other involuntary mental health treatment.

F. The department may petition the court for the appointment of a guardian or conservator if the department determines that a no less restrictive course of care or treatment is available that is consistent with the incapacitated adult's welfare and safety.

G. The department and its employees are prohibited from:

(1) taking custody of an adult;

(2) acting as guardian, conservator or surrogate for any adult in need of protective services or protective placement, except that an employee may serve in that role when related by affinity or consanguinity to an adult;

(3) acting as treatment guardian under the Mental Health and Developmental Disabilities Code [43-1-2 NMSA 1978], except that an employee may serve in that role when related by affinity or consanguinity to an adult;

(4) acting as qualified health care professionals pursuant to the Uniform Probate Code [45-1-101 NMSA 1978]; and

(5) acting as visitors under the Uniform Probate Code for any adult in need of protective services or protective placement.

H. The department may assess a civil penalty not to exceed ten thousand dollars ($10,000) per violation against a person that violates the provisions of Subsection D of this section. The department may assess and collect the penalty after notice and an opportunity for hearing, before a hearing officer designated by the department to hear the matter, upon a determination that a person willfully interfered with the department pursuant to this section. The hearing officer has the power to administer oaths on request of any party and issue subpoenas and subpoenas duces tecum. Additionally, if the violation is against a person covered by the Personnel Act [10-9-1 NMSA 1978], the department shall refer the matter to the agency employing the person for disciplinary action. Any party may appeal a final decision by the department to the court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

**History: Laws 1989, ch. 389, § 11; 1997, ch. 132, § 9; 2007, ch. 91, § 7.**

**The 2007 amendment,** effective July 2, 2007, added new Subsections E, F, G and H; provided that the Adult Protective Services Act does not affect other statutes concerning treatment of adults in mental health care institutions; authorized the department to petition a district court for appointment of a guardian or conservator; prohibited the department and its employees from taking custody of an adult, acting as guardian, conservator or surrogate, acting as treatment guardian or acting as qualified health care professional or visitor under the Uniform Probate Code; and authorized the department, after a hearing, to assess a civil penalty not to exceed $10,000 against a person who violates provisions of this section.

**The 1997 amendment,** effective June 20, 1997, added "or conservator" in Subsection A and added Subsection D.

## 27-7-25. Ex-parte orders for emergency protective services or emergency protective placement; notice; petition.

A. Upon petition by the department, the court may issue an order authorizing the provision of involuntary protective services or protective placement on an emergency basis to an adult under the criteria set forth in Subsection B of this section.



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B. At the time a petition is filed or any time thereafter, the court may issue an ex-parte order authorizing the provision of involuntary protective services or involuntary protective placement upon a sworn written statement of facts showing probable cause exists to believe that:

(1) the adult is incapacitated;

(2) an emergency exists;

(3) the adult lacks the ability to consent to receive protective services or protective placement; and

(4) no person authorized by law or court order to give consent for the adult is available or willing to consent to the provision of protective services or protective placement on an emergency basis.

C. The petition for an emergency ex-parte order shall set forth:

(1) the name, address and interest of the petitioner;

(2) the name, age and address of the adult in need of protective services;

(3) the facts describing the nature of the emergency;

(4) the facts describing the nature of the adult's incapacity;

(5) the proposed protective services or protective placement;

(6) the petitioner's reasonable belief, together with supporting facts, about the need for emergency intervention; and

(7) the facts showing the petitioner's attempts to obtain the adult's consent to the proposed protective services or protective placement and the outcome of those attempts.

D. An affidavit for an ex-parte order for emergency protective services or emergency protective placement may be signed by any person who has knowledge of the facts alleged or is informed of them and believes that they are true.

E. The Rules of Evidence do not apply to the issuance of an emergency ex-parte protective services or protective placement order.

F. In issuing an emergency ex-parte order, the court shall adhere to the following limitations:

(1) only the protective services or protective placement necessary to remove the conditions creating the emergency shall be ordered, and the order shall specifically designate the proposed protective services or protective placement;

(2) protective services or protective placement authorized by an emergency ex-parte order shall not include hospitalization or a change of residence, unless the order gives specific approval for the action;

(3) protective services or protective placement may be provided by emergency ex-parte order only for ten days; provided that the original order may be renewed once for a period of twenty additional days upon application to the court showing that continuation of the original order is necessary to remove the conditions creating the emergency. An application for renewal of the original order shall be supported by a written report of the results of the evaluation required by Subsection C of Section 27-7-27 NMSA 1978 and copies of the actual evaluations;

(4) the issuance of an emergency ex-parte order shall not deprive the adult of any rights except those provided for in the order;

(5) to implement an emergency ex-parte order, the court may authorize forcible entry of premises for the purposes of rendering protective services or protective placement or transporting the adult to another location for the provision of services or placement only if facts contained in the affidavit supporting the petition for ex-parte order show that attempts to gain voluntary access to the premises have failed and forcible entry is necessary; provided that persons making an authorized forcible entry shall be accompanied by a law enforcement officer; and

(6) service of an ex-parte order authorizing forcible entry shall be according to the following procedure. The order shall be served on the alleged incapacitated adult by a person authorized to serve arrest warrants and shall direct the officer to advise the adult of the nature of the protective services or protective placement that have been ordered by the court. If the order authorizes emergency protective placement, the order shall direct the officer to assist in transfer of the adult to a place designated by the court.

G. Notice of the filing of the petition and the issuance of the emergency ex-parte order, including a copy of the petition, the ex-parte order and the affidavit for ex-parte order, shall be given to the adult and the adult's spouse or, if none, the adult children or next of kin, surrogate or guardian,



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if any. The notice shall be given, in language reasonably understandable by its intended recipients, within twenty-four hours, excluding Saturdays, Sundays and legal holidays, from the time that the ex-parte order authorizing protective services or protective placement is issued by the court or, if the ex-parte order authorizes forcible entry, from the time the ex-parte order is served upon the incapacitated adult. The notice shall inform the recipients that a hearing will be held no later than ten days after the date the petition is filed to determine whether the conditions creating the emergency have been removed and whether the adult should be released from the court's order for protective services or protective placement.

H. Within ten days from the filing of a petition for an emergency order for protective services or protective placement, the court shall hold a hearing upon any application for renewal of the emergency order. The hearing upon an application for renewal shall be held pursuant to the provisions of Section 27-7-27 NMSA 1978.

I. The protected adult or any interested person may petition the court to have the emergency order set aside or modified at any time, notwithstanding any prior findings by the court that the adult is incapacitated.

J. If the adult continues to need protective services or protective placement after the renewal order provided in Paragraph (3) of Subsection F of this section has expired, the department or original petitioner shall immediately petition the court to appoint a conservator or guardian or to order nonemergency protective services or protective placement pursuant to Section 27-7-26 NMSA 1978.

K. The petitioner shall not be liable for filing the petition if the petitioner acted in good faith.

**History: 1978 Comp., § 27-7-25, enacted by Laws 1990, ch. 79, § 6; 1997, ch. 132, § 10; 2007, ch. 91, § 8.**

**Repeals and reenactments.** — Laws 1990, ch. 79, § 6 repealed former 27-7-25 NMSA 1978, as enacted by Laws 1989, ch. 389, § 12, effective March 2, 1989.

**Cross references.** — For Rules of Evidence, *see* Rule 11-101 NMRA et seq.

For applicability of the Rules of Evidence, *see* 1-1101 NMRA and the compiler's annotations following 11-1101 NMRA.

For motion for ex-parte custody order, *see* 10-450 NMRA.

For affidavit for ex-parte custody order, *see* 10-451 NMRA.

**The 2007 amendment,** effective July 2, 2007, prescribed the content of a petition for an emergency ex-parte order.

**The 1997 amendment,** effective June 20, 1997, in Paragraph E(5), added Subparagraph (a), designated the former provisions as Subparagraph (b), and added Subparagraphs (c) through (e).

## 27-7-25.1. Emergency protective placement by a law enforcement officer without a court order.

A. When, from personal observation of a law enforcement officer, it appears probable that an incapacitated adult will suffer immediate and irreparable physical injury or death if not immediately placed in a facility, that the adult is unable to give consent and that it is not possible due to the emergency nature of the circumstances to follow the procedures of Section 27-7-25 NMSA 1978, the law enforcement officer making that observation may transport the adult to a facility. No court order is required to authorize the law enforcement officer to act upon the officer's observation pursuant to this section.

B. A law enforcement officer who transports an incapacitated adult to a facility pursuant to the provisions of this section shall immediately notify the department of the placement.

C. The department shall file a petition pursuant to Subsection A of Section 27-7-25 NMSA 1978 within two working days after the placement of the adult by the law enforcement officer has occurred unless the department determines that the criteria for emergency removal and placement have not been met or that there is no further need for involuntary protective services or protective placement.

D. Upon receipt of notice from a law enforcement officer that an adult has been placed in a facility pursuant to the authority of this section, the department shall give notice pursuant to Subsection G of Section 27-7-25 NMSA 1978 within two working days after the placement of the adult has taken place.

E. The court shall hold a hearing on the petition filed by the department as a result of the law enforcement officer's emergency placement within ten days of the filing of the petition, pursuant



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to the provisions of Section 27-7-27 NMSA 1978, to determine whether the conditions creating the need for the emergency placement have been removed and whether the adult should be released from the protective placement.

**History: 1978 Comp., § 27-7-25.1, enacted by Laws 1990, ch. 79, § 7; 1997, ch. 132, § 11; 2007, ch. 91, § 9.**

**The 2007 amendment,** effective July 2, 2007, provided for emergency protective placement.

**The 1997 amendment,** effective June 20, 1997, added the language beginning "unless the department" in Subsection C.

## 27-7-26. Nonemergency protective services or protective placement; findings; petition; order.

A. Involuntary nonemergency protective services or protective placement shall not take place unless ordered by a court after a finding on the record based on clear and convincing evidence that:

(1) the adult is incapacitated and lacks the ability to consent;

(2) the adult is incapable of providing for the adult's own care or custody and the adult is at significant risk of abuse, neglect or exploitation that creates a substantial risk of serious physical harm to the adult or others;

(3) the adult needs care or treatment;

(4) the proposed order is substantially supported by the evaluation provided for in Subsection E of this section or, if not so supported, there are compelling reasons for ordering those protective services or that protective placement; and

(5) no less restrictive alternative course of care or treatment is available that is consistent with the incapacitated adult's welfare and safety.

B. The petition for nonemergency protective services or protective placement shall state with particularity the factual basis for the allegations specified in Subsection A of this section and shall be based on the most reliable information available to the petitioner.

C. Written notice of a petition for nonemergency protective services or protective placement shall be served upon the adult by personal service at least fourteen days prior to the time set for a hearing. Notice shall also be given to the adult's legal counsel, caretaker, guardian, conservator, surrogate, spouse and adult children or next of kin, whose names and addresses are known to the petitioner or can with reasonable diligence be ascertained. The person serving the notice shall certify to the court that the petition has been delivered and how the required notice was given. The notice shall be in language reasonably understandable by the adult who is the subject of the petition and also shall be given orally if necessary. The notice shall include:

(1) the names of all petitioners;

(2) the factual basis of the belief that protective services or protective placement is needed;

(3) the rights of the adult in the court proceedings; and

(4) the name and address of the proposed protective services or protective placement.

D. Upon the filing of a petition for nonemergency protective services or protective placement, the court shall hold a hearing pursuant to the provisions of Section 27-7-27 NMSA 1978.

E. In order to make the findings required in Paragraphs (2) through (5) of Subsection A of this section, the court shall direct that a comprehensive evaluation of the adult alleged to be in need of protective services or protective placement be conducted as provided in Subsection C of Section 27-7-27 NMSA 1978.

F. In ordering nonemergency protective placement, the court shall give consideration to the choice of residence of the adult. The court may order protective placement in a facility or with a provider.

G. The court may authorize nonemergency protective services or protective placement for an adult for a period not to exceed six months.

H. At the time of expiration of an order for nonemergency protective services or protective placement, the original petitioner may petition the court to extend its order for protective services or protective placement for an additional period not to exceed six months. The contents of the petition shall conform to the provisions of Subsections A and B of this section. Notice of the petition for the extension of protective services or protective placement shall be made in conformity with



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Subsection C of this section. The court shall hold a hearing to determine whether to renew the order. Any person entitled to a notice under Subsection C of this section may appear at the hearing and challenge the petition. The court shall conduct the hearing pursuant to the provisions of Section 27-7-27 NMSA 1978.

I. The services provided to or the residence of an adult that had been established pursuant to an order for nonemergency protective services or protective placement shall not be changed unless the court authorizes the change of services or transfer of residence. The adult or the adult's legal representative may petition the court to order such a change of services or transfer of residence.

J. Prior to the expiration of the nonemergency protective services or protective placement, the department shall review the need for continued services or placement, including the necessity for appointment of a conservator or guardian, and shall make such recommendation to the court.

**History: Laws 1989, ch. 389, § 13; 1990, ch. 79, § 8; 1997, ch. 132, § 12; 2007, ch. 91, § 10.**

**The 2007 amendment,** effective July 2, 2007, provided for nonemergency protective services and permits an adult or the adult's legal representative to petition the district court to order a change of services or transfer of residence.

**The 1997 amendment,** effective June 20, 1997, inserted "or protective services" throughout the section; in the introductory language of Subsection A, substituted "is unable" for "refuses" and inserted "or services"; deleted former Subsection B, which read: "The department, a protective services agency, a conservator, a guardian or any interested person may petition the court for nonemergency protective placement" and redesignated the remaining subsections and references thereto accordingly; in Subsection C, substituted "fourteen" for "ten" in the first sentence, substituted "care providers, guardian, spouse and adult children or next of kin" for "and persons having physical custody of the adult" in the second sentence, and added "or services" in Paragraph (4); in Subsection H, in the first sentence, deleted "the guardian" preceding "the original" and deleted "or any interested person" following "petitioner" and inserted "or services" in the second sentence; in Subsection I, inserted "or services provided to" and substituted "or change of services" for "after finding compelling reasons to justify the transfer"; in Subsection J, added the language beginning "and shall make" and deleted the former second sentence, relating to the making of the report to all persons notified of the original petition; and deleted former Subsection L, which read: "Any adult may request non-emergency protective placement under the Adult Protective Services Act. No legal rights are relinquished or modified as a result of that placement."

## 27-7-27. Hearing on petition.

A. The hearing on a petition for renewal of an emergency ex-parte order for protective services or protective placement or for an order for nonemergency protective services or protective placement shall be held under the following conditions:

(1) the adult shall be present unless the court determines it is impossible for the adult to be present or it is not in the adult's best interest because of a threat to that adult's health and safety;

(2) the adult has the right to counsel whether or not the adult is present at the hearing. If the adult is indigent, the court shall appoint counsel no later than the time of the filing of the petition;

(3) counsel appointed by the court pursuant to Paragraph (2) of this subsection shall interview the allegedly incapacitated adult prior to any hearing on the petition or any application for renewal of the original emergency order;

(4) the adult shall have the right to trial by jury upon request by the adult or the adult's counsel only in hearings held on petitions for nonemergency protective services or protective placement; and

(5) the adult has the right at the adult's own expense or, if indigent, at the expense of the state to secure an independent medical, psychological or psychiatric examination relevant to the issue involved in any hearing under this section and to present a report of this independent evaluation or the evaluator's personal testimony as evidence at the hearing.

B. The duty of counsel representing an adult for whom a petition for an order for emergency protective services or for nonemergency protective services or protective placement has been filed shall be to represent the adult by protecting the adult's legal rights and presenting the adult's declared position to the court.

C. The department shall establish an evaluation or assessment process for the conduct of a comprehensive physical, mental and social evaluation of an adult for whom a petition has been filed in a court for an order for nonemergency protective services or protective placement or for



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whom an application for renewal of an original emergency order has been made. The court shall consider the department's evaluation or assessment in determining whether to issue an order or renewal of an order for nonemergency protective services or protective placement.

D. The court shall issue for the record a statement of its findings in support of any order for renewal of emergency protective services or for nonemergency protective services or protective placement.

**History: Laws 1989, ch. 389, § 14; 1990, ch. 79, § 9; 1997, ch. 132, § 13; 2007, ch. 91, § 11.**

**The 2007 amendment,** effective July 2, 2007, provided in Subsection C for hearings on the renewal of an emergency ex-parte order for protective placement and nonemergency protective services and required the department to establish an evaluation process for physical, mental and social evaluations of adults for whom a petition has been filed in a court for nonemergency protective services and placement or for renewal of an emergency order.

**The 1997 amendment,** effective June 20, 1997, inserted "or services" throughout the section.

## 27-7-28. Legal proceedings; filing.

For all legal proceedings called for in the Adult Protective Services Act, attorneys for the department or the district attorney's office shall file all proceedings on behalf of the petitioner.

**History: Laws 1989, ch. 389, § 15.**

## 27-7-29. Confidentiality of records; penalty.

A. All records of the department, the department's designee, including a multidisciplinary team, the court and state and local agencies that are created or maintained pursuant to investigations under the Adult Protective Services Act or for whom application has ever been made for protection shall be confidential and shall not be disclosed directly or indirectly to the public.

B. The records described in Subsection A of this section shall be open to inspection only by persons with a legitimate interest in the records as follows:

(1) the alleged abused, neglected or exploited adult, or the adult's surrogate, except as to the identity of the referral source and second source information, such as medical or psychological evaluations;

(2) court personnel;

(3) law enforcement officials;

(4) department personnel;

(5) any state government social services agency in any other state;

(6) health care or mental health professionals involved in the evaluation, treatment, residential care or protection of the adult;

(7) parties and their counsel in all legal proceedings pursuant to the Adult Protective Services Act or legal actions pursuant to the Uniform Probate Code [45-1-101 NMSA 1978];

(8) persons who have been, or will be in the immediate future, providing care or services to the adult, except the alleged perpetrator of the abuse, neglect or exploitation;

(9) persons appointed by the court pursuant to the Uniform Probate Code to be the adult's guardian ad litem, guardian, conservator, visitor or qualified health care professional;

(10) any of the persons whom the department petitions the court appoint pursuant to the Uniform Probate Code;

(11) any other person or entity, by order of the court, having a legitimate interest in the case or the work of the court; and

(12) protection and advocacy representatives pursuant to the federal Developmental Disabilities Assistance and Bill of Rights Act, Protection and Advocacy for Individuals with Mental Illness Act or the protection and advocacy of individual rights provisions of the Rehabilitation Act.

C. Records of cases involving substantiated abuse, neglect or exploitation shall be provided as appropriate to the department of health, the district attorney's office, the medicaid fraud control



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unit in New Mexico, the office of the attorney general and the office of the long-term care ombudsman for appropriate additional action.

D. Any person who intentionally, unlawfully releases any information or records closed to the public pursuant to this section or releases or makes other unlawful use of records in violation of this section is guilty of a misdemeanor.

E. The department may assess a civil penalty not to exceed ten thousand dollars ($10,000) per violation against any person that intentionally, unlawfully releases any information or records closed to the public pursuant to this section or releases or makes other unlawful use of records. The department may assess and collect the penalty, after notice and an opportunity for hearing before a hearing officer designated by the department to hear the matter, upon a determination that a person violated the provisions of this subsection. The hearing officer has the power to administer oaths on request of any party and issue subpoenas and subpoenas duces tecum. Additionally, if the violation is against a person covered by the Personnel Act [10-9-1 NMSA 1978], the department shall refer the matter to the agency employing the person for disciplinary action. Any party may appeal a final decision by the department to the court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

**History: Laws 1989, ch. 389, § 16; 1997, ch. 132, § 14; 2007, ch. 91, § 12.**

**Cross references.** — For the federal Developmental Disabilities Assistance and Bill of Rights Act, *see* 42 U.S.C.S. § 6000 et seq.

For the federal Protection and Advocacy for Mentally Ill Individuals Act, *see* 42 U.S.C.S. § 10801 et seq.

**The 2007 amendment,** effective July 2, 2007, provided that records of the department's designee, including a multidisciplinary team, are confidential and provided that an adult's record may inspected by the adult's surrogate and protection and advocacy representatives pursuant to the protection and advocacy of individual rights provisions of the Rehabilitation Act; and authorized the department in new Subsection E, after a hearing, to assess a civil penalty of not to exceed $10,000 against a person who violates provisions of this section.

**The 1997 amendment,** effective June 20, 1997, substituted "the court, state and local agencies and protective services agencies that are created or maintained pursuant to investigations" for "that are protected" in Subsection A; rewrote Subsection B; substituted "department of health, the district attorney's office" for "health and environment department" in Subsection C; and deleted "petty" preceding "misdemeanor" in Subsection D.

## 27-7-30. Duty to report; penalty.

A. Any person, including financial institutions, having reasonable cause to believe that an incapacitated adult is being abused, neglected or exploited shall immediately report that information to the department.

B. The report required in Subsection A of this section may be made orally or in writing. The report shall include the name, age and address of the adult, the name and address of any other person responsible for the adult's care, the nature and extent of the adult's condition, the basis of the reporter's knowledge and other relevant information.

C. Any person failing or refusing to report, or obstructing or impeding any investigation, as required by Subsection A of this section is guilty of a misdemeanor.

D. The department may assess a civil penalty not to exceed ten thousand dollars ($10,000) per violation against a person that violates the provisions of Subsection A of this section or obstructs or impedes any investigation as required pursuant to Subsection A of this section. The department may assess and collect the penalty, after notice and an opportunity for hearing before a hearing officer designated by the department to hear the matter, upon a determination that a person violated the provisions of Subsection A of this section or obstructed or impeded any investigation as required pursuant to this section. The hearing officer has the power to administer oaths on request of any party and issue subpoenas and subpoenas duces tecum. Additionally, if the violation is against a person covered by the Personnel Act [10-9-1 NMSA 1978], the department shall refer the matter to the agency employing the person for disciplinary action. Any party may appeal a final decision by the department to the court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

**History: Laws 1989, ch. 389, § 17; 1990, ch. 79, § 10; 1997, ch. 132, § 15; 2007, ch. 91, § 13.**

**The 2007 amendment,** effective July 2, 2007, included financial institutions as a "person" and authorized the department in new Subsection D, after a hearing, to assess



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a civil penalty of not to exceed $10,000 against a person who violates provisions of this section.

**The 1997 amendment,** effective June 20, 1997, in Subsection A, inserted "incapacitated" and "immediately", and deleted "or other appropriate agency" following "department"; and inserted "or obstructing or impending any investigation" in Subsection C.

## 27-7-31. Immunity.

Any person making a report pursuant to Section 27-7-30 NMSA 1978, testifying in any judicial proceeding arising from the report or participating in a required evaluation pursuant to the Adult Protective Services Act or any law enforcement officer carrying out his responsibilities under that act or any person providing records or information as required under that act shall be immune from civil or criminal liability on account of that report, testimony or participation, unless the person acted in bad faith or with a malicious purpose.

**History: Laws 1989, ch. 389, § 18; 1997, ch. 132, § 16.**

**The 1997 amendment,** effective June 20, 1997, substituted "Section 27-7-30 NMSA 1978" for "Section 17 of the Adult Protective Services Act", substituted "the Adult Protective Services" for "that", and inserted "or any person providing records or information as required under that act".

# ARTICLE 7A

# Employee Abuse Registry Act

Sec.
27-7A-1. Short title.
27-7A-2. Definitions.
27-7A-3. Employee abuse registry.
27-7A-4. Investigation and substantiation of abuse, neglect or exploitation by the department.
27-7A-5. Adult protective services division report of abuse, neglect or exploitation.
27-7A-6. Placement on registry and hearing process.
27-7A-7. Adoption of rules.
27-7A-8. Penalties.

## 27-7A-1. Short title.

This act [27-7A-1 to 27-7A-8 NMSA 1978] may be cited as the "Employee Abuse Registry Act".

**History: Laws 2005, ch. 256, § 1.**

**Effective dates.** — Laws 2005, ch. 256 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

## 27-7A-2. Definitions.

As used in the Employee Abuse Registry Act:

A. "abuse" means:

(1) knowingly, intentionally or negligently and without justifiable cause inflicting physical pain, injury or mental anguish; or

(2) the intentional deprivation by a caretaker or other person of services necessary to maintain the mental and physical health of a person;

B. "department" means the department of health;

C. "direct care" means face-to-face services provided or routine and unsupervised physical or financial access to a recipient of services;

D. "employee" means a person employed by or on contract with a provider, either directly or through a third party arrangement to provide direct care. "Employee" does not include a New Mexico licensed health care professional practicing within the scope of the profession's license or a certified nurse aide;

E. "exploitation" means an unjust or improper use of a person's money or property for another person's profit or advantage, pecuniary or otherwise;

F. "neglect" means, subject to a person's right to refuse treatment and subject to a provider's right to exercise sound medical discretion, the failure of an employee to provide basic needs such



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as clothing, food, shelter, supervision and care for the physical and mental health of a person or failure by a person that may cause physical or psychological harm;

G. "provider" means an intermediate care facility for the mentally retarded; a rehabilitation facility; a home health agency; a homemaker agency; a home for the aged or disabled; a group home; an adult foster care home; a case management entity that provides services to elderly people or people with developmental disabilities; a corporate guardian; a private residence that provides personal care, adult residential care or natural and surrogate family services provided to persons with developmental disabilities; an adult daycare center; a boarding home; an adult residential care home; a residential service or habilitation service authorized to be reimbursed by medicaid; any licensed or medicaid-certified entity or any program funded by the aging and long-term services department that provides respite, companion or personal care services; programs funded by the children, youth and families department that provide homemaker or adult daycare services; and any other individual, agency or organization that provides respite care or delivers home- and community-based services to adults or children with developmental disabilities or physical disabilities or to the elderly, but excluding a managed care organization unless the employees of the managed care organization provide respite care, deliver home- and community-based services to adults or children with developmental disabilities or physical disabilities or to the elderly;

H. "registry" means an electronic database that provides information on substantiated employee abuse, neglect or exploitation; and

I. "secretary" means the secretary of health.

**History: Laws 2005, ch. 256, § 2.**

**Cross reference.** — For the department of health, *see* Sections 9-7-1 through 9-7-17 NMSA 1978.

For the secretary of health, *see* Section 9-7-5 NMSA 1978.

**Effective dates.** — Laws 2005, ch. 256 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

## 27-7A-3. Employee abuse registry.

A. The department shall establish an "employee abuse registry" of employees and enter into the registry names of employees with substantiated abuse, neglect or exploitation charges as determined by the department pursuant to the Employee Abuse Registry Act.

B. Before a provider hires or contracts with an employee, the provider shall inquire of the department's registry as to whether the employee is included in the registry.

C. When the department's registry receives an inquiry, the department shall inform the provider whether an employee is included in the employee abuse registry.

D. Providers that hire employees shall document that they have checked the abuse registry for each applicant being considered for employment or contract.

E. A provider shall not hire or contract with an employee in a direct care setting who is included in the employee abuse registry.

F. The department or other governmental agency may, at its discretion, terminate or not enter into or renew a contract with a provider that fails to comply with the provisions of Subsection E of this section.

G. A provider, including its administrators and employees, is not civilly liable to an applicant or an employee for a good faith decision to employ, not employ or terminate employment pursuant to the Employee Abuse Registry Act.

H. After a period of three years, an employee placed on the employee abuse registry may petition the department for removal of the employee's name from the employee abuse registry. Petitions for removal shall be in writing and mailed or hand delivered to the department. Within thirty days of the department's receipt of a petition, the secretary shall issue a written decision on the petition and provide that decision to the employee in person or by certified mail. If the secretary denies the petition, the employee may, within ten days of receipt of that decision, request a hearing. If an employee requests a hearing, that hearing shall be conducted by an independent hearing officer. An employee aggrieved by the final decision following a hearing shall have the right to judicial review pursuant to the provisions of Section 39-3-1.1 NMSA 1978.



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**History: Laws 2005, ch. 256, § 3.**
**Effective dates.** — Laws 2005, ch. 256 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

## 27-7A-4. Investigation and substantiation of abuse, neglect or exploitation by the department.

A. In addition to other actions required by law, the department shall review all reports of abuse, neglect or exploitation against employees of providers that are licensed by or under contract with the department and shall investigate such reports as necessary to determine whether there is a reasonable basis to believe that an employee committed abuse, neglect or exploitation.

B. If the department determines that abuse, neglect or exploitation has occurred, the department shall notify the employee and the provider of that determination, and such determination shall include a determination of whether the abuse, neglect or exploitation was the result of conduct by the employee, the provider or both.

**History: Laws 2005, ch. 256, § 4.**
**Effective dates.** — Laws 2005, ch. 256 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

## 27-7A-5. Adult protective services division report of abuse, neglect or exploitation.

A. The adult protective services division of the aging and long-term services department shall investigate allegations of abuse, neglect and exploitation consistent with its statutory responsibilities.

B. If the adult protective services division determines that abuse, neglect or exploitation has occurred, it shall notify the employee and the provider of that determination, and such determination shall include a determination of whether the abuse, neglect or exploitation was the result of conduct by the employee, the provider or both.

C. The adult protective services division shall report to the department of health any substantiated finding of abuse, neglect or exploitation made against an employee of a provider under waiver or other programs administered by the aging and long-term services department and not otherwise licensed by or under contract with the department.

**History: Laws 2005, ch. 256, § 5.**
**Cross reference.** — For the adult protective services division of the aging and long-term services department, *see* Sections 9-23-1 through 9-23-12 NMSA 1978.
**Effective dates.** — Laws 2005, ch. 256 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

## 27-7A-6. Placement on registry and hearing process.

A. If the department or the adult protective services division of the aging and long-term services department determines that abuse, neglect or exploitation by an employee has occurred, the department making that determination shall notify the employee and the provider, in person or by certified mail, of the following:

(1) the nature of the determination of the abuse, neglect or exploitation;

(2) the date and time of the occurrence;

(3) the employee's right to a hearing;

(4) the department's intent to report the substantiated findings, once the employee has had the opportunity for a hearing, to the registry; and

(5) that the employee's failure to request a hearing in writing within thirty days from the date of the notice shall result in the department reporting substantiated findings to the registry and the provider.



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B. If an employee requests a hearing, that hearing shall be conducted by an independent hearing officer of the department that made the determination of abuse, neglect or exploitation.

C. After expiration of the time period for requesting a hearing, or if a determination of abuse, neglect or exploitation is substantiated through the hearing process, the substantiated finding of abuse, neglect or exploitation shall be placed on the registry through a report of the appropriate department.

D. An employee aggrieved by the final decision following a hearing shall have the right to judicial review pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

**History: Laws 2005, ch. 256, § 6.**

**Cross reference.** — For the adult protective services division of the aging and long-term services department, *see* Sections 9-23-1 through 9-23-12 NMSA 1978.

**Effective dates.** — Laws 2005, ch. 256 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

**ANNOTATIONS**

**No denial of procedural due process.** — Where plaintiff, who was a certified nurse aide, was terminated by a health care facility for abusing residents of the facility; the department of health notified plaintiff that it had found the allegation to be valid; a hearing officer found that plaintiff had abused residents of the facility; the secretary of the department reviewed the hearing officers' report and ordered that plaintiff's name be placed on the nurse registry, effectively ending plaintiff's ability to find employment as a certified nurse aide; the department's regulations applicable to employees required a determination of the severity of abuse for purposes of deciding if an employee was to be placed on the registry; the regulations applicable to nurse aides did not require a determination of the severity of abuse and defined "abuse" to include conduct likely to cause harm to residents; and plaintiff claimed that plaintiff had been denied procedural due process because the regulations did not provide for an assessment of the severity of the alleged abuse or the impact of the abuse on the residents which created a risk of erroneous deprivation of plaintiff's property interest in continuing employment as a nurse aide, the regulations did not deprive plaintiff of procedural due process because the definition of "abuse" was sufficiently specific to put plaintiff on notice of the conduct that constituted abuse and plaintiff's conduct underwent three stages of review before the finding of abuse was placed on the registry. *Victor v. N.M. Dep't of Health*, 2014-NMCA-012.

## 27-7A-7. Adoption of rules.

By January 1, 2006, the department of health and the aging and long-term services department shall jointly establish and adopt rules necessary to carry out the provisions of the Employee Abuse Registry Act, including procedures for determining abuse, neglect and exploitation that consider the severity of the alleged abuse, neglect and exploitation and procedures for reporting for the administrative hearing process and for sanctions for failure to comply with the Employee Abuse Registry Act.

**History: Laws 2005, ch. 256, § 7.**

**Cross reference.** — For the department of health, *see* Sections 9-7-1 through 9-7-17 NMSA 1978. For the secretary of health, *see* Section 9-7-5 NMSA 1978.

**Effective dates.** — Laws 2005, ch. 256 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

## 27-7A-8. Penalties.

The department shall administer sanctions for a provider's failure to comply with the Employee Abuse Registry Act, including a directed plan of correction or civil monetary penalty not to exceed five thousand dollars ($5,000) per instance.

**History: Laws 2005, ch. 256, § 8.**

**Effective dates.** — Laws 2005, ch. 256 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

# ARTICLE 8

# Community Action

Sec.
27-8-1. Short title.
27-8-2. Policy; purpose.
27-8-3. Definitions.
27-8-4. Financial assistance for community action agencies.
27-8-5. Community action agencies; designation; powers.
27-8-6. Community action agencies; board; local participation.
27-8-7. Community action programs.
27-8-8. Regulations.
27-8-9. Financial assistance; limitations.



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## 27-8-1. Short title.

This act [27-8-1 to 27-8-9 NMSA 1978] may be cited as the "Community Action Act".

**History: Laws 1983, ch. 139, § 1.**

**ANNOTATIONS**

**Legislator contracting with agency must ascertain how agency organized.** — A legislator contracting with a community action agency will have to ascertain how the agency is organized to determine whether the prohibitions of N.M. Const., art. IV, § 28 will apply. If it is a county, county agency or a private agency, the contract will not be covered by the provision, but if it is a municipality or municipal agency, the contract will be prohibited if it was authorized by law during the legislator's term. 1989 Op. Att'y Gen. No. 89-34.

## 27-8-2. Policy; purpose.

Although in recent years New Mexico has shown improvement in indices such as personal income and the number of families below the poverty level, the state continues to compare poorly with other states. New Mexico has risen from 48th in 1974 to 41st in per capita personal income; however, poverty continues to be the lot of a substantial number of New Mexicans. New Mexico can achieve its full economic and social potential only if every individual has the opportunity to contribute to the full extent of his capabilities and to participate in the working of our society. It is, therefore, the policy of this state to eliminate the paradox of poverty in the midst of plenty in this state by opening to everyone the opportunity to live in decency and dignity. It is the purpose of the Community Action Act to strengthen, supplement and coordinate efforts in furtherance of that policy.

**History: Laws 1983, ch. 139, § 2.**

## 27-8-3. Definitions.

As used in the Community Action Act:

A. "poverty level" means the official poverty level established by the federal director of the office of management and budget and revised periodically by the federal secretary of health and human services; and

B. "secretary" means the secretary of human services.

**History: Laws 1983, ch. 139, § 3.**

## 27-8-4. Financial assistance for community action agencies.

A. The secretary may provide financial assistance to community action agencies for the planning, conduct, administration and evaluation of community action programs as described in the Community Action Act in accordance with state and federal law and regulations.

B. No funds provided pursuant to Subsection A of this section shall be distributed to a community action agency unless the agency has submitted to the secretary a plan on the proposed use of the funds and the secretary has approved that plan.

C. Subject to applicable federal law or regulation, community action agencies shall be eligible to receive federal funds, including but not limited to community services block grant funds, which have been previously designated as antipoverty funds.

D. Each community action agency receiving funds pursuant to this section shall report annually to the secretary concerning the use of the funds.

E. The secretary shall provide annually for an audit of funds distributed pursuant to this section to community action agencies and shall make any requirements necessary to insure fiscal responsibility and accountability and effective, efficient handling of funds.

**History: Laws 1983, ch. 139, § 4.**



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## 27-8-5. Community action agencies; designation; powers.

A. A community action agency is a political subdivision of the state, a combination of political subdivisions or a public or private nonprofit agency that:

(1) has the power and authority to enter into contracts with public and private nonprofit agencies and organizations in fulfilling the purposes of the Community Action Act;

(2) is capable of planning, conducting, administering and evaluating a community action program;

(3) has a service area at least equivalent to the geographic boundaries of a county; and

(4) is designated a community action agency by the governor or by federal law or was officially designated a community action agency, community action program or limited purpose agency under the provisions of the federal Economic Opportunity Act of 1964 on September 30, 1981.

B. The governor is empowered to declare that an entity designated as a community action agency under Subsection A of this section is no longer a community action agency upon a determination that such entity is unable or unwilling to carry out its responsibilities under the Community Action Act.

C. A community action agency is empowered to:

(1) receive, administer and transfer funds in support of a community action program under the Community Action Act; and

(2) delegate powers to other agencies and programs subject to the powers of its governing board and its overall program responsibilities.

**History: Laws 1983, ch. 139, § 5.**

**Cross references.** — For the federal Economic Opportunity Act of 1964, *see* 42 U.S.C.S. § 2704 et seq.

## 27-8-6. Community action agencies; board; local participation.

A. Each community action agency shall administer its community action program through a community action board. Board members shall be selected as follows:

(1) one-third of the members of the board shall be elected public officials currently holding office in the geographical area to be served by the community action agency or their representatives, except that if the number of elected officials reasonably available and willing to serve is less than one-third of the membership of the board, membership on the board of appointive officials may be counted in meeting this one-third requirement;

(2) at least one-third of the members shall be persons chosen in accordance with democratic selection procedures adequate to ensure that they are representative of the poor in the area served; and

(3) the other members shall be officials or members of business, industry, labor, religious, welfare, education or other major groups and interests in the community.

B. Each member of the board selected to represent a specific geographic area within a community shall reside in the area represented.

C. No person selected under Paragraph (2) or (3) of Subsection A of this section shall serve for more than five consecutive years.

**History: Laws 1983, ch. 139, § 6; 2021, ch. 105, § 1**

**The 2021 amendment,** effective June 18, 2021, changed the structure of community action boards, and revised the term limit provision; in Subsection A, after "community action board", deleted "consisting of fifteen members"; and in Subsection C, after "more than five consecutive years", deleted "or more than a total of ten years".

## 27-8-7. Community action programs.

Each community action agency shall use available funds for a community action program which:

A. provides a range of services and activities which have a measurable and potentially major impact on causes of poverty in the community;

B. provides activities designed to assist low-income participants, including the elderly poor, to:



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(1) secure and retain meaningful employment;
(2) attain an adequate education;
(3) make better use of available income;
(4) provide and maintain adequate housing and a suitable living environment;
(5) obtain emergency assistance through loans or grants to meet immediate and urgent individual and family needs, including the need for health services, nutritious food, housing and employment-related assistance;
(6) remove obstacles and solve problems which block the achievement of self-sufficiency;
(7) achieve greater participation in the affairs of the community; and
(8) make more effective use of other programs related to the purposes of the Community Action Act;

C. provides on an emergency basis for the provision of such supplies and services, nutritious food and related services as may be necessary to counteract conditions of starvation and malnutrition among the poor;

D. coordinates and establishes linkages between governmental and other social services programs to assure the effective delivery of such services to low-income individuals;

E. encourages the use of entities in the private sector of the community in efforts to alleviate poverty in the community; and

F. furthers any other purpose consistent with federal or state law or regulations.

**History: Laws 1983, ch. 139, § 7.**

## 27-8-8. Regulations.

The secretary shall adopt such rules and regulations as may be necessary to carry out the provisions of the Community Action Act.

**History: Laws 1983, ch. 139, § 8.**

## 27-8-9. Financial assistance; limitations.

The secretary, consistent with federal law, shall make grants of not less than ninety percent of the annual allocation of funds available under the community services block grant to community action agencies defined in Subsection A of Section 5 [27-8-5 NMSA 1978] of the Community Action Act. The human services department is authorized to implement, by regulation or contract, a limitation on the amount of community services block grant funds allocated to administrative costs.

**History: Laws 1983, ch. 139, § 9.**

# ARTICLE 9

# Community Care

Sec.
27-9-1. Program; demonstrations.
27-9-2. Implementation.

## 27-9-1. Program; demonstrations.

The human services department, in cooperation with the department of health, is authorized to administer demonstration programs that provide in-home and coordinated community care services to the frail elderly and to persons with a disability who would otherwise require institutionalization. The programs authorized by this section shall serve both those eligible and not eligible for federal medical assistance programs.



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**History: Laws 1983, ch. 323, § 1; 2007, ch. 46, § 22.**

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

## 27-9-2. Implementation.

The secretary of human services shall, by regulation, specify the areas in which the programs shall operate, specify the services to be provided, establish eligibility criteria of persons to be served and provide for cost sharing, where possible, with individuals and participating communities.

**History: Laws 1983, ch. 323, § 2.**

# ARTICLE 10

# Statewide Health Care

Sec.
27-10-1. Short title.
27-10-2. Findings and purpose.
27-10-3. County-supported medicaid fund created; use; appropriation by the legislature.
27-10-4. Alternative revenue source to imposition of county health care gross receipts tax; transfer to county-supported medicaid fund.

## 27-10-1. Short title.

Sections 1 through 4 [27-10-1 to 27-10-4 NMSA 1978] of this act may be cited as the "Statewide Health Care Act".

**History: Laws 1991, ch. 212, § 1.**

**Cross references.** — For County Local Option Gross Receipts Tax Act, *see* Chapter 7, Article 20E NMSA 1978.

For imposition of intermediate sanctions and civil penalty for health facility's noncompliance with any departmental licensing requirement, *see* 24-1-5.2 NMSA 1978.

## 27-10-2. Findings and purpose.

A. Access to health care reduces long-term medical and social costs. The effectiveness of statewide health care has been decreased by excessive fragmentation and failure to maximize the use of existing in-state revenues and to develop effective ways of drawing upon potential federal revenue sources. An effective statewide health care system must retain local health care efforts, stimulate local innovations for meeting particular health care needs and use existing resources to expand health care options, especially for those citizens unable to pay for their own care.

B. The purpose of the county-supported medicaid fund is to leverage existing resources to better address the state's health care needs. The county-supported medicaid fund will be used to accomplish this purpose by using local revenues to support the state medicaid program and to institute or support primary care health care services pursuant to Section 24-1A-3.1 NMSA 1978. Money appropriated from the county-supported medicaid fund to institute or support primary care health care services pursuant to Section 24-1A-3.1 NMSA 1978 shall be supplemental to general fund appropriations.

**History: Laws 1991, ch. 212, § 2; 1993, ch. 321, § 19; 1996, ch. 29, § 5.**

**The 1996 amendment,** effective May 15, 1996, in Subsection B, inserted "or support" in the second sentence and added the last sentence.

**The 1993 amendment,** effective July 1, 1993, substituted "to support the state medicaid program" for "solely to expand eligibility for federal medicaid optional coverages in supplementation to mandated federal medicaid services" in the second sentence of Subsection B.



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## 27-10-3. County-supported medicaid fund created; use; appropriation by the legislature.

A. There is created in the state treasury the "county-supported medicaid fund". The fund shall be invested by the state treasurer as other state funds are invested. Income earned from investment of the fund shall be credited to the county-supported medicaid fund. The fund shall not revert in any fiscal year.

B. Money in the county-supported medicaid fund is subject to appropriation by the legislature to support the state medicaid program and to institute or support primary care health care services pursuant to Subsections D and E of Section 24-1A-3.1 NMSA 1978. Of the amount appropriated each year, nine percent shall be appropriated to the department of health to institute or support primary care health care services pursuant to Subsections D and E of Section 24-1A-3.1 NMSA 1978.

C. Up to three percent of the county-supported medicaid fund each year may be expended for administrative costs related to medicaid or developing new primary care health care centers or facilities.

D. In the event federal funds for medicaid are not received by New Mexico for any eighteen-month period, the unencumbered balance remaining in the county-supported medicaid fund and the safety net care pool fund at the end of the fiscal year following the end of any eighteen-month period shall be paid within a reasonable time to each county for deposit in the county health care assistance fund in proportion to the payments made by each county through tax revenues or transfers in the previous fiscal year as certified by the local government division of the department of finance and administration. The department will provide for budgeting and accounting of payments to the fund.

**History: Laws 1991, ch. 212, § 3; 1992, ch. 31, § 2; 1993, ch. 321, § 20; 1996, ch. 29, § 6; 2014, ch. 79, § 17.**

**Cross references.** — For the sole community provider fund, *see* 27-5-6.1 NMSA 1978.

**The 2014 amendment,** effective March 12, 2014, changed the name of the sole community provider fund and the indigent hospital claims fund; in Subsection D, in the first sentence, after "medicaid fund and the" deleted "sole community provider" and added "safety net care pool", and after "deposit in the county", deleted "indigent hospital claims".

**The 1996 amendment,** effective May 15, 1996, in Subsection B, inserted "or support" twice and substituted "Subsections D and E" for "Subsection E" in two places.

**The 1993 amendment,** effective July 1, 1993, in Subsection B, substituted "to support the state medicaid program" for "for expanding eligibility for federal medicaid optional coverages in supplementation to mandated federal medicaid services" in the first sentence and the language beginning "nine percent shall be appropriated" for "up to nine percent may be appropriated to the department of health" in the second sentence; in Subsection C, deleted "amounts appropriated and expended from" after "three percent of"; and in Subsection D, deleted "optional coverages" after "federal funds for medicaid" and inserted "and the sole community provider fund" in the first sentence and substituted "budgeting and accounting of payments" for "accounting and enforcing the deposits" in the second sentence.

**The 1992 amendment,** effective May 20, 1992, in Subsection B, substituted "department of health" for "health and environment department"; in Subsection D, substituted references to "any" eighteen-month period for references to "the" eighteen-month period in two places, inserted "in the county-supported medicaid fund", and made stylistic changes.

## 27-10-4. Alternative revenue source to imposition of county health care gross receipts tax; transfer to county-supported medicaid fund.

A. In the event a county does not enact an ordinance imposing a county health care gross receipts tax pursuant to Section 7-20D-3 [7-20E-18] NMSA 1978, the county shall, by ordinance to be effective July 1, 1993, dedicate to the county-supported medicaid fund an amount equal to a gross receipts tax rate of one-sixteenth of one percent applied to the taxable gross receipts reported during the prior fiscal year by persons engaging in business in the county. For purposes of this subsection, a county may use funds from any existing authorized revenue source of the county.

B. For each county that has in effect an ordinance enacted pursuant to Subsection A of this section on July 1 of each year, the taxation and revenue department shall certify to the county by September 15, 1993 and by September 15 of each subsequent fiscal year the amount of gross receipts reported for the county for purposes of the gross receipts tax during the prior fiscal year.



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Upon certification by the department, any county enacting an ordinance pursuant to Subsection A of this section shall transfer to the county-supported medicaid fund by the last day of March, June, September and December of each year an amount equal to a rate of one-sixty-fourth of one percent applied to the certified amount.

C. The requirements of an ordinance enacted pursuant to this section may be terminated for a county only on the effective date of an ordinance enacted by the county imposing the county health care gross receipts tax; provided that if the effective date of the ordinance imposing the tax is January 1, the termination does not apply to the payments required for September and December of that year.

**History: Laws 1991, ch. 212, § 4; 1992, ch. 31, § 3; 1993, ch. 321, § 21.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Section 7-20D-3 NMSA 1978 was recompiled as 7-20E-18 NMSA 1978 by Laws 1993, ch. 354, § 18.

**The 1993 amendment,** effective July 1, 1993, deleted "except as may be otherwise provided in Section 27-5-7 NMSA 1978" from the end of Subsection A.

**The 1992 amendment,** effective May 20, 1992, substituted references to fiscal year for calendar year in three places; in Subsection A, substituted "pursuant to Section 7-20D-3 NMSA 1978" for "pursuant to Section 3 of the County Health Care Gross Receipts Tax Act and if no balance remains in the county indigent hospital claims fund for the current fiscal year" and "July 1, 1993" for "January 1, 1992"; in Subsection B, substituted "July 1 of each year" for "January 1 of each year", "by September 15, 1993 and by September 15" for "by March 15, 1992 and by March"; and, in Subsection C, substituted "January 1" for "July 1" and "payments required for September and December" for "payments required for March and June".

# ARTICLE 11

# Medicaid Providers

Sec.
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## 27-11-1. Short title.

Chapter 27, Article 11 NMSA 1978 may be cited as the "Medicaid Provider and Managed Care Act".

**History: Laws 1998, ch. 30, § 1; 2019, ch. 215, § 1.**

**The 2019 amendment,** effective January 1, 2020, changed the name of the act from the Medicaid Provider Act to the Medicaid Provider and Managed Care Act, and provided the statutory citation for the Medicaid Provider and Managed Care Act; deleted "This act" and added "Chapter 27, Article 11 NMSA 1978", and after "Medicaid Provider", added "and Managed Care".

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

**Temporary provisions.** — Laws 2019, ch. 215, § 18, effective January 1, 2020 provided that all references in law to the Medicaid Provider Act shall be deemed to be references to the Medicaid Provider and Managed Care Act.

## 27-11-2. Definitions.

As used in the Medicaid Provider and Managed Care Act:



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A. "claim" means a request for payment for services;

B. "clean claim" means a claim for reimbursement that:

(1) contains substantially all the required data elements necessary for accurate adjudication of the claim without the need for additional information from the medicaid provider or subcontractor;

(2) is not materially deficient or improper, including lacking substantiating documentation required by medicaid; and

(3) has no particular or unusual circumstances that require special treatment or that prevent payment from being made in due course on behalf of medicaid;

C. "credible" means having indicia of reliability after the state has reviewed all allegations, facts and evidence carefully and acted judiciously on a case-by-case basis;

D. "credible allegation of fraud" means an allegation that has been verified by the state from any source, including fraud hotline complaints, claims data mining and provider audits;

E. "department" means the human services department;

F. "fraud" means any act that constitutes fraud under state or federal law;

G. "managed care organization" means a person eligible to enter into risk-based prepaid capitation agreements with the department to provide health care and related services;

H. "medicaid" means the medical assistance program established pursuant to Title 19 of the federal Social Security Act and regulations issued pursuant to that act;

I. "medicaid provider" means a person that provides medicaid-related services to recipients;

J. "overpayment" means an amount paid to a medicaid provider or subcontractor in excess of the medicaid allowable amount, including payment for any claim to which a medicaid provider or subcontractor is not entitled;

K. "person" means an individual or other legal entity;

L. "recipient" means a person whom the department has determined to be eligible to receive medicaid-related services;

M. "secretary" means the secretary of human services; and

N. "subcontractor" means a person that contracts with a medicaid provider or a managed care organization to provide medicaid-related services to recipients.

**History: Laws 1998, ch. 30, § 2; 2019, ch. 215, § 2.**

**The 2019 amendment,** effective January 1, 2020, defined "claim", "clean claim", "credible", "credible allegation of fraud", "fraud", and "overpayment", and revised the definitions of "medicaid provider" and "subcontractor", as used in the Medicaid Provider and Managed Care Act; after "Medicaid Provider", added "and Managed Care"; added new Subsections A through D and redesignated former Subsection A as Subsection E; added new Subsection F and redesignated former Subsections B through D as Subsections G through I, respectively; in Subsection I, after "person", deleted "including a managed care organization, operating under contract with the department to provide" and added "that provides"; added new Subsection J and redesignated former Subsections E through H as Subsections K through N, respectively; and in Subsection N, after "medicaid provider", added "or a managed care organization".

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 27-11-3. Review of medicaid provider or managed care organization; contract remedies; penalties.

A. Consistent with the terms of any contract between the department and a medicaid provider or managed care organization, the secretary shall have the right to be afforded access to such of the medicaid provider's or managed care organization's records and personnel, as well as its subcontracts and that subcontractor's records and personnel, as may be necessary to ensure that the medicaid provider or managed care organization is complying with the terms of its contract with the department.

B. Upon not less than two days' written notice to a medicaid provider or managed care organization, the secretary may, consistent with the provisions of the Medicaid Provider and Managed Care Act and rules issued pursuant to that act, carry out an administrative investigation or conduct administrative proceedings to determine whether a medicaid provider or managed care organization has:



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(1) materially breached its obligation to furnish medicaid-related services to recipients, or any other duty specified in its contract with the department;

(2) violated any provision of the Public Assistance Act [27-2-1 through 27-2-34 NMSA 1978] or the Medicaid Provider and Managed Care Act or any rules issued pursuant to those acts;

(3) intentionally or with reckless disregard made any false statement with respect to any report or statement required by the Public Assistance Act or the Medicaid Provider and Managed Care Act, rules issued pursuant to either of those acts or a contract with the department;

(4) intentionally or with reckless disregard advertised or marketed, or attempted to advertise or market, its services to recipients in a manner as to misrepresent its services or capacity for services, or engaged in any deceptive, misleading or unfair practice with respect to advertising or marketing;

(5) hindered or prevented the secretary from performing any duty imposed by the Public Assistance Act, the Human Services Department Act [Chapter 9, Article 8 NMSA 1978] or the Medicaid Provider and Managed Care Act or any rules issued pursuant to those acts; or

(6) fraudulently procured or attempted to procure any benefit from medicaid.

C. Subject to the provisions of Subsection D of this section, after affording a medicaid provider or managed care organization written notice of hearing not less than ten days before the hearing date and an opportunity to be heard, and upon making appropriate administrative findings, the secretary may take any or any combination of the following actions against the medicaid provider or managed care organization:

(1) impose an administrative penalty of not more than five thousand dollars ($5,000) for engaging in any practice described in Subsection B of this section; provided that each separate occurrence of such practice shall constitute a separate offense;

(2) issue an administrative order requiring the medicaid provider or managed care organization to:

(a) cease or modify any specified conduct or practices engaged in by it or its employees, subcontractors or agents;

(b) fulfill its contractual obligations in the manner specified in the order;

(c) provide any service that has been denied;

(d) take steps to provide or arrange for any service that it has agreed or is otherwise obligated to make available; or

(e) enter into and abide by the terms of a binding or nonbinding arbitration proceeding, if agreed to by any opposing party, including the secretary; or

(3) suspend or revoke the contract between the medicaid provider or managed care organization and the department pursuant to the terms of that contract.

D. If a contract between the department and a medicaid provider or managed care organization explicitly specifies a dispute resolution mechanism for use in resolving disputes over performance of that contract, the dispute resolution mechanism specified in the contract shall be used to resolve such disputes in lieu of the mechanism set forth in Subsection C of this section.

E. If a medicaid provider's or managed care organization's contract so specifies, the medicaid provider or managed care organization shall have the right to seek de novo review in district court of any decision by the secretary regarding a contractual dispute.

**History: Laws 1998, ch. 30, § 3; 1999, ch. 229, § 1; 2019, ch. 215, § 3.**

**The 2019 amendment,** effective January 1, 2020, added a "managed care organization" as a medicaid provider; after "medicaid", deleted "providers" and added "provider or managed care organization"; after each occurrence of "medicaid provider", added "or managed care organization" throughout the section, and after each occurrence of "Medicaid Provider", added "and Managed Care" throughout the section.

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

**The 1999 amendment,** effective June 18, 1999, in Subsection B, deleted "Upon not less than seven days' written notice to a medicaid provider" preceding "The secretary may"; and in Subsection C(1), substituted "Paragraphs (1) through (6)" for "Paragraphs (1) through (7)".



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## 27-11-4. Retention and production of records.

A. Medicaid providers, managed care organizations and their subcontractors shall retain, for a period of at least six years from the date of creation, all medical and business records that are necessary to verify the:

(1) treatment or care of any recipient for which the medicaid provider, managed care organization or subcontractor received payment from the department to provide that benefit or service;

(2) services or goods provided to any recipient for which the medicaid provider, managed care organization or subcontractor received payment from the department to provide that benefit or service;

(3) amounts paid by medicaid or the medicaid provider or managed care organization on behalf of any recipient; and

(4) records required by medicaid under any contract between the department and the medicaid provider or managed care organization.

B. Upon written request by the department to a medicaid provider, managed care organization or any subcontractor for copies or inspection of records pursuant to the Public Assistance Act [27-2-1 through 27-2-34 NMSA 1978], the medicaid provider, managed care organization or subcontractor shall provide the copies or permit the inspection, as applicable within two business days after the date of the request unless the records are held by a subcontractor, agent or satellite office, in which case the records shall be made available within ten business days after the date of the request.

C. Failure to provide copies or to permit inspection of records requested pursuant to this section shall constitute a violation of the Medicaid Provider and Managed Care Act within the meaning of Paragraph (3) of Subsection B of Section 27-11-3 NMSA 1978.

**History: Laws 1998, ch. 30, § 4; 1999, ch. 229, § 2; 2019, ch. 215, § 4.**

**The 2019 amendment,** effective January 1, 2020, added a "managed care organization" as a medicaid provider; after each occurrence of "medicaid provider", added "or managed care organization" throughout the section; after each occurrence of "Medicaid Provider", added "and Managed Care" throughout the section; and in Subsection A, Paragraph A(1), after "medicaid provider,", added "managed care organization or subcontractor", and in Paragraph A(2), after "medicaid provider,", added "managed care organization or subcontractor".

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

**The 1999 amendment,** effective June 18, 1999, in Subsection B, substituted "Upon request" for "Upon written request" and deleted "within five business days after the date of the request unless the records are held by a subcontractor, agent or satellite office, in which case the records shall be made available within ten business days after the date of the request"; in Subsection C, substituted "Section 27-11-3 NMSA 1978" for "Section 3 of that act".

## 27-11-5. Rules.

The secretary shall adopt and promulgate rules appropriate to administer, carry out and enforce the provisions of the Medicaid Provider Act.

**History: Laws 1998, ch. 30, § 5.**

## 27-11-6. Repealed.

**Repeals.** — Laws 2006, ch. 25, § 2 repealed 27-11-6 NMSA 1978, as enacted by Laws 2004, ch. 4, § 1, relating to the imposition of a daily bed surcharge, effective March 2, 2006. For provisions of former section, *see* the 2005 NMSA 1978 on *NMOneSource.com*.

## 27-11-7. Determination of overpayments or credible allegation of fraud; audit findings; sampling; extrapolation limited; notice of right to informal conference and expedited adjudicatory proceeding.

A. The department may audit a medicaid provider or subcontractor for overpayment, using sampling for the time period audited. If the department contracts for the audit, the department



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shall contract only with an independent auditor approved by the state auditor. Each audited claim shall be reviewed by a person who is licensed, certified, registered or otherwise credentialed in New Mexico as to the matters such person reviews, including coding or specific clinical practice.

B. The department shall not extrapolate audit findings unless a medicaid provider's or subcontractor's error rate exceeds ten percent based upon an appropriate sampling and a representative sample of claims computed by valid statistical methods in accordance with the most recently published medicare program integrity manual and using statistical software approved by the United States department of health and human services.

C. Prior to reaching either a final determination of overpayment or a credible allegation of fraud, the department shall serve the medicaid provider or subcontractor with a written preliminary finding of overpayment.

D. The preliminary finding of overpayment shall:

(1) state with specificity the factual and legal basis for each claim forming the basis of an alleged overpayment;

(2) include a copy of the final audit report if the alleged overpayment is based on an audit; and

(3) notify the medicaid provider or subcontractor that is the subject of a preliminary finding of overpayment of its right to request, within thirty calendar days of service of the preliminary finding of overpayment, an informal conference with a representative of the department who is knowledgeable about the department's preliminary finding of overpayment and with a member of the audit team, if an audit formed the basis of any alleged overpayment, to informally address, resolve or dispute the department's preliminary finding of overpayment.

E. Prior to making either a final determination of overpayment or a determination of credible allegation of fraud, the department may impose corrective action upon the medicaid provider or subcontractor to address systemic conditions contributing to errors in the submission of claims for payment to which a medicaid provider or subcontractor is not entitled.

**History: Laws 2019, ch. 215, § 5.**
**Effective dates.** — Laws 2019, ch. 215, § 20 made Laws 2019, ch. 215, § 5 effective January 1, 2020.

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 27-11-8. Informal conference; corrective action; requirements.

A. A medicaid provider or subcontractor seeking an informal conference pursuant to this section shall serve the department with a written request for such conference no later than thirty calendar days following the service of a preliminary determination of overpayment by the department on the medicaid provider or subcontractor. Upon receipt of a request for an informal conference, the department shall set a date for the conference to occur no later than fourteen business days following receipt of the request.

B. Within seven days following the informal conference, a medicaid provider or subcontractor may submit a proposed corrective action plan to the department to correct clerical, typographical, scrivener's and computer errors or to provide requested credentialing, licensure or training records identified in audit findings. The department shall not unreasonably withhold approval of the proposed corrective action plan. A medicaid provider or subcontractor shall have no less than thirty days from the date of approval of its corrective action plan to provide additional information or documentation to the department to attempt to address or resolve a disputed preliminary finding of overpayment.

**History: Laws 2019, ch. 215, § 6.**
**Effective dates.** — Laws 2019, ch. 215, § 20 made Laws 2019, ch. 215, § 6 effective January 1, 2020.

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.



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## 27-11-9. Expedited adjudicatory proceedings; requirements.

A. A medicaid provider or subcontractor seeking an expedited adjudicatory proceeding pursuant to the Medicaid Provider and Managed Care Act shall serve the department and the administrative hearings office with a written request for such proceeding no later than thirty calendar days following the service of a final determination of overpayment by the department on the medicaid provider or subcontractor.

B. The chief hearing officer of the administrative hearings office shall appoint or contract with a hearing officer qualified pursuant to Section 8 [27-11-10 NMSA 1978] of this 2019 act no later than thirty calendar days after service upon the administrative hearings office of a request for an expedited adjudicatory proceeding pursuant to the Medicaid Provider and Managed Care Act by a medicaid provider or subcontractor.

C. The expedited adjudicatory proceeding requested by a medicaid provider or subcontractor in accordance with the Medicaid Provider and Managed Care Act shall commence no later than thirty calendar days following the appointment of the hearing officer or as stipulated by the _parties or as otherwise ordered by the hearing officer upon a showing of good cause. The evidentiary hearing of an expedited adjudicatory proceeding pursuant to this section shall not exceed ten business days in length and shall be conducted in accordance with Section 12-8-11 NMSA 1978.

D. After affording the parties the opportunity to submit proposed findings and conclusions of law, and based solely upon the record in accordance with the Medicaid Provider and Managed Care Act and the Administrative Procedures Act [12-8-1 through 12-8-25 NMSA 1978], the hearing officer shall make findings of fact and conclusions of law on all material issues of fact, law or discretion, stating the basis for each. In addition, the hearing officer shall determine the amount of overpayment with respect to each disputed claim submitted for payment, if any. The findings of fact and conclusions of law of the hearing officer shall be made and served upon all parties of record within thirty calendar days following the hearing officer's receipt of the record.

E. The hearing officer's findings of fact and conclusions of law shall be binding on the department and constitute a final agency decision, which may be appealed pursuant to Section 39-3-1.1 NMSA 1978.

**History: Laws 2019, ch. 215, § 7.**

**Effective dates.** — Laws 2019, ch. 215, § 20 made Laws 2019, ch. 215, § 7 effective January 1, 2020.

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 27-11-10. Qualifications and selection of hearing officer for expedited adjudicatory proceedings.

A. The hearing officer presiding over the expedited adjudicatory proceeding held pursuant to the Medicaid Provider and Managed Care Act shall:

(1) be licensed and in good standing to practice law in New Mexico or another state;

(2) have at least three years' cumulative experience in one or more of the following areas: the health insurance industry, the medicaid program, health care regulatory compliance, medical claims administration or health law;

(3) not currently be employed by or represent, or belong to a law firm that currently represents, the department or a medicaid provider or managed care organization or third-party administrator currently doing business with the department; and

(4) not be related within the third degree of consanguinity to a person currently employed by the department, currently doing business with the department or currently employed by an organization doing business with the department.

B. The hearing officer shall not be:

(1) a lobbyist registered under the Lobbyist Regulation Act [Chapter 2, Article 11 NMSA 1978] who currently represents, or has in the prior calendar year represented, a client in matters before the department; or



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(2) affiliated with, or the spouse of, a lobbyist registered under the Lobbyist Regulation Act who currently represents, or has in the prior calendar year represented, a client in matters before the department.

C. The chief hearing officer of the administrative hearings office shall select the hearing officer to preside over an expedited adjudicatory proceeding held pursuant to the Medicaid Provider and Managed Care Act and the Administrative Procedures Act [12-8-1 through 12-8-25 NMSA 1978].

**History: Laws 2019, ch. 215, § 8.**
**Effective dates.** — Laws 2019, ch. 215, § 20 made Laws 2019, ch. 215, § 8 effective January 1, 2020.

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 27-11-11. Costs of expedited adjudicatory proceeding.

A. Each party shall be responsible for its own costs related to the expedited adjudicatory proceeding, including costs associated with preparation for the hearing, discovery, depositions, subpoenas, service of process and witness expenses, travel expenses and investigation expenses and attorney fees.

B. The hearing officer shall allow telephonic testimony of a witness if requested by a party.

C. The department shall reimburse the administrative hearings office for the costs of a contract hearing officer.

**History: Laws 2019, ch. 215, § 9.**
**Effective dates.** — Laws 2019, ch. 215, § 20 made Laws 2019, ch. 215, § 9 effective January 1, 2020.

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 27-11-12. Rights of medicaid provider or subcontractor; preliminary or final determination of overpayment.

A. A medicaid provider or subcontractor may challenge:

(1) the department's preliminary or final determination of overpayment as:

(a) exceeding statutory authority;

(b) arbitrary or capricious;

(c) a failure to follow department procedure; or

(d) not supported by substantial evidence;

(2) the credentials of persons who participated in the audit or claims review; or

(3) the methodology or accuracy of the department's audit.

B. A medicaid provider or subcontractor may, but shall not be required to, conduct its own audit or sampling to challenge a preliminary or final determination of overpayment.

**History: Laws 2019, ch. 215, § 10.**
**Effective dates.** — Laws 2019, ch. 215, § 20 made Laws 2019, ch. 215, § 10 effective January 1, 2020.

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 27-11-13. Release of suspended payment for services previously rendered; prepayment review; remedial training and education; temporary assistance.

A. The department shall direct the release of a suspended payment to a medicaid provider or subcontractor that is the subject of a referral based upon a determination of a credible allegation of fraud for services previously rendered if the medicaid provider or subcontractor posts a surety bond in the amount of the suspended payment, which posting shall be deemed good cause not to suspend payment.



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B. The provisions of this section shall not prevent the department from:

(1) conducting a prepayment review of claims for ongoing services rendered by the medicaid provider or subcontractor;

(2) requiring the medicaid provider or subcontractor or its employees to complete remedial training or education to prevent the submission of claims for payment to which the medicaid provider or subcontractor is not entitled; or

(3) requiring the medicaid provider or subcontractor to engage an independent third party approved by the department to temporarily manage or provide technical assistance to the medicaid provider or subcontractor.

C. The department shall direct that the release of a suspended payment occur no later than ten business days following the earlier of:

(1) the posting of a surety bond by the medicaid provider or subcontractor in the amount of the suspended payment;

(2) notice from the attorney general that the attorney general will not pursue legal action against the medicaid provider or subcontractor arising out of the referral of the medicaid provider or subcontractor based on a determination of a credible allegation of fraud;

(3) the date on which an administrative decision as to the basis for suspending such payments, or portion of such payments, in favor of the medicaid provider or subcontractor becomes final; or

(4) the date on which a judicial decision as to the basis for suspending such payments, or portion of such payments, in favor of the medicaid provider or subcontractor becomes final and not subject to further appeal.

**History: Laws 2019, ch. 215, § 11.**
**Effective dates.** — Laws 2019, ch. 215, § 20 made Laws 2019, ch. 215, § 11 effective January 1, 2020.

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 27-11-14. Maintenance of services; payment for ongoing services.

A. Following the referral of a medicaid provider or subcontractor based on a determination of a credible allegation of fraud, and during the pendency of a dispute between the department and a medicaid provider or subcontractor regarding an alleged overpayment, including an overpayment based in whole or in part on a credible allegation of fraud, the department shall not terminate or deny the medicaid provider's or subcontractor's continued participation in the state's medicaid program if the medicaid provider or subcontractor:

(1) submits to a prepayment review of claims for ongoing services;

(2) demonstrates that its employees have completed remedial training or education required by the department to prevent the submission of claims for payment to which the medicaid provider or subcontractor is not entitled; and

(3) engages an independent third party approved by the department to temporarily manage or provide technical assistance to the medicaid provider or subcontractor following the referral or during the pendency of the dispute.

B. The department shall not unreasonably withhold approval of a third party proposed by the medicaid provider or subcontractor pursuant to Paragraph (3) of Subsection A of this section.

C. A medicaid provider or subcontractor that complies with the requirements of Subsection A of this section shall be reimbursed for each clean claim for ongoing services within ten calendar days of receipt if submitted electronically or thirty calendar days if submitted manually.

**History: Laws 2019, ch. 215, § 12.**
**Effective dates.** — Laws 2019, ch. 215, § 20 made Laws 2019, ch. 215, § 12 effective January 1, 2020.

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.



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## 27-11-15. Disposition of recovered medicaid funds.

A. Overpayments collected pursuant to the Medicaid Provider and Managed Care Act on behalf of the state shall be remitted to the department for deposit in the general fund to be used for the state's medicaid program.

B. The department shall not enter into a contract to pay any portion of funds recovered by the state from a medicaid provider, a managed care organization or a subcontractor to any other person unless expressly authorized or required to do so by state or federal law.

**History: Laws 2019, ch. 215, § 13.**
**Effective dates.** — Laws 2019, ch. 215, § 20 made Laws 2019, ch. 215, § 13 effective January 1, 2020.

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 27-11-16. Credible allegation of fraud; judicial review; substantial evidence required.

A. A credible allegation of fraud determination by the department shall be deemed a final agency decision and may be appealed pursuant to Section 39-3-1.1 NMSA 1978.

B. A medicaid provider or subcontractor that is the subject of a referral to the attorney general for further investigation based on a credible allegation of fraud may seek judicial review, pursuant to Section 39-3-1.1 NMSA 1978, of the department's determination that the allegation of fraud is credible. The department shall show by substantial evidence that:

(1) it has followed its own procedures; and

(2) the evidence relied upon to make its credible allegation of fraud determination was relevant, credible and material to the issue of fraud.

C. In a proceeding for judicial review under this section, the reviewing court shall not consider evidence acquired by the department after making its credible allegation of fraud determination.

**History: Laws 2019, ch. 215, § 14.**
**Effective dates.** — Laws 2019, ch. 215, § 20 made Laws 2019, ch. 215, § 14 effective January 1, 2020.

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 27-11-17. Award of costs, fees and interest.

A. If a medicaid provider or subcontractor is the prevailing party in any expedited adjudicatory or court proceeding brought by the medicaid provider or subcontractor pursuant to the Medicaid Provider and Managed Care Act on or after January 1, 2020 in connection with a preliminary or final determination of overpayment or a determination of credible allegation of fraud, the medicaid provider or subcontractor shall be entitled to:

(1) reasonable administrative costs incurred in connection with an expedited adjudicatory proceeding with the department;

(2) reasonable litigation costs incurred in connection with a court proceeding; and

(3) interest pursuant to Subsection F of this section.

B. *As used in this section:*

(1) "court proceeding" means any civil action brought in state district court;

(2) "reasonable administrative costs" means actual charges for preparation for and conduct of an administrative proceeding, including:

(a) court reporter fees, service of process fees and similar expenses;

(b) the services of expert witnesses;

(c) any study, analysis, report, test or project reasonably necessary for the preparation of the party's case; and

(d) fees and costs paid or incurred for the services of attorneys or of certified public accountants in connection with the expedited adjudicatory proceeding; and

(3) "reasonable litigation costs" means:



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(a) reasonable court costs; and

(b) actual charges for: 1) filing fees, court reporter fees, service of process fees and similar expenses; 2) the services of expert witnesses; 3) any study, analysis, report, test or project reasonably necessary for the preparation of the party's case; and 4) fees and costs paid or incurred for the services of attorneys or certified public accountants in connection with the proceeding.

C. For purposes of this section:

(1) the medicaid provider or subcontractor is the prevailing party if it has:

(a) substantially prevailed with respect to the amount in controversy; or

(b) substantially prevailed with respect to most of the issues involved in the case or the most significant issue or set of issues involved in the case;

(2) the medicaid provider or subcontractor shall not be treated as the prevailing party if the hearing officer finds that the position of the department in the proceeding was based upon a reasonable application of the law to the facts of the case. For purposes of this paragraph, the position of the department shall be presumed not to be based upon a reasonable application of the law to the facts of the case if:

(a) the department did not follow its own rules or procedures in making a preliminary finding or final determination of overpayment; or

(b) the department's preliminary finding or final determination of overpayment giving rise to the proceeding was not supported by substantial evidence at the time such finding or determination was made; and

(3) the determination of whether the medicaid provider or subcontractor is the prevailing party and the amount of reasonable administrative costs or reasonable litigation costs shall be made:

(a) by agreement of the parties;

(b) in an expedited adjudicatory proceeding, by the hearing officer; or

(c) in a court proceeding, by the court.

D. A decision or order granting or denying in whole or in part an award for reasonable administrative costs pursuant to Subsection A of this section by the hearing officer shall be reviewable in the same manner as other decisions of the administrative hearings office. An order granting or denying in whole or in part an award for reasonable litigation costs pursuant to Subsection A of this section in a court proceeding may be incorporated as a part of the decision or judgment in the court proceeding and shall be subject to appeal in the same manner as the decision or judgment.

E. No agreement for or award of reasonable administrative costs or reasonable litigation costs in any expedited adjudicatory or court proceeding pursuant to Subsection A of this section shall exceed the lesser of thirty percent of the amount of the settlement or judgment or one hundred thousand dollars ($100,000). A medicaid provider or subcontractor awarded administrative or litigation costs pursuant to this section may not receive an award of attorney fees pursuant to any other statutory provision.

F. Interest on amounts owed to a prevailing medicaid provider or subcontractor shall accrue and be paid at the rate of one and one-half percent a month on the amount of a:

(1) clean claim electronically submitted by the medicaid provider or subcontractor and not paid within thirty days of receipt;

(2) clean claim manually submitted by the medicaid provider or subcontractor and not paid within forty-five days of receipt; or

(3) claim for which additional information was necessary to substantiate the claim and not paid within sixty days of receipt of such additional information.

**History: Laws 2019, ch. 215, § 15.**

**Effective dates.** — Laws 2019, ch. 215, § 20 made Laws 2019, ch. 215, § 15 effective January 1, 2020.

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.



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## 27-11-18. Applicability of Administrative Procedures Act.

A. The department shall be subject to Sections 12-8-2, 12-8-10 through 12-8-13, 12-8-15 and 12-8-16 NMSA 1978 for expedited adjudicatory proceedings as provided by the Medicaid Provider and Managed Care Act.

B. Sections 12-8-2, 12-8-10 through 12-8-13, 12-8-15 and 12-8-16 NMSA 1978 apply to Sections 5 [27-11-7 NMSA 1978], 7 through 11 [27-11-9 through [27-11-13 NMSA 1978] and 14 [27-11-16 NMSA 1978] of this 2019 act.

**History: Laws 2019, ch. 215, § 16.**

**Effective dates.** — Laws 2019, ch. 215, § 20 made Laws 2019, ch. 215, § 16 effective January 1, 2020.

**Severability.** — Laws 2019, ch. 215, § 19, effective January 1, 2020, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

# ARTICLE 12

# Child Health

(Repealed by Laws 1998, ch. 52, § 9.)

## 27-12-1 to 27-12-7. Repealed.

**Repeals.** — Laws 1998, ch. 52, § 9 repealed 27-12-1 to 27-12-7 NMSA 1978, the Child Health Act, as enacted by Laws 1998, ch. 52, §§ 1 to 7, effective July 1, 2002. For provisions of former sections, *see* the 1999 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 13

# Consumer Direction

Sec.
27-13-1. Short title.
27-13-2. Purpose.
27-13-3. Definitions.
27-13-4. Consumer direction programs authorized.
27-13-5. Department duties.
27-13-6. Report.
27-13-7. Fiscal intermediary; exemptions; workers' compensation.

## 27-13-1. Short title.

This act [27-13-1 to 27-13-6 NMSA 1978] may be cited as the "Consumer Direction Act".

**History: Laws 2003, ch. 210, § 1.**

**Effective dates.** — Laws 2003, ch. 210, § 7 made the act effective July 1, 2003.

## 27-13-2. Purpose.

The purpose of the Consumer Direction Act is to ensure a consumer the right to direct his personal assistance services if he so chooses by selecting an attendant appropriate to his needs and to maximize personal assistance service availability and satisfaction.

**History: Laws 2003, ch. 210, § 2.**

**Effective dates.** — Laws 2003, ch. 210, § 7 made the act effective July 1, 2003.

## 27-13-3. Definitions.

As used in the Consumer Direction Act:



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A. "attendant" means a person, including an allowable family member, who provides personal assistance services;

B. "consumer" means a person receiving personal assistance services through any personal assistance programs offered by the state of New Mexico;

C. "department" means any department or agency of the state offering personal assistance service to individuals;

D. "fiscal intermediary" means a person or entity selected by agreement between the consumer and the department under contract to the department to assist the consumer to perform certain employment functions, including payroll responsibilities for the attendant and filing necessary eligibility information with the department;

E. "personal assistance services" means a prescribed course of regular personal care, including hygiene, mobility and daily living assistance that permits a person to live in his home rather than an institution, including bathing, dressing, grooming, eating, toileting, shopping, transporting, cueing medication administration and communicating;

F. "plan" means a written and signed agreement between a consumer or surrogate and the department for the provision of personal assistance services; and

G. "surrogate" means a family member, legal guardian or other person approved by the consumer and identified in the personal assistance services plan to assist in direction of personal assistance services and choice of attendant.

**History: Laws 2003, ch. 210, § 3.**

**Effective dates.** — Laws 2003, ch. 210, § 7 made the act effective July 1, 2003.

## 27-13-4. Consumer direction programs authorized.

Consistent with the federal Social Security Act and subject to the appropriation and availability of federal and state funds, each administering department or agency shall by rule provide a program permitting a consumer or surrogate to direct personal assistance services through the hiring, supervision and training of an attendant or attendants paid through a fiscal intermediary under contract with the department.

**History: Laws 2003, ch. 210, § 4.**

**Cross references.** — For the federal Social Security Act, *see* 42 U.S.C. § 301 et seq.

**Effective dates.** — Laws 2003, ch. 210, § 7 made the act effective July 1, 2003.

## 27-13-5. Department duties.

A department shall:

A. establish by rule the criteria and procedures for developing and amending a personal assistance services plan with a consumer;

B. develop criteria and procedures for selection of a fiscal intermediary to contract with the department to provide fiscal intermediary services to a consumer; and

C. establish rates for reimbursement of an attendant providing personal assistance services to a consumer and for the compensation of a fiscal intermediary.

**History: Laws 2003, ch. 210, § 5.**

**Effective dates.** — Laws 2003, ch. 210, § 7 made the act effective July 1, 2003.

## 27-13-6. Report.

Annually by October 1, each department shall deliver a report to the legislative finance committee and the legislative health and human services committee on services provided pursuant to the Consumer Direction Act and a comparison of those services and services provided by the department through other means and an evaluation of the effectiveness and consumer satisfaction with the respective means of service delivery.



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**History: Laws 2003, ch. 210, § 6.** **Effective dates.** — Laws 2003, ch. 210, § 7 made the act effective July 1, 2003.

## 27-13-7. Fiscal intermediary; exemptions; workers' compensation.

A. A fiscal intermediary shall not be subject to vicarious liability as an employer or principal for a wrongful act committed by a personal care attendant if the attendant:

(1) is not a current or former employee of the fiscal intermediary;

(2) has not received training or instruction from the fiscal intermediary with respect to providing personal care services to a person with a disability, not including administrative paper work;

(3) has been hired by and received training or instruction from the consumer or the consumer's authorized representative to provide personal care to the consumer; and

(4) provides basic assistance with daily living activities that do not require the education, certification or training of a licensed health care practitioner.

B. A fiscal intermediary may identify a personal care attendant as a covered employee with the fiscal intermediary's workers' compensation carrier solely to provide workers' compensation coverage in the event of a work-related injury. Nothing in this subsection shall be construed to create an employer-employee relationship between the fiscal intermediary and the personal care attendant.

C. Nothing in this section shall be construed to provide the fiscal intermediary with immunity from a claim for a wrongful act committed by the fiscal intermediary or its employees.

D. As used in this section:

(1) "consumer" means a person who is eligible for and receives state-funded or -operated services based on the person's disabilities;

(2) "fiscal intermediary" means a provider that furnishes administrative assistance for a consumer who selects a consumer-directed, rather than consumer-delegated, personal care program;

(3) "personal care attendant" means a person who provides assistance to a consumer with activities of daily living, including bathing, dressing, eating, transportation, shopping and similar activities; and

(4) "personal care program" means a state-funded or -operated support program, including medicaid, that provides the services of a personal care attendant for certain persons with a disability.

**History: Laws 2003, ch. 207, § 1; 2007, ch. 46, § 23.** **The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

# ARTICLE 14

# Medicaid False Claims Act


Sec.
27-14-1. Short title.
27-14-2. Purpose.
27-14-3. Definitions.
27-14-4. False claims against the state; liability for certain acts.
27-14-5. Documentary material in possession of state agency.
27-14-6. Immunity.
27-14-7. Civil action for false claims.
Sec.
27-14-8. Rights of the parties to qui tam actions.
27-14-9. Award to qui tam plaintiff.
27-14-10. Certain actions barred.
27-14-11. Department not liable for certain expenses.
27-14-12. Employee protection.
27-14-13. False claims and reporting procedure.
27-14-14. Application of other law.
27-14-15. Use of funds.


## 27-14-1. Short title.

This [act] may be cited as the "Medicaid False Claims Act" .

**History: Laws 2004, ch. 49, § 1.**



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**Bracketed material.** — The bracketed material was added by the compiler and is not a part of the law.

**Cross references.** — For the Medicaid Fraud Act, *see* Chapter 30, Article 44 NMSA 1978.

**Effective dates.** — Laws 2004, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

## 27-14-2. Purpose.

The purpose of the Medicaid False Claims Act is to deter persons from causing or assisting to cause the state to pay medicaid claims that are false and to provide remedies for obtaining treble damages and civil recoveries for the state when money is obtained from the state by reason of a false claim.

**History: Laws 2004, ch. 49, § 2.**

**Effective dates.** — Laws 2004, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

## 27-14-3. Definitions.

As used in the Medicaid False Claims Act:

A. "claim" means a written or electronically submitted request for payment of health care services pursuant to the medicaid program;

B. "department" means the human services department;

C. "medicaid" means the federal-state program administered by the human services department pursuant to Title 19 or Title 21 of the federal Social Security Act;

D. "medicaid recipient" means an individual on whose behalf a person claims or receives a payment from the medicaid program, regardless of whether the individual was eligible for the medicaid program; and

E. "qui tam" means an action brought under a statute that allows a private person to sue for a recovery, part of which the state will receive.

**History: Laws 2004, ch. 49, § 3.**

**Effective dates.** — Laws 2004, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

## 27-14-4. False claims against the state; liability for certain acts.

A person commits an unlawful act and shall be liable to the state for three times the amount of damages that the state sustains as a result of the act if the person:

A. presents, or causes to be presented, to the state a claim for payment under the medicaid program knowing that such claim is false or fraudulent;

B. presents, or causes to be presented, to the state a claim for payment under the medicaid program knowing that the person receiving a medicaid benefit or payment is not authorized or is not eligible for a benefit under the medicaid program;

C. makes, uses or causes to be made or used a record or statement to obtain a false or fraudulent claim under the medicaid program paid for or approved by the state knowing such record or statement is false;

D. conspires to defraud the state by getting a claim allowed or paid under the medicaid program knowing that such claim is false or fraudulent;

E. makes, uses or causes to be made or used a record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the state, relative to the medicaid program, knowing that such record or statement is false;

F. knowingly applies for and receives a benefit or payment on behalf of another person, except pursuant to a lawful assignment of benefits, under the medicaid program and converts that benefit or payment to his own personal use;

G. knowingly makes a false statement or misrepresentation of material fact concerning the conditions or operation of a health care facility in order that the facility may qualify for certification or recertification required by the medicaid program; or



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H. knowingly makes a claim under the medicaid program for a service or product that was not provided.

**History: Laws 2004, ch. 49, § 4.**
**Cross references.** — For the Medicaid Fraud Act, *see* Chapter 30, Article 44 NMSA 1978.
**Effective dates.** — Laws 2004, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

## 27-14-5. Documentary material in possession of state agency.

A. The department shall have access to all documentary materials of persons and medicaid recipients to which a state agency has access. Documentary material provided pursuant to this subsection is provided to allow investigation of an alleged unlawful act or for use or potential use in an administrative or judicial proceeding.

B. Except for disclosure to any person under investigation or who is the subject of allegations made pursuant to the Medicaid False Claim Act [27-14-1 NMSA 1978] or as ordered by a court for good cause shown, the department shall not produce for inspection or copying or otherwise disclose the contents of documentary material obtained pursuant to this section to a person other than:

(1) an authorized employee of the attorney general;
(2) an agency of this state, the United States or another state;
(3) a district attorney, city attorney or county attorney of this state;
(4) the United States attorney general; or
(5) a state or federal grand jury.

**History: Laws 2004, ch. 49, § 5.**
**Effective dates.** — Laws 2004, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

## 27-14-6. Immunity.

Notwithstanding any other law, a person is not civilly or criminally liable for providing access to documentary material pursuant to the Medicaid False Claims Act [27-14-1 NMSA 1978] to a person identified in Subsection B of Section 5 of that act.

**History: Laws 2004, ch. 49, § 6.**
**Effective dates.** — Laws 2004, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

## 27-14-7. Civil action for false claims.

A. The department shall diligently investigate suspected violations. If the department finds that a person has violated or is violating the provisions of the Medicaid False Claims Act, the department may bring a civil action pursuant to Subsection F of this section.

B. A private civil action may be brought by an affected person for a violation of the Medicaid False Claims Act on behalf of the person bringing suit and for the state. The action shall be brought in the name of the state. The action may be dismissed if the court and the department, pursuant to Subsection F of this section, give written consent to the dismissal and their reasons for consenting.

C. For private civil actions, a copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the department. The complaint shall be filed in writing and shall remain under seal for at least sixty days. The complaint shall not be served on the defendant until the expiration of sixty days or any extension approved. Within sixty days after receiving a copy of the complaint, the department shall conduct an investigation of the factual allegations and legal contentions made in the complaint, shall make a written determination of whether there is substantial evidence that a violation has occurred and shall provide the person against which a complaint has been made with a copy of the



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determination. If the department determines that there is not substantial evidence that a violation has occurred, the complaint shall be dismissed.

D. The department may, for good cause shown, move the court for extensions of time during which the complaint remains under seal. Any such motion may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to a complaint filed pursuant to this section until twenty days after the complaint is unsealed and served to the defendant. The complaint shall be deemed unsealed at the expiration of the sixty-day period in the absence of a court-approved extension.

E. Before the expiration of the sixty-day period or any extensions obtained, the department, pursuant to Subsection F of this section, shall:

(1) proceed with the action, in which case the action shall be conducted by the department; or

(2) notify the court and the person who brought the action that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action if the department determined that there is substantial evidence that a violation of the Medicaid False Claims Act has occurred.

F. The department shall notify the attorney general prior to filing a civil action pursuant to the Medicaid False Claims Act and shall not proceed with the action except with the written approval of the attorney general. The attorney general shall, within twenty working days from the notification by the department, notify the department whether it may proceed with the civil action. Failure by the attorney general to notify the department of its determination within the specified time period shall be construed as consent to proceed. The department shall, after filing the civil action, notify the attorney general of any proposed dismissal or settlement and the department shall not proceed with the dismissal or settlement except with the written approval of the attorney general.

**History: Laws 2004, ch. 49, § 7.**

**Effective dates.** — Laws 2004, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

## 27-14-8. Rights of the parties to qui tam actions.

A. If the department proceeds with the action, it shall have the exclusive responsibility for prosecuting the action and shall not be bound by an act of the person bringing the action. The person bringing the action shall have the right to continue as a nominal party to the action and shall not have the right to participate in the litigation except as a witness.

B. The department may dismiss the action, pursuant to Subsection F of Section 7 of the Medicaid False Claims Act [27-14-7 NMSA 1978], notwithstanding the objections of the person bringing the action if the person has been notified by the department of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

C. The department may settle the action with the defendant, pursuant to Subsection F of Section 7 of the Medicaid False Claims Act, notwithstanding the objections of the person bringing the action if the court determines, after the hearing, that the proposed settlement is fair, adequate and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

D. If the state elects not to proceed with the action, the person bringing the action shall have the right to conduct the action. If the department requests, it shall be served with copies of the pleadings filed in the action and shall be supplied with copies of all deposition transcripts at the department's expense. When a person proceeds with the action, the court, without limiting the status and rights of the person bringing the action, may allow the department to intervene at a later date upon a showing of good cause.

E. Whether or not the department proceeds with the action, upon a showing by the department that certain actions of discovery by the person bringing the action would interfere with the department's investigation or prosecution of a civil matter arising out of the same facts, the court may stay such discovery for a period not to exceed sixty days. Such a showing shall be conducted in camera. The court may extend the sixty-day period upon a further showing in camera that the department



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has pursued the civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing civil investigation or proceedings.

**History: Laws 2004, ch. 49, § 8.**

**Effective dates.** — Laws 2004, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

## 27-14-9. Award to qui tam plaintiff.

A. If the department proceeds with an action brought by a person pursuant to the Medicaid False Claims Act, the person shall, subject to the limitations in this subsection, receive at least fifteen percent but not more than twenty-five percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one that the court finds to be based primarily on disclosures of specific information other than information provided by the party bringing the action relating to allegations or transactions in a criminal, civil or administrative hearing or from the news media, the court shall award a sum as it considers appropriate; provided that the sum does not exceed ten percent of the proceeds and takes into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. A payment to a person pursuant to this subsection shall be made from the proceeds. The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney fees and costs. In determining the amount of reasonable attorney fees and costs, the court shall consider whether such fees and costs were necessary to the prosecution of the action, were incurred for activities that were duplicative of the activities of the department in prosecuting the case or were repetitious, irrelevant or for purposes of harassment or caused the defendant undue burden or unnecessary expense. All such expenses, fees and costs shall be awarded against the defendant.

B. If the department does not proceed with an action pursuant to the Medicaid False Claims Act, the person bringing the action or settling the claim shall receive an amount that the court decides is reasonable for collecting the civil recovery and damages recoverable by the state. The amount shall be not less than twenty-five percent and not more than thirty percent of the proceeds of the action or settlement and shall be paid out of such proceeds. The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney fees and costs. In determining the amount of reasonable attorney fees and costs, the court shall consider whether such fees and costs were necessary to the prosecution of the action, were incurred for activities, which were repetitious, irrelevant or for purposes of harassment or caused the defendant undue burden or unnecessary expense. All such expenses, fees and costs shall be awarded against the defendant.

C. Whether or not the department proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action that the party would otherwise receive pursuant to Subsection A or B of this section, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from the person's role in the violation of the Medicaid False Claims Act, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the state to continue the action represented by the department. If the department does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney fees and costs if the defendant prevails in the action and the court finds that the claim of the party bringing the action was:

(1) filed for an improper purpose;

(2) not warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law; or

(3) was based on allegations or factual contentions not supported.



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**History: Laws 2004, ch. 49, § 9.**
**Effective dates.** — Laws 2004, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

## 27-14-10. Certain actions barred.

A. A court shall not have jurisdiction of an action brought pursuant to the Medicaid False Claims Act against a department official if the action is substantially based on evidence or information known to the department when the action was brought.

B. A person shall not bring an action pursuant to the Medicaid False Claims Act that is substantially based upon allegations or transactions that are the subject of a civil suit or an administrative proceeding in which the department is already a party.

C. A court shall not have jurisdiction over an action pursuant to the Medicaid False Claims Act substantially based upon the public disclosure of allegations or actions in a criminal, civil or administrative hearing or from the news media, unless the action is brought by the department or the person bringing the action is an original source of the information. For the purposes of this subsection, "original source" means the person bringing suit that has independent knowledge, including knowledge based on the person's own investigation of the defendant's conduct, of the information on which the allegations are based and has voluntarily provided or verified the information on which the allegations are based or has voluntarily provided the information to the department before filing an action pursuant to this section that is based on the information.

**History: Laws 2004, ch. 49, § 10.**
**Effective dates.** — Laws 2004, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

## 27-14-11. Department not liable for certain expenses.

The department shall not be liable for expenses that a person incurs in bringing an action pursuant to the Medicaid False Claims Act.

**History: Laws 2004, ch. 49, § 11.**
**Effective dates.** — Laws 2004, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

## 27-14-12. Employee protection.

Any employee who is discharged, demoted, suspended, threatened, harassed or otherwise discriminated against in the terms and conditions of employment by the employer because of lawful acts done by the employee on behalf of the employee or others in disclosing information to the department or in furthering a false claims action pursuant to the Medicaid False Claims Act, including investigation for, initiation of, testimony for or assistance in an action filed or to be filed pursuant to that act, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status that the employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney fees. An employee may bring an action in the appropriate court of the state for the relief provided in this subsection.

**History: Laws 2004, ch. 49, § 12.**
**Effective dates.** — Laws 2004, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

## 27-14-13. False claims and reporting procedure.

A. A civil action shall be brought within the limitations set forth in Section 37-1-4 NMSA 1978.



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B. In any action brought pursuant to the Medicaid False Claims Act, the department or the person bringing the action shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

C. Notwithstanding any other provision of law, a final judgment rendered in favor of the department in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty, shall preclude the defendant from denying the essential elements of the offense in any action that involves the same transaction as in the criminal proceeding and that is brought pursuant to the Medicaid False Claims Act.

**History: Laws 2004, ch. 49, § 13.**
**Effective dates.** — Laws 2004, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

## 27-14-14. Application of other law.

The application of a civil remedy pursuant to this law does not preclude the application of other laws, statutes or regulatory remedy, except that a person may not be liable for a civil remedy pursuant to the Medicaid False Claims Act and civil damages or recovery pursuant to the Medicaid Fraud Act [30-44-1 NMSA 1978] if the civil remedy and the civil damages or recoveries are assessed for the same conduct by another government agency.

**History: Laws 2004, ch. 49, § 14.**
**Effective dates.** — Laws 2004, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

## 27-14-15. Use of funds.

A. Damages collected pursuant to the Medicaid False Claims Act on behalf of the state shall be remitted to the state treasurer for deposit in the general fund to be used for the state's medicaid program.

B. Penalties, legal fees or costs of investigation recovered pursuant to the Medicaid False Claims Act on behalf of the state shall be remitted to the state treasurer for deposit in the general fund to be used for the state's medicaid program.

C. Pursuant to Subsection C of Section 30-44-8 NMSA 1978, penalties recovered pursuant to the Medicaid False Claims Act on behalf of the state may be claimed by the attorney general pursuant to procedures established by the department and the attorney general.

**History: Laws 2004, ch. 49, § 15.**
**Effective dates.** — Laws 2004, ch. 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

# ARTICLE 15

# Money Follows the Person in New Mexico

Sec.
27-15-1. Short title.
27-15-2. Definition.
27-15-3. Community-based living; choice of options.
27-15-4. Information.
27-15-5. Quality improvement.

## 27-15-1. Short title.

This act [27-15-1 to 27-15-5 NMSA 1978] may be cited as the "Money Follows the Person in New Mexico Act".

**History: Laws 2006, ch. 112, § 1.**



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**Effective dates.** — Laws 2006, ch. 112 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 27-15-2. Definition.

As used in the Money Follows the Person in New Mexico Act, "department" means the aging and long-term services department [9-23-4 NMSA 1978].

**History: Laws 2006, ch. 112, § 2.**
**Effective dates.** — Laws 2006, ch. 112 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 27-15-3. Community-based living; choice of options.

An elderly or disabled individual who is identified and assessed as eligible for community-based living shall be allowed to choose, from among all service options available, the type of service that best meets that individual's needs. The individual's medical assistance funds shall be made available for the individual for the service option the individual selects, not to exceed the cost of the service. The department shall apply for federal approval as necessary, and upon federal approval, implement this section under existing or future federal legislation.

**History: Laws 2006, ch. 112, § 3.**
**Effective dates.** — Laws 2006, ch. 112 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 27-15-4. Information.

The department shall identify and provide adequate information to a medicaid-eligible individual residing in a nursing home and, if appropriate, the individual's representative, of the opportunity for the individual to receive community-based services and support pursuant to the Money Follows the Person in New Mexico Act.

**History: Laws 2006, ch. 112, § 4.**
**Cross references.** — For medicaid assistance programs, *see* 27-2-12.2 to 27-2-12.12 NMSA 1978.
**Effective dates.** — Laws 2006, ch. 112 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 27-15-5. Quality improvement.

The department shall develop and implement a quality improvement system of performance indicators and outcome measures to evaluate the level and effectiveness of participation of individuals who are eligible for community-based services and to ensure that the services and support that an individual receives pursuant to the Money Follows the Person in New Mexico Act are adequate.

**History: Laws 2006, ch. 112, § 5.**
**Effective dates.** — Laws 2006, ch. 112 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.



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# CHAPTER 28

# Human Rights

Art.


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# ARTICLE 1

## Human Rights

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# 28-1-1. Short title.

Chapter 28, Article 1 NMSA 1978 may be cited as the "Human Rights Act".

**History: 1953 Comp., § 4-33-1, enacted by Laws 1969, ch. 196, § 1; 2000, ch. 4, § 1.**

**Cross references.** — For commission on status of women, *see* 28-3-1 NMSA 1978.

For sex discrimination prohibited, *see* N.M. Const., art. II, § 18.

For Uniform Owner-Resident Relations Act, *see* 47-8-1 NMSA 1978.

**The 2000 amendment,** effective February 15, 2000, substituted "Chapter 28, Article 1 NMSA 1978" for "this act".

## ANNOTATIONS

**Human Rights Act protects against discriminatory treatment,** not against general claims of employer unfairness. *Juneau v. Intel Corp.*, 2006-NMSC-002, 139 N.M. 12, 127 P.3d 548.

**Evidence of discrimination.** — In an action based on a claim of racial discrimination, racist statements made by defendant that were not directed at plaintiff and that did not purport to describe her did not constitute direct evidence of racial discrimination. *Perry v. Woodward*, 199 F.3d 1126 (10th Cir. 1999).

**Punitive damages in civil rights action.** — Where plaintiff sued state hospital in state court alleging that employees of the hospital had retaliated against plaintiff for filing a human rights commission claim; plaintiff did not sue any individual employees in the state court action; plaintiff obtained an award for compensatory damages in state court; and plaintiff sued individual employees of the hospital in federal court for violation of plaintiff's civil rights for retaliating against plaintiff, plaintiff was not barred from suing individual employees for retaliation and recovering punitive damages, because different rules governed the measure of damages in the state action and in the federal action. *Gonzales v. Hernandez*, 175 F.3d 1202 (10th Cir. 1999).

**Notice requirement where federal court action.** — Failure to give notice to New Mexico human rights commission before bringing action in federal court bars recovery in federal court. *Harris v. Ericson*, 457 F.2d 765 (10th Cir. 1972).

**Human Rights Act inapplicable on federal enclave.** — Congress has exclusive authority over federal enclaves, and therefore plaintiffs' claims were barred by the federal enclave doctrine, where plaintiffs, employees of Sandia corporation (Sandia labs) located on Kirtland air force base, brought state-law employment discrimination claims against Sandia labs, a federally funded research and development contractor operating under contract for the department of energy. *Kennicott v. Sandia Corp.*, 314 F.Supp.3d 1142 (D.N.M. 2018)

**Judicial review of discrimination claims.** — Court's failure to explicitly apply framework for analyzing employment discrimination suits set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and adopted by the New Mexico Supreme Court in *Smith v. FDC Corp.*, 1990-NMSC-020, 109 N.M. 514, 787 P.2d 433, was not error where the court's findings were consistent with a proper application of the McDonnell Douglas/Smith framework and the record contained substantial evidence to support the court's finding that the employer did not perceive the employee to be handicapped. *Martinez v. Yellow Freight Sys.*, 1992-NMSC-015, 113 N.M. 366, 826 P.2d 962.

**Retaliatory discharge.** — A common-law tort action for retaliatory discharge may be brought when the claimant alleges she was discharged from her employment because she earlier sought relief against her employer under the New Mexico Human Rights Act. *Gandy v. Wal-Mart Stores, Inc.*, 1994-NMSC-040, 117 N.M. 441, 872 P.2d 859; *EEOC v. MTS Corp.*, 937 F. Supp. 1503 (D.N.M. 1996).

**Employer's burden of proof in sex discrimination and wrongful discharge cases.** — In a sex discrimination case, as with damages recoverable in cases of wrongful discharge, the employer has the burden of proving the employee did not exercise reasonable diligence in mitigating lost earnings. It is for the jury to decide, under the facts of each case, whether seeking formal education represents care or diligence to minimize damages. *Montoya v. Super Save Warehouse Foods*, 1991-NMSC-003, 111 N.M. 212, 804 P.2d 403.

**Availability of equal protection claim.** — The law in New Mexico is unsettled as to whether a claim of discrimination in employment that is asserted under this act can also be maintained under the equal protection clause of the New Mexico constitution. *Roybal v. City of Albuquerque*, 653 F. Supp. 102 (D.N.M. 1986).

**New Mexico created state remedy for age discrimination** through the New Mexico Human Rights Act that affords victims back wages and other monetary relief. *Gill v. Public Employees Ret. Bd.*, 2004-NMSC-016, 135 N.M. 472, 90 P.3d 491.

**Age and disability claims must be pursued under administrative procedures available** in the New Mexico Human Rights Act and do not lie in common-law tort. *Gormley v. Coca-Cola Enter.*, 2004-NMCA-021, 135 N.M.128, 85 P.3d 252, *aff'd*, 2005-NMSC-003, 137 N.M. 192, 109 P.3d 280.

**Effect on municipalities.** — The passage of the 1969 "Human Rights Act" does not remove the authority municipalities already possess in the realm of human rights. Whatever ordinance is passed cannot lower or be inconsistent with the state standards that have been set for human rights in this article. 1971 Op. Att'y Gen. No. 71-64.

**Law reviews.** — For note and comment, "For This Right There is a Remedy: New Mexico Supreme Court's Application of Ex Parte Young to Allow Suits Against the State in Gill v. Public Employees Retirement Board", see 35 N.M.L. Rev. 501 (2005).

For article, "Reticent Revolution: Prospects For Damage Suites Under New Mexico Bill of Rights," see 25 N.M.L. Rev. 173 (1995).

For student article, "The Sexual Harassment Claim Quandary: Workers' Compensation as an Inadequate and Unavailable Remedy: Cox v. Chino Mines/Phelps Dodge", see 24 N.M.L. Rev. 565 (1994).

For comment, "Public Accommodations in New Mexico: The Right to Refuse Service for Reasons Other Than Race or Religion," see 10 Nat. Resources J. 635 (1970).

For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M.L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

For article, "The Tort of 'Outrageous Conduct' In New Mexico: Intentional Infliction of Emotional Harm Without Physical Injury," see 19 N.M.L. Rev. 425 (1989).

For note, "Claiming Employment Discrimination in New Mexico Under State and Federal Law," see 21 N.M.L. Rev. 415 (1991).

For article, "Reticent Revolution: Prospects for Damage Suits Under the New Mexico Bill of Rights," see 25 N.M.L. Rev. 173 (1995).



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**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Application of state law to sex discrimination in employment, 87 A.L.R.3d 93.

In-house counsel's right to maintain action for wrongful discharge, 16 A.L.R.5th 239.

Pre-emption of wrongful discharge cause of action by civil rights laws, 21 A.L.R.5th 1.

Excessiveness or adequacy of damages for wrongful termination of at-will employee under state law, 86 A.L.R.5th 397.

Standing of state, local government, or agency thereof to bring suit under Civil Rights Act of 1871 (42 USCS § 1983), 106 A.L.R. Fed. 586.

Application of Age Discrimination in Employment Act (29 USCS § 621 et seq.) to religious institutions, 136 A.L.R. Fed. 487.

Punitive damages in actions for violations of Title VII of the Civil Rights Act of 1964 (42 USCA § 1981a; 42 USCA § 2000e et seq.), 150 A.L.R. Fed. 601.

Actions brought under 42 U.S.C.A. §§ 1981-1983 for racial discrimination - supreme court cases, 164 A.L.R. Fed. 483.

## 28-1-2. Definitions.

As used in the Human Rights Act:

A. "person" means one or more individuals, a partnership, association, organization, corporation, joint venture, legal representative, trustees, receivers or the state and all of its political subdivisions;

B. "employer" means any person employing four or more persons and any person acting for an employer;

C. "commission" means the human rights commission;

D. "director" or "bureau" means the human rights bureau of the labor relations division of the workforce solutions department;

E. "employee" means any person in the employ of an employer or an applicant for employment;

F. "labor organization" means any organization that exists for the purpose in whole or in part of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employment;

G. "employment agency" means any person regularly undertaking with or without compensation to procure opportunities to work or to procure, recruit or refer employees;

H. "public accommodation" means any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private;

I. "housing accommodation" means any building or portion of a building that is constructed or to be constructed, which is used or intended for use as the residence or sleeping place of any individual;

J. "real property" means lands, leaseholds or commercial or industrial buildings, whether constructed or to be constructed, offered for sale or rent, and any land rented or leased for the use, parking or storage of house trailers;

K. "secretary" means the secretary of workforce solutions;

L. "unlawful discriminatory practices" means those unlawful practices and acts specified in Section 28-1-7 NMSA 1978;

M. "physical or mental handicap" means a physical or mental impairment that substantially limits one or more of a person's major life activities. A person is also considered to be physically or mentally handicapped if the person has a record of a physical or mental handicap or is regarded as having a physical or mental handicap;

N. "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;

O. "applicant for employment" means a person applying for a position as an employee;

P. "sexual orientation" means heterosexuality, homosexuality or bisexuality, whether actual or perceived;

Q. "gender identity" means a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth;



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R. "reasonable accommodation" means modification or adaptation of the work environment, work schedule, work rules or job responsibilities, and reached through good faith efforts to explore less restrictive or less expensive alternatives to enable an employee to perform the essential functions of the job and that does not impose an undue hardship on the employer;

S. "undue hardship" means an accommodation requiring significant difficulty or expense when considered in light of the following factors:

(1) the nature and cost of the accommodation;

(2) the financial resources of the employer involved in the provision of the reasonable accommodation;

(3) the number of persons the employer employs;

(4) the effect of the accommodation on expenses and resources;

(5) the impact of the accommodation otherwise upon the employer's business;

(6) the overall financial resources of the employer;

(7) the overall size of the business of an employer with respect to the number, type and location of its facilities;

(8) the type of operation of the employer, including the composition, structure and functions of the workforce of the employer; or

(9) the geographic separateness or administrative or fiscal relationship to the employer of the employer's facilities;

T. "cultural or religious headdresses" includes hijabs, head wraps or other headdresses used as part of an individual's personal cultural or religious beliefs;

U. "protective hairstyles" includes such hairstyles as braids, locs, twists, tight coils or curls, cornrows, bantu knots, afros, weaves, wigs or head wraps; and

V. "race" includes traits historically associated with race, including hair texture, length of hair, protective hairstyles or cultural or religious headdresses.

**History: 1953 Comp., § 4-33-2, enacted by Laws 1969, ch. 196, § 2; 1973, ch. 155, § 1; 1983, ch. 241, § 1; 1987, ch. 76, § 1; 1987, ch. 342, § 16; 1993, ch. 268, § 1; 2003, ch. 383, § 1; 2007, ch. 200, § 17; 2020, ch. 49, § 1; 2021, ch. 19, § 3; 2021, ch. 37, § 3.**

**The 2021 amendment,** effective July 1, 2021, defined "cultural or religious headdresses", "protective hairstyles", and "race" as used in the Human Rights Act; added new Subsections T through V.

Laws 2021, ch. 19, § 3 and Laws 2021, ch. 37, § 3, both effective July 1, 2021, enacted identical amendments to this section. The section was set out as amended by Laws 2021, ch. 37, § 3. *See* 12-1-8 NMSA 1978.

**The 2020 amendment,** effective May 20, 2020, defined "reasonable accommodation" and "undue hardship" as used in the Human Rights Act, and added Subsections R and S.

**The 2007 amendment,** effective July 1, 2007, defined "bureau" as the human rights bureau of the labor relations division of the workforce solutions department and "secretary" as the secretary of workforce solutions.

**The 2003 amendment,** effective July 1, 2003, in Subsection M, substituted "a person's" for "an individual's" preceding "major life activities", substituted "A person" for "An individual" preceding "is also considered"; and added Subsections P and Q.

**The 1993 amendment,** effective June 18, 1993, substituted "labor department" for "department of labor" in Subsection D.

## ANNOTATIONS

**Commercial photography business was a public accommodation.** — Where plaintiff offered photography services to the public on a commercial basis and solicited customers by offering its services to the public at large through its website, advertisements on multiple search engines, and in the Yellow Pages; and plaintiff did not participate in selective advertising, such as telephone solicitation, or in any way seek to target a select group of people through its advertisements, plaintiff constituted a public accommodation under the Human Rights Act, Section 28-1-1 NMSA 1978 et seq. *Elane Photography, LLC v. Willock*, 2012-NMCA-086, 284 P.3d 428, cert. granted, 2012-NMCERT-008.

**University of New Mexico is not a "public accommodation"** within the meaning of the New Mexico Human Rights Act, and is not subject to the jurisdiction of the human rights commission in the instance of a nursing student's complaint of racial discrimination. *Human Rights Comm'n v. Board of Regents*, 1981-NMSC-026, 95 N.M. 576, 624 P.2d 518.

**Meaning of "places of accommodation" in former law.** — Single dwellings, duplexes and apartment buildings, being in their nature distinctly private, were not "places of accommodation" as defined in the Civil Rights Act, 49-8-1 to 49-8-7, 1953 Comp. (now repealed), and consequently the restrictions against discrimination did not apply thereto. 1963-64 Op. Att'y Gen. No. 63-150 (opinion rendered under prior law).

**Law reviews.** — For note and comment, "New Tort Rules Unmarried Partners: The Enhanced Potential for Successful Loss of Consortium and NIED Claims by Same Sex Partners in New Mexico After Lozoya", see 34 N.M.L. Rev. 461 (2004).

For comment, "Public Accommodations in New Mexico: The Right to Refuse Service for Reasons Other Than Race or Religion," see 10 Nat. Resources J. 635 (1970).

For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M.L. Rev. 51 (1976-77).

For note, "Human Rights Commission v. Board of Regents: Should a University be Considered a Public Accommodation Under the New Mexico Human Rights Act"? see 12 N.M.L. Rev. 541 (1982).



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**Am. Jur. 2d, A.L.R. and C.J.S. references.** — What constitutes private club or association not otherwise open to public that is exempt from state civil rights statute, 83 A.L.R.5th 467.

Meaning of term "employer" as defined in § 701(b) of Title VII of Civil Rights Act of 1964, as amended (42 USCS § 2000e(b)), 69 A.L.R. Fed. 191.

Who is "employer" within meaning of Age Discrimination in Employment Act of 1967 (29 USCS § 621 et seq.), 137 A.L.R. Fed. 551.

What constitutes religious harassment in employment in violation of Title VII of Civil Rights Act of 1964 (42 USCA § 2000e et seq.), 149 A.L.R. Fed. 405.

What constitutes reverse or majority race or national origin discrimination violative of federal constitution or statutes - nonemployment cases, 152 A.L.R. Fed. 1

## 28-1-3. Human rights commission.

A. There is created the "human rights commission" consisting of eleven members appointed by the governor with the advice and consent of the senate. Not more than six of the members shall be of the same political party. Not more than one member may be appointed from any one county. The governor shall designate a member to serve as chairman. The commission shall designate one of its members as vice chairman to preside in the absence or incapacity of the chairman.

B. The term of office of each member of the commission is for four years; however, of the commissioners first appointed, one shall be appointed for a term ending December 31, 1969, one for a term ending December 31, 1970, one for a term ending December 31, 1971 and two for terms ending December 31, 1972; provided, the two additional members added pursuant to this 1975 amendment shall be initially appointed for staggered terms of two and three years respectively so that one term ends on December 31, 1977 and one ends on December 31, 1978. The four additional commissioners added pursuant to this 1991 amendment shall be appointed for staggered terms; two shall be appointed for terms ending December 31, 1992; and two shall be appointed for terms ending December 31, 1993.

C. Any member chosen to fill a vacancy occurring otherwise than by expiration of term shall be appointed for the remainder of the unexpired term. Six members of the commission constitute a quorum to conduct business. Vacancies on the commission shall not impair the right of the remaining members to exercise the powers of the commission.

D. Each member of the commission shall be reimbursed, as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978], during the performance of official duties and shall receive no other compensation, perquisite or allowance.

**History: 1953 Comp., § 4-33-3, enacted by Laws 1969, ch. 196, § 3; 1975, ch. 124, § 1; 1987, ch. 342, § 17; 1991, ch. 104, § 1.**

**The 1991 amendment,** effective June 14, 1991, in Subsection A, substituted "eleven members" for "seven members" in the first sentence and "six of the members" for "four of the members" in the second sentence; added the second sentence in Subsection B; and, in Subsection C, substituted "the remainder of the unexpired term" for "the unexpired term of the member whom he is to succeed" at the end of the first sentence and "Six members" for "Four members" at the beginning of the second sentence.

**ANNOTATIONS**

**Law reviews.** — For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M. L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

## 28-1-4. Powers and duties.

A. The commission may:

(1) hear complaints and issue orders, including cease and desist orders concerning alleged unlawful discriminatory practice;

(2) hold hearings, subpoena witnesses and compel their attendance, administer oaths, take the testimony of any person under oath, order depositions and require the production for examination of any books, records, correspondence, documents and other evidence relating to any matter under investigation or in question before the commission. Contumacy or refusal to obey a subpoena issued pursuant to this section constitutes contempt punishable by the district court of the judicial district in which the witness may be found. No individual shall be excused from attending and testifying or from producing evidence in obedience to a subpoena issued pursuant to



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this section on the grounds that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or a forfeiture. However, no individual shall be prosecuted or subjected to any penalty or forfeiture concerning any matter for which he is compelled to testify or give evidence after having claimed his right against self-incrimination. Nevertheless, the individual so testifying shall not be exempt from prosecution and punishment for perjury committed while testifying.

B. The division may:

(1) receive and investigate complaints of alleged unlawful discriminatory practice;

(2) seek to eliminate discrimination through conciliation and persuasion by voluntary conferences with interested parties;

(3) recommend application by the director to a district court in the county where the violating party resides for specific performance of any conciliation agreement or for enforcement of any order issued by the commission;

(4) endeavor to eliminate prejudice and to further good will. The division in cooperation with the state department of public education and local boards of education shall encourage an educational program for all residents of the state, calculated to eliminate prejudice, its harmful effects and its incompatibility with principles of fair play, equality and justice;

(5) encourage voluntary advisory groups to study problems of discrimination in all fields, to foster, through community efforts, good will and cooperation in this state and to make recommendations to the secretary for the development of policies and procedures which the secretary may recommend to appropriate state agencies;

(6) seek and enlist the cooperation and contributions and grants of individuals and foundations, private, charitable, religious, labor, civic and benevolent organizations and the federal government for the purposes of this section;

(7) issue publications and release the results of investigation and research which in the secretary's judgment will tend to promote good will and prevent or eliminate discrimination; and

(8) submit annually a written report of all its activities and recommendations to the secretary, the governor and the legislature.

**History: 1978 Comp., § 28-1-4, enacted by Laws 1987, ch. 342, § 18.**

**Repeals and reenactments.** — Laws 1987, ch. 342, § 18 repealed former 28-1-4 NMSA 1978, as enacted by Laws 1969, ch. 196, § 4, effective July 1, 1987 and enacted a new section.

**ANNOTATIONS**

**Law reviews.** — For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M.L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

## 28-1-5. Procedures for adopting regulations.

A. The secretary may adopt, promulgate, amend and repeal rules and regulations to carry out the provisions of the Human Rights Act.

B. No rule or regulation of general application may be adopted, amended or repealed without a public hearing before the secretary or his designee.

C. The public hearing shall be in Santa Fe, and notice of the subject, time and place of the meeting, the manner in which interested persons may present their views and the method by which copies of the proposed rule, regulation or amendment may be obtained shall be:

(1) published in each county at least thirty days prior to the hearing date in a newspaper of general circulation; and

(2) mailed at least thirty days prior to the hearing date to all persons who have made a written request for advance notice of the hearing.

D. The secretary shall allow all interested persons a reasonable opportunity to submit arguments and to examine witnesses testifying at the hearing.

E. The secretary may designate a hearing officer to take evidence at the hearing.

F. Any person appearing or represented at the hearing shall be given written notice of the secretary's action on the proposed rule, regulation, amendment or repeal.



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G. No rule, regulation, amendment or repeal shall become effective until thirty days after its filing.

**History: 1953 Comp., § 4-33-5, enacted by Laws 1969, ch. 196, § 5; 1987, ch. 342, § 19.**

## 28-1-6. Validity of regulation; judicial review.

A. Any person who is or may be affected by a regulation adopted by the secretary may appeal to the court of appeals for further relief. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days after filing of the regulation.

B. The procedure for perfecting an appeal to the court of appeals under this section consists of the timely filing of a notice of appeal with a copy of the regulation from which the appeal is taken. The appellant shall certify in his notice of appeal that arrangements have been made with the secretary for preparation of a sufficient number of transcripts of the record of the hearing on which the appeal depends to support his appeal to the court, at the expense of the appellant, including three copies which he shall furnish to the secretary.

C. Upon appeal, the court of appeals shall set aside the regulation only if found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by a preponderance of evidence in the record; or

(3) otherwise not in accordance with law.

**History: 1953 Comp., § 4-33-6, enacted by Laws 1969, ch. 196, § 6; 1987, ch. 342, § 20.**

## 28-1-7. Unlawful discriminatory practice.

It is an unlawful discriminatory practice for:

A. an employer, unless based on a bona fide occupational qualification or other statutory prohibition, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of race, age, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, physical or mental handicap or serious medical condition, or, if the employer has fifty or more employees, spousal affiliation; provided, however, that 29 U.S.C. Section 631(c)(1) and (2) shall apply to discrimination based on age;

B. a labor organization to exclude a person or to expel or otherwise discriminate against any of its members or against any employer or employee because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, spousal affiliation, physical or mental handicap or serious medical condition;

C. any employer, labor organization or joint apprenticeship committee to refuse to admit or employ any person in any program established to provide an apprenticeship or other training or retraining because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, physical or mental handicap or serious medical condition, or, if the employer has fifty or more employees, spousal affiliation;

D. any person, employer, employment agency or labor organization to print or circulate or cause to be printed or circulated any statement, advertisement or publication, to use any form of application for employment or membership or to make any inquiry regarding prospective membership or employment that expresses, directly or indirectly, any limitation, specification or discrimination as to race, color, religion, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, physical or mental handicap or serious medical condition, or, if the employer has fifty or more employees, spousal affiliation, unless based on a bona fide occupational qualification;



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E. an employment agency to refuse to list and properly classify for employment or refer a person for employment in a known available job, for which the person is otherwise qualified, because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, spousal affiliation, physical or mental handicap or serious medical condition, unless based on a bona fide occupational qualification, or to comply with a request from an employer for referral of applicants for employment if the request indicates, either directly or indirectly, that the employer discriminates in employment on the basis of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, spousal affiliation, physical or mental handicap or serious medical condition, unless based on a bona fide occupational qualification;

F. any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, spousal affiliation or physical or mental handicap; provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation;

G. any person to:

(1) refuse to sell, rent, assign, lease or sublease or offer for sale, rental, lease, assignment or sublease any housing accommodation or real property to any person or to refuse to negotiate for the sale, rental, lease, assignment or sublease of any housing accommodation or real property to any person because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, spousal affiliation or physical or mental handicap; provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation;

(2) discriminate against any person in the terms, conditions or privileges of the sale, rental, assignment, lease or sublease of any housing accommodation or real property or in the provision of facilities or services in connection therewith because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, spousal affiliation or physical or mental handicap; provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation; or

(3) print, circulate, display or mail or cause to be printed, circulated, displayed or mailed any statement, advertisement, publication or sign or use any form of application for the purchase, rental, lease, assignment or sublease of any housing accommodation or real property or to make any record or inquiry regarding the prospective purchase, rental, lease, assignment or sublease of any housing accommodation or real property that expresses any preference, limitation or discrimination as to race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, spousal affiliation or physical or mental handicap; provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation;

H. any person to whom application is made either for financial assistance for the acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation or real property or for any type of consumer credit, including financial assistance for the acquisition of any consumer good as defined by Section 55-9-102 NMSA 1978, to:

(1) consider the race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, spousal affiliation or physical or mental handicap of any individual in the granting, withholding, extending, modifying or renewing or in the fixing of the rates, terms, conditions or provisions of any financial assistance or in the extension of services in connection with the request for financial assistance; or

(2) use any form of application for financial assistance or to make any record or inquiry in connection with applications for financial assistance that expresses, directly or indirectly, any limitation, specification or discrimination as to race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, spousal affiliation or physical or mental handicap;

I. any person or employer to:



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(1) aid, abet, incite, compel or coerce the doing of any unlawful discriminatory practice or to attempt to do so;

(2) engage in any form of threats, reprisal or discrimination against any person who has opposed any unlawful discriminatory practice or has filed a complaint, testified or participated in any proceeding under the Human Rights Act; or

(3) willfully obstruct or prevent any person from complying with the provisions of the Human Rights Act or to resist, prevent, impede or interfere with the commission or any of its members, staff or representatives in the performance of their duties under the Human Rights Act;

J. any employer to refuse or fail to accommodate a person's physical or mental handicap or serious medical condition, unless such accommodation is unreasonable or an undue hardship;

K. any employer to refuse or fail to make reasonable accommodation for an employee or job applicant with a need arising from pregnancy, childbirth or condition related to pregnancy or childbirth; or

L. any employer to require an employee with a need arising from pregnancy, childbirth or condition related to pregnancy or childbirth to take paid or unpaid leave if another reasonable accommodation can be provided unless the employee voluntarily requests to be placed on leave or the employee is placed on leave pursuant to federal law.

**History: 1953 Comp., § 4-33-7, enacted by Laws 1969, ch. 196, § 7; 1973, ch. 58, § 1; 1973, ch. 155, § 2; 1975, ch. 62, § 1; 1983, ch. 241, § 2; 1987, ch. 76, § 2; 1995, ch. 125, § 1; 2001, ch. 347, § 1; 2003, ch. 383, § 2; 2004, ch. 115, § 1; 2019, ch. 96, § 1; 2020, ch. 49, § 2.**

**The 2020 amendment,** effective May 20, 2020, added protections for pregnancy, childbirth or related conditions; in Subsection A, after each occurrence of "gender identity", added "pregnancy, childbirth or condition related to pregnancy or childbirth"; and added Subsections K and L.

**The 2019 amendment,** effective June 14, 2019, included sexual orientation and gender identity among classes protected from unlawful discrimination by employers, and removed the limitation of fifteen or more employees an employer must have to include sexual orientation and gender identity as bases for unlawful discrimination practices; in Subsection A, added "sexual orientation, gender identity", and after "shall apply to discrimination based on age", deleted "or, if the employer has fifteen or more employees, to discriminate against an employee based upon the employee's sexual orientation or gender identity".

**The 2004 amendment,** effective July 1, 2004, amended Subsection A to delete "sexual orientation, gender identity" and to add at the end of the Subsection "or, if the employer has fifty or more employees, spousal affiliation; provided, however, that 29 U.S.C. Section 631(c)(1) and (2) shall apply to discrimination based on age; or, if the employer has fifteen or more employees, to discriminate against an employee based upon the employee's sexual orientation or gender identity;".

**The 2003 amendment,** effective July 1, 2003, deleted "the" following "therewith because of" in Paragraph G(2); substituted "55-9-102" for "55-9-109" following "defined by Section" in Subsection H; substituted "a person's" for "to an individual's" following "fail to accommodate" in Subsection J; inserted "sexual orientation, gender identity" throughout the section; and substituted "a person" for "an individual", "person" for "individual", and "a person's" for "an individual's" throughout the section.

**The 2001 amendment,** effective June 15, 2001, in Subsection A, inserted "or other statutory prohibition" following "bona fide occupational qualification", deleted "marital status" preceding "physical or mental handicap", and inserted "or, if the employer has fifty or more employees, spousal affiliation" following "serious medical condition"; in Subsections B through H, substituted "spousal affiliation" for "marital status"; and in Subsection E, inserted "or serious medical condition" following the first instance of "mental handicap".

**The 1995 amendment,** effective June 16, 1995, inserted "serious" preceding "medical condition" throughout the section.

**ANNOTATIONS**

I. GENERAL CONSIDERATION.
II. SEXUAL HARASSMENT AND DISCRIMINATION.
III. AGE, DISABILITY AND RACE DISCRIMINATION.
IV. RETALIATION.

I. GENERAL CONSIDERATION.

**"Otherwise qualified".** — An employee is required to demonstrate that he or she is "otherwise qualified" to show a public policy violation based on Section 28-1-7A NMSA 1978. *Chavez v. Qwest*, Inc., 483 F.Supp.2d 1103 (D.N.M. 2007).

**ERISA actions.** — Where a complaint asserts a mixed motive of both discrimination because of age and discrimination because of a benefits-defeating motive, ERISA does not completely preempt a state age-discrimination claim. *Ruby v. Sandia*, 699 F.Supp.2d 1247 (D.N.M. 2010).

**Human Rights Act inapplicable on federal enclave.** — Congress has exclusive authority over federal enclaves, and therefore plaintiffs' claims were barred by the federal enclave doctrine, where plaintiffs, employees of Sandia corporation (Sandia labs) located on Kirtland air force base, brought state-law employment discrimination claims against Sandia labs, a federally funded research and development contractor operating under contract for the department of energy. *Kennicott v. Sandia Corp.*, 314 F.Supp.3d 1142 (D.N.M. 2018).

**Age and sex discrimination claims not preempted by federal law.** — Where plaintiff claimed that defendant Sandia national laboratories discriminated against her by forcing her from her position as a neutron generator productions specialist and placing her in a new job as a maintenance support technician, where she was unlikely to succeed because of her age and sex, and that after defendant placed her in this new position, defendant determined that plaintiff was not physically capable of doing the job, advised her to apply for other positions within the organization and eventually terminated her, and where defendant claimed that the wrongs of which plaintiff complains arose from a breach of obligations under a collective bargaining agreement governed by the federal Labor Management Relations Act (LMRA), dismissal of plaintiff's claims was not proper, because the LMRA does not preempt plaintiff's age and sex discrimination claims



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and New Mexico employees have the right not to suffer discrimination on the basis of age or sex independent of a collective bargaining agreement's language about an employee's rights. *Benavidez v. Sandia National Laboratories*, 212 F.Supp.3d 1039 (D.N.M. 2016).

**Federal enclave doctrine barred plaintiff's plausible age and sex discrimination claims.** — Where plaintiff claimed that defendant Sandia national laboratories discriminated against her by forcing her from her position as a neutron generator productions specialist and placing her in a new job as a maintenance support technician, where she was unlikely to succeed because of her age and sex, and that after defendant placed her in this new position, defendant determined that plaintiff was not physically capable of doing the job, advised her to apply for other positions within the organization and eventually terminated her, although plaintiff pled sufficient facts to make it plausible that she had a protected status under the NMHRA, being over the age of forty and a woman, that defendant took an adverse employment action against her, and that her protected status was a determinative factor in the decision for her reassignment, significant change in employment status, or change in benefits, her claims, brought under the New Mexico Human Rights Act, §§ 28-1-1 to -14 NMSA 1978, were barred by the federal enclave doctrine because the events complained of took place on Kirtland air force base and congress has exclusive authority over federal enclaves. *Benavidez v. Sandia National Laboratories*, 212 F.Supp.3d 1039 (D.N.M. 2016).

**Constitutionality of section.** — This section defines what is an unlawful discriminatory practice with sufficient particularity to effectuate the legislative intent of the Human Rights Act, and therefore is not repugnant to the New Mexico constitution. *Keller v. City of Albuquerque*, 1973-NMSC-048, 85 N.M. 134, 509 P.2d 1329, *overruled on other grounds*, *Green v. Kase*, 1992-NMSC-004, 113 N.M. 76, 823 P.2d 318.

**Burden of proving exhaustion of administrative remedies.** — Plaintiffs, who have alleged in their complaint that they have exhausted their administrative remedies, have the burden of proving exhaustion of their administrative remedies in order for their case to proceed at the district court level. *Rist v. Design Ctr. at Floor Concepts*, 2013-NMCA-109.

**Failure to exhaust administrative remedies deprives the court of subject matter jurisdiction.** — Where plaintiffs alleged that they were dismissed from their jobs for not participating in defendant's religious activities; plaintiffs filed complaints with the equal employment opportunity commission and cross filed the complaints with the human rights division; plaintiffs did not receive a letter of non-determination from the division; and after receiving right-to-sue letters from the commission, plaintiffs filed suit against defendant for wrongful termination and discrimination, plaintiffs failed to exhaust their remedies under the Human Rights Act, which deprived the district court of subject matter jurisdiction, requiring the dismissal of the complaint with prejudice. *Rist v. Design Ctr. at Floor Concepts*, 2013-NMCA-109.

**Prohibiting commercial photography business from discriminating based on sexual orientation did not violate freedom of expression.** — Where plaintiff offered wedding photography services to the general public; plaintiff's business was a public accommodation under the Human Rights Act, Section 28-1-1 NMSA 1978 et seq.; plaintiff refused to photograph a same-sex commitment ceremony between defendant and defendant's partner on religious grounds; and plaintiff claimed that the act compelled plaintiff to express a positive image and message about same-sex commitment ceremonies contrary to plaintiff's beliefs, the act did not violate plaintiff's first amendment rights to refrain from speaking because the act only requires that businesses that operate as a public accommodation, cannot discriminate against potential clients based on their sexual orientation, it does not compel plaintiff to either speak a government-mandated message or to publish the speech of another person. *Elane Photography, LLC v. Willock*, 2013-NMSC-040, *aff'g* 2012-NMCA-086, 284 P.3d 428.

Where plaintiff violated the Human Rights Act, Section 28-1-1 NMSA 1978 et seq., by refusing on religious and moral grounds to photograph defendant's commitment ceremony with defendant's same-sex partner; and plaintiff claimed that the act violated plaintiff's freedom of expression because photography is an artistic expression entitled to first amendment protection, the act did not violate plaintiff's freedom of expression because the act regulated plaintiff's conduct in its commercial business, not its speech or right to express its views about same-sex relationships. *Elane Photography, LLC v. Willock*, 2012-NMCA-086, 284 P.3d 428, cert. granted, 2012-NMCERT-008, *aff'd*, 2013-NMSC-040.

**Prohibiting commercial photography business from discriminating based on sexual orientation did not violate freedom of religion.** — Where plaintiff offered wedding photography services to the general public; plaintiff's business was a public accommodation under the Human Rights Act, Section 28-1-1 NMSA 1978 et seq.; plaintiff refused to photograph a same-sex commitment ceremony between defendant and defendant's partner on religious grounds; and plaintiff claimed that the act compelled plaintiff to express a positive image and message about same-sex commitment ceremonies contrary to plaintiff's beliefs, the act did not violate plaintiff's first amendment free exercise rights because the act is a neutral law of general applicability that ensures that businesses that choose to operate as a public accommodation do not discriminate against protected classes of people, it does not target only religiously motivated discrimination. *Elane Photography, LLC v. Willock*, 2013-NMSC-040, *aff'g* 2012-NMCA-086, 284 P.3d 428.

Where plaintiff violated the Human Rights Act, Section 28-1-1 NMSA 1978 et seq., by refusing on religious and moral grounds to photograph defendant's commitment ceremony with defendant's same-sex partner; and plaintiff claimed that the act violated plaintiff's freedom of religion because the act forced plaintiff to photograph same-sex marriages in violation of plaintiff's owner's religious belief that marriage is the union of one man and one woman, the act did not violate plaintiff's freedom of religion because the act is directed at and applies generally to all citizens transacting business through public accommodations that deal with the public at large, any burden on religion or religious beliefs was incidental and uniformly applied to all citizens, and a rational basis existed to support the governmental interest in protecting specific classes of citizens from discrimination in public accommodations. *Elane Photography, LLC v. Willock*, 2012-NMCA-086, 284 P.3d 428, cert. granted, 2012-NMCERT-008, *aff'd*, 2013-NMSC-040.

**Burden of proof.** — To avoid an adverse judgment as a matter of law, the plaintiff ordinarily need not introduce additional evidence of discrimination beyond evidence establishing a prima facie case and evidence of the falsity of the proffered reason for the employment action. *Garcia-Montoya v. State Treasurer's Office*, 2001-NMSC-003, 130 N.M. 25, 16 P.3d 1084.

**Protections in Human Rights Act apply equally to all plaintiffs, regardless of minority status.** — The New Mexico Human Rights Act (NMHRA) prohibits unlawful discrimination based on the traits declared by the legislature to be worthy of protection. Therefore, under the plain language of the NMHRA, its protections and requirements apply equally to all plaintiffs, regardless of their minority status. *Garcia v. Hatch Valley Pub. Schs.*, 2018-NMSC-020, *rev'g* 2016-NMCA-034, 369 P.3d 1.

**Prima facie case of employment discrimination.** — To establish a prima facie case of employment



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discrimination, the plaintiff must show that the plaintiff is a member of a protected class, the plaintiff was qualified to continue in the employment position, plaintiff's employment was terminated, and plaintiff was dismissed purportedly for performance nearly identical to the performance of one outside the protected class who was nonetheless retained. *Garcia v. Hatch Valley Pub. Schs.*, 2018-NMSC-020, *rev'g* 2016-NMCA-034, 369 P.3d 1.

Where plaintiff claimed that she was subjected to employment discrimination because she is not Hispanic, and where plaintiff proffered evidence purporting to show that she was treated less favorably than her Hispanic coworkers in a variety of ways, some of which were unrelated to her performance or termination, such as the scheduling and assignment of bus routes, compensation for pre- and post-trip inspection time, maintaining a clean bus, and enforcement of post-accident testing and suspension policies, plaintiff's proffered evidence was insufficient to establish a prima facie case of discriminatory termination, and the district court did not err in granting defendant's motion for summary judgment, because plaintiff failed to come forward with evidence that one or more Hispanic employees' performance was nearly identical to plaintiff's performance as a whole; the evidence was therefore insufficient to rule out the most common nondiscriminatory reasons for the termination of her employment. *Garcia v. Hatch Valley Pub. Schs.*, 2018-NMSC-020, *rev'g* 2016-NMCA-034, 369 P.3d 1.

**Burden of proof on claims of unlawful discrimination.** — For claims of unlawful discrimination, the plaintiff bears the initial burden of demonstrating a prima facie case of discrimination by showing that he or she is a member of the protected group, that he or she was qualified to continue in his or her position, that his or her employment was terminated, and that his or her position was filled by someone not a member of the protected class, or that he or she was dismissed purportedly for misconduct nearly identical to that engaged in by one outside of the protected class who was nonetheless retained. A plaintiff is also afforded the opportunity to rebut the employer's proffered reason as pretextual. *Garcia v. Hatch Valley Pub. Schs.*, 2016-NMCA-034, cert. granted.

**Rebutting presumption of liability.** — Where no tangible employment action has been taken against the employee, the employer may rebut the presumption of liability by proving elements of an affirmative defense. *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58.

**Failure to state claim for common law retaliatory discharge.** — Where plaintiffs, who brought a claim for wrongful termination based on religious discrimination, alleged that defendant discriminated against plaintiffs because of plaintiffs' religion, created a hostile work environment for plaintiffs and retaliated against plaintiffs by terminating plaintiffs in violation of the Human Rights Act, specifically Section 28-1-7 (A) NMSA 1978, plaintiffs did not plead a claim for the common law tort of retaliatory discharge nor did they give defendant adequate notice of the common law tort claim separate from the wrongful termination charge filed under the Human Rights Act. *Rist v. Design Ctr. at Floor Concepts*, 2013-NMCA-109.

**Summary judgment appropriate.** — Because plaintiff had acknowledged that she could not reasonably be accommodated in her former job and reassignment was not required under the Human Rights Act, summary judgment on a Human Rights Act claim was appropriate. *Albert v. Smith's Food & Drug Ctrs.*, Inc., 356 F.3d 1242 (10th Cir. 2004).

**Guidance provided by interpretation of federal law.** — The evidentiary methodology adopted by the United States Supreme Court in interpreting the federal Civil Rights Act of 1964 provides guidance for proving a violation of the New Mexico Human Rights Act. *Smith v. FDC Corp.*, 1990-NMSC-020, 109 N.M. 514, 787 P.2d 433.

**Reassignment.** — Although the Human Rights Act was intended to eliminate unlawful discriminatory practice, nothing in that broad purpose requires that reasonable accommodation be read to include reassignment. *Albert v. Smith's Food & Drug Ctrs., Inc.*, 356 F.3d 1242 (10th Cir. 2004).

**"Reasonable accommodation" defined.** — Although the statute does not define what constitutes a "reasonable accommodation", the New Mexico Human Rights Commission regulations, 9.1.1.7 NMAC, define reasonable accommodation. *Albert v. Smith's Food & Drug Ctrs., Inc.*, 356 F.3d 1242 (10th Cir. 2004).

**Medical marijuana is not an accommodation that must be provided for by employer.** — Where plaintiff filed a complaint with the New Mexico human rights division alleging unlawful discrimination by defendant tractor supply company, and where evidence at trial established that plaintiff applied for a management position with defendant, and where, during the interview process, plaintiff advised defendant's hiring manager of his diagnosis of HIV/AIDS and of his participation in the medical cannabis program, and where, after being hired for the job, defendant was required to report to a testing facility to undergo a drug test, the results of which indicated a positive test for cannabis metabolites, and where defendant discharged plaintiff on the basis of the positive drug test, defendant's motion to dismiss was granted because the Lynn and Erin Compassionate Use Act, §§ 26-2B-1 to -10 NMSA 1978, which authorizes New Mexico's medical cannabis program, combined with the New Mexico Human Rights Act, §§ 28-1-1 to -14 NMSA 1978, does not provide a cause of action for plaintiff, as medical marijuana is not an accommodation that must be provided for by the employer. *Garcia v. Tractor Supply Company*, 154 F.Supp.3d 1225 (D.N.M. 2016).

## II. SEXUAL HARASSMENT AND DISCRIMINATION.

**Refusal by commercial photography business to photograph a same-sex commitment ceremony constituted discrimination.** — Where plaintiff offered wedding photography services to the general public; plaintiff's business was a public accommodation under the Human Rights Act, Section 28-1-1 NMSA 1978 et seq.; and plaintiff refused to photograph a same-sex commitment ceremony between defendant and defendant's partner on religious grounds, plaintiff violated the act because plaintiff discriminated against defendant on the basis of plaintiff's sexual orientation. *Elane Photography, LLC v. Willock*, 2013-NMSC-040, *aff'g* 2012-NMCA-086, 284 P.3d 428.

Where plaintiff, which was a commercial photography business, refused to photograph defendant's commitment ceremony with defendant's same-sex partner based on plaintiff's owners' religious and moral beliefs which prohibited plaintiff from photographing images that convey a message that marriage can be defined other than as the union of one man and one woman; and plaintiff constituted a public accommodation under the Human Rights Act, Section 28-1-1 NMSA 1978 et seq., plaintiff violated the act by discriminating against defendant based on defendant's sexual orientation. *Elane Photography, LLC v. Willock*, 2012-NMCA-086, 284 P.3d 428, cert. granted, 2012-NMCERT-008, *aff'd*, 2013-NMSC-040.

**Hostile work environment sexual harassment.** — A plaintiff's claim of hostile work environment sexual harassment was supported by substantial evidence where she proved the following: an attorney, who worked with plaintiff as a paralegal, regularly made sexual innuendoes and told dirty jokes that were demeaning to women, engaged in sexual discussions and flirted with female employees, inappropriately touched female employees, commented about employees' sexual preferences and tolerated similar conduct by other office employees and the attorney became more aggressive when plaintiff reported



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the occurrences to her employer, followed plaintiff and yelled at her, disciplined plaintiff for pretextual reasons and berated and belittled her publicly. *Littell v. Allstate Ins. Co.*, 2008-NMCA-012, 143 N.M. 506, 177 P.3d 1080.

**Employer liability will be presumed** where there is actionable sexual harassment and the harassing employee has supervisory authority over the victimized employee. *Ocana v. American Furn. Co.*, 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58.

**Proof of sex discrimination.** — In plaintiff's action alleging that her employer discriminated against her on the basis of her sex, the trial court properly allowed her to compare her wages with those of males employed as subsidiary managers by the company in other cities. *Sonntag v. Shaw*, 2001-NMSC-015, 130 N.M. 238, 22 P.3d 1188.

**Hostile work environment** claim was established by aggregation of incidents reflecting severity and pervasiveness of harassment almost daily for nineteen months. *Nava v. City of Santa Fe*, 2004-NMSC-039, 136 N.M. 647, 103 P.3d 571.

**Standard applicable to hostile work environment claims.** — To state a claim for a hostile work environment, the alleged conduct must be so severe and pervasive that the workplace is transformed into a hostile and abusive environment for the employee. *Herald v. Board of Regents of the Univ. of N.M.*, 2015-NMCA-104, cert. denied, 2015-NMCERT-009.

Where plaintiff, a resident physician at the university of New Mexico school of medicine, was dismissed from the residency program and brought suit against the board of regents of the university of New Mexico claiming sex discrimination, and where plaintiff proffered a jury instruction stating that to prove her hostile work environment, she was required to establish that defendant's conduct, after it learned of plaintiff's allegations of rape, was based on her sex and was "severe or pervasive," the district court's denial of plaintiff's instruction was proper, and the court's instruction, stating that to find a hostile work environment, plaintiff had to establish that defendant's conduct was based on plaintiff's sex and was "severe and pervasive," accurately stated the law. *Herald v. Board of Regents of the Univ. of N.M.*, 2015-NMCA-104, cert. denied, 2015-NMCERT-009.

**Claim not barred by exclusivity provision of Worker's Compensation Act.** — The plaintiff's claim of sex discrimination under the New Mexico Human Rights Act was not barred by the exclusivity provision of the Worker's Compensation Act, Section 52-1-6 NMSA 1978 et seq., even though her claim for worker's compensation and for violation of the NMHRA stemmed from the same set of facts. *Sabella v. Manor Care, Inc.*, 1996-NMSC-014, 121 N.M. 596, 915 P.2d 901.

**Claim under the Human Rights Act was not barred by the Personnel Act.** — The protections against discrimination and retaliation contained in the Human Rights Act apply to probationary employees of the state who have been discharged pursuant to the Personnel Act, Section 10-9-1 NMSA 1978 et seq. *Rodriguez v. N.M. Dep't of Workforce Solutions*, 2012-NMCA-059, 278 P.3d 1047.

Where the employee was hired as a probationary employee of the Department of Workforce Solutions; while the employee was a probationary employee, the employee was given notice of dismissal from the employee's position pursuant to the Personnel Act, Section 10-9-1 NMSA 1978 et seq., which permitted the department to terminate the employee without cause; as a probationary employee, the employee had no property interest in continuing employment; and the employee filed a claim under the Human Rights Act alleging discrimination and retaliation based on sex and age, the employee had a right to pursue the claims under the Human Rights Act. *Rodriguez v. N.M. Dep't of Workforce Solutions*, 2012-NMCA-059, 278 P.3d 1047.

**Human Rights Act prohibition against discrimination on the basis of spousal affiliation or sexual orientation.** — An owner of a mobile home park was not "using" property for an immoral purpose when renting to cohabiting couples, or to tenants engaged in drug trafficking in the absence of a showing of knowledge of the drug trafficking. *Maloof v. Prieskorn*, 2004-NMCA-126, 136 N.M. 516, 101 P.3d 327, cert. denied, 2004-NMCERT-011, 136 N.M. 656, 103 P.3d 580.

**City of Albuquerque ordinance which prohibits public nudity** does not violate the New Mexico Human Rights Act which in general prohibits an establishment that offers services to the public from discriminating on the basis of sex. *City of Albuquerque v. Sachs*, 2004-NMCA-065, 135 N.M. 578, 92 P.3d 24, cert. denied, 2004-NMCERT-006, 135 N.M. 789, 93 P.3d 1292.

**Summary judgment appropriate.** — Where superior told plaintiff over a two-month period that he found plaintiff attractive and asked if plaintiff was interested in a relationship, but did not pursue the matter after he was rebuffed by plaintiff and reduced his contact with plaintiff; superior never made any comment connecting a promised raise to anything other than plaintiff's job performance; and plaintiff offered no evidence that her work performance was affected, that she felt compelled to resign, that her superior made any suggestion that her response to his advances would have an impact on her compensation or other aspect of her employment, or that plaintiff suffered any adverse employment action after she reported what she believed to be harassment to her superior, plaintiff failed to show quid pro quo sexual harassment, hostile work environment sexual harassment, constructive discharge or retaliation. *Ulibarri v. State*, 2006-NMSC-009, 139 N.M. 193, 131 P.3d 43.

## III. AGE, DISABILITY AND RACE DISCRIMINATION.

**Age and disability claims** must be pursued under the New Mexico Human Rights Act and do not lie in common law tort. Employees may not pursue age and discrimination claims outside the Act that do not contain allegations sufficient to meet the elements of retaliatory discharge, intentional infliction of emotional distress, prima facie tort, or other existing independent torts. *Gormley v. Coca-Coca Enters.*, 2004-NMCA-021, 135 N.M. 128, 85 P.3d 252, *aff'd*, 2005-NMSC-003, 137 N.M. 192, 109 P.3d 280.

**Disability based on serious medical condition.** — Plaintiff established a prima facie case of disability for purposes of an employment discrimination claim based on plaintiff's breast cancer and on the effects of plaintiff's cancer medication which substantially impaired plaintiff's normal sex life. *Keller v. Board of Educ. of City of Albuquerque*, 182 F. Supp. 2d 1148 (D.N.M. 2001).

**Human Rights Act prohibits** employers from refusing to reasonably accommodate individual's disability. *Albert v. Smith's Food & Drug Centers, Inc.*, 356 F.3d 1242 (10th Cir. 2004).

**New Mexico created state remedy for age discrimination** through the New Mexico Human Rights Act that affords victims back wages and other monetary relief. *Gill v. Pub. Employees Ret. Bd.*, 2004-NMSC-016, 135 N.M. 472, 90 P.3d 491.

**Bona fide occupational qualification.** — Termination of nanny who, due to illness, was unable to perform job was not a wrongful discharge under this section; the ability to attend work regularly is a bona fide occupational qualification within the meaning of Subsection A. *Stock v. Grantham*, 1998-NMCA-081, 125 N.M. 564, 964 P.2d 125, cert. denied, 125 N.M. 322, 961 P.2d 167.

**Race discrimination not shown.** — Shopping center manager did not discriminate against an East Indian store owner by refusing to renew the owner's lease of a



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space in the shopping center, where the decision not to renew the lease was purely a business judgment based on efforts to improve the center's "tenant mix". *Goradia v. Hahn Co.*, 1991-NMSC-040, 111 N.M. 779, 810 P.2d 798.

**Protections in Human Rights Act apply equally to all plaintiffs, regardless of minority status.** — The New Mexico Human Rights Act (NMHRA) prohibits unlawful discrimination based on the traits declared by the legislature to be worthy of protection. Therefore, under the plain language of the NMHRA, its protections and requirements apply equally to all plaintiffs, regardless of their minority status. *Garcia v. Hatch Valley Pub. Schs.*, 2018-NMSC-020, *rev'g* 2016-NMCA-034, 369 P.3d 1.

**Prima facie case of employment discrimination.** — To establish a prima facie case of employment discrimination, the plaintiff must show that the plaintiff is a member of a protected class, the plaintiff was qualified to continue in the employment position, plaintiff's employment was terminated, and plaintiff was dismissed purportedly for performance nearly identical to the performance of one outside the protected class who was nonetheless retained. *Garcia v. Hatch Valley Pub. Schs.*, 2018-NMSC-020, *rev'g* 2016-NMCA-034, 369 P.3d 1.

Where plaintiff claimed that she was subjected to employment discrimination because she is not Hispanic, and where plaintiff proffered evidence purporting to show that she was treated less favorably than her Hispanic coworkers in a variety of ways, some of which were unrelated to her performance or termination, such as the scheduling and assignment of bus routes, compensation for pre- and post-trip inspection time, maintaining a clean bus, and enforcement of post-accident testing and suspension policies, plaintiff's proffered evidence was insufficient to establish a prima facie case of discriminatory termination, and the district court did not err in granting defendant's motion for summary judgment, because plaintiff failed to come forward with evidence that one or more Hispanic employees' performance was nearly identical to plaintiff's performance as a whole; the evidence was therefore insufficient to rule out the most common nondiscriminatory reasons for the termination of her employment. *Garcia v. Hatch Valley Pub. Schs.*, 2018-NMSC-020, *rev'g* 2016-NMCA-034, 369 P.3d 1.

**Classifications such as Caucasian, white, and non-Hispanic are protected.** — Where plaintiff, a Caucasian and of German descent, claimed that she was subject to discrimination based on her status as a non-Hispanic, the district court erred in granting defendant's motion for summary judgment on the grounds that the school district that refused to renew plaintiff's employment contract was not aware of plaintiff's asserted national origin, and therefore plaintiff's national origin could not, as a matter of law, have been a motivating factor in the decision to terminate her employment. A national origin discrimination claim based on the ethnic distinction between Hispanics and non-Hispanics is actionable under the New Mexico Human Rights Act. *Garcia v. Hatch Valley Pub. Schs.*, 2016-NMCA-034, cert. granted.

**Reverse discrimination claims.** — Reverse discrimination claims are analyzed like any other racial discrimination claim, and where plaintiff, who identified her protected group as white or non-Hispanic, presented evidence concerning her training and experience, as well as evidence that other school bus drivers, who did not belong to the protected class, had similar performance issues and were not terminated, plaintiff satisfied the prima facie case requirement to show that the circumstances of her termination give rise to an inference of discrimination, and the burden shifts to the school district to provide a legitimate purpose for plaintiff's termination. Plaintiff's evidence was also sufficient to raise a question as to pretext, and therefore plaintiff put forward sufficient evidence to create genuine issues of material fact with respect to her discrimination claim against defendant. The district court erred in granting summary judgment dismissing plaintiff's claim. *Garcia v. Hatch Valley Pub. Schs.*, 2016-NMCA-034, cert. granted.

**Age and race discrimination shown.** — Fifty-nine year-old Navajo Indian made out a case that he was terminated because of his age and race, where he identified age and race-based animus, and demonstrated that he was treated differently than similarly situated young, non-Native Americans, to a degree sufficient to support a judgment and award of damages. *Smith v. FDC Corp.*, 1990-NMSC-020, 109 N.M. 514, 787 P.2d 433.

**Age discrimination not shown.** — Employee's charge of age discrimination was not established where the evidence showed that the employer did not breach its reduction-in-force policy, plaintiff was not treated less favorably than younger employees, and the employer had a legitimate nondiscriminatory reason not to retain the employee. *Cates v. Regents of N.M. Inst. of Mining & Tech.*, 1998-NMSC-002, 124 N.M. 633, 954 P.2d 65.

**"Medical condition" does not include a temporary injury with minimal residual effects.** *Trujillo v. N. Rio Arriba Elec. Coop., Inc.*, 2002-NMSC-004, 131 N.M. 607, 41 P.3d 333.

**Court may not impute knowledge of certain medical conditions.** — Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, the employer cannot be held to have imputed knowledge of a medical condition. *Trujillo v. N. Rio Arriba Elec. Coop.*, 2002-NMSC-004, 131 N.M. 607, 41 P.3d 333.

**Totally disabled employee.** — By admitting in his worker's compensation claim that he was totally disabled, an employee also admitted that he was not "otherwise qualified", per Subsection A, and, thus, was barred as matter of law from recovery under the Human Rights Act, Section 28-1-1 NMSA 1978 et seq. *Kitchell v. Pub. Serv. Co.*, 1998-NMSC-051, 126 N.M. 525, 972 P.2d 344.

## IV. RETALIATION.

**Retaliation provisions.** — The plain language of the New Mexico Human Rights Act retaliation provision in Section 28-1-7I(2) NMSA 1978 is broad enough to provide protection to a defense attorney participating in a mediation. *Kelley v. City of Albuquerque*, 542 F.3d 802 (10th Cir. 2008)

**Acts of retaliation.** — Prohibited acts of "threats, reprisal or discrimination" are considered together under the general label of unlawful retaliation. *Juneau v. Intel Corp.*, 2006-NMSC-002, 139 N.M. 12, 127 P.3d 548.

**Prima facie case of retaliation.** — To present a prima facie case of retaliation, opposition to a discriminatory practice must be shown and regardless of how a complaint of discrimination is made to the employer, the employee's communication to the employer must sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner and at the very least, if the statement does not mention a specific act of discrimination, the employer must be able to discern from the context of the statement that the employee opposes an allegedly unlawful employment practice. *Ocana v. American Furniture Co.*, 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58.

**Plaintiff failed to establish a prima facie case of retaliation.** — Where former employee who worked as a veterinary medical officer and area epidemiology officer for the United States Department of Agriculture (USDA) brought an action asserting retaliation claims under the New Mexico Human Rights Act (NMHRA), §§ 28-1-1 to 28-1-14 NMSA 1978, against employees of the New Mexico Livestock Board (NMLB), claiming that the NMLB employees wrote negative comments about plaintiff's job performance in correspondence to his USDA supervisor, resulting in plaintiff's termination from the USDA, in retaliation for



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plaintiff's opposition to a discriminatory practice when he disclosed that the USDA and the NMLB allowed an infection agent to enter the human food chain on the Navajo reservation and that a USDA employee committed fiscal fraud, the district court did not err in granting defendants' motion for summary judgment, because plaintiff failed to establish a prima facie case of retaliation under the NMHRA because he provided no evidence that defendant had any knowledge of plaintiff's protected activities. *Muller v. Perdue*, 744 Fed. Appx. 555 (10th Cir. 2018).

**Burden of proof.** — In action for retaliation under the New Mexico Human Rights Act, the plaintiff has the burden of establishing that the defendant's actions were taken with the intent to retaliate against the plaintiff. *Gioia v. Pinkerton's, Inc.*, 194 F. Supp. 2d 1207 (D.N.M. 2002).

**Plaintiff who is not at-will employee may not pursue action** for tort of retaliatory discharge under the policy exception to the at-will doctrine when the plaintiff has an alternative remedial grievance procedure available under a collective bargaining agreement. *Silva v. American Fed'n. of State, County & Mun. Employees*, 231 F.3d 691 (10th Cir. 2001).

**Continuing violation doctrine applies to retaliation claim.** — The continuing violation doctrine applies to retaliation claims. If one act contributing to a retaliation claim based on a series of actions and not a single, discrete act occurred within the statutory period for filing complaints, all acts creating the retaliation claim may be considered, including facts and evidence of facts that occurred prior to the one-hundred-eighty-day statute of limitations cut-off for filing complaints. *Charles v. NMSU Regents*, 2011-NMCA-057, 150 N.M. 17, 256 P.3d 29, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Where plaintiff complained several times about the conduct of a co-worker and after each complaint, the co-worker and plaintiff's supervisors retaliated with harassment, threatening behavior, discrimination and reprisals, plaintiff's claim of retaliation was based on a cumulative series of acts, not a discrete discriminatory act, the continuing violation doctrine applied, and the court could consider all of the conduct that occurred during plaintiff's employment, including conduct that occurred more than 180 days prior to the date plaintiff filed a complaint. *Charles v. NMSU Regents*, 2011-NMCA-057, 150 N.M. 17, 256 P.3d 29, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

**Sufficient evidence of constructive discharge.** — Where plaintiff testified that during plaintiff's four years of employment with defendant, plaintiff's co-worker yelled at plaintiff, told plaintiff to "shut up", accused plaintiff of not doing anything, called plaintiff insulting names, subjected plaintiff to intimidating conduct by yelling at plaintiff, slammed drawers and cabinets, refused to give plaintiff receipts for purchases made using a university card that was issued to plaintiff, made fun of plaintiff, and told plaintiff to hold plaintiff's blouse closed when plaintiff bent down or the co-worker would kick plaintiff; some of the co-worker's conduct occurred in front of students; and plaintiff's supervisor yelled at plaintiff and criticized plaintiff in front of students, threw a cigarette butt at plaintiff, unfairly criticized plaintiff's work performance, accused plaintiff of being late to work, and decreased plaintiff's performance rating with respect to working relations, plaintiff's evidence was sufficient to support the jury's findings that plaintiff was constructively discharged. *Charles v. NMSU Regents*, 2011-NMCA-057, 150 N.M. 17, 256 P.3d 29, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

**Retaliatory discharge shown.** — In an action by an employee against an employer alleging gender discrimination and retaliatory discharge, since the supervisor's own testimony constituted an admission that the employee's complaint of gender discrimination caused him to make the determination to terminate her, the employee was entitled to judgment as a matter of law. *Brillhart v. Philips Elec. N. Am. Corp.*, 938 F. Supp. 742 (D.N.M. 1996), *rev'd*, 179 F.3d 1271 (10th Cir. 1999).

**Retaliatory actions shown.** — Jury reasonably concluded that retaliation was the motive behind the unfair criticism and isolation to which the employee was subjected after she filed a discrimination claim, as well as the employer's failure to give her the same consideration for a particular position as other employees. *Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, 129 N.M. 586, 11 P.3d 550.

**Evidence established retaliation for opposing unlawful discriminatory practice.** — Where plaintiff filed a worker's compensation claim after hurting his ankle while working at the outback steakhouse (outback) in Las Cruces, New Mexico, and where outback terminated plaintiff's employment because it believed that plaintiff could not perform the tasks required of his job, and where a jury found that outback violated the New Mexico Human Rights Act (NMHRA), §§ 28-1-1 through -14 NMSA 1978, and awarded plaintiff damages for lost wages and emotional distress, the district court did not err in denying outback's motion for judgment as a matter of law, because plaintiff established that outback believed, even if mistakenly, that plaintiff was physically handicapped, that his ankle injury substantially limited one or more of his major life activities, and the record established that plaintiff had a good faith, objectively reasonable belief that outback violated the NMHRA by terminating him because it regarded him as having a physical handicap. *Goodman v. OS Rest. Servs. LLC*, 2020-NMCA-019.

**Prospective employee may be required to enter race on application for security reasons** despite provisions of Section 59-4-4C, 1953 Comp. (similar to Subsection D of this section). 1963-64 Op. Att'y. Gen. No. 63-163.

**Law reviews.** — For note and comment, "The Irrational Legacy of Romer v. Evans: A Decade of Judicial Review Reveals the Need for Heightened Scrutiny of Legislation That Denies Equal Protection to Members of the Gay Community," see 36 N.M.L. Rev. 565 (2006).

For comment, "Public Accommodations in New Mexico: The Right to Refuse Service for Reasons Other Than Race or Religion," see 10 Nat. Resources J. 635 (1970).

For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M.L. Rev. 51 (1976-77).

For note, "Human Rights Commission v. Board of Regents: Should a University be Considered a Public Accommodation Under the New Mexico Human Rights Act"? see 12 N.M.L. Rev. 541 (1982).

For article, "Defending the Abusively Discharged Employee: In Search of a Judicial Solution," see 12 N.M.L. Rev. 711 (1982).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 15 Am. Jur. 2d Civil Rights §§ 28 to 34, 41 to 60, 98 to 175, 193 to 206, 226 to 242, 249 to 256.

Tenants or buyers: race or religious belief as permissible consideration in choosing tenants or buyers of real estate, 14 A.L.R.2d 153.

Discharge from private employment on ground of political views or conduct, 51 A.L.R.2d 742, 29 A.L.R.4th 287, 38 A.L.R.5th 39.

Businesses or establishments falling within state civil rights statute provisions prohibiting discrimination, 87 A.L.R.2d 120.

Blockbusting: validity and construction of anti-blockbusting regulations designed to prevent brokers from inducing sales of realty because of actual or rumored entry of racial group in neighborhood, 34 A.L.R.3d 1432.

Exclusion of or discrimination against physician or surgeon by hospital, 37 A.L.R.3d 645.



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Aliens: constitutionality of enactment or regulation forbidding or restricting employment of aliens in public employment or on public works, 38 A.L.R.3d 1213.

Discrimination in provision of municipal services or facilities as civil rights violation, 51 A.L.R.3d 950.

Trailer park as place of public accommodation within meaning of state civil rights statutes, 70 A.L.R.3d 1142.

Application of state law to sex discrimination in employment, 87 A.L.R.3d 93.

State laws prohibiting sex discrimination as violated by dress or grooming requirements for customers of establishments serving food or beverages, 89 A.L.R.3d 7.

Construction and effect of state legislation forbidding job discrimination because of physical handicap, 90 A.L.R.3d 383.

Union security arrangements in state public employment, 95 A.L.R.3d 1102.

Application of state law to age discrimination in employment, 96 A.L.R.3d 195.

Prohibition, under state civil rights laws, of racial discrimination in rental of privately owned residential property, 96 A.L.R.3d 497.

Identification of jobseeker by race, religion, national origin, sex, or age, in "situation wanted" employment advertising as violation of state civil rights laws, 99 A.L.R.3d 154.

On-the-job sexual harassment as violation of state civil rights law, 18 A.L.R.4th 328.

Construction and effect of state legislation forbidding discrimination in housing on account of physical handicap, 28 A.L.R.4th 685.

What constitutes illegal discrimination under state statutory prohibition against discrimination in housing accommodations on account of marital status, 33 A.L.R.4th 964.

What constitutes employment discrimination on basis of "marital status," for purposes of state civil rights laws, 44 A.L.R.4th 1044.

Discipline or discharge for sexual conduct as violative of state fair employment laws, 47 A.L.R.4th 863.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress, 52 A.L.R.4th 853.

AIDS infection as affecting right to attend public school, 60 A.L.R.4th 15.

Accommodation requirement under state legislation forbidding job discrimination on account of handicap, 76 A.L.R.4th 310.

Handicap as job disqualification under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 265.

Discrimination "because of handicap" or "on the basis of handicap" under state statutes prohibiting job discrimination on account of handicap, 81 A.L.R.4th 144.

State civil rights legislation prohibiting sex discrimination in housing, 81 A.L.R.4th 205.

What constitutes handicap under state legislation forbidding job discrimination on account of handicap, 82 A.L.R.4th 26.

Liability for discharge of employee from private employment on ground of political views or conduct, 38 A.L.R.5th 39.

Application of state law to age discrimination in employment, 51 A.L.R.5th 1.

Validity, construction, and application of state enactment, order, or regulation expressly prohibiting sexual orientation discrimination, 82 A.L.R.5th 1.

Individual liability of supervisors, managers, officers or co-employees for discriminatory actions under state Civil Rights Act, 83 A.L.R.5th 1.

When is supervisor's or coemployee's hostile environment sexual harassment imputable to employer under state law, 94 A.L.R.5th 1.

Discrimination against pregnant employee as violation of state fair employment laws, 99 A.L.R.5th 1.

What constitutes substantial limitation on major life activity of working for purposes of state civil rights acts, 102 A.L.R.5th 1.

Necessity of, and what constitutes, employer's reasonable accommodation of employee's religious preference under state law, 107 A.L.R.5th 623, § 7.

Refusal to hire, or dismissal from employment, on account of plaintiff's sexual lifestyle or sexual preference as violation of federal constitution or federal civil rights statutes, 42 A.L.R. Fed. 189.

Sex discrimination in law enforcement and corrections employment, 53 A.L.R. Fed. 31.

Actions, under 42 USCS § 1983, for violations of federal statutes pertaining to rights of handicapped persons, 63 A.L.R. Fed. 215.

Age as bona fide occupational qualification "reasonably necessary" for normal conduct of business under § 4(f)(1) of Age Discrimination in Employment Act (29 USCS § 623(f)(1)), 63 A.L.R. Fed. 610.

Admissibility, in action under Title VII of the Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), of evidence of discriminatory practices predating the Act, 63 A.L.R. Fed. 891.

Liability under Title VII of Civil Rights Act of 1964 (42 USCS § 2000e et seq.) of employer, as successor employer, for discriminatory employment practices of predecessor, 67 A.L.R. Fed. 806.

Disparate impact test for sex discrimination in employment under Title VII of Civil Rights Act of 1964 (42 USCS § 2000e et seq.), 68 A.L.R. Fed. 19.

When is work environment intimidating, hostile, or offensive, so as to constitute sexual harassment in violation of Title VII of Civil Rights Act of 1964, as amended (42 USCS § 2000e et seq.), 78 A.L.R. Fed. 252.

Reinstatement as remedy for discriminatory discharge or demotion under Age Discrimination in Employment Act (29 USCS § 621 et seq.), 78 A.L.R. Fed. 575.

Actions under Age Discrimination in Employment Act (29 USCS §§ 621-634) challenging hiring or retirement practices in law enforcement employment, 79 A.L.R. Fed. 373.

Who is "qualified" handicapped person protected from employment discrimination under Rehabilitation Act of 1973 (29 USCS §§ 701 et seq.) and regulations promulgated thereunder, 80 A.L.R. Fed. 830.

Effect of mixed or dual motives in actions under Title VII (equal employment opportunities subchapter) of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 83 A.L.R. Fed. 268.

Actionability, under federal and state antidiscrimination legislation, of foreign employer's discriminating in favor of foreign workers in hiring and other employment matters, 84 A.L.R. Fed. 114.

Nature and burden of proof in Title VII action alleging favoritism in promotion or job assignment due to sexual or romantic relationship between supervisor and another, 86 A.L.R. Fed. 230.

Circumstances which warrant finding of constructive discharge in cases under Age Discrimination in Employment Act (29 USCS § 621 et seq.), 93 A.L.R. Fed. 10.

When does adverse employment decision based on person's foreign accent constitute national origin discrimination in violation of Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 104 A.L.R. Fed. 816.

Protection of debtor from acts of discrimination by private entity under § 525(b) of Bankruptcy Code of 1978 (11 USCS § 525(b)), 105 A.L.R. Fed. 555.

Sex discrimination in job assignment or transfer as violation of Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 123 A.L.R. Fed. 1

Who, other than specifically excluded persons, is "employee" under § 4(a)(1) of Age Discrimination in



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Employment Act of 1967 (29 USC § 623(a)(1)), 125 A.L.R. Fed. 273.

Employee's retention of benefits received in consideration of promise not to enforce claims under Age Discrimination in Employment Act as ratification of otherwise invalid or voidable waiver under § 7(f)(1) of act (29 USC § 626(f)(1)), 128 A.L.R. Fed. 577.

Validity, construction, and application of § 274A of Immigration and Nationality Act (8 USCS § 1324a), involving unlawful employment of aliens, 130 A.L.R. Fed. 381.

What constitutes employer's reasonable accommodation of employee's religious preferences under Title VII of Civil Rights Act of 1964, 134 A.L.R. Fed. 1.

Who is "employer" within meaning of Age Discrimination in Employment Act of 1967 (29 USCS § 621 et seq.), 137 A.L.R. Fed. 551.

Conduct of plaintiff as defense in action for employment discrimination based on sexual harassment under federal civil rights statutes, 145 A.L.R. Fed. 459.

Construction and application of § 804(f) of Fair Housing Act (42 USCA § 3604(f)), prohibiting discrimination in housing because of individual's disability, 148 A.L.R. Fed. 1.

What constitutes reverse or majority gender discrimination against males violative of federal constitution or statutes - public employment cases, 153 A.L.R. Fed. 609.

What constitutes direct evidence of age discrimination in action under age discrimination in employment act (29 U.S.C.A. §§ 621et seq.) - post-Price Waterhouse cases, 155 A.L.R. Fed. 283.

What constitutes racial harassment in employment violative of Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e et seq.), 156 A.L.R. Fed. 1.

Sex discrimination in public education under Title IX - supreme court cases, 158 A.L.R. Fed. 563.

Liability of employer, under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.) for sexual harassment of employee by customer, client, or patron, 163 A.L.R. Fed. 445.

What constitutes "Willful violation" under age discrimination in employment act (29 U.S.C. § 626 et seq.) entitling victim to liquidate damages, 165 A.L.R. Fed. 1.

What constitutes reverse sex or gender discrimination against males violative of federal constitution or statutes - nonemployment cases, 166 A.L.R. Fed. 1.

What constitutes reverse or majority race or national origin discrimination violative of federal constitution or statutes - public employment cases, 168 A.L.R. Fed. 1.

14 C.J.S. Civil Rights, §§ 53 to 67, 146 to 181.

## 28-1-7.1. Prohibiting discrimination against seniors in certain volunteer service.

The state or a political subdivision of the state shall not exclude a person older than sixty years of age from volunteer service as long as the person is physically, mentally and professionally capable of performing the services involved. For the purposes of this section, "professionally capable" means having the ability to demonstrate reasonable proficiency and having any relevant certification in accordance with the laws, rules or technical standards that may govern the particular profession.

**History: Laws 2003, ch. 231, § 1.**

**Effective dates.** — Laws 2003, ch. 231, § 2 made the act effective July 1, 2003.

## 28-1-7.2. Quotas prohibited.

A person, employer, employment agency or organization shall not use the provisions of the Human Rights Act to adopt or implement a quota on the basis of sexual orientation or gender identity.

**History: Laws 2003, ch. 383, § 3.**

**Effective dates.** — Laws 2003, ch. 383, § 5 made the act effective July 1, 2003.

## 28-1-8. Repealed.

**Repeals.** — Laws 1983, ch. 241, § 6, repealed 28-1-8 NMSA 1978, as enacted by Laws 1973, ch. 155, § 3, relating to certification of preexisting disability, effective June 17, 1983.

## 28-1-9. Exemptions.

Nothing contained in the Human Rights Act shall:

A. apply to any single-family dwelling sold, leased, subleased or rented by an owner without the making of any notice, statement or advertisement with respect to the sale, lease, sublease or rental of a dwelling unit that indicates any preference, limitation or discrimination based on race, color, religion, national origin, ancestry, sex, sexual orientation or gender identity. This exemption is subject to these further reservations:



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(1) to qualify for the exemption, the seller must not be an owner of or own or have reserved any interest in more than three single-family dwellings; and

(2) if the seller does not currently live in the dwelling or he was not the most recent occupant, the exemption granted in this section shall only apply to one sale in twenty-four months;

B. bar any religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization from limiting admission to or giving preference to persons of the same religion or denomination or from making selections of buyers, lessees or tenants as are calculated by the organization or denomination to promote the religious or denominational principles for which it is established or maintained, unless membership in the religious or denominational organization is restricted on account of race, color, national origin or ancestry;

C. bar any religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization from imposing discriminatory employment or renting practices that are based upon sexual orientation or gender identity; provided, that the provisions of the Human Rights Act with respect to sexual orientation and gender identity shall apply to any other:

(1) for-profit activities of a religious or denominational institution or religious organization subject to the provisions of Section 511(a) of the Internal Revenue Code of 1986, as amended; or

(2) nonprofit activities of a religious or denominational institution or religious organization subject to the provisions of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended;

D. apply to rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of the living quarters as his residence;

E. apply to public restrooms, public showers, public dressing facilities or sleeping quarters in public institutions, where the preference or limitation is based on sex; and

F. prevent the mandatory retirement of an employee upon reaching the age of sixty-five years or older, if the employer is operating under a retirement plan that meets the requirements of Public Law 93-406, the Employee Retirement Income Security Act of 1974.

**History: 1953 Comp., § 4-33-8, enacted by Laws 1969, ch. 196, § 8; 1973, ch. 58, § 2; 1975, ch. 78, § 1; 2003, ch. 383, § 4; 2004, ch. 115, § 2.**

**Cross references.** — For the federal Employee Retirement Income Security Act of 1974, *see* 26 U.S.C. § 410 et seq.

For Section 511(a) of the Internal Revenue Code of 1986, *see* 26 U.S.C. § 511(a).

For Section 501(c)(3), *see* 26 U.S.C. § 501(c)(3).

**The 2004 amendment,** effective July 1, 2004, deleted Subsection G, which provided that the Human Rights Act does not apply to a business that employs fourteen or fewer full-time employees.

**The 2003 amendment,** effective July 1, 2003, substituted "sex, sexual orientation or gender identity" for "or sex" following "national origin, ancestry" in Subsection A; in Paragraph A(2), substituted "does not currently" for "doesn't presently" near the beginning, deleted "then" following "most recent occupant", substituted "shall" for "will" following "in this section"; in Subsection B, substituted "that is operated, supervised" for "which is operated, or supervised" following "institution or organization", inserted "that" following "controlled by or"; added present Subsection C and redesignated former Subsections C to E as Subsections D to F; and added Subsection G.

**ANNOTATIONS**

**Law reviews.** — For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M.L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and application of provisions of § 702 of Civil Rights Act of 1964 (42 USCS § 2000e-1) exempting activities of religious organizations from operation of Title VII Equal Employment Opportunity provisions, 67 A.L.R. Fed. 874.

Actions under Age Discrimination in Employment Act (29 USCS §§ 621 to 634) challenging hiring or retirement practices in law enforcement employment, 79 A.L.R. Fed. 373.

Validity, construction, and application of § 804 (c) of Civil Rights Act of 1968 (Fair Housing Act) (42 USCS § 3604 (c)) prohibiting discriminatory notice, statement, or advertisement with respect to sale or rental of dwelling, 142 A.L.R. Fed. 1



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## 28-1-10. Grievance procedure.

A. A person claiming to be aggrieved by an unlawful discriminatory practice and a member of the commission who has reason to believe that discrimination has occurred may file with the human rights division of the labor department a written complaint that shall state the name and address of the person alleged to have engaged in the discriminatory practice, all information relating to the discriminatory practice and any other information that may be required by the commission. All complaints shall be filed with the division within three hundred days after the alleged act was committed.

B. The director shall advise the respondent that a complaint has been filed against the respondent and shall furnish the respondent with a copy of the complaint. The director shall promptly investigate the alleged act. If the director determines that the complaint lacks probable cause, the director shall dismiss the complaint and notify the complainant and respondent of the dismissal. The complaint shall be dismissed subject to appeal as in the case of other orders of the commission.

C. If the director determines that probable cause exists for the complaint, the director shall attempt to achieve a satisfactory adjustment of the complaint through persuasion and conciliation. The director and staff shall neither disclose what has transpired during the attempted conciliation nor divulge information obtained during any hearing before the commission or a commissioner prior to final action relating to the complaint. An officer or employee of the labor department who makes public in any manner information in violation of this subsection is guilty of a misdemeanor and upon conviction shall be fined not more than one thousand dollars ($1,000) or imprisoned not more than one year.

D. A person who has filed a complaint with the human rights division may request and shall receive an order of nondetermination from the director without delay after the division's receipt of the complaint and in jointly filed cases, after the federal complaint has been closed. The order of nondetermination may be appealed pursuant to the provisions of Section 28-1-13 NMSA 1978.

E. In the case of a complaint filed by or on behalf of a person who has an urgent medical condition and has notified the director in writing of the test results, the director shall make the determination whether probable cause exists for the complaint and shall attempt any conciliation efforts within ninety days of the filing of the written complaint or notification, whichever occurs last.

F. If conciliation fails or if, in the opinion of the director, informal conference cannot result in conciliation and the complainant has not requested a waiver of right to hearing pursuant to the provisions of Subsection J of this section, the commission shall issue a written complaint in its own name against the respondent, except that in the case of a complaint filed by or on behalf of a person who has an urgent medical condition, who has notified the director in writing of the test results and who so elects, the director shall issue an order of nondetermination, which may be appealed pursuant to the provisions of Section 28-1-13 NMSA 1978. The complaint shall set forth the alleged discriminatory practice, the secretary's regulation or the section of the Human Rights Act alleged to have been violated and the relief requested. The complaint shall require the respondent to answer the allegations of the complaint at a hearing before the commission or hearing officer and shall specify the date, time and place of the hearing. The hearing date shall not be more than fifteen or less than ten days after service of the complaint. The complaint shall be served on the respondent personally or by registered mail, return receipt requested. The hearing shall be held in the county where the respondent is doing business or the alleged discriminatory practice occurred.

G. Within one year of the filing of a complaint by a person aggrieved, the commission or its director shall:

(1) dismiss the complaint for lack of probable cause;

(2) achieve satisfactory adjustment of the complaint as evidenced by order of the commission; or

(3) file a formal complaint on behalf of the commission.

H. Upon the commission's petition, the district court of the county where the respondent is doing business or the alleged discriminatory practice occurred may grant injunctive relief pending



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hearing by the commission or pending judicial review of an order of the commission so as to preserve the status quo or to ensure that the commission's order as issued will be effective. The commission shall not be required to post a bond.

I. For purposes of this section, "urgent medical condition" means any medical condition as defined by an appropriate medical authority through documentation or by direct witness of a clearly visible disablement that poses a serious threat to the life of the person with the medical condition.

J. The complainant may seek a trial de novo in the district court in lieu of a hearing before the commission, provided the complainant requests from the director, in writing, a waiver of complainant's right to hearing within sixty days of service of written notice of a probable cause determination by the director. The director shall approve the waiver request and shall serve notice of the waiver upon the complainant and respondent. The complainant may request a trial de novo pursuant to Section 28-1-13 NMSA 1978 within ninety days from the date of service of the waiver. Issuance of the notice shall be deemed a final order of the commission for the purpose of appeal pursuant to Section 28-1-13 NMSA 1978.

**History: 1953 Comp., § 4-33-9, enacted by Laws 1969, ch. 196, § 9; 1981, ch. 220, § 1; 1983, ch. 241, § 3; 1987, ch. 342, § 21; 1991, ch. 45, § 1; 1993, ch. 268, § 2; 1993, ch. 305, § 1; 1995, ch. 125, § 2; 2005, ch. 311, § 1.**

**The 2005 amendment,** effective June 17, 2005, changed the time when complaints must be filed from one hundred eighty days to three hundred days in Subsection A; deleted the former provision of Subsection D that the division shall receive an order of non-determination one hundred eighty days after receipt of the complaint; provided in Subsection D that the division shall receive and order of non-determination without delay after receipt of the complaint and in jointly filed cases, after the federal complaint has been closed; and changed the time the complainant may request a trial de novo from thirty days to ninety days.

**The 1995 amendment,** effective June 16, 1995, made minor stylistic changes in Subsection A, in Subsection F, inserted "and the complainant has not requested a waiver of right to hearing pursuant to the provisions of Subsection J of this section" in the first sentence and "or hearing officer" in the third sentence, and added Subsection J.

**The 1993 amendment,** effective June 18, 1993, inserted a new Subsection G, and redesignated former Subsections G and H as present Subsections H and I.

**The 1991 amendment,** effective July 1, 1991, inserted "human rights" in the first sentence of Subsection A; added Subsections D, E and H; redesignated former Subsections D and E as Subsections F and G; in Subsection F added the exception at the end of the first sentence; and made stylistic changes in Subsections A and B.

## ANNOTATIONS

**Exhaustion of administrative remedies.** — A plaintiff must exhaust plaintiff's administrative remedies against a party before bringing an action against that party based on a claim under the Human Rights Act. *Sonntag v. Shaw*, 2001-NMSC-015, 130 N.M. 238, 22 P.3d 1188.

**Independent tort action not precluded.** — The Human Rights Act did not preclude the plaintiff from bringing a tort claim against her employer and supervisor based on allegations that the supervisor disparaged and humiliated her in front of other employees necessitating her hospitalization. *Beavers v. Johnson Controls World Servs., Inc.*, 1995-NMCA-070, 120 N.M. 343, 901 P.2d 761.

**Compliance with grievance procedure of Human Rights Act is prerequisite to suit** under the act. *Jaramillo v. J.C. Penney Co.*, 1985-NMCA-002, 102 N.M. 272, 694 P.2d 528.

**Exhaustion of administrative remedies not required.** — Because the Human Rights Act does not provide an exclusive remedy, exhaustion of administrative remedies under the act is not a prerequisite to proceeding with an independent tort claim. The legislature did not intend the act's remedies to be exclusive. *Gandy v. Wal-Mart Stores, Inc.*, 1994-NMSC-040, 117 N.M. 441, 872 P.2d 859.

**Effect of filing with EEOC.** — Even though the plaintiff had filed a sex discrimination complaint against her former employer only with the equal employment opportunity commission (EEOC), she exhausted her administrative remedies and could file an appeal in the district court because a work-sharing agreement between the EEOC and New Mexico human rights division (NMHRD) and NMHRD regulations provided that NMHRD procedural requirements were met by filing a complaint with either the NMHRD or the EEOC. *Sabella v. Manor Care, Inc.*, 1996-NMSC-014, 121 N.M. 596, 915 P.2d 901.

**Notice required.** — Plaintiff has to give notice to the New Mexico human rights commission (now the human rights division of the department of labor) of the alleged discrimination before commencement of his action in federal court. *Harris v. Ericson*, 457 F.2d 765 (10th Cir. 1972).

**Notice of right to sue from EEOC.** — Receiving a notice of right to sue from the equal employment opportunity commission did not satisfy the state law requirement of obtaining an order from the human rights division, nor did such notice affect the 30-day time limit for filing an appeal from an order of the division in state court. *Mitchell-Carr v. McLendon*, 1999-NMSC-025, 127 N.M. 282, 980 P.2d 65.

**Statute of limitations begins to run from the date of an adverse employment action.** — In age discrimination cases, the statute of limitations commences to run when a plaintiff knows or should know of the adverse employment action, regardless of whether the plaintiff then has or should have knowledge of the employer's discriminatory intent. *Slusser v. Vantage Builders, Inc.*, 2013-NMCA-073.

**Statute of limitations began to run upon termination of employment.** — Where plaintiff, who held a managerial position in defendant's accounting department and who met or exceeded defendant's expectations, was terminated by defendant in February 2006 ostensibly because plaintiff's position had been eliminated by a restructuring of the accounting department; in June 2007, plaintiff learned that a younger person, who was paid substantially less than plaintiff, had been assigned plaintiff's position and had the same roles and performed the same job as plaintiff; plaintiff filed a charge of discrimination in October 2007; and plaintiff claimed that the statute of



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limitations began to run when plaintiff learned that defendant's action was discriminatory, the statute began to run upon plaintiff's termination and expired prior to the filing of plaintiff's action. *Slusser v. Vantage Builders, Inc.*, 2013-NMCA-073.

**Statute of limitations was not equitably tolled.** — Where plaintiff asserted that evidence of discrimination existed immediately after plaintiff's termination that a younger employee took over plaintiff's responsibilities; and plaintiff never showed that plaintiff acted diligently to discover the evidence and pursue plaintiff's rights or that plaintiff could not have known about the discrimination even with reasonable diligence in investigating the basis of plaintiff's termination, the statute of limitations was not equitably tolled. *Slusser v. Vantage Builders, Inc.*, 2013-NMCA-073.

**Equitable estoppel did not prevent the assertion of statute of limitations.** — Where defendant told plaintiff that plaintiff was being terminated because plaintiff's position had been eliminated as a result of a restructuring of defendant's business and plaintiff later learned that plaintiff's termination was performance related, defendant's original statement to plaintiff did not constitute active steps to prevent plaintiff from timely filing an age discrimination complaint and defendant was not equitably estopped from asserting a statute of limitations defense. *Slusser v. Vantage Builders, Inc.*, 2013-NMCA-073.

**Notice not timely filed.** — Failure to file within the time set forth in Subsection A deprives the New Mexico commission of a bona fide opportunity to consider or act upon the discrimination complaint, and plaintiff cannot successfully rely on the resultant rejection as such a termination of state proceedings within the meaning of § 706(d), of Title VII of 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(d), so as to invoke the extended federal filing period. *Dubois v. Packard Bell Corp.*, 470 F.2d 973 (10th Cir. 1972).

**Time limit under Subsection G.** — Subsection G does not expressly place a jurisdictional time limit on the issuance of orders of nondetermination. *Mitchell-Carr v. McLendon*, 1999-NMSC-025, 127 N.M. 282, 980 P.2d 65.

**Effect of not meeting state notice requirement on federal age discrimination action.** — The failure to satisfy the state notice requirement within the time limits specified by state law does not bar a federal action which has already been commenced, but such federal action should be held in abeyance so as to give the state agency the opportunity to entertain respondent's grievance. *Mistretta v. Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980).

**Commencement of state proceeding prerequisite to federal age discrimination action.** — The commencement of state proceedings, in so-called deferral states such as New Mexico, is a jurisdictional requirement of the federal Age Discrimination in Employment Act. *Mistretta v. Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980).

**When statutory period commences to run anew.** — The statutory period commences to run anew from the last allegedly unlawful employment practice. *Molybdenum Corp. of Am. v. EEOC*, 457 F.2d 935 (10th Cir. 1972).

**Commencement when no continuing unlawful practice.** — The limitation period for filing a complaint commenced to run when second employment application was denied for the same reason as first, and where refusal to hire was not actuated by a continuing discriminatory employment practice. *Molybdenum Corp. of Am. v. EEOC*, 457 F.2d 935 (10th Cir. 1972).

**Exhaustion of remedies.** — A plaintiff suing as the personal representative of a decedent, rather than on her own behalf, must still exhaust the administrative remedies pursuant to this act against the defendant before she may sue the defendant in court. *Tafoya v. Bobroff*, 865 F. Supp. 742 (D.N.M. 1994), *aff'd*, 74 F.3d 1250 (10th Cir. 1996).

**Complaint form denied filers the right to exhaust administrative remedies.** — Where the charge of discrimination form prescribed by regulation of the human rights division instructed filers to identify the alleged discriminating agency by the name and address of the agency, but did not require any identification of individual agency employees involved in the discrimination, the form did not provide filers a fair and adequate opportunity to exhaust administrative remedies and preserve the right to pursue judicial remedies for liability against individual defendants under the Human Rights Act and filers who filed the prescribed form were not required to have exhausted administrative remedies against the previously unnamed individual defendants before pursuing their judicial remedies against the previously unnamed individual defendants. *Lobato v. N.M. Env't Dep't*, 2012-NMSC-002, 268 P.3d 1284.

**Law reviews.** — For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M. L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 15 Am. Jur. 2d Civil Rights § 261.

14 C.J.S. Civil Rights, §§ 448 to 462.

## 28-1-11. Hearing procedures.

A. The respondent to a complaint made pursuant to Section 28-1-10 NMSA 1978 may file a written answer to the complaint, appear at the hearing, give testimony and be represented by counsel and may obtain from the commission subpoenas for any person or for the production of any evidence pertinent to the proceeding. The complainant shall be present at the hearing and may be represented by counsel. Each party shall have the right to amend his complaint or answer.

B. A panel of three members of the commission designated by the chairman shall sit, and a decision agreed upon by two members of the panel shall be the decision of the commission. However, no commissioner who has filed a complaint may sit on the panel hearing his complaint. Hearings also may be conducted by a hearing officer employed by the human rights division of the labor department or, if the hearing officer is unavailable, one member of the commission may be designated by the chairman to act as a hearing officer. A hearing officer shall have the same powers and duties as a commissioner as set forth in Paragraph (2) of Subsection A of Section 28-1-4 NMSA 1978.



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C. The complainant or his representative shall present to the commission or the hearing officer the case supporting the complaint. No evidence concerning prior attempts at conciliation shall be received. The director shall not participate in the hearing, except as a witness.

D. The commission and the hearing officer shall not be bound by the formal rules of evidence governing courts of law or equity but shall permit reasonable direct examination and cross-examination and the submission of briefs. Testimony at the hearing shall be taken under oath and recorded by tape or otherwise. Upon the request of any party, testimony shall be transcribed, provided that all costs of transcribing shall be paid by the party so requesting. Each commissioner and hearing officer may administer oaths.

E. Upon the conclusion of a hearing conducted by a hearing officer, the hearing officer shall prepare a written report setting forth proposed findings of fact and conclusions of law and recommending the action to be taken by the commission. The hearing officer shall submit the report to a review panel consisting of no more than three members of the commission designated by the chairman. No commissioner may sit on the panel reviewing the hearing officer's report issued in connection with a complaint filed by the commissioner. A decision by a majority of the members of the review panel shall be the decision of the commission. If the commission finds from the evidence presented at any hearing held pursuant to this section that the respondent has engaged in a discriminatory practice, it shall make written findings of fact, conclusions of law and its decision based upon the findings of fact and conclusions of law. The commission may adopt, modify or reject the proposed findings of fact and conclusions of law and the action recommended by the hearing officer. Within five days after any order is rendered by the commission following a hearing, the commission shall serve upon each party of record and his attorney, if any, a written copy of the order by certified mail to the party's address of record. All parties shall be deemed to have been served on the tenth day following the mailing. As part of its order, the commission may require the respondent to pay actual damages to the complainant and to pay reasonable attorneys' fees, if the complainant was represented by private counsel, and to take such affirmative action as the commission considers necessary, including a requirement for reports of the manner of compliance.

F. If the commission finds from the evidence that the respondent has not engaged in a discriminatory practice, it shall make written findings of fact and serve the complainant and respondent with a copy of the findings of fact and with an order dismissing the complaint.

**History: 1953 Comp., § 4-33-10, enacted by Laws 1969, ch. 196, § 10; 1975, ch. 248, § 1; 1983, ch. 241, § 4; 1987, ch. 342, § 22; 1995, ch. 125, § 3.**

**The 1995 amendment,** effective June 16, 1995, substituted "must" for "shall" in Subsection A; added the third and fourth sentences in Subsection B; in Subsection C, substituted "The complainant or his representative" for "A member of the division staff, the attorney general or special counsel" and inserted "or the hearing officer"; in Subsection D, inserted "and the hearing officer" in the first and last sentences; and in Subsection E, added the first through the fourth and the sixth sentences, inserted "presented at any hearing held pursuant to this section" in the fifth sentence, and made a minor stylistic change in the last sentence.

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**Proceeding not stayed by filing federal suit.** — The filing of an age discrimination complaint in federal court does not stay a proceeding before the commission to redress the same alleged unlawful discriminatory practice. *Mares v. Santa Fe Pub. Schs.*, 1987-NMSC-074, 106 N.M. 354, 743 P.2d 110.

**"Actual damages".** — The law in New Mexico is unsettled as to whether the provision for "actual damages," Subsection E, encompasses damages for emotional harm. *Roybal v. City of Albuquerque*, 653 F. Supp. 102 (D.N.M. 1986).

**Law reviews.** — For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M. L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 15 Am. Jur. 2d Civil Rights § 261.

Award of front pay under state job discrimination statutes, 74 A.L.R.4th 746.

Damages and other relief under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 435.

Nature and burden of proof in Title VII action alleging favoritism in promotion or job assignment due to sexual or romantic relationship between supervisor and another, 86 A.L.R. Fed. 230.

Evidence of discriminatory effect alone as sufficient to prove, or to establish prima facie case of, violation of Fair Housing Act (42 USCS §§ 3601 et seq.), 100 A.L.R. Fed. 97.

Availability of nominal damages in action under Title VII of Civil Rights Act of 1964 (42 USCS § 2000e et seq.), 143 A.L.R. Fed. 269.

Actions under Fair Housing Act (42 USCS § 3601 et seq.), based on sexual harassment or creation of hostile environment, 144 A.L.R. Fed. 595.

Availability of damages under § 504 of the Rehabilitation Act (29 USCA § 794) in actions against persons or entities other than federal government or agencies thereof, 145 A.L.R. Fed. 353.

Punitive damages in actions for violations of Title VII of the Civil Rights Act of 1964 (42 USCA § 1981a; 42 USCA §§ 2000e et seq.), 150 A.L.R. Fed. 601.



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Award of compensatory damages under 42 USCA § 1981a for violation of Title VII of Civil Rights Act of 1964, 154 A.L.R. Fed. 347.

14 C.J.S. Civil Rights, §§ 454 to 459.

## 28-1-12. Enforcement.

If a respondent to a complaint filed pursuant to the Human Rights Act is not complying with an order of the commission, the attorney general or district attorney, at the request of the secretary, shall secure enforcement of the commission's order by a district court. The proceeding shall be initiated by the filing of a petition in the district court where the respondent is doing business or the alleged discriminatory practice occurred. A copy of the petition shall be served on the respondent personally or by registered mail, return receipt requested. The court may make and enter upon the proceedings an order to decree enforcement of the order of the commission.

**History: 1953 Comp., § 4-33-11, enacted by Laws 1969, ch. 196, § 11; 1987, ch. 342, § 23.**

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**Subject matter jurisdiction could not be raised in enforcement action.** — Where the human rights commission's complaint was heard more than fifteen days following service of the complaint; at the hearing on the complaint, respondent argued that the commission had lost subject matter jurisdiction to hear the complaint because the hearing had not occurred within the required time; and respondent did not appeal the commission's adverse judgment, respondent could not challenge the subject matter jurisdiction of the commission in an action filed by the attorney general to enforce the commission's judgment. *N.M. Human Rights Comm'n v. Accurate Machine & Tool Co., Inc.*, 2010-NMCA-107, 149 N.M. 119, 245 P.3d 63, cert. denied, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Pursuit of nonjudicial remedy for employment discrimination as amounting to election against judicial remedy, 103 A.L.R.5th 557.

## 28-1-13. Appeal.

A. A person aggrieved by an order of the commission may obtain a trial de novo by filing a notice of appeal in the district court of the county where the discriminatory practice occurred or where the respondent does business. The notice of appeal must be filed within ninety days from the date of service of the commission's order. A copy of the notice of appeal shall be served personally or by certified mail, return receipt requested, on all parties who appeared before the commission at their last known addresses. A copy of the notice of appeal shall also be served at the division in Santa Fe. An order of the commission shall not be superseded or stayed during the appeal unless the district court so directs after notice to the commission and a hearing.

B. If testimony at the hearing was transcribed, the division shall, upon receipt of the notice of appeal, file so much of the transcript of the record as the parties requesting the transcript designate as necessary for the appeal with the district court.

C. Upon appeal, either party may request a jury. The jurisdiction of the district court is exclusive and its judgment is final, subject to further appeal to the court of appeals.

D. If the complainant prevails in an action or proceeding under this section, the court in its discretion may allow actual damages and reasonable attorney fees, and the state shall be liable the same as a private person.

**History: 1953 Comp., § 4-33-12, enacted by Laws 1969, ch. 196, § 12; 1975, ch. 248, § 2; 1983, ch. 241, § 5; 1987, ch. 342, § 24; 2005, ch. 309, § 1; 2005, ch. 311, § 2.**

**Cross references.** — For procedures governing appeals to the district court, *see* Rule 1-076 NMRA.

For scope of review of the district court, *see Zamora v. Village of Ruidoso Downs*, 120 N.M. 778, 907 P.2d 182 (1995).

**2005 Multiple Amendments.** — Laws 2005, ch. 309, § 1 and Laws 2005, ch. 311, § 2 enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2005, ch. 311, § 2, as the last act signed by the governor, is set out above and incorporates both amendments. The amendments enacted by Laws 2005, ch. 309, § 1 and Laws 2005, ch. 311, § 2 are described below. To view the session laws in their entirety, *see* the 2005 session laws on *NMOneSource.com*.

Laws 2005, ch. 311, § 2, effective June 17, 2005, changed the time within which a notice of appeal must be filed from thirty days to ninety days in Subsection A and changed the appellate court in Subsection C from the supreme court to the court of appeals.

Laws 2005, ch. 309, § 1, effective June 17, 2005, in Subsection A, in the first sentence, after "trial de novo" added "by filing a notice of appeal"; in the second sentence, added "must be filed"; in the fourth sentence, added "A copy of the notice of appeal"; and in Subsection C, changed "supreme court" to "court of appeals".



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## ANNOTATIONS

I. GENERAL CONSIDERATION.
II. EXHAUSTION OF ADMINISTRATIVE REMEDIES.
III. TIME LIMITATIONS.
IV. SCOPE OF REVIEW.
V. ATTORNEY FEES.

### I. GENERAL CONSIDERATION.

**Collateral estoppel did not apply.** — The findings made in administrative proceedings are not entitled to collateral estoppel in New Mexico Human Rights Act actions because by specifically providing for a "trial de novo in district court" in New Mexico Human Rights Act actions, the legislature created a statutory exception to the application of collateral estoppel in such cases. *Contreras v. Miller Bonded, Inc.*, 2014-NMCA-011, cert. granted, 2013-NMCERT-012.

Where a municipal bus driver was terminated for cause; the bus driver's claim that the termination resulted from discrimination based on sex and medical condition was fully contested before the municipal personnel board; on appeal, the district court determined that there was substantial evidence to support the termination for cause and that the termination had not resulted from discrimination; and where a sheetmetal apprentice, who suffered a work injury and who did not give notice of the injury, was terminated for failure to show up for work; the sheetmetal apprentice's claim that the termination resulted from discrimination based on a serious medical condition was fully litigated before a workers' compensation judge who determined that the termination was for cause and that the sheetmetal apprentice had failed to give notice of the injury before the termination; on appeal, the court of appeals summarily affirmed the compensation order; the bus driver and the sheetmetal apprentice filed complaints in district court alleging that their terminations resulted from discrimination in violation of the New Mexico Human Rights Act; and the district court determined that the bus driver and the sheetmetal apprentice were precluded by collateral estoppel from re-litigating their discrimination claims and granted summary judgment against them, the district court erred in granting summary judgment because the findings of an administrative agency have no collateral estoppel effect on actions filed under the New Mexico Human Rights Act. *Contreras v. Miller Bonded, Inc.*, 2014-NMCA-011, cert. granted, 2013-NMCERT-012.

**Hostile work environment sexual harassment.** — Plaintiff presented a prima facie case of hostile work environment sexual harassment where supervisor began to harass plaintiff when supervisor became general manager of store where plaintiff worked, supervisor follower plaintiff around, supervisor would approach plaintiff when she was alone, stare at her, and touch himself in a sexually suggestive manner, supervisor would stand near plaintiff and stare at her breasts, supervisor usually had an erection when plaintiff saw him and he rubbed up against plaintiff with an erection on one occasion; supervisor parked his car next to plaintiff's car even though supervisor had a designated parking area, supervisor would appear out of nowhere when plaintiff went to the warehouse; and supervisor's behavior made plaintiff feel uncomfortable and supervisor's presence affected plaintiff's performance at work. *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58.

**Vicarious liability of employer.** — Employer may be held vicariously liable to employee for an actionable hostile environment created by a supervisor with immediate authority over the employee. Employer liability will be presumed where there is actionable sexual harassment and the harassing employee has supervisory authority over the victimized employee. Where no tangible employment action has been taken against the employee, the employer may rebut the presumption by proving that the employer exercised reasonable care to prevent and correct promptly any sexual harassing behavior and the employee reasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58.

**Section applies only to de novo appeals from commission decision;** when the administrative procedure was never invoked, a district court action was not an appeal under this section. *Jaramillo v. J.C. Penney Co.*, 1985-NMCA-002, 102 N.M. 272, 694 P.2d 528.

**Venue.** — The legislature intended that appeal for a trial de novo be limited to the district court of the county of the place elected by the commission to hear the complaint, as between a place of employer's doing business or of the alleged discriminatory practice. *Montoya v. Super Save Warehouse Foods*, 1991-NMSC-003, 111 N.M. 212, 804 P.2d 403.

**Section not overridden by Tort Claims Act.** — The Tort Claims Act (Article 4 of Chapter 41 NMSA 1978) does not override or supersede the Human Rights Act so as to shield a governmental entity from liability otherwise flowing from a discriminatory practice proscribed by the latter act. This section constitutes a waiver of sovereign immunity for liability imposed on public entities by the human rights commission, or by a district court on appeal from a commission decision, for violations of the Human Rights Act. *Luboyeski v. Hill*, 1994-NMSC-032, 117 N.M. 380, 872 P.2d 353.

**Remedies are not exclusive.** — The Whistleblower Protection Act (WPA), 10-16C-1 through -6 NMSA 1978, and the New Mexico Human Rights Act (HRA), 28-1-1 through -15 NMSA 1978, are not in irreconcilable conflict; a plaintiff may state a WPA claim alongside a claim under the HRA. *Herald v. Board of Regents of the Univ. of N.M.*, 2015-NMCA-104, cert. denied, 2015-NMCERT-009.

Where plaintiff, a resident physician at the university of New Mexico school of medicine, was dismissed from the residency program and brought suit against the board of regents of the university of New Mexico claiming that her termination was driven by discrimination and retaliation in violation of the New Mexico Human Rights Act (HRA), 28-1-1 NMSA 1978 et seq., and the Whistleblower Protection Act (WPA), 10-16C-1 NMSA 1978 et seq., the district court erred in dismissing plaintiff's WPA claims on the grounds that the WPA and the HRA are irreconcilably conflicting and in concluding that plaintiff could therefore only proceed under the HRA. *Herald v. Board of Regents of the Univ. of N.M.*, 2015-NMCA-104, cert. denied, 2015-NMCERT-009.

**Admissibility of reports not in record.** — Ordinary rules of evidence govern the admissibility of administrative findings, and the district court is not precluded from adherence to the hearsay evidence rule in ruling on the admissibility of official reports or statements that are not in the nature of a transcript of the record. *Behrmann v. Phototron Corp.*, 1990-NMSC-073, 110 N.M. 323, 795 P.2d 1015.

**"Actual damages" construed.** — The term "actual damages" in Subsection D is synonymous with compensatory damages, and excludes punitive damages. As for prospective damages, because they are a species of actual damages, they properly may be granted where evidence has been presented as to their present worth. *Behrmann v. Phototron Corp.*, 1990-NMSC-073, 110 N.M. 323, 795 P.2d 1015.

**Evidence supporting award of front pay.** — Evidence of plaintiff's inability to find full-time employment in his locality, despite his strenuous efforts, constitutes sufficient evidence of his inability to mitigate damages to



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support the court's discretion in determining that future employment would be unlikely and to support an award of front pay. *Smith v. FDC Corp.*, 1990-NMSC-020, 109 N.M. 514, 787 P.2d 433.

**State immunity from interest not waived.** — Subsection D of this section does not explicitly waive the state's immunity from post-judgment interest. *Nava v. City of Santa Fe*, 2004-NMSC-039, 136 N.M. 647, 103 P.3d 571.

**Interest not authorized.** — Trial court did not abuse its discretion by refusing to assess interest on the judgment, fees, and costs in plaintiff's retaliation suit, because an interest award under Section 56-8-4 NMSA 1978 is not an absolute right, but rather is a matter to be left to the discretion of the trial court, and there is no authority suggesting that the phrase "actual damages and reasonable attorney's fees" in Subsection D of this section should be expanded to include interest. *Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, 129 N.M. 586, 11 P.3d 550.

**Validity of certain jury instructions.** — The court did not abuse its discretion in giving "sex stereotyping" and "absence-of-direct-proof" instructions to the jury in an action brought by an employee who alleged that she was wrongfully terminated from her job as a salesperson because she became pregnant. *Behrmann v. Phototron Corp.*, 1990-NMSC-073, 110 N.M. 323, 795 P.2d 1015.

## II. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

**Exhaustion of remedies against individual defendants required.** — Individual defendants cannot be sued in district court under this article unless and until the complainant exhausts her administrative remedies against them. *Luboyeski v. Hill*, 1994-NMSC-032, 117 N.M. 380, 872 P.2d 353.

**Liability of individual.** — Where plaintiff named only the corporation as a defendant in her complaint for discrimination before the human rights division, the president of the corporation was not now personally liable in district court because, while she exhausted her administrative remedies against the corporation, she failed to do so against the president individually. *Sonntag v. Shaw*, 2001-NMSC-015, 130 N.M. 238, 22 P.3d 1188.

**Complaint form denied filers the right to exhaust administrative remedies.** — Where the charge of discrimination form prescribed by regulation of the human rights division instructed filers to identify the alleged discriminating agency by the name and address of the agency, but did not require any identification of individual agency employees involved in the discrimination, the form did not provide filers a fair and adequate opportunity to exhaust administrative remedies and preserve the right to pursue judicial remedies for liability against individual defendants under the Human Rights Act and filers who filed the prescribed form were not required to have exhausted administrative remedies against the previously unnamed individual defendants before pursuing their judicial remedies against the previously unnamed individual defendants. *Lobato v. N.M. Env't Dep't*, 2012-NMSC-002, 268 P.3d 1284.

**Exhaustion of administrative remedies.** — Even though the plaintiff had filed a sex discrimination complaint against her former employer only with the equal employment opportunity commission (EEOC), she exhausted her administrative remedies and could file an appeal in the district court because a work-sharing agreement between the EEOC and New Mexico human rights division (NMHRD) and NMHRD regulations provided that NMHRD procedural requirements were met by filing a complaint with either the NMHRD or the EEOC. *Sabella v. Manor Care, Inc.*, 1996-NMSC-014, 121 N.M. 596, 915 P.2d 901.

## III. TIME LIMITATIONS.

**Time limitations.** — Where human rights division did not give plaintiff's attorney notice of its record of decision even though attorney filed an entry of appearance with the division, district court could find that the division's actions tolled the thirty-day time limit to file an appeal to district court and required district court to deny defendant's motion for summary judgment that plaintiff had not timely filed notice of appeal. *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58.

**Time limit on filing complaint.** — Receiving a notice of right to sue from the equal employment opportunity commission did not satisfy the state law requirement of obtaining an order from the human rights division, nor did such notice affect the thirty-day time limit for filing an appeal from an order of the division in state court. *Mitchell-Carr v. McLendon*, 1999-NMSC-025, 127 N.M. 282, 980 P.2d 65.

**Time limits tolled.** — Although the EEOC issued its decision in July, 1999, the division did not notify complainant's attorney of record of the decision because he was erroneously not put on the mail distribution list. Although the division normally corresponds with a complainant through his or her attorney once the attorney files an entry of appearance on the complainant's behalf, the division did not do this, and, as a result, complainant did not receive notice of the division's decision until much later. Thus, a fact-finder could find that the division's actions tolled the time limits. *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58.

**The statute of limitations for a state law claim over which a federal district court exerts supplemental jurisdiction is tolled while the federal case is pending.** — Where plaintiff brought a claim against her employer individually and the employer's dental practice for discrimination on the basis of sex under the New Mexico Human Rights Act (NMHRA), 28-1-1 to 28-1-14 NMSA 1978, and where plaintiff also filed a federal complaint seeking damages for unlawful discriminatory and retaliatory practices in violation of the NMHRA and a Title VII claim against the dental practice, the state district court erred in dismissing plaintiff's claim against the dental practice because plaintiff filed her amended complaint in state court while her federal case was pending, and under 28 U.S.C. § 1367(d), the statute of limitations for any applicable state law claim over which a federal district court exerts supplemental jurisdiction under 28 U.S.C. § 1367(d) is tolled while the claim is pending and for a period of 30 days after it is dismissed by the federal court. The state district court, however, correctly dismissed plaintiff's NMHRA claim against her employer individually, because the employer was not named as a defendant in plaintiff's federal action, and therefore the federal court did not exert supplemental jurisdiction over that claim under 28 U.S.C. § 1367(a), and the statute of limitations on that claim as to the employer individually was not tolled under 28 U.S.C. § 1367(d). *Williams v. Mann*, 2017-NMCA-012.

## IV. SCOPE OF REVIEW.

**Scope of review.** — In appeals from the human rights commission (now the human rights division of the department of labor), the district court, by virtue of specific provisions for trial de novo and jury trial, has the right to make an independent determination of the facts. The general rule in respect to appeals from administrative bodies is not applicable. *Keller v. City of Albuquerque*, 1973-NMSC-048, 85 N.M. 134, 509 P.2d 1329, *overruled*



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*on other grounds, Green v. Kase*, 113 N.M. 76, 823 P.2d 318.

**Review of transcript.** — There is no statutory requirement that on de novo appeals from the commission, the jury or the judge must hear the transcript of the proceedings before the commission. *Green v. Kase*, 1992-NMSC-004, 113 N.M. 76, 823 P.2d 318.

**Administrative review distinguished.** — The scope of judicial review contemplated by this section is much broader than in appeals brought generally under the Administrative Procedures Act (12-8-1 NMSA 1978 et seq.), where judicial review is restricted to the record. School district appealing decision of human rights commission was not required to state grounds for appeal, and therefore its notice of appeal was effective to give the district court jurisdiction to try the case de novo. *Linton v. Farmington Mun. Schs.*, 1974-NMSC-079, 86 N.M. 748, 527 P.2d 789.

**Review of jurisdiction.** — Court of appeals has no authority to review a judgment of the district court on the issue of jurisdiction. *Dominguez v. Stone*, 1981-NMCA-146, 97 N.M. 211, 638 P.2d 423.

V. ATTORNEY FEES.

**In determining the reasonableness of an award of attorney's fees,** a court should consider a variety of factors, including: (1) the time and effort required, considering the complexity of the issues and the skill required; (2) the customary fee in the area for similar services; (3) the results obtained and the amount of the controversy; (4) time limitations; and (5) the ability, experience, and reputation of the attorney performing the services. *Smith v. FDC Corp.*, 1990-NMSC-020, 109 N.M. 514, 787 P.2d 433.

**Recovery of attorney's fees.** — Time records do not constitute essential evidence for recovering attorney's fees. *Lucero v. Aladdin Beauty Colls., Inc.*, 1994-NMSC-022, 117 N.M. 269, 871 P.2d 365.

**Computation of attorney fees.** — Although the trial court did not determine what the customary fee would be, it did not abuse its discretion by awarding an amount that was approximate to the reasonable hourly rate multiplied by the reasonable number of hours spent on the case. *Lucero v. Aladdin Beauty Colls., Inc.*, 1994-NMSC-022, 117 N.M. 269, 871 P.2d 365.

**Recovery of attorney fees.** — Subsection D of this section may be interpreted to include attorney's fees for administrative proceedings, but in order to receive the fees, the complainant must prevail. *Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, 129 N.M. 586, 11 P.3d 550.

Fee award at $200 per hour, rather than requested rate of $230, was not abuse of discretion where trial court judge did not cut number of hours claimed and actually added five hours for work in connection with motions for fees, costs, and interest, and resulting award of $97,290.47 was approximately 34% of total judgment rendered by jury and was actually greater than judgment following remittitur. *Nava v. City of Santa Fe*, 2004-NMSC-039, 136 N.M. 647, 103 P.3d 571.

**Law reviews.** — For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M. L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Damages and other relief under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 435.

Availability and scope of punitive damages under state employment discrimination law, 81 A.L.R.5th 367.

Evidence of discriminatory effect alone as sufficient to prove, or to establish prima facie case of, violation of Fair Housing Act (42 USCS § 3601 et seq.), 100 A.L.R. Fed. 97.

Factors or conditions in employment discrimination cases said to justify increase in attorney's fees awarded under § 706 (k) of Civil Rights Act of 1964 (42 USCS § 2000e-5(k)), 140 A.L.R. Fed. 301.

Availability of nominal damages in action under Title VII of Civil Rights Act of 1964 (42 USCS § 2000e et seq.), 143 A.L.R. Fed. 269.

Availability of damages under § 504 of the Rehabilitation Act (29 USCA § 794) in actions against persons or entities other than federal government or agencies thereof, 145 A.L.R. Fed. 353.

Punitive damages in actions for violations of Title VII of the Civil Rights Act of 1964 (42 USCA § 1981a; 42 USCA §§ 2000e et seq.), 150 A.L.R. Fed. 601.

Factors or conditions in employment discrimination cases said to justify decrease in attorney's fees awarded under § 706(k) of Civil Rights Act of 1964 (42 USCA § 2000e-5(k)), 151 A.L.R. Fed. 77.

Award of compensatory damages under 42 USCA § 1981a for violation of Title VII of Civil Rights Act of 1964, 154 A.L.R. Fed. 347.

## 28-1-14. Posting of law and information.

Every person who is subject to the Human Rights Act, except an individual selling houses, shall keep posted in a conspicuous place on his premises notices prepared by the division which shall set forth excerpts of the Human Rights Act and other relevant information as determined by the secretary.

**History: 1953 Comp., § 4-33-13, enacted by Laws 1969, ch. 196, § 13; 1987, ch. 342, § 25.**

## 28-1-15. Repealed.

**Repeals.** — Laws 2005, ch. 208, § 27 repealed 28-1-15 NMSA 1978, as enacted by Laws 1987, ch. 333, § 1, relating to termination of the Human Rights Act, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.



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# ARTICLE 2

# Criminal Offender Employment

Sec.
28-2-1. Short title.
28-2-2. Purpose of act.
28-2-3. Employment eligibility determination.
28-2-3.1. Employment eligibility determination; private employers.
28-2-4. Power to refuse, renew, suspend or revoke public employment or license.
28-2-5. Nonapplicability to law enforcement agencies.
28-2-6. Applicability.

## 28-2-1. Short title.

Chapter 28, Article 2 NMSA 1978 may be cited as the "Criminal Offender Employment Act".

**History: 1953 Comp., § 41-24-1, enacted by Laws 1974, ch. 78, § 1; 2019, ch. 176, § 1.**

**The 2019 amendment,** effective June 14, 2019, provided the statutory citation for the Criminal Offender Employment Act; after the section heading, changed "Sections 1 through 6 of this act" to "Chapter 28, Article 2 NMSA 1978".

**ANNOTATIONS**

**Law reviews.** — For note, "Negligent Hiring and Retention - Availability of Action Limited By Foreseeability Requirement," see 10 N.M.L. Rev. 491 (1980).

## 28-2-2. Purpose of act.

The legislature finds that the public is best protected when criminal offenders or ex-convicts are given the opportunity to secure employment or to engage in a lawful trade, occupation or profession and that barriers to such employment should be removed to make rehabilitation feasible.

**History: 1953 Comp., § 41-24-2, enacted by Laws 1974, ch. 78, § 2.**

**ANNOTATIONS**

**Law reviews.** — For note, "Negligent Hiring and Retention - Availability of Action Limited By Foreseeability Requirement," see 10 N.M.L. Rev. 491 (1980).

## 28-2-3. Employment eligibility determination.

A. Subject to the provisions of Subsection B of this section and Sections 28-2-4 and 28-2-5 NMSA 1978, in determining eligibility for employment with the state or any of its political subdivisions or for a license, permit, certificate or other authority to engage in any regulated trade, business or profession, the board or other department or agency having jurisdiction may take into consideration a conviction, but the conviction shall not operate as an automatic bar to obtaining public employment or license or other authority to practice the trade, business or profession. A board, department or agency of the state or any of its political subdivisions shall not make an inquiry regarding a conviction on an initial application for employment and shall only take into consideration a conviction after the applicant has been selected as a finalist for the position.

B. The following criminal records shall not be used, distributed or disseminated in connection with an application for any public employment, license or other authority:

(1) records of arrest not followed by a valid conviction;

(2) convictions that have been sealed, dismissed, expunged or pardoned;

(3) juvenile adjudications; or

(4) convictions for a crime that is not job-related for the position in question and consistent with business necessity.

**History: 1953 Comp., § 41-24-3, enacted by Laws 1974, ch. 78, § 3; 2010, ch. 76, § 1; 2021 (1st S.S.), ch. 3, § 1.**

**Cross references.** — For persons convicted of felonious or infamous crime ineligible for public office unless pardoned or restored to political rights, *see* 10-1-2 NMSA 1978.

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, revised the list of criminal records that cannot be considered in an application for public employment,



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licensure or other authority to engage in any regulated trade, business or profession; in Subsection B, in Paragraph B(2), after the paragraph designation, deleted "misdemeanor", and after "convictions", deleted "not involving moral turpitude" and added "that have been sealed, dismissed, expunged or pardoned", and added Paragraphs B(3) and B(4).

**The 2010 amendment,** effective May 19, 2010, in Subsection A, after "Sections", deleted "3 and 4 of the Criminal Offender Employment Act" and added "28-2-4 and 28-2-5 NMSA 1978"; and added the last sentence.

**ANNOTATIONS**

**State board of education subject to article.** — The state board of education is subject to the provisions of Criminal Offender Employment Act (COEA), because it is an agency which determines eligibility for employment with the state. *Bertrand v. N.M. State Bd. of Educ.*, 1975-NMCA-145, 88 N.M. 611, 544 P.2d 1176, cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

**Testimony concerning indictment.** — Because an agency has wide discretion in receiving and excluding evidence in proceedings under the Uniform Licensing Act, any error in allowing reference to an indictment against a dentist was harmless. *Weiss v. N.M. Bd. of Dentistry*, 1990-NMSC-077, 110 N.M. 574, 798 P.2d 175.

## 28-2-3.1. Employment eligibility determination; private employers.

A. If a private employer uses a written or electronic employment application, the employer shall not make an inquiry regarding an applicant's history of arrest or conviction on the employment application but may take into consideration an applicant's conviction after review of the applicant's application and upon discussion of employment with the applicant. Nothing in this section shall prohibit an employer from notifying the public or an applicant that the law or the employer's policy could disqualify an applicant who has a certain criminal history from employment in particular positions with that employer.

B. An applicant who claims to be aggrieved by a violation of Subsection A of this section may seek relief under the Human Rights Act pursuant to the process set out in Sections 28-1-10 through 28-1-13 NMSA 1978.

**History: Laws 2019, ch. 176, § 2.**

**Effective dates.** — Laws 2019, ch. 176 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 28-2-4. Power to refuse, renew, suspend or revoke public employment or license.

A. Any board or other agency having jurisdiction over employment by the state or any of its political subdivisions or the practice of any trade, business or profession may refuse to grant or renew or may suspend or revoke any public employment or license or other authority to engage in the public employment, trade, business or profession for one or both of the following causes:

(1) where the applicant, employee or licensee has been convicted of a felony and the criminal conviction directly relates to the particular employment, trade, business or profession; and

(2) where the applicant, employee or licensee has been convicted of homicide, kidnapping, human trafficking, trafficking in controlled substances, criminal sexual penetration or related sexual offenses or child abuse and the applicant, employee or licensee has applied for reinstatement, renewal or issuance of a teaching certificate, a license to operate a child-care facility or employment at a child-care facility, regardless of rehabilitation.

B. The board or other agency shall explicitly state in writing the reasons for a decision that prohibits the person from engaging in the employment, trade, business or profession if the decision is based in whole or in part on conviction of any crime described in Paragraphs (1) and (2) of Subsection A of this section.

**History: 1953 Comp., § 41-24-4, enacted by Laws 1974, ch. 78, § 4; 1985, ch. 234, § 1; 1997, ch. 238, § 5; 1997, ch. 251, § 1 2021 (1st S.S.), ch. 3, § 2.**

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, removed misdemeanor convictions involving moral turpitude and that relate to the particular employment, trade, business or profession from the permissible causes for denying, revoking or suspending public employment or a license to engage in a trade, business or profession, and removed an agency's authority to deny public employment or a professional license for felony and misdemeanor convictions that do not relate to a particular employment position; in Subsection A, after "business or profession for", deleted "any one or any combination" and added "one or both", in Paragraph A(1), after "convicted of a felony", deleted "or a misdemeanor involving moral turpitude",



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deleted former Paragraph A(2) and redesignated former Paragraph A(3) as Paragraph A(2); in Subsection B, after "Paragraphs (1) and", changed "(3)" to "(2)", and after "Subsection A of this section", deleted "Completion of probation or parole supervision or expiration of a period of three years after final discharge or release from any term of imprisonment without any subsequent conviction shall create a presumption of sufficient rehabilitation for purposes of Paragraph (2) of Subsection A of this section.".

**1997 Amendments.** —

Laws 1997, ch. 251, § 1, effective July 1, 1997, inserted "or employee" in two places and "a license to operate a child-care facility or employment at a child-care facility" in Paragraph A(3).

Laws 1997, ch. 238, § 5, effective June 20, 1997, in Paragraph A(3), inserted "homicide, kidnapping" following "convicted of" near the beginning and "renewal" following "reinstatement" near the end.

## ANNOTATIONS

**The purpose of a license revocation proceeding** is not to punish the licensee but to protect the public from practitioners who do not possess the necessary qualifications. *Varoz v. N.M. Bd. of Podiatry*, 1986-NMSC-051, 104 N.M. 454, 722 P.2d 1176.

**Content of notice of contemplated action.** — The "evidence" to be set out in the notice of contemplated action under Section 61-1-4 NMSA 1978 is the evidence of the ground or grounds to be relied upon in taking the contemplated action under former Section 61-5-14 NMSA 1978, not the evidence to the adduced by way of explanation and determination of rehabilitation under Criminal Offender Employment Act. *Weiss v. N.M. Bd. of Dentistry*, 1990-NMSC-077, 110 N.M. 574, 798 P.2d 175.

**Jury determination of guilt relevant concern.** — For purposes of this article, a jury determination of a teacher's guilt of sexual misconduct with a minor acted as a conviction, despite subsequent dismissal of the case after the teacher completed his deferred sentence. *Garcia v. State Bd. of Educ.*, 1984-NMCA-102, 102 N.M. 306, 694 P.2d 1371, cert. denied, 102 N.M. 293, 694 P.2d 1358 (1985).

**Decertified teacher has burden of proving rehabilitation.** — A teacher who was found guilty of sexual misconduct with a minor was convicted of a crime directly relating to the teaching profession and, therefore, had the burden of showing, upon application for recertification, that he had been sufficiently rehabilitated. *Garcia v. State Bd. of Educ.*, 1984-NMCA-102, 102 N.M. 306, 694 P.2d 1371, cert. denied, 102 N.M. 293, 694 P.2d 1358 (1985).

**Revocation of dental license.** — Where a dentist was convicted of four counts of making or permitting a false claim for reimbursement for public assistance services, a conviction itself, as distinguished from the underlying conduct, is a sufficient basis for revoking a dental license. *Weiss v. N.M. Bd. of Dentistry*, 1990-NMSC-077, 110 N.M. 574, 798 P.2d 175.

**Meaning of rehabilitation.** — While "rehabilitation" is not defined in this section (although the statute does create a presumption of rehabilitation after completion of parole, or after a certain period has elapsed after release from prison), its dictionary definition is "to restore a condition of good health, ability to work or the like". *Bertrand v. N.M. State Bd. of Educ.*, 1975-NMCA-145, 88 N.M. 611, 544 P.2d 1176, cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

**Board must state reasons why applicant has not been rehabilitated** and may not rely solely on the fact of conviction to deny an application. *Garcia v. State Bd. of Educ.*, 1984-NMCA-102, 102 N.M. 306, 694 P.2d 1371, cert. denied, 102 N.M. 293, 694 P.2d 1358 (1985).

**Distinction in treatment of crimes relates to burden of proof.** — The distinction in treatment, under this section, between crimes that directly relate to a profession and crimes that do not directly relate to a profession concerns the burden of proof: under Subsection A(1), an applicant for issuance or reinstatement of a license or certificate has the burden of proving that he or she has been sufficiently rehabilitated, while, under Subsection A(2), there is a presumption of rehabilitation and the board or agency has the burden of proving an applicant for issuance or reinstatement of a license or certificate has not been sufficiently rehabilitated. *N.M. Bd. of Pharmacy v. Reece*, 1983-NMSC-080, 100 N.M. 339, 670 P.2d 950.

**Where court accepted board rehabilitation decision.** — Probative evidence of rehabilitation of a teacher who was on one year's probation for one count of distribution of marijuana included her conscientious and successful performance at her job and the parents' perception of her as a person with whom they would trust their children; but evidence that she had become angry when her probation officer would not let her see her file, made a derogatory comment about the laws and "narcs," told a student who asked her about drugs that he could get in some trouble because of some bad laws, but for him to do what he wanted, was probative of what the board could conclude was a poor attitude towards criminal offenses for one who was a teacher, and since the state board members spoke to her at some length themselves and were able to draw their own impressions of her progress towards rehabilitation, the appellate court would not substitute its judgment for that of the board. *Bertrand v. N.M. State Bd. of Educ.*, 1975-NMCA-145, 88 N.M. 611, 544 P.2d 1176, cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

**Standard for use of conviction to revoke license.** — In order for a conviction to be used as a basis for a license revocation, the licensing agency must explicitly state its reasons for a decision prohibiting the licensee from engaging in his or her employment or profession, and the agency must find that the licensee has not been sufficiently rehabilitated to warrant the public trust and must give reasons for this finding. *Weiss v. N.M. Bd. of Dentistry*, 1990-NMSC-077, 110 N.M. 574, 798 P.2d 175.

**Writing requirement explained.** — When a decision is made on grounds that a criminal conviction directly relates to a person's profession, the reasons for such a decision must be explicitly stated in writing. It is not sufficient to merely recite the language of the statute, but rather the "reasons" for the conclusion that there is a direct relation must be given, especially so that a reviewing body may know the reasons for the administrative body's conclusion; and if the conviction of a crime is to operate as other than an automatic bar to employment, the administrative agencies must explain what they perceive the detrimental effect of employment to be. *Bertrand v. N.M. State Bd. of Educ.*, 1975-NMCA-145, 88 N.M. 611, 544 P.2d 1176, cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

**Scope of writing required under Subsection B.** — Subsection B of Section 28-2-4 NMSA 1978 requires the board to state the reasons for its decision that the crime for which the professional was convicted directly relates to the practice of the profession, and also the reasons, if any, why the professional has not been rehabilitated and why he should be prevented from practicing the profession. *N.M. Bd. of Pharmacy v. Reece*, 1983-NMSC-080, 100 N.M. 339, 670 P.2d 950.

**Knowledge of public record not imputed to estop dismissal.** — Where the local school board did not have knowledge of a teacher's conviction until approached by her probation officer, although it was a matter of public record, the court of appeals declined to impute this knowledge to the board so as to estop it from dismissing her. *Bertrand v. N.M. State Bd. of Educ.*, 1975-NMCA-145, 88 N.M. 611, 544 P.2d 1176, cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

**Prejudicial error resulted from failure to follow revocation procedures.** — Failure of real estate



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commission to follow the procedures established by this section in its revocation of a real estate license for conviction of conspiracy to import marijuana was prejudicial error. *McCoy v. N.M. Real Estate Comm'n*, 1980-NMSC-081, 94 N.M. 602, 614 P.2d 14 (1980).

**Required procedure for denial, suspension, or revocation of real estate license.** — In each instance in which the real estate commission contemplates the denial, suspension or revocation of a license because of a criminal conviction, certain steps should be followed: 1) whether the conviction directly relates or does not directly relate to real estate, notice should be given to the licensee that the basis for the action is warranted by the Criminal Offender Employment Act; 2) evidence should be introduced on behalf of the commission supporting whether the conviction is directly related or not directly related to the business of a real estate broker or salesperson, and whether sufficient rehabilitation has been made, if required by the Criminal Offender Employment Act; 3) findings should be made after the hearing to uphold the decision of the commission under the Criminal Offender Employment Act as well as under the Real Estate Licensing Act. 1982 Op. Att'y Gen. No. 82-02.

**Law reviews.** — For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 51 Am. Jur. 2d Licenses and Permits §§ 56, 58, 106, 142; 63A Public Officers and Employees §§ 48 to 50, 184 to 186, 241 to 243, 291.

53 C.J.S. Licenses §§ 39, 52; 67 C.J.S. Officers and Public Employees §§ 22, 101, 110, 125.

## 28-2-5. Nonapplicability to law enforcement agencies.

The Criminal Offender Employment Act is not applicable to any law enforcement agency; however, nothing herein shall be construed to preclude a law enforcement agency in its discretion from adopting the policy set forth herein.

**History: 1953 Comp., § 41-24-5, enacted by Laws 1974, ch. 78, § 5.**

## 28-2-6. Applicability.

The provisions of the Criminal Offender Employment Act relating to any board or other agency which has jurisdiction over the practice of any trade, business or profession apply to authorities made subject to its coverage by law, or by any such authorities' rules or regulations if permitted by law.

**History: 1953 Comp., § 41-24-6, enacted by Laws 1974, ch. 78, § 6.**

ANNOTATIONS

**Suspension or revocation of real estate license.** — The provisions of the Criminal Offender Employment Act must be followed by the real estate commission in any action by the commission to suspend or revoke a broker's or salesperson's license because of a conviction of a felony or misdemeanor involving moral turpitude. 1982 Op. Att'y Gen. No. 82-02.

# ARTICLE 3

# Commission on the Status of Women

Sec.
28-3-1. Commission on the status of women; creation.
28-3-2. Commission on the status of women; duties.
28-3-3. Commission on the status of women; powers.
28-3-4. Commission on the status of women; staff.
28-3-5. Commission on the status of women; reports.
28-3-6. Commission on the status of women; compensation.
28-3-6.1. Office of the governor's council on women's health created.
28-3-7. Short title.
28-3-8. Findings and purpose of act.
28-3-9. Definitions.
28-3-10. Office for displaced homemakers; creation; research and planning for displaced homemaker programs.
28-3-11. Report and recommendations.

## 28-3-1. Commission on the status of women; creation.

A. The "commission on the status of women" is created. The commission consists of fifteen members, including one member of the human rights commission, representative of all fields of interest to women. Members shall be appointed by the governor. Members of the first commission shall be appointed for staggered terms, five ending on December 31, 1975 and five on December 31



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of each of the following two years. Thereafter, appointments shall be for terms of three years or less made in such manner that the terms of five members expire on December 31 of each year. At least one member shall be appointed from, and reside in, each planning and development district. A majority of the members appointed shall be women and no more than eight members shall belong to any one political party.

B. A majority of the commission's members constitutes a quorum for the transaction of business. The governor shall designate a chairman and vice-chairman from among the membership.

**History: 1953 Comp., § 4-33A-1, enacted by Laws 1974, ch. 90, § 1.**

**Cross references.** — For Human Rights Act, *see* Chapter 28, Article 1 NMSA 1978.

For discrimination on basis of sex prohibited, *see* N.M. Const., art. II, § 18.

**Compiler's notes.** — Pursuant to Laws 1977, ch. 252, § 9, the commission on the status of women is administratively attached to the human services department.

## 28-3-2. Commission on the status of women; duties.

The commission shall:

A. stimulate and encourage throughout the state the study and review of the status of women in New Mexico and may act as a clearinghouse for all activities involving the status of women;

B. recommend methods of overcoming discrimination against women in public and private employment;

C. promote methods for enabling women to develop their skills, continue their education and be retrained;

D. cooperate with and assist public and private entities dealing with women;

E. conduct periodic conferences throughout the state to apprise women of their rights and opportunities and to learn from them of their needs and problems; and

F. secure recognition of women's accomplishments and contributions to New Mexico.

**History: 1953 Comp., § 4-33A-2, enacted by Laws 1974, ch. 90, § 2.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Application of state law to sex discrimination in employment, 87 A.L.R.3d 93.

## 28-3-3. Commission on the status of women; powers.

The commission:

A. may receive on behalf of the state any gifts, donations or bequests from any source to be used in carrying out its duties; and

B. is designated as the state agency for handling all United States government programs related to the status of women except those designated by law as the responsibility of another state agency, and may enter into agreements and contracts with agencies of the United States government for this purpose.

**History: 1953 Comp., § 4-33A-3, enacted by Laws 1974, ch. 90, § 3.**

## 28-3-4. Commission on the status of women; staff.

The commission shall appoint a director, who is the administrative officer of the commission. The director shall employ other necessary employees under the provisions of the Personnel Act [Chapter 10, Article 9 NMSA 1978].

**History: 1953 Comp., § 4-33A-4, enacted by Laws 1974, ch. 90, § 4.**



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## 28-3-5. Commission on the status of women; reports.

The commission shall submit reports on its preceding year's work to the governor and the legislature by December 1 of each year. The reports shall contain recommendations, if any, for legislation or other appropriate action.

**History: 1953 Comp., § 4-33A-5, enacted by Laws 1974, ch. 90, § 5.**

## 28-3-6. Commission on the status of women; compensation.

Commission members shall be reimbursed as provided for nonsalaried public officers in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978], and shall receive no other compensation, perquisite or allowance.

**History: 1953 Comp., § 4-33A-6, enacted by Laws 1974, ch. 90, § 6.**

## 28-3-6.1. Office of the governor's council on women's health created.

A. The "office of the governor's council on women's health" is created and is administratively attached to the commission on the status of women.

B. The office of the governor's council on women's health shall:

(1) serve as a clearinghouse for education and information on women's health;

(2) recommend performance measures and outcomes specific to women's health;

(3) report annually by September 1 to the governor on women's health policy issues;

(4) assist in developing policy to improve women's health and well-being, including policies that explain and explore the links between women's health and economic security; and

(5) assist state agencies, including the department of health, to improve access to health care for women.

C. The governor shall appoint the director of the office of the governor's council on women's health, who shall serve at the pleasure of the governor.

D. The governor shall appoint advisors to the office of the governor's council on women's health to represent the geographic diversity of the state as follows:

(1) one representative from each of the following:

(a) the commission on the status of women;

(b) the department of health;

(c) the New Mexico health policy commission;

(d) the children, youth and families department;

(e) the human services department;

(f) the Indian affairs department;

(g) the veterans' services department; and

(h) the office on African American affairs;

(2) one representative of providers of women's health services;

(3) two representatives from rural counties; and

(4) four representatives of advocacy, community or consumer groups.

E. Advisors to the office of the governor's council on women's health shall serve at the pleasure of the governor, shall meet at least four times per year and shall serve for two-year terms.

F. For purposes of conducting business, a majority of the advisors to the office of the governor's council on women's health shall constitute a quorum.

G. The advisors to the office of the governor's council on women's health may organize statewide meetings and focus groups to involve members of the public further in improving women's health and to identify emerging issues around women's health care delivery and services.

**History: Laws 2009, ch. 83, § 1.**



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**Effective dates.** — Laws 2009, ch. 83 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

## 28-3-7. Short title.

This act [28-3-7 to 28-3-11 NMSA 1978] may be cited as the "Displaced Homemakers Act".

**History: 1953 Comp., § 4-33A-7, enacted by Laws 1977, ch. 292, § 1.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Who, other than specifically excluded persons, is "employee" under § 4(a)(1) of Age Discrimination in Employment Act of 1967 (29 USC § 623(a)(1)), 125 A.L.R. Fed. 273.

## 28-3-8. Findings and purpose of act.

The legislature finds that there is an increasing number of persons in New Mexico who, in their middle years and having fulfilled the role of homemaker, find themselves displaced because of dissolution of marriage, death of a spouse or other loss of family income. As a consequence of this displacement such persons suffer a greatly reduced income, high rate of unemployment because of age, lack of work experience, discrimination and limited or no opportunity to collect funds of assistance such as social security, unemployment compensation, medicaid and other health insurance benefits or pension plans of the spouse. It is the purpose of this legislation to provide research and planning for programs to serve such displaced homemakers.

**History: 1953 Comp., § 4-33A-8, enacted by Laws 1977, ch. 292, § 2.**

## 28-3-9. Definitions.

As used in the Displaced Homemakers Act [28-3-7 to 28-3-11 NMSA 1978] :

A. "displaced homemaker" means any individual who has worked in the home for a substantial number of years providing unpaid household services for family members and who:

(1) has difficulty obtaining adequate employment; or

(2) has been dependent on the income of another family member but is no longer supported by such income, has been dependent on federal assistance but is no longer eligible for such assistance or is supported as the parent of minor children by federal assistance or spousal support; and

B. "income of another family member" means any income in support of an entire family unit used for the purpose of providing that family with economic security, but does not include the payment of alimony or child support.

**History: 1953 Comp., § 4-33A-9, enacted by Laws 1977, ch. 292, § 3.**

## 28-3-10. Office for displaced homemakers; creation; research and planning for displaced homemaker programs.

There is created in the commission on the status of women an "office for displaced homemakers." The office for displaced homemakers shall conduct research and planning for programs to meet the needs of displaced homemakers, which programs may include:

A. job counseling services specifically designed for a person entering the job market after a number of years as a homemaker;

B. job training and job placement services, including but not limited to:

(1) assistance in gaining admission to existing public and private job training programs and opportunities;



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(2) development of training and placement programs for jobs in the private and public sectors, in conjunction with state and local government agencies, private employers and already existing training and placement programs; and

(3) identification of community needs and fundseeking for creation of new public service jobs which displaced homemakers might fill;

C. information and assistance with respect to health care, financial matters, education, nutrition and legal problems;

D. a clearinghouse of information to compile, coordinate and disseminate information about services and programs available to displaced homemakers;

E. training for service agency personnel who work with displaced homemakers; and

F. the development of methods and materials aimed at facilitating outreach and communication for displaced homemaker service agencies and programs.

**History: 1953 Comp., § 4-33A-10, enacted by Laws 1977, ch. 292, § 4; 1978, ch. 126, § 1.**

## 28-3-11. Report and recommendations.

The director of the commission on the status of women, in conjunction with the office for displaced homemakers, shall submit to the legislature an annual report on the number of displaced homemakers served by existing public and private agencies and shall make recommendations for displaced homemaker programs which may include:

A. a plan for the establishment, funding and implementation of regional displaced homemaker service centers in New Mexico; and

B. recommendations for legislative action.

**History: 1953 Comp., § 4-33A-11, enacted by Laws 1977, ch. 292, § 5; 1978, ch. 126, § 2.**

# ARTICLE 4

# Aging and Long-term Services

Sec.
28-4-1. Commission on aging [Aging and long-term services department]; duties.
28-4-2. Definitions.
28-4-3. Commission on aging [Aging and long-term services department]; powers.
28-4-4. Agency created.
28-4-5. Agency duties.
28-4-6. Agency powers.
28-4-7. Agency staff.
28-4-8. Reports.
28-4-9. Advisory committee.

## 28-4-1. Commission on aging [Aging and long-term services department]; duties.

The commission on aging [aging and long-term services department] shall establish and maintain a comprehensive statewide program designed to meet the social service needs of the state's aged population. Not by way of limitation, the commission [department] shall:

A. strengthen and coordinate services of state and local public bodies for the benefit of the aged;

B. promote the utilization of older persons in all phases of employment;

C. disseminate information to the aged relative to federal, state and local services for the aged;

D. encourage training programs, retraining programs and opportunities for older workers;

E. develop new methods of job placement for older workers;

F. promote public recognition of the advantages of hiring and retaining older workers; and

G. promote and develop programs of community resources and facilities designed to meet the social needs of older persons.



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**History: 1953 Comp., § 13-1-59, enacted by Laws 1969, ch. 55, § 2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Compiler's notes.** — Laws 2003, ch. 403, §§ 1 and 2, effective June 20, 2003, provided that the governor may, by executive order issued in 2003, make the following state agencies cabinet-level departments: (1) the state agency on aging may become the aging and long-term care department [aging and long-term services department]; (2) the office of cultural affairs may become the cultural affairs department; (3) the New Mexico office of Indian affairs may become the Indian affairs department; and (4) the New Mexico veterans' service commission may become the veterans' service department. Functions, personnel, appropriations, money, records, files, furniture equipment, and property of a specified agency would be transferred to the resulting departments.

**Cross references.** — For provisions regarding the office of guardianship, *see* 28-16B-1 NMSA 1978 et seq.

For elderly homeowners' maximum property tax liability and income tax credit or refund for excess, *see* 7-2-18 NMSA 1978.

For definitions applicable to provisions of the first three sections of this article, *see* 27-1-1 NMSA 1978.

## 28-4-2. Definitions.

The commission on aging shall mean the aging services bureau of the social services division of the human services department [aging and long-term services department].

**History: 1953 Comp., § 13-1-59.1, enacted by Laws 1977, ch. 252, § 17.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 28-4-3. Commission on aging [Aging and long-term services department]; powers.

The commission [department]:

A. may receive on behalf of the state any gifts, donations or bequests from any source, to be used in carrying out its duties; and

B. is designated as the state agency for handling all programs of the federal government related to the aging, except those designated by law as the responsibility of another state agency, and may enter into agreements and contracts with agencies of the federal government for this purpose.

**History: 1953 Comp., § 13-1-60, enacted by Laws 1969, ch. 55, § 3.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 28-4-4. Agency created.

There is created as an entity of state government the "state agency on aging," ["aging and long-term services department"] which shall be administratively attached to the human services department. The administrative head of the agency shall be the director, who shall be appointed by and serve at the pleasure of the governor.

**History: Laws 1979, ch. 203, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 23, § 13 provided that all references to the state agency on aging be deemed references to the aging and long-term services department.

## 28-4-5. Agency duties.

The state agency on aging [aging and long-term services department] shall establish and maintain a comprehensive statewide program designed to meet the social service needs of the state's aged population, including but not limited to the following:

A. strengthen and coordinate services of state and local public bodies for the benefit of the aged;

B. promote the utilization of older persons in all phases of employment;

C. disseminate information to the aged relative to federal, state and local services for the aged;

D. encourage training programs, retraining programs and opportunities for older workers;

E. develop new methods of job placement for older workers;



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F. promote public recognition of the advantages of hiring and retaining older workers; and

G. promote and develop programs of community resources and facilities designed to meet the social needs of older persons.

**History: Laws 1979, ch. 203, § 2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 23, § 13 provided that all references to the state agency on aging be deemed references to the aging and long-term services department.

## 28-4-6. Agency powers.

A. The state agency on aging [aging and long-term services department]:

(1) may receive on behalf of the state any gifts, donations or bequests from any source to be used in carrying out its duties; and

(2) is designated as the state agency [department] for handling all programs of the federal government related to the aged, except those designated by law as the responsibility of another state agency, and may enter into agreements and contracts with agencies of the federal government for this purpose.

B. The state agency on aging [aging and long-term services department] may adopt and promulgate such reasonable rules and regulations as are deemed necessary to carry out its duties. Unless otherwise provided by law, no rule or regulation affecting any person or agency outside the state agency on aging [aging and long-term services department] shall be adopted, amended or repealed without a public hearing on the proposed action before the director of the state agency on aging [aging and long-term services department] or a hearing officer designated by him. The public hearing shall be held in Santa Fe unless otherwise permitted by statute. Notice of the subject matter of the rule or regulation, the action proposed to be taken, the time and place of the hearing, the manner in which interested persons may present their views and the method by which copies of the proposed rule or regulation or proposed amendment or repeal of an existing rule or regulation may be obtained shall be published once at least thirty days prior to the hearing in a newspaper of general circulation and mailed at least thirty days prior to the hearing date to all persons who have made a written request for advance notice of hearing. The director of the state agency on aging [aging and long-term services department] shall also provide such notice to the director of each senior citizen center no later than forty days prior to the public hearing. All rules and regulations shall be filed in accordance with the State Rules Act [Chapter 14, Article 4 NMSA 1978].

C. To ensure that the health and safety needs of the state's aged population are being met, the state agency on aging [aging and long-term services department] may conduct unannounced quality care evaluations of health and long-term care facilities that provide services to the aged, including the use of undercover patients or employees. Any employee or contractor of the state agency on aging [aging and long-term services department] who participates in such an evaluation shall be immune from liability in any civil action related to the evaluation, provided it is conducted in good faith. The purpose of this subsection is to confirm and clarify the authority of the state agency on aging [aging and long-term services department] to conduct quality care evaluations to protect the interests of the state's aged population.

**History: Laws 1979, ch. 203, § 3; 1989, ch. 249, § 1; 1997, ch. 257, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 23, § 13 provided that all references to the state agency on aging be deemed references to the aging and long-term services department.

**The 1997 amendment,** effective July 1, 1997, added Subsection C and made stylistic changes in Subsection B.

## 28-4-7. Agency staff.

The director shall hire such staff as is necessary, all of whom shall be subject to the Personnel Act [Chapter 10, Article 9 NMSA 1978].

**History: Laws 1979, ch. 203, § 4.**



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## 28-4-8. Reports.

The state agency on aging [aging and long-term services department] shall submit reports on its work for the preceding year to the governor and the legislature at least forty-five days prior to each regular legislative session. The reports shall contain recommendations on present and future needs of the aged.

**History: Laws 1979, ch. 203, § 5.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 23, § 13 provided that all references to the state agency on aging be deemed references to the aging and long-term services department.

## 28-4-9. Advisory committee.

The governor shall appoint an eleven-member advisory committee to the state agency on aging [aging and long-term services department] in accordance with the provisions of the Executive Reorganization Act [9-1-1 to 9-1-10 NMSA 1978]. In establishing the committee, the governor shall take note of any federal requirements regarding membership and shall appoint members for staggered terms of four years. Members of the committee shall be reimbursed for services as provided for in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

**History: Laws 1979, ch. 203, § 6; 1989, ch. 249, § 2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 23, § 13 provided that all references to the state agency on aging be deemed references to the aging and long-term services department.

# ARTICLE 5

# Committee on Children and Youth

(Repealed by Laws 1988, ch. 101, § 51.)

## 28-5-1 to 28-5-3. Repealed.

**Repeals.** — Laws 1988, ch. 101, § 51 repealed 28-5-1 to 28-5-3 NMSA 1978 as enacted by Laws 1977, ch. 252, § 18 and Laws 1967, ch. 235, §§ 2 and 3, relating to the committee on children and youth, effective July 1, 1989.

# ARTICLE 6

# Age of Majority

Sec.
28-6-1. Age of majority; eighteen years; exception.

Sec.
28-6-2 to 28-6-8. Repealed.

## 28-6-1. Age of majority; eighteen years; exception.

A. Except as provided in Subsection B or otherwise specifically provided by existing law, any person who has reached his eighteenth birthday shall be considered to have reached his majority as provided in Section 12-2-2 NMSA 1978 [repealed] and is an adult for all purposes the same as if he had reached his twenty-first birthday.

B. For the purposes of the Uniform Gifts to Minors Act [repealed], as it relates to any gift made prior to June 18, 1971, the donee shall not be entitled to delivery or payment over of the gift until he has reached his twenty-first birthday.

**History: 1953 Comp., § 13-13-1, enacted by Laws 1971, ch. 213, § 1; 1973, ch. 138, § 12.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.



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Section 12-2-2 NMSA 1978 was repealed in 1997. For comparable provisions, *see* 12-2A-3 NMSA 1978.

The Uniform Gifts to Minors Act, referred to in Subsection B, formerly appeared as 46-7-1 to 46-7-10 NMSA 1978, but was by repealed Laws 1989, ch. 357, § 26. For present comparable provisions, *see* the Uniform Transfers to Minors Act, 46-7-11 NMSA 1978 et seq.

**Cross references.** — For consent to prenatal, delivery and postnatal treatment, *see* 24-1-13.1 NMSA 1978.

For contributing to delinquency of minor, *see* 30-6-3 NMSA 1978.

For sexually oriented material harmful to minors, *see* 30-37-2 NMSA 1978.

For "adult" as person 18 years of age or over under Children's Code, *see* 32A-1-4 NMSA 1978.

For educational loans, legal disability of minors removed, *see* 58-6-3 NMSA 1978.

For alcoholic beverages, sale to person under 21 unlawful, identity cards, employment, *see* 60-7B-1 to 60-7B-11 NMSA 1978.

### ANNOTATIONS

**Section not unconstitutional.** — Although trial court had continuing jurisdiction to modify divorce decree containing child custody provisions under the provisions of Section 40-4-7 NMSA 1978, that decree was considered final and not within the meaning of a "pending case" in N.M. Const., art. IV, § 34. Therefore, this section, which by its operation freed divorced father from making support payments to daughter who had reached age of 18, and thus, under the new section, was no longer a minor, is not unconstitutional. *Phelps v. Phelps*, 1973-NMSC-044, 85 N.M. 62, 509 P.2d 254.

**Purpose of section.** — The phrase "for all purposes" does not bar the right of parties to a contract to agree that "of full age" may be stipulated to mean 21 years; the purpose of the statute is to substitute the age of 18 for the age of 21 when any prior special law fixes an adult age of 21 years, subject to the specific exception of liquor control, and there is no analogical or interpretive basis for the contention that "for all purposes" means that a person 18 years of age is an adult in every phase of law, including the law of contracts and the modification of contracts. *Peterson v. Romero*, 1975-NMCA-127, 88 N.M. 483, 542 P.2d 434.

**Effect of section on contracts where age stipulated.** — Rental contract requiring that the rented vehicle be driven by "persons of full age (21 years)" was not modified by this section, and therefore neither car lessee nor estate of 18-year-old deceased driver were covered by the insurance provisions of the rental contract. *Peterson v. Romero*, 1975-NMCA-127, 88 N.M. 483, 542 P.2d 434.

**On child-support payments.** — Divorced husband was relieved by enactment of this statute from making further child-support payments under decree which required husband to make such payments during minority of his children or until they earlier become married or otherwise emancipated, where children were age 20 and 18 respectively. *Mason v. Mason*, 1973-NMSC-031, 84 N.M. 720, 507 P.2d 781.

**Relation between age and voluntariness of confession.** — Age is a factor to be considered in determining the voluntariness of a confession; however, a person who has reached the age of 18 is considered an adult for most purposes. *State v. Aguirre*, 1978-NMCA-029, 91 N.M. 672, 579 P.2d 798, cert. denied, 91 N.M. 751, 580 P.2d 972.

**Law reviews.** — For student article, "Tort Law — Either the Parents or the Child May Claim Compensation for the Child's Medical and Non-Medical Damages: Lopez v. Southwest Community Health Services," see 23 N.M.L. Rev. 373 (1993).

For symposium, "The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control," see 3 N.M.L. Rev. 11 (1973).

For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 42 Am. Jur. 2d Infants § 4.

Inclusion or exclusion of the day of birth in computing one's age, 5 A.L.R.2d 1143.

Infant's liability for medical, dental, or hospital services, 53 A.L.R.4th 1249.

Statute protecting minors in a specified age range from rape or other sexual activity as applicable to defendant minor within protected age group, 18 A.L.R.5th 856.

43 C.J.S. Infants §§ 2, 3.

## 28-6-2 to 28-6-8. Repealed.

**Repeals.** — Laws 1995, ch. 206, § 4 repealed former 28-6-2 through 28-6-8 NMSA 1978, as enacted by Laws 1981, ch. 270, §§ 1 through 7, relating to the age of majority and the emancipation of minors, effective July 1, 1995. For provisions of former sections, *see* the 1994 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 32A-21-1 to 32A-21-7 NMSA 1978.

# ARTICLE 7

# Blind and Disabled Persons

Sec.
28-7-1. Short title.
28-7-2. Policy.
28-7-3. Equal right to use public facilities.
28-7-4. Driver to take precautions approaching blind; liability for damage.
28-7-5. Interference with rights of blind; penalty.
28-7-6. Annual proclamation of white cane safety day by governor.
28-7-7. Policy of state on employment of persons with a disability.
28-7-8 to 28-7-12. Repealed.
28-7-13. Prohibiting influence against joining organizations for the visually handicapped.
28-7-14. Medical eye care.
28-7-15. Short title.
28-7-16. Commission for the blind created.
28-7-17. Commission for the blind; powers and duties.
28-7-18. Staff.
28-7-19. Qualification as blind; examinations required.
28-7-20. Corrective medical services.
28-7-21. Reports.
28-7-22. Receipt of federal funds; designation.
28-7-23. Hearing; appeal.



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## 28-7-1. Short title.

This act [28-7-1 to 28-7-7 NMSA 1978] may be cited as the "White Cane Law".

**History: 1953 Comp., § 12-13-1, enacted by Laws 1967, ch. 232, § 1; recompiled as 1953 Comp., § 12-26-1, by Laws 1972, ch. 51, § 9.**

**Cross references.** — For governor's commission on disability, *see* 28-10-1 NMSA 1978 et seq.

For guide dogs for blind, penalty for refusing admittance, hearing ear aid dogs, exemption of guide dogs from municipal licensing, *see* Chapter 28, Article 11 and 77-1-15.1 NMSA 1978.

For voting assistance, *see* 1-12-12 NMSA 1978 et seq.

For public employment, blind not barred from competitive examination, *see* 10-9-14 NMSA 1978.

For school for visually handicapped, *see* 21-5-1 NMSA 1978 et seq.

For vending stand program for the blind, *see* 22-14-24 NMSA 1978 et seq.

For health insurance, *see* 59A-22-33 NMSA 1978.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Accommodation requirement under state legislation forbidding job discrimination on account of handicap, 76 A.L.R.4th 310.

Handicap as job disqualification under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 265.

Damages and other relief under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 435.

Discrimination "because of handicap" or "on the basis of handicap" under state statutes prohibiting job discrimination on account of handicap, 81 A.L.R.4th 144.

What constitutes handicap under state legislation forbidding job discrimination on account of handicap, 82 A.L.R.4th 26.

Visual impairment as handicap or disability under state employment discrimination law, 77 A.L.R.5th 595.

Availability and scope of punitive damages under state employment discrimination law, 81 A.L.R.5th 367.

Remedies available under Americans with Disabilities Act (42 USCS § 12101 et seq.), 136 A.L.R. Fed. 63.

To what extent are federal entities subject to suit under § 504(a) of Rehabilitation Act (42 USCA § 794(a)), which prohibits any program or activity conducted by any executive agency or the postal service from discriminating on basis of disability, 146 A.L.R. Fed. 319.

What constitutes federal financial assistance for purposes of § 504 of Rehabilitation Act (29 USCA § 794), which prohibits any program or activity receiving federal financial assistance from discriminating on basis of disability, 147 A.L.R. Fed. 205.

Action under Americans with Disabilities Act (42 U.S.C.A. § 12101 et seq.), to remedy alleged harassment or hostile work environment, 162 A.L.R. Fed. 603.

What constitutes employment discrimination by public entity in violation of Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12132, 164 A.L.R. Fed. 433.

## 28-7-2. Policy.

It is the policy of this state to encourage and enable persons who are blind, visually impaired or who have another physical disability to participate fully in the social and economic life of the state and to engage in remunerative employment.

**History: 1953 Comp., § 12-13-2, enacted by Laws 1967, ch. 232, § 2; recompiled as 1953 Comp., § 12-26-2, by Laws 1972, ch. 51, § 9; 2007, ch. 46, § 24.**

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Accommodation requirement under state legislation forbidding job discrimination on account of handicap, 76 A.L.R.4th 310.

Handicap as job disqualification under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 265.

Damages and other relief under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 435.

Discrimination "because of handicap" or "on the basis of handicap" under state statutes prohibiting job discrimination on account of handicap, 81 A.L.R.4th 144.

What constitutes handicap under state legislation forbidding job discrimination on account of handicap, 82 A.L.R.4th 26.

Remedies available under Americans with Disabilities Act (42 USCS § 12101 et seq.), 136 A.L.R. Fed. 63.

To what extent are federal entities subject to suit under § 504(a) of Rehabilitation Act (42 USCA § 794(a)), which prohibits any program or activity conducted by any executive agency or the postal service from discriminating on basis of disability, 146 A.L.R. Fed. 319.

When is individual regarded as having or perceived to have, impairment within meaning of Americans with Disabilities Act (42 USCA § 12102(2)(c)), 148 A.L.R. Fed. 305.

Action under Americans with Disabilities Act (42 U.S.C.A. § 12101 et seq.), to remedy alleged harassment or hostile work environment, 162 A.L.R. Fed. 603.

## 28-7-3. Equal right to use public facilities.

A. Persons who are blind, visually impaired or who have another physical disability have the same right as others to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities and other public places.



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B. Persons who are blind, visually impaired or who have another physical disability are entitled to full and equal accommodations, advantages, facilities and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, streetcars, boats or any other public conveyances or modes of transportation, hotels, lodging places, places of public accommodation, amusement or resort and any other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons.

C. Every totally or partially blind person shall have the right to be accompanied by a guide dog, specially trained for the purpose, in any of the places listed in this section without being required to pay an extra charge for the guide dog; provided that the person shall be liable for any damage done to the property or facilities by the dog.

D. The attorney general, district attorney or any person with a disability may file an action in the judicial district when a building has been built or altered and the work has not been accomplished in accordance with the current uniform building code, other applicable publications and established handicapped standards. The building official shall notify those applying for a permit that they shall comply with established standards. Any interested person may appeal the granting or denial of a waiver to the district court where the building is located. If the court finds that the building owner was required to comply with handicap access standards of the uniform building code and has failed to comply with such standards within a reasonable period of time, then the party filing action shall recover the court costs, attorney fees and appropriate injunctive relief to remedy the violation.

**History: 1953 Comp., § 12-13-3, enacted by Laws 1967, ch. 232, § 3; recompiled as 1953 Comp., § 12-26-3, by Laws 1972, ch. 51, § 9; 1987, ch. 39, § 1; 2007, ch. 46, § 25.**

**Cross references.** — For procedures governing administrative appeals to the district court, *see* Rule 1-074 NMRA.

For scope of review of the district court, *see Zamora v. Village of Ruidoso Downs*, 120 N.M. 778, 907 P.2d 182 (1995).

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Construction and effect of state legislation forbidding discrimination in housing on account of physical handicap, 28 A.L.R.4th 685.

Validity and construction of state statutes requiring construction of handicapped access facilities in buildings open to public, 82 A.L.R.4th 121.

Validity, construction, and application of § 302 of Americans with Disabilities Act (42 USCS § 12182), prohibiting discrimination on basis of disability by owners or operators of places of public accommodation, 136 A.L.R. Fed. 1

Who is recipient of, and what constitutes program or activity receiving, federal financial assistance for purposes of § 504 of Rehabilitation Act (29 U.S.C.A. § 794), which prohibits any program or activity receiving financial assistance from discriminating on basis of disability, 160 A.L.R. Fed. 297.

When are public entities required to provide services, programs, or activities to disabled individuals under Americans with Disabilities Act, 42 U.S.C.A. § 12132, 160 A.L.R. Fed. 637.

When does a public entity discriminate against individuals in its provision of services, programs, or activities under the Americans with Disabilities Act, 42 U.S.C.A. § 12132, 163 A.L.R. Fed. 339.

## 28-7-4. Driver to take precautions approaching blind; liability for damage.

The driver of a vehicle approaching a totally or partially blind pedestrian who is carrying a cane predominantly white or metallic in color, with or without a red tip, or using a guide dog shall take all necessary precautions to avoid injury to such blind pedestrian, and any driver who fails to take such precautions shall be liable in damages for any injury caused to such pedestrian; provided that a totally blind or partially blind pedestrian not carrying such a cane or using a guide dog in any of the places, accommodations or conveyances listed herein, shall have all the rights and privileges conferred by law upon other persons, and the failure of a totally blind pedestrian to carry such a cane or to use a guide dog in any such places, accommodations or conveyances shall not be held to constitute nor be evidence of contributory negligence.

**History: 1953 Comp., § 12-13-4, enacted by Laws 1967, ch. 232, § 4; recompiled as 1953 Comp., § 12-26-4, by Laws 1972, ch. 51, § 9.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Contributory negligence, in motor vehicle accident case, of pedestrian under physical disability, 83 A.L.R.2d 769.



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## 28-7-5. Interference with rights of blind; penalty.

A person, firm or corporation or the agent of a person, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities enumerated in Section 28-7-3 NMSA 1978 or otherwise interferes with the rights of a blind or visually impaired person or a person who has a physical disability enumerated in the White Cane Law [28-7-1 to 28-7-7 NMSA 1978] is guilty of a misdemeanor.

**History: 1953 Comp., § 12-13-5, enacted by Laws 1967, ch. 232, § 5; recompiled as 1953 Comp., § 12-26-5, by Laws 1972, ch. 51, § 9; 2007, ch. 46, § 26.**

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

## 28-7-6. Annual proclamation of white cane safety day by governor.

Each year, the governor shall take suitable public notice of October 15 as white cane safety day. The governor shall issue a proclamation in which the governor:

A. comments upon the significance of the white cane;

B. calls upon the citizens of the state to observe the provisions of the White Cane Law [28-7-1 to 28-7-7 NMSA 1978] and to take precautions necessary to the safety of persons with a disability;

C. reminds the citizens of the state of the policies with respect to persons with a disability declared in the White Cane Law and urges the citizens to cooperate in giving effect to them; and

D. emphasizes the need of the citizens to be aware of the presence of persons with a disability in the community and to keep streets, highways, sidewalks, walkways, public buildings, public facilities, other public places, places of public accommodation, amusement and resort and other places to which the public is invited safe and functional and to offer assistance to persons with a disability upon appropriate occasions.

**History: 1953 Comp., § 12-13-6, enacted by Laws 1967, ch. 232, § 6; recompiled as 1953 Comp., § 12-26-6, by Laws 1972, ch. 51, § 9; 2007, ch. 46, § 27.**

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

## 28-7-7. Policy of state on employment of persons with a disability.

It is the policy of this state that a person who is blind, visually impaired or who has another physical disability shall be employed in the state service, the service of the political subdivisions of the state, the public schools and all other employment supported in whole or in part by public funds on the same terms and conditions as others, unless it is shown that the particular disability prevents the performance of the work involved.

**History: 1953 Comp., § 12-13-7, enacted by Laws 1967, ch. 232, § 7; recompiled as 1953 Comp., § 12-26-7, by Laws 1972, ch. 51, § 9; 2007, ch. 46, § 28.**

**Cross references.** — For public employment, blind not barred from competitive examination, *see* 10-9-14 NMSA 1978.

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Visual impairment as handicap or disability under state employment discrimination law, 77 A.L.R.5th 595.

## 28-7-8 to 28-7-12. Repealed.

**Repeals.** — Laws 1983, ch. 60, § 4, repealed 28-7-8 to 28-7-12 NMSA 1978, as enacted by Laws 1967, ch. 274, §§ 1 to 5 and as recompiled by Laws 1972, ch. 51, § 9, relating to administrative procedures for complaints against the division of services for the blind, and establishing a fair hearing board, effective June 17, 1983. For present provisions, *see* 22-14-12 NMSA 1978.



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## 28-7-13. Prohibiting influence against joining organizations for the visually handicapped.

No officer or employee of the state or any political subdivision of the state who is concerned with the administration of any program for the visually handicapped shall exert the influence of his office or position against the right of a person to join organizations for the visually handicapped.

**History: 1953 Comp., § 12-13-13, enacted by Laws 1967, ch. 113, § 1; recompiled as 1953 Comp., § 12-26-13, by Laws 1972, ch. 51, § 9.**

## 28-7-14. Medical eye care.

There is created the "medical eye care and sight conservation program" which shall be operated and administered by the commission for the blind. The medical eye care and sight conservation program shall serve persons who meet the program qualifications established by the commission and who are not eligible for vocational rehabilitation services.

**History: 1953 Comp., § 12-26-14, enacted by Laws 1976, ch. 39, § 1; 1986, ch. 108, § 15.**

**Cross references.** — For Special Medical Needs Act, *see* Chapter 27, Article 4 NMSA 1978.

## 28-7-15. Short title.

Sections 1 through 9 [28-7-15 to 28-7-23 NMSA 1978] of this act may be cited as the "Commission for the Blind Act".

**History: Laws 1986, ch. 108, § 1.**

## 28-7-16. Commission for the blind created.

A. There is created the "commission for the blind", consisting of three members, at least one of whom shall be blind, appointed by the governor with the advice and consent of the senate. Members of the first commission shall be appointed for staggered terms, one ending on December 31, 1988, one ending December 31, 1990 and one ending December 31, 1992. Thereafter, appointments shall be for staggered terms of six years.

B. A majority of the members of the commission constitutes a quorum for the transaction of business. The commission shall elect a chairman from its membership.

C. Members of the commission shall be compensated as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

**History: Laws 1986, ch. 108, § 2.**

## 28-7-17. Commission for the blind; powers and duties.

The commission for the blind shall:

A. apply for and receive money from any state or federal agency to be used for purposes relating to blindness and receive on behalf of the state any gifts, donations or bequests from any source, to be used in carrying out the commission's duties;

B. maintain a complete register of blind persons domiciled in New Mexico, specifying the nature and cause of blindness, capacity and need for educational or industrial training and other pertinent information;

C. maintain bureaus of information and industrial assistance to help blind persons find employment, train them in work which may be pursued in their own homes and assist them in merchandising and marketing their goods;



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D. establish, equip and maintain a center with qualified instructors for vocational, industrial and other training of eligible blind persons. The center shall also provide for orientation and assistance for the adjustment of blind persons;

E. research and study the causes of blindness and its prevention in cooperation with the state or any other entity which the commission deems appropriate;

F. cooperate with appropriate state agencies in the adoption and carrying out of preventive measures relating to blindness;

G. promulgate rules and regulations necessary to effectuate the provisions of the Commission for the Blind Act [28-7-15 to 28-7-23 NMSA 1978]; and

H. publish an annual report on the activities and services of the commission.

**History: Laws 1986, ch. 108, § 3.**

## 28-7-18. Staff.

The commission shall appoint a director, who is the administrative officer of the commission. The director shall employ such assistants and employees as are necessary for the efficient operation of the commission. The director and all employees are subject to the Personnel Act [Chapter 10, Article 9 NMSA 1978].

**History: Laws 1986, ch. 108, § 4.**

## 28-7-19. Qualification as blind; examinations required.

A. Qualification of a person as blind shall be determined by means of an eye examination by a licensed ophthalmologist. Blindness shall be the major handicap in cases of multiple handicaps. Persons who are not blind but who have been certified by a licensed ophthalmologist as suffering from a deteriorating condition which will result in blindness also qualify as blind.

B. The commission shall determine the procedure to be followed for the examination of any person to establish blindness and shall maintain a list of all ophthalmologists currently licensed in New Mexico. The person may choose any licensed ophthalmologist to make the examination and the cost shall be paid by the commission pursuant to its regulations.

**History: Laws 1986, ch. 108, § 5.**

## 28-7-20. Corrective medical services.

In addition to arranging and paying for examinations to determine blindness, the commission may arrange and pay for medical and surgical treatment of blind persons whenever a listed ophthalmologist judges that the treatment will be beneficial.

**History: Laws 1986, ch. 108, § 6.**

## 28-7-21. Reports.

Whenever a licensed ophthalmologist finds a person he has examined to be blind, he shall report this fact, along with details of the examination, to the commission within thirty days of the examination date.

**History: Laws 1986, ch. 108, § 7.**



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## 28-7-22. Receipt of federal funds; designation.

The commission is authorized to receive and administer any federal funds relating to vocational rehabilitation of blind persons.

**History: Laws 1986, ch. 108, § 8.**

## 28-7-23. Hearing; appeal.

The commission shall provide an opportunity for a fair hearing to any person applying for or receiving services who is dissatisfied with any act or failure to act arising from the operation of or administration of any program of the commission. The commission shall adopt rules and regulations as necessary to govern the conduct of such hearings.

**History: Laws 1986, ch. 108, § 9.**

# ARTICLE 8

# Identifying Devices and Cards for Disabled Persons

Sec.
28-8-1. Definitions.
28-8-2. Identifying devices for persons having certain conditions.
28-8-3. Duty of peace officer.
28-8-4. Duty of medical practitioners.
28-8-5. Duty of others.
28-8-6. Falsifying identification or misrepresenting condition.
28-8-7. Other duties.

## 28-8-1. Definitions.

As used in this act [28-8-1 to 28-8-7 NMSA 1978]:

A. "disabled condition" means the condition of being unconscious, semiconscious, incoherent or otherwise incapacitated to communicate;

B. "disabled person" means a person in a disabled condition;

C. "the emergency symbol" means the caduceus inscribed within a six-barred cross used by the American Medical Association to denote emergency information;

D. "identifying device" means an identifying bracelet, necklace, metal tag or similar device bearing the emergency symbol and the information needed in an emergency; and

E. "medical practitioner" means a person licensed or authorized to practice medicine or osteopathy.

**History: 1953 Comp., § 12-31-1, enacted by Laws 1973, ch. 265, § 1.**

## 28-8-2. Identifying devices for persons having certain conditions.

A. A person who suffers from epilepsy, diabetes, a cardiac condition or any other type of illness that causes temporary blackouts, semiconscious periods or complete unconsciousness, or who suffers from a condition requiring specific medication or medical treatment, is allergic to certain medications or items used in medical treatment, wears contact lenses or is unable to communicate coherently or effectively in the English language, is authorized and encouraged to wear an identifying device.

B. Any person may carry an identification card bearing his name, type of medical condition, physician's name and other medical information.

C. By wearing an identifying device a person gives his consent for any peace officer or medical practitioner who finds him in a disabled condition to make a reasonable search of his clothing or other effects for an identification card of the type described in Subsection B of this section.



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**History: 1953 Comp., § 12-31-2, enacted by Laws 1973, ch. 265, § 2.**

## 28-8-3. Duty of peace officer.

A. A peace officer shall make a diligent effort to determin [determine] whether any disabled person he finds is an epileptic or a diabetic or suffers from some other type of illness that would cause the condition. Whenever feasible, this effort shall be made before the person is charged with a crime or taken to a place of detention.

B. In seeking to determine whether a disabled person suffers from an illness, a peace officer shall make a reasonable search for an identifying device and an identification card of the type described in Subsection B of Section 2 [28-8-2 NMSA 1978] of this act and examine them for emergency information. The peace officer may not search for an identifying device or an identification card in a manner or to an extent that would appear to a reasonable person in the circumstances to cause an unreasonable risk of worsening the disabled person's condition.

C. A peace officer who finds a disabled person without an identifying device or identification card is not relieved of his duty to that person to make a diligent effort to ascertain the existence of any illness causing the disabled condition.

D. A claim for relief against a peace officer does not arise from his making a reasonable search of the disabled person to locate an identifying device or identification card, even though the person is not wearing an identifying device or carrying an identification card. However, nothing found on the disabled person during a search authorized under this act [28-8-1 to 28-8-7 NMSA 1978] shall be admitted into evidence in any court in a criminal proceeding where the disabled person is a defendant if the admission of the product of the search would not be entitled to admission except for the authority to search granted in Subsection C of this section.

E. A peace officer who determines or has reason to believe that a disabled person is suffering from an illness causing his condition shall promptly notify the person's physician, if practicable. If the officer is unable to ascertain the physician's identity or to communicate with him, the officer shall make a reasonable effort to cause the disabled person to be transported immediately to a medical practitioner or to a facility where medical treatment is available. If the officer believes it unduly dangerous to move the disabled person, he shall make a reasonable effort to obtain the assistance of a medical practitioner.

**History: 1953 Comp., § 12-31-3, enacted by Laws 1973, ch. 265, § 3.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 28-8-4. Duty of medical practitioners.

A. A medical practitioner, in discharging his duty to a disabled person whom he has undertaken to examine or treat, shall make a reasonable search for an identifying device or an identification card of the type described in Subsection B of Section 2 [28-8-2 NMSA 1978] of this act and examine them for emergency information.

B. A claim for relief against a medical practitioner does not arise from his making a reasonable search of a disabled person to locate an identifying device or identification card, even though the person is not wearing an identifying device or carrying an identification card.

**History: 1953 Comp., § 12-31-4, enacted by Laws 1973, ch. 265, § 4.**

## 28-8-5. Duty of others.

A. A person, other than a peace officer or medical practitioner, who finds a disabled person may make a reasonable effort to notify a peace officer. If a peace officer or medical practitioner is not present, a person who finds a disabled person may:

(1) make a reasonable search for an identifying device; and



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(2) if the identifying device is found, may make a reasonable search for an identification card of the type described in Subsection B of Section 2 [28-8-2 NMSA 1978] of this act.

If a device or card is located, the person making the search shall attempt promptly to bring its contents to the attention of a peace officer or medical practitioner.

B. A claim for relief does not arise from a reasonable search to locate an identifying device or identification card as authorized by Subsection A of this section.

**History: 1953 Comp., § 12-31-5, enacted by Laws 1973, ch. 265, § 5.**

## 28-8-6. Falsifying identification or misrepresenting condition.

A person who, with intent to deceive, provides, wears, uses or possesses a false identifying device or an identification card of the type described in Subsection B of Section 2 [28-8-2 NMSA 1978] of this act is guilty of a misdemeanor and shall be fined not more than three hundred dollars ($300) or imprisoned for not more than ninety days, or both.

**History: 1953 Comp., § 12-31-6, enacted by Laws 1973, ch. 265, § 6.**

## 28-8-7. Other duties.

The duties imposed by this act [28-8-1 to 28-8-7 NMSA 1978] are in addition to, and not in limitation of, other duties existing under the law of this state.

**History: 1953 Comp., § 12-31-7, enacted by Laws 1973, ch. 265, § 7.**

# ARTICLE 9

# Employment of Blind Persons

(Recompiled by Laws 1983, ch. 60, § 3.)

## 28-9-1 to 28-9-6. Recompiled.

**Recompilations.** — Laws 1983, ch. 60, § 3, recompiled 28-9-1 to 28-9-6 NMSA 1978, relating to the employment of blind persons, as 22-14-24 to 22-14-29 NMSA 1978, effective June 17, 1983.

# ARTICLE 10

# Concerns and Employment of the Disabled

Sec.
28-10-1. Governor's commission on disability.
28-10-2. Governor's commission on disability; powers and duties.
28-10-3. Additional powers.
28-10-3.1. Full-service gasoline stations; decal display; service to person with a disability.
28-10-3.2. Short title.
28-10-3.3. Program created.
28-10-4. Advisory council.
28-10-5. Disability fund created.
28-10-5.1. Housing modification for persons with a disability permanent fund; investment; distribution.
28-10-6. Reports.
28-10-7. Compensation.
28-10-8. Administrative attachment.
28-10-8.1. Director; commission staff.
28-10-9. Short title.
28-10-10. Definition.
28-10-11. State policy.
28-10-12. Personnel board; rules.



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## 28-10-1. Governor's commission on disability.

A. The "governor's commission on disability" is created, consisting of sixteen members, nine of whom shall be appointed by the governor. The seven remaining members shall be the director of the vocational rehabilitation division of the public education department, the secretary of workforce solutions or the secretary's designee, the director of the behavioral health services division of the human services department, the secretary of children, youth and families or the secretary's designee, the secretary of early childhood education and care or the secretary's designee, the secretary of aging and long-term services or the secretary's designee and the secretary of human services or the secretary's designee. Initially, three members shall be appointed for terms ending December 31, 1978, three members for terms ending December 31, 1980 and three members for terms ending December 31, 1982. Thereafter, appointments shall be for six years expiring on December 31 of even-numbered years. Appointed members shall be appointed from different geographic areas of the state and from the major disability services in the state. Appointed members shall include persons with disabilities, representatives of government and private enterprise, parents or guardians of persons with disabilities and professionals in, or those who are interested in, service for persons with disabilities. Not more than five of the members appointed by the governor shall be of the same political party.

B. A majority of the members of the commission constitutes a quorum for the transaction of business. The commission shall meet at least twice a year and shall annually elect a chair and a vice chair.

C. The commission shall be primarily concerned with those persons with disabilities who have a condition that, regardless of its physical or mental origin, constitutes a substantial occupational disadvantage.

**History: 1953 Comp., § 59-15-1, enacted by Laws 1973, ch. 349, § 1; 1977, ch. 198, § 1; 1979, ch. 34, § 1; 2004, ch. 20, § 1; 2007, ch. 325, § 8; 2022, ch. 30, § 6.**

**Cross references.** — For admission of disabled to state educational institutions without charge other than tuition, *see* 22-14-16 NMSA 1978.

For employment of blind persons, *see* 22-14-24 NMSA 1978 et seq.

**The 2022 amendment,** effective July 1, 2022, added the secretary of early childhood education and care, or the secretary's designee, to the governor's commission on disability; and in Subsection A, after "consisting of", deleted "fifteen" and added "sixteen", and after "children, youth and families or the secretary's designee", added "the secretary of early childhood education and care or the secretary's designee".

**The 2007 amendment,** effective June 15, 2007, changed "department of health" to "human services department" and changed "secretary of aging" to "secretary of aging and long-term services".

**The 2004 amendment,** effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability", and increased the members from 13 to 15 by adding the secretary of children, youth and families and the director of the state agency on aging [aging and long-term services department].

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — What constitutes handicap under state legislation forbidding job discrimination on account of handicap, 82 A.L.R.4th 26.

## 28-10-2. Governor's commission on disability; powers and duties.

The governor's commission on disability shall establish and maintain a comprehensive statewide program designed to encourage and promote attention to the concerns of the training and employment of individuals with disabilities in this state. To further this purpose, the commission shall:

A. cooperate with the president's committee on employment of individuals with disabilities and other federal efforts on behalf of disability concerns;

B. cooperate with all employers and training leaders, both public and private, in locating or developing employment opportunities for individuals with disabilities;

C. encourage and assist in the organization and operation of committees at the community level, the chairs of which shall automatically become members of the advisory council authorized under Section 28-10-4 NMSA 1978;

D. assist state, local and federal agencies to coordinate their activities to secure maximum utilization of funds and efforts that aid in the training and employment of individuals with disabilities;



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E. enter into written agreements with public and private employers, unions and rehabilitation agencies for the purpose of achieving the maximum employment of individuals with disabilities;

F. inform individuals with disabilities who are seeking jobs of specific facilities available to assist them in locating suitable training and employment;

G. conduct educational programs via publications and other means to acquaint the public, the legislature and the governor with the abilities and the accomplishments of individuals with disabilities;

H. promote the elimination of architectural barriers in construction so as to make buildings used by the public readily accessible to and usable by persons with physical limitations;

I. make such rules as it determines advisable for the conduct of its own business;

J. designate standing committees related to state planning, community organization, public relations and information, legislative action, federal coordination, state coordination, youth, medical rehabilitation, employers and awards;

K. designate such special committees as necessary for undetermined periods to carry out special short-term programs;

L. establish and administer a residential accessibility modification program to assist low-income individuals with disabilities to make accessibility modifications to residential dwellings as needed to enable those individuals with disabilities to remain in their homes or to leave institutional settings and be reintegrated into the community;

M. give advice and testimony on disability concerns to the governor or the legislature or any committee established by them, upon request; and

N. provide training to state and local law enforcement officers regarding matters pertaining to accessible parking for persons with disabilities.

**History: 1953 Comp., § 59-15-2, enacted by Laws 1973, ch. 349, § 2; 1977, ch. 198, § 2; 1979, ch. 34, § 2; 2001, ch. 226, § 2; 2004, ch. 20, § 2; 2010, ch. 74, § 1.**

**The 2010 amendment,** effective May 19, 2010, added Subsection N.

**The 2004 amendment,** effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability" and made other minor grammatical changes throughout.

**The 2001 amendment,** effective April 3, 2001, added present Subsection L, and renumbered former Subsection L as M.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — When must specialized equipment or other workplace modifications be provided to qualified disabled employee or applicant as reasonable accommodation, 125 A.L.R. Fed. 629.

When must employer offer qualified disabled employee or applicant opportunity to change employee's workplace or work at home as means of fulfilling reasonable accommodation requirement, 133 A.L.R. Fed. 521.

When does job restructuring constitute reasonable accommodation of qualified disabled employee or applicant?, 142 A.L.R. Fed. 311.

## 28-10-3. Additional powers.

The governor's commission on disability:

A. may receive on behalf of the state any gifts, donations or bequests from any source to be used in carrying out its duties; and

B. is designated as the state agency for handling all programs of the federal government related to the concerns of individuals with disabilities except those designated by law as the responsibility of another state agency and may enter into contracts and agreements with agencies of the federal government for this purpose that do not conflict with existing programs of other state agencies.

**History: 1953 Comp., § 59-15-3, enacted by Laws 1973, ch. 349, § 3; 1977, ch. 198, § 3; 1979, ch. 34, § 3; 2004, ch. 20, § 3.**

**The 2004 amendment,** effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability" and "handicapped persons" to "individuals with disabilities".

## 28-10-3.1. Full-service gasoline stations; decal display; service to person with a disability.

A. The governor's commission on disability shall design and produce a decal for display in full-service gasoline stations signifying that the gasoline station will provide gasoline pumping,



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window washing, fluid checks and other services provided at its full-service island to any properly permitted or certified driver with a disability at a self-service island.

B. Any full-service gasoline station providing the services described in Subsection A of this section may request and shall receive the decal upon application to the governor's commission on disability.

C. No gasoline station shall display the decal issued by the governor's commission on disability unless it provides full service to any driver with a disability at a self-service island.

D. A gasoline station owner or operator who displays a decal signifying that the station will provide additional services to drivers with a disability at a self-service island and who fails to provide that service shall be subject to revocation of the decal for display according to this section.

**History: Laws 1995, ch. 95, § 1; 2004, ch. 20, § 4; 2007, ch. 46, § 29.**

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

**The 2004 amendment,** effective May 19, 2004, changed the name of the "governor's commission on concerns of the handicapped" to the "governor's commission on disability".

## 28-10-3.2. Short title.

Sections 1 and 2 [28-10-3.2 and 28-10-3.3 NMSA 1978] of this act may be cited as the "Parking Placard Abuse Act".

**History: Laws 1999, ch. 297, § 1.**

**Effective dates.** — Laws 1999, ch. 297 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 18, 1999, 90 days after adjournment of the legislature.

## 28-10-3.3. Program created.

The "placard abuse prevention program" is created in the governor's commission on disability to ensure compliance with statutes affecting parking privileges for persons with severe mobility impairment and safe and effective use of designated disabled parking space. The commission shall design and implement a program to:

A. monitor the system of eligibility for and use of parking placards and special registration plates;

B. provide public awareness education and training to address barriers to the appropriate use of designated disabled parking space;

C. pursue efforts to reduce abuse and misuse of designated disabled parking space privileges, including revocation of parking placards and special registration plates; and

D. provide education, training and technical assistance to local law enforcement agencies and volunteers on enforcement of statutes affecting use of designated disabled parking space.

**History: Laws 1999, ch. 297, § 2; 2004, ch. 20, § 5.**

**The 2004 amendment,** effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability".

## 28-10-4. Advisory council.

A. The governor's commission on disability shall appoint an appropriate advisory council on disability, which shall include representatives of state departments and agencies and individuals attentive to the concerns of individuals with disabilities.

B. The advisory council shall meet at the call of the chairman and shall make recommendations to the governor's commission on disability for the improvement and coordination of state activities relative to the concerns of individuals with disabilities.

**History: 1953 Comp., § 59-15-4, enacted by Laws 1973, ch. 349, § 4; 1977, ch. 198, § 4; 1979, ch. 34, § 4; 2004, ch. 20, § 6.**

**The 2004 amendment,** effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability" and changed "handicapped" to "individuals with disabilities".



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## 28-10-5. Disability fund created.

A. There is created in the state treasury a "disability fund". All funds, gifts, donations, bequests and other income of the governor's commission on disability shall be deposited by the director of the commission in the fund and shall be appropriated to the commission to further the purpose of Sections 28-10-1 through 28-10-8.1 NMSA 1978 or for the purposes stated by the donor or grantor of the funds.

B. Distributions made to the disability fund from the housing modification for persons with a disability permanent fund shall constitute a separate account in the fund and are appropriated to the governor's commission on disability for the purpose of carrying out a residential accessibility modification program.

C. Money in the disability fund shall not revert but shall be used only as provided in Sections 28-10-1 through 28-10-8.1 NMSA 1978.

**History: 1953 Comp., § 59-15-5, enacted by Laws 1973, ch. 349, § 5; 2001, ch. 226, § 3; 2004, ch. 20, § 7; 2007, ch. 46, § 30.**

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

**The 2004 amendment,** effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability".

**The 2001 amendment,** effective April 3, 2001, inserted the Subsection A and C designations and added Subsection B; in Subsection A, substituted "the governor's committee on concerns of the handicapped" for "the committee" and "director" for "executive secretary"; and made stylistic changes.

## 28-10-5.1. Housing modification for persons with a disability permanent fund; investment; distribution.

A. The "housing modification for persons with a disability permanent fund" is created in the state treasury. The fund shall consist of money appropriated to the fund and any gifts, donations or bequests made to the fund. Money in the fund shall be invested by the state investment officer as land grant permanent funds are invested pursuant to Chapter 6, Article 8 NMSA 1978, and earnings from investment of the fund shall be credited to the fund. Money in the fund shall not revert at the end of any fiscal year and shall not be expended for any purpose, except that an annual distribution shall be made to the fund for persons with a disability in accordance with Subsection B of this section.

B. On July 1 of fiscal year 2002 and on July 1 of each fiscal year thereafter, an annual distribution shall be made from the housing modification for persons with a disability permanent fund to the disability fund in an amount equal to three hundred thousand dollars ($300,000) until that amount is less than an amount equal to five percent of the average of the year-end market values of the housing modification for persons with a disability permanent fund for the immediately preceding five calendar years. Thereafter, the amount of the annual distribution shall be five percent of the average of the year-end market values of the housing modification for persons with a disability permanent fund for the immediately preceding five calendar years.

**History: Laws 2001, ch. 226, § 1; 2007, ch. 46, § 31.**

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

## 28-10-6. Reports.

The governor's commission on disability and the advisory council on disability shall submit reports on their work for the preceding year to the governor and the legislature at least forty-five days prior to each regular legislative session. The report shall contain recommendations on present and future needs of individuals with disabilities.

**History: 1953 Comp., § 59-15-6, enacted by Laws 1973, ch. 349, § 6; 1977, ch. 198, § 5; 1979, ch. 34, § 5; 2004, ch. 20, § 8.**

**The 2004 amendment,** effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability" and changed "handicapped" to "individuals with disabilities".



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## 28-10-7. Compensation.

Members of the governor's commission on disability shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] but shall receive no other compensation, perquisite or allowance. Members of the advisory council on disability may receive reimbursement in the same manner from funds available to the commission, only for advisory council meetings.

**History: 1953 Comp., § 59-15-7, enacted by Laws 1973, ch. 349, § 7; 1977, ch. 198, § 6; 1979, ch. 34, § 6; 2004, ch. 20, § 9.**

**Repeals and reenactments.** — Laws 1982, ch. 13, § 1, repealed former 28-10-8 NMSA 1978, as enacted by Laws 1977, ch. 198, § 7, relating to the administration and funding for the committee on concerns of the handicapped, and enacted a new section, effective March 1, 1982.

**The 2004 amendment,** effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability".

## 28-10-8. Administrative attachment.

The governor's commission on disability is administratively attached, as defined in the Executive Reorganization Act [9-1-1 9-1-10 NMSA 1978], to the department of finance and administration.

**History: 1978 Comp., § 28-10-8, enacted by Laws 1982, ch. 13, § 1. ; 2004, ch. 20, § 10.**

**Repeals and reenactments.** — Laws 1982, ch. 13, § 1, repealed former 28-10-8 NMSA 1978, as enacted by Laws 1977, ch. 198, § 7, relating to the administration and funding for the committee on concerns of the handicapped, and enacted a new section, effective March 1, 1982.

**The 2004 amendment,** effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability".

## 28-10-8.1. Director; commission staff.

The governor's commission on disability shall appoint a director who is the administrative officer of the commission. The director shall employ other necessary employees under the provisions of the Personnel Act [10-9-1 NMSA 1978].

**History: 1978 Comp., § 28-10-8.1, enacted by Laws 1982, ch. 13, § 2; 2004, ch. 20, § 11.**

**The 2004 amendment,** effective May 19, 2004, changed the name of the "governor's committee on concerns of the handicapped" to the "governor's commission on disability".

## 28-10-9. Short title.

Sections 28-10-9 through 28-10-12 NMSA 1978 may be cited as the "Disability Employment Act".

**History: 1953 Comp., § 5-1-14, enacted by Laws 1969, ch. 129, § 1; 2007, ch. 46, § 32.**

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

## 28-10-10. Definition.

As used in the Disability Employment Act [28-10-9 through 28-10-12 NMSA 1978], "persons with a disability" includes persons with a mental or physical disability.

**History: 1953 Comp., § 5-1-15, enacted by Laws 1969, ch. 129, § 2; 2007, ch. 46, § 33.**

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

## 28-10-11. State policy.

In order to further the efforts of New Mexico in alleviating the problems of persons with a disability, full consideration shall be given to the employment of such persons in state government



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in positions in which they meet the necessary performance requirements or in positions in which performance requirements can be modified to take advantage of their abilities without detriment to the state service.

**History: 1953 Comp., § 5-1-16, enacted by Laws 1969, ch. 129, § 3; 2007, ch. 46, § 34.**

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

## 28-10-12. Personnel board; rules.

The personnel board shall establish rules and procedures consistent with the state policy of employment of persons with a disability. The rules and procedures shall be adopted after consultation with appropriate vocational rehabilitation agencies, state institutions, interested private associations and organizations and interested individuals. Any rules or procedures adopted by the personnel board shall provide that:

A. certification in an appropriate form shall be required from an appropriate agency to the effect that:

(1) the person with a disability has the ability to perform the duties of the position sought;

(2) the person with a disability is physically qualified to do the work without hazard to that person or to others; and

(3) the person with a disability is socially competent in a work environment and, either independently or with continuing help as has been provided, in after-working-hours living;

B. there are suitable periods of probation or trial employment for persons with a disability before the employment becomes permanent under the provisions of the Personnel Act [Chapter 10, Article 9 NMSA 1978]; and

C. the processes set forth in this section for establishing the eligibility of persons with a disability are construed to meet the requirements of competitive entrance examinations under the provisions of the Personnel Act.

**History: 1953 Comp., § 5-1-17, enacted by Laws 1969, ch. 129, § 4; 2007, ch. 46, § 35.**

**Compiler's notes.** — The personnel board is administratively attached to the general services department, as provided in 10-9-11 NMSA 1978.

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

# ARTICLE 10A

# Human Immunodeficiency Virus Tests as Condition of Employment

Sec.
28-10A-1. Human immunodeficiency virus related test; limitation.

## 28-10A-1. Human immunodeficiency virus related test; limitation.

A. No person may require an individual to disclose the results of a human immunodeficiency virus related test as a condition of hiring, promotion or continued employment, unless the absence of human immunodeficiency virus infection is a bona fide occupational qualification of the job in question.

B. A person who asserts that a bona fide occupational qualification exists for disclosure of an individual's human immunodeficiency virus related test results shall have the burden of proving that:

(1) the human immunodeficiency virus related test is necessary to ascertain whether an individual is currently able to perform in a reasonable manner the duties of the particular job or



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whether an individual will present a significant risk of transmitting human immunodeficiency virus to other persons in the course of normal work activities; and

(2) there exists no reasonable accommodation short of requiring the test.

**History: Laws 1989, ch. 228, § 1.**

# ARTICLE 11

## Service Animal

Sec.
28-11-1. Repealed.
28-11-1.1. Short title.
28-11-2. Definitions.
28-11-3. Admittance of qualified service animal.
28-11-4. Penalty.
28-11-5. Findings and purpose; interference with qualified service animals prohibited; criminal and civil penalties.
28-11-6. Prohibition of false presentation of animal as a qualified service animal.

## 28-11-1. Repealed.

**Repeals.** — Laws 1989, ch. 242, § 5 repealed 28-11-1 NMSA 1978, as enacted by Laws 1977, ch. 332, § 1, relating to hearing ear aid dogs, effective June 16, 1989.

## 28-11-1.1. Short title.

Chapter 28, Article 11 NMSA 1978 may be cited as the "Service Animal Act".

**History: Laws 2005, ch. 224, § 1; 2013, ch. 57, § 1.**

**The 2013 amendment,** effective June 14, 2013, changed the name of the act; after "cited as the", deleted "Assistance" and added "Service".

## 28-11-2. Definitions.

As used in the Service Animal Act:

A. "emotional support animal", "comfort animal" or "therapy animal" means an animal selected to accompany an individual with a disability that does not work or perform tasks for the benefit of an individual with a disability and does not accompany at all times an individual with a disability;

B. "qualified service animal" means any qualified service dog or qualified service miniature horse that has been or is being trained to provide assistance to an individual with a disability; but "qualified service animal" does not include a pet, an emotional support animal, a comfort animal or a therapy animal;

C. "qualified service dog" means a dog that has been trained or is being trained to work or perform tasks for the benefit of an individual with a disability who has a physical or mental impairment that substantially limits one or more major life activities; and

D. "qualified service miniature horse" means a miniature horse that has been trained or is being trained to work or perform tasks for the benefit of an individual with a disability who has a physical or mental impairment that substantially limits one or more major life activities.

**History: Laws 1989, ch. 242, § 1; 1999, ch. 262, § 1; 1999, ch. 288, § 1; 2005, ch. 224, § 2; 2013, ch. 57, § 2.**

**Cross references.** — For the federal Americans with Disabilities Act, *see* 42 U.S.C. § 12101 et seq.

**The 2013 amendment,** effective June 14, 2013, added terms and definitions relating to emotional support and service animals; added Subsection A; in Subsection B, at the beginning of the sentence, after "qualified", deleted "assistance" and added "service", after "means any", deleted "assistance" and added "qualified service", after "dog or", deleted "other animal" and added "qualified service miniature horse", and after "disability", deleted "and includes" and added "but 'qualified service animal' does not include a pet, an emotional support animal, a comfort animal or a therapy animal"; deleted former Subsection A, which provided that an assistance dog was a qualified assistance animal; deleted former Subsection B, which provided that a guide dog was a qualified assistance



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animal; deleted former Subsection C, which provided that a hearing dog was a qualified assistance animal; deleted former Subsection D, which provided that a service dog was a qualified assistance animal; and added Subsections C and D.

**The 2005 amendment,** effective June 17, 2005, deleted the former definition of "qualified assistance animal", which was defined to mean a dog trained by a recognized school to assist persons with disabilities, an animal recognized as a service animal pursuant to the Americans with Disabilities Act or an animal approved by the committee on concerns for the handicapped and added the definition of "qualified assistance animal".

**The 1999 amendment,** effective June 18, 1999, rewrote the section to the extent that a detailed comparison was impracticable.

## 28-11-3. Admittance of qualified service animal.

A. Notwithstanding any other provision of law:

(1) a person with a disability who is using a qualified service animal shall be admitted to any building open to the public and to all other public accommodations and shall be allowed access to all common carriers; provided that the qualified service animal is under the control of an owner, a trainer or a handler of the qualified service animal. A person shall not deny an individual with a qualified service animal entry to a building open to the public or to any public accommodation or deny access to a common carrier, regardless of any policy of denying to pets entry to that building, public accommodation or common carrier. A person shall not be required to pay any additional charges for the qualified service animal, but may be liable for any damage done by the qualified service animal; provided that persons without disabilities would be liable for similar damage; and

(2) in an emergency requiring transportation or relocation of the owner or trainer of the qualified service animal, to the extent practicable, accommodations shall be made for the qualified service animal to remain or be reunited with the owner, trainer or handler. When accommodations cannot be made for allowing the qualified service animal to remain with the owner, trainer or handler, the qualified service animal shall be placed pursuant to instructions provided by the owner, trainer or handler.

B. This section does not require a public accommodation or common carrier to permit an owner, trainer or handler using a qualified service animal to have access to a public accommodation or common carrier in circumstances in which the individual's use of the qualified service animal poses a direct threat of significant harm to the health or safety of others.

**History: Laws 1989, ch. 242, § 2; 1999, ch. 262, § 2; 1999, ch. 288, § 2; 2005, ch. 224, § 3; 2013, ch. 57, § 3.**

**The 2013 amendment,** effective June 14, 2013, provided for the entry of qualified service animals to buildings open to the public, public accommodations and public carriers; in the title of the section, deleted "assistance animals" and added "service animal"; in Paragraph (1) of Subsection A, deleted "assistance" and added "service" before "animal", in the first sentence, at the beginning of the sentence, added "a person with a disability who is using", after "and to all", added "other", after "public accommodations", deleted "such as restaurants, hotels, hospitals, swimming pools, stores" and added "and shall be allowed access to all", after "common carriers", deleted "and theaters", and after "owner", deleted "or", after "trainer", added "or a handler"; added the second sentence and at the beginning of the second sentence, deleted "No"; in the third sentence, after "A person shall", deleted "not", after "but", deleted "shall" and added "may", and after "damage done by the qualified service animal", added the remainder of the sentence; in Paragraph (2) of Subsection A, deleted "assistance" and added "service" before "animal", in the first sentence, after "reunited with the owner", deleted "or" and at the end of the sentence, after "trainer", added "or handler"; and added Subsection B.

**The 2005 amendment,** effective June 17, 2005, added Subsection B to provide that in an emergency, requiring transportation or relocation of the owner or trainer, accommodations shall be made for the qualified assistance animal to remain with the owner or trainer.

**The 1999 amendment,** effective June 18, 1999, deleted the Subsection A and B designations, substituted "assistance animal" for "service animal" and "assistance animal" for "service animal" throughout the section, substituted "person with a disability or a trainer of assistance animals" for "totally or partially blind, hearing impaired or mobility impaired person. B. Pursuant to Subsection A of this section" at the end of the first sentence, and inserted "qualified assistance" before "animal" at the end of the last sentence.

## 28-11-4. Penalty.

A. A person who violates a provision of the Service Animal Act is guilty of a misdemeanor and, upon conviction, shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

B. Nothing in this section shall be construed to preclude any other remedy otherwise available pursuant to common law or other law of this state.



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**History: Laws 1989, ch. 242, § 3; 2005, ch. 224, § 4; 2013, ch. 57, § 4.**

**The 2013 amendment,** effective June 14, 2013, provided that the section does not preclude other available remedies; in Subsection A, after "violates a provision of the", deleted "Assistance" and added "Service"; and added Subsection B.

**The 2005 amendment,** effective June 17, 2005, changed the statutory reference to the Assistance Animal Act.

## 28-11-5. Findings and purpose; interference with qualified service animals prohibited; criminal and civil penalties.

A. The legislature finds that unrestrained animals constitute a danger to qualified service animals and public safety. The purpose of this section is to protect persons with disabilities and qualified service animals from attack by unrestrained animals.

B. It is unlawful for any person, with no legitimate reason, to:

(1) intentionally interfere with the use of a qualified service animal by harassing or obstructing the owner, trainer or handler of the qualified service animal or the qualified service animal; or

(2) intentionally fail or refuse to control the person's unrestrained animal, which animal interferes with or obstructs the owner, trainer or handler of the qualified service animal.

C. The provisions of this section shall not apply to unrestrained animals on private property not open to the public.

D. A person who violates the provisions of this section is guilty of a misdemeanor and upon conviction shall be punished pursuant to Section 31-19-1 NMSA 1978. A person convicted under this section may be ordered to pay restitution, including, but not limited to, actual damages.

E. Nothing in this section shall be construed to preclude any other remedies otherwise available pursuant to common law or the NMSA 1978.

**History: Laws 1999, ch. 113, § 1; 2005, ch. 224, § 5; 2013, ch. 57, § 5.**

**Cross references.** — For definition and degrees of cruelty to animals, *see* 30-18-1 NMSA 1978.

For the federal Americans with Disabilities Act, *see* 42 U.S.C. § 12101 et seq.

**The 2013 amendment,** effective June 14, 2013, expanded the application of the section to include animals in addition to dogs; in the title of the section, deleted "assistance" and added "service"; in Subsection A, deleted "assistance" and added "service" before "animal", and deleted "dogs" and added "animals"; in Subsection B, in the introductory sentence, after "with no", deleted "legal justification" and added "legitimate reason"; in Paragraph (1) of Subsection B, deleted "assistance" and added "service" before "animal", after "obstructing the owner", deleted "or", and after "trainer", added "or handler"; in Paragraph (2) of Subsection B, deleted "assistance" and added "service" before "animal", after "person's unrestrained", deleted "dog, and that dog" and added "animal, which animal", after "obstructs the owner", deleted "or", after "trainer", added "or handler", and after "service animal", deleted "or the qualified assistance animal"; in Subsection C, after "unrestrained", deleted "dogs" and added "animals"; and in Subsection D, in the second sentence after "to pay restitution, including", deleted "the cost of veterinary bills and replacement and training costs of a qualified assistance animal, if such costs are incurred as a result of the violation" and added "but not limited to, actual damages".

**The 2005 amendment,** effective June 17, 2005, deleted the former provision of Subsection B, which defined "assistance dog" as a dog that has been trained for persons with a hearing, sight or other physical disability or impairment; provided in Subsection B(1) that it is unlawful for a person to interfere with the use of a qualified assistance animal by harassing or obstructing the owner or trainer of the animal, or the animal; provides in Subsection B(2) that it is unlawful for a person to fail or refuse to control that person's unrestrained dog and that dog interferes with or obstructs the owner or trainer of a qualified assistance animal or the animal; provided in Subsection C that this section does not apply to unrestrained dogs on private property; and deleted former Subsection G, which defined "assistance animal" to mean an animal recognized as a service animal pursuant to the Americans with Disabilities Act.

## 28-11-6. Prohibition of false presentation of animal as a qualified service animal.

A. A person shall not knowingly present as a qualified service animal any animal that does not meet a definition of "qualified service animal" pursuant to Section 28-11-2 NMSA 1978. A person who violates the provisions of this section is guilty of a misdemeanor and upon conviction shall be punished pursuant to Section 31-19-1 NMSA 1978.

B. Nothing in this section shall be construed to preclude any other remedies otherwise available pursuant to common law or the NMSA 1978.



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**History: Laws 2013, ch. 57, § 6.**
**Effective dates.** — Laws 2013, ch. 57 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

# ARTICLE 11A

# Telecommunication Devices for the Deaf

Sec.
28-11A-1. Legislative finding.
28-11A-2. Definitions.
28-11A-3. Vocational rehabilitation division; purchase of telecommunication devices for the deaf.

## 28-11A-1. Legislative finding.

The legislature finds that many state citizens who are unable to utilize telephone services in a regular manner due to hearing impairments are able to communicate through the use of telecommunication devices and that such devices should be installed in municipal police and county sheriff departments in areas where such units are in use by deaf persons and in the communications section of the state police in order to assure prompt response to emergency situations.

**History: Laws 1981, ch. 260, § 1.**

## 28-11A-2. Definitions.

As used in this act [28-11A-1 to 28-11A-3 NMSA 1978]:

A. "deaf person" means any person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit him from understanding telephonic voice communications; and

B. "telecommunication device for the deaf " means a teletypewriter or other instrument for telecommunication in which speaking or hearing is not required for communication.

**History: Laws 1981, ch. 260, § 2.**

## 28-11A-3. Vocational rehabilitation division; purchase of telecommunication devices for the deaf.

A telecommunication device for the deaf shall be purchased by the vocational rehabilitation division of the department of education and installed in the office of the municipal police department of any municipality with a population in excess of ten thousand inhabitants if the division determines and verifies that at least five telecommunication devices for the deaf are in use by deaf persons in the municipality, and in the office of the county sheriff in counties not having a municipality with a population in excess of ten thousand inhabitants if the division determines and verifies that at least five such devices are in use by deaf persons in that county.

**History: Laws 1981, ch. 260, § 3.**

# ARTICLE 11B

# Commission for Deaf and Hard-of-Hearing Persons

Sec.
28-11B-1. Commission for deaf and hard-of-hearing persons created.
28-11B-2. Commission for deaf and hard-of-hearing persons; powers and duties.
28-11B-3. Commission; staff.
28-11B-4. Commission; task forces.



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## 28-11B-1. Commission for deaf and hard-of-hearing persons created.

A. There is created the "commission for deaf and hard-of-hearing persons", consisting of seven members, a majority of whom are deaf or hard-of-hearing persons, including three ex-officio members and four members appointed by the governor without regard for party affiliation, with the advice and consent of the senate. Terms of appointed members shall be for six years, expiring on December 31 of odd-numbered years, in accordance with the staggered terms of the appointed members holding office on the effective date of this 1999 amendment.

B. Ex-officio members are:

(1) the president of the New Mexico association for the deaf or his designee;

(2) the superintendent of the New Mexico school for the deaf or his designee; and

(3) the director of the vocational rehabilitation division of the state department of public education or his designee who shall be knowledgeable in the area of deafness.

C. Appointed members are:

(1) a parent of a deaf or hard-of-hearing child;

(2) a professional person who is deaf or hard of hearing;

(3) a deaf or hard-of-hearing person who resides in southern New Mexico; and

(4) a deaf or hard-of-hearing person who resides in northern New Mexico.

D. A majority of the members of the commission for deaf and hard-of-hearing persons constitutes a quorum for transaction of business. The commission shall elect a chairman from its membership.

E. Members of the commission for deaf and hard-of-hearing persons shall be compensated as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

F. Commission members who are serving upon the effective date of this 1999 act shall serve out the terms to which they were appointed.

**History: Laws 1991, ch. 72, § 1; 1999, ch. 72, § 1.**

**The 1999 amendment,** effective June 18, 1999, in Subsection A, inserted "including three ex-officio members and four members" in the first sentence, deleted the former second sentence, which read "Initially, three members shall be appointed for terms ending December 31, 1993, two members for terms ending December 31, 1995 and two members for terms ending December 31, 1997", in the second sentence, substituted "Terms of appointed members" for "Thereafter, appointments" and added the language beginning "in accordance" to the end; in Subsection B, substituted "Ex-officio members are" for "Appointments shall include" in the introductory language, deleted former Paragraph (3) which read, "a parent of a deaf or hard-of-hearing child", redesignated former Paragraph (4) as Paragraph (3); added the Subsection C designation, the introductory language, and Paragraph C(1); redesignated former Paragraphs B(5) through B(7) as Paragraphs C(2) through C(4); redesignated former Subsections C and D as Subsections D and E; added Subsection F; and made minor stylistic changes.

## 28-11B-2. Commission for deaf and hard-of-hearing persons; powers and duties.

The commission for deaf and hard-of-hearing persons shall:

A. supervise the activities of the executive director of the commission;

B. identify the needs of the deaf and hard-of-hearing population of New Mexico;

C. provide educational assistance to state agencies and, specifically, ensure agency compliance with regulations pertaining to deafness promulgated pursuant to the federal Americans with Disabilities Act;

D. coordinate with state agencies providing services for deaf and hard-of-hearing persons;

E. advocate for equal access to services and opportunities for deaf and hard-of-hearing persons;

F. provide continuing education services to deaf and hard-of-hearing persons;

G. assist in the establishment of a statewide interpreter referral service;

H. review and coordinate certification and evaluation processes for interpreters;

I. convene a minimum of four times each year in varying locations throughout the state; and

J. submit reports on its work for the preceding year to the governor and the legislature at least forty-five days prior to each regular legislative session.



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**History: Laws 1991, ch. 72, § 2.**

**Cross references.** — For the federal Americans with Disabilities Act, *see* 42 U.S.C. § 12101 et seq.

## 28-11B-3. Commission; staff.

A. The commission for deaf and hard-of-hearing persons shall appoint an executive director, who shall be the administrative officer of the commission. A preference will be given to applicants for the executive director position who are deaf or hard of hearing.

B. The executive director shall employ such assistants and employees as are necessary for the efficient operation of the commission for deaf and hard-of-hearing persons. There shall be a minimum of five full-time staff members. The executive director shall not be subject to the Personnel Act [Chapter 10, Article 9 NMSA 1978]. All other staff members shall be subject to the Personnel Act.

**History: Laws 1991, ch. 72, § 3.**

## 28-11B-4. Commission; task forces.

The commission for deaf and hard-of-hearing persons may appoint task forces as they are needed to study specific issues regarding deaf and hard-of-hearing persons. The task forces shall make written recommendations to the commission regarding improvement and coordination of activities relative to the concerns of deaf and hard-of-hearing persons.

**History: Laws 1991, ch. 72, § 4.**

# ARTICLE 11C

# Deaf and Hard-of-Hearing Children's Educational Bill of Rights

Sec.
28-11C-1. Short title.
28-11C-2. Findings and purpose.
28-11C-3. Educational rights of deaf and hard-of-hearing children; additional duty of public education department.

## 28-11C-1. Short title.

This act [28-11C-1 to 28-11C-3 NMSA 1978] may be cited as the "Deaf and Hard-of-Hearing Children's Educational Bill of Rights".

**History: Laws 2004, ch. 107, § 1 and Laws 2004, ch. 111, § 1.**

**Effective dates.** — Laws 2004, ch. 107 and Laws 2004, ch. 111 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, were effective May 19, 2004, 90 days after adjournment of the legislature.

**Compiler's notes.** — Laws 2004, ch. 107, § 1 and Laws 2004, ch. 111, § 1 enacted identical new sections of law. Both were compiled as section 28-11C-1 NMSA 1978.

## 28-11C-2. Findings and purpose.

A. The legislature finds that:

(1) hearing loss affects the most basic human need, communication. Without quality communication a child is isolated from other human beings and from the exchange of knowledge essential for educational growth and, therefore, cannot develop the skills required to become a productive, capable adult and a fully participatory member of society;



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(2) children with hearing loss have the same innate capabilities as any other children. They communicate in a wide variety of manual and spoken modes, languages and systems. Some use aural/oral modes of communication, while others use a combination of aural/oral and manual communication. Many use American sign language, which is a formal language, as well as the preferred everyday language of the deaf community. Obviously, all children need to develop English proficiency; and

(3) it is, therefore, critical that all New Mexicans work toward ensuring that:

(a) deaf and hard-of-hearing children, like all children, have quality, ongoing and fluid communication, both in and out of the classroom;

(b) deaf and hard-of-hearing children be placed in the least restrictive educational environment and receive services based on their unique communication, language and educational needs, consistent with 20 U.S.C. Section 1414(d)(3)(B)(iv) of the federal Individuals with Disabilities Education Act;

(c) deaf and hard-of-hearing children be given an education in which teachers and related service providers and assessors understand the unique nature of deafness, are specifically trained to work with hard-of-hearing and deaf pupils and can communicate spontaneously and fluidly with these children;

(d) deaf and hard-of-hearing children, like all children, have the benefit of an education in which there are a sufficient number of age-appropriate peers and adults with whom they can interact and communicate in a spontaneous and fluid way;

(e) deaf and hard-of-hearing children receive an education in which they are exposed to deaf and hard-of-hearing role models;

(f) deaf and hard-of-hearing children, like all children, have direct and appropriate access to all components of the educational process, including recess, lunch and extracurricular, social and athletic activities;

(g) deaf and hard-of-hearing children, like all children, be provided with programs in which transition planning, as required under the federal Individuals with Disabilities Education Act, focuses on their unique vocational needs; and

(h) families of children who are deaf or hard-of-hearing receive accurate, balanced and complete information regarding their child's educational and communication needs and the available programmatic, placement and resource options, as well as access to support services and advocacy resources from public and private agencies, departments and all other institutions and resources knowledgeable about hearing loss and the needs of children who are deaf or hard-of-hearing.

B. Given the central importance of communication to all human beings, the purpose of the Deaf and Hard-of-Hearing Children's Educational Bill of Rights is to encourage the development of a communication-driven and language-driven educational delivery system in New Mexico for children who are deaf or hard-of-hearing.

**History: Laws 2004, ch. 107, § 2 and Laws 2004, ch. 111, § 2.**

**Effective dates.** — Laws 2004, ch. 107 and Laws 2004, ch. 111 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, were effective May 19, 2004, 90 days after adjournment of the legislature.

**Compiler's notes.** — Laws 2004, ch. 107, § 2 and Laws 2004, ch. 111, § 2 enacted identical new sections of law. Both were compiled as section 28-11C-2 NMSA 1978.

## 28-11C-3. Educational rights of deaf and hard-of-hearing children; additional duty of public education department.

A. The state of New Mexico recognizes the unique communication needs of children who are deaf or hard-of-hearing and encourages the development of specific recommendations by all state agencies, institutions and political subdivisions concerned with the early intervention, early childhood and kindergarten through twelfth grade education of students who are deaf or hard-of-hearing, including the public education department, the New Mexico school for the deaf and the department of health, to ensure that:

(1) these children have what every other child takes for granted, including an educational environment in which their language and communication needs are fully addressed and developed



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and in which they have early, ongoing and quality access to planned and incidental communication opportunities; and

(2) the recommendations, consistent with the findings and purpose of the Deaf and Hard-of-Hearing Children's Educational Bill of Rights, be completed expeditiously.

B. Since 20 U.S.C. Section 1414(d)(3)(B)(iv) of the federal Individuals with Disabilities Education Act requires that the individual education plan team consider the unique communication needs of children who are deaf or hard-of-hearing, the public education department shall develop a model "communication consideration for students who are deaf or hard-of-hearing", to become part of the individual education plan process. The model shall be disseminated to all local school districts, with training to be provided as determined by the department.

**History: Laws 2004, ch. 107, § 3 and Laws 2004, ch. 111, § 3.**

**Cross references.** — For the Behavior Health Capital Funding Act, *see* 9-7-1 NMSA 1978.

For the Public Education Department Act, *see* 9-24-1 NMSA 1978.

For the School for the Deaf, *see* 21-6-1 NMSA 1978.

**Compiler's notes.** — Laws 2004, ch. 107, § 3 and Laws 2004, ch. 111, § 3 enacted identical new sections of law, both effective May 19, 2004. Both were compiled as 28-11C-3 NMSA 1978.

# ARTICLE 12

# Indian Affairs

Sec.
28-12-1 to 28-12-3. Repealed.

Sec.
28-12-4 to 28-12-9. Repealed.

## 28-12-1 to 28-12-3. Repealed.

**Repeals.** — Laws 1996, ch. 25, § 4 repealed 28-12-1 to 28-12-3 NMSA 1978, as enacted by Laws 1939, ch. 42, § 1, and Laws 1967, ch. 299, §§ 1 and 2, relating to the intertribal Indian ceremonial association, effective July 1, 1996. For provisions of former sections, *see* the 1995 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 9-15A-7.1 NMSA 1978.

## 28-12-4 to 28-12-9. Repealed.

**Repeals.** — Laws 2004, ch. 18, § 18 and Laws 2004, ch. 24, § 18 repealed 28-12-4 to 28-12-9 NMSA 1978, effective May 19, 2004. For provisions of former sections, *see* the 2003 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 13

# Veterans' Services

Sec.
28-13-1 to 28-13-14. Repealed.
28-13-15. Repealed.

Sec.
28-13-16. Recompiled.

## 28-13-1 to 28-13-14. Repealed.

**Repeals.** — Laws 2004, ch. 19, § 33 repealed 28-13-1 to 28-13-14 NMSA 1978, effective May 19, 2004. For provisions of former sections, *see* the 2003 NMSA 1978 on *NMOneSource.com*.

## 28-13-15. Repealed.

**Repeals.** — Laws 1979, ch. 317, § 12, repealed 28-13-15 NMSA 1978, relating to the exemption of the responsibilities of the veterans' service committee from the authority of the secretary of the human services department, effective July 1, 1979.



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## 28-13-16. Recompiled.

**Recompilations.** — Laws 2004, ch. 19, § 31 recompiled former 28-13-16 NMSA 1978 as 14-8-17 NMSA 1978, effective May 19, 2004.

# ARTICLE 13A

# Veterans' Special Recreation and Museum Privileges

Sec.
28-13A-1. Special recreation and museum privileges.

## 28-13A-1. Special recreation and museum privileges.

A. On the federally designated legal holiday known as "Veterans' Day", any New Mexico resident, who provides satisfactory proof that the resident is currently serving or has served in the armed forces of the United States, and the resident's spouse and dependent children, shall be entitled to:

(1) free use of any state park or recreation area operated by the state parks division of the energy, minerals and natural resources department, including the waiving of all admittance, camping, permit or other user fees or charges; and

(2) free general admission to any state museum or historic site.

B. The governing boards of state museums and historic sites shall waive general museum and historic site admission fees for fifty percent or more disabled veterans residing in the state. Proof of disability satisfactory to the governing boards of the state museums and historic sites is required to obtain the privileges pursuant to this subsection.

**History: Laws 1991, ch. 93, § 1; 2007, ch. 13, § 2; 2013, ch. 67, § 6.**

**Cross references.** — For the Veterans' Services Department Act, *see* 9-22-1 NMSA 1978.

For source and disbursement of state park and recreation revenues, *see* 16-2-19 NMSA 1978.

For the establishment, location, and property of the museum of New Mexico, *see* 18-3-1 NMSA 1978.

For the museum of space history division, *see* 18-7-1 NMSA 1978.

For the Natural History and Science Museum Act, *see* 18-3A-1 NMSA 1978.

**The 2013 amendment,** effective June 14, 2013, renamed state monuments as historic sites; and in Paragraph (2) of Subsection A and in Subsection B, deleted "monument" and added "historic sites" and after "museums and" added "historic sites".

**The 2007 amendment,** effective July 1, 2007, in Subsection B, provided for the waiver of admission fees for fifty percent or more disabled veterans residing in New Mexico upon proof of disability and generally reorganized the contents of the section.

# ARTICLE 14

# Aid to Children of Deceased Military and State Police Personnel

Sec.
28-14-1. Use of funds for children of deceased New Mexico military personnel and state policemen.
28-14-2. Amounts payable to institutions; eligibility.
28-14-3. Selection by veterans' services department.
28-14-4. Maximum payments.

## 28-14-1. Use of funds for children of deceased New Mexico military personnel and state policemen.

A. The funds set aside under the provisions of Sections 28-14-1 through 28-14-4 NMSA 1978 shall be used for the sole purposes of providing for matricular fees, board and room rent and books and supplies for the use and benefit of the children, not under sixteen and not over twenty-six years of age, of:



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(1) those persons who were residents of New Mexico at the time of entry into military service and who entered the military service of the United States during World War I or II, or during any action in which the military forces of the United States are engaged in armed conflict, and who were killed in action or died of other cause during the conflict or as a result of such military service;

(2) deceased members of the New Mexico national guard who were killed while on active duty in the service of the state after having been called to active duty by the governor; and

(3) deceased members of the New Mexico state police who were killed while on active duty in the service of the state.

B. The benefits enumerated in Subsection A of this section shall further be restricted to children who are attending or who may attend a state educational or training institution of a secondary or college grade. Children shall be selected under the provisions of Section 28-14-3 NMSA 1978 and shall be admitted to state institutions of secondary or college grade free of tuition.

**History: 1941 Comp., § 66-1701, enacted by Laws 1949, ch. 170, § 1; 1953, ch. 31, § 1; 1953 Comp., § 74-4-1; Laws 1955, ch. 216, § 1; 1971, ch. 83, § 3; 1973, ch. 203, § 1; 1975, ch. 29, § 1; 1975, ch. 89, § 1.**

**ANNOTATIONS**

**Generally.** — A child may be granted a scholarship or other aid covering periods of more than one year. Further, there is no objection to granting these benefits to two or more children of the same deceased veteran. The only basis for determining who shall receive the benefits is "need and merit" as determined by the state board of education. 1955-56 Op. Att'y Gen. No. 55-6287.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 C.J.S. Armed Services § 113.

## 28-14-2. Amounts payable to institutions; eligibility.

The amounts due to any educational or training institution pursuant to Chapter 28, Article 14 NMSA 1978 shall be payable to those institutions on vouchers signed by the secretary of veterans' services or the secretary's authorized representative. The veterans' services department shall determine the eligibility of children making application for the benefits provided in Chapter 28, Article 14 NMSA 1978 and shall satisfy itself of the attendance of the children and of the accuracy of charges submitted to the department. No staff of the department shall receive any compensation for this service except as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

**History: 1941 Comp., § 66-1702, enacted by Laws 1949, ch. 170, § 2; 1953 Comp., § 74-4-2; Laws 1975, ch. 29, § 2; 2004, ch. 19, § 26.**

**The 2004 amendment,** effective May 19, 2004, added "Chapter 28, Article 14 NMSA 1978" in two places and changed "director of veterans' affairs" to "secretary of veterans' services".

## 28-14-3. Selection by veterans' services department.

Children who are to receive the educational benefits provided under Section 28-14-1 NMSA 1978 shall be selected by the veterans' services department on the basis of need and merit. Nominations shall be made by:

A. the department, for children of deceased veterans;

B. the adjutant general, for children of deceased national guard of New Mexico members; and

C. the New Mexico state police board, for children of deceased New Mexico state police members.

**History: 1941 Comp., § 66-1703, enacted by Laws 1949, ch. 170, § 3; 1953 Comp., § 74-4-3; Laws 1973, ch. 203, § 2; 1975, ch. 29, § 3; 1975, ch. 89, § 2; 2004, ch. 19, § 27.**

**The 2004 amendment,** effective May 19, 2004, changed "veterans' service commission" to "veterans' services department".

## 28-14-4. Maximum payments.

Not more than three hundred dollars ($300) shall be paid, in addition to the free tuition, for any child for one year.

**History: 1941 Comp., § 66-1704, enacted by Laws 1949, ch. 170, § 4; 1953 Comp., § 74-4-4; Laws 1975, ch. 29, § 4.**



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# ARTICLE 15

# Reemployment of Persons in Armed Forces

Sec.
28-15-1. Reemployment of persons in armed forces.
28-15-2. Status on reinstatement; restriction on discharge.
28-15-3. Enforcement in district court; procedure.

## 28-15-1. Reemployment of persons in armed forces.

Any person who, after having given advance written or verbal notice of an obligation or intention to perform service in the uniformed services to the person's employer, unless notice is precluded by military necessity or is otherwise impossible or unreasonable, since July 1, 1940, has left or leaves a position the person has held, other than a temporary position, in the employ of any employer to enter the armed forces of the United States, an organized reserve or the national guard of this state or any other state or territory of the United States and who serves on active duty and is honorably discharged or released from active duty to complete the person's remaining service in a reserve component or is entitled to a certificate of service, or who terminates service without dishonor, has not had a cumulative period of absence in excess of five years by reason of service in the uniformed services and is still qualified to perform the duties of that position and makes application for reemployment within ninety days after the person is relieved from training and service, or from hospitalization and convalescence continuing after discharge for a period of not more than two years, shall be reemployed as follows:

A. if the person's position was in the employ of a private employer, the employer shall restore the person to that position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; or

B. if the person's position was in the employ of the state or any political subdivision thereof, the person shall be deemed to meet all the requirements of the Personnel Act [Chapter 10, Article 9 NMSA 1978] as well as all residency requirements or other provisions of law and shall be restored to that position or to a position of like seniority, status and pay.

**History: Laws 1941, ch. 10, § 1; 1941 Comp., § 57-701; Laws 1945, ch. 24, § 1; 1953 Comp., § 74-5-1; Laws 1969, ch. 260, § 1; 1971, ch. 163, § 1; 2017, ch. 26, § 2.**

**Cross references.** — For veteran's preference in Personnel Act, *see* 10-9-13.2 NMSA 1978.

**The 2017 amendment,** effective July 1, 2017, extended employment rights to persons who are members of the military active or reserve components outside of the State of New Mexico, but have civilian employment within the State of New Mexico, and added gender neutral language; in the introductory paragraph, added "after having given advance written or verbal notice of an obligation or intention to perform service in the uniformed services to the person's employer, unless notice is precluded by military necessity or is otherwise impossible or unreasonable", after armed forces of the United States", deleted "national guard or" and added "an", after "organized reserve", added "or the national guard of this state or any other state or territory of the United States", after "who terminates", deleted "his", after "without dishonor", deleted "if an officer", added "has not had a cumulative period of absence in excess of five years by reason of service in the uniformed services", after "perform the duties of", deleted "such" and added "that", after "hospitalization", added "and convalescence", and after "not more than", deleted "one year" and added "two years"; in Subsection A, after the next occurrence of "to", deleted "such" and added "that"; and in Subsection B, after "the state", deleted "of New Mexico", and after "restored to", deleted "such" and added "that".

### ANNOTATIONS

**Sovereign immunity barred USERRA claim against the state.** — Article I, Section 8, Clause 11 of the United States Constitution, known as the war powers clause, does not authorize congress to subject the state to private suits for damages in state courts pursuant to the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301 to 4335, absent the state's consent and the Legislature has not waived the state's constitutional immunity to private USERRA suits for damages. *Ramirez v. State ex rel. CYFD*, 2014-NMCA-057, *rev'd by* 2016-NMSC-016.

Where plaintiff, who was a member of the New Mexico national guard, was employed by the department; plaintiff was deployed to Iraq; upon plaintiff's return from active duty, plaintiff was reemployed by the department in plaintiff's previous position; plaintiff's working relations with plaintiff's supervisors deteriorated and plaintiff's employment was terminated; and filed a suit under Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301 to 4335, alleging that the department discriminated against plaintiff and terminated plaintiff because of plaintiff's military service, plaintiff's claim was barred by state sovereign immunity. *Ramirez v. State ex rel. CYFD*, 2014-NMCA-057, *rev'd by* 2016-NMSC-016.

**Generally.** — An "employee," who leaves a position to enter the armed forces of the United States, may remain in the service indefinitely and retain his reemployment rights. No distinction is made between volunteers and draftees under the Veterans' Reemployment Act (Sections 28-15-1 to 28-15-3 NMSA 1978). No distinction is drawn between



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officers and enlisted personnel under the Veterans' Reemployment Act. 1959-60 Op. Att'y Gen. No. 59-18.

**Scope of benefits.** — Volunteers as well as draftees are entitled to the benefits of this act (Sections 28-15-1 to 28-15-3 NMSA 1978). 1941-42 Op. Att'y Gen. No. 42-4104.

**Legislative intent.** — The legislative policy indicated by this act (Sections 28-15-1 to 28-15-3 NMSA 1978) is to restore the veteran to his old position whenever possible, and if not, to a position of like seniority, status and pay. 1945-46 Op. Att'y Gen. No. 46-4832.

**Intent regarding Personnel Act.** — The language of Subsection B makes it clear that the legislature does not intend for returning veterans seeking reemployment with the state to meet the standards of the Personnel Act. 1969 Op. Att'y Gen. No. 69-108.

**Officers of state not affected.** — This act (28-15-1 to 28-15-3 NMSA 1978) does not apply to officers of the state of New Mexico or its subdivisions, but only to employees. 1945-46 Op. Att'y Gen. No. 46-4882.

**Time between leaving employment and induction.** — An employee who left his employment within a reasonable time before induction without obtaining other employment in the meantime is entitled to reemployment. 1945-46 Op. Att'y Gen. No. 45-4829.

**Effect of return of veteran.** — Since contracts are entered into subject to existing statutes, where a teacher is employed to fill a vacancy caused by the absence of a person in the armed forces, his contract is terminated when the veteran returns to his former position. 1945-46 Op. Att'y Gen. Nos. 45-4813, 45-4818.

**Seven-year absence.** — A veteran who was employed within the state of New Mexico as a locomotive fireman and locomotive engineer on January 27, 1951, at which time he was called to active service with the United States Air Force, may upon his discharge from military service on January 31, 1958 secure reemployment under Sections 28-15-1 to 28-15-3 NMSA 1978. 1957-58 Op. Att'y Gen. No. 58-209.

**Salary increases.** — When a veteran returns to his former position, he is entitled to proportionate salary increases and other benefits, if any, to which other employees who continued in service have become entitled. 1945-46 Op. Att'y Gen. Nos. 46-4815, 46-4832.

**Service credit for retirement purposes.** — Section 10-11-6A(1) NMSA 1978 must be interpreted in a manner consistent with the federal and state laws on veteran reemployment rights. If the veteran otherwise qualifies for reemployment and applies within 90 days of the termination of his active duty period, he still may acquire service credit for retirement purposes even though the employer does not actually rehire him until after the ninetieth day. 1988 Op. Att'y Gen. No. 88-24.

**Employee more rights than probationer.** — If a person contemplated by Subsection B has gained the status of an "employee" as that term is defined by Section 10-9-3 NMSA 1978 and the personnel board rules, he will have additional rights under the state personnel board rules that a "probationer" would not. 1969 Op. Att'y Gen. No. 69-108.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 77 Am. Jur. 2d Veterans and Veterans' Laws § 88 et seq.

Rights of non-civil service public employees, with respect to discharge or dismissal, under state veterans' tenure statutes, 58 A.L.R.2d 960.

When does sale or reorganization exempt business from reemployment requirements of military veterans' reemployment laws (38 USCS §§ 2021 et seq.), 63 A.L.R. Fed. 132.

6 C.J.S. Armed Services §§ 268 to 287.

## 28-15-2. [Status on reinstatement; restriction on discharge.]

Any person who is restored to a position in accordance with the provisions hereof shall be considered as having been on furlough or leave of absence during his services in the armed forces of the United States, and shall be restored without loss of seniority, and shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person entered the armed forces of the United States, and shall not be discharged from such position without cause within one year after such restoration.

**History: Laws 1941, ch. 10, § 2; 1941 Comp., § 57-702; 1953 Comp., § 74-5-2.**

ANNOTATIONS

**Salary increases and benefits.** — When a veteran returns to his former position, he is entitled to proportionate salary increases and other benefits, if any, to which other employees who continued in service have become entitled. 1945-46 Op. Att'y Gen. Nos. 46-4815, 46-4832.

## 28-15-3. [Enforcement in district court; procedure.]

In case any person acting either in a public or private capacity fails or refuses to comply with the provisions hereof the district court of the district in which such person maintains a place of business (if such person is a private employer), or in which such person is a public official, shall have power, upon the filing of a motion, petition or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer or public officials to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reasons of such employer's or official's unlawful action. The court shall order a speedy hearing in any such case, and shall advance it on the calendar. Upon application to the district attorney for the pertinent district by any person claiming to be entitled to the benefits



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of such provisions, such district attorney, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition or other appropriate pleading and the prosecution thereof to specifically require the compliance with such provisions: provided, that no fees or court costs shall be taxed against the person so applying for such benefits.

**History: Laws 1941, ch. 10, § 3; 1941 Comp., § 57-703; 1953 Comp., § 74-5-3.**

ANNOTATIONS

**Bringing suit to restore position.** — Only the returning veteran or the district attorney of the appropriate district can bring an action to have the veteran restored to his prior position if employment is refused. 1969 Op. Att'y Gen. No. 69-108.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Applicability of doctrine of laches to bar veterans' re-employment claims where there is delay by government officials and agencies in rendering veterans' re-employment aid pursuant to 38 USCS § 2025, 53 A.L.R. Fed. 451.

# ARTICLE 16

# Developmental Disabilities Community Services

Sec.
28-16-1 to 28-16-15.1. Repealed.
28-16-15.2. Developmental disabilities planning council; additional duties.
28-16-16 to 28-16-18. Repealed.

## 28-16-1 to 28-16-15.1. Repealed.

**Repeals.** — Laws 1993, ch. 50, § 19 repealed 28-16-1 to 28-16-15.1 NMSA 1978, as enacted or amended by Laws 1984, ch. 100, §§ 1-4, §§ 6-8, and § 10, Laws 1989, ch. 70, § 1, Laws 1989, ch. 92, § 2, Laws 1989, ch. 195, §§ 1-4, Laws 1990, ch. 97, § 2, and Laws 1991, ch. 11, § 1, relating to developmental disabilities community services, effective June 18, 1993. For provisions of former sections, *see* the 1992 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 28-16A-1 to 28-16A-18 NMSA 1978.

**Compiler's notes.** — Laws 1990, ch. 97, § 3, as amended by Laws 1993, ch. 84, § 3, repealed 28-16-15.1 NMSA 1978, as enacted by Laws 1990, ch. 97, § 2, effective July 1, 1995. The delayed repeal was not given effect, due to the prior repeal of 28-16-15.1 NMSA by Laws 1993, ch. 50, § 19.

## 28-16-15.2. Developmental disabilities planning council; additional duties.

The developmental disabilities planning council shall cooperate with the department of health and the human services department to:

A. provide data to support an amendment to the developmental disabilities medicaid waiver program to increase the number of eligible persons served;

B. develop a contingency plan to describe the role and control the growth of intermediate care facilities for the mentally retarded; and

C. develop flexibility in the system of prioritization for admission to allow persons to move within the service system to an appropriate level of service, including movement of residents of intermediate care facilities for the mentally retarded to the developmental disabilities medicaid waiver program.

**History: Laws 1993, ch. 84, § 2.**

**Compiler's notes.** — The developmental disabilities planning council, referred to in this section, was originally created by 28-16-14 NMSA 1978. That section was repealed in 1993. *See* Chapter 28, Article 16A NMSA 1978.

## 28-16-16 to 28-16-18. Repealed.

**Repeals.** — Laws 1993, ch. 50, § 19 repealed 28-16-16 through 28-16-18 NMSA 1978, as enacted Laws 1989, ch. 92, §§ 3-5 and Laws 1990, ch. 97, § 2, relating to the developmental disabilities planning council, effective June 18, 1993. For provisions of former sections, *see* the 1992 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 28-16A-1 to 28-16A-18 NMSA 1978.



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# ARTICLE 16A

# Developmental Disabilities

Sec.
28-16A-1. Short title.
28-16A-2. Legislative authorization.
28-16A-3. Definitions.
28-16A-4. Developmental disabilities planning council; creation; membership; terms.
28-16A-5. Powers and duties.
28-16A-6. Eligibility.
28-16A-7. Comprehensive review and analysis.
28-16A-8. Reporting on community services for persons with developmental disabilities.
28-16A-9. Information and referral system; coordination and continuation.
28-16A-10. Developmental disabilities council; staff.
28-16A-11. Developmental disabilities council; reports.
28-16A-12. Developmental disabilities council; compensation.
28-16A-13. Authorization for providing support and services for persons with developmental disabilities.
28-16A-14. Quality assurance system.
28-16A-15. Admission, transfer, withdrawal and discharge of persons receiving support and services purchased or provided by the department.
28-16A-16. Determination of rates for payment for support and services.
28-16A-17. Independent status of service providers.
28-16A-18. Developmental disabilities early childhood evaluation system.
28-16A-19. Information and referral task force creation.
28-16A-20. Reporting; department of health; intermediate care facilities for individuals with intellectual disabilities; independent review.

## 28-16A-1. Short title.

Chapter 28, Article 16A NMSA 1978 may be cited as the "Developmental Disabilities Act".

**History: Laws 1993, ch. 50, § 1; 2021, ch. 61, § 1.**

**Cross references.** — For the Children's Mental Health and Developmental Disabilities Act, *see* Chapter 32A, Article 6A NMSA 1978.

**The 2021 amendment,** effective June 18, 2021, deleted "Section 1 through 18 of this act" and added "Chapter 28, Article 16A NMSA 1978".

## 28-16A-2. Legislative authorization.

The Developmental Disabilities Act authorizes the department to plan, provide and coordinate support and services to persons with developmental disabilities.

**History: Laws 1993, ch. 50, § 2; 2021, ch. 61, § 2.**

**The 2021 amendment,** effective June 18, 2021, removed a provision stating the purpose of the legislature in enacting the Developmental Disabilities Act; and deleted former Subsection A and former subsection designation "B".

**ANNOTATIONS**

**Purpose of act.** — The Developmental Disabilities Act expresses a clear state policy in favor of integrating disabled students into communities. Although this act is directed at assisting individuals with developmental disabilities, such as autism or mental retardation, this important state policy applies with equal force to individuals with any form of disability or handicap. *Hill v. Community of Damien of Molokai*, 1996-NMSC-008, 121 N.M. 353, 911 P.2d 861.

## 28-16A-3. Definitions.

As used in the Developmental Disabilities Act:

A. "assessment" means a process for measuring and determining a person's strengths, needs and preferences to determine eligibility for support and services and to develop or modify an individual support and service plan;

B. "case management" means a process that:

(1) assists a person with a developmental disability to know and understand the person's choices and rights and to obtain support and services that the person is eligible to receive and that are reflected in the individual support and service plan; and



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(2) monitors the provision of support and services received by a person with a developmental disability;

C. "comprehensive review and analysis" means the comprehensive review and analysis conducted pursuant to Subsection A of Section 28-16A-7 NMSA 1978;

D. "council" means the developmental disabilities council;

E. "department" means the department of health;

F. "diagnostic evaluation" means an empirical process that determines if, and to what degree, a person has a developmental deficiency and the type of intervention and services that are needed for the person and that person's family;

G. "inclusive" means using the same community resources that are used by and available to all citizens and developing relationships with nonpaid caregivers or recipients of support and services for persons with developmental disabilities;

H. "individual support and service plan" means a plan developed by an interdisciplinary team and agreed to by a person with a developmental disability, or by a parent of a minor or a legal guardian, as appropriate, that describes the combination and sequence of special, interdisciplinary or generic care, treatment or other support and services that are needed and desired by a person with a developmental disability;

I. "interdisciplinary team" means a group of persons drawn from or representing professions that are relevant to identifying the needs of a person with a developmental disability and designing a program to meet that person's needs. The team shall include the person with a developmental disability, the parent of a minor child or a legal guardian, as appropriate;

J. "self-determination" means having:

(1) the ability and opportunity to:

(a) communicate and make personal decisions;

(b) communicate choices and exercise control over the type and intensity of services, supports and other assistance that an individual receives; and

(c) participate in, and contribute to, an individual's community;

(2) the authority to control resources to obtain needed services, supports and other assistance; and

(3) support, including financial support, to advocate for oneself and others, develop leadership skills through training in self-advocacy, participate in coalitions, educate policymakers and play a role in the development of public policies that affect individuals with developmental disabilities; and

K. "service provider" means a nonprofit corporation, tribal government or tribal organization, unit of local government or other organization that has entered into a contract or provider agreement with the department for the purpose of providing developmental disabilities support and services.

**History: Laws 1993, ch. 50, § 3; 2021, ch. 61, § 3.**

**The 2021 amendment,** effective June 18, 2021, defined "comprehensive review and analysis" and "council", and revised the definitions of certain terms, as used in the Developmental Disabilities Act; in Subsection B, Paragraph B(2), after "person", added "with a developmental disability"; added new Subsections C and D and redesignated former Subsections C through G as Subsections E through I, respectively; and added Subsection J and redesignated former Subsection H as Subsection K.

## 28-16A-4. Developmental disabilities council; creation; membership; terms.

A. The "developmental disabilities council" is created in accordance with the federal Developmental Disabilities Assistance and Bill of Rights Act. The council shall be an adjunct agency as provided in the Executive Reorganization Act [9-1-1 to 9-1-10 NMSA 1978].

B. The council shall consist of no fewer than twenty-six members, at least sixty percent of whom shall be:

(1) persons with developmental disabilities;

(2) parents or legal guardians of children with developmental disabilities; or



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(3) immediate relatives or guardians of adults with mentally impairing developmental disabilities who cannot advocate for themselves.

C. Of the sixty percent of members described in Subsection B of this section, one-third shall be persons with developmental disabilities, one-third shall be members described in Paragraphs (2) and (3) of Subsection B of this section and one-third shall be a combination of members described in Subsection B of this section. At least one member described in Subsection B of this section shall be an immediate relative or guardian of a person who resides or previously resided in an institution or shall be a person with a developmental disability who resides or previously resided in an institution. No member of the council shall be an employee, or someone who manages employees, of a state agency that receives funds to provide developmental disabilities supports and services.

D. The council shall also include:

(1) the secretary of health, or the secretary's designee;

(2) the secretary of human services, or the secretary's designee;

(3) the secretary of children, youth and families, or the secretary's designee;

(4) the secretary of early childhood education and care, or the secretary's designee;

(5) the secretary of aging and long-term services, or the secretary's designee;

(6) the secretary of public education, or the secretary's designee;

(7) the director of the vocational rehabilitation division of the public education department, or the director's designee;

(8) the director of the state protection and advocacy system established pursuant to the federal Developmental Disabilities Assistance and Bill of Rights Act of 1990, or the director's designee;

(9) the director of an entity within a state institution of higher education designated as a university center for excellence in developmental disabilities education, research and service; and

(10) at all times, representatives of local and nongovernmental agencies and private nonprofit groups concerned with services for persons with developmental disabilities in New Mexico.

E. The governor shall select the members of the council for appointment pursuant to Subsection B and Paragraphs (9) and (10) of Subsection D of this section after soliciting recommendations from organizations representing a broad range of persons with developmental disabilities and other persons interested in persons with developmental disabilities. The council may, at the initiative of the council or at the request of the governor, coordinate council and public input to the governor regarding all recommendations.

F. The membership of the council shall be geographically representative of the state and reflect the diversity of the state with respect to race and ethnicity.

G. Members, except for ex-officio members, shall be appointed by the governor for terms of three years.

H. The governor shall provide for rotation of the membership of the council. These provisions shall allow members to continue to serve on the council until those members' successors are appointed and qualified.

I. The council shall notify the governor regarding membership requirements of the council and shall notify the governor when vacancies on the council remain unfilled for a significant period of time.

J. Council members shall recuse themselves from any discussion of grants or contracts for which such members' departments, agencies or programs are grantees, contractors or applicants. The council shall ensure that no council member casts a vote on any matter that would provide direct financial benefit to the member or otherwise give the appearance of a conflict of interest.

**History: Laws 1993, ch. 50, § 4; 2021, ch. 61, § 4; 2022, ch. 30, § 7.**

**Cross references.** — For the federal Developmental Disabilities Assistance and Bill of Rights Act, *see* 42 U.S.C. § 6000 et seq.

**The 2022 amendment,** effective July 1, 2022, added the secretary of early childhood education and care, or the secretary's designee, to the developmental disabilities council; in Subsection B, after "no fewer than", deleted "twenty-five" and added "twenty-six"; in Subsection D, added a new Paragraph D(4) and redesignated former Paragraphs D(4) through D(9) as Paragraphs D(5) through D(10), respectively; in Subsection E, after "(9)", added "and (10)"; and in Subsection H, after "are appointed", added "and qualified".

**The 2021 amendment,** effective June 18, 2021, renamed the developmental disabilities planning council as the developmental disabilities council, and revised the



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number and composition of the developmental disabilities council; in the section heading, after "disabilities", deleted "planning"; in Subsection A, after "developmental disabilities", deleted "planning", and deleted "developmental disabilities planning"; added new Subsections B through F and redesignated former Subsection C as Subsection G; and added new Subsections H through J.

## 28-16A-5. Powers and duties.

A. The council shall:

(1) provide statewide advocacy for persons with developmental disabilities;

(2) develop and submit to the federal government the five-year plan for council activities and any amendments to the plan;

(3) to the maximum extent feasible, review and comment on all state plans that relate to programs affecting persons with developmental disabilities;

(4) submit to the secretary of the United States department of health and human services, through the office of the governor, periodic reports that the secretary may request;

(5) advise the governor and the legislature about the needs of persons with developmental disabilities;

(6) hold all council meetings with a video conference option;

(7) carry out any other activities authorized or required by the provisions of the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000; and

(8) oversee the office of the state special education ombud.

B. The council is authorized to:

(1) award grants and enter into contracts to carry out its duties;

(2) seek funding from sources other than the state;

(3) create and support regional county or local advisory councils;

(4) provide training to persons with developmental disabilities, their families and providers of support and services through traineeships, sponsoring training opportunities and by other means determined appropriate by the council; and

(5) promulgate rules in accordance with the State Rules Act [Chapter 14, Article 4 NMSA 1978] to carry out the provisions of the Special Education Ombud Act [28-16C-1 to 28-16C-11 NMSA 1978].

**History: Laws 1993, ch. 50, § 5; 2021, ch. 53, § 12; 2021, ch. 61, § 5.**

**Cross references.** — For the federal Developmental Disabilities Assistance and Bill of Rights Act, *see* 42 U.S.C. § 6000 et seq.

**2021 Multiple Amendments.** — Laws 2021, ch. 53, § 12 and Laws 2021, ch. 61, § 5, both effective June 18, 2021, enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2021, ch. 61, § 5, as the last act signed by the governor, is set out above and incorporates both amendments. The amendments enacted by Laws 2021, ch. 53, § 12 and Laws 2021, ch. 61, § 5 are described below. To view the session laws in their entirety, *see* the 2021 session laws on *NMOneSource.com*.

The nature of the difference between the amendments is that Laws 2021, ch. 53, § 12, required the developmental disabilities planning council to oversee the office of the state special education ombud, and to promulgate rules in accordance with the State Rules Act to carry out the provisions of the Special Education Ombud Act, and Laws 2021, ch. 61, § 5, revised the powers and duties of the developmental disabilities council.

**Laws 2021, ch. 53, § 12,** effective June 18, 2021, required the developmental disabilities planning council to oversee the office of the state special education ombud, and to promulgate rules in accordance with the State Rules Act to carry out the provisions of the Special Education Ombud Act; in Subsection A, added Paragraph A(9); and in Subsection B, added Paragraph B(5).

**Laws 2021, ch. 61, § 5,** effective June 18, 2021, revised the powers and duties of the developmental disabilities council; in Subsection A, in the introductory clause, after "The", deleted "developmental disabilities planning", deleted Paragraph A(1) and redesignated former Paragraph A(2) as Paragraph A(1), in Paragraph A(1), after "advocacy", deleted "systems", deleted former Paragraphs A(3) and A(4), added a new Paragraph A(2) and redesignated former Paragraphs A(5) through A(7) as Paragraphs A(3) through A(5), respectively, added a new Paragraph A(6) and redesignated former Paragraph A(8) as Paragraph A(7), in Paragraph A(7), after "Developmental Disabilities Assistance and Bill of Rights Act", added "of 2000"; and in Subsection B, in the introductory clause, after "The", deleted "developmental disabilities planning", and in Paragraph B(4), after "appropriate by the", deleted "developmental disabilities planning".

## 28-16A-6. Eligibility.

A. For purposes of eligibility for support and services, "developmental disability" means a severe chronic disability of a person, which disability:



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(1) is attributable to a mental or physical impairment, including the result from trauma to the brain, or combination of mental and physical impairments;

(2) is manifested before the person reaches the age of twenty-two years;

(3) is expected to continue indefinitely;

(4) results in substantial functional limitations in three or more of the following areas of major life activity:

(a) self-care;

(b) receptive and expressive language;

(c) learning;

(d) mobility;

(e) self-direction;

(f) capacity for independent living; and

(g) economic self-sufficiency; and

(5) reflects the person's need for a combination and sequence of special, interdisciplinary or generic care treatment or other support and services that are of lifelong or extended duration and are individually planned and coordinated.

B. A child, from birth through two years of age, who is at risk for or who has a developmental delay as defined by rules of the early childhood education and care department is eligible for early intervention services.

C. A person who is eligible for developmental disability supports and services based on any previous definition of developmental disability used by the state and was receiving services on June 15, 1993 shall remain eligible for developmental disability supports and services. However, a child, from birth through age two, who is determined to be at risk for or who has a developmental delay shall be eligible for early intervention services only, unless the child meets the criteria set forth in Subsection A of this section.

**History: Laws 1993, ch. 50, § 6; 2021, ch. 61, § 6; 2022, ch. 30, § 8.**

**The 2022 amendment,** effective July 1, 2022, clarified the early childhood education and care department's responsibilities with regard to infants, toddlers and children with developmental delays; and in Subsection B, after "by rules of the", added "early childhood education and care".

**The 2021 amendment,** effective June 18, 2021, clarified certain language related to eligibility for support and services; in Subsection A, after "chronic disability of", deleted "a person that" and added "an individual, which disability"; in Subsection B, deleted "are children" and added "A child, from"; and in Subsection C, deleted "is a person" and added "An individual", after "who is eligible for", added "developmental disability supports and", and after "receiving services on", deleted "the effective date of the Developmental Disabilities Act" and added "June 15, 1993 shall remain eligible for developmental disability supports and services".

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — What constitutes substantial limitation on major life activity of working for purposes of Americans with Disabilities Act (42 USCS § 12101-12213), 141 A.L.R. Fed. 603.

## 28-16A-7. Comprehensive review and analysis.

A. The council shall conduct a comprehensive review and analysis of the extent to which services, supports and other assistance are available to individuals with developmental disabilities and their families and the extent of unmet need for services, supports and all other assistance for those individuals and their families in the state. The results of the comprehensive review and analysis shall include:

(1) the number of individuals with developmental disabilities residing in New Mexico;

(2) the range and degree of severity of the disabilities of individuals with developmental disabilities in New Mexico; and

(3) such other information and analysis required under federal law.

B. The findings of the comprehensive review and analysis shall be utilized in the development of the council's five-year plan.

C. The council shall:

(1) repeat the comprehensive review and analysis at least every five years, with a summary of the findings; and



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(2) distribute the comprehensive review and analysis and the summary of findings to relevant organizations, programs and agencies in the state.

**History: Laws 1993, ch. 50, § 7; 2021, ch. 61, § 7.**

**The 2021 amendment,** effective June 18, 2021, required the developmental disabilities council to conduct a comprehensive review and analysis of the extent to which services, supports and other assistance are available to individuals with developmental disabilities and their families, listed certain information that should be included in the comprehensive review, required that the findings of the comprehensive review be utilized in the development of the council's five-year plan, required the council to repeat the comprehensive review and analysis at least every five years and to distribute the comprehensive review and analysis to relevant organizations, programs and agencies in the state; completely rewrote the section heading; in Subsection A, deleted "In order to comply with the provisions of 42 U.S.C Section 6067", after the first occurrence of "The", deleted "developmental disabilities planning", and after "council shall conduct a", deleted "needs assessment of persons with developmental disabilities to determine" and added the remainder of the language, in Paragraph A(1), after "the number", added "of individuals with developmental disabilities", in Paragraph A(2), after "the disabilities", added "of individuals with developmental disabilities in New Mexico; and", deleted former Paragraphs A(3) and A(4), and added a new Paragraph A(3); in Subsection B, after "findings of the", deleted "assessment" and added "comprehensive review and analysis", after "shall be", deleted "included in the state plan for developmental disabilities services and support" and added "utilized in the development of the council's five-year plan"; and in Subsection C, after "The", deleted "assessment shall be repeated" and added "council shall", in Paragraph C(1), added "repeat the comprehensive review and analysis", after "at least every", changed "two" to "five", and after "findings", deleted "distributed", and added Paragraph C(2).

## 28-16A-8. Reporting on community services for persons with developmental disabilities.

The department of health, the human services department, the public education department, the vocational rehabilitation division of the public education department, the children, youth and families department, the early childhood education and care department, the New Mexico school for the blind and visually impaired and the New Mexico school for the deaf shall provide to the council, on an annual basis, information and data with respect to the actual or estimated number of persons with developmental disabilities served by the agency, the type of services provided, any major changes in policies adopted in the previous year or anticipated in the coming year that have had or are expected to have a beneficial or deleterious effect on persons with developmental disabilities and any gaps in eligibility or services that pose a barrier to the provision of services needed by persons with developmental disabilities.

**History: Laws 1993, ch. 50, § 8; 2021, ch. 61, § 8; 2022, ch. 30, § 9.**

**The 2022 amendment,** effective July 1, 2022, required the early childhood education and care department to provide to the developmental disabilities council, on an annual basis, information and data with respect to the actual estimated persons with developmental disabilities served by the agency, the types of services provided, any major changes in policies adopted in the previous year or anticipated in the coming year that have had or are expected to have a beneficial or deleterious effect on persons with developmental disabilities and any gaps in eligibility or services that pose a barrier to the provision of services needed by persons with developmental disabilities; and after "children, youth and families department", added "the early childhood education and care department".

**The 2021 amendment,** effective June 18, 2021, required certain state agencies to provide to the developmental disabilities council, on an annual basis, information and data with respect to the actual or estimated number of individuals with developmental disabilities served by the agency, the type of services provided, any major changes in policies adopted in the previous year or anticipated in the coming year that have had or are expected to have a beneficial or deleterious effect on persons with developmental disabilities; in the section heading, deleted "Planning for" and added "Reporting on"; deleted former Subsection A and former subsection designation "B", after "New Mexico school for the deaf shall", deleted "each submit a plan for support and services for persons with developmental and other disabilities within a reasonable time to allow for meaningful coordination, review and comment by the developmental disabilities planning council"; and deleted former Subsection C and added the remainder of the section.

## 28-16A-9. Information and referral system; coordination and continuation.

In order to coordinate information and referral services and eliminate the duplication of effort, the council shall provide information and referral services for persons with disabilities, their families, providers of support and services and local and state agencies, including:

A. the human services department;



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B. the department of health;
C. the public education department and its vocational rehabilitation division;
D. the New Mexico school for the deaf;
E. the New Mexico school for the blind and visually impaired;
F. the Carrie Tingley crippled children's hospital;
G. the children, youth and families department; and
H. the early childhood education and care department.

**History: Laws 1993, ch. 50, § 9; 2021, ch. 61, § 9; 2022, ch. 30, § 10.**

**The 2022 amendment,** effective July 1, 2022, included the early childhood education and care department to the list of agencies for which the developmental disabilities council may provide information and referral services; and added Subsection H.

**The 2021 amendment,** effective June 18, 2021, made technical amendments; deleted "developmental disabilities planning" preceding "council"; and in Subsection E, after "school for the", added "blind and", and after "visually", deleted "handicapped" and added "impaired.

## 28-16A-10. Developmental disabilities council; staff.

The council shall employ an executive director, who is the administrative officer of the council. The executive director shall employ other necessary employees pursuant to the provisions of the Personnel Act [Chapter 10, Article 9 NMSA 1978].

**History: Laws 1993, ch. 50, § 10; 2021, ch. 61, § 10.**

**The 2021 amendment,** effective June 18, 2021, made conforming changes due to the renaming of the developmental disabilities planning council as the developmental disabilities council; in the section heading, after "disabilities", deleted "planning"; and after the first occurrence of "The", deleted "developmental disabilities planning".

## 28-16A-11. Developmental disabilities council; reports.

The council shall submit reports on its preceding year's work to the governor and the interim legislative health and human services committee by November 1 of each year. The reports shall contain recommendations, if any, for legislation or other appropriate action.

**History: Laws 1993, ch. 50, § 11; 2021, ch. 61, § 11.**

**The 2021 amendment,** effective June 18, 2021, made conforming changes due to the renaming of the developmental disabilities planning council as the developmental disabilities council, and changed the date by when the council must submit reports on its preceding year's work; and after the first occurrence of "The", deleted "developmental disabilities planning", and after "human services committee by", changed "December" to "November".

## 28-16A-12. Developmental disabilities council; compensation.

Council members shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] and the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000. Reasonable accommodations shall be made available to permit full participation in council activities by its members, including personal assistance to members with developmental disabilities and respite care for members that are parents, immediate relatives or legal guardians of persons with developmental disabilities. Other than what is required in the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000, council members shall receive no other compensation, perquisite or allowance for their service on the council.

**History: Laws 1993, ch. 50, § 12; 2021, ch. 61, § 12.**

**The 2021 amendment,** effective June 18, 2021, made conforming changes due to the renaming of the developmental disabilities planning council as the developmental disabilities council, and included a provision allowing the council to be reimbursed as provided in the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000; in the section heading, after "disabilities", deleted "planning"; deleted "Developmental disabilities planning", after "Per Diem and Mileage Act", added "and the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000", and added "Other than what is required in the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000, council members shall receive", and after "allowance", deleted "shall be received" and added "for their service on the council".



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## 28-16A-13. Authorization for providing support and services for persons with developmental disabilities.

A. Subject to the availability of appropriations provided expressly for this purpose, the department may:

(1) acquire, provide or coordinate support and services for persons with developmental disabilities;

(2) enter into contracts and provider agreements with agencies and persons capable of providing support and services to persons with developmental disabilities; and

(3) establish advisory councils and task forces as necessary to guide the development and review of support and services to persons with developmental disabilities.

B. Support and services shall be provided based on individual support and service plans developed by an interdisciplinary team. The team is responsible for collectively evaluating a child's or adult's needs and developing an individual support and service plan to meet the needs; provided that the early childhood education and care department shall be responsible for the team that is evaluating a child for family, infant, toddler program services.

C. The department or, for children eligible for family, infant, toddler program services, the early childhood education and care department shall:

(1) solicit the involvement of consumers, providers, parents, professional organizations and other governmental organizations prior to the adoption or revision of rules concerning the provision of support, services, standards or funding systems. Participants shall be selected in a manner that reflects geographical, cultural, organizational and professional representation across the state;

(2) develop rules, including policies and procedures that, to the extent possible, will promote uniformity in reimbursement and quality assurance systems regardless of the source of funding; and

(3) convene and maintain a family, infant, toddler interagency coordinating council and a statewide adult support and services task force that shall, at a minimum, address quality assurance.

**History: Laws 1993, ch. 50, § 13; 2021, ch. 61, § 13; 2022, ch. 30, § 11.**

**The 2022 amendment,** effective July 1, 2022, provided that the early childhood education and care department is responsible for the team that evaluates and provides services for children eligible for family, infant, toddler program services; in Subsection B, added "provided that the early childhood education and care department shall be responsible for the team that is evaluating a child for family, infant, toddler program services"; and in Subsection C, after "The department", added "or, for children eligible for family, infant, toddler program services, the early childhood education and care department".

**The 2021 amendment,** effective June 18, 2021, made certain clarifying amendments; in the section heading, after "providing", deleted "community-based" and added "support and"; and in Subsection A, Paragraph A(2), after "persons with developmental disabilities", deleted "that promote the objectives of the department's state plan, prepared pursuant to Section 5 of the Developmental Disabilities Act".

**ANNOTATIONS**

**Governor entitled to legislative immunity.** — Although actions of the governor recommending state appropriations for medicaid waivers, revamping the state personnel system and plan for growth in the medicaid programs were legislative in nature and therefore the governor is entitled to legislative immunity, *Lewis v. New Mexico Dept. of Health*, 275 F.Supp.2d 1319 (D.N.M. 2003), an action brought against other state officials in their individual capacities are permitted under the Ex Parte Young doctrine. *Lewis v. N.M. Dept. of Health*, 261 F.3d 970 (10th Cir. 2001).

## 28-16A-14. Quality assurance system.

A. The department shall develop and maintain a quality assurance system to improve and enhance the quality of support and services for persons with developmental disabilities. The management information system portion of the quality assurance system shall track and maintain information concerning the characteristics of the persons served, support and services received and the length of time support and services are provided.

B. The program evaluation portion of the quality assurance system shall consist of a comprehensive collection of data from providers and analysis of measures of effectiveness, efficiency and consumer satisfaction.



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C. The department shall adopt regulations that ensure compliance with recognized professional standards for support and services.

**History: Laws 1993, ch. 50, § 14.**

## 28-16A-15. Admission, transfer, withdrawal and discharge of persons receiving support and services purchased or provided by the department.

A. In cooperation with other state agencies, the department shall adopt requirements for admission, transfer, withdrawal and discharge of persons receiving support and services funded in whole or in part by state funds.

B. The department shall maintain a centralized registry of persons who are requesting or receiving support and services and a centralized referral system that promotes the delivery of support and services within the person's home community and reflects the person's informed selection and choice of a support or service provider. This centralized referral system shall determine eligibility based on a comprehensive assessment and shall prioritize individuals waiting to access publicly funded developmental disability support and services.

C. The centralized referral system shall maintain information regarding the needs of persons not receiving services and shall report the information annually to the legislature. The department shall have the authority to provide assessments and case management services to persons applying for and receiving publicly funded support and services necessary to implement the provisions of this section.

**History: Laws 1993, ch. 50, § 15.**

## 28-16A-16. Determination of rates for payment for support and services.

A. The department shall develop, implement and maintain a provider reimbursement system based on the level of support and services required by a person with a developmental disability.

B. If the approved funding from the legislature does not permit the implementation of a reimbursement system using the considerations provided for in this section, the department shall develop and implement a service reduction plan.

C. The department shall report to the legislature and the governor the impact of any service reduction plans and the steps that will be taken to reinstate those services.

D. The department shall report annually to the legislature and the governor an estimate of the costs of maintaining support and services for persons with developmental disabilities being served, including the effects of changes in the costs of providing support and services, an estimate of the costs of providing support and services to persons that are eligible for service but not receiving services, and the request of the department for funding of services.

E. Contractors shall be required to submit records of support and services delivered as determined by the department, subject to monitoring by the department.

F. Contingent upon appropriations, the department shall conduct an independent biannual cost study for the purpose of establishing payment rates. The results of this study shall be submitted to the legislature.

**History: Laws 1993, ch. 50, § 16.**

## 28-16A-17. Independent status of service providers.

Except as otherwise provided, each service provider shall be considered to be an independent contractor and not an entity of state government.

**History: Laws 1993, ch. 50, § 17.**



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## 28-16A-18. Developmental disabilities early childhood evaluation system.

The state shall have a timely, comprehensive, multidisciplinary system for evaluating infants, toddlers and preschool-age children suspected of having developmental delays. Diagnostic evaluations for infants and toddlers shall address family service needs and shall include training capabilities to educate community providers and parents in the understanding and application of the evaluations. This diagnostic evaluation system shall be jointly provided through a coordinated system by the children's medical services bureau of the public health division or the developmental disabilities supports division of the department, the early childhood education and care department, the university of New Mexico's center for development and disability and the public education department.

**History: Laws 1993, ch. 50, § 18; 2021, ch. 61, § 14; 2022, ch. 30, § 12.**

**The 2022 amendment,** effective July 1, 2022, included the early childhood education and care department with other agencies responsible for evaluating infants, toddlers and preschool-age children suspected of having developmental delays; and after "the developmental disabilities supports division of the department", added "the early childhood education and care department".

**The 2021 amendment,** effective June 18, 2021, in the third sentence, after "developmental disabilities", added "supports", after "the university of New Mexico's", deleted "developmental disabilities team" and added "center for developmental and disability", after "and the", deleted "state department of", and after "public education", added "department".

## 28-16A-19. Information and referral task force creation.

The "information and referral task force" is created in the council to develop a statewide, comprehensive "211" information and referral plan for use as a telephone dialing code for access to health and human services. The plan shall include a tariff structure based on existing agreements, a common taxonomy of terms, coordination between public and private systems and standardized statewide training and exploration of a centralized information repository. The task force shall include representation from the department of health; the human services department; the children, youth and families department; the early childhood education and care department; the workforce solutions department; the aging and long-term services department; the internet long-term care link program; the governor's commission on disability; the New Mexico commission for the blind; the commission for deaf and hard-of-hearing persons; a statewide organization that raises money for health and human service purposes; and other interested parties.

**History: Laws 2003, ch. 323, § 1; 2021, ch. 61, § 15; 2022, ch. 30, § 13.**

**The 2022 amendment,** effective July 1, 2022, provided that the information and referral task force shall include representation from the early childhood education and care department; and after "children, youth and families department", added "the early childhood education and care department".

**The 2021 amendment,** effective June 18, 2021, made technical amendments; after "referral task force located in the", deleted "developmental disabilities planning", after "children, youth and families department; the", deleted "labor" and added "workforce solutions", after the next occurrence of "the", deleted "state agency on", after "aging", added "and long-term services department", and after "governor's", deleted "committee on concerns of the handicapped" and added "commission on disability".

## 28-16A-20. Reporting; department of health; intermediate care facilities for individuals with intellectual disabilities; independent review.

Within thirty days of the date on which reporting pursuant to each review is available, the department shall provide the council with each report issued pursuant to the independent reviews of intermediate care facilities for individuals with intellectual disabilities that are performed pursuant to the requirements of federal law.

**History: Laws 2021, ch. 61, § 16.**

**Effective dates.** — Laws 2021, ch. 61 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.



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# ARTICLE 16B

# Office of Guardianship

Sec.
28-16B-1. Short title.
28-16B-2. Office of guardianship; created; staff.
28-16B-3. Office; powers and duties.
28-16B-4. Service agreement monitoring and enforcement.
28-16B-5. Guardianship service agreements.
28-16B-6. Resolution of complaints.
28-16B-7. Office of guardianship fund; creation; appropriation.

## 28-16B-1. Short title.

Chapter 28, Article 16B NMSA 1978 may be cited as the "Office of Guardianship Act".

**History: Laws 2003, ch. 280, § 1; 2009, ch. 159, § 7.**

**Cross references.** — For mental health and development disabilities, *see* Chapter 43, Article 1 NMSA 1978.

**The 2009 amendment,** effective June 19, 2009, changed the reference to the act to the chapter and article of NMSA 1978.

## 28-16B-1.1. Professional guardian and conservator licensing.

As used in the Office of Guardianship Act:

A. "professional guardian" means an individual or entity appointed by a court that serves as a guardian for more than two individuals who are not related to the guardian by marriage, adoption or third degree of blood or affinity; and

B. "protected person" means a person eighteen years of age or older for whom a guardian or conservator has been appointed or other protective order has been made.

**History: Laws 2021, ch. 128, § 1.**

**Effective dates.** — Laws 2021, ch. 128, § 14 made Laws 2021, ch. 128, § 1 effective July 1, 2021.

## 28-16B-2. Office of guardianship; created; staff.

A. The "office of guardianship" is created in the developmental disabilities planning council.

B. The executive director of the developmental disabilities planning council shall employ a head of the office who shall be an attorney licensed in New Mexico who is hired on the basis of ability, experience and knowledge of guardianship issues under the Uniform Probate Code [Chapter 45 NMSA 1978]. The position shall be classified pursuant to the Personnel Act [Chapter 10, Article 9 NMSA 1978].

C. Subject to appropriations, the executive director may hire such other professional and clerical staff as necessary to carry out the purposes of the office.

**History: Laws 2003, ch. 280, § 2; 2021, ch. 128, § 2.**

**The 2021 amendment,** effective July 1, 2021, required the head of the office of guardianship to be an attorney licensed in New Mexico; in Subsection B, after "The", added "executive", and after "who shall be", added "an attorney licensed in New Mexico who is"; and in Subsection C, after "appropriations, the", added "executive".

## 28-16B-3. Office; powers and duties.

A. The office of guardianship may:

(1) promulgate rules in accordance with the State Rules Act [Chapter 14, Article 4 NMSA 1978] to carry out the provisions of the Office of Guardianship Act; and

(2) enter into agreements with other state or federal agencies to provide guardianship services and to provide or receive payment for such services.

B. The office of guardianship shall:

(1) provide for adult guardianship services to income-eligible incapacitated persons, including temporary guardianship as provided in Section 45-5-310 NMSA 1978;



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(2) provide for the recruitment and training of persons interested and willing to serve as mental health treatment guardians;

(3) provide training and information to interested persons on the duties and responsibilities of guardians, including alternatives to guardianship and mental health treatment guardianship;

(4) establish procedures for the investigation and resolution of complaints against guardianship and legal services providers that have entered into service agreements with the office;

(5) provide legal services, including petitioning attorney, guardian ad litem and court visitor services, to petition the district court for guardianship of persons believed to be incapacitated or to seek amendment or termination of existing guardianship orders if the needs or situation of protected persons have changed; provided that the selection of persons to receive guardianship and legal services shall be made by the office based on selection criteria established by rule;

(6) prior to providing legal services to petition for guardianship, identify and provide information on least restrictive options, including alternatives to guardianship, to the alleged incapacitated person and to individuals applying for guardianship services;

(7) publish an annual report regarding the guardianship and legal services provided by the office of guardianship, including the:

(a) number and ages of protected persons assigned to a professional guardian, the judicial district where the guardianship case is assigned and the reason for appointment of a guardian;

(b) number of guardianship petitions filed by the office and the status of the petitions;

(c) number of income-eligible alleged incapacitated persons or protected persons on the wait list;

(d) number of applicants requesting family guardians and the number requesting professional guardians;

(e) number of cases dismissed or terminated and the reasons for the dismissal or termination;

(f) number of complaints the office received against guardianship and legal services providers, and the status of the complaints;

(g) disciplinary or legal actions taken by the office against guardianship and legal services providers;

(h) number of complaints filed against the office and the status of the complaints; and

(i) number of cases in which a professional guardian was removed, and the reason for the removal;

(8) establish and manage a volunteer court visitor program to provide post-adjudication court visitor services for adult guardianship cases when requested by the district court; and

(9) serve as an interested person as defined in Subsection I of Section 45-5-101 NMSA 1978.

**History: Laws 2003, ch. 280, § 3; 2009, ch. 159, § 8; 2021, ch. 128, § 3.**

**The 2021 amendment,** effective July 1, 2021, established additional duties for the office of guardianship, including providing additional legal services, publishing an annual report, and establishing and managing a volunteer court visitor program; and in Subsection B, Paragraph B(1), deleted "contract for the provision of probate" and added "provide for adult", in Paragraph B(4), after "complaints against", deleted "contractors" and added "guardianship and legal services providers that have entered into service agreements with the office", in Paragraph B(5), deleted "contract for attorneys" and added "provide legal services, including petitioning attorney, guardian ad litem and court visitor services", and after "selection of persons", deleted "to be served under such contracts" and added "to receive guardianship and legal services", and added new Paragraphs B(6) through B(8) and redesignated former Paragraph B(6) as Paragraph B(9).

**The 2009 amendment,** effective June 19, 2009, in Paragraph (5) of Subsection B, changed "ward" to "protected person".

## 28-16B-4. Service agreement monitoring and enforcement.

A. The office of guardianship shall monitor professional guardians providing services to income-eligible protected persons and enforce agreements the office has executed with guardianship and legal services providers. In carrying out this duty, the office may:

(1) have access to case records, copies of court filings and reports, financial records and other records maintained by guardianship and legal services providers related to the services provided to income-eligible protected persons, unless specifically sequestered by the court;



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(2) petition the court of jurisdiction for access to records that have been sequestered;

(3) conduct annual comprehensive service reviews to ensure service providers comply with service agreements and statutory duties;

(4) visit protected persons to evaluate the adequacy of guardianship services provided and determine if the guardianship should be amended or terminated; and

(5) pursue legal and other remedies against service providers for noncompliance with service agreements and statutory duties.

B. The office shall protect and maintain the confidentiality of all client-specific information and records obtained to the same extent as required for the service providers and to any extent otherwise required by state or federal law.

**History: Laws 2003, ch. 280, § 4; 2009, ch. 159, § 9; 2021, ch. 128, § 4.**

**The 2021 amendment,** effective July 1, 2021, required the office of guardianship to monitor professional guardians providing services to income-eligible protected persons, and authorized the office to conduct annual comprehensive service reviews and other monitoring activities of its service providers to ensure protected persons served by the office of guardianship are receiving appropriate services; in the section heading, deleted "Contract" and added "Service agreement"; in Subsection A, in the introductory paragraph, after "shall monitor", deleted "and enforce all guardianship contracts" and added "professional guardians providing services to income-eligible protected persons and enforce agreements the office has executed with guardianship and legal services providers", in Paragraph A(1), after "maintained by", deleted "contractors related to contract services provided" and added "guardianship and legal services providers related to the services provided to income-eligible protected persons", deleted former Paragraph A(3), added new Paragraphs A(3) and A(4) and redesignated former Paragraph A(4) as Paragraph A(5), and in Paragraph A(5), after "remedies against", deleted "contractors for noncompliance with contract provisions" and added "service providers for noncompliance with service agreements and statutory duties"; and in Subsection B, after "required for the", deleted "contractor" and added "service providers".

**The 2009 amendment,** effective June 19, 2009, in Paragraph (3) of Subsection A, changed "ward" to "protected person".

## 28-16B-5. Guardianship service agreements.

A service agreement for guardianship services shall include:

A. a requirement that service providers be certified and in good standing with a national or state organization recognized by the supreme court that provides professional certification for guardians;

B. a requirement for adoption and compliance with a code of ethics for guardians;

C. the maximum caseload for guardians;

D. the fee schedule for services provided;

E. assurance that the civil rights of protected persons served by the service provider shall be met, including the right to be served in the most integrated setting appropriate to the needs of the protected person;

F. provisions for access by the office of guardianship to records, protected persons and service provider staff as needed to monitor and enforce contract compliance and for quality assurance purposes; and

G. minimum financial accounting and reporting requirements.

**History: Laws 2003, ch. 280, § 5; 2009, ch. 159, § 10; 2021, ch. 128, § 5.**

**The 2021 amendment,** effective July 1, 2021, revised the required contents of a service agreement for guardianship services, including a requirement that service providers be certified and in good standing with a national or state organization recognized by the supreme court that provides professional certification for guardians; changed "contractor" to "service provider" throughout; in the section heading, deleted "Contracts" and added "Guardianship service agreements"; in the introductory clause, after "A", deleted "contract" and added "service agreement"; and deleted former Subsection A and added new Subsection A.

**The 2009 amendment,** effective June 19, 2009, in Subsections E and F, changed "ward" to "protected person".

## 28-16B-6. Resolution of complaints.

A. The office of guardianship shall establish by rule for the filing, investigation and resolution of complaints about guardianship services provided by contractors.

B. The office shall acknowledge receipt of the complaint, notify all parties involved and initiate an investigation within fifteen working days of the filing of the complaint.



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C. A determination shall be made and a decision rendered on the complaint within sixty working days unless mutually agreed upon by all parties or unless a shorter time is required to protect the protected person.

D. The office may refer complaints to other agencies for investigation or prosecution, as appropriate.

E. Complaints against the office or a staff member of the office shall be investigated by the human services department.

**History: Laws 2003, ch. 280, § 6; 2009, ch. 159, § 11.**

**Cross references.** — For the Department of Health Act, *see* Chapter 9, Article 7 NMSA 1978.

**The 2009 amendment,** effective June 19, 2009, in Subsection C, changed "ward" to "protected person".

## 28-16B-7. Office of guardianship fund; creation; appropriation.

A. The "office of guardianship fund" is created in the state treasury. All gifts, donations, bequests and interest income of the developmental disabilities planning council's office of guardianship shall be deposited by the executive director of the developmental disabilities planning council into the fund. The developmental disabilities planning council shall administer the fund, and money in the fund is appropriated to the office of guardianship to further the purposes of the Office of Guardianship Act. Income from investment of the fund shall be credited to the fund. Money in the fund shall be disbursed on warrants signed by the secretary of finance and administration pursuant to vouchers signed by the executive director of the developmental disabilities planning council or the executive director's authorized representative.

B. Money in the office of guardianship fund shall not revert or be transferred to any other state fund at the end of any fiscal year and shall not be expended for any purpose except as provided in this section.

**History: Laws 2013, ch. 107, § 1.**

**Effective dates.** — Laws 2013, ch. 107 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

# ARTICLE 16C

# Special Education Ombud

Sec.
28-16C-1. Short title.
28-16C-2. Definitions.
28-16C-3. Creation of the office of the state special education ombud; general duties of the office.
28-16C-4. Annual report; contents.
28-16C-5. Investigation and resolution of special education concerns.
28-16C-6. Access to student educational records.
28-16C-7. Confidentiality of information.
28-16C-8. Conflict of interest.
28-16C-9. Posting and distribution of ombud information.
28-16C-10. Availability of legal counsel to the office.
28-16C-11. Interference with the office and retaliation prohibited; potential actions for noncompliance.

## 28-16C-1. Short title.

Sections 1 through 11 [28-16C-1 to 28-16C-11 NMSA 1978] of this act may be cited as the "Special Education Ombud Act".

**History: Laws 2021, ch. 53, § 1.**

**Effective dates.** — Laws 2021, ch. 53 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.



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## 28-16C-2. Definitions.

As used in the Special Education Ombud Act:

A. "council" means the developmental disabilities planning council;

B. "office" means the office of the state special education ombud;

C. "parent" includes a legal guardian or custodian who has custody and control of a student or an individual who has legal authority to make educational decisions on behalf of the student;

D. "state ombud" means the state special education ombud; and

E. "student" means a public school student receiving or seeking special education services.

**History: Laws 2021, ch. 53, § 2.**

**Effective dates.** — Laws 2021, ch. 53 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 28-16C-3. Creation of the office of the state special education ombud; general duties of the office.

A. The "office of the state special education ombud" is created within the council.

B. The council shall appoint the "state special education ombud", who shall head the office and supervise the ombuds and other staff of the office. The state ombud may contract for services to assist the office in conducting its duties and may use the services of volunteers.

C. The state ombud shall:

(1) identify, investigate and resolve concerns pertaining to special education services that are filed with the office by parents;

(2) assist students and parents in protecting the educational rights of students, which may include assisting students and parents in individualized education plan meetings or other proceedings pursuant to the federal Individuals with Disabilities Education Act;

(3) inform students and parents about special education resources in their community;

(4) ensure that students and parents have regular and timely access to the services provided through the office and that students and parents receive timely responses from representatives of the office;

(5) identify any patterns of concerns that emerge regarding special education services and educational rights and recommend strategies for improvement to the public education department;

(6) collaborate with the public education department to ensure that all dispute resolution processes are available to students and parents, including the special education parent liaison, mediation, facilitated individualized education program meetings, state complaint and investigations and due process hearings;

(7) collaborate with the parent training information centers and protection and advocacy agencies within the state to identify and report systemic special education issues to the public education department;

(8) ensure that office staff, contractors and volunteers are trained in:

(a) federal, state and local laws, rules and policies with respect to special education in the state;

(b) investigative techniques;

(c) dispute resolution; and

(d) such other matters as the office deems appropriate;

(9) develop procedures for the certification of ombuds. An employee or contractor shall not investigate a concern filed with the office unless that person is certified by the office;

(10) analyze, comment on and monitor the development and implementation of federal and state laws, rules and other governmental policies and actions that pertain to the educational rights of students with respect to the adequacy of special education services in the state;

(11) recommend changes to laws, rules, policies and actions pertaining to the special educational rights of students as the office determines to be appropriate;

(12) facilitate public comment on proposed laws, rules, policies and actions; and



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(13) provide information to public and private agencies, legislators and other persons regarding the problems and concerns of special education services and make recommendations related to those problems and concerns.

**History: Laws 2021, ch. 53, § 3.**
**Cross references.** — For the Individuals with Disabilities Education Act, *see* 20 USCS § 1400 et seq.

**Effective dates.** — Laws 2021, ch. 53 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 28-16C-4. Annual report; contents.

No later than December 1 of each year, the office shall prepare a report that includes:

A. actions taken by the office in the year for which the report is prepared;

B. special education concerns identified by or on behalf of students and parents, resolution of the concerns and the effectiveness of the resolution processes;

C. recommendations for improving the quality of special education services provided to students and protecting the educational rights of students; and

D. policy, regulatory and legislative recommendations to solve identified concerns related to special education, to improve processes of resolutions of concerns, to improve the quality of services provided to students, to protect the educational rights of students and to remove barriers to education and educational services.

**History: Laws 2021, ch. 53, § 4.**
**Effective dates.** — Laws 2021, ch. 53 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 28-16C-5. Investigation and resolution of special education concerns.

The office shall identify, investigate and seek to resolve concerns related to special education communicated by or on behalf of students and parents. If the office does not address a concern, the office shall notify the concerned person of the decision not to address the concern and the reasons for the decision.

**History: Laws 2021, ch. 53, § 5.**
**Effective dates.** — Laws 2021, ch. 53 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 28-16C-6. Access to student educational records.

Upon request and with consent from the student or the student's parent, the office shall have access to the student's educational records from the public education department, a school district or a public school as necessary to carry out the office's responsibilities.

**History: Laws 2021, ch. 53, § 6.**
**Effective dates.** — Laws 2021, ch. 53 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 28-16C-7. Confidentiality of information.

A. All files and records maintained by the office that pertain to students are confidential and not subject to the provisions of the Inspection of Public Records Act [Chapter 14, Article 2 NMSA 1978]. The state ombud shall not disclose the identity of a concerned person or student about whom the office maintains files or records unless:

(1) the concerned person, student or parent consents in writing to the disclosure;

(2) the concerned person, student or parent gives oral consent that is documented immediately in writing by a representative of the office. If the student is unable to give oral consent,



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the student may give consent in any way that the student is able to, and the consent shall also be documented immediately in writing by a representative of the office; or

(3) disclosure is ordered by a court.

B. The annual report required pursuant to Section 4 [28-16C-4 NMSA 1978] of the Special Education Ombud Act may be based on confidential information and may be published or furnished to the public, but the report shall not identify individual students directly or indirectly nor violate the privileged or confidential nature of the relationship and communications between the student and the office.

**History: Laws 2021, ch. 53, § 7.**
**Effective dates.** — Laws 2021, ch. 53 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 28-16C-8. Conflict of interest.

The council shall ensure that:

A. a person or an immediate family member of that person involved in the designation of an ombud does not have a conflict of interest;

B. an employee or a contractor of the office or an immediate family member of the employee or contractor does not have a conflict of interest; and

C. an ombud:

(1) does not have an ownership or investment interest, represented by equity, debt or other financial relationship, in a public school providing special education services;

(2) is not employed by, or participating in the management of, a public school providing special education services; and

(3) does not receive, or have the right to receive, directly or indirectly, remuneration in cash or in kind under a compensation arrangement with a public school providing special education services.

**History: Laws 2021, ch. 53, § 8.**
**Effective dates.** — Laws 2021, ch. 53 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 28-16C-9. Posting and distribution of ombud information.

Every public school providing special education services shall post in a conspicuous location in the public school a notice regarding the office that contains a brief description of the services provided by the office and the name, address and phone number of the office and shall post it online on the public school's website, if applicable. The public school providing special education services shall distribute information regarding the state ombud at the beginning of every school year, in addition to providing the information as part of the annual individual education plan process prior to scheduling the first individual education plan meeting of each school year. The form of the notice shall be approved by the office.

**History: Laws 2021, ch. 53, § 9.**
**Effective dates.** — Laws 2021, ch. 53 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 28-16C-10. Availability of legal counsel to the office.

The council shall ensure that adequate legal counsel is available and is able, without conflict of interest, to:

A. provide advice and consultation to the office needed to protect the educational rights of students; and



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B. assist the office and contractors in the performance of the official duties of the state ombud and representatives.

**History: Laws 2021, ch. 53, § 10.**
**Effective dates.** — Laws 2021, ch. 53 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

## 28-16C-11. Interference with the office and retaliation prohibited; potential actions for noncompliance.

A. A person shall not willfully interfere with the lawful actions of the office.

B. A person shall not institute discriminatory, disciplinary or retaliatory action against any student or parent for filing a concern with, providing information to or otherwise cooperating with the office.

C. If public school personnel or a contractor or volunteer of a school district or charter school fails to comply with the provisions of the Special Education Ombud Act:

(1) the council shall report the noncompliance to the public education department;

(2) the office shall collaborate with the public education department to access processes and resources to address special education services concerns; and

(3) the office shall collaborate with the public education department to identify further appropriate actions to be taken in response to the report, which may include a corrective action plan or any other administrative action that the public education department is authorized to take to ensure that students receive the free and appropriate public education required by the Individuals with Disabilities Education Act and state law. The office shall provide a letter to the concerned person explaining the actions the public education department will take.

**History: Laws 2021, ch. 53, § 11.**
**Cross references.** — For the Individuals with Disabilities Education Act, *see* 20 USCS § 1400 et seq.

**Effective dates.** — Laws 2021, ch. 53 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

# ARTICLE 17

# Long-Term Care Ombudsman

Sec.
28-17-1. Short title.
28-17-2. Purpose.
28-17-3. Definitions.
28-17-4. Establishment of the office of the state long-term care ombudsman; general duties of the office.
28-17-5. Rule-making authority of director.
28-17-6. Regional and local long-term care ombudsman programs.
28-17-7. Training and certification.
28-17-8. Investigation and resolution of complaints.
28-17-9. Referrals.
28-17-10. Facility posting of ombudsman information.
28-17-11. Access to agency records.
28-17-12. Access to long-term care facilities.
28-17-13. Access to records of patients, residents or clients.
28-17-14. Confidentiality of information.
28-17-15. Conflict of interest.
28-17-16. Representatives of the office.
28-17-17. Immunity from liability.
28-17-18. Availability of legal counsel.
28-17-19. Interference with the office and retaliation prohibited; penalty; civil; appeal.

## 28-17-1. Short title.

Chapter 28, Article 17 NMSA 1978 may be cited as the "Long-Term Care Ombudsman Act".

**History: Laws 1989, ch. 208, § 1; 2017, ch. 81, § 1.**
**Cross references.** — For the Continuing Care Act, *see* Chapter 24, Article 17 NMSA 1978.
**The 2017 amendment,** effective June 16, 2017, changed "Sections 1 through 19 of this act" to "Chapter 28, Article 17 NMSA 1978".

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40A Am. Jur. 2d Hospitals and Asylums § 39.



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Liability of nursing home for violating statutory duty to notify third party concerning patient's medical condition, 46 A.L.R.5th 821.

7 C.J.S. Asylums and Institutional Care Facilities §§ 5, 6, 14.

## 28-17-2. Purpose.

The legislature recognizes that the state agency on aging [aging and long-term services department] pursuant to a grant from the federal government has established an office of the state long-term care ombudsman. The legislature declares that it is the public policy of this state to encourage community contact and involvement with patients, residents and clients of long-term care facilities. The legislature finds that in order to comply with the federal Older Americans Act and to effectively assist patients, residents and clients of long-term care facilities in the assertion of their civil and human rights, the structure, powers and duties of the office of the state long-term care ombudsman shall be specifically defined.

**History: Laws 1989, ch. 208, § 2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2004, ch. 23, § 13 provided that all references to the "state agency on aging" be deemed references to the "aging and long-term services department".

**Cross references.** — For the federal Older Americans Act, *see* 42 U.S.C. § 3001 et seq.

## 28-17-3. Definitions.

As used in the Long-Term Care Ombudsman Act:

A. "adult protective services" means the agency's adult protective services division that receives and investigates reports of adult abuse, neglect or exploitation;

B. "agency" means the aging and long-term services department;

C. "care" means assistance with the activities of daily living, including eating, dressing, oral hygiene, bathing, mobility, toileting, grooming, taking medications, transferring from a bed or chair and walking;

D. "director" means the secretary of aging and long-term services;

E. "informed consent" means an agreement by a resident or a resident's surrogate decision-maker to allow a disclosure of information, made with full knowledge of the risks involved and the available alternatives, that is made in writing or through the use of auxiliary aids and services or communicated by a resident or a resident's surrogate decision-maker orally, visually or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the office;

F. "licensing and certification" means the licensing and certification bureau of the department of health;

G. "long-term care facility" means any residential facility that provides care to one or more persons unrelated to the owner or operator of the facility, including:

(1) a skilled nursing facility;

(2) an intermediate care nursing facility, including an intermediate care facility for the intellectually disabled;

(3) a nursing facility;

(4) an adult residential shelter care home;

(5) a boarding home;

(6) any other adult care home or adult residential care facility;

(7) a continuing care community;

(8) any swing bed in an acute care facility or extended care facility; and

(9) any adult daycare facility;

H. "office" means the office of the state long-term care ombudsman;

I. "Older Americans Act" means the federal Older Americans Act of 1965;

J. "ombudsman" means an employee or volunteer of the office who is trained and certified to act as a representative of the office;



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K. "ombudsman coordinator" means the coordinator of a regional or local ombudsman program designated by the office;

L. "program" means the New Mexico long-term care ombudsman program;

M. "resident" means any patient, client or person residing in and receiving care in a long-term care facility;

N. "state ombudsman" means the individual who heads the office and supervises the ombudsmen; and

O. "surrogate decision-maker" means any of the following:

(1) an individual chosen by a resident to act on the resident's behalf to support the resident in decision-making; accessing medical, social or other personal information of the resident; managing financial matters; or receiving notifications;

(2) an individual authorized by state or federal law, including an agent pursuant to a power of attorney, a representative payee or other fiduciary of the resident, to act on behalf of a resident to support the resident in decision-making; accessing medical, social or other personal information of the resident; managing financial matters; or receiving notifications;

(3) a resident's legal representative; or

(4) the court-appointed guardian or conservator of a resident.

**History: Laws 1989, ch. 208, § 3; 1997, ch. 257, § 2; 2017, ch. 81, § 2.**

**Cross references.** — For the federal Older Americans Act, *see* 42 U.S.C. § 3001 et seq.

**The 2017 amendment,** effective June 16, 2017, defined "informed consent" and revised certain definitions for terms used in the Long-Term Care Ombudsman Act; in Subsection A, after "means", deleted "the children, youth and families department pursuant to the Adult Protective Services Act" and added "the agency's adult protective services division that receives and investigates reports of adult abuse, neglect or exploitation"; in Subsection B, after "means the", deleted "state agency on", and after "aging", added "and long-term services department"; in Subsection D, after "means the", deleted "director of the state agency on" and added "secretary of", and after "aging", added "and long-term services"; added a new Subsection E and redesignated former Subsections E through N as Subsections F through O, respectively; in Subsection G, in Paragraph G(2), after "facility for the", deleted "mentally retarded" and added "intellectually disabled", and in Paragraph G(9), after "adult", changed "day care" to "daycare"; in Subsection I, after "Act", added "of 1965"; in Subsection J, after "means an", deleted "individual" and added "employee or volunteer of the office who is", and after "representative of the office", deleted "of the state long-term care ombudsman"; in Subsection K, after "office", deleted "of the state ombudsman"; in Subsection N, after "means the", deleted "state long-term care ombudsman" and added "individual who heads the office and supervises the ombudsmen"; and in Subsection O, in the introductory clause, after "surrogate", changed "decision maker" to "decision-maker", and after "means", deleted "a legally appointed agent, guardian or surrogate who is authorized to act on behalf of a resident" and added "any of the following", and added Paragraphs O(1) through O(4).

**The 1997 amendment,** effective July 1, 1997, added Subsections C, K, L and N, deleted former Subsection H defining "older individual", and redesignated former Subsections C through G and K as D through H and M; substituted "children, youth and families" for "human services" in Subsection A; substituted "department of health" for "health and environment department" in Subsection E; added the language beginning "any residential facility" at the end of the introductory paragraph in Subsection F; added "including an intermediate care facility for the mentally retarded" at the end of Paragraph F(2); deleted former Paragraph F(3), which read "intermediate care facility for the mentally retarded"; redesignated former Paragraphs F(4) through F(10) as F(3) through F(9); added "or adult residential care facility" at the end of Paragraph F(6); deleted "health" preceding "care" in Paragraph F(9); and made stylistic changes in Subsection F.

## 28-17-4. Establishment of the office of the state long-term care ombudsman; general duties of the office.

A. Pursuant to the Older Americans Act, the agency shall establish and operate an "office of the state long-term care ombudsman" either directly or by contract or other arrangement with any public agency or nonprofit private organization; except that no contract or arrangement may be made with any entity that is responsible for licensing or certifying long-term care services or an association or association affiliate of long-term care facilities or of any other residential facilities.

B. The director shall designate the state ombudsman.

C. The ombudsman shall serve on a full-time basis, and shall, personally or through representatives of the office:



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(1) identify, investigate and resolve complaints that are made by, or on behalf of, residents and that relate to action, inaction or decisions that may adversely affect the health, safety, welfare or rights of the residents, including the welfare and rights of the residents with respect to the appointment and activities of guardians and representative payees, of:

(a) providers, or representatives of providers, of long-term care services;

(b) public agencies; or

(c) health and social service agencies;

(2) provide services to assist the residents in protecting the health, safety, welfare and rights of the residents;

(3) inform the residents about means of obtaining services;

(4) ensure that the residents have regular and timely access to the services provided through the office and that the residents and complainants receive timely responses from representatives of the office;

(5) represent the interests of the residents before governmental agencies and seek administrative, legal and other remedies on behalf of residents to protect the health, safety, welfare and rights of the residents;

(6) provide administrative and technical assistance to designated regional and local ombudsman programs and assist the programs in participating in the program;

(7) analyze, comment on and monitor the development and implementation of federal, state and local laws, regulations and other governmental policies and actions that pertain to the health, safety, welfare and rights of the residents, with respect to the adequacy of long-term care facilities and services in the state and recommend any changes in such laws, regulations, policies and actions as the office determines to be appropriate; and facilitate public comment on the laws, regulations, policies and actions;

(8) provide for training representatives of the office, promote the development of citizen organizations to participate in the program and provide technical support for the development of resident and family councils to protect the well-being and rights of residents;

(9) prepare an annual report:

(a) describing the activities carried out by the office in the year for which the report is prepared;

(b) containing and analyzing the data collected;

(c) evaluating the problems experienced by, and the complaints made by or on behalf of, residents;

(d) containing recommendations for improving quality of the care and life of the residents, and protecting the health, safety, welfare and rights of the residents;

(e) analyzing the success of the program, including success in providing services to residents of board and care facilities and other similar adult care facilities;

(f) identifying barriers that prevent the optimal operation of the program; and

(g) providing policy, regulatory and legislative recommendations to solve identified problems, to resolve complaints, to improve the quality of care and life of residents, to protect the health, safety, welfare and rights of residents and to remove the barriers;

(10) coordinate ombudsman services with the protection and advocacy systems for individuals with developmental disabilities and mental illness;

(11) provide such information as the office determines to be necessary to public and private agencies, legislators and other persons regarding the problems and concerns of older individuals residing in long-term care facilities; and recommendations related to the problems and concerns; and

(12) carry out such other activities as the state ombudsman determines to be appropriate.

**History: Laws 1989, ch. 208, § 4; 1997, ch. 257, § 3.**

**Cross references.** — For the federal Older Americans Act, *see* 42 U.S.C. § 3001 et seq.

**The 1997 amendment,** effective July 1, 1997, in Subsection A, deleted "either directly or by contract or other arrangement" following "operate" and added the language beginning with that phrase at the end; and rewrote Subsection C.



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## 28-17-5. Rule-making authority of director.

The director shall adopt and promulgate such reasonable rules and regulations as are deemed necessary to carry out the provisions of the Long-Term Care Ombudsman Act. Unless otherwise provided by statute, no regulation affecting any person or agency outside the office shall be adopted, amended or repealed without a public hearing on the proposed action before the director or a hearing officer designated by him. The public hearing shall be held in Santa Fe unless the public notice of hearing indicates otherwise. Notice of the subject matter of the regulation, the action proposed to be taken, the time and place of the hearing, the manner in which interested persons may present their views and the method by which copies of the proposed regulation may be obtained shall be published once at least thirty days prior to the hearing date in a newspaper of general circulation and mailed at least thirty days prior to the hearing date to all persons who have made a written request for advance notice of hearing. All rules and regulations shall be filed in accordance with the State Rules Act [Chapter 14, Article 4 NMSA 1978].

**History: Laws 1989, ch. 208, § 5.**

## 28-17-6. Regional and local long-term care ombudsman programs.

A. In carrying out the duties of the office, the state ombudsman may designate an entity as a regional or local ombudsman entity, and may designate an employee or volunteer to represent the entity. An individual so designated shall, in accordance with the policies and procedures established by the office and the agency:

(1) provide services to protect the health, safety, welfare and rights of residents;

(2) ensure that residents in the service area of the entity have regular, timely access to representatives of the program and timely responses to complaints and requests for assistance;

(3) identify, investigate and resolve complaints made by or on behalf of residents that relate to action, inaction or decisions that may adversely affect the health, safety, welfare or rights of the residents;

(4) represent the interests of residents before government agencies and seek administrative, legal and other remedies to protect the health, safety, welfare and rights of the residents;

(5) review and, if necessary, comment on any existing and proposed laws, regulations and other government policies and actions, that pertain to the rights and well-being of residents;

(6) facilitate the ability of the public to comment on the laws, regulations, policies and actions;

(7) support the development of resident and family councils; and

(8) carry out other activities that the ombudsman determines to be appropriate.

B. To be eligible to be designated as regional or local ombudsman entities, and individuals eligible to be designated as representatives of such entities, the entities shall:

(1) have demonstrated capability to carry out the responsibilities of the office;

(2) be free of conflicts of interest;

(3) in the case of the entities, be public or nonprofit private entities; and

(4) meet such additional requirements as the state ombudsman may specify.

**History: Laws 1989, ch. 208, § 6; 1997, ch. 257, § 4.**

**The 1997 amendment,** effective July 1, 1997, rewrote the section to such an extent that a detailed comparison would be impracticable.

## 28-17-7. Training and certification.

A. The state ombudsman shall ensure that office staff, including volunteers and other representatives of the office, are trained in:



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(1) federal, state and local laws, regulations and policies with respect to long-term care facilities in the state;

(2) investigative techniques; and

(3) such other matters as the agency deems appropriate.

B. The state ombudsman shall develop procedures for the certification of ombudsmen.

C. No officer, employee or other representative of the office shall investigate any complaint filed with the office unless such person is certified by the office.

**History: Laws 1989, ch. 208, § 7.**

## 28-17-8. Investigation and resolution of complaints.

The office shall investigate and seek to resolve complaints and concerns communicated by or on behalf of patients, residents or clients of any long-term care facility. The office may initiate investigations based on its observations of the conditions in a long-term care facility. If the office does not investigate a complaint, the complainant shall be notified of the decision not to investigate and the reasons for the decision.

**History: Laws 1989, ch. 208, § 8.**

## 28-17-9. Referrals.

A. When abuse, neglect or exploitation of a resident of a long-term care facility is witnessed or suspected, the state ombudsman or an ombudsman shall personally discuss the matter with the resident, or, if the resident is unable to communicate informed consent, the resident's surrogate decision-maker, if applicable, and:

(1) if the resident communicates informed consent to referral and disclosure of identifying information to the long-term care facility, law enforcement or one or more of the entities listed in Subsection B of this section, the state ombudsman or an ombudsman shall assist the resident in reporting the allegation, or the state ombudsman or an ombudsman shall make the report directly. The method of reporting is at the sole discretion of the resident, though the state ombudsman or an ombudsman may counsel the resident regarding the method of reporting. If the resident is capable of informed consent and chooses not to refer the matter and not to disclose identifying information, the state ombudsman or an ombudsman shall not make a referral or disclose this information;

(2) if the state ombudsman or an ombudsman determines that the resident is not able to communicate informed consent, the state ombudsman or the ombudsman shall consult with the resident's surrogate decision-maker, if any. If the surrogate decision-maker chooses to make a referral and disclose relevant identifying information with respect to the resident, the state ombudsman or an ombudsman shall assist the surrogate decision-maker in reporting the allegation or the state ombudsman or an ombudsman shall make the report directly. The method of reporting is at the sole discretion of the resident's surrogate decision-maker, though the state ombudsman or an ombudsman may counsel the surrogate decision-maker regarding the method of reporting. If the surrogate decision-maker chooses not to refer the matter and not to disclose identifying information, the state ombudsman or an ombudsman shall not make a referral or disclose this information unless the state ombudsman or the ombudsman has reasonable cause to believe that the surrogate decision-maker has taken an action, failed to act or made a decision that may adversely affect the health, safety, welfare or rights of the resident, in which case, the state ombudsman or the ombudsman shall follow the procedure established in Paragraph (3) of this subsection as if the resident did not have a surrogate decision-maker; or

(3) if the state ombudsman or an ombudsman determines that the resident is not able to communicate informed consent and does not have a surrogate decision-maker, an ombudsman, with the consent of the state ombudsman, may make a referral and disclose relevant identifying information about the resident if the state ombudsman or the ombudsman has reasonable cause to believe that it is in the best interest of the resident to make a referral and has no evidence indicating that



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the resident would not want a referral to be made. In the event that these conditions are met and the abuse, neglect or exploitation has been personally witnessed by the state ombudsman or an ombudsman, the state ombudsman or the ombudsman shall make the report and the disclosure directly to the long-term care facility, law enforcement or the entities set forth in Subsection B of this section.

B. The following state agencies or boards shall endeavor to give priority to any complaint referred to them by the office:

(1) the facilities management division of the general services department;
(2) licensing and certification;
(3) adult protective services;
(4) the New Mexico medical board;
(5) the board of nursing;
(6) the board of nursing home administrators;
(7) the board of pharmacy;
(8) the office of the attorney general; and
(9) the medical assistance division of the human services department.

C. Any state agency or board that responds to a complaint against a long-term care facility or licensed individual that was referred to the agency by the office shall forward to the office copies of related inspection reports and plans of correction and notice of any citations or sanctions levied against the long-term care facility or the licensed individual.

**History: Laws 1989, ch. 208, § 9; 1997, ch. 257, § 5; 2017, ch. 81, § 3.**

**The 2017 amendment,** effective June 16, 2017, clarified the language outlining the duties of ombudsman to report suspected or witnessed abuse, neglect or exploitation of a resident of a long-term care facility, established limitations on referral in cases of abuse, neglect or exploitation of a person residing in a long-term care facility, and added a division of the general services department and of the human services department as well as the office of the attorney general to the list of agencies tasked with acting on complaints filed by the office of the state long-term care ombudsman; in Subsection A, after "When", added "abuse, neglect or exploitation of a resident of a long-term care facility is witnessed or suspected, the state ombudsman or an ombudsman shall personally discuss the matter with the resident, or, if the resident is unable to communicate informed consent, the resident's surrogate decision-maker, if applicable, and:", and added Paragraphs A(1) through A(3); in Subsection B, added a new Paragraph B(1), redesignated former Paragraph B(1) as Paragraph B(2), deleted former Paragraph B(2), added Paragraph B(3), in Paragraph B(4), after "New Mexico", added "medical", and after "board", deleted "of medical examiners", at the end of Paragraph B(6), deleted "or", in Paragraph B(7), after "pharmacy", deleted "The office shall coordinate its efforts with those of any state agency or board to which it makes investigation referrals", and added Paragraphs B(8) and B(9); and in Subsection C, after "agency or board", deleted "which" and added "that", after "plans of correction", added "and", and after "any citations", deleted "and" and added "or".

**The 1997 amendment,** effective July 1, 1997, substituted "children, youth and families" for "human services" in Paragraph B(2) and deleted "state" preceding "board" in Paragraph B(5).

## 28-17-10. Facility posting of ombudsman information.

Every long-term care facility shall post in a conspicuous location a notice of the name, address and phone number of the office. The name and phone number of the nearest designated program and that of the ombudsman assigned to that long-term care facility shall be posted, where applicable. A brief description of the services provided by the office and the designated program shall be included in the notice. The form of the notice shall be approved by the office.

**History: Laws 1989, ch. 208, § 10.**

## 28-17-11. Access to agency records.

Upon request, the office shall have access to records of any state or local government agency, including copies of all licensing and certification records relating to long-term care facilities as necessary to carry out its responsibilities under the Long-Term Care Ombudsman Act and which records are available to the patient, resident or client, except for records and information unavailable pursuant to Section 7-1-8 NMSA 1978.

**History: Laws 1989, ch. 208, § 11; 1997, ch. 257, § 6.**

**The 1997 amendment,** effective July 1, 1997, rewrote the section.



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## 28-17-12. Access to long-term care facilities.

Representatives of the office shall have immediate access to any patient, resident or client for the purpose of effectively carrying out the provisions of the Long-Term Care Ombudsman Act.

**History: Laws 1989, ch. 208, § 12.**

## 28-17-13. Access to records of patients, residents or clients.

A. In order for the office to carry out its responsibilities, including conducting investigations, under the Long-Term Care Ombudsman Act, the office shall have full and immediate access to readily available medical, personal, financial and other nonmedical records, which include administrative records, policies, procedures or documents that concern, involve or pertain to a resident's diet, comfort, health, safety or welfare, but do not include internal quality assurance and risk management reports, of a patient, resident or client of a long-term care facility that are retained by the facility or the facility's parent corporation or owner. If the records are not readily available, they are to be provided to the office within twenty-four hours of the request. If the patient, resident or client:

(1) has the ability to consent in writing, access may only be obtained by the written consent of the patient, resident or client;

(2) is unable to consent in writing, oral consent may be given;

(3) has a legally appointed surrogate decision-maker authorized to approve review of records, the office shall obtain the permission of the surrogate decision-maker for review of the records, unless any of the following apply:

(a) the existence of the surrogate decision-maker is unknown to the office or the facility;

(b) the surrogate decision-maker cannot be reached within five working days;

(c) access to the records is necessary to investigate or evaluate a complaint; or

(d) the surrogate decision-maker refuses to give the permission and a representative of the office has reasonable cause to believe that the surrogate decision-maker is not following the wishes of the resident; and

(4) is unable to express written or oral consent and there is no surrogate decision-maker or the notification of the surrogate decision-maker is not applicable for reasons set forth in Paragraph (3) of this subsection or the patient, resident or client is deceased, inspection of records may be made by employees of the office, ombudsman coordinators and by ombudsmen approved by the ombudsman coordinator or the state ombudsman.

B. Copies of records may be reproduced by the office. If investigation of records is sought pursuant to this section, the ombudsman shall upon request produce a statement signed by the ombudsman coordinator or state ombudsman authorizing the ombudsman to review the records. Facilities providing copies of records pursuant to this section may charge the office for the actual copying cost for each page copied.

C. Upon request by the office, a long-term care facility shall provide to the office the name, address and telephone number of the guardian, conservator, attorney-in-fact, legal representative or next-of-kin of any patient, resident or client and a copy of any document granting legal decision-making power over a resident.

D. The long-term care facility and personnel who disclose records pursuant to this section shall not be liable for the disclosure.

E. In order to carry out its responsibilities as a health oversight agency, the office shall establish procedures to protect the confidentiality of records obtained pursuant to this section and in accordance with the federal Health Insurance Portability and Accountability Act of 1996 regulations.

**History: Laws 1989, ch. 208, § 13; 1997, ch. 257, § 7; 2003, ch. 109, § 1; 2017, ch. 81, § 4.**

**Cross references.** — For the federal Health Insurance Portability and Accountability Act of 1996, *see* 42 U.S.C. 300gg et seq.

**The 2017 amendment,** effective June 16, 2017, removed the requirement for third-party witnessing when residents of long-term care facilities orally consent to release of medical, personal, financial and other nonmedical records for office of the state long-term care ombudsman investigations; in Subsection A, Paragraph A(2), after "consent may be given", deleted "in the presence of a third party as witness", and changed "decision maker" to "decision-maker" throughout the paragraph.



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**The 2003 amendment,** effective June 20, 2003, rewrote Subsection A; inserted "or evaluate" in Subparagraph A(3)(c); added the Subparagraph A(3)(d) designation; in Subsection E, added "In order to carry out its responsibilities as a health oversight agency, the" at the beginning, and added "and in accordance with the federal Health Insurance Portability and Accountability Act of 1996 regulations" at the end.

**The 1997 amendment,** effective July 1, 1997, substituted "surrogate decision maker" for "guardian or conservator" and "guardianship or conservatorship" throughout the section; substituted "residents" for "resident" in the section heading; substituted "has a legally appointed surrogate decision maker authorized" for "is under New Mexico guardianship or conservatorship that provides the guardian or conservator with the authority" in Paragraph A(3); added Subparagraph A(3)(c); inserted "of records" near the beginning of Subsection B; and added the language beginning "and a copy" at the end of Subsection C.

## 28-17-14. Confidentiality of information.

A. The files and records of the office may be disclosed only for purposes of fulfilling the duties of the office pursuant to Subsection C of Section 28-17-4 NMSA 1978 at the discretion of the state ombudsman or the state ombudsman's designee. All state ombudsman files and records pertaining to clients, patients and residents are confidential and not subject to the provisions of the Inspection of Public Records Act [Chapter 14, Article 3 NMSA 1978]. The state ombudsman shall not disclose the identity of any complainant, resident, client or patient about whom the office maintains files or records unless:

(1) the complainant, resident, client or patient or the legal representative of that person consents in writing to the disclosure;

(2) the complainant, resident, client or patient gives oral consent that is documented immediately in writing by a representative of the office;

(3) disclosure is necessary for the provision of ombudsman services to the patient, resident or client and the patient, resident or client is unable to express written or oral consent; or

(4) disclosure is ordered by the court.

B. The director shall have access to the records and files of the office to verify the effectiveness and quality of the program where the identity of any complainant, witness, patient, resident or client is not disclosed.

**History: Laws 1989, ch. 208, § 14; 1997, ch. 257, § 8; 2003, ch. 109, § 2.**

**The 2003 amendment,** effective June 20, 2003, in Subsection A, deleted "of the ombudsman" preceding "pursuant to Subsection C", substituted "the state ombudsman's designee" for "person designated by him" following "state ombudsman or", inserted the second sentence, substituted "resident, client or patient" for "or resident" following "of any complainant"; rewrote Paragraph A(1); substituted "resident, client or patient" for "or resident" near the beginning of Paragraph A(2); and deleted "ombudsman" following "and quality of the" in Subsection B.

**The 1997 amendment,** effective July 1, 1997, rewrote Subsection A; deleted former Subsection B relating to access of complainants, witnesses, patients, residents or clients to records and files; and redesignated former Subsection C as Subsection B.

## 28-17-15. Conflict of interest.

The agency shall ensure that:

A. no individual or a member of the immediate family of an individual involved in the designation of the ombudsman or the designation of a regional or local ombudsman is subject to a conflict of interest;

B. no officer or employee of the office, ombudsman coordinator or representative, or a member of their immediate family, is subject to a conflict of interest; and

C. any ombudsman:

(1) does not have a direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service;

(2) does not have an ownership or investment interest, represented by equity, debt or other financial relationship, in a long-term care facility or a long-term care service;

(3) is not employed by, or participating in the management of, a long-term care facility; and

(4) does not receive, or have the right to receive, directly or indirectly, remuneration in cash or in kind under a compensation arrangement with an owner or operator of a long-term care facility.



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**History: Laws 1989, ch. 208, § 15; 1997, ch. 257, § 9.** **The 1997 amendment,** effective July 1, 1997, rewrote the section to such an extent that a detailed comparison would be impracticable.

## 28-17-16. Representatives of the office.

Any regional or local ombudsman program designated by the office or any individual certified by the office, whether an employee or an unpaid volunteer, shall be treated as a representative of the office.

**History: Laws 1989, ch. 208, § 16.**

## 28-17-17. Immunity from liability.

No representative of the office shall be liable under state law for the good faith performance of official duties pursuant to the Long-Term Care Ombudsman Act.

**History: Laws 1989, ch. 208, § 17.**

## 28-17-18. Availability of legal counsel.

The agency shall ensure that:

A. adequate legal counsel is available and is able, without conflict of interest, to:

(1) provide advice and consultation needed to protect the health, safety, welfare and rights to residents; and

(2) assist the ombudsman and representatives of the office in the performance of the official duties of the ombudsman and representatives;

B. representation is provided to any representative of the office against whom suit or other legal action is brought or threatened to be brought in connection with the performance of the official duties of the ombudsman or such a representative; and

C. the office pursues administrative, legal and other appropriate remedies on behalf of residents.

**History: Laws 1989, ch. 208, § 18; 1997, ch. 257, § 10.** **The 1997 amendment,** effective July 1, 1997, rewrote the section.

## 28-17-19. Interference with the office and retaliation prohibited; penalty; civil; appeal.

A. No person shall willfully interfere with the lawful actions of the office, including the request for immediate entry into a long-term care facility.

B. No person shall institute discriminatory, disciplinary or retaliatory action against any resident, employee or other person for filing a complaint, providing information to or otherwise cooperating with a representative of the office.

C. Any person who violates Subsection A of this section shall be subject to a civil penalty of up to five thousand dollars ($5,000) per occurrence. Any person who violates Subsection B of this section shall be subject to a civil penalty of up to ten thousand dollars ($10,000) per occurrence. The agency may assess and collect the penalty after notice and an opportunity for hearing, before a hearing officer designated by the agency to hear the matter, upon a determination that a person willfully interfered with the office or discriminated, disciplined or retaliated against an individual who communicated or disclosed information to the office in good faith pursuant to Subsection A or B of this section. The hearing officer has the power to administer oaths on request of any party and issue subpoenas and subpoenas duces tecum. However, if the violation is against a person covered by the Personnel Act [Chapter 10, Article 9 NMSA 1978], the office shall refer the matter to the agency employing the person for disciplinary action.



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D. Any party may appeal to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

**History: Laws 1989, ch. 208, § 19; 1997, ch. 257, § 11; 1998, ch. 55, § 39; 1999, ch. 265, § 41.**

**The 1999 amendment,** effective July 1, 1999, substituted "Subsection A or B" for "Subsections A and B" in the third sentence of Subsection C and substituted "Section 39-3-1.1" for "Section 12-8A-1" in Subsection D.

**The 1998 amendment,** effective September 1, 1998, in the section heading, inserted "; appeal"; in Subsection B, substituted "a" for "any"; and rewrote Subsection D.

**The 1997 amendment,** effective July 1, 1997, rewrote Subsection B and, in Subsection C, substituted "five thousand dollars ($5,000)" and "ten thousand dollars ($10,000)" for "two thousand five hundred dollars ($2,500)" and "five thousand dollars ($5,000)", respectively, and made stylistic changes.

# ARTICLE 18

# Education of the Handicapped (Repealed.)

(Repealed by Laws 2019, ch. 48, § 37.)

## 28-18-1. Repealed.

**Repeals.** — Laws 2019, ch. 48, § 37 repealed 28-18-1 NMSA 1978, as enacted by Laws 1990, ch. 4, § 1, relating to department designation, authorization, payment system effective, effective July 1, 2020. For provisions of former section, *see* the 2019 NMSA 1978 on *NMOne Source.com*.

## 28-18-2. Repealed.

**Repeals.** — Laws 2019, ch. 48, § 37 repealed 28-18-2 NMSA 1978, as enacted by Laws 1990, ch. 4, § 2, relating to custodian of funds, effective July 1, 2020. For provisions of former section, *see* the 2019 NMSA 1978 on *NMOne Source.com*.

# ARTICLE 19

# Martin Luther King, Jr. Commission

Sec.
28-19-1. Martin Luther King, Jr. commission; created; defined; members; terms; compensation.
28-19-2. Martin Luther King, Jr. fund; created.
28-19-3. Duties of the commission.
28-19-4. Commission report.

## 28-19-1. Martin Luther King, Jr. commission; created; defined; members; terms; compensation.

A. The "Martin Luther King, Jr. commission" is created. The purpose of the commission is to develop, promote, coordinate and review statewide plans and activities for the annual commemoration and celebration of the birthday of Martin Luther King, Jr. in accordance with Section 12-5-2 NMSA 1978.

B. As used in Sections 1 through 4 of this act [28-19-1 to 28-19-4 NMSA 1978], "commission" means the Martin Luther King, Jr. commission.

C. The commission shall be comprised of thirteen members as follows:

(1) four members appointed by the governor;

(2) one member appointed by the president pro tempore of the senate;

(3) one member appointed by the minority leader of the senate;

(4) one member appointed by the speaker of the house of representatives;

(5) one member appointed by the minority leader of the house of representatives;

(6) the state treasurer or his designee;



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(7) the secretary of state or his designee;

(8) a native American appointed by the New Mexico office of Indian affairs [Indian affairs department];

(9) the director of the human rights division of the labor department or his designee; and

(10) the chairman of the New Mexico state corporation commission [public regulation commission] or his designee.

D. Members of the commission shall be appointed initially for terms as follows: seven members shall be appointed for terms of two years and six members shall be appointed for terms of four years. The initial terms shall be selected by random drawing. After the expiration of the initial terms, all members shall be appointed for four-year terms. The initial commission shall be appointed within forty-five days of the effective date of this act. Vacancies resulting from the death or resignation of a member shall be filled by appointment by the commission chairman for the unexpired portion of the term of the member creating the vacancy. In filling any vacancy, the commission chairman may accept recommendations from the person who originally appointed the member creating the vacancy.

E. The members of the commission shall receive no compensation for their service.

F. The members of the commission shall select a chairman from among the members of the commission.

G. The commission shall appoint an executive director to coordinate all activities on the commission's behalf.

**History: Laws 1991, ch. 252, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1998, ch. 108, § 80 provided that references to the state corporation commission be construed as references to the public regulation commission.

Laws 2004, ch. 24, § 17 provided that statutory references to the New Mexico office of Indian affairs be changed to the Indian affairs department pursuant to an executive order issued in accordance with Laws 2003, Chapter 403.

## 28-19-2. Martin Luther King, Jr. fund; created.

A. There is created within the state treasury for the commission a fund that shall be designated as the "Martin Luther King, Jr. fund" that shall consist of appropriations, endowments and bequests.

B. Money from the fund shall be disbursed upon warrant of the secretary of finance and administration pursuant to vouchers submitted by the executive director of the commission for the purpose of carrying out the provisions of this act [28-19-1 to 28-19-4 NMSA 1978].

**History: Laws 1991, ch. 252, § 2.**

## 28-19-3. Duties of the commission.

The duties and powers of the commission shall include, but not be limited to, the following:

A. to develop a plan for the commemoration and celebration of the official legal holiday honoring Martin Luther King, Jr.;

B. to develop and submit to the governor and the legislature recommendations for specific commemorative activities to be undertaken by the state for the Martin Luther King, Jr. holiday;

C. to coordinate state plans and activities with federal plans and activities for the commemoration and celebration of Martin Luther King, Jr.'s birthday;

D. to develop, with other agencies of the state, an interpretive program that explores the historical, social, political and cultural themes associated with the life and works of Martin Luther King, Jr.;

E. to develop and acquire interpretive materials and publications on the significance of Martin Luther King, Jr.'s work and develop a commemorative program for state employees, school children and the general public;

F. to create a process to facilitate the implementation of the master plan project and other recommendations made by the commission;



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G. to prepare and provide to the general public advice, assistance and information on the Martin Luther King, Jr. holiday activities recommended by the commission;

H. to submit other studies, reports and recommendations to the governor and the legislature as are necessary with respect to activities for the continued commemoration and celebration of Martin Luther King, Jr.; and

I. to accept endowments and bequests for the Martin Luther King, Jr. fund.

**History: Laws 1991, ch. 252, § 3.**

## 28-19-4. Commission report.

The commission shall make an initial report to the governor and the legislature of its findings, conclusions, proposals and recommendations for the observance of the Martin Luther King, Jr. holiday within ninety days of the effective date of this act. The commission shall submit an annual report of its activities to the legislature no later than December 1 of each year. The first annual report shall be submitted no later than December 1, 1989.

**History: Laws 1991, ch. 252, § 4.**

**Compiler's notes.** — The phrase "effective date of this act" means April 4, 1991, the effective date of Laws 1991, Chapter 252.

# ARTICLE 20

# Nursing Mothers

Sec.
28-20-1. Right to breastfeed.
28-20-2. Use of a breast pump in the workplace.

## 28-20-1. [Right to breastfeed.]

A mother may breastfeed her child in any location, public or private, where the mother is otherwise authorized to be present.

**History: Laws 1999, ch. 117, § 1.**

**Cross references.** — For indecent exposure, *see* 30-9-14 NMSA 1978.

**Effective dates.** — Laws 1999, ch. 117 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 18, 1999, 90 days after adjournment of the legislature.

## 28-20-2. Use of a breast pump in the workplace.

A. In order to foster the ability of a nursing mother who is an employee to use a breast pump in the workplace, an employer, including the state and its political subdivisions, shall provide:

(1) a space for using the breast pump that is:

(a) clean and private;

(b) near the employee's workspace; and

(c) not a bathroom; and

(2) flexible break times.

B. An employer shall not be liable for:

(1) storage or refrigeration of breast milk;

(2) payment for a nursing mother's break time in addition to established employee breaks; or

(3) payment of overtime while a nursing mother is using a breast pump.

**History: Laws 2007, ch. 18, § 1.**

**Effective dates.** — Laws 2007, ch. 18, contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.



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# ARTICLE 21

# African American Affairs

Sec.
28-21-1. Short title.
28-21-2. Definitions.
28-21-3. Office created; powers and duties.
28-21-4. Fund created; administration.

## 28-21-1. Short title.

This act [28-21-1 to 28-21-4 NMSA 1978] may be cited as the "African American Affairs Act".

**History: Laws 1999, ch. 163, § 1.**

**Effective dates.** — Laws 1999, ch. 163, § 5, made the African American Affairs Act effective July 1, 2000.

**Temporary provisions.** — Laws 2020 (1st S.S.), ch. 1, § 1, effective June 26, 2020, provided:

A. The "New Mexico civil rights commission" is created and shall function from the date of its appointment until March 31, 2021.

B. The New Mexico civil rights commission consists of nine members, no more than five of which shall be from the same political party, appointed as follows:

(1) the governor shall appoint three members;

(2) the New Mexico legislative council shall appoint six members; and

(3) the appointing authorities shall make every effort to ensure economic, geographic, gender, cultural and racial diversity among the appointed members as well as at least one member experienced in law enforcement.

C. The commission shall elect a chair and may elect such officers as it deems necessary to carry out its duties.

D. Two absences from meetings of the commission constitutes grounds for removal of a member of the commission. Upon the request of the chair of the commission, the appointing authority shall replace the member who has failed to attend two meetings of the commission.

E. A majority of the members appointed constitutes a quorum for the transaction of business. The support of a majority of the members appointed is required for adoption of any action by the commission.

F. The members of the commission shall review policies and develop policy proposals for laws for the creation of a civil right of action for the deprivation, by a public body or a person acting on behalf of or under the authority of a public body, of any right, privilege or immunity secured by the constitution of New Mexico. The commission shall consider whether such right of action shall provide for monetary damages, including punitive damages, and other equitable relief, including injunctive relief. The commission shall consider whether attorney fees shall be mandated for a prevailing plaintiff, the statute of limitations for the right of action and indemnification of employees of a public body in cases involving the right of action.

G. The commission shall review the use of qualified immunity as a defense to liability by an employee of a public body for a claim that would be brought either under 42 U.S.C. Section 1983 or pursuant to the right of action considered by the commission in Subsection F of this section.

H. The commission shall review and assess the need for and costs of additional insurance policies for public employees and public bodies, or for persons acting on behalf of or under the authority of public bodies, if the policies or laws proposed pursuant to Subsections F and G of this section are adopted.

I. The commission shall submit a report of its findings, including specific recommendations and proposed legislation, to the governor, the New Mexico legislative council and the appropriate legislative interim committee dealing with courts, corrections and justice by November 15, 2020.

J. The commission may hire or contract for appropriate staff. Staff shall assist the commission as directed by the chair, including conducting interviews with parties that wish to express their views to the commission and synthesizing this information for the commission. The commission may request assistance from the legislative council service and the risk management division of the general services department.

K. Members of the commission are entitled to compensation pursuant to the provisions of the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] and shall receive no other perquisite, compensation or allowance.

L. As used in this section, "public body" means the executive, legislative and judicial branches of state and local governments and all advisory boards, commissions, committees, agencies or entities created by the constitution of New Mexico or any branch of government that receives public funding, including political subdivisions, special taxing districts, school districts and institutions of higher education.

## 28-21-2. Definitions.

As used in the African American Affairs Act:

A. "fund" means the office on African American affairs fund; and

B. "office" means the office on African American affairs.

**History: Laws 1999, ch. 163, § 2.**

**Effective dates.** — Laws 1999, ch. 163, § 5, made the African American Affairs Act effective July 1, 2000.



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## 28-21-3. Office created; powers and duties.

A. The "office on African American affairs" is created and attached administratively to the human services department.

B. The governor shall appoint a director, who shall work at the pleasure of the governor. The director shall employ other necessary employees, who shall be subject to the provisions of the Personnel Act [Chapter 10, Article 9 NMSA 1978].

C. The office, in cooperation with the Martin Luther King, Jr. commission, shall:

(1) study issues important to African Americans, including history and culture; education, scholarships and other financial assistance for education and career development; economic and social problems and issues such as jobs, housing, discrimination, family support, youth idleness and crime; and health care, maternal and child health, teen pregnancy, access and other health issues;

(2) secure recognition of African Americans' accomplishments and contributions to New Mexico and the United States;

(3) cooperate with and assist public and private entities dealing with issues important to African Americans;

(4) direct the operations of the office;

(5) where appropriate, conduct periodic conferences throughout the state to inform African Americans of the opportunities available to them through state and private sources, to encourage them to share their history and culture with other New Mexicans and participate in the social and political processes of their communities and to learn from conference participants their needs and problems; and

(6) otherwise act as an advocate for African American citizens of New Mexico.

D. Additionally, the office shall:

(1) act as a clearinghouse for information important to the African American community;

(2) function as the coordinating office for all services and activities of state agencies and programs pertaining to African Americans;

(3) encourage funding and implementation of training programs and other opportunities for African Americans;

(4) promote and develop programs about community resources designed to meet the needs of African Americans;

(5) prepare and submit a budget for the office; and

(6) publish an annual report on the activities and services of the office.

E. The office may:

(1) adopt and promulgate rules in accordance with the State Rules Act [Chapter 14, Article 4 NMSA 1978] to carry out the duties of the office;

(2) accept gifts, grants, donations, bequests and devises from any source to be used to carry out its duties; and

(3) enter into contracts.

**History: Laws 1999, ch. 163, § 3.**

**Effective dates.** — Laws 1999, ch. 163, § 5, made the African American Affairs Act effective July 1, 2000.

**Temporary provisions.** — Laws 2014, ch. 68, § 1, effective May 21, 2014, provided:

A. By July 1, 2014, the director of the office on African American affairs shall create and implement a one-year pilot program in Bernalillo county. The pilot program shall seek to reduce infant mortality and enhance maternal health among African American residents.

B. The office on African American affairs shall partner with competent direct service providers to employ and track implementation of a prenatal health care model known as "centering" among pregnant African American women that has been proven nationally to reduce infant mortality and premature birth rates.

C. The office on African American affairs shall design and implement a culturally competent tool for providing health care education and outreach to pregnant African American women living in Bernalillo county. Women participating in the pilot program shall be offered solutions for enhancing their health during pregnancy and reducing the risk of infant mortality.

D. The office on African American affairs shall establish benchmarks for the pilot program. It shall collect and analyze qualitative data about the pilot program's outcomes and compare these outcomes to the benchmarks.

E. By November 1, 2015, the director of the office on African American affairs shall report the findings and recommendations arising from the pilot program to the governor, the secretary of health and the legislative health and human services committee.



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## 28-21-4. Fund created; administration.

The "office on African American affairs fund" is created in the state treasury. The fund shall consist of gifts, grants, donations and bequests. Money in the fund at the end of any fiscal year shall not revert. The fund shall be administered by the office, and disbursements from the fund shall be made on warrant drawn by the secretary of finance and administration pursuant to vouchers signed by the director of the office or his authorized representative.

**History: Laws 1999, ch. 163, § 4.**

**Effective dates.** — Laws 1999, ch. 163, § 5, made the African American Affairs Act effective July 1, 2000.

# ARTICLE 22

# Religious Freedom Restoration

Sec.
28-22-1. Short title.
28-22-2. Definitions.
28-22-3. Religious freedom protected; exceptions.
28-22-4. Private remedies.
28-22-5. Construction of act.

## 28-22-1. Short title.

Sections 1 through 5 [28-22-1 to 28-22-5 NMSA 1978] of this act may be cited as the "New Mexico Religious Freedom Restoration Act".

**History: Laws 2000 (2nd S.S.), ch. 17, § 1.**

**Effective dates.** — Laws 2000 (2nd S.S.), ch. 17 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective July 3, 2000, 90 days after the adjournment of the legislature.

**ANNOTATIONS**

**The New Mexico Religious Freedom Restoration Act does not apply to actions between private parties.** — Where plaintiff offered wedding photography services to the general public; plaintiff's business was a public accommodation under the Human Rights Act, Section 28-1-1 NMSA 1978 et seq.; plaintiff refused to photograph a same-sex commitment ceremony between defendant and defendant's partner on religious grounds, defendant filed a discrimination complaint against plaintiff with the human rights commission; and the human rights commission determined that plaintiff had violated the act by discriminating against defendant on the basis of defendant's sexual orientation, the New Mexico Religious Freedom Restoration Act, Section 28-22-1 NMSA 1978 et seq., did not apply to the enforcement of the Human Rights Act by the commission, because the commission acted as an administrative tribunal, not as a party to the suit between plaintiff and defendant as private parties. *Elane Photography, LLC v. Willock*, 2013-NMSC-040, *aff'g* 2012-NMCA-086, 284 P.3d 428.

**The New Mexico Religious Freedom Restoration Act, Section 28-22-1 NMSA 1978 et seq. applies only in cases that involve a governmental agency as a adverse party.** *Elane Photography, LLC v. Willock*, 2012-NMCA-086, 284 P.3d 428, cert. granted, 2012-NMCERT-008.

**The act does not apply in cases that involve non-governmental parties.** — Where defendant filed a discrimination claim with the human rights commission alleging that plaintiff violated the Human Rights Act, Section 28-1-1 NMSA 1978 et seq., by refusing on religious and moral grounds to photograph defendant's commitment ceremony with defendant's same-sex partner; and plaintiff claimed that the act violated plaintiff's freedom of religion because the act forced plaintiff to photograph same-sex marriages in violation of plaintiff's owner's religious belief that marriage is the union of one man and one woman, the New Mexico Religious Freedom Restoration Act, Section 28-22-1 NMSA 1978 et seq., did not apply to the litigation between plaintiff and defendant because neither party was a governmental agency. *Elane Photography, LLC v. Willock*, 2012-NMCA-086, 284 P.3d 428, cert. granted, 2012-NMCERT-008.

## 28-22-2. Definitions.

As used in the New Mexico Religious Freedom Restoration Act:

A. "free exercise of religion" means an act or a refusal to act that is substantially motivated by religious belief; and

B. "government agency" means the state or any of its political subdivisions, institutions, departments, agencies, commissions, committees, boards, councils, bureaus or authorities.



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**History: Laws 2000 (2nd S.S.), ch. 17, § 2.**
**Effective dates.** — Laws 2000 (2nd S.S.), ch. 17 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective July 3, 2000, 90 days after the adjournment of the legislature.

## 28-22-3. Religious freedom protected; exceptions.

A government agency shall not restrict a person's free exercise of religion unless:

A. the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions; and

B. the application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

**History: Laws 2000 (2nd S.S.), ch. 17, § 3.**
**Effective dates.** — Laws 2000 (2nd S.S.), ch. 17 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective July 3, 2000, 90 days after the adjournment of the legislature.

**ANNOTATIONS**

**The criminal sexual contact of a minor and contributing to the delinquency of a minor statutes do not violate the Religious Freedom Restoration Act.** — Where defendant, who was the spiritual leader of a religious group that lived together, was convicted of criminal sexual contact of a minor and of contributing to the delinquency of a minor based on unclothed experiences with two teenage children; and defendant claimed that because defendant believed that touching the children was a religious act, defendant was not guilty of committing a crime and that the criminal sexual contact of a minor statute, Section 30-9-13 NMSA 1978 and the contributing to the delinquency of a minor statute, Section 30-6-3 NMSA 1978, violate the Religious Freedom Restoration Act, because the statutes are laws of general applicability that do not directly discriminate against or among religions, the protection of minors from sexual abuse and delinquency is a compelling governmental interest, and the statutes are the least restrictive means of achieving the government's goal of protecting minors from sexual abuse and delinquency, the statutes do not violate the act. *State v. Bent*, 2013-NMCA-108, cert. denied, 2013-NMCERT-012.

## 28-22-4. Private remedies.

A. A person whose free exercise of religion has been restricted by a violation of the New Mexico Religious Freedom Restoration Act may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government agency, including:

(1) injunctive or declaratory relief against a government agency that violates or proposes to violate the provisions of the New Mexico Religious Freedom Restoration Act; and

(2) damages pursuant to the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978], reasonable attorney fees and costs.

B. Immunity from liability of the government agency and its employees is waived for an action brought pursuant to this section.

**History: Laws 2000 (2nd S.S.), ch. 17, § 4.**
**Effective dates.** — Laws 2000 (2nd S.S.), ch. 17 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective July 3, 2000, 90 days after the adjournment of the legislature.

## 28-22-5. Construction of act.

Nothing in the New Mexico Religious Freedom Restoration Act authorizes a government agency to burden a person's free exercise of religion. The protection of the free exercise of religion granted in that act is in addition to the protections granted by federal law and the state and federal constitutions. The New Mexico Religious Freedom Restoration Act does not affect the grant of benefits or tax exemptions to religious organizations nor does it impair any other exemptions granted by law.

**History: Laws 2000 (2nd S.S.), ch. 17, § 5.**
**Effective dates.** — Laws 2000 (2nd S.S.), ch. 17 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective July 3, 2000, 90 days after the adjournment of the legislature.



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# ARTICLE 23

# Fair Pay for Women

Sec.
28-23-1. Short title.
28-23-2. Definitions.
28-23-3. Prohibition on paying employees less for same work.
28-23-4. Grievance procedure.
28-23-5. Retaliation prohibited.
28-23-6. Enforcement; penalties; remedies.

## 28-23-1. Short title.

This act [28-23-1 to 28-23-6 NMSA 1978] may be cited as the "Fair Pay for Women Act".

**History: Laws 2013, ch. 12, § 1.**

**Effective dates.** — Laws 2013, ch. 12 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

ANNOTATIONS

**Fair Pay for Women Act inapplicable on federal enclave.** — Congress has exclusive authority over federal enclaves, and therefore plaintiffs' claims were barred by the federal enclave doctrine, where plaintiffs, employees of Sandia corporation (Sandia labs) located on Kirtland air force base, brought state-law employment discrimination claims against Sandia labs, a federally funded research and development contractor operating under contract for the department of energy. *Kennicott v. Sandia Corp.*, 314 F.Supp.3d 1142 (D.N.M. 2018)

## 28-23-2. Definitions.

As used in the Fair Pay for Women Act:

A. "commission" means the human rights commission;

B. "director" means the chief of the human rights bureau of the labor relations division of the workforce solutions department;

C. "employ" means suffer or permit to work;

D. "employee" means any individual employed by an employer;

E. "employer" means a person employing four or more employees and any person acting for an employer;

F. "unpaid wage" means the difference between the wages paid to the employee and the wages that would have been paid to the employee had the discrimination not occurred; and

G. "wage" means compensation for performance of services by an employee for an employer whether paid by the employer or another person, including cash value of all compensation paid in any medium other than cash.

**History: Laws 2013, ch. 12, § 2.**

**Effective dates.** — Laws 2013, ch. 12 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

ANNOTATIONS

**The state of New Mexico is an employer subject to claims brought under the Fair Pay for Women Act.** — The state, an entity capable of suing and being sued, is a legal entity that falls within the definition of "person" and thus is subject to suit for violating the terms of the Fair Pay for Women Act. *Wolinsky v. N.M. Corrections Dep't*, 2018-NMCA-071, cert. denied.

**State employee's right to pursue wage discrimination claims.** — Where plaintiff sued her employer, the New Mexico corrections department, for sex-based pay discrimination in violation of the Fair Pay for Women Act (FPWA), alleging that her salary was approximately $8,000 less than that of a male employee in the same position, the district court erred in dismissing plaintiff's case based on the conclusion that defendant, a state agency, was not subject to the FPWA, because the state, an entity capable of suing and being sued, is a legal entity that falls within the definition of "person" and thus is subject to suit for violating the terms of the FPWA; the FPWA provides state employees the same right to pursue sex-based wage discrimination claims that persons employed by private employers possess. *Wolinsky v. N.M. Corrections Dep't*, 2018-NMCA-071, cert. denied.

## 28-23-3. Prohibition on paying employees less for same work.

A. No employer shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in the establishment



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at a rate less than the rate that the employer pays wages to employees of the opposite sex in the establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility and that are performed under similar working conditions, except where the payment is made pursuant to a:

(1) seniority system;

(2) merit system; or

(3) system that measures earnings by quantity or quality of production.

B. An employer shall not reduce the wage of an employee to comply with this section.

C. No agreement between an employer and an employee for a specific wage in violation of the Fair Pay for Women Act shall prevent the employee from raising a claim based on a violation of the Fair Pay for Women Act.

**History: Laws 2013, ch. 12, § 3.**

**Effective dates.** — Laws 2013, ch. 12 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

ANNOTATIONS

**Fair Pay for Women Act inapplicable on federal enclave.** — Congress has exclusive authority over federal enclaves, and therefore plaintiffs' claims were barred by the federal enclave doctrine, where plaintiffs, employees of Sandia corporation (Sandia labs) located on Kirtland air force base, brought state-law employment discrimination claims against Sandia labs, a federally funded research and development contractor operating under contract for the department of energy. *Kennicott v. Sandia Corp.*, 314 F.Supp.3d 1142 (D.N.M. 2018)

**The state of New Mexico is an employer subject to claims brought under the Fair Pay for Women Act.** — The state, an entity capable of suing and being sued, is a legal entity that falls within the definition of "person" and thus is subject to suit for violating the terms of the Fair Pay for Women Act. *Wolinsky v. N.M. Corrections Dep't*, 2018-NMCA-071, cert. denied.

**State employee's right to pursue wage discrimination claims.** — Where plaintiff sued her employer, the New Mexico corrections department, for sex-based pay discrimination in violation of the Fair Pay for Women Act (FPWA), alleging that her salary was approximately $8,000 less than that of a male employee in the same position, the district court erred in dismissing plaintiff's case based on the conclusion that defendant, a state agency, was not subject to the FPWA, because the state, an entity capable of suing and being sued, is a legal entity that falls within the definition of "person" and thus is subject to suit for violating the terms of the FPWA; the FPWA provides state employees the same right to pursue sex-based wage discrimination claims that persons employed by private employers possess. *Wolinsky v. N.M. Corrections Dep't*, 2018-NMCA-071, cert. denied.

## 28-23-4. Grievance procedure.

A. A person claiming to be aggrieved by an unlawful discriminatory practice in violation of the Fair Pay for Women Act may:

(1) maintain an action to establish liability and recover damages and injunctive relief in any court of competent jurisdiction by any one or more employees on behalf of the employee or employees or on behalf of other employees similarly situated; or

(2) seek relief under the Human Rights Act [Chapter 28, Article 1 NMSA 1978] pursuant to the process set out in Sections 28-1-10 through 28-1-13 NMSA 1978.

B. The court in any action brought under this section shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow costs of the action and reasonable attorney fees to be paid by the defendant. In any proceedings brought pursuant to the provisions of this section, the employee shall not be required to pay any filing fee or other court costs necessarily incurred in such proceedings.

C. The court in any action brought under this section may order appropriate injunctive relief, including requiring an employer to post in the place of business a notice describing violations by the employer as found by the court or a copy of a cease and desist order applicable to the employer.

D. An action arising under the Fair Pay for Women Act shall be brought no later than two years from the last date of the employee's employment.

E. A person claiming to be aggrieved by an unlawful discriminatory practice in violation of the Fair Pay for Women Act need not exhaust state administrative remedies.

F. The initiation of an administrative process under the Human Rights Act pursuant to the process set out in Sections 28-1-10 through 28-1-13 NMSA 1978 shall toll the statute of limitations for initiating a claim under the Fair Pay for Women Act.



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**History: Laws 2013, ch. 12, § 4.**
**Effective dates.** — Laws 2013, ch. 12 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

## 28-23-5. Retaliation prohibited.

It is a violation of the Fair Pay for Women Act for an employer or any other person to discharge, demote, deny promotion to or in any other way discriminate against an employee in the terms or conditions of employment in retaliation for the person asserting a claim or right pursuant to the Fair Pay for Women Act or assisting another person to do so, or for informing another person about employment rights or other rights provided by law.

**History: Laws 2013, ch. 12, § 5.**
**Effective dates.** — Laws 2013, ch. 12 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

## 28-23-6. Enforcement; penalties; remedies.

A. An employer who violates a provision of the Fair Pay for Women Act shall be liable to the affected employee for damages and equitable relief, including employment, reinstatement and promotion. Damages shall be calculated on the basis of:

(1) the affected employee's unpaid wages and the damages from retaliation;

(2) all other actual damages; and

(3) treble damages.

B. The court may, in its sound discretion, not award treble damages or award any amount thereof not to exceed the amount specified in this section if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that the employer had reasonable grounds for believing that the employer's act or omission was not a violation of the Fair Pay for Women Act.

C. An employer who violates a provision of the Fair Pay for Women Act may also be liable to the employee for punitive damages.

D. Recovery of unpaid wages is limited to six years prior to the date of the last violation of the Fair Pay for Women Act.

**History: Laws 2013, ch. 12, § 6.**
**Effective dates.** — Laws 2013, ch. 12 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

# ARTICLE 24

# Gender-Free Restrooms

Sec.
28-24-1. Short title.
28-24-2. Definitions.
28-24-3. Public facility availability.

## 28-24-1. Short title.

This act [28-24-1 through 28-24-3 NMSA 1978] may be cited as the "Gender-Free Restrooms Act".

**History: Laws 2019, ch. 109, § 1.**
**Effective dates.** — Laws 2019, ch. 109, § 4 made Laws 2019, ch. 109, § 1 effective July 1, 2019.



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## 28-24-2. Definitions.

As used in the Gender-Free Restrooms Act:

A. "gender identity" means a person's self- perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth;

B. "gender-neutral signage" means a sign that indicates a restroom without preference or distinction to a specific gender identity or sex;

C. "public accommodation" means any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private; and

D. "single-user toilet facility" means a single- occupancy restroom with an outer door that can be locked by the occupant.

**History: Laws 2019, ch. 109, § 2.** **Effective dates.** — Laws 2019, ch. 109, § 4 made Laws 2019, ch. 109, § 2 effective July 1, 2019.

## 28-24-3. Public facility availability.

A. A single-user toilet facility that exists or is constructed on or after July 1, 2019 in a public accommodation shall be:

(1) made available to any person regardless of gender identity or sex;

(2) designated for use by not more than one occupant at a time or for family or assisted use; and

(3) identified with gender-neutral signage.

B. Nothing in this section shall be construed to require construction of a new, single-user toilet facility if one does not exist in a public accommodation.

**History: Laws 2019, ch. 109, § 3.** **Effective dates.** — Laws 2019, ch. 109, § 4 made Laws 2019, ch. 109, § 3 effective July 1, 2019.



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# CHAPTER 29

# Law Enforcement

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# ARTICLE 1

## Peace Officers in General

Sec.


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## 29-1-1. Investigation of criminal violations; commencement of prosecution; cooperation; removal.

It is hereby declared to be the duty of every sheriff, deputy sheriff, constable and every other peace officer to investigate all violations of the criminal laws of the state which are called to the attention of any such officer or of which he is aware, and it is also declared the duty of every such officer to diligently file a complaint or information, if the circumstances are such as to indicate to a reasonably prudent person that such action should be taken, and it is also declared his duty to cooperate with and assist the attorney general, district attorney or other prosecutor, if any, in all reasonable ways. Such cooperation shall include the prompt reporting of all arrests for liquor law violations at licensed liquor establishments to the department of alcoholic beverage control. Failure to perform his duty in any material way shall subject such officer to removal from office and payment of all costs of prosecution.

**History: Laws 1921, ch. 170, § 1; C.S. 1929, § 33-4433; 1941 Comp., § 40-101; 1953 Comp., § 31-1-1; Laws 1979, ch. 37, § 1.**

**Cross references.** — For New Mexico mounted patrol, *see* 29-6-1 NMSA 1978 et seq.

For sheriffs generally, *see* 4-41-2 NMSA 1978 et seq.

For state parks and recreation areas, police powers of superintendent and state park and recreation commission employees, *see* 16-2-30 NMSA 1978.

For game laws, enforcement, *see* 17-2-19 NMSA 1978.

For trappers' and fur dealers' law, duty to enforce, *see* 17-5-8 NMSA 1978.

For disabled persons, search of person, clothing and effects for identifying device, *see* 28-8-2, 28-8-3 NMSA 1978.

For carrying of weapons by peace officers, *see* 30-7-2 NMSA 1978.

For resisting or obstructing an officer, penalty, *see* 30-22-1 NMSA 1978.

For forest fire laws, duties, *see* 30-32-3 NMSA 1978.

For uniformed guards of corrections department, peace officer powers, *see* 33-1-10 NMSA 1978.

For Detoxification Reform Act, *see* Chapter 43, Article 2 NMSA 1978.

For arrests under motor vehicle laws, *see* 66-8-122 NMSA 1978 et seq.

For livestock board, sheriffs and peace officers to execute orders of, *see* 77-3-2, 77-3-10 NMSA 1978.

### ANNOTATIONS

**Plainclothes officer can intrude when he observes truck driven erratically.** — This section does not preclude plainclothes officer from making intrusion into pickup truck by opening a door where officer has observed truck being driven rapidly and in an erratic manner and, reaching truck after it has stopped, has observed that occupant appeared incoherent and lacked understanding of request to roll down window. Such facts warranted the officer, as person of reasonable caution, to open the pickup door. *State v. Ray*, 1977-NMCA-100, 91 N.M. 67, 570 P.2d 605, cert. denied, 91 N.M. 4, 569 P.2d 413.

**Liability for failure to take proper actions.** — A governmental entity and its law enforcement officers may be held liable, after receiving notice, for negligently failing to take adequate action to protect a citizen from imminent danger and injury because of failure to adopt proper procedures for responding to and investigating a reported criminal act. *Schear v. Board of Cnty. Comm'rs*, 1984-NMSC-079, 101 N.M. 671, 687 P.2d 728.

**Liability for failure to cooperate with prosecutors.** — The statutory obligations that officers cooperate with prosecutors and bring defendants before the courts are primarily designed to protect the public by ensuring that dangerous criminals are removed from society and brought to justice; accordingly, as with the duty to investigate crimes under this section, the duties of cooperating with prosecutors, diligently filing complaints, and bringing defendants before the courts inure to the benefit of private individuals, and the violation of these statutory duties may give rise to a cognizable claim under the Tort Claims Act, Sections 41-4-1 through 41-4-27 NMSA 1978. *Weinstein v. City of Santa Fe ex rel. Santa Fe Police Dep't*, 1996-NMSC-021, 121 N.M. 646, 916 P.2d 1313.

**Liability for failure to detain intoxicated driver.** — Law enforcement officers may be liable if they fail to detain an intoxicated driver, who then acts with the requisite level of intent to commit a battery while driving intoxicated. *Blea v. City of Espanola*, 1994-NMCA-008, 117 N.M. 217, 870 P.2d 755, cert. denied, 117 N.M. 328, 871 P.2d 984.

**Immunity from liability for wrongful issuance of warrant.** — Police officers and assistant district attorney were immune from liability for alleged wrongful issuance and service of a search warrant which was valid on its face in which court ordered police officers to search for child, take him into custody, keep him safely and make a return of the proceedings on the warrant. *Torres v. Glasgow*, 1969-NMCA-053, 80 N.M. 412, 456 P.2d 886.

**Class of persons to be protected by duty to investigate.** — In creating the duty to investigate, the legislature did not limit the traditional tort concept of foreseeability that would otherwise define the intended beneficiaries of the statute; all persons who are foreseeably at risk within the general population are within the class of persons to be protected by the duty to investigate. *Torres v. State*, 1995-NMSC-025, 119 N.M. 609, 894 P.2d 386.

When any person of the public, regardless of geographic location, is foreseeably at risk of injury by a party reported to be in violation of the criminal law, officers undertaking the investigation of the crime owe that person a



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duty to exercise the care ordinarily exercised by prudent and qualified officers. *Torres v. State*, 1995-NMSC-025, 119 N.M. 609, 894 P.2d 386.

**Foreseeability of criminal act.** — Since it is not unlikely that a murderer would flee the city in which he committed the crime and, given modern-day transportation, that this person would flee across state lines, and since the police knew or should have known that it is possible that a person who kills randomly with no motive would kill again, the harm in this case was not so removed from the conduct of the defendants that the court may say as a matter of law that the victims were unforeseeable; thus foreseeability is a question for the jury to determine by giving thought to, among other things, the time, space, and distance between the alleged failure to investigate and the deaths of the two victims. *Torres v. State*, 1995-NMSC-025, 119 N.M. 609, 894 P.2d 386.

**Sufficiency of allegations in complaint.** — Allegations in a complaint that sheriff deputies failed to apprehend a drunk driver or investigate a tavern disturbance, and that this failure proximately caused personal injury to the plaintiff's family, sufficed to state a cause of action for negligent violation of a right secured under New Mexico law for which Section 41-4-12 NMSA 1978 waives sovereign immunity. *California First Bank v. State Dep't of Alcoholic Beverage Control*, 1990-NMSC-106, 111 N.M. 64, 801 P.2d 646.

**Constables may carry firearms** because they are peace officers. 1963-64 Op. Att'y Gen. No. 63-117.

**Magistrate or municipal court case may not be continued where appeal filed.** — A peace officer who has prosecuted a criminal case in magistrate or municipal court may not continue to prosecute the case in district court after an appeal of the magistrate or municipal court judgment has been filed in district court. 1989 Op. Att'y Gen. No. 89-27.

**Sheriff may file complaint without consent of district attorney.** — The sheriff may file a complaint against a party for game law violation without first obtaining the consent of, or consulting, the district attorney. He should, before filing any criminal charge, consult his district attorney, except perhaps in cases of emergency where the sheriff waives a warrant on hearing in order to arrest someone who is believed about to leave the country. 1939-40 Op. Att'y Gen. 39-3257.

**When district attorney has authority to appear in court.** — The district attorney as chief law enforcement officer has the authority to appear in any case filed before any justice of the peace (now magistrate court) in any county in his district when, in his opinion, the interests of the people in his district require his participation in any case filed before a justice of the peace (magistrate) in said district. 1953-54 Op. Att'y Gen. No. 53-5669.

**Law reviews.** — For note, "Criminal Procedure - New Mexico Denies Fifth Amendment Protection to Corporations: *John Doe and Five Unnamed Corporations v. State ex rel. Governor's Organized Crime Prevention Commission*," see 23 N.M.L. Rev. 315 (1993).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 70 Am. Jur. 2d Sheriffs, Police, and Constables §§ 28 to 32, 46 et seq.

Constitutionality of authority for arrest by peace officers without a warrant, 1 A.L.R. 585.

Peace officers' criminal responsibility for killing or wounding one whom they wished to identify, 18 A.L.R. 1368, 61 A.L.R. 321.

Mobs, liability for failure to prevent killing by, 60 A.L.R. 873.

Territorial extent of power to arrest under warrant, 61 A.L.R. 377.

Personal immunity, validity and construction of legislation, conferring on police officers for acts in course of duty, 163 A.L.R. 1435.

Civil liability of law enforcement officers for malicious prosecution, 28 A.L.R.2d 646, 81 A.L.R.4th 1031.

Personal liability of sheriff, or his bond, for negligently causing personal injury or death, 60 A.L.R.2d 873.

Municipal liability for personal injuries resulting from police officer's use of excessive force in performance of duty, 88 A.L.R.2d 1330.

Liability of police officer or his bond for injuries or death of third persons resulting from operation of motor vehicle by subordinate, 15 A.L.R.3d 1189.

Nonfeasance: personal liability of policeman, sheriff or similar peace officer or his bond for injury suffered as a result of failure to enforce law or arrest lawbreaker, 41 A.L.R.3d 700.

Liability of prison authorities for injury to prisoner directly caused by assault by other prisoner, 41 A.L.R.3d 1021.

Sexual misconduct or irregularity as amounting to "conduct unbecoming an officer," justifying officer's demotion or removal or suspension from duty, 9 A.L.R.4th 614.

Liability for false arrest or imprisonment under warrant as affected by mistake as to identity of person arrested, 39 A.L.R.4th 705.

Right to compensation for real property damaged by law enforcement personnel in course of apprehending suspect, 23 A.L.R.5th 834.

When does police officer's use of force during arrest become so excessive as to constitute violation of constitutional rights, imposing liability under Federal Civil Rights Act of 1871 (42 USCS § 1983), 60 A.L.R. Fed. 204.

62 C.J.S. Municipal Corporations §§ 574, 575, 577, 578; 80 C.J.S. Sheriffs and Constables §§ 10, 18, 26, 35 to 42.

## 29-1-2. [Stolen livestock and other property; duties.]

That it shall be the duty of all sheriffs, deputy sheriffs and constables, in their respective counties, to employ all lawful means to immediately trace and discover all livestock and other property which may have been stolen or unlawfully taken from the possession of the true owner thereof.

**History: Laws 1921, ch. 109, § 1; C.S. 1929, § 4-201; 1941 Comp., § 40-102; 1953 Comp., § 39-1-2.**

**Cross references.** — For livestock board inspector's duties, *see* 77-9-33 NMSA 1978.

For motor or other vehicle transporting livestock stopped for purpose of examining certificate, *see* 77-9-46 NMSA 1978.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 70 Am. Jur. 2d Sheriffs, Police, and Constables §§ 46, 48, 49 to 51, 54.

80 C.J.S. Sheriffs and Constables § 52 et seq.



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## 29-1-3. [Arrest and detention of escaped prisoners.]

All persons [Any person] who shall have been committed to jail, under any criminal charge, and shall before the final trial of the cause for which he was imprisoned, or before the completion of the sentence, in case he shall be convicted in the court in which the charge may be pending, escape from jail, and any time thereafter shall be found in any county, precinct or demarcation of this state, he shall be arrested and imprisoned again, until the judgment of the court may be had or the sentence fully complied with.

**History: Laws 1861-1862, p. 14; C.L. 1865, ch. 61, § 48; C.L. 1884, § 832; C.L. 1897, § 1226; Code 1915, § 3060; C.S. 1929, § 75-129; 1941 Comp., § 40-103; 1953 Comp., § 39-1-3.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For penalty for permitting prisoner to escape, *see* 30-22-11 NMSA 1978.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Extradition of escaped convict, 78 A.L.R. 419.

62 C.J.S. Municipal Corporations §§ 563, 574, 575; 80 C.J.S. Sheriffs and Constables § 66 et seq.

## 29-1-4. [Officers' duties under 29-1-3.]

It shall be the duty of judicial and ministerial officers, in their respective counties, precincts or demarcations, who shall see or receive information that any of the persons mentioned in the foregoing section [29-1-3 NMSA 1978], are to be found in his county, precinct or demarcation, notwithstanding he shall have escaped at any time, to apprehend as soon as possible the fugitive, and send him forthwith to the jail of the respective county, where he shall be kept, with all possible security in order to prevent his making his escape again.

**History: Laws 1861-1862, p. 14; C.L. 1865, ch. 61, § 49; C.L. 1884, § 833; C.L. 1897, § 1227; Code 1915, § 3061; C.S. 1929, § 75-130; 1941 Comp., § 40-104; 1953 Comp., § 39-1-4.**

ANNOTATIONS

**No tort liability for failure to inform out-of-state officials of escape.** — In a wrongful death action arising out of the escape of state prisoners, who crossed over into Colorado and killed a resident thereof, the New Mexico State police, who were informed of the escape soon after it occurred and diligently attempted to apprehend the escapees as soon as possible, but who did not inform Colorado officials, did not breach any duty giving rise to tort liability. *Wittkowski v. State Corr. Dep't*, 1985-NMCA-066, 103 N.M. 526, 710 P.2d 93, cert. quashed, 103 N.M. 442, 708 P.2d 1043, *overruled on other grounds*, *Silva v. State*, 1987-NMSC-107, 106 N.M. 472, 745 P.2d 380.

## 29-1-5. [Penalty for violation by sheriff, constable or deputy; surety's liability.]

If any sheriff, deputy sheriff or constable, or any deputy shall be found guilty of delay, negligence or neglect in compliance with the provisions of the preceding section [29-1-4 NMSA 1978], on complaint being made before any justice of the peace [magistrate] in the county, he shall be fined in any sum not less than fifty dollars [($50.00)], nor more than one hundred dollars [($100)], which shall be collected of them or their securities.

**History: Laws 1861-1862, p. 14; C.L. 1865, ch. 61, § 50; C.L. 1884, § 834; C.L. 1897, § 1228; Code 1915, § 3062; C.S. 1929, § 75-131; 1941 Comp., § 40-105; 1953 Comp., § 39-1-5.**

**Compiler's notes.** — The compilers of the 1915 code deleted "coroner" after "deputy sheriff" and substituted "with the provisions of the preceding section" for "herewith".

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. The office of justice of the peace was abolished, and the jurisdiction, powers and duties were transferred to the magistrate court. *See* 35-1-38 NMSA 1978.

## 29-1-6. [Penalty for violation by magistrate.]

If any justice of the peace [magistrate] shall be guilty of a violation of Section 29-1-4 NMSA 1978, on conviction thereof before the district court, he shall be fined in any sum not less than twenty-five dollars [($25.00)] nor more than fifty dollars [($50.00)].



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**History: Laws 1861-1862, p. 14; C.L. 1865, ch. 61, § 51; C.L. 1884, § 835; C.L. 1897, § 1229; Code 1915, § 3063; C.S. 1929, § 75-132; 1941 Comp., § 40-106; 1953 Comp., § 39-1-6.**

**Compiler's notes.** — The compilers of the 1915 code deleted a proviso at the end of this section which provided that all fines collected under this act shall go to the county treasury of the county in which the violation shall have been committed, and it shall be the duty of the attorney general to prosecute all charges made under the provisions of this act, in the district court of the respective county. For disposition of fines and penalties, *see* N.M. Const., art. XII, § 4.

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. The office of justice of the peace was abolished, and the jurisdiction, powers and duties were transferred to the magistrate court. *See* 35-1-38 NMSA 1978.

## 29-1-7. Execution of process; officer may call aid.

In all cases when, by the common law or a statute of this state, any officer is authorized to execute any process, he may call to his aid all inhabitants above the age of majority in the county in which the officer is authorized to act.

**History: Laws 1850-1851, p. 163; C.L. 1865, ch. 89, § 1; C.L. 1884, § 2612; C.L. 1897, § 3785; Code 1915, § 4537; C.S. 1929, § 106-108; 1941 Comp., § 40-107; 1953 Comp., § 39-1-7; Laws 1973, ch. 61, § 1.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Voluntary exposure to unnecessary danger by insured, by aiding peace officer, 17 A.L.R. 191.

6A C.J.S. Arrest § 50.

## 29-1-8. [Penalty for refusing to aid officer; action to recover.]

If any person shall refuse or neglect to obey the summons of any such officer, such person shall be fined in any sum not exceeding fifty dollars [($50.00)], nor less than five dollars [($5.00)], to be recovered by suit before any justice of the peace [magistrate], to the use of the county in which said suit may originate.

**History: Laws 1850-1851, p. 163; C.L. 1865, ch. 89, § 2; C.L. 1884, § 2613; C.L. 1897, § 3786; Code 1915, § 4538; C.S. 1929, § 106-109; 1941 Comp., § 40-108; 1953 Comp., § 39-1-8.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. The office of justice of the peace was abolished, and the jurisdiction, powers and duties were transferred to the magistrate court. *See* 35-1-38 NMSA 1978.

**Cross references.** — For refusing to aid an officer, petty misdemeanor, *see* 30-22-2 NMSA 1978.

## 29-1-9. Appointment of peace officers; citizenship certificate of appointment; exceptions.

No sheriff of a county, mayor of a city or other person authorized by law to appoint special deputy sheriffs, marshals, policemen or other peace officers in the state of New Mexico to preserve the public peace and to prevent and quell public disturbances shall appoint as such special deputy sheriff, marshal, policeman or other peace officer any person who shall not be a citizen of the United States of America. No person shall assume or exercise the functions, powers, duties and privileges incident and belonging to the office of special deputy sheriff, marshal, policeman or other peace officer without first having received an appointment in writing from a person authorized by law to appoint special deputy sheriffs, marshals, policemen or other peace officers; provided that nothing in this section shall apply to lawfully appointed United States marshals or to deputies of those marshals or to railroad peace officers appointed pursuant to Section 63-2-18 NMSA 1978 in the performance of their duties as peace officers.

This section shall not apply in times of riot or unusual disturbance and when so declared by the public proclamation of the governor of the state.

**History: Laws 1891, ch. 60, §§ 1, 2; C.L. 1897, §§ 743, 744; Code 1915, § 1256; C.S. 1929, § 33-4412; 1941 Comp., § 40-109; 1953 Comp., § 39-1-9; 1979, ch. 98, § 1; 2006, ch. 30, § 2.**

**Compiler's notes.** — The first paragraph of this section derives from Laws 1891, ch. 60, § 1, and the second paragraph was a proviso clause of § 2 of the same act. The first part of Laws 1891, ch. 60, § 2, relating to impersonating a peace officer, formerly compiled as 40-16-1, 1953 Comp., was repealed by Laws 1963, ch. 303, § 30-1.

**Cross references.** — For deputy sheriff, appointment and qualifications, *see* 4-41-5, 4-41-8, 4-41-10 NMSA 1978.



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**The 2006 amendment,** effective March 2, 2006, deleted references to special constables; required that appointed peace officers be citizens of the United States of America; and provided that appointed peace officers be appointed by a person authorized by law to appoint such officers.

ANNOTATIONS

**Legislature may set restrictions upon public employees.** — Nothing in the constitution prevents the legislature setting such restrictions as it sees fit upon public employees. The legislature has exercised its power in Section 10-1-5 NMSA 1978 (repealed) over all public employees, and in this section and Section 4-41-10 NMSA 1978, additional requirements are stated for deputy sheriffs and other peace officers. 1959-60 Op. Att'y Gen. No. 60-222.

**Wildlife law enforcement officers can be required to hold New Mexico and United States citizenship.** 1979 Op. Att'y Gen. No. 79-30.

**At common law sheriff could appoint peace officers.** — At common law a sheriff could appoint an undersheriff and as many general or special deputies as the public service may have required. 1957-58 Op. Att'y Gen. No. 57-83.

**Sheriff can commission officers.** — A sheriff can commission as a special deputy sheriff a full-time law enforcement officer employed by a municipality, the Navajo tribe or the federal government. The applicants, of course, would have to secure the appointment from the sheriff of the county in which they wish to act and qualify in accordance with this section and Sections 4-41-8, 4-41-10 NMSA 1978, and any other statutes of the state of New Mexico pertaining to the qualification of deputy sheriffs. 1957-58 Op. Att'y Gen. No. 57-83.

**In absence of emergency, patrol member must be furnished request.** — When no actual emergency exists, a member of the mounted patrol whose assistance is requested by the state police must be furnished the request in writing, signed by the officer making the request. 1959-60 Op. Att'y Gen. No. 60-239.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 70 Am. Jur. 2d Sheriffs, Police, and Constables §§ 1 to 5, 8, 10, 13.

Power to appoint public officer for term commencing at or after expiration of term of appointing officer or body, 75 A.L.R.2d 1277.

Validity, construction and application of regulation regarding outside employment of government employees or officers, 94 A.L.R.3d 1230.

Validity, construction, and application of regulations regarding outside employment of governmental employees of officers, 62 A.L.R.5th 671.

63 C.J.S. Municipal Corporations § 478 et seq.; 80 C.J.S. Sheriffs and Constables §§ 3, 22, 37.

## 29-1-10. [Law enforcement agencies, state and local; participation in federal programs.]

All state and local law enforcement agencies are hereby authorized to participate in the Federal Law Enforcement Assistance Act of 1965 (Public Law 98-197 [89-197]).

**History: 1953 Comp., § 39-1-11, enacted by Laws 1966, ch. 24, § 1.**

**Compiler's notes.** — The federal Law Enforcement Assistance Act of 1965 was codified as a note following 18 USCS § 3001 prior to its repeal by Public Law 90-351 on June 19, 1968.

**Bracketed material.** — The bracketed material was inserted by the compiler to correct an error and is not part of the law.

## 29-1-10.1. Federal funds; receipt and expenditure for law enforcement activities.

Any law enforcement agency of the state of New Mexico may receive and spend for law enforcement activities, in addition to amounts appropriated to it, transfers from the United States department of justice or the United States department of the treasury pursuant to the Controlled Substances Act, 21 U.S.C. § 881(e) (1970), and the Tariff Act of 1930, 19 U.S.C. § 1616(a) (1930), both as amended before or after the effective date of this section.

**History: Laws 1986, ch. 87, § 1.**

**Compiler's notes.** — The Tariff Act of 1930, 19 USC 1616, referred to in this section, was repealed in 1986. For present comparable provisions, *see* 19 USC § 1616a.

## 29-1-11. Authorization of tribal and pueblo police officers and certain federal officers to act as New Mexico peace officers; authority and procedure for commissioned peace officers.

A. All persons who are duly commissioned officers of the police or sheriff's department of any New Mexico Indian nation, tribe or pueblo or who are law enforcement officers employed by the bureau of Indian affairs and are assigned in New Mexico are, when commissioned under Subsection



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B of this section, recognized and authorized to act as New Mexico peace officers. These officers have all the powers of New Mexico peace officers to enforce state laws in New Mexico, including the power to make arrests for violation of state laws.

B. The chief of the New Mexico state police is granted authority to issue commissions as New Mexico peace officers to members of the police or sheriff's department of any New Mexico Indian nation, tribe or pueblo or a law enforcement officer employed by the bureau of Indian affairs to implement the provisions of this section. The procedures to be followed in the issuance and revocation of commissions and the respective rights and responsibilities of the departments shall be set forth in a written agreement to be executed between the chief of the New Mexico state police and the Indian nation, tribe or pueblo or the appropriate federal official.

C. The agreement referred to in Subsection B of this section shall contain the following conditions:

(1) the Indian nation, tribe or pueblo, but not the bureau of Indian affairs, shall submit proof of adequate public liability and property damage insurance for vehicles operated by the peace officers and police professional liability insurance from a company licensed to sell insurance in the state;

(2) each applicant for a commission shall successfully complete four hundred hours of basic police training that is approved by the director of the New Mexico law enforcement academy;

(3) the chief of the New Mexico state police shall have the authority to suspend any commission granted pursuant to Subsection B of this section for reasons solely within the chief's discretion;

(4) if any provision of the agreement is violated by the Indian nation, tribe or pueblo or any of its agents, the chief of the New Mexico state police shall suspend the agreement on five days' notice, which suspension shall last until the chief is satisfied that the violation has been corrected and will not recur;

(5) the goldenrod-colored officer's second copy of any citation issued pursuant to a commission authorized by this section shall be submitted within five days to the chief of the New Mexico state police;

(6) any citation issued pursuant to a commission authorized by this section shall be to a magistrate court of New Mexico; except that any citations issued to Indians within the exterior boundaries of an Indian reservation shall be cited into tribal court;

(7) the agreement or any commission issued pursuant to it shall not confer any authority on a tribal court or other tribal authority that the court or authority would not otherwise have;

(8) the authority conferred by any agreement entered into pursuant to the provisions of this section shall be coextensive with the exterior boundaries of the reservation; except that an officer commissioned under this section may proceed in hot pursuit of an offender beyond the exterior boundaries of the reservation, and the authority conferred in any written agreement between the chief of the New Mexico state police and the Navajo Nation may extend beyond the exterior boundaries of the Navajo reservation to and including the area enclosed by the following description:

Beginning at a point where the southern boundary line of the Navajo Nation reservation intersects the western right-of-way line of US 491, and running thence; southerly along the western right-of-way line of US 491 to the northerly city limits of Gallup; thence, easterly along the northerly city limits of Gallup to the northern side of the right of way of I-40; thence, in an easterly direction along the northerly side of the right of way of I-40 to the northerly limits of the village of Prewitt; thence, in a straight line between the northerly boundary of the village of Prewitt to the southerly boundary of Ambrosia Lake; thence in a straight line between the southerly boundary of Ambrosia Lake to the southerly boundary of Hospah; thence, east along a straight line from the southerly boundary of Hospah to the southern boundary of Torreon; thence along the easterly side of the right of way of state road 197 to the westerly city limits of Cuba; thence, north along the westerly side of the right of way of state road 44 to the southerly boundary of the Jicarilla Apache Nation reservation; thence, westerly along the southerly boundary of the Jicarilla Apache Nation reservation to the southwest corner of that reservation; thence, northerly along the westerly boundary of the Jicarilla Apache Indian reservation to a point where the westerly boundary of the reservation intersects the southerly side of the right of way of state road 44; thence, northerly along the southerly side of the right of way of state road 44 to its intersection with the northerly



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side of the right of way of Navajo road 3003; thence, along the northerly side of the right of way of Navajo road 3003 to a point where the northerly side of the right of way of Navajo road 3003 intersects the westerly side of the right-of-way line of state road 371; thence, northerly along the west side of the right of way of state road 371 to the southerly side of the right of way of Navajo road 36; thence, westerly along the southerly side of the right of way of Navajo road 36 to the eastern border of the Navajo Nation reservation; thence, along the eastern and southerly borders of the Navajo Nation reservation to the point of beginning.

The municipalities of Cuba and Gallup and the villages of Thoreau and Prewitt are excluded from the grant of authority that may be conferred in any written agreement entered into pursuant to provisions of this section; provided, however, any written agreement may include under such grant of authority the communities of Ambrosia Lake, Hospah, Torreon, Lybrook, Nageezi, Counselors and Blanco Trading Post and those communities commonly known as the Wingate community; the Navajo Nation Blue Water ranch area of the Thoreau community; the Prewitt community, exclusive of the village of Prewitt; the Haystack community; the Desidero community; the Sand Springs community; the Rincon Marquis community; the Charley Jesus Arviso and the Castillo community; and state road 264 beginning at the point where it intersects US 491 and ending where state road 264 intersects the Arizona-New Mexico state line; and

(9) the chief of the New Mexico state police or the chief's designee and the Indian nation, tribe or pueblo or the appropriate federal official shall be required to meet at least quarterly or more frequently at the call of the chief of the New Mexico state police to discuss the status of the agreement and invite other law enforcement or other officials to attend as necessary.

D. Nothing in this section impairs or affects the existing status and sovereignty of an Indian nation, tribe or pueblo as established under the laws of the United States.

E. All persons who are duly commissioned federal law enforcement officers employed by the federal bureau of investigation; drug enforcement administration; bureau of alcohol, tobacco and firearms; United States secret service; United States customs service; immigration and naturalization service; United States marshals service; postal inspection service; United States probation department; and United States pretrial services agency; and other appropriate federal officers whose primary duty is law enforcement related, who are assigned in New Mexico and who are required to be designated by the county sheriff on a case-by-case basis in the county in which they are working, are recognized and authorized to act as New Mexico peace officers and have all the powers of New Mexico peace officers to enforce state laws in New Mexico, including the power to make arrests for violation of state laws. The department of public safety shall maintain a registry that lists the name and affiliated federal agency of every federal law enforcement officer recognized and authorized to act as a New Mexico peace officer pursuant to the provisions of this subsection. This subsection shall not be construed to impose liability upon or to require indemnification by the state for any act performed by a federal law enforcement officer pursuant to this subsection.

F. The provisions of Subsection E of this section regarding designation of federal law enforcement officers by a county sheriff do not apply to federal law enforcement officers who are duly commissioned officers of a police or sheriff's department for an Indian nation, tribe or pueblo in New Mexico or who are federal law enforcement officers employed by the bureau of Indian affairs.

G. Nothing in this section limits, impairs or nullifies the authority of county sheriffs to appoint pursuant to Chapter 4, Article 41 NMSA 1978 duly commissioned state or federally certified officers who are employees of a police or sheriff's department of an Indian nation, tribe or pueblo in New Mexico or who are federal law enforcement officers employed by the bureau of Indian affairs as deputy sheriffs authorized to enforce New Mexico criminal and traffic law.

**History: 1953 Comp., § 39-1-12, enacted by Laws 1972, ch. 8, § 1; 1979, ch. 39, § 1; 1981, ch. 120, § 1; 1983, ch. 275, § 1; 1988, ch. 14, § 3; 1993, ch. 179, § 1; 1995, ch. 186, § 1; 1997, ch. 260, § 1; 2002, ch. 92, § 1; 2005, ch. 290, § 1.**

**The 2005 amendment,** effective June 17, 2005, added Subsection G to provide that nothing in this section limits, impairs or nullifies the authority of county sheriffs to appoint duly commissioned state or federally certified officers who are employees of a police or sheriff's department of an Indian nation, tribe or pueblo in New Mexico or who are federal law enforcement officers employed by the bureau of Indian affairs as deputy sheriffs authorized to enforce New Mexico criminal and traffic law.

**The 2002 amendment,** effective May 15, 2002, deleted "payment" following "authority" in the section heading; and deleted Paragraph C(10), which provided for payment from the law enforcement protection fund to tribes



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or pueblos for each commissioned peace officer in the tribe or pueblo.

**The 1997 amendment,** effective July 1, 1997, in Subsection E, in the first sentence, inserted "United States probation department; United States pretrial services agency;", deleted "as designated by the chief of the New Mexico state police upon a recommendation by a county sheriff" preceding "who are assigned", and inserted "and who are required to be designated by the county sheriff on a case-by-case basis in the county in which they are working", added the second sentence; and added Subsection F.

**The 1995 amendment,** effective June 16, 1995, substituted "pursuant to provisions of" for "under" near the end of Paragraph (8) in Subsection C, and in Subsection E deleted "and" preceding "postal" and substituted "whose primary duty is law enforcement related, as designated by the chief of the New Mexico state police upon a recommendation by a county sheriff" for "as designated by the chief of the New Mexico state police".

**The 1993 amendment,** effective June 18, 1993, inserted "payment" and substituted "commissioned peace officers" for "commissioning" in the section heading; added Paragraph (10) of Subsection C; and made minor stylistic changes in Paragraphs (2), (4), (8), and (9) of Subsection C and in Subsection E.

ANNOTATIONS

**Tribal officer was properly cross-commissioned.** — Where defendant, who was a non-Indian, was arrested by a Pueblo police officer on property of the Pueblo and charged in a county magistrate court with aggravated DWI; the officer was cross-commissioned as a county special deputy sheriff by the county sheriff's office; the officer signed an oath of office that was also signed by the county sheriff and carried a card issued by the county sheriff's office indicating the officer's cross-commissioning status; the officer was wearing the Pueblo police department uniform at the time of the arrest; the officer was a commissioned, full-time Pueblo tribal officer; and the officer's salary was paid by the Pueblo police department and included incremental pay financed from a grant from the bureau of Indian affairs to assist the Pueblo police department in targeting the motoring public, the officer was properly cross-commissioned and could properly arrest defendant while wearing the uniform of and receiving a salary from the Pueblo police department. *State v. Sanchez*, 2014-NMCA-095.

**Off-reservations crimes.** — State officers have the authority to enter Indian country to investigate off-reservation crimes committed in their presence by Indians, so long as the investigation does not infringe on tribal sovereignty by circumventing or contravening a governing tribal procedure. A traffic stop which included the administration of field sobriety tests, did not circumvent or contravene the Navajo Nation Code and, therefore, did not infringe on the sovereignty of the Navajo Nation. *State v. Harrison*, 2010-NMSC-038, 148 N.M. 500, 238 P.3d 869, *aff'g* 2008-NMCA-107, 144 N.M. 651, 190 P.3d 1146.

**Authority of non-cross-commissioned officer.** — A state police officer, who is not cross-commissioned with the bureau of Indian affairs or the tribe, may pursue an Indian onto the reservation, across jurisdictional lines, for a minor traffic offense committed outside the reservation and after determining that the officer lacks jurisdiction, the officer may continue to detain the Indian and collect evidence for use against him. *State v. Harrison*, 2008-NMCA-107, 144 N.M. 651, 190 P.3d 1146, *aff'd*, 2010-NMSC-038, 148 N.M. 500, 238 P.3d 869.

**Inconsistency between written agreements.** — It is inconsistent for the legislature to require a written agreement for the issuance of a cross commission under this section between state law enforcement and Indian tribal police officers and not require a written agreement for mutual aid agreements under Section 29-8-3 NMSA 1978. *State v. Branham*, 2004-NMCA-131, 136 N.M. 579, 102 P.3d 646.

**Authority of cross-commissioned officer.** — Traffic stop and detention and arrest are not illegal where Navajo tribal officer acted as a New Mexico peace officer with authority to enforce the Motor Vehicle Code on non-Indian land in the city of Gallup. *State v. Martinez*, 2005-NMCA-052, 137 N.M. 432, 112 P.3d 293, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

Because Navajo tribal officer claims to have been deputized by the McKinley County sheriff, Subsection C(8) of Section 29-1-11 NMSA 1978 does not defeat his claimed authority to act as a cross-commissioned county deputy. *State v. Martinez*, 2005-NMCA-052, 137 N.M. 432, 112 P.3d 293, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

**Authority of non-cross-commissioned officers.** — A non-cross-commissioned federal police officer has the lawful authority not only to stop a motor vehicle within an Indian reservation, but also to issue the driver a federal traffic citation based on state law. *Ryder v. State*, 1982-NMSC-066, 98 N.M. 316, 648 P.2d 774.

A non-cross-commissioned bureau of Indian affairs officer is empowered to stop a vehicle within the borders of an Indian reservation for a traffic law offense and, upon determining that the offender is a non-Indian, to request him to wait until a cross-commissioned BIA officer arrives. *State v. Ryder*, 1981-NMCA-017, 98 N.M. 453, 649 P.2d 756, *aff'd*, 1982-NMSC-066, 98 N.M. 316, 648 P.2d 774.

**Authority of tribal police officer over non-Indian.** — A tribal police officer has the authority to stop and issue a tribal citation, and arrest a non-Indian, so long as the Indian authorities promptly deliver up the non-Indian offender, rather than try and punish him themselves. *State v. Ryder*, 1981-NMCA-017, 98 N.M. 453, 649 P.2d 756, *aff'd*, 1982-NMSC-066, 98 N.M. 316, 648 P.2d 774.

**Where state police officer initially stopped defendant for speeding** on Mescalero reservation, because the officer did not have authority to enforce Mescalero tribal traffic ordinances, defendant's motion to suppress evidence was properly granted. *State v. Branham*, 2004-NMCA-131, 136 N.M. 579, 102 P.3d 646.

**Citations issued to non-Indians.** — Traffic citations lawfully issued by a commissioned bureau of Indian affairs officer to a non-Indian cannot legally be referred to a tribal court, but should be referred to state magistrate court. 1992 Op. Att'y Gen. No. 92-07.

**Law reviews.** — For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

## 29-1-12. Authorization to maintain and retake custody of Arizona prisoners.

An officer or employee of the Arizona department of corrections who has in his custody, pursuant to Arizona law, a ward, offender or prisoner of the state of Arizona whom he is transporting from a facility in Arizona to another point in Arizona via New Mexico or to a point in New Mexico for



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firefighting or conservation work shall maintain custody of such ward, offender or prisoner in New Mexico. Such officer or employee may, in the event of escape of such ward, offender or prisoner in New Mexico, retake such ward, offender or prisoner in the same manner as if such officer or employee were a New Mexico police officer and such ward, offender or prisoner had been committed to his custody under New Mexico law.

**History: 1953 Comp., § 39-1-13, enacted by Laws 1975, ch. 281, § 1.**

## 29-1-13. Unclaimed property; inventory.

A peace officer shall immediately inventory and record any personal property that comes into his possession and is taken under authority of law or is left in his possession or in the possession of the state, county or municipality. As used in Sections 29-1-13 through 29-1-15 NMSA 1978, "peace officer" means any full-time employee of a police or sheriff's department that is part of or administered by the state or any political subdivision of the state and which employee is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of the state.

**History: Laws 1983, ch. 50, § 1.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Uniform Disposition of Unclaimed Property Act, 98 A.L.R.2d 304.

## 29-1-14. Unclaimed property; authority to sell; notice of sale; deadly weapons, controlled substances and other contraband excepted.

A. Any personal property having a fair market value greater than fifty dollars ($50.00) that has been unclaimed by the true owner, is no longer necessary for use in obtaining a conviction, is not needed for any other public purpose and has been in the possession of a state, county or municipal law enforcement agency for more than ninety days shall be sold at public sale.

B. Prior to the sale of seized personal property, the law enforcement agency shall make a reasonable attempt to notify the original owner of the seized personal property and shall publish a notice of the sale of unclaimed personal property once each week for two successive weeks. The notice shall contain:

(1) a brief description of the personal property to be sold;

(2) the time and place of the sale; and

(3) the name of any purported owner, if known.

C. If prior to the sale the true owner identifies the personal property to be sold and offers strict proof of identity and ownership of the personal property, the personal property shall be returned to its true owner.

D. Any personal property offered but not sold at a public sale may be destroyed or otherwise disposed of upon application to the district court, ex parte and without notice.

E. Any personal property sold at public sale, claimed by its true owner, destroyed or otherwise disposed of pursuant to this section shall be removed from the inventory record kept by the law enforcement agency.

F. Any personal property having a fair market value equal to or less than fifty dollars ($50.00) that has been unclaimed by the true owner, is no longer necessary for use in obtaining a conviction, is not needed for any other public purpose and has been in the possession of a state, county or municipal law enforcement agency for more than ninety days may be destroyed, except as otherwise provided by order of the district court upon ex parte application without notice.

G. Any alcoholic beverage that has been unclaimed by the true owner, is no longer necessary for use in obtaining a conviction, is not needed for any other public purpose and has been in the possession of a state, county or municipal law enforcement agency for more than ninety days may



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be destroyed or may be utilized by the scientific laboratory division of the department of health for educational or scientific purposes.

H. This section shall not apply to deadly weapons or items of significant historical value, poisons, controlled substances or other contraband lawfully seized as evidence for the prosecution of a violation of statute or ordinance or which has otherwise come into the lawful possession of a state, county or municipal law enforcement agency and has been in possession for more than ninety days. Once it is determined by the law enforcement agency that any property enumerated in this subsection is no longer necessary for use in obtaining a conviction or is not needed for any other public purpose, the law enforcement agency may apply to the district court, ex parte and without notice, for an order authorizing destruction or other disposition of the property; provided that a state, county or municipal law enforcement agency shall allow state museums access to agency inventory records for the purpose of inspecting and selecting firearms that are appropriate to state museum firearm collections. The court shall grant the application if the proposed destruction or disposition is in the best interest of the public safety and welfare.

I. This section shall not apply to any personal property for which a notice of intent to claim has been served. Any victim, as defined in Section 31-26-3 NMSA 1978, or alleged victim shall be entitled to serve notice of intent to claim ownership of any personal property upon that person, agency or entity in actual custody or control of the property. Nothing in this subsection shall be construed to limit, interfere with or affect the rights or remedies of the rightful owner of any seized property.

**History: 1978 Comp., § 29-1-14, enacted by Laws 1983, ch. 50, § 2; 1989, ch. 147, § 1; 1994, ch. 22, § 1; 2003, ch. 340, § 1.**

**The 2003 amendment,** effective July 1, 2003, in Subsection A, deleted the former last sentence concerning the federal Gun Control Act of 1968; in Subsection B, deleted "or owners" following "purported owner"; in Subsection H, deleted "except for firearms" following "deadly weapons" in the first sentence and "prior to the sale of firearms" following "provided that" in the second sentence; in Subsection I, substituted "Section 31-26-3" for "Section 31-24-3".

**The 1994 amendment,** effective July 1, 1994, substituted "a state, county or municipal law enforcement agency" for "the state, county, municipality or peace officer" in the first sentence in Subsections A and H, and in Subsections F and G, "Prior to the sale of seized personal property, the law enforcement agency shall make a reasonable attempt to notify original owner of seized personal property and shall" for "The peace officer shall" in the first sentence in the introductory paragraph of Subsection B, "law enforcement agency" for "peace officer" in Subsection E and near the beginning of the second sentence in Subsection H, "department of health" for "health and environment department" in Subsection G and "the law enforcement agency" for "he" near the middle of the second sentence in Subsection H; inserted "federal" in the second sentence in Subsection A; and added the proviso clause at the end of the second sentence in Subsection H.

**The 1989 amendment,** effective June 16, 1989, in Subsection A inserted "having a fair market value greater than fifty dollars ($50.00)" in the first sentence; added present Subsection D; redesignated former Subsection D as present Subsection E, while substituting therein "claimed by its true owner, destroyed or otherwise disposed of pursuant to this section" for "or claimed by its true owner"; added Subsections F and G; redesignated former Subsection E as Subsection H, while substituting "ninety days" for "one year" at the end of the first sentence; and added Subsection I.

**ANNOTATIONS**

**Intention to abandon may be manifested** by expressed acts of the owner or by acts or conduct implying abandonment which may be inferred from the circumstances. 1955-56 Op. Att'y Gen. No. 56-6357.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions § 506 et seq.

63 C.J.S. Municipal Corporations § 883.

## 29-1-15. Proceeds of sale; title to property vests in purchaser.

A. Any money derived by a peace officer from the sale of unclaimed personal property shall be paid to the appropriate treasurer for credit to the general fund of the state, county or municipality.

B. Any person purchasing unclaimed personal property at a public auction conducted by a peace officer has good title to the property. The true owner of the unclaimed personal property is divested of any right to the property and is estopped from making any claim to the property.

**History: Laws 1983, ch. 50, § 3.**

**ANNOTATIONS**

**Law reviews.** — For comment, "Regional Planning - Subdivision Control - New Mexico's New Municipal Code," see 6 Nat. Res. J. 135 (1966).



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## 29-1-16. Electronic recordings of custodial interrogations.

A. A state or local law enforcement officer shall comply when reasonably able to do so with the following procedures when conducting a custodial interrogation:

(1) the custodial interrogation shall be electronically recorded in its entirety;

(2) if conducted in a police station, the custodial interrogation shall be electronically recorded by a method that includes audio or visual or both, if available; and

(3) the electronic recording shall include the advice of constitutional rights required by law.

B. A law enforcement officer shall comply with the provisions of this section unless the law enforcement officer has good cause not to electronically record the entire custodial interrogation and makes a contemporaneous written or electronic record of the reasons for not doing so. Good cause includes:

(1) the electronic recording equipment was not reasonably available;

(2) the electronic recording equipment failed and obtaining replacement equipment was not feasible;

(3) the individual refused to be recorded; or

(4) the statement was made in a court proceeding or a grand jury proceeding.

C. Statements that are spontaneously volunteered and not the result of custodial interrogation are not subject to the provisions of this section.

D. The provisions of this section shall apply only to custodial interrogations when, at the time of the interrogation, the person is suspected of committing a felony offense.

E. The provisions of this section do not apply to custodial interrogations conducted outside the state of New Mexico.

F. The provisions of this section do not apply to statements used for impeachment purposes.

G. The provisions of this section do not apply within a correctional facility.

H. As used in this section:

(1) "custodial interrogation" means questioning by law enforcement officers that requires the advice of constitutional rights; and

(2) "electronic recording" means a complete and authentic electronic recording created by visual or audio media, including by motion picture, videotape, audio tape or digital media.

I. This section shall not be construed to exclude otherwise admissible evidence in any judicial proceeding.

**History: Laws 2005, ch. 252, § 1.**

**Effective dates.** — Laws 2005, ch. 252, § 3 made Laws 2005, ch. 252, § 1 effective January 1, 2006.

**Severability.** — Laws 2005, ch. 252, § 2 provided that if any part of Laws 2005, ch. 252, § 1 is held invalid, the remainder shall not be affected.

**ANNOTATIONS**

**Law not retroactive.** — Where defendant made statements to police officers at an interview that occurred on May 31, 2005, and Laws 2005, Chapter 252, Section 3 made Section 29-1-16 NMSA 1978 effective on January 1, 2006, Section 29-1-16 NMSA 1978 did not apply to defendant's statements. *State v. Garcia*, 2011-NMSC-003, 149 N.M. 185, 246 P.3d 1057.

## 29-1-17. Identity theft reports.

When a law enforcement officer interviews an alleged identity theft victim, the law enforcement officer shall make a written report of the information provided by the victim and by witnesses on appropriate forms provided by the attorney general. A copy of the police report shall be filed with the office of the attorney general.

**History: Laws 2009, ch. 95, § 1.**

**Effective dates.** — Laws 2009, ch. 95, § 6 made Laws 2009, ch. 95, § 1 effective July 1, 2009.



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## 29-1-18. Requiring certain law enforcement agencies to use body-worn cameras while on duty; adoption of policies and procedures governing use.

A. A law enforcement agency shall require peace officers the agency employs and who routinely interact with the public to wear a body-worn camera while on duty. Each law enforcement agency subject to the provisions of this section shall adopt policies and procedures governing the use of body-worn cameras, including:

(1) requiring activation of a body-worn camera whenever a peace officer is responding to a call for service or at the initiation of any other law enforcement or investigative encounter between a peace officer and a member of the public;

(2) prohibiting deactivation of a body-worn camera until the conclusion of a law enforcement or investigative encounter;

(3) requiring that any video recorded by a body-worn camera shall be retained by the law enforcement agency for not less than one hundred twenty days; and

(4) establishing disciplinary rules for peace officers who:

(a) fail to operate a body-worn camera in accordance with law enforcement agency policies;

(b) intentionally manipulate a body-worn camera recording; or

(c) prematurely erase a body-worn camera recording in violation of law enforcement agency policies.

B. Peace officers who fail to comply with the policies and procedures required to be adopted pursuant to Subsection A of this section shall be presumed to have acted in bad faith and shall be deemed liable for the independent tort of negligent spoliation of evidence or the independent tort of intentional spoliation of evidence.

C. As used in this section:

(1) "body-worn camera" means an electronic device worn on a person's body that records both audio and video data;

(2) "law enforcement agency" means the police department of a municipality, the sheriff's office of a county, the New Mexico state police or the department of public safety; and

(3) "peace officer" means any full-time salaried or certified part-time salaried officer who by virtue of office or public employment is vested by law with the duty to maintain the public peace.

**History: Laws 2020 (1st S.S.), ch. 7, § 1.**

**Effective dates.** — Laws 2020 (1st S.S.), ch. 7 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective September 20, 2020, 90 days after the adjournment of the legislature.

# ARTICLE 2

# State Police


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29-2-24. Waiver.
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29-2-27. Security for the governor and the legislature.
29-2-28. Provide concurrent jurisdiction of state property and grounds.
29-2-29. State police; group life insurance.

## 29-2-1. New Mexico state police created.

There is created in the department of public safety the "New Mexico state police division".

**History: 1941 Comp., § 40-201, enacted by Laws 1941, ch. 147, § 1; 1953 Comp., § 39-2-1; Laws 1977, ch. 257, § 19; 1979, ch. 202, § 12; 1987, ch. 254, § 17; 1989, ch. 204, § 21.**

**Cross references.** — For radio communication property, ownership transferred to the department of information technology, *see* 9-27-18 NMSA 1978.

For educational funds for children of police killed in active duty, *see* 28-14-1 NMSA 1978 et seq.

**The 1989 amendment,** effective July 1, 1989, substituted "department of public safety" for "department of state government".

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 81A C.J.S. States § 81.

## 29-2-1.1. Definitions.

As used in Chapter 29 NMSA 1978:

A. "chief" or "chief of the state police" means the director of the New Mexico state police division of the department;

B. "commission" means the public safety advisory commission;

C. "department" means the department of public safety;

D. "member of the New Mexico state police" means a commissioned officer of the New Mexico state police, including an officer who is certified and commissioned as of June 30, 2015 in the former motor transportation division or the former special investigations division;

E. "New Mexico law enforcement academy" or "academy" means a division of the department established pursuant to the Law Enforcement Training Act [Chapter 29, Article 7 NMSA 1978];

F. "New Mexico state police" means the New Mexico state police division of the department; and

G. "secretary" means the secretary of public safety.

**History: 1978 Comp., § 29-2-1.1, enacted by Laws 1987, ch. 254, § 18; 1989, ch. 204, § 22; 2015, ch. 3, § 4.**

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by amending certain law enforcement definitions; in Subsection D, after the second occurrence of "state police," added the remainder of the sentence; in Subsection E, after "means a", deleted "bureau of the training and recruiting", after "department", deleted "of public safety" and added "established pursuant to the Law Enforcement Training Act"; in Subsection F, after the semicolon, added "and"; and deleted former Subsection G and redesignated former Subsection H as Subsection G.

**The 1989 amendment,** effective July 1, 1989, deleted "public safety" preceding "department" in Subsections A and F, and substituted "department of public safety" for "public safety department" in Subsection C, "New Mexico state police" for "department" in Subsection D, and all of the present language of Subsection E following "means" for "the training division of the public safety department".

## 29-2-2. Repealed.

**Repeals.** — Laws 1987, ch. 254, § 27 repealed 29-2-2 NMSA 1978, as amended by Laws 1979, ch. 202, § 13, relating to police board composition, effective July 1, 1987.

## 29-2-3. New Mexico state police; organization.

The New Mexico state police shall consist of a chief and such patrol officers, sergeants, lieutenants and captains as the secretary may deem advisable within the limits of the funds appropriated for the New Mexico state police; provided that the number of captains, lieutenants and sergeants shall not exceed twenty-five percent of the total number of the police, exclusive of the chief; but this requirement shall not be interpreted so as to require the demotion of any member of the



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previous state police division, the former motor transportation division or the former special investigations division.

**History: 1941 Comp., § 40-203, enacted by Laws 1941, ch. 147, § 3; 1953 Comp., § 39-2-3; Laws 1977, ch. 257, § 21; 1979, ch. 202, § 14; 2015, ch. 3, § 5.**

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by clarifying references to positions within the organizational structure of the New Mexico state police; after the first occurrence of "chief", added "and"; after "such", deleted "patrolmen" and added "patrol officers"; after "captains as the", deleted "New Mexico state police board" and added "secretary", after "provided", deleted "however", and after "police division", deleted "of the criminal justice department" and added "the former motor transportation division or the former special investigations division".

## 29-2-4. Appointments; removal.

The chief of the New Mexico state police shall be appointed by the secretary. All patrol officers and other officers and all civilian employees shall be appointed by the chief.

**History: 1941 Comp., § 40-204, enacted by Laws 1941, ch. 147, § 4; 1953 Comp., § 39-2-4; Laws 1977, ch. 257, § 22; 1979, ch. 202, § 15; 2015, ch. 3, § 6.**

**Compiler's notes.** — Although "removal" was added to the section heading, no provisions relevant to removal were added to this section by the 1979 amendment.

**Cross references.** — For removal during probationary period, *see* 29-2-9 NMSA 1978.

For disciplinary proceedings culminating in removal, *see* 29-2-11 NMSA 1978.

For removal of chief, *see* 29-2-19 NMSA 1978.

For certificate from law enforcement academy, *see* 29-7-6 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by clarifying certain duties regarding appointment within the department of public safety; after "appointed by the", deleted "New Mexico state police board" and added "secretary", and after "All", deleted "patrolmen" and added "patrol officers.

## 29-2-4.1. Rules.

The secretary shall promulgate rules governing employment and operating practices and related matters for employees of the New Mexico state police.

**History: 1978 Comp., § 29-2-4.1, enacted by Laws 1979, ch. 202, § 16; 2015, ch. 3, § 7.**

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by providing the secretary of public safety with the authority to create rules for the department; in the catchline, deleted "and regulations"; after "The", deleted "New Mexico state police board" and added "secretary"; and after "rules", deleted "and regulations".

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Sexual misconduct or irregularity as amounting to "conduct unbecoming an officer," justifying officer's demotion or removal or suspension from duty, 9 A.L.R.4th 614.

## 29-2-5. Repealed.

**Repeals.** — Laws 1987, ch. 254, § 27 repealed 29-2-5 NMSA 1978, as enacted by Laws 1941, ch. 147, § 5, relating to retention of chief and members of state police, effective July 1, 1987.

## 29-2-6. Qualifications of members.

A. Members of the New Mexico state police, except the chief, shall:

(1) at the time of their appointment, be citizens of the United States;

(2) at the time of their appointment, have reached twenty-one years of age;

(3) except as otherwise provided in Subsection B of this section, at the time of their appointment, have completed at least sixty hours of college credit or have had two years of military or law enforcement service. This requirement shall not apply to officers who are certified and commissioned as of June 30, 2015 in the former motor transportation division or the former special investigations division;

(4) be of good moral character and not have been convicted of a felony or infamous crime in the courts of this state or other state or any country or in the federal courts; and

(5) pass a physical examination that the New Mexico state police may require.



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B. Notwithstanding the requirement of Paragraph (3) of Subsection A of this section, the chief may appoint a member of the New Mexico state police who has at least thirty hours of college credit, and the chief shall determine an appropriate time period after appointment for the member to complete the additional thirty hours of college credit required. This provision shall not apply to officers who are certified and commissioned as of June 30, 2015 in the former motor transportation division or the former special investigations division.

**History: 1941 Comp., § 40-206, enacted by Laws 1941, ch. 147, § 6; 1953 Comp., § 39-2-6; Laws 1963, ch. 100, § 1; 1967, ch. 64, § 1; 1973, ch. 37, § 1; 1977, ch. 257, § 23; 1979, ch. 202, § 17; 1993, ch. 70, § 1; 1998, ch. 5, § 1; 2001, ch. 45, § 1; 2009, ch. 55, § 1; 2011, ch. 91, § 1; 2015, ch. 3, § 8.**

**Cross references.** — For inapplicability of Criminal Offender Employment Act to law enforcement agencies, *see* 28-2-5 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by clarifying qualification requirements for members of the New Mexico state police; in Subsection A, Paragraph 3, added the second sentence relating to certain certified and commissioned officers; in Subsection B, added the second sentence relating to certain certified and commissioned officers; and deleted Subsection C.

**The 2011 amendment,** effective June 17, 2011, supplemented the educational requirement for state police officers by adding, as an alternative to the college credit requirement, a requirement of two years of military or law enforcement service.

**The 2009 amendment,** effective June 19, 2009, in Paragraph (3) of Subsection A, added "except as otherwise provided in Subsection B of this section", deleted "not less than", and added "at least"; deleted former Subparagraph (b) of Paragraph (3) of Subsection A that required not less than 30 hours of college credit and completion of an additional 30 hours of college credit; and added Paragraph B.

**The 2001 amendment,** effective July 1, 2001, added Subparagraph A(3)(b).

**The 1998 amendment,** effective July 1, 1998, rewrote Paragraph A(3); deleted "any" preceding "or" in two places in Paragraph A(4); substituted "pass a physical" for "successfully pass any physical" in Paragraph A(5); and in Subsection B, substituted "A" for "No", inserted "not" following "shall", and substituted "a member of the public safety advisory commission for "any member of the department of public safety advisory commission".

**The 1993 amendment,** effective June 18, 1993, substituted "twenty-one years of age" for "age of majority and be not more than thirty-five years of age" in Paragraph (2) of Subsection A; deleted former Subsection B which read "Members of the New Mexico state police, including the chief, shall not be over sixty-one years of age"; redesignated former Subsection C as Subsection B; and substituted "department of public safety advisory commission" for "New Mexico state police board" at the end of Subsection B.

ANNOTATIONS

**Discretion to terminate officer for not passing physical.** — The board (now commission) charged with management and control of the department has the discretion to terminate an officer for failure to pass the required physical examination. This is a continuing qualification and members must pass any reasonable physical examination required from time to time. *Tafoya v. N.M. State Police Bd.*, 1970-NMSC-106, 81 N.M. 710, 472 P.2d 973.

**Notice and hearing required.** — While the board (now commission) may require its officers to submit to and pass any physical examination reasonably required and while the failure to pass may be the basis for a removal proceeding, this is far different from vaulting this section to a power of dismissal at the discretion of the board (now commission) without prior notice and a hearing. *Tafoya v. N.M. State Police Bd.*, 1970-NMSC-106, 81 N.M. 710, 472 P.2d 973.

**Nepotism provision controls over general statute.** — The general state statute pertaining to nepotism (Section 10-1-10 NMSA 1978) is not applicable in regard to the hiring of state police personnel, but rather this section, which pertains specifically to the state police, is controlling. 1963-64 Op. Att'y Gen. No. 63-114.

**When fully qualified individual not appointed as member.** — One who is otherwise fully qualified cannot be appointed as a member of the New Mexico state police if his two years of residency did not occur immediately prior to the time of appointment, but such a person can be accepted by the state police as a candidate to attend the recruit training school. 1961-62 Op. Att'y Gen. No. 62-120 (opinion rendered prior to 1963 and 1967 amendments).

**Prohibited relationship degrees.** — It may be said that the officer and his wife stand one and the same, in relation to the collateral line relationship of the wife. This being so, the wife and her brother stand as to one another in the second degree. And continuing one degree further to the son of the aforesaid brother, being also the nephew of the herein considered officer's wife, a prohibited relationship degree exists, e.g., a third-degree separation. 1957-58 Op. Att'y Gen. No. 58-170 (opinion rendered prior to 1963 and 1967 amendments).

**Applicant not considered for state police.** — It is not permissible for an applicant to be considered for the New Mexico state police force whose father's sister is married to an officer of said force. 1957-58 Op. Att'y Gen. No. 58-170 (opinion rendered prior to 1963 and 1967 amendments).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction and effect of state constitutional or statutory provision regarding nepotism in the public service, 11 A.L.R.4th 826.

Sex discrimination in law enforcement and corrections employment, 53 A.L.R. Fed. 31.

81A C.J.S. States § 83.

## 29-2-7. Commissioned officers; application; procedure.

The New Mexico state police shall cause all applicants for the position of commissioned officer to submit a written detailed application on forms as the secretary shall prescribe, and the secretary shall cause an investigation to be made of all applicants, subsequent to their taking the examination referred to in Section 29-2-8 NMSA 1978, for the purpose of determining the moral character, general reputation and fitness of any applicant. An applicant who is found unfit as a result of the



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investigation shall be disqualified for employment. The secretary shall by rule prescribe the physical qualifications of applicants and shall require each applicant to submit to a physical examination by doctors as the secretary shall designate. An applicant who does not meet the physical requirements prescribed by the secretary shall be disqualified for employment. Inasmuch as laws have been enacted providing for retirement, disability and life insurance funds for members of the New Mexico state police, it is the intention of the legislature that no applicants will be appointed who are in such physical condition that the cost of such protection will thereby be increased.

**History: 1941 Comp., § 40-207, enacted by Laws 1941, ch. 147, § 7; 1953 Comp., § 39-2-7; Laws 1977, ch. 257, § 24; 1978, ch. 82, § 1; 1979, ch. 202, § 18; 2015, ch. 3, § 9.**

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by clarifying certain duties of the secretary of public safety with regard to commissioning officers; after "application on", deleted "such"; substituted "secretary" for "board" throughout the section; after the first occurrence of "examination", deleted "hereinafter"; after "referred to", added "in Section 29-2-8 NMSA 1978"; after "any applicant", inserted a period, deleted "and any such", began a second sentence and added "An"; in the present second sentence, after "result of", deleted "such" and added "the", after "examination by", deleted "such", and after "designate", inserted a period, deleted "and any", began a third sentence, and added "An".

## 29-2-8. New Mexico state police; commissioned officers; examination.

The New Mexico state police shall conduct a written examination of all applicants for the position of commissioned officer for the purpose of determining their mental qualifications and knowledge of the laws of New Mexico and their ability to render assistance in case of accidents upon the public highways. No applicant shall be appointed a member of the New Mexico state police, other than the chief, until the applicant has passed the written examination with a grade of not less than seventy-two percent. This section shall not apply to officers who are certified and commissioned as of June 30, 2015 in the former motor transportation division or the former special investigations division.

**History: 1941 Comp., § 40-208, enacted by Laws 1941, ch. 147, § 8; 1953 Comp., § 39-2-8; Laws 1977, ch. 257, § 25; 1978, ch. 82, § 2; 1979, ch. 202, § 19; 2015, ch. 3, § 10.**

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by clarifying certain qualification requirements of officers within the New Mexico state police; after "highways", deleted "and", inserted a period, and began a second sentence; in the present second sentence, after "until", deleted "he shall have" and added "the applicant has", after "passed", deleted "such" and added "the"; and added the third sentence relating to certain certified and commissioned officers.

## 29-2-9. Probationary period; length; permanent commission; salary.

A. All new appointments as members of the New Mexico state police shall be for a probationary period of two years. During the probationary period, the new members may be removed or suspended at the discretion of the chief. At the end of two years of satisfactory service and upon recommendation of the chief and with concurrence of the secretary, the appointee may receive a permanent commission as a member of the New Mexico state police. However, the probationary period may be extended beyond a two-year period upon the recommendation of the chief with the concurrence of the secretary. This subsection shall not apply to officers who are certified and commissioned as of June 30, 2015 in the former motor transportation division or the former special investigations division. Members who are on probation on July 1, 2015 shall complete the probationary period under which they were hired.

B. The salaries of all members of the New Mexico state police, probationary and permanent, and that of the chief shall be fixed by the secretary.

**History: 1941 Comp., § 40-209, enacted by Laws 1941, ch. 147, § 9; 1953, ch. 80, § 2; 1953 Comp., § 39-2-9; Laws 1977, ch. 257, § 26; 1979, ch. 202, § 20; 2015, ch. 3, § 11.**

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by clarifying certain duties of the secretary of public safety and amending qualification requirements for certain officers; designated the previously undesignated paragraphs as Subsections A and B; in the second sentence of Subsection A, deleted each occurrence of "such" and added "the", after "chief", deleted "of the New Mexico state police"; in the third sentence of Subsection A, after "concurrence of the", deleted "New Mexico state police board" and added "secretary"; in the fourth sentence of Subsection A, deleted "board" and added "secretary"; added the fifth sentence relating to certain certified and commissioned officers; and in Subsection B, after "fixed by the", deleted board and added "secretary".



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## 29-2-10. Promotions.

All promotions in the New Mexico state police to the rank of sergeant shall be made after written examinations. All promotions above the rank of sergeant shall be made by the chief after concurrence and approval by the secretary. The ranks of sergeant, lieutenant and captain shall be permanent unless established as an exempt rank by the chief with the concurrence of the secretary. All promotions above the rank of captain are by executive appointment of the chief with concurrence of the secretary, and those persons shall serve at the pleasure of the chief with the concurrence of the secretary.

**History: 1941 Comp., § 40-210, enacted by Laws 1941, ch. 147, § 10; 1953 Comp., § 39-2-10; Laws 1979, ch. 202, § 21; 2015, ch. 3, § 12.**

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by clarifying certain duties of the secretary of public safety with regard to promotions in the New Mexico state police; in the first sentence, after "written examinations", deleted the remainder of the sentence; and substituted "secretary" for "New Mexico state police board" and "board" throughout the section.

## 29-2-11. Disciplinary proceedings; appeal.

A. A New Mexico state police officer holding a permanent commission shall not be removed from office, demoted or suspended except for incompetence, neglect of duty, violation of a published rule of conduct, malfeasance in office or conduct unbecoming an officer, except as provided in this section. A probationary officer not holding a permanent commission may be removed from office, demoted or suspended in accordance with New Mexico state police rules.

B. The secretary may suspend an officer for disciplinary reasons for not more than thirty days in accordance with New Mexico state police rules without further review or appeal.

C. In the event an officer is removed from office, demoted or suspended for a period of more than thirty days, the secretary shall provide written notification of the grounds supporting the action to the officer. The officer may appeal the secretary's action to the commission within thirty days of the date of receipt of the secretary's written notification. The appeal process shall be public and conducted in accordance with New Mexico state police rules.

D. In the event the commission finds that there is just cause for the removal, demotion or suspension of the officer for a period in excess of thirty days, the officer may appeal the decision of the commission to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

**History: 1941 Comp., § 40-211, enacted by Laws 1941, ch. 147, § 11; 1953, ch. 80, § 3; 1953 Comp., § 39-2-11; Laws 1970, ch. 5, § 1, 1977, ch. 257, § 27; 1979, ch. 202, § 22; 1987, ch. 254, § 19; 1989, ch. 204, § 23; 1998, ch. 55, § 40; 1999, ch. 265, § 42; 2006, ch. 11, § 1; 2006, ch. 12, § 1.**

**Cross references.** — For procedures governing administrative appeals to the district court, *see* Rule 1-074 NMRA.

**The 2006 amendment,** effective February 24, 2006, provided in Subsection A that a probationary officer not holding a permanent commission may be removed from office, demoted or suspended in accordance with state police rules; deleted the provision in Subsection B, which provided that an officer holding a permanent commission had the right to have a suspension reviewed by the commission; deleted provisions in Subsection C, which provided for the filing of written charges with the commission, notice of charges to the officer, a prompt hearing by the commission, legal representation of the officer, and the making of a record of the hearing; added a provision in Subsection C that the secretary shall provide notification to the officer of the grounds supporting a removal, demotion or suspension; added a provision in Subsection C, which provided for an appeal of the secretary's action to the commission in accordance with state police rules; and provided in Subsection D for an appeal to district court if the commission finds that there is just cause for the removal, demotion or suspension.

Laws 2006, ch. 11, § 1 and Laws 2006, ch. 12, § 1 enacted identical amendments to this section. The section was set out as amended by Laws 2006, ch. 12, § 1. *See* 12-1-8 NMSA 1978.

**The 1999 amendment,** effective July 1, 1999, substituted "Section 39-3-1.1" for "Section 12-8A-1" in Subsection D.

**The 1998 amendment,** effective September 1, 1998, inserted "; appeal" in the section heading; added the subsection designations; in Subsection B, substituted "rules" for "regulations"; in Subsection C, deleted "so" following "person"; and rewrote Subsection D.

**The 1989 amendment,** effective July 1, 1989, substituted "except as provided in this section" for "and only on specific written charges filed with the commission with timely and adequate notice of the charges to the person charged and after a hearing on the charges by the commission" in the first sentence; added the present second through fifth sentences; inserted "of his own choice and at his own expense" in the sixth sentence; rewrote the ninth sentence, which formerly read: "In the event the commission recommends to the secretary that the person charged shall be removed, demoted or suspended for a period in excess of thirty days and the secretary so orders,



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the person may appeal from the decision of the secretary to the district court of the district in which the alleged cause or any one of the alleged causes for the proceeding arose"; substituted "commission" for "secretary" and "commission's" for "secretary's" in the next-to-last sentence; deleted "provided, however, that the chief of the New Mexico state police may suspend members of the New Mexico state police for disciplinary reasons for periods not to exceed thirty days" at the end of the present last sentence; and deleted the former last sentence, which read: "Any member holding a permanent commission thus suspended by the chief has the right to have the suspension reviewed by the commission, but no further review or appeal shall be allowed."

ANNOTATIONS

**Incompetence includes physical inability to perform.** — Incompetence includes physical inability to perform, which inclusion fits in with the pattern and purpose of the statutory plan. A termination or removal for physical unfitness is no less final than one for another form of incompetence. *Tafoya v. N.M. State Police Bd.*, 1970-NMSC-106, 81 N.M. 710, 472 P.2d 973.

**Physical inability to perform constitutes voluntary resignation not governed by section.** — Request by officer injured in line of duty who had used all his sick leave for leave of absence which was improper under Rule 7, regulatory rule promulgated by state police board, issued pursuant to Section 29-2-22 NMSA 1978, and his physical inability to perform the functions of his job as a senior patrolman, constituted a voluntary resignation, not a termination governed by this section. *Budagher v. N.M. State Police Bd.*, 1971-NMSC-077, 82 N.M. 787, 487 P.2d 489.

**Officer must first pursue administrative remedy.** — Police officer who was wrongfully dismissed and who claimed salary and other benefits must first pursue them administratively. *Tafoya v. N.M. State Police Bd.*, 1970-NMSC-106, 81 N.M. 710, 472 P.2d 973.

**Board (now commission) is required to meet statutory procedures when it desires to terminate officer,** and if this is not done consequently the severance from service is short of statutory right. *Tafoya v. N.M. State Police Bd.*, 1970-NMSC-106, 81 N.M. 710, 472 P.2d 973.

**Doubts as to right to procedural safeguards.** — Any doubt as to the right to procedural safeguards should be resolved in the officer's favor unless the right to remove at will or pleasure is clearly expressed. *Tafoya v. N.M. State Police Bd.*, 1970-NMSC-106, 81 N.M. 710, 472 P.2d 973.

**No hearing required when reduction in rank.** — The procedures of advancement, not a promotion, and reduction in rank resulting from regulation providing that all ranks above captain will be appointments and not permanently enable the chief to shift key personnel to positions where their interest and ability are used to best advantage, without the necessity of a hearing by New Mexico state police board. *Wimberly v. N.M. State Police Bd.*, 1972-NMSC-034, 83 N.M. 757, 497 P.2d 968.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Sexual misconduct or irregularity as amounting to "conduct unbecoming an officer," justifying officer's demotion or removal or suspension from duty, 9 A.L.R.4th 614.

81A C.J.S. States § 110.

## 29-2-12. Oath.

All members of the New Mexico state police and the secretary shall take the oath of office required of all state officials.

**History: 1941 Comp., § 40-212, enacted by Laws 1941, ch. 147, § 12; 1953 Comp., § 39-2-12; Laws 1977, ch. 257, § 28; 1978, ch. 82, § 3; 1979, ch. 202, § 23; 2015, ch. 3, § 13.**

**The 2015 amendment,** effective July 1, 2015, provided for the secretary of public safety to take the oath of office required of all state officials; after "police and the", deleted "New Mexico state police board" and added "secretary".

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 81A C.J.S. States § 91.

## 29-2-13. Uniforms and badges; uniform allowance to be set by secretary.

A suitable and distinctive uniform shall be prescribed by the secretary. The secretary shall provide and issue to each commissioned officer a uniform and an appropriate badge which shall contain in plain legible letters the words "New Mexico state police". The prescribed uniform and badge shall be worn at all times when on duty, except when by direction of the chief or the governor, any member of the New Mexico state police is assigned to special duties. Uniform allowance and subsistence pay shall be established by the secretary and allowed in addition to a commissioned officer's salary and paid on a monthly basis to each commissioned officer of the division. The uniform allowance and subsistence pay shall be expended only for the purposes allowed and any portion of the uniform allowance or subsistence pay not so spent in each fiscal year shall revert to the general fund.

**History: 1941 Comp., § 40-213, enacted by Laws 1941, ch. 147, § 13; 1953 Comp., § 39-2-13; Laws 1976, ch. 8, § 1; 1977, ch. 257, § 29; 1979, ch. 202, § 24; 1989, ch. 204, § 24.**

**The 1989 amendment,** effective July 1, 1989, substituted "secretary" for "board" in the section heading and "secretary" for "New Mexico state police board" in the first sentence, deleted the former second and third sentences relating to establishment and expenditure of uniform allowance, substituted all of the language of the present second sentence preceding "which" for "The board shall also provide and issue to each member an appropriate badge and uniform", and added the last two sentences.



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ANNOTATIONS

**Section allows each officer to purchase own uniform.** — This section indicates the legislative intention to allow each officer to purchase his own uniforms, since the phraseology cannot be said to even imply that the purchase of uniforms is to be made by the department pursuant to the State Purchasing Agent Act. 1964 Op. Att'y Gen. No. 64-134.

## 29-2-14. Unauthorized wearing of uniform or badge; unauthorized marking of motor vehicle; penalty.

A. Unauthorized wearing of uniform or badge consists of the wearing or requiring the wearing, without authorization by the secretary, of a uniform or badge or both whose material, color or design, or any combination of them, is such that the wearer appears to be a member of the New Mexico state police.

B. Unauthorized marking of motor vehicle consists of the marking, using, possessing or owning or requiring the marking or using, without authorization by the secretary, of a motor vehicle whose insignia, color or equipment, or any combination of them, is such that the motor vehicle appears to be a New Mexico state police motor vehicle.

C. Whoever commits unauthorized wearing of uniform or badge or unauthorized marking of motor vehicle is guilty of a petty misdemeanor.

**History: 1953 Comp., § 39-2-13.1, enacted by Laws 1971, ch. 87, § 1; 1977, ch. 257, § 30; 1979, ch. 202, § 25; 2015, ch. 3, § 14.**

**Cross references.** — For impersonating peace officer, *see* 30-27-2.1 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, changed references made to the New Mexico police board to the secretary of public safety; in Subsection A, after "authorization by the", deleted "New Mexico state police board" and added "secretary", in Subsection B, after "authorization by the", deleted "board" and added "secretary".

## 29-2-15. Repealed.

**Repeals.** — Laws 1987, ch. 254, § 27 repealed 29-2-15 NMSA 1978, as enacted by Laws 1941, ch. 147, § 14, relating to division of state police, effective July 1, 1987.

## 29-2-16. State police school; compensation.

A. Before entering upon the appointee's duties, every appointee to the New Mexico state police shall be required to attend a school of instruction approved by the secretary. A uniform course of instruction shall be given all trainees governing the operation, maintenance and temporary roadside repair of motor vehicles, the laws of the state that the appointee may be called on to enforce and other instruction as the secretary may require. Attendance at the school or other course of instruction as may be prescribed renders the person attending subject to the control of the New Mexico state police during attendance.

B. The secretary may, within the budgetary means of the New Mexico state police, allow subsistence and compensation for trainees attending the school of instruction at the New Mexico state police headquarters or elsewhere.

C. This section shall not apply to members of the former motor transportation division or the former special investigations division.

**History: 1941 Comp., § 40-215, enacted by Laws 1941, ch. 147, § 15; 1953 Comp., § 39-2-15; Laws 1959, ch. 231, § 1; 1971, ch. 211, § 1; 1977, ch. 257, § 31; 1978, ch. 82, § 4; 1979, ch. 202, § 26; 1981, ch. 189, § 1; 2015, ch. 3, § 15.**

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by amending certain duties of appointees to the New Mexico state police and clarifying certain duties of the secretary of public safety; in Subsection A, after "upon", deleted "his" and added "the appointee's", after "attend", deleted "for a period of at least ninety days", after "approved by", deleted "New Mexico state police board" and added "secretary", after "laws of the state", deleted "which" and added "that", and after "instruction as the", deleted "New Mexico state police board" and added "secretary"; in Subsection B, after "The", deleted "board" and added "secretary", and deleted the second sentence; and added Subsection C.



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## 29-2-17. Repealed.

**Repeals.** — Laws 1979, ch. 202, § 53, repealed 29-2-17 NMSA 1978, as enacted by Laws 1941, Ch. 147, § 16, relating to the state police reserve, effective July 1, 1979.

## 29-2-18. State police chief and other members; powers and duties.

A. The chief and other members of the New Mexico state police, when duly commissioned and sworn under the provisions of Sections 29-2-1 through 29-2-29 NMSA 1978, shall have the following powers and shall be:

(1) conservators of the peace within the state with full power to apprehend, arrest and bring before the proper court all law violators within the state;

(2) ex-officio deputies and agents of all the officers and departments of the taxation and revenue department and of the officers and departments within the state charged with the registration of motor vehicles, the issuance of licenses to operators of motor vehicles and of the officers and departments of the state charged with the regulation and control of motor vehicles operated upon the public highways for hire in the transportation of either passengers or property; and

(3) charged with the enforcement of all laws of New Mexico regulating the use of highways.

B. Upon request of any officer or agency of the state charged with the duty of enforcing any law of the state that is made to the secretary, one or more members of the New Mexico state police may be temporarily designated specifically to enforce the provisions of such law.

**History: 1941 Comp., § 40-217, enacted by Laws 1941, ch. 147, § 17; 1953 Comp., § 39-2-17; Laws 1977, ch. 257, § 33; 1979, ch. 202, § 27; 2015, ch. 3, § 16.**

**Cross references.** — For request for aid from New Mexico mounted patrol, *see* 29-6-5 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by clarifying the language in the section and changing references to the New Mexico police board to the secretary of public safety; designated the previously undesignated introductory language as Subsection A, redesignated former Subsections A, B and C as Paragraphs 1, 2 and 3 of Subsection A, and redesignated former Subsection D as Subsection B; in the introductory language of Subsection A, after "state police", deleted "who" and after "powers and", deleted "shall perform the following duties: they"; in Subsection A, Paragraph 2, deleted "they shall be" preceding "ex-officio", and at the end of the paragraph, added "and"; in Subsection A, Paragraph 3, deleted "they shall be" preceding "charged" and at the end of the paragraph, deleted "and"; and in Subsection B, after the second occurrence of "state", added "that is", and after "made to the", deleted "New Mexico state police board" and added "secretary".

### ANNOTATIONS

**Arrest for possession of marijuana.** — Defendant's car was stopped during a general roadblock and defendant opened his car trunk and then his suitcase at the police officer's request. The officer found marijuana residue in the suitcase and defendant was then placed under arrest for possession of marijuana and the contraband was seized. This stop and seizure was not unlawfully accomplished and the court of appeals was in error in reversing the conviction of defendant for marijuana possession. *State v. Bloom*, 1977-NMSC-016, 90 N.M. 192, 561 P.2d 465.

**During course of arrest may not use excessive force.** — Plaintiff charged defendant police officer with unlawfully, willfully and maliciously assaulting him when the defendant threw plaintiff onto the pavement while removing him from a bar for drunkenness and disorderly conduct, causing breaks to plaintiff's leg. Police officers are entitled to use only reasonable force, not excessive force, in performing their duties. *Mead v. O'Connor*, 1959-NMSC-077, 66 N.M. 170, 344 P.2d 478.

**Officer's authority as conservator of peace** gave him the right to be on the plaintiff's property when called by another person who was involved in a dispute with the plaintiff, and he was within his rights in detaining the plaintiff when it was necessary to preserve the peace and further his investigation of the dispute. *Romero v. Sanchez*, 1995-NMSC-028, 119 N.M. 690, 895 P.2d 212.

**Arrest of persons charged with violating state gambling laws.** 1943-44 Op. Att'y Gen. No. 44-4616.

**State police and county sheriffs have concurrent authority within county** and each has the duty and authority of enforcing the state's laws. 1943-44 Op. Att'y Gen. No. 43-4252.

## 29-2-19. Chief; qualifications; removal.

A. The chief is the executive officer of the New Mexico state police and is subject to the control, supervision and direction of the secretary. The appointee, at the time of appointment as chief by the secretary, shall have been a member of the New Mexico state police holding a permanent commission for ten continuous years immediately prior to the appointment and shall have served not less than three years in a supervisory capacity. Appointment shall be made with the consent of the senate.

B. The chief shall serve at the pleasure of the secretary.

C. The seniority and retirement rating of the chief shall be continuous as for any other member.



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D. The chief shall maintain an office in Santa Fe in such quarters as are provided by the New Mexico state police for that purpose.

**History: 1953 Comp., § 39-2-18, enacted by Laws 1977, ch. 257, § 34; 1979, ch. 202, § 28; 1981, ch. 185, § 1; 2015, ch. 3, § 17.**

**Repeals and reenactments.** — Laws 1977, ch. 257, § 34, repealed former 39-2-18, 1953 Comp., relating to executive duties of chief, removal, seniority and retirement, location of office and residence, and enacted a new 39-2-18, 1953 Comp. Laws 1977, ch. 257, § 107, also repealed former 39-2-18, 1953 Comp., as it existed before the enactment of the new section.

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by clarifying the qualifications of the chief of the state police; in Subsection A, after "police and", deleted "shall be" and added "is", after "direction of the", deleted "New Mexico state police board. He shall" and added "secretary. The appointee"; in the second sentence of Subsection A, after "time of", deleted "his", after "appointment", added "as chief", after "by the", deleted "board" and added "secretary shall", after "prior to", deleted "his" and added "the", and after "capacity", deleted "and said"; in Subsection B, after "pleasure of the" deleted "New Mexico state police board" and added "secretary"; and in Subsection D, after "maintain", deleted "his" and added "an".

## 29-2-20. Districts.

The New Mexico state police chief, subject to the control of the secretary, may divide the state into districts and may designate home stations for the members of the New Mexico state police.

**History: 1941 Comp., § 40-219, enacted by Laws 1941, ch. 147, § 19; 1953 Comp., § 39-2-19; Laws 1977, ch. 257, § 35; 1979, ch. 202, § 29; 2015, ch. 3, § 18.**

**The 2015 amendment,** effective July 1, 2015, changed references made to the New Mexico state police board to the secretary of public safety; after "control of the", deleted "New Mexico state police board" and added "secretary".

## 29-2-21. Details.

The governor of New Mexico may from time to time detail all or any part of the New Mexico state police to such part of the state as in his judgment may be necessary to bring about proper law enforcement in the state to handle disturbances or to investigate specific law violations.

**History: 1941 Comp., § 40-220, enacted by Laws 1941, ch. 147, § 20; 1953 Comp., § 39-2-20; Laws 1977, ch. 257, § 36; 1979, ch. 202, § 30.**

## 29-2-22. Rulemaking power; rules to establish standards of conduct.

The secretary has authority to make and promulgate rules and regulations for the purpose of carrying out the provisions of Sections 29-2-1 through 29-2-29 NMSA 1978. The secretary shall establish by rules, from time to time, standards of conduct for members of the New Mexico state police, and a copy of the rules shall be delivered to each member and displayed at each station of the department. The rules shall be filed pursuant to the State Rules Act [Chapter 14, Article 4 NMSA 1978].

**History: 1941 Comp., § 40-221, enacted by Laws 1941, ch. 147, § 21; 1953, ch. 80, § 5; 1953 Comp., § 39-2-21; Laws 1977, ch. 257, § 37; 1978, ch. 82, § 5; 1979, ch. 202, § 31; 2015, ch. 3, § 19.**

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by giving the secretary of public safety rulemaking power; in the first sentence, after "The", deleted "New Mexico state police board shall have" and added "secretary has"; in the second sentence, after "The", deleted "New Mexico state police board" and added "secretary", after "copy", deleted "thereof" and added "of the rules", and after "each", deleted "such"; in the third sentence, deleted "Such" and added "The".

**ANNOTATIONS**

**Board's authority to make rules controlled by statute.** — Authority of the police board to promulgate rules and regulations must be found in and is limited by statute. Such authority is not limited to those powers expressly granted by statute, but includes, also, all powers that may fairly be implied therefrom. *Winston v. N.M. State Police Bd.*, 1969-NMSC-066, 80 N.M. 310, 454 P.2d 967.

**Agency's authority includes express and implied powers granted.** — It is a fundamental principle of administrative law that the authority of an agency is not limited to those powers expressly granted by statute, but includes, also, all powers that may fairly be implied therefrom. *Wimberly v. N.M. State Police Bd.*, 1972-NMSC-034, 83 N.M. 757, 497 P.2d 968.

**Temporary rank adjustments within scope of powers.** — Where New Mexico state police board has adopted a regulation providing that "all ranks above captain will be appointments and not permanent," and the officers who hold these ranks are given additional salary and



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emoluments, but these ranks, according to the record, are considered by the board and the department to be temporary, plaintiff's adjustments in rank from captain to major and major to lieutenant colonel were not promotions as such but were temporary advancements within the framework of administration of the New Mexico state police and both chief of police and the board acted within the scope of their authority under the laws of the state of New Mexico in adjusting plaintiff's rank from lieutenant colonel to major and from major to captain. *Wimberly v. N.M. State Police Bd.*, 1972-NMSC-034, 83 N.M. 757, 497 P.2d 968.

**Regulation allowing director to shift key personnel.** — The procedures of advancement and reduction in rank resulting from regulation providing that all ranks above captain will be appointments and not permanent enable the chief of police to shift key personnel to positions where their interest and ability are used to best advantage. *Wimberly v. N.M. State Police Bd.*, 1972-NMSC-034, 83 N.M. 757, 497 P.2d 968.

**Board can prohibit employee from running for office.** — The board can constitutionally promulgate a rule prohibiting a state police employee from running for or accepting a political office. *State ex rel. Harkleroad v. N.M. State Police Bd.*, 1985-NMSC-076, 103 N.M. 270, 705 P.2d 676.

**Involuntary retirement rule is invalid.** — State police board regulation providing for involuntary retirement of all police officers who had completed 30 years of service, even where such officers had not reached mandatory retirement age, exceeded statutory authority of the board and therefore was invalid. *Winston v. N.M. State Police Bd.*, 1969-NMSC-066, 80 N.M. 310, 454 P.2d 967.

**Effect of using all of sick leave.** — Rule 7 of regulation promulgated by state police board filed pursuant to this section makes it clear that under no circumstances can an officer who was injured in line of duty but who has used up all of his sick leave be granted a leave of absence from the police department, and request for such leave constitutes a voluntary resignation. *Budagher v. N.M. State Police Bd.*, 1971-NMSC-077, 82 N.M. 787, 487 P.2d 489 (decided under prior law).

**No authority for rule requiring mandatory retirement after 30 years.** — There is no delegated authority for the state police board to promulgate a rule requiring mandatory retirement after 30 years of service; such rule would be unreasonable, arbitrary and conflict with the former retirement by age 61 requirement of Section 29-2-6B NMSA 1978. 1967 Op. Att'y Gen. No. 67-72 (rendered under prior law).

## 29-2-23. Repealed.

**Repeals.** — Laws 1979, ch. 202, § 53 repealed 29-2-23 NMSA 1978, as enacted by Laws 1941, Ch. 147, § 23, relating to the transfer of powers and duties in the bureau of identification of the department of justice to the technical services bureau of the criminal justice support division of the criminal justice department, effective July 1, 1979.

## 29-2-24. Waiver.

The provisions of Sections 29-2-6 through 29-2-8 NMSA 1978 may be waived by the secretary with regard to plainclothes or special investigators and other employees not regularly uniformed.

**History: 1941 Comp., § 40-225, enacted by Laws 1941, ch. 147, § 25; 1953 Comp., § 39-2-25; Laws 1977, ch. 257, § 39; 1979, ch. 202, § 32; 2015, ch. 3, § 20.**

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by providing authority to the secretary of the department of public safety to waive certain qualification requirement for officers; after "waived by the", deleted "unanimous vote of all members of the New Mexico state police board" and added "secretary", and after "plainclothes", deleted "men".

## 29-2-25. Accident reports.

When any member of the New Mexico state police investigates a motor vehicle accident, the member shall make a written report of the findings on appropriate forms furnished by the New Mexico state police, the original of which report shall be filed in the office of the New Mexico state police and shall be furnished to any person upon written application accompanied by a fee as set by the secretary for the photocopy of each surface of all documents comprising a report.

**History: 1941 Comp., § 40-226, enacted by Laws 1947, ch. 38, § 1; 1953 Comp., § 39-2-26; Laws 1957, ch. 59, § 1; 1977, ch. 257, § 40; 1978, ch. 82, § 6; 1979, ch. 202, § 33; 2015, ch. 3, § 21.**

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by amending the language relating to the completion of vehicle accident reports; after the first occurrence of "police", deleted "shall investigate" and added "investigates"; after "accident", deleted "he" and added "the member"; after "written report of", deleted "his" and added "the"; after the second occurrence of "report", deleted "and of all reports of motor vehicle accidents heretofore made"; after "set by the", deleted "New Mexico state police board" and added "secretary"; and changed "photostat" to "photocopy".

### ANNOTATIONS

**Limited protection of accused.** — Section 29-10-4 NMSA 1978 protects the confidentiality of information concerning the identity of a person who has been accused, but not charged, with a crime only if that information has been collected in connection with an investigation of, or otherwise relates to, another person who has been charged with committing a crime. However, information in other records which identifies a person accused but not charged with or arrested for a crime may be protected



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from public disclosure under Section 14-2-1 NMSA 1978 et seq. Finally, even if it would otherwise be protected under either statute, information about a person accused but not charged with a crime is open to public inspection if it is contained in a document listed in Section 29-10-7 NMSA 1978. 1994 Op. Att'y Gen. No. 94-02.

**No conflict between Arrest Record Information Act and section** when accident falls within exemption of former 39-10-8D, 1953 Comp. (repealed and reenacted as Section 29-10-7 NMSA 1978), if the information on the accident report is the same as that information on the initial record of entry, or if any arrest information on the report is deleted from the copy disseminated. 1975 Op. Att'y Gen. No. 75-37 (opinion rendered under former law).

**Accident report not confidential.** — Reports made by police officers regarding an accident would not be considered confidential under Section 66-7-213 NMSA 1978, and would be subject to inspection by persons interested either in the office of the governor's traffic safety coordinating committee or in the police department which made and transmitted the report. 1953-54 Op. Att'y Gen. 53-5840 (opinion rendered under former law).

## 29-2-26. Repealed.

**Repeals.** — Laws 1979, ch. 202, § 53 repealed 29-2-26 NMSA 1978, as enacted by Laws 1955, Ch. 193, § 1, relating to the representation of the state police board and police officers by the attorney general, effective July 1, 1979.

## 29-2-27. Security for the governor and the legislature.

A. The New Mexico state police shall provide security and protection for the governor, and security and protection for the governor's family. The extent and manner in which the security is provided shall be determined by the governor and the chief of the New Mexico state police.

B. The New Mexico state police shall provide security and protection for the legislature while it is in session.

**History: 1953 Comp., § 39-2-28, enacted by Laws 1969, ch. 125, § 1; 1977, ch. 257, § 41; 1979, ch. 202, § 34.**

## 29-2-28. Provide concurrent jurisdiction of state property and grounds.

The New Mexico state police shall have concurrent jurisdiction for the protection of all public buildings, grounds and property of the state government, its agencies, instrumentalities and institutions, including but not limited to the state capitol and the state capitol complex. Such concurrent jurisdiction shall include the exercise of supervisory authority over any other security forces employed on such property by the agency, instrumentality or institution, at the option or election of the chief of the New Mexico state police.

**History: 1953 Comp., § 39-2-28.1, enacted by Laws 1971, ch. 259, § 1; 1977, ch. 257, § 42; 1979, ch. 202, § 35.**

## 29-2-29. State police; group life insurance.

Notwithstanding the provisions of Section 10-7-4 NMSA 1978 and in addition to all other benefits provided commissioned officers, the department shall provide life insurance coverage in the amount of twenty-five thousand dollars ($25,000) for each state police officer to be paid to his designated beneficiary. The coverage shall include double indemnity provisions for death incurred in line of duty. The coverage shall be provided by a group term insurance policy, the premium for which shall be paid out of state funds appropriated to the department of public safety.

**History: 1953 Comp., § 39-2-29, enacted by Laws 1973, ch. 297, § 1; 1989, ch. 204, § 25.**

**Cross references.** — For educational funds for children of police killed in active duty, *see* 28-14-1 NMSA 1978.

**The 1989 amendment,** effective July 1, 1989, substituted all of the present language of the first sentence preceding "shall" for "Notwithstanding the provisions of Section 5-4-12 NMSA 1953 and in addition to all other benefits provided state police officers, the New Mexico state police", and substituted "department of public safety" for "state police" in the last sentence.



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# ARTICLE 3

# Identification of Criminals

Sec.
29-3-1. New Mexico state police; identification and information.
29-3-2. New Mexico state police; cooperation; local and state.
29-3-3. New Mexico state police; cooperation; federal.
29-3-4. State agencies; cooperation.
29-3-5 to 29-3-7. Repealed.
29-3-8. Biometric identifying information of persons arrested; state arrest records; disposition.
29-3-8.1. Repealed.
29-3-9. Instruction.
29-3-10. DNA collection from persons arrested.
29-3-11. Uniform crime reporting system established; duties of department.
29-3-12. Updates to criminal history records.

## 29-3-1. New Mexico state police; identification and information.

A. It is the duty of the New Mexico state police to install and maintain complete systems for the identification of criminals, including the fingerprint system and the modus operandi system. The New Mexico state police shall obtain, from whatever source procurable, and shall file and preserve for record, plates, photographs, outline pictures, fingerprints, measurements, descriptions, modus operandi statements and such other information about, concerning and relating to any and all persons who have been or who shall be convicted of a felony or who shall attempt to commit a felony within this state or who are well-known and habitual criminals or who have been convicted of any of the following felonies or misdemeanors:

(1) illegally carrying, concealing or possessing a pistol or any other dangerous weapon;
(2) buying or receiving stolen property;
(3) unlawful entry of a building;
(4) escaping or aiding an escape from prison;
(5) making or possessing a fraudulent or forged check or draft;
(6) petit larceny;
(7) unlawfully possessing or distributing habit-forming narcotic drugs; and
(8) driving while under the influence of intoxicating liquor or drugs.

B. The New Mexico state police may also obtain like information concerning persons who have been convicted of violating any of the military, naval or criminal laws of the United States or who have been convicted of a crime in any other state, country, district or province, which, if committed within this state, would be a felony.

C. The New Mexico state police shall make a complete and systematic record and index of all information obtained for the purpose of providing a convenient and expeditious method of consultation and comparison.

**History: Laws 1935, ch. 149, § 4; 1941 Comp., § 40-301; 1953 Comp., § 39-3-1; Laws 1977, ch. 257, § 43; 1979, ch. 202, § 36; 1997, ch. 242, § 1.**

**Cross references.** — For the DNA Identification Act, *see* Chapter 29, Article 16 NMSA 1978.

**The 1997 amendment,** effective July 1, 1997, in Subsection A, deleted "such" preceding "plates" and "hereafter" following "who shall", designated the paragraphs and added Paragraph (8), in Subsection C inserted "of" following "index", and made minor stylistic changes.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6A C.J.S. Arrest § 62.

## 29-3-2. New Mexico state police; cooperation; local and state.

The New Mexico state police shall cooperate with the respective sheriffs, constables, marshals, police and other peace officers of this state in the detection of crime and the apprehension of criminals throughout the state and shall, on the direction of the chief of the New Mexico state police, governor or attorney general, conduct such investigations as may be deemed necessary to obtain and secure evidence which may be considered necessary or essential for the conviction of alleged violators of the criminal laws of this state, and the chief is hereby authorized to assist any



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prosecuting attorney in the prosecution of any criminal case which may in his judgment require such cooperation. All expenses such as travel, meals and lodging involved in such assistance shall be paid from the court fund of the county in which the trial is held or to be held.

**History: Laws 1935, ch. 149, § 5; 1941 Comp., § 40-302; 1953 Comp., § 39-3-2; Laws 1977, ch. 257, § 44; 1979, ch. 202, § 37.**

## 29-3-3. New Mexico state police; cooperation; federal.

It shall be the duty of the New Mexico state police and it is hereby granted the power to cooperate with agencies of other states and of the United States having similar powers to develop and carry on a complete interstate, national and international system of criminal identification and investigation, and also to furnish upon request any information in their possession concerning any person charged with crime to any court, district attorney or police officer or any peace officer of this state, or of any other state or the United States.

**History: Laws 1935, ch. 149, § 6; 1941 Comp., § 40-303; 1953 Comp., § 39-3-3; Laws 1977, ch. 257, § 45; 1979, ch. 202, § 38.**

**ANNOTATIONS**

**No tort liability for failure to inform out-of-state officials of escape.** — In a wrongful death action arising out of the escape of state prisoners, who crossed over into Colorado and killed a resident thereof, the New Mexico State police, who were informed of the escape soon after it occurred and diligently attempted to apprehend the escapees as soon as possible, but who did not inform Colorado officials, did not breach any duty giving rise to tort liability. *Wittkowski v. State Corr. Dep't*, 1985-NMCA-066, 103 N.M. 526, 710 P.2d 93, cert. quashed, 103 N.M. 442, 708 P.2d 1043, *overruled on other grounds*, *Silva v. State*, 1987-NMSC-107, 106 N.M. 472, 745 P.2d 380.

## 29-3-4. State agencies; cooperation.

A. It is the duty of the university of New Mexico, the human services department, the department of health and all other state departments, divisions, bureaus, boards, commissions, institutions and officials, free of charge or reward, to cooperate with the law enforcement officers of the state and the New Mexico state police, and to render to them such services and assistance relative to microanalysis, handwriting, toxicology, chemistry, photography, medicine, ballistics and all other sciences and matters relating to or that would aid in controlling crime and the detection, apprehension, identification and prosecution of criminals.

B. Beginning July 1, 2018 and through June 30, 2021, the department of public safety forensic laboratories bureau shall assist a law enforcement agency crime laboratory in a class A county with a population greater than six hundred thousand according to the most recent federal decennial census by processing and testing sexual assault examination kits that consist of one or more samples of biological material collected pursuant to a medical examination of a sexual assault victim for that laboratory. The bureau may charge a laboratory that the bureau assists as provided in this subsection a fee of up to eight hundred dollars ($800) for each sexual assault examination kit that the bureau processes and tests. Fees collected by the bureau in accordance with this subsection shall be deposited in the sexual assault examination kit fund.

C. As used in this section, "biological material" means material that is derived from a human body and includes bodily fluids, hair and skin cells.

**History: Laws 1935, ch. 149, § 7; 1941 Comp., § 40-304; 1953 Comp., § 39-3-4; Laws 1977, ch. 257, § 46; 1978, ch. 3, § 1; 1979, ch. 202, § 39; 2017, ch. 98, § 1.**

**The 2017 amendment,** effective June 16, 2017, required the department of public safety forensic laboratories bureau to assist certain local law enforcement crime laboratories for a three year period with testing samples of biological material collected pursuant to a medical examination of a sexual assault victim, allowed the bureau to charge a fee for assisting in testing samples of biological material, and defined "biological material" for purposes of this section; added the subsection designation "A."; in Subsection A, after "It", deleted "shall be" and added "is", after "human services department, the", added "department of" and after "health", deleted "and environment department", and after "departments", added "divisions"; and added Subsections B and C.



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## 29-3-5 to 29-3-7. Repealed.

**Repeals.** — Laws 1979, ch. 202, § 53 repealed 29-3-5 to 29-3-7 NMSA 1978, as enacted by Laws 1935, Ch. 149, §§ 8, 9, & 10, relating to supplies, quarters and reports of the technical services bureau of the criminal justice support division, criminal justice department, effective July 1, 1979.

## 29-3-8. Biometric identifying information of persons arrested; state arrest records; disposition.

A. A booking facility shall electronically collect biometric identifying information from a person arrested for the following crimes prior to the person's release:

(1) the commission of a criminal offense amounting to a felony;

(2) the commission of a criminal offense not amounting to a felony but punishable by imprisonment for more than six months under the laws of the state or a political subdivision of the state; or

(3) the violation of a provision of Section 66-8-102 NMSA 1978 or the violation of a municipal or county ordinance prescribing criminal penalties for driving while under the influence of intoxicating liquor or drugs.

B. Biometric identifying information shall be obtained each time a person is arrested.

C. At the time biometric identifying information is collected, the booking facility shall create an arrest record with a state arrest tracking number provided by the department. The arrest record shall include:

(1) the date of arrest;

(2) the state arrest tracking number assigned to the arrest record;

(3) the state personal identification number assigned to the arrestee by the department;

(4) the arrestee's biometric identifying information; and

(5) a completed description with charge code of each offense charged.

D. The department shall promulgate rules addressing:

(1) collection of biometric identifying information;

(2) submission of biometric identifying information;

(3) creation of a state personal identification number system to identify a person arrested and charged with a crime and ensure that the same state personal identification number is assigned to the person regardless of the number of times the person is arrested or the location of the arrest within the state; and

(4) creation of a state arrest tracking number system for each arrest record.

E. At booking, the booking facility shall immediately forward the arrest record and any other information required by department rule to the department.

F. The department shall immediately provide the:

(1) biometric identifying information to the federal bureau of investigation in Washington, D.C.;

(2) state personal identification number to agencies at all levels of government that are engaged in the apprehension, prosecution or defense, adjudication, incarceration or rehabilitation of criminal offenders; and

(3) arrest record to the administrative office of the district attorneys for submission to the appropriate prosecuting authority.

G. Biometric identifying information shall be collected from an inmate who is charged with a felony or misdemeanor offense while incarcerated, and the jail or corrections facility shall forward the offender's biometric identifying information to the department.

H. The administrative office of the courts shall provide to the department the disposition of all criminal cases assigned a state arrest tracking number. The disposition shall be provided in electronic format, promptly upon the conclusion of the case.

I. The administrative office of the district attorneys shall provide to the department the disposition of all criminal cases assigned a state arrest tracking number when the district attorney decides not to file charges in the case. The disposition shall be provided in electronic format promptly upon a district attorney's decision not to file charges in the case.



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J. The department shall forward the disposition of all criminal cases to the federal bureau of investigation and the national crime information center within five business days of receipt.

K. Law enforcement agencies, the administrative office of the courts and the administrative office of the district attorneys shall allow the department access to their records for the purpose of auditing those records to ensure compliance with the provisions of this section.

L. As used in this section:

(1) "biometric identifying information" means physical characteristics used in verifying the identity of an individual, including photographs, fingerprint impressions and palm print impressions;

(2) "booking facility" means a jail, police station, sheriff's office or other place of detention;

(3) "charge code" means the unique code assigned to the crime from the master charge code table distributed by the New Mexico justice information sharing council;

(4) "state arrest tracking number" means an incident-based unique number assigned to the arrest; and

(5) "state personal identification number" means a unique number assigned to the arrestee based on the arrestee's biometric identifying information.

**History: 1953 Comp., § 39-3-8, enacted by Laws 1978, ch. 87, § 1; 1979, ch. 202, § 40; 1997, ch. 242, § 2; 2002, ch. 46, § 1; 2011, ch. 17, § 1; 2019, ch. 192, § 2.**

**The 2019 amendment,** effective July 1, 2019, specified that photographs, fingerprints and palm prints are biometric identifying information of an arrested person; required booking facilities to electronically collect biometric identifying information from a person arrested for certain crimes, provided requirements for the content and disposition of arrest records, required the department of public safety to promulgate rules addressing the collection of biometric identifying information, and provided additional duties for the department of public safety; in the section heading, deleted "fingerprint and palm print impressions" and added "biometric identifying information", and after "arrested", added "state arrest records"; in Subsection A, after "A", deleted "person arrested for" and added "booking facility shall electronically collect biometric identifying information from a person arrested for the following crimes prior to the person's release:", added subsection designation "(1)", in Paragraph A(1), after "felony", deleted "under the laws of this state or any other jurisdiction shall be required by the arresting peace officer or the jail to make fingerprint and palm print impressions prior to the person's release. The arresting peace officer or the jail shall obtain fingerprint and palm print impressions and a photograph", added new Paragraphs A(2) and A(3); added new subsection designations "B." and "C."; in Subsection B, added "Biometric identifying information shall be obtained"; in Subsection C, after "time", deleted "of fingerprinting and palm printing" and added "biometric identifying information is collected, the booking facility shall create an arrest record with", after "state", added "arrest", and after "number", deleted "shall be assigned to the fingerprint and palm print records and the booking sheet." and added "provided by the department. The arrest record shall include:", and added new Paragraphs C(1) through C(5); deleted former Subsections B and C, added new Subsections D and E and redesignated former Subsections D through G as Subsections F through I, respectively; in Subsection F, deleted "Fingerprint and palm print impressions shall be made pursuant to rules adopted by the department. Fingerprint and palm print record submission policies and a state tracking number system for fingerprint and palm print records shall be implemented pursuant to rules adopted by the department. All felony, misdemeanor and DWI arrest fingerprints and palm prints shall be made in duplicate. Both copies and a photograph of the person arrested shall be forwarded to the department within five days following the date of arrest.", after "department shall", deleted "forward one copy" and added "immediately provide the:", and added new Paragraphs F(1) through F(3); in Subsection G, after the subsection designation, added "Biometric identifying information shall be collected from", after "incarcerated", deleted "shall be fingerprinted, palm printed and photographed", after "offender's", deleted "fingerprint and palm print records and photograph" and added "biometric identifying information"; in Subsection H, after "assigned a state", added "arrest"; in Subsection I, after "assigned a state", added "arrest"; added new Subsection J and redesignated former Subsection H as Subsection K; and added new Subsection L.

**The 2011 amendment,** effective June 17, 2011, required palm prints of persons who are arrested.

**The 2002 amendment,** effective July 1, 2002, in Subsection A, inserted "or the jail" and "prior to the person's release" in the first sentence, and added the second and third sentences; in Subsection B, substituted "by the arresting peace officer or the jail to make fingerprint impressions prior to the person's release" for "to make fingerprint impressions" in the first sentence, and added the second and third sentences; in Subsection C, inserted "or the jail" and "prior to the person's release" in the first sentence, and added the second and third sentences; rewrote Subsection D, substituting "the department" for "the New Mexico state police board" in the first sentence, adding the present second sentence, inserting "misdemeanor and DWI" in the third sentence, and adding the requirement of a photograph and the five-day requirement in the fourth sentence; deleted former Subsection E in light of the other amendments, and added present Subsections E through H.

**The 1997 amendment,** effective July 1, 1997, added Subsection C, redesignating the following subsections accordingly, and substituted "federal bureau of investigation" for "FBI" in Subsection E.

## 29-3-8.1. Repealed.

**Repeals.** — Laws 2019, ch. 203, § 8 repealed 29-3-8.1 NMSA 1978, as enacted by Laws 2002, ch. 46, § 2, relating to petition to expunge arrest information, effective January 1, 2020. For provisions of former section, *see* the 2019 NMSA 1978 on *NMOneSource.com*.



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## 29-3-9. Instruction.

The governor or the chief of the New Mexico state police may, when deemed necessary or advisable, detail and commission any member or members of the New Mexico state police to attend as a student any school of instruction, now or which may hereafter be established and operated by the United States or any of its agencies, having for its purpose the instruction and training of operators in crime detection and identification, investigation and apprehension of criminals. Such person or persons so detailed and commissioned shall, when they are members of the New Mexico state police, draw the same salaries and allowances as when on duty in this state and shall be deemed to be on leave of absence for such purpose. All other persons so detailed and commissioned for such purpose shall be paid such compensation and allowance as may be provided by law.

**History: Laws 1935, ch. 149, § 13; 1941 Comp., § 40-309; 1953 Comp., § 39-3-9; Laws 1977, ch. 257, § 50; 1979, ch. 202, § 41.**

## 29-3-10. DNA collection from persons arrested.

A. A person eighteen years of age or over who is arrested for the commission of a felony under the laws of this state or any other jurisdiction shall provide a DNA sample to jail or detention facility personnel upon booking. A sample is not required if it is determined that a sample has previously been taken, is in the possession of the administrative center, has not been expunged pursuant to the DNA Identification Act [Chapter 29, Article 16 NMSA 1978] and is sufficient for DNA identification testing.

B. Jail or detention facility personnel who collect samples pursuant to this section shall forward the samples to the administrative center. A sample shall not be analyzed and shall be destroyed unless one of the following conditions has been met:

(1) the arrest was made upon an arrest warrant for a felony;

(2) the defendant has appeared before a judge or magistrate who made a finding that there was probable cause for the arrest; or

(3) the defendant posted bond or was released prior to appearing before a judge or magistrate and then failed to appear for a scheduled hearing.

C. Samples shall be collected in accordance with rules and procedures adopted by the DNA oversight committee, shall be subject to the confidentiality and penalty provisions of the DNA Identification Act and shall be used only as authorized by that act.

D. As used in this section:

(1) "administrative center" means the law enforcement agency or unit that administers and operates the DNA identification system pursuant to the provisions of the DNA Identification Act;

(2) "DNA" means deoxyribonucleic acid; and

(3) "sample" means a sample of biological material that is sufficient for DNA testing.

**History: Laws 2006, ch. 104, § 1; 2011, ch. 84, § 1.**

**The 2011 amendment,** effective July 1, 2011, required DNA samples from all persons arrested for commission of a felony if the arrest was made upon an arrest warrant, a judge or a magistrate has found probable cause for the arrest, or the defendant failed to appear for a hearing after posting bond.

## 29-3-11. Uniform crime reporting system established; duties of department.

A. The department of public safety shall develop, operate and maintain a uniform crime reporting system and shall be the central repository for the collection, storage, retrieval and analysis of crime incident and arrest reports generated by all law enforcement agencies in this state. The system shall be operational as of January 1, 2008.

B. The department shall:



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(1) compile statistical data and forward such data as required to the federal bureau of investigation or the appropriate department of justice agency in accordance with standards and procedures of the national system;

(2) provide forms, standards and procedures and related training to state and local law enforcement agencies as necessary for the agencies to report incident and arrest activity for inclusion in the statewide system;

(3) in conjunction with the New Mexico sentencing commission, annually publish a report on the nature and extent of crime in New Mexico and submit the report to the governor and to the legislature;

(4) maintain the privacy and security of information in accordance with applicable state and federal laws;

(5) provide the New Mexico sentencing commission access to the data collected and maintained by the department; and

(6) establish rules as necessary to implement the provisions of this section.

C. Every law enforcement agency in the state shall:

(1) submit crime incident reports to the department of public safety on forms or in the format prescribed by the department;

(2) submit any other crime incident information as may be required by the department of public safety; and

(3) use the unique code assigned to the crime from the master charge code table distributed by the New Mexico justice information sharing council for the automated fingerprint identification system and use uniform crime incident reporting as provided by the department for all incidents and arrests.

D. The annual report and other statistical data reports generated by the department shall be made available to state and local law enforcement agencies, the administrative office of the courts and the general public.

**History: Laws 2007, ch. 37, § 1; 2019, ch. 192, § 3.**

**Cross references.** — For duty of state police to establish and maintain complete systems for the identification of criminals, *see* 29-3-1 NMSA 1978.

For the public safety department, *see* 9-19-4 NMSA 1978.

**The 2019 amendment,** effective July 1, 2019, required the department of public safety to share data with the New Mexico sentencing commission; in Subsection B, added new Paragraph B(5); in Subsection C, in Paragraph C(3), after "use the', deleted "state uniform statutory charge codes" and added "unique code assigned to the crime from the master charge code table distributed by the New Mexico justice information sharing council"; and in Subsection D, after "law enforcement agencies," added "the administrative office of the courts".

## 29-3-12. Updates to criminal history records.

The department of public safety shall maintain an electronic subscription service to provide notice of updates to criminal history records, including dispositions, for agencies authorized by law to receive particular criminal history record information. The department shall update, upon receipt, criminal history repository records and dispositions pursuant to any change in information discovered by the department. Within forty-eight hours after the department becomes aware that an individual's criminal history record information in a repository record has changed, the department shall provide notice of the updated information to any agency authorized by law to receive information on that particular record.

**History: Laws 2011, ch. 83, § 1.**

**Effective dates.** — Laws 2011, ch. 83 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2011, 90 days after the adjournment of the legislature.



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# ARTICLE 3A

# Criminal Record Expungement

Sec.
29-3A-1. Short title.
29-3A-2. Definitions.
29-3A-3. Expungement of records upon identity theft.
29-3A-4. Expungement of records upon release without conviction.
29-3A-5. Expungement of records upon conviction.
29-3A-6. Notices; rulemaking.
29-3A-7. Effect of an order to expunge.
29-3A-8. Expungement of arrest and conviction records; procedure.
29-3A-9 Dismissal of sentences; incarcerated persons.

## 29-3A-1. Short title.

Chapter 29, Article 3A NMSA 1978 may be cited as the "Criminal Record Expungement Act".

**History: Laws 2019, ch. 203, § 1; 2021 (1st S.S.), ch. 3, § 3.**

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, changed "This act" to "Chapter 29, Article 3A NMSA 1978".

## 29-3A-2. Definitions.

As used in the Criminal Record Expungement Act:

A. "arrest records" means records of identification of a person under arrest or under investigation for a crime taken or gathered by an official; "arrest records" includes information gathered from the national crime information center or another criminal record database, photographs, fingerprints and booking sheets; except "arrest records" does not include:

(1) driving while intoxicated citations maintained by the taxation and revenue department;

(2) computer-aided dispatch information; or

(3) log books relating to breath alcohol testing equipment;

B. "expungement" means the removal from access to the general public of a notation of an arrest, complaint, indictment, information, plea of guilty, conviction, acquittal, dismissal or discharge record, including a record posted on a publicly accessible court, corrections or law enforcement internet website; and

C. "public records" means documentation relating to a person's arrest, indictment, proceeding, finding or plea of guilty, conviction, acquittal, dismissal or discharge, including information posted on a court or law enforcement website; but "public records" does not include:

(1) arrest record information that:

(a) reveals confidential sources, methods, information or individuals accused but not charged with a crime and that is maintained by the state or any of its political subdivisions pertaining to any person charged with the commission of any crime; or

(b) is confidential and unlawful to disseminate or reveal, except as provided in the Arrest Record Information Act [Chapter 29, Article 10 NMSA 1978] or other law;

(2) the file of a district attorney or attorney general maintained as a confidential record for law enforcement purposes and not open for inspection by members of the public;

(3) a record maintained by the children, youth and families department, the human services department or the public education department when that record is confidential under state or federal law and is required to be maintained by state or federal law for audit or other purposes; or

(4) a record received pursuant to a background check as authorized by law.

**History: Laws 2019, ch. 203, § 2.**

**Effective dates.** — Laws 2019, ch. 203, § 9 made Laws 2019, ch. 203, § 2 effective January 1, 2020.



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## 29-3A-3. Expungement of records upon identity theft.

A. A person who is wrongfully identified in arrest records or public records as a result of identity theft may petition the district court for an order to expunge arrest records and public records.

B. After a hearing on the petition and upon a showing that the person is a victim of identity theft, the court shall issue an order within thirty days of the hearing requiring that all arrest records and public records be expunged.

C. The court shall cause a copy of the order to be delivered to all relevant law enforcement agencies and courts. The order shall prohibit all relevant law enforcement agencies and courts from releasing copies of such records to any person, except upon order of the court.

D. After notice to and a hearing for all interested parties and in compliance with all applicable law, the court shall insert in the records the correct name and other identifying information of the offender, if known or ascertainable, in lieu of the name of the person wrongly identified.

**History: Laws 2019, ch. 203, § 3.** **Effective dates.** — Laws 2019, ch. 203, § 9 made Laws 2019, ch. 203, § 3 effective January 1, 2020.

## 29-3A-4. Expungement of records upon release without conviction.

A. One year from the date of the final disposition in the case, a person released without conviction for a violation of a municipal ordinance, misdemeanor, felony, penalty assessments under the Criminal Code [30-1-1 NMSA 1978] and the Motor Vehicle Code [66-1-1 NMSA 1978] or violations and deferred sentences under the Motor Vehicle Code may petition the district court in the district in which the charges against the person originated for an order to expunge arrest records and public records related to that case.

B. A petitioner shall provide notice by first-class United States mail of the filed petition to the following parties, which parties shall be given thirty days in which to provide to the district court any objections to the petition:

(1) the district attorney for that district; and

(2) the department of public safety.

C. A single petition filed pursuant to Subsection A of this section may include a request to expunge multiple arrest records and public records that originated within the jurisdiction of a district. A petition shall be filed under seal or under pseudonym. Petitions brought pursuant to the Criminal Record Expungement Act and all records of proceedings thereunder shall be expunged upon the conclusion of proceedings. The petitioner shall attach to and file with the petition copies of the petitioner's record of arrest and prosecutions from the department of public safety dated no earlier than ninety days prior to the date the petition is filed.

D. A party that seeks to object to a petition on the basis of the contents of a petitioner's record of arrest and prosecutions from the federal bureau of investigation must provide a copy of that record to a petitioner at no charge at the time the party objects.

E. After a hearing on the petition, the court shall issue an order within thirty days of the hearing requiring that all arrest records and public records related to the case be expunged if it finds that no other charge or proceeding is pending against the petitioner and if the petitioner was released without a conviction, including:

(1) an acquittal or finding of not guilty;

(2) a nolle prosequi, a no bill or other dismissal;

(3) a referral to a preprosecution diversion program;

(4) an order of conditional discharge pursuant to Section 31-20-13 NMSA 1978; or

(5) the proceedings were otherwise discharged.

F. The court shall cause a copy of the order to be delivered to all relevant law enforcement agencies and courts. The order shall prohibit all relevant law enforcement agencies and courts from releasing copies of the records to any person, except upon order of the court.



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**History: Laws 2019, ch. 203, § 4; 2021 (1st S.S.), ch. 3, § 4.**

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, added penalty assessments under the Criminal Code and the Motor Vehicle Code or violations and deferred sentences under the Motor Vehicle Code to the existing provision that authorizes a person to petition a district court for an order to expunge arrest records and public records related to the case, made changes to the requirements for notice of petitions and objections, and added provisions governing the form and content of petitions; in Subsection A, after "felony", added "penalty assessments under the Criminal Code and the Motor Vehicle Code or violations and deferred sentences under the Motor Vehicle Code"; in Subsection B, after "provide notice", added "by first-class United States mail", and after "shall be given", deleted "an opportunity" and added "thirty days in which", and deleted former Paragraph B(3); and added new Subsections C and D and redesignated former Subsections C and D as Subsections E and F, respectively.

## 29-3A-5. Expungement of records upon conviction.

A. A person convicted of a violation of a municipal ordinance, misdemeanor or felony, following the completion of the person's sentence and the payment of any fines or fees owed to the state for the conviction, may petition the district court in which the person was convicted for an order to expunge arrest records and public records related to that conviction.

B. A petitioner shall provide notice of the filed petition to the following parties, which parties shall be given an opportunity to provide to the district court any objections to the petition:

(1) the district attorney for that district;

(2) the department of public safety; and

(3) the law enforcement agency that arrested the petitioner.

C. After a hearing on a petition, the court shall issue an order within thirty days of the hearing requiring that all arrest records and public records related to the conviction be expunged if the court finds that:

(1) no other charge or proceeding is pending against the petitioner;

(2) justice will be served by an order to expunge;

(3) the petitioner has fulfilled any victim restitution ordered by the court in connection with the petitioner's conviction; and

(4) no other criminal conviction of the petitioner has occurred for a period of:

(a) two years if the petition relates to a conviction for a violation of a municipal ordinance or a misdemeanor not otherwise provided in this paragraph;

(b) four years if the petition relates to a misdemeanor conviction for aggravated battery as provided in Subsection B of Section 30-3-5 NMSA 1978 or to a conviction for a fourth degree felony not otherwise provided in this paragraph;

(c) six years if the petition relates to a conviction for a third degree felony not otherwise provided in this paragraph;

(d) eight years if the petition relates to a conviction for a second degree felony not otherwise provided in this paragraph; or

(e) ten years if the petition relates to a conviction for a first degree felony or for any offense provided in the Crimes Against Household Members Act [30-3-10 through 30-3-18 NMSA 1978].

D. The court shall cause a copy of the order to be delivered to all relevant law enforcement agencies and courts. The order shall prohibit all relevant law enforcement agencies and courts from releasing copies of such records to any person, except upon order of the court.

E. To determine whether justice will be served by an order to expunge, the court shall consider:

(1) the nature and gravity of the offense or conduct that resulted in the petitioner's conviction;

(2) the petitioner's age, criminal history and employment history;

(3) the length of time that has passed since the offense was committed and the related sentence was completed;

(4) the specific adverse consequences the petitioner may be subject to if the petition is denied; and

(5) any reasons to deny expungement of the records submitted by the district attorney.



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F. For the purposes of determining the time lapsed since a criminal conviction as required in Subsection C of this section, time shall be measured from the last date on which a person completed a sentence for a conviction in any jurisdiction.

G. The provisions of Subsection A of this section do not apply to an offense committed against a child, an offense that caused great bodily harm or death to another person, a sex offense as defined in Section 29-11A-3 NMSA 1978, embezzlement pursuant to Section 30-16-8 NMSA 1978 or an offense involving driving while under the influence of intoxicating liquor or drugs.

**History: Laws 2019, ch. 203, § 5.** **Effective dates.** — Laws 2019, ch. 203, § 9 made Laws 2019, ch. 203, § 5 effective January 1, 2020.

## 29-3A-6. Notices; rulemaking.

The administrative office of the courts and the department of public safety shall develop rules and procedures to implement the Criminal Record Expungement Act, including procedures for notifying the accused of the accused's rights under that act.

**History: Laws 2019, ch. 203, § 6.** **Effective dates.** — Laws 2019, ch. 203, § 9 made Laws 2019, ch. 203, § 6 effective January 1, 2020.

## 29-3A-7. Effect of an order to expunge.

Upon entry an of order to expunge, the proceedings shall be treated as if they never occurred, and officials and the person who received the order to expunge may reply to an inquiry that no record exists with respect to the person; provided that arrest or conviction records shall be disclosed by the person and officials in connection with any application for or query regarding qualification for employment or association with any financial institution regulated by the financial industry regulatory authority or the securities and exchange commission.

**History: Laws 2019, ch. 203, § 7.** **Effective dates.** — Laws 2019, ch. 203, § 9 made Laws 2019, ch. 203, § 7 effective January 1, 2020.

## 29-3A-8. Expungement of arrest and conviction records; procedure.

If a person was charged with an offense involving cannabis that is no longer a crime on the effective date of the Cannabis Regulation Act [26-2C-1 to 26-2C-42 NMSA 1978] or that would have resulted in a lesser offense if that act had been in effect at the time of the offense, whether or not the person is convicted, all public records held by a court or an agency of the state or a local jurisdiction that relate to the person's arrest or conviction shall be automatically expunged two years after the date of the person's conviction or the date of the person's arrest if there was no conviction; provided that if the arrest or conviction included multiple charges, only the portions of the public records related to the cannabis charge shall be expunged. If the person is or was under eighteen years of age at the time of the arrest or conviction, the public records shall be retained for two years or until the person is eighteen years of age, whichever comes first, and shall then be automatically expunged; provided that if the arrest or conviction included multiple charges, only the portions of the public records related to the cannabis charge shall be expunged. The public records shall be removed from all statewide criminal databases. The supreme court shall promulgate rules to implement the provisions of this section.

**History: Laws 2021 (1st S.S.), ch. 3, § 5.** **Effective dates.** — Laws 2021 (1st S.S.), ch. 3 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.



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## 29-3A-9. Dismissal of sentences; incarcerated persons.

A. Within thirty days following the effective date of this section, a correctional facility, a county jail or a juvenile correctional facility in which a person is currently incarcerated for an offense that is no longer a crime pursuant to the provisions of the Cannabis Regulation Act [26-2C-1 to 26-2C-42 NMSA 1978], or that would have resulted in a lesser offense if that act had been in effect at the time of the offense, shall notify the court that the convicted person's case may be:

(1) reopened to consider possible dismissal of the person's sentence; or

(2) expunged pursuant to the provisions of the Criminal Record Expungement Act.

B. A court shall reopen a case pursuant to Subsection A of this section and dismiss the person's sentence if it is legally invalid.

C. A person who has completed the person's sentence for a conviction, whether by trial or negotiated plea, who would not have been guilty of an offense or who would have been guilty of a lesser offense if the Cannabis Regulation Act had been in effect at the time of the offense is entitled to have the conviction dismissed and expunged because the prior conviction is now legally invalid or redesignated as a penalty assessment citation.

D. On or before January 1, 2022, the department of public safety shall review the public records in the state criminal history databases and shall identify all past convictions that are potentially eligible for dismissal and expungement or redesignation pursuant to the Cannabis Regulation Act. The department of public safety shall notify the corrections department, prosecutors and defense counsel of record in the case resulting in the conviction of all cases that are eligible for dismissal and expungement or redesignation.

E. The prosecutor of the case shall have until July 1, 2022 to review all cases and determine whether to challenge the dismissal and expungement or redesignation.

F. The prosecutor of the case may challenge the resentencing of a person pursuant to this section when the person does not meet the criteria established under the Cannabis Regulation Act.

G. On or before July 1, 2022, the prosecutor of the case shall inform the court and defense counsel of record in the case resulting in the conviction when the prosecutor of the case is challenging a particular dismissal and expungement or redesignation. The prosecutor of the case shall also inform the court when the prosecutor of the case is not challenging a particular dismissal and expungement or redesignation.

H. If the prosecutor of the case does not challenge the dismissal and expungement or redesignation by July 1, 2022, the court shall notify the department of public safety that the case has been dismissed. Upon notice, the department of public safety shall expunge the public record pertaining to the offense; provided that if the arrest included multiple charges, only the portions of the public records related to the cannabis charge shall be expunged.

I. A person who is currently incarcerated or who was incarcerated in the past for a cannabis offense that is no longer a crime may at any time petition to modify the person's criminal sentence or to have the person's conviction vacated. If the petition is granted, the court shall issue an order within thirty days of the granting of the petition requiring that the portions of the public records related to the cannabis offense, as well as all records of proceedings related to the petition for expungement, be expunged.

J. Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to a person who was convicted of or incarcerated for a cannabis offense.

K. The provisions of this section shall apply equally to juvenile delinquency adjudications and convictions of a juvenile if the juvenile would not have been guilty of an offense or would have been guilty of a lesser offense as provided in the Cannabis Regulation Act.

L. No fee or cost of any kind shall be imposed upon a person whose sentence is reviewed pursuant to this section.

**History: Laws 2021 (1st S.S.), ch. 3, § 6.**

**Effective dates.** — Laws 2021 (1st S.S.), ch. 3 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 29, 2021, 90 days after adjournment of the legislature.



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# ARTICLE 3B

## Accurate Eyewitness Identification

Sec.
29-3B-1. Short title.
29-3B-2. Definitions.
29-3B-3. Eyewitness identification procedures.
29-3B-4. Training of law enforcement officers.

### 29-3B-1. Short title.

Sections 12 through 15 [29-3B-1 through 29-3B-4 NMSA 1978] of this act may be cited as the "Accurate Eyewitness Identification Act".

**History: Laws 2019, ch. 211, § 12.**

**Effective dates.** — Laws 2019, ch. 211, § 17 made Laws 2019, ch. 211, § 12 effective July 1, 2019.

### 29-3B-2. Definitions.

As used in the Accurate Eyewitness Identification Act:

A. "administrator" means a person conducting a photo lineup or live lineup;

B. "blind" means the administrator does not know the identity of the suspect;

C. "blinded" means the administrator may know who the suspect is but does not know which lineup member is being viewed by the eyewitness;

D. "eyewitness" means a person who observes another person at or near the scene of an offense;

E. "filler" means either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure;

F. "live lineup" means an identification procedure in which a group of persons, including the suspected perpetrator of an offense and other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator;

G. "photo lineup" means an identification procedure in which an array of photographs, including a photograph of the suspected perpetrator of an offense and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness either in hard copy form or via computer for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator;

H. "showup" means an identification procedure in which an eyewitness is presented with a single suspect for the purpose of determining whether the eyewitness identifies this individual as the perpetrator; and

I. "suspect" means a person believed by law enforcement to be the possible perpetrator of the crime.

**History: Laws 2019, ch. 211, § 13.**

**Effective dates.** — Laws 2019, ch. 211, § 17 made Laws 2019, ch. 211, § 13 effective July 1, 2019.

### 29-3B-3. Eyewitness identification procedures.

A. Not later than January 1, 2020, a criminal justice entity conducting eyewitness identification procedures shall adopt and comply with written policies for using an eyewitness to make a decision about whether a suspect is the perpetrator of a crime upon viewing the suspect in person in a live lineup or showup or upon viewing a representation of the suspect in a photo lineup.



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B. Each governmental entity in New Mexico that administers eyewitness identification procedures shall provide a copy of its written policies to the secretary of public safety no later than February 1, 2020 and the secretary shall make those policies available to the public.

C. A law enforcement agency shall biennially review policies adopted pursuant to this section to incorporate new scientifically supported protocols.

D. In developing and revising policies pursuant to this section, a law enforcement agency shall adopt those practices shown by reliable evidence to enhance the accuracy of identification procedures. Each governmental entity in New Mexico that administers eyewitness identification procedures shall submit its updated written policies to the secretary of public safety no later than February 1 of each odd-numbered year.

E. A law enforcement agency shall include in policies adopted pursuant to this section practices to enhance the objectivity and reliability of eyewitness identifications and to minimize the possibility of mistaken identifications, including the following:

(1) having a blind administrator or blinded administrator perform the live lineup or photo lineup;

(2) documenting a description of the suspect provided by the eyewitness, including a description of the circumstances under which the suspect was seen by the eyewitness, the time of day, the length of time the suspect was seen, the perceived or actual distance from the eyewitness to the suspect and the lighting conditions;

(3) providing the eyewitness with instructions that minimize the likelihood of an inaccurate identification, including that the perpetrator may or may not be in the identification procedure and that the investigation will continue regardless of whether an identification is made;

(4) composing the lineup so that the fillers generally resemble the eyewitness's description of the perpetrator so that the suspect does not unduly stand out from the fillers;

(5) using at least four fillers in a live lineup and at least five fillers in a photo lineup;

(6) ensuring, when practicable, that a photograph of the suspect used in a photo lineup is contemporary and resembles the suspect's appearance at the time of the offense;

(7) presenting separate photo lineups and live lineups when there are multiple eyewitnesses, ensuring that the same suspect is placed in a different position for each identification procedure;

(8) having the administrator seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified is the person who committed the crime;

(9) minimizing factors at any point in time that influence an eyewitness to identify a suspect or affect the eyewitness's confidence level in identifying a suspect, including verbal or nonverbal statements by or reactions from the administrator;

(10) presenting lineup members one at a time;

(11) adopting relevant practices shown to enhance the reliability of an eyewitness participating in a showup procedure, such as:

(a) identifying the circumstances under which a showup is warranted;

(b) transporting the eyewitness to a neutral, non-law enforcement location where the detained suspect is being held;

(c) removing the suspect from the law enforcement squad car;

(d) removing restraints from the suspect when the suspect is being observed by the eyewitness; and

(e) administering the showup procedure close in time to the commission of the crime;

(12) video recording the entirety of the photo lineup and live lineup and, where practicable, the showup procedure, unless the recording equipment is not reasonably available or the recording equipment fails and obtaining replacement equipment is not feasible; and

(13) preserving photographic documentation of all live lineup and photo lineup members and showup suspects, as well as all descriptions provided by the eyewitness of the perpetrator.



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F. All written departmental eyewitness identification policies shall be made available to the public upon request.

**History: Laws 2019, ch. 211, § 14.**

**Effective dates.** — Laws 2019, ch. 211, § 17 made Laws 2019, ch. 211, § 14 effective July 1, 2019.

ANNOTATIONS

**Article II, Sec. 18 provides broader due process protections than the United States constitution in the context of admission of eyewitness identification evidence.** — Article II, Section 18 of the New Mexico constitution affords broader due process protection than the United States constitution in the context of admission of eyewitness identification evidence because the federal reliability standard, the *Manson* rule, is both scientifically and jurisprudentially unsound, and hence flawed under an interstitial review, and therefore does not satisfy due process under the New Mexico constitution. *State v. Martinez*, 2021-NMSC-002, *overruling Patterson v. LeMaster*, 2001-NMSC-013, 130 N.M. 179, 21 P.3d 1032, *State v. Jacobs*, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127, and *State v. Baca*, 1983-NMSC-049, 99 N.M. 754, 664 P.2d 360.

**New standard for determining whether eyewitness identification evidence is admissible at trial.** — Under New Mexico's new standard for determining whether eyewitness identification evidence is admissible at trial, if a witness makes an identification of a defendant as a result of a police identification procedure that is unnecessarily suggestive and conducive to misidentification, the identification and any subsequent identification by the same witness must be suppressed. *State v. Martinez*, 2021-NMSC-002, *overruling Patterson v. LeMaster*, 2001-NMSC-013, 130 N.M. 179, 21 P.3d 1032, *State v. Jacobs*, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127, and *State v. Baca*, 1983-NMSC-049, 99 N.M. 754, 664 P.2d 360.

**Burden of proof for admitting evidence of eyewitness identifications.** — Under New Mexico's approach to admitting eyewitness identifications, the initial burden falls on the accused to establish prima facie that some aspect of the identification procedure employed by the police was suggestive in nature. If the accused does not meet that burden, suppression is not required. However, if the accused demonstrates that the identification procedure contained one or more suggestive elements, the burden shifts to the state to prove by clear and convincing evidence *either* that (1) the procedure employed was not so suggestive as to materially taint the identification made by the eyewitness, which is to say that any departure from proper procedure could not have increased the risk of misidentification, *or* (2) good reason existed for the police to employ the suggestive procedure in the first instance. If the state fails to carry its responsive burden, the identification evidence and any subsequent in-court identification must be suppressed. *State v. Martinez*, 2021-NMSC-002, *overruling Patterson v. LeMaster*, 2001-NMSC-013, 130 N.M. 179, 21 P.3d 1032, *State v. Jacobs*, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127, and *State v. Baca*, 1983-NMSC-049, 99 N.M. 754, 664 P.2d 360.

**New Mexico courts abandon the independent source doctrine in the context of disputed eyewitness identifications.** — Pursuant to the independent source doctrine, an in-court identification which is independent of and not tainted by an out-of-court identification is admissible at trial. The independent source doctrine in the context of due process and disputed eyewitness identification evidence lacks legal justification and is contrary to existing science. New Mexico therefore abandons the doctrine in the context of disputed eyewitness identifications. *State v. Martinez*, 2021-NMSC-002, *overruling Patterson v. LeMaster*, 2001-NMSC-013, 130 N.M. 179, 21 P.3d 1032, *State v. Jacobs*, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127, and *State v. Baca*, 1983-NMSC-049, 99 N.M. 754, 664 P.2d 360.

**Suppression of eyewitness identification not required where defendant failed to establish prima facie that some aspect of the identification procedure used was suggestive in nature.** — Where defendant was charged with two counts of murder in the first-degree, and where, during the investigation, detectives showed an eyewitness five or six photos of different individuals, including a picture of defendant, and where the eyewitness identified defendant in one of the photographs as the person he saw at the scene of the shooting, and where, two days later, detectives assembled a photo array and requested that the eyewitness view the array which was composed of six photographs, some of which were the same photos shown to the eyewitness two days before as well as some photos that were new to him, and where the eyewitness again identified defendant in a photo as the person he saw at the scene of the shooting, the district court did not err in admitting evidence of the eyewitness's identification because defendant failed to establish prima facie that some aspect of the identification procedure used by the detectives was suggestive in nature. *State v. Martinez*, 2021-NMSC-002, *overruling Patterson v. LeMaster*, 2001-NMSC-013, 130 N.M. 179, 21 P.3d 1032, *State v. Jacobs*, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127, and *State v. Baca*, 1983-NMSC-049, 99 N.M. 754, 664 P.2d 360.

## 29-3B-4. Training of law enforcement officers.

The secretary of public safety shall create, administer and conduct training programs for law enforcement officers and recruits on the methods and technical aspects of the eyewitness identification practices and procedures shown by reliable evidence to enhance the accuracy of eyewitness evidence referenced in the Accurate Eyewitness Identification Act.

**History: Laws 2019, ch. 211, § 15.**

**Effective dates.** — Laws 2019, ch. 211, § 17 made Laws 2019, ch. 211, § 15 effective July 1, 2019.



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# ARTICLE 4
# State Police Pension Fund

Sec.
29-4-1. Police board may establish trust funds; purpose.
29-4-2. Provisions governing trust funds; trust agreements; approval by governor, police board and insurance department [public regulation commission].
29-4-3. Contributions to funds; maximum.
29-4-4. State contributions to funds; liquidation.
29-4-5. State treasurer is trustee of funds; duties.
29-4-6. Pension consultants; employment; duties.
29-4-7. Annual report of trustee.
29-4-8. Administration of pension program; pension advisory board; membership; assistance to trustee.
29-4-9. Repeal of conflicting laws; fees, rewards and previously accumulated funds go into supplementary trust fund.
29-4-10. Interest in trust fund not subject to assignment, lien or judicial process; trustee may pay expenses.
29-4-11. Effective date of act and pension program; approval of governor, police board and insurance department.

## 29-4-1. [Police board may establish trust funds; purpose.]

Authority is hereby granted to the board of supervisors of the New Mexico state police [secretary of public safety] to create and establish in behalf and for the benefit of eligible members of the New Mexico state police a pension trust fund providing termination benefits and retirement benefits and a supplementary trust fund providing benefits to such members and their dependents in the event of disability or death as limited hereinafter or in the trust agreements.

**History: Laws 1939, ch. 213, § 1; 1941 Comp., § 40-401; 1953 Comp., § 39-4-1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. The name of the board of supervisors of the New Mexico state police was changed by Laws 1941, ch. 147, § 24 (compiled as 39-2-24, 1953 Comp.), to the board of supervisors of the division of courtesy and information. Laws 1977, ch. 257, § 107, repealed 39-2-24, 1953 Comp. Under former 29-2-2 NMSA 1978, the New Mexico state police board appeared to exercise the powers and functions of the former board of supervisors. Section 29-2-2 NMSA 1978 was repealed by Laws 1984, ch. 254, § 27. Pursuant to 29-2-1.1 NMSA 1978, "New Mexico state police board" or "board" now means the secretary of public safety.

**Cross references.** — For membership in public employees' retirement association of New Mexico, *see* 10-11-3 NMSA 1978.

### ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 60A Am. Jur. 2d Pensions and Retirement Funds § 1618.

81A C.J.S. States §§ 46, 112 to 119.

## 29-4-2. [Provisions governing trust funds; trust agreements; approval by governor, police board and insurance department [public regulation commission].]

All monies in said pension trust fund and said supplementary trust fund shall be deposited, administered and disbursed in accordance with the terms of this act [29-4-1 to 29-4-11 NMSA 1978] and with the terms of the pension trust agreement and supplementary trust agreement which shall be drafted pursuant to the terms of this act and shall not become effective until specifically approved by the governor of New Mexico, the board of supervisors of the New Mexico state police [secretary of public safety] and the insurance department of the state of New Mexico [public regulation commission].

**History: Laws 1939, ch. 213, § 2; 1941 Comp., § 40-402; 1953 Comp., § 39-4-2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

The name of the board of supervisors of the New Mexico state police was changed by Laws 1941, ch. 147, § 24 (compiled as 39-2-24, 1953 Comp.), to the board of supervisors of the division of courtesy and information. Laws 1977, ch. 257, § 107, repealed 39-2-24, 1953 Comp. Under former 29-2-2 NMSA 1978, the New Mexico state police board appeared to exercise the powers and functions of the former board of supervisors. Section 29-2-2 NMSA 1978 was repealed by Laws 1984, ch. 254, § 27. Pursuant to 29-2-1.1 NMSA 1978, "New Mexico state police board" or "board" now means the secretary of public safety.

Laws 1998, ch. 108, § 80 provided that references in law to the insurance board be construed to be references to the public regulation commission.

### ANNOTATIONS

**Insurance policy limits benefits paid.** — An insurance policy constitutes the supplemental trust agreement referred to in this section, and this insurance policy has limits on the total amount of benefits which may be paid in any particular instance. If it is desired to have benefits for disabled policemen over and above the limits of coverage of the policy, then those benefits should themselves be the subject of a trust agreement. 1965 Op. Att'y Gen. No. 65-92.



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## 29-4-3. [Contributions to funds; maximum.]

Contributions to the pension trust fund by members of the New Mexico state police shall not exceed six percent (6%) of their regular monthly salaries, and contributions to the supplementary trust fund shall not exceed five percent (5%) of their regular monthly salaries.

**History: Laws 1939, ch. 213, § 3; 1941 Comp., § 40-403; 1953 Comp., § 39-4-3.**

## 29-4-4. State contributions to funds; liquidation.

State contributions to the pension trust fund and the supplementary trust fund shall be appropriated as a part of the annual operating budget of the state police. Contributions to the funds shall be in an amount necessary to prevent any actuarial deterioration of the fund as determined by an annual actuarial investigation. Termination of the trust and liquidation of the funds shall be effected only by specific legislative act.

**History: 1978 Comp., § 29-4-4 enacted by Laws 1980, ch. 8, § 1.**

**Repeals and reenactments.** — Laws 1980, ch. 8, § 1, repealed former 29-4-4 NMSA 1978, relating to state appropriations to the state police pension trust fund and supplementary trust fund, and enacted a new section.

## 29-4-5. [State treasurer is trustee of funds; duties.]

The treasurer of the state of New Mexico shall serve as trustee for the pension trust fund and the supplementary trust fund and shall receive and hold as trustee for the uses and purposes set out in the trust agreements any and all funds paid to it as such trustee by the state, the department, the employee beneficiaries or by any other person or persons.

**History: Laws 1939, ch. 213, § 5; 1941 Comp., § 40-405; 1953 Comp., § 39-4-5.**

## 29-4-6. [Pension consultants; employment; duties.]

The board of supervisors of the New Mexico state police [secretary of public safety] are [is] hereby authorized and empowered to engage pension consultants to assist in drafting the trust agreements and establishing an equitable, practical and actuarially sound pension program. The trustee shall engage pension consultants to supervise and assist in the technical operation of the pension trust in order that there may be no deterioration in the actuarial status of the plan.

**History: Laws 1939, ch. 213, § 6; 1941 Comp., § 40-406; 1953 Comp., § 39-4-6.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. The name of the board of supervisors of the New Mexico state police was changed by Laws 1941, ch. 147, § 24 (compiled as 39-2-24, 1953 Comp.), to the board of supervisors of the division of courtesy and information. Laws 1977, ch. 257, § 107, repealed 39-2-24, 1953 Comp. Under former 29-2-2 NMSA 1978, the New Mexico state police board appeared to exercise the powers and functions of the former board of supervisors. Section 29-2-2 NMSA 1978 was repealed by Laws 1984, ch. 254, § 27. Pursuant to 29-2-1.1 NMSA 1978, "New Mexico state police board" or "board" now means the secretary of public safety.

## 29-4-7. [Annual report of trustee.]

Within ninety days after the close of each fiscal year the trustee, with the aid of the pension consultants, shall prepare and file an annual report with the department and the New Mexico insurance department which shall include the following:

Schedule I. Receipts and disbursements.

Schedule II. Assets of pension trust listing investments as to book value and current market value as of the end of the fiscal year.

Schedule III. List of terminations, showing cause and amount of refund.



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Schedule IV. The application of actuarially computed "reserve factors" to the payroll data properly classified for the purpose of computing the reserve liability of the trust fund as of the end of the fiscal year.

Schedule V. The application of actuarially computed "current liability factors" to the payroll data properly classified for the purpose of computing the liability of the trust fund as of the end of the fiscal year.

Schedule VI. An actuarial computation of the pension liability for all employees retired prior to the close of the fiscal year.

**History: Laws 1939, ch. 213, § 7; 1941 Comp., § 40-407; 1953 Comp., § 39-4-7.**

## 29-4-8. [Administration of pension program; pension advisory board; membership; assistance to trustee.]

The complete pension program authorized by the terms of this act [29-4-1 to 29-4-11 NMSA 1978] shall be administered by the trustee with the assistance and counsel of a pension advisory board which shall consist of the chief of the department [director of the New Mexico state police division of the department] as chairman, two members appointed by the board of supervisors of the New Mexico state police [secretary of public safety] with the approval of the governor, and two members elected by the participating members. One of the initial appointees and one of the initial elected representatives shall serve for one-year terms and the other elected and appointed representatives shall serve for two-year terms.

**History: Laws 1939, ch. 213, § 8; 1941 Comp., § 40-408; 1953 Comp., § 39-4-8.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1977, ch. 257, changed several references in this chapter from the chief of the state police to director of the state police division. Laws 1979, ch. 202, changed several references in this chapter from the director of the state police division to the chief of the New Mexico state police. *See* 29-2-3 NMSA 1978. Pursuant to 29-2-1.1 NMSA 1978, "chief of the state police" now means the director of the New Mexico state police division of the department. The bracketed language was not enacted by the legislature and is not part of the law.

The name of the board of supervisors of the New Mexico state police was changed by Laws 1941, ch. 147, § 24 (compiled as 39-2-24, 1953 Comp.), to the board of supervisors of the division of courtesy and information. Laws 1977, ch. 257, § 107, repealed 39-2-24, 1953 Comp. Under former 29-2-2 NMSA 1978, the New Mexico state police board appeared to exercise the powers and functions of the former board of supervisors. Section 29-2-2 NMSA 1978 was repealed by Laws 1984, ch. 254, § 27. Pursuant to 29-2-1.1 NMSA 1978, "New Mexico state police board" or "board" now means the secretary of public safety.

## 29-4-9. [Repeal of conflicting laws; fees, rewards and previously accumulated funds go into supplementary trust fund.]

Upon the establishment of the pension trust fund and supplementary trust fund as outlined by this act [29-4-1 to 29-4-11 NMSA 1978], all conflicting laws are expressly repealed and any funds previously accumulated for this purpose shall be transferred to the supplementary trust fund. No fee for the performance of an act in line of duty and no reward offered for the apprehension or conviction of any person or persons, or for the recovery of any property may be accepted by any member of the department of state police, but any fee or reward to which such member would be entitled except for the foregoing provisions shall be paid to the supplementary trust fund. All laws and parts of laws in conflict herewith are hereby repealed.

**History: Laws 1939, ch. 213, § 9; 1941 Comp., § 40-409; 1953 Comp., § 39-4-9.**

## 29-4-10. [Interest in trust fund not subject to assignment, lien or judicial process; trustee may pay expenses.]

No person entitled to any interest in or share of or pension or benefit from the trust funds shall, prior to the actual payment therefor, have the right to anticipate the same, or to sell, assign, pledge



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or mortgage or otherwise dispose of or encumber the same, nor shall such interest, share, pension or benefit prior to the actual payment thereof, be liable for the debts or liabilities of the person entitled thereto or be subject to attachment, garnishment, execution or to levy or sale on judicial proceedings, or be transferable by any means, voluntarily or involuntarily. The trustee may expend such sums as it [he] may deem proper from such fund for the necessary expenses connected therewith.

**History: Laws 1939, ch. 213, § 10; 1941 Comp., § 40-410; 1953 Comp., § 39-4-10.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. The bracketed word "he" in the last sentence was inserted by the 1941 compiler of the New Mexico statutes and was not deleted by the compiler of the 1953 compilation or by the present compiler.

**Cross references.** — For exemption from legal process for Public Employees Retirement Act benefits, *see* 10-11-135 NMSA 1978.

For exemption from legal process for Judicial Retirement Act benefits, *see* 10-12B-7 NMSA 1978.

For exemption from legal process for Magistrate Retirement Act benefits, *see* 10-12C-7 NMSA 1978.

For exemption from legal process for Educational Retirement Act benefits, *see* 22-11-42 NMSA 1978.

For exemption from legal process for married persons or heads of households, *see* 42-10-1 NMSA 1978.

For rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, *see* Rules 1-065.1, 2-801, and 3-801 NMRA, respectively.

For form for claim of exemptions on executions, *see* Rule 4-803 NMRA.

For form for order on claim of exemption and order to pay in execution proceedings, *see* Rule 4-804 NMRA.

For form for application for writ of garnishment and affidavit, *see* Rule 4-805 NMRA.

For form for notice of right to claim exemptions from execution, *see* Rule 4-808A NMRA.

For form for claim of exemption from garnishment, *see* Rule 4-809 NMRA.

**ANNOTATIONS**

**Law reviews.** — For article, "Attachment in New Mexico - Part II," see 2 Nat. Res. J. 75 (1962).

## 29-4-11. [Effective date of act and pension program; approval of governor, police board and insurance department.]

The powers conferred upon the board of supervisors of the New Mexico state police [secretary of public safety] by the provisions of this act [29-4-1 to 29-4-11 NMSA 1978] shall be possessed and may be exercised from and after the first day of July, 1939, and this act shall be in full force and effect from and after that date. The pension program authorized in this act may become operative at any time after the passage of this act upon the approval of the governor of New Mexico, the board of supervisors of the New Mexico state police [secretary of public safety] and the insurance department of the state of New Mexico.

**History: Laws 1939, ch. 213, § 12; 1941 Comp., § 40-411; 1953 Comp., § 39-4-11.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. The name of the board of supervisors of the New Mexico state police was changed by Laws 1941, ch. 147, § 24 (compiled as 39-2-24, 1953 Comp.), to the board of supervisors of the division of courtesy and information. Laws 1977, ch. 257, § 107, repealed 39-2-24, 1953 Comp. Under former 29-2-2 NMSA 1978, the New Mexico state police board appeared to exercise the powers and functions of the former board of supervisors. Section 29-2-2 NMSA 1978 was repealed by Laws 1984, ch. 254, § 27. Pursuant to 29-2-1.1 NMSA 1978, "New Mexico state police board" or "board" now means the secretary of public safety.

**Severability.** — Laws 1939, ch. 213, § 11 provided for the severability of the act if any part or application thereof is held invalid.

# ARTICLE 4A

# Peace Officers', New Mexico Mounted Patrol Members' and Reserve Police Officers' Survivors Supplemental Benefits

Sec.

29-4A-1. Short title.
29-4A-2. Findings; purpose.
29-4A-3. Definitions.
29-4A-4. Fund created.
29-4A-5. Peace officers', New Mexico mounted patrol members' and reserve police officers' survivors supplemental death benefits; review committee; determination; payment.
29-4A-5. Peace officers', New Mexico mounted patrol members' and reserve police officers' survivors supplemental death benefits; review committee; determination; payment. (Effective July 1, 2023.)



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## 29-4A-1. Short title.

Chapter 29, Article 4A NMSA 1978 may be cited as the "Peace Officers', New Mexico Mounted Patrol Members' and Reserve Police Officers' Survivors Supplemental Benefits Act".

**History: Laws 1995, ch. 59, § 1; 2002, ch. 78, § 1; 2016, ch. 41, § 1.**

**The 2016 amendment,** effective May 18, 2016, amended the title of the act to include New Mexico mounted patrol members and reserve police officers; and after "Peace Officers'", added "New Mexico Mounted Patrol Members' and Reserve Police Officers'".

**The 2002 amendment,** effective May 15, 2002, substituted "Chapter 29, Article 4A NMSA 1978" for "This act".

## 29-4A-2. Findings; purpose.

The legislature finds that peace officers throughout the state risk their lives daily to protect the citizens of New Mexico. The legislature further finds that when peace officers are killed in the line of duty, their immediate families can suffer grievously, both emotionally and economically. To recognize the substantial public safety benefits conferred by peace officers and in consideration of the sacrifices undertaken by these officers and their families for the citizens of New Mexico, it is the purpose of the Peace Officers' Survivors Supplemental Benefits Act to ensure that certain supplemental death benefits accrue to the spouse and surviving children, or parents if there are no surviving children or spouse, of a peace officer killed in the line of duty.

**History: Laws 1995, ch. 59, § 2; 2002, ch. 78, § 2.**

**The 2002 amendment,** effective May 15, 2002, inserted "or parents if there are no surviving children or spouse" in the last sentence.

## 29-4A-3. Definitions.

As used in the Peace Officers', New Mexico Mounted Patrol Members' and Reserve Police Officers' Survivors Supplemental Benefits Act:

A. "fund" means the peace officers', New Mexico mounted patrol members' and reserve police officers' survivors fund;

B. "New Mexico mounted patrol" means units or troops officered and manned to assist with law enforcement pursuant to the provisions of Sections 29-6-1 and 29-6-4 NMSA 1978, Subsection A of Section 29-6-5 NMSA 1978 and Section 29-6-6 NMSA 1978;

C. "peace officer" means any full-time salaried and commissioned or certified law enforcement officer of a police or sheriff's department or a conservation officer of the department of game and fish as used in Chapter 17 NMSA 1978 that is part of or administered by the state or any political subdivision of the state;

D. "reserve police officer" means a volunteer or a temporary or part-time employee of a state or local law enforcement agency who is accepted by that agency as a reserve law enforcement officer after receiving a background check and training as needed by that agency and who is not a member of the New Mexico mounted patrol; and

E. "secretary" means the secretary of public safety.

**History: Laws 1995, ch. 59, § 3; 1997, ch. 165, § 1; 2016, ch. 41, § 2.**

**The 2016 amendment,** effective May 18, 2016, defined New Mexico mounted patrol members and reserve police officers as used in the Peace Officers', New Mexico Mounted Patrol Members' and Reserve Police Officers' Supplemental Benefits Act; in the introductory sentence, after "Peace Officers'", added "New Mexico Mounted Patrol Members' and Reserve Police Officers'", in Subsection A, after "peace officers'", added ", New Mexico mounted patrol members' and reserve police officers'"; added new Subsection B and redesignated former Subsection B as Subsection C; and added new Subsection D and redesignated former Subsection C as Subsection E.

**The 1997 amendment,** effective June 20, 1997, inserted "or a conservation officer of the department of game and fish as used in Chapter 17 NMSA 1978" in Subsection B.

## 29-4A-4. Fund created.

The "peace officers', New Mexico mounted patrol members' and reserve police officers' survivors fund" is created in the state treasury and shall be administered by the department of public safety.



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The fund shall consist of all gifts, donations and bequests of money to the fund as well as any appropriations made to the fund. Earnings from investment of the fund shall be credited to the fund. Money in the fund is appropriated to the department of public safety for the purpose of paying death benefits pursuant to the Peace Officers', New Mexico Mounted Patrol Members' and Reserve Police Officers' Survivors Supplemental Benefits Act and shall be paid out only upon warrants issued by the secretary of finance and administration pursuant to vouchers signed by the secretary of public safety. Any unexpended or unencumbered balance remaining in the fund at the end of any fiscal year shall not revert.

**History: Laws 1995, ch. 59, § 4; 2016, ch. 41, § 3.**

**The 2016 amendment,** effective May 18, 2016, amended the name of the fund to include New Mexico mounted patrol members and reserve police officers; after "'peace officers'", added", New Mexico mounted patrol members' and reserve police officers'", and after "Peace Officers'", added "New Mexico Mounted Patrol Members' and Reserve Police Officers'".

## 29-4A-5. Peace officers', New Mexico mounted patrol members' and reserve police officers' survivors supplemental death benefits; review committee; determination; payment.

A. There is created the "peace officers', New Mexico mounted patrol members' and reserve police officers' survivors supplemental death benefits review committee". The committee shall consist of the attorney general, the chief of the New Mexico state police and the state president of the fraternal order of police or their designees.

B. The peace officers', New Mexico mounted patrol members' and reserve police officers' survivors supplemental death benefits review committee shall determine whether a peace officer, New Mexico mounted patrol member or reserve police officer has been killed in the line of duty and advise the secretary of that determination. In addition to any other death benefits provided by law, the surviving spouse, children or parents shall be paid two hundred fifty thousand dollars ($250,000) as supplemental death benefits whenever a peace officer, New Mexico mounted patrol member or reserve police officer is killed in the line of duty. The benefits shall be paid from the fund.

C. The benefits shall be paid first to the surviving spouse. If there is no surviving spouse, the benefits shall be distributed in pro rata shares to all surviving children. If there are no surviving children or spouse, benefits shall be distributed to the surviving parents of the peace officer, New Mexico mounted patrol member or reserve police officer.

**History: Laws 1995, ch. 59, § 5; 2002, ch. 78, § 3; 2007, ch. 59, § 1; 2016, ch. 41, § 4.**

**The 2016 amendment,** effective May 18, 2016, provided survivors supplemental death benefits for New Mexico mounted patrol members and reserve police officers; in the catchline, added "New Mexico mounted patrol members' and reserve police officers'" and throughout the sections, after "'peace officers'", added "New Mexico mounted patrol members' and reserve police officers'".

**The 2007 amendment,** effective June 15, 2007, increased supplemental death benefits from $100,000 to $250,000.

**The 2002 amendment,** effective May 15, 2002, inserted "or parents" in the second sentence of Subsection B; and added the last sentence in Subsection C.

## *29-4A-5. Peace officers', New Mexico mounted patrol members' and reserve police officers' survivors supplemental death benefits; review committee; determination; payment. (Effective July 1, 2023.)*

*A. There is created the "peace officers', New Mexico mounted patrol members' and reserve police officers' survivors supplemental death benefits review committee". The committee shall consist of the attorney general, the chief of the New Mexico state police and the state president of the fraternal order of police or their designees.*

*B. The peace officers', New Mexico mounted patrol members' and reserve police officers' survivors supplemental death benefits review committee shall determine whether a peace officer, New*



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*Mexico mounted patrol member or reserve police officer has been killed in the line of duty and advise the secretary of that determination. In addition to any other death benefits provided by law, the surviving spouse, children or parents shall be paid one million dollars ($1,000,000) as supplemental death benefits whenever a peace officer, New Mexico mounted patrol member or reserve police officer is killed in the line of duty. The benefits shall be paid from the fund.*

*C. The benefits shall be paid first to the surviving spouse. If there is no surviving spouse, the benefits shall be distributed in pro rata shares to all surviving children. If there are no surviving children or spouse, benefits shall be distributed to the surviving parents of the peace officer, New Mexico mounted patrol member or reserve police officer.*

***History: Laws 1995, ch. 59, § 5; 2002, ch. 78, § 3; 2007, ch. 59, § 1; 2016, ch. 41, § 4; 2022, ch. 56, § 3.***

***The 2022 amendment,*** *effective July 1, 2023, enhanced peace officers' survivors supplemental death benefits; and in Subsection B, after "shall be paid", deleted "two hundred fifty thousand dollars ($250,000)" and added "one million dollars "(1,000,000)".*

# ARTICLE 5

# Educational Institutions; Traffic Regulations and Police Officers

Sec.
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## 29-5-1. Educational institutions; campus traffic regulations.

A. The board of regents of each state educational institution designated in Article 12, Section 11 of the constitution of New Mexico may promulgate regulations governing the operation and parking of vehicles on any area within the exterior boundaries of lands under its control which is not a public street or highway, including but not limited to:

(1) limiting the rates of speed;

(2) assigning parking spaces and designating parking areas and their uses, and collecting rent therefor;

(3) prohibiting parking;

(4) removing vehicles parked in violation of campus traffic regulations, at the expense of the violator who shall pay the expense before the vehicle is released; and

(5) instituting a system of vehicle registration for the identification and regulation of vehicles regularly using institutional premises, including a reasonable charge to defray costs of registration.

B. Areas subject to campus traffic regulations shall be marked with signs conforming with standards used by the state highway department.

C. Any person who violates any campus traffic regulation adopted under this section is guilty of a misdemeanor and shall be punished by a fine of not more than five dollars ($5.00). All fines and forfeitures collected under this section may be remitted to the state educational institution on whose campus the violation occurred. The money from such fines and forfeitures remitted to state educational institutions shall be used solely for the purposes of enforcing this act [29-5-1, 29-5-2 NMSA 1978], for planning and improving movement and control and related parking problems, and for use in the operation, management and administration of the institution's security department responsible for the enforcement of this act.

**History: 1953 Comp., § 39-5-1, enacted by Laws 1968, ch. 62, § 153; 1975, ch. 167, § 2.**



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ANNOTATIONS

**Board may also employ and assign duties of campus security.** — The board of regents of the university of New Mexico is specifically given traffic control jurisdiction on its property and may employ and assign duties of campus security officers for the institution. 1969 Op. Att'y Gen. No. 69-48.

**Section 35-14-2 NMSA 1978 supplements section.** — Section 35-14-2 NMSA 1978, providing for a waiver of the right to regulate university property under agreement between boards of regents of state educational institutions and municipalities for traffic offenses occurring on the university campus, supplements this section and Section 29-5-2 NMSA 1978. 1969 Op. Att'y Gen. No. 69-48.

**City crime ordinances not applicable to land under board's control.** — Ordinances of the city of Albuquerque dealing with crimes do not apply to land under the control of the board of regents of the university of New Mexico except for traffic offenses as provided in Section 35-14-2 NMSA 1978. 1969 Op. Att'y Gen. No. 69-48.

## 29-5-1.1. Educational institutions; campus traffic regulations.

A. The board of regents of each state educational institution designated in Article 12, Section 11 of the constitution of New Mexico that is located within a county having a population in excess of ninety-five thousand according to the most recent federal decennial census may promulgate regulations governing the operation and parking of vehicles on any area within the exterior boundaries of lands under its control which is not a municipal street or highway, including but not limited to:

(1) limiting the rates of speed;

(2) assigning parking spaces, designating parking areas and their uses and collecting rent for them;

(3) prohibiting parking;

(4) removing vehicles parked in violation of campus traffic regulations at the expense of the violator who shall pay the expense before the vehicle is released; and

(5) instituting a system of vehicle registration for the identification and regulation of vehicles regularly using institutional premises, including a reasonable charge to defray costs of providing parking and traffic enforcement services and campus parking.

B. Areas subject to campus traffic regulations shall be marked with signs conforming with standards used by the state highway and transportation department.

C. Regulations of a board of regents promulgated pursuant to this section shall include a specific penalty for each type of violation, which shall not exceed one hundred dollars ($100). In addition, the regents may impose an administrative cost assessment not exceeding five dollars ($5.00) for each parking citation issued as costs of administration of a campus traffic program.

D. Except as provided by Subsection J of this section, unless a warning notice or a parking citation is given, at the time of making an arrest for any violation of this section, the arresting officer shall offer the alleged violator the option of accepting a penalty assessment or appearing in the metropolitan, municipal or magistrate court within five days after issuance of the citation. The violator's signature on the penalty assessment notice constitutes as acknowledgment of guilt of the offense stated in the notice.

E. Payment of any parking violation penalty assessment shall be made by mailing the payment within five days from the date the citation was issued to the university police office for processing in the manner prescribed by the board of regents.

F. Payment of any moving violation penalty assessment shall be made by mailing the payment within thirty days from the date of issuance of the citation to the motor vehicle division of the taxation and revenue department, Santa Fe. Payments of penalty assessments are timely if postmarked within thirty days from the date of issuance of the citation. When a penalty assessment is paid by currency, a receipt may be immediately mailed to the violator. When a penalty assessment is paid by check, the canceled check is a sufficient receipt.

G. No record of any penalty assessment payment is admissible as evidence in any court in any civil action.

H. If a penalty assessment is not paid within thirty days from the date of issuance of the citation, the violator shall be prosecuted for the violation charged on the penalty assessment notice in a manner as if a penalty assessment notice had not been issued.



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I. Any penalty assessment collected by the motor vehicle division of the taxation and revenue department pursuant to Subsection F of this section shall be remitted to the state treasurer for deposit into the current school fund. Any administrative cost assessment collected by the division pursuant to this section shall be remitted within thirty days to the state educational institution which issued the citation for administering parking and traffic regulations on that campus. Any penalty assessment or administrative cost assessment collected by the university police office pursuant to Subsection E of this section shall be retained by the state educational institution as reimbursement for its expenses.

J. No penalty assessment citation shall be issued for:

(1) speeding in excess of twenty-five miles an hour in excess of the speed limit;

(2) operating a vehicle while under the influence of alcohol or drugs; or

(3) an offense which has caused or contributed to the cause of an accident resulting in injury or death to any person.

K. The uniform traffic citation form approved by the director of the motor vehicle division shall be used as the complaint for violations of regulations promulgated pursuant to the provisions of this section. Citations for moving violations shall be issued in the manner set forth in Sections 66-8-123 through 66-8-127 NMSA 1978.

**History: 1978 Comp., § 29-5-1.1, enacted by Laws 1981, ch. 304, § 1; 1987, ch. 111, § 1; 1988, ch. 33, § 1; 1989, ch. 59, § 1.**

**The 1989 amendment,** effective March 16, 1989, deleted "within metropolitan court districts" following "institutions" in the section heading; in Subsection A substituted "having a population in excess of ninety-five thousand according to the most recent federal decennial census" for "which has a metropolitan court" in the introductory paragraph; and in Subsection D inserted "municipal or magistrate" in the first sentence.

## 29-5-2. Educational institutions; university police officers.

A. The board of regents of each state educational institution designated in Article 12, Section 11 of the constitution of New Mexico may employ and assign duties of university police officers for the institution.

B. At all times while on duty, university police officers shall carry commissions of office issued by the board of regents. University police officers have the powers of peace officers within the exterior boundaries of lands under control of the board of regents employing them, including public streets and highways within the boundaries, or immediately adjacent to a campus where students are educated. Within this territory, a university police officer may enforce all applicable laws, ordinances and campus traffic regulations, but no arrest for violation of any law, ordinance or campus traffic regulation relating to motor vehicles is valid unless, at the time of arrest, the university police officer is wearing:

(1) a distinctive badge bearing the name of the institution, issued to the officer by the board of regents; or

(2) a distinctive uniform prescribed and issued to the officer by the board of regents.

**History: 1953 Comp., § 39-5-2, enacted by Laws 1968, ch. 62, § 154; 1975, ch. 22, § 1; 2019, ch. 14, § 1.**

**The 2019 amendment,** effective July 1, 2019, extended the authority of university police officers to public streets and highways immediately adjacent to a campus where students are educated; and in Subsection B, added "or immediately adjacent to as where students are educated".

ANNOTATIONS

**Authority of university police officers.** — University of New Mexico officers possessed the powers of peace officers in dealing with defendant as long as he was parked "within the exterior boundaries" of the university. *State v. Dawson*, 1999-NMCA-072, 127 N.M. 472, 983 P.2d 421.

**Arrest permitted off grounds under "fresh pursuit" doctrine.** — The common law doctrine of "fresh pursuit" applies to university police to permit an arrest off of university grounds of suspect observed committing a felony on grounds. *State v. Nysus*, 2001-NMCA-102, 131 N.M. 338, 35 P.3d 993, cert. denied, 131 N.M. 363, 36 P.3d 953 (2002).

**Traffic control jurisdiction.** — The board of regents of the university of New Mexico is specifically given traffic control jurisdiction on its property and may employ and assign duties of campus security officers for the institution. 1969 Op. Att'y Gen. No. 69-48.

**Section 35-14-2 NMSA 1978 supplements section.** — Section 35-14-2 NMSA 1978, providing for a waiver of the right to regulate university property under agreement



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between boards of regents of state educational institutions and municipalities for traffic offenses occurring on the university campus, supplements Section 29-5-1 NMSA 1978 and this section. 1969 Op. Att'y Gen. No. 69-48.

**City's jurisdiction over university limited.** — With certain exceptions the jurisdiction of the city of Albuquerque over the university of New Mexico campus is limited to the enforcement of state laws on the campus. 1969 Op. Att'y Gen. No. 69-48.

**Crime ordinances not applicable except for traffic offenses.** — Ordinances of the city of Albuquerque dealing with crimes do not apply to land under the control of the board of regents of the university of New Mexico except for traffic offenses as provided in Section 35-14-2 NMSA 1978. 1969 Op. Att'y Gen. No. 69-48.

## 29-5-3. Post-secondary educational institutions; boards authorized to establish campus police force; qualifications and authority of campus police officers.

A. As used in this section "post-secondary educational institution" means a community college operating pursuant to Chapter 21, Article 13 NMSA 1978, a technical and vocational institute operating pursuant to Chapter 21, Article 16 NMSA 1978 and an area vocational school operating pursuant to Chapter 21, Article 17 NMSA 1978.

B. The governing board of a post-secondary educational institution may adopt and promulgate traffic regulations to apply to areas within the exterior boundaries of the lands under control of the board, including streets and highways.

C. The governing board of a post-secondary educational institution may employ and assign duties to persons as campus police officers for the community college.

D. Persons employed as campus police officers by a post-secondary educational institution governing board:

(1) shall have the powers of peace officers within the exterior boundaries of lands under the control of the board, including streets and highways;

(2) shall at all times while on duty carry commissions of office issued by the board;

(3) shall fulfill the requirements for certification in Subsection A of Section 29-7-6 NMSA 1978 within one year of the date of first employment;

(4) may enforce all applicable laws, ordinances and campus traffic regulations within the territory in which they have powers of peace officers; and

(5) may make arrests for violations of laws, ordinances and campus traffic regulations that they have authority to enforce, but no arrest is valid unless the arresting campus police officer is at the time of the arrest wearing:

(a) a distinctive badge issued to him by the post-secondary educational institution governing board and bearing the name of the post-secondary educational institution; and

(b) a distinctive uniform prescribed and issued to him by the board.

**History: Laws 1997, ch. 115, § 1.**

## 29-5-4. Post-secondary educational institutions; campus traffic regulations; agreement with municipality.

A. As used in this section, "post-secondary educational institution" means a community college operating pursuant to the Community College Act [Chapter 21, Article 13 NMSA 1978] or a technical and vocational institute operating pursuant to the Technical and Vocational Institute Act [Chapter 21, Article 16 NMSA 1978] that does not have campus police officers created pursuant to Section 29-5-3 NMSA 1978.

B. The governing board of a post-secondary educational institution may adopt and promulgate traffic regulations to apply to areas within the exterior boundaries of the lands under the control of the board, including streets and highways. Traffic regulations may include:

(1) limiting the rates of speed;

(2) assigning parking spaces and designating parking and no parking areas and their uses;

(3) prohibiting parking;



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(4) removing, disabling or booting vehicles parked in violation of campus traffic regulations at the expense of the violator, who shall pay the expense before the vehicle is released; and

(5) instituting a system of vehicle registration for the identification and regulation of vehicles regularly using campus facilities, including a reasonable charge to defray the costs of providing parking and traffic enforcement services and campus parking.

C. All areas subject to traffic regulations shall be marked with signs conforming with standards used by the department of transportation.

D. Traffic regulations adopted by a post-secondary educational institution pursuant to this section shall include a specific penalty for each type of violation that shall not exceed the penalty for the same violation under state law or municipal ordinance for the municipality where the post-secondary educational institution is located.

E. A post-secondary educational institution may enter into a written agreement with the municipality where the institution is located for municipal police enforcement of traffic regulations and for enforcement of applicable laws and ordinances within the exterior boundaries of the lands under the control of the institution. The written agreement shall outline the terms and conditions for municipal enforcement of the institution's traffic regulations, including the following:

(1) unless a warning notice or a parking citation is given at the time of making an arrest for a traffic violation, the arresting officer shall offer the alleged violator the option of accepting a penalty assessment or appearing in municipal court for adjudication within five days after issuance of the citation;

(2) if an alleged violator elects to appear in municipal court in lieu of accepting a penalty assessment, the fine imposed upon later conviction shall not exceed the penalty assessment established for the particular penalty assessment;

(3) a violator's signature on the penalty assessment notice constitutes an acknowledgment of guilt of the offense stated in the notice;

(4) payment of a parking violation penalty assessment shall be made by mailing the payment within five days from the date the citation was issued to the municipality for processing in accordance with the written agreement. Payment of the penalty assessment is timely if postmarked within five days from the date of issuance of the citation;

(5) payment of any moving violation penalty assessment shall be made by mailing the payment within thirty days from the date the citation was issued to the municipality for processing in accordance with the written agreement. Payment of the penalty assessment is timely if postmarked within thirty days from the date of issuance of the citation;

(6) when a penalty assessment is paid by currency, a receipt shall be immediately mailed to the violator;

(7) if a penalty assessment is not paid within thirty days from the date of issuance of the citation, the violator shall be prosecuted for the violation charged on the penalty assessment notice in a manner as if a penalty assessment notice had not been issued;

(8) all penalties and fines assessed shall be paid to the municipality to defray the costs of enforcement and adjudication of citations issued at the post-secondary educational institution; and

(9) the uniform traffic citation form approved by the motor vehicle division of the taxation and revenue department shall be used as the complaint for violations of campus traffic regulations. Citations for moving violations shall be issued in the manner set forth in Sections 66-8-123 through 66-8-127 NMSA 1978.

F. A municipality enforcing campus traffic regulations pursuant to this section may, by commission, authorize campus security personnel at the post-secondary educational institution to issue citations for violations of non-moving traffic regulations on such terms and conditions as provided in the written agreement but in no event shall campus security personnel be given arrest powers.

G. In the absence of a written agreement with a municipality for the enforcement of traffic regulations, campus security personnel may enforce traffic regulations. The punishment for a violation of a campus traffic regulation shall be not more than five dollars ($5.00) per violation. All fines collected pursuant to this subsection shall be remitted to the post-secondary educational institution and shall be used solely for the purposes of enforcing campus traffic regulations and for



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planning and improving movement and control of vehicles and related parking problems and for use in the operation, management and administration of the institution's security office.

H. When a traffic citation is issued by a campus security officer, the officer shall be wearing a distinctive badge and uniform issued to the officer by the post-secondary educational institution.

I. A record of a penalty assessment payment is not admissible as evidence in court in a civil action.

J. A post-secondary educational institution may withhold the issuance of grades and degrees in order to secure payment of unpaid traffic or parking assessments.

**History: 1978 Comp., § 29-5-4, enacted by Laws 2011, ch. 53, § 1.**

**Effective dates.** — Laws 2011, ch. 53, § 3 made Laws 2011, ch. 53, § 1 effective July 1, 2011.

# ARTICLE 6

# New Mexico Mounted Patrol

Sec.
29-6-1. Establishment; composition.
29-6-2. Board of directors; elections[; commissions as emergency and voluntary state police].
29-6-3. Duties of board of directors.
29-6-4. Duties of mounted patrol.
29-6-4.1. Training and entrance requirements of the New Mexico mounted patrol.
29-6-4.2. Mounted patrol; applicants; criminal history screening; denial of commission.
29-6-5. Mounted patrol; aid to law enforcement agencies; workmen's compensation.
29-6-6. Service upon call of governor.

## 29-6-1. [Establishment; composition.]

There is hereby created the New Mexico mounted patrol to be composed of units or troops situated throughout the state and organized, officered and manned pursuant to and under the direction of the governor.

**History: 1941 Comp., § 66-1101, enacted by Laws 1941, ch. 149, § 1; 1953 Comp., § 9-11-1.**

## 29-6-2. Board of directors; elections[; commissions as emergency and voluntary state police].

A. The control, management, supervision and power of internal organization is vested in a board of directors composed of not less than one member from each troop of the New Mexico mounted patrol elected by the members of the organization to serve for a term of two years and until their successors are duly elected and qualified. The first election hereunder shall be held and conducted at such time and pursuant to such rules promulgated by the governor. Succeeding elections shall be pursuant to rules and regulations promulgated by the qualified and active board of directors.

B. The director of the New Mexico state police [division of the department] may, at the expense of members of the New Mexico mounted patrol, execute and deliver to each member of the mounted patrol proper pocket commissions as emergency and voluntary state police, the same to be effective only upon specific request of the New Mexico state police in each instance of service. Such commissions shall bear the written approval of the governor of New Mexico; such commissions shall automatically expire and new ones issued and delivered upon each change in the directorship of the New Mexico state police or the governorship.

**History: 1941 Comp., § 66-1103, enacted by Laws 1941, ch. 149, § 3; 1951, ch. 49, § 1; 1953 Comp., § 9-11-3; Laws 1979, ch. 327, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.



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## 29-6-3. [Duties of board of directors.]

The board of directors shall be empowered to make rules and regulations for the government, control, management, supervision and internal organization of the New Mexico mounted patrol and to provide for the selection of troopers and for such officers and noncommissioned officers as may be necessary from time to time to command the various units or troops.

**History: 1941 Comp., § 66-1104, enacted by Laws 1941, ch. 149, § 4; 1953 Comp., § 9-11-4.**

## 29-6-4. [Duties of mounted patrol.]

It shall be the duty of the New Mexico mounted patrol and the members thereof to assist in the enforcement of law by cooperating with all law enforcement agencies and regulatory bodies of the state of New Mexico when requested by them and under their direction and control; to act as an official bodyguard to the governor of this state or to distinguished visitors upon the call of the governor.

**History: 1941 Comp., § 66-1105, enacted by Laws 1941, ch. 149, § 5; 1953 Comp., § 9-11-5.**

ANNOTATIONS

**Legislative intent that patrol perform voluntarily.** — Since no provision is found relating to the salaries or other compensation for services rendered, it must be concluded as the legislative intent that all members of the patrol were to perform in a voluntary and honorary capacity only. 1957-58 Op. Att'y Gen. No. 57-41.

**Power to arrest same as private citizen.** — Unless called in specific instances to assist law enforcement officers, officer's power to arrest is no different than that of a private citizen. Throughout the statutes it is seen that authority to arrest, other than as a private citizen, exists only when there is a specific request from regular law enforcement officers. And it is further apparent that when called upon to assist law enforcement agencies that patrol's conduct shall be under their direction and control. The commission which is issued can, of course, have no more force than the authority given by the statutes under which that commission is issued. 1955-56 Op. Att'y Gen. No. 56-6350.

**Uniform unnecessary to exercise authority.** — It is not necessary that mounted patrol be in uniform in order to exercise the authority which it has. 1955-56 Op. Att'y Gen. No. 56-6350.

**Extra-hazardous duty not performed under color of employment agreement.** — A trooper or officer of the New Mexico mounted patrol, in carrying out duties as provided, is without question engaging in extra-hazardous activities. However, such extra-hazardous duty is not being performed under any color of an employment agreement. 1957-58 Op. Att'y Gen. No. 57-41.

## 29-6-4.1. Training and entrance requirements of the New Mexico mounted patrol.

A. The New Mexico law enforcement academy is hereby empowered to approve a basic law enforcement training program for New Mexico mounted patrol members. The academy is authorized to promulgate the necessary rules and regulations setting program standards and record keeping requirements.

B. New Mexico mounted patrol members who began active service prior to July 1, 1983 are exempted from the basic law enforcement training requirements set forth in Subsection A of this section.

**History: 1978 Comp., § 29-6-4.1, enacted by Laws 1985, ch. 83, § 1.**

**Cross references.** — For law enforcement training, *see* 29-7-1 NMSA 1978 et seq.

## 29-6-4.2. Mounted patrol; applicants; criminal history screening; denial of commission.

A. As used in this section:

(1) "criminal record" means information concerning a person's arrests, indictments or other formal criminal charges and any dispositions arising from them, including convictions, dismissals, acquittals, sentencing and correctional supervision, collected by criminal justice agencies and stored in the databases of the federal bureau of investigation, the national law enforcement telecommunications system, the department of public safety or the repositories of criminal history information of other states; and



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(2) "criminal history screening" means a criminal history background investigation of an applicant for the New Mexico mounted patrol conducted by using fingerprints collected by the department of public safety or a local law enforcement agency and submitted to the federal bureau of investigation.

B. The New Mexico mounted patrol shall perform a criminal history screening on all applicants for mounted patrol. If an applicant has a criminal record, his application for a commission in the mounted patrol may be denied. If an applicant has a felony conviction or a conviction for a misdemeanor involving moral turpitude, his application for a commission in the mounted patrol shall be denied.

C. The chief of the New Mexico state police shall determine whether to grant a commission to an applicant who has a criminal record that did not result in conviction of a felony or a misdemeanor involving moral turpitude. The chief's decision to deny an application for a commission in the mounted patrol is final and may not be appealed.

D. An applicant for the New Mexico mounted patrol shall be fingerprinted and the applicant shall provide two fingerprint cards or the equivalent electronic fingerprints to the mounted patrol to assist the mounted patrol in conducting a criminal history screening of the applicant. The applicant shall pay the cost of the criminal history screening. The mounted patrol shall not charge the applicant more than the actual cost of the nationwide criminal history screening.

**History: Laws 1999, ch. 121, § 1.**

## 29-6-5. Mounted patrol; aid to law enforcement agencies; workmen's compensation.

A. Members of the New Mexico mounted patrol may be detailed to assist and render aid in specific instances involving law enforcement or other matters when request is made for such assistance and aid by the New Mexico state police or other state or local law enforcement agencies. When acting upon such call, members shall be deemed to be the agents or deputies of the authority issuing such request, shall be possessed of the same powers and duties as such requesting authorities and shall be completely covered by the Workmen's [Workers'] Compensation Act [Chapter 52, Article 1 NMSA 1978] if the employer's insurance policy is endorsed to clearly show that its coverage extends to the claimant.

B. For purposes of calculating the amount of any mounted patrol member's disability or death benefits pursuant to the Workmen's [Workers'] Compensation Act, the member's average weekly wages shall be deemed to be the average weekly wages the member was receiving from any and every employer, regardless of whether the member's employment with such employer was covered in fact by the Workmen's [Workers'] Compensation Act. The degree of disability, if any, shall be determined on the basis of the member's disability in regard to such other employment.

C. If a mounted patrol member is covered by workmen's compensation coverage pursuant to Subsection A of this section, the Workmen's [Workers'] Compensation Act shall be his exclusive remedy against the mounted patrol and the supervising law enforcement agency for any injury or death proximately caused by accident arising out of and in the course of the member's duties.

**History: 1941 Comp., § 66-1106, enacted by Laws 1941, ch. 149, § 6; 1953 Comp., § 9-11-6; Laws 1961, ch. 241, § 1; 1983, ch. 247, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

### ANNOTATIONS

**Meaning of "state police".** — When the statute refers to the New Mexico state police without any qualification, it grants power to any regularly appointed, active member of the state police to call upon a member of the mounted patrol for assistance. 1959-60 Op. Att'y Gen. No. 60-239.

**State police may call for law enforcement matters only.** — The mounted patrol may only be called upon by the state police for matters involving law enforcement, to assist and render aid to the state police, and for other matters related to the function of the state police. The statute does not contemplate calling upon members of the mounted patrol for training purposes, and the state police may not call upon members of the mounted patrol for the purpose of giving training to the mounted patrol. But where the purpose is law enforcement, or to render assistance to the state police in a proper function of the state police, then any member of the state police is authorized to call out members of the mounted patrol for assistance. 1959-60 Op. Att'y Gen. No. 60-239.

**When no actual emergency exists,** a member of the mounted patrol whose assistance is requested by the state police must be furnished the request in writing, signed



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by the officer making the request. 1959-60 Op. Att'y Gen. No. 60-239.

**No state insurance or compensation plan coverage.** — Members of the New Mexico mounted patrol are not covered by any state insurance or compensation plan during periods of service as provided. 1957-58 Op. Att'y Gen. No. 57-41.

**If group insurance is acquired, then classification is as a unit.** — For purposes of acquiring group insurance protection, a troop of the New Mexico mounted patrol was classified as a unit or group under former Section 59-18-16 NMSA 1978. 1957-58 Op. Att'y Gen. No. 57-41.

## 29-6-6. [Service upon call of governor.]

The governor shall have the power in case of insurrection, invasion, riot, breach of the peace or imminent danger to call into service the New Mexico mounted patrol or any unit or member thereof. Any and all service under such call shall be under the direction and control of the governor.

**History: 1941 Comp., § 66-1107, enacted by Laws 1941, ch. 149, § 7; 1953 Comp., § 9-11-7.**

# ARTICLE 7

# Law Enforcement Training

Sec.
29-7-1. Short title.
29-7-2. Academy established.
29-7-3. New Mexico law enforcement academy board.
29-7-3. New Mexico law enforcement standards and training council. (Effective July 1, 2023.)
29-7-4. Powers and duties of board.
29-7-4. Powers and duties of council. (Effective July 1, 2023.)
29-7-4.1. Domestic abuse incident training.
29-7-4.2. Child abuse incident training.
29-7-4.3. Law enforcement certification board; appointment; powers and duties. (Effective July 1, 2023.)
29-7-4.4. Law enforcement officer training. (Effective July 1, 2023.)
29-7-5. Powers and duties of the director.
29-7-5. Powers and duties of the director. (Effective July 1, 2023.)
29-7-5.1. Removal of director.
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29-7-6. Qualifications for certification.
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29-7-7.1. In-service law enforcement training; requirements; eligibility.
29-7-7.2. Reports.
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29-7-8. Repealed.
29-7-9. Repealed.
29-7-10. Certification by waiver.
29-7-10. Certification by waiver. (Effective July 1, 2023.)
29-7-11. Repealed.
29-7-12. Charges; fund created; use.
29-7-12. Charges; fund created; use. (Effective July 1, 2023.)
29-7-13. Refusal, suspension or revocation of certification.
29-7-14. Law enforcement officers as school resource officers; training required.
29-7-15. Revoke police officer certification after conviction or making certain pleas.

## 29-7-1. Short title.

Chapter 29, Article 7 NMSA 1978 may be cited as the "Law Enforcement Training Act".

**History: 1953 Comp., § 39-6-1, enacted by Laws 1969, ch. 264, § 1; 1970, ch. 48, § 1; 1981, ch. 114, § 1; 1993, ch. 255, § 1.**

**The 1993 amendment,** effective July 1, 1993, substituted "Chapter 29, Article 7 NMSA 1978" for "Sections 29-7-1 through 29-7-11".

## 29-7-2. Academy established.

The "New Mexico law enforcement academy" is established to provide a planned program of basic law enforcement training and in-service law enforcement training for police officers and to furnish instruction and seminars to constantly upgrade law enforcement within the state.



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**History: 1953 Comp., § 39-6-2, enacted by Laws 1969, ch. 264, § 2; 1970, ch. 48, § 2; 1981, ch. 114, § 2.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Liability of supervisory officials and governmental entities for having failed to adequately train, supervise, or control individual peace officers who violate plaintiff's civil rights under 42 USCS § 1983, 70 A.L.R. Fed. 17.

## 29-7-3. New Mexico law enforcement academy board.

A. There is created the "New Mexico law enforcement academy board".

B. The academy shall be controlled and supervised by policy set by the board. The board shall be composed of the attorney general, who shall serve automatically by reason of office and serve as chair of the board, and eight members who are qualified electors to be appointed by the governor and confirmed by the senate. An appointed board member shall serve and have all of the duties, responsibilities and authority of that office during the period prior to the final action by the senate in confirming or rejecting the appointment.

C. Appointments to the board shall be for terms of four years or less made in such manner that the terms of not more than two members expire on July 1 of each year. At all times, the board shall have represented on it, as members, one municipal police chief, one sheriff, one state police officer, one attorney who is currently employed in a district attorney's office, one certified police chief of a New Mexico Indian tribe or pueblo, one certified New Mexico police officer holding the rank of sergeant or below and two citizen-at-large members, neither of whom shall be a police officer or retired police officer or have familial or financial connections to a police officer or any agency or department for which a police officer works. Vacancies shall be filled by the governor for the unexpired term.

D. Members of the board shall receive, for their service as members of the board, per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978].

**History: 1978 Comp., § 29-7-3, enacted by Laws 1979, ch. 202, § 42; 1983, ch. 121, § 1; 1993, ch. 250, § 1; 1993, ch. 255, § 2; 1994, ch. 39, § 1; 2015, ch. 3, § 22.**

**Repeals and reenactments.** — Laws 1977, ch. 257, § 51 repealed a former 39-6-3, 1953 Comp., relating to the academy board, and enacted a new 39-6-3, 1953 Comp. (29-7-3 NMSA 1978).

Laws 1979, ch. 202, § 42 repealed former 29-7-3 NMSA 1978, relating to the control and management of the law enforcement academy, and enacted a new 29-7-3 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by amending the qualifications for the composition of the New Mexico law enforcement academy board; in Subsection B, after "reason of", deleted "his", after "serve as", deleted "chairman" and added "chair", and after "of the board, and", deleted "six" and added "eight"; in Subsection C, deleted "On or before July 1, 1994, the governor shall increase the number of members on the board to eight by appointing two additional members. The seventh member of the board shall be a citizen at-large member whose term shall end on July 1, 1996. The eighth member of the board shall be a police officer who is a New Mexico certified police officer, holding the rank of sergeant or below at the time of his appointment, and whose term shall end on July 1, 1996 or sooner if he retires or is deactivated from duty for longer than thirty days.", after "police officer, one", deleted "district", after "attorney", added "who is currently employed in a district attorney's office", and after "citizen-at-large members", added the remainder of the sentence.

**The 1994 amendment,** effective May 18, 1994, deleted "not later than July 1, 1983" following "governor" in the second sentence in Subsection B; and, in Subsection C, substituted the first three sentences for the former first three sentences, relating to appointment of the first board members, and substituted "Appointments to the board" for "Thereafter, all appointments" in the fourth sentence and "one certified New Mexico police officer holding the rank of sergeant or below and two citizen-at-large members" for "and one citizen-at-large member" in the next-to-last sentence.

**The 1993 amendment,** effective July 1, 1993, substituted "academy" for "New Mexico law enforcement academy" in the first sentence of Subsection B.

## *29-7-3. New Mexico law enforcement standards and training council. (Effective July 1, 2023.)*

*A. There is created the "New Mexico law enforcement standards and training council".*

*B. The council shall develop and adopt basic training and in-service training standards for police officers and telecommunicators in New Mexico.*

*C. The council shall consist of the director of the New Mexico law enforcement academy and the directors of all the satellite law enforcement academies, who shall serve automatically by reason*



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*of their position. The remaining seven members of the council shall be appointed by the governor and confirmed by the senate. An appointed council member shall serve and have all of the duties, responsibilities and authority of that office during the period prior to the final action by the senate in confirming or rejecting the appointment. The members appointed by the governor shall consist of one attorney who is currently employed in a district attorney's office; one attorney who is currently employed by the public defender department; one certified police chief of a New Mexico Indian nation, tribe or pueblo; two members who have experience and specialize in providing adult education; and two citizen-at-large members, one of whom shall have experience as a behavioral health provider and neither of whom shall be a police officer or retired police officer or have familial or financial connections to a police officer or any agency or department for which a police officer works. Vacancies shall be filled by the governor for the unexpired term.*

*D. Appointments to the council shall be for terms of four years or less made in such manner that the terms of not more than two members expire on July 1 of each year.*

*E. Members of the council shall receive, for their service as members of the council, per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].*

***History: 1978 Comp., § 29-7-3, enacted by Laws 1979, ch. 202, § 42; 1983, ch. 121, § 1; 1993, ch. 250, § 1; 1993, ch. 255, § 2; 1994, ch. 39, § 1; 2015, ch. 3, § 22; 2003, ch. 260, § 5; 2022, ch. 56, § 4.***

***The 2022 amendment,*** *effective July 1, 2023, revised duties and responsibilities of the council, and revised the qualifications and terms for membership in the council; in the section heading, deleted "academy board" and added "standards and training council"; in Subsection A, after "New Mexico law enforcement", deleted "academy board" and added "standards and training council"; deleted former Subsection B, added new Subsections B and C and redesignated former Subsections C and D as Subsections D and E, respectively; in Subsection D, after "Appointments to the", deleted "board" and added "council", and deleted "At all times, the board shall have represented on it, as members, one municipal police chief, one sheriff, one state police officer, one attorney who is currently employed in a district attorney's office, one certified police chief of a New Mexico Indian tribe or pueblo, one certified New Mexico police officer holding the rank of sergeant or below and two citizen-at-large members, neither of whom shall be a police officer or retired police officer or have familial or financial connections to a police officer or any agency or department for which a police officer works. Vacancies shall be filled by the governor for the unexpired term."; and in Subsection E, substituted each occurrence of "board" with "council".*

## 29-7-4. Powers and duties of board.

The board shall:

A. approve or disapprove the appointment of the director by the secretary;

B. develop and implement a planned program of:

(1) basic law enforcement training and in-service law enforcement training, a portion of which may be conducted on a regional basis; and

(2) basic telecommunicator training and in-service telecommunicator training, as provided in the Public Safety Telecommunicator Training Act [29-7C-1 to 29-7C-9 NMSA 1978], a portion of which may be conducted on a regional basis;

C. prescribe qualifications for instructors and prescribe courses of instruction for:

(1) basic law enforcement training and in-service law enforcement training; and

(2) basic telecommunicator training and in-service telecommunicator training, as provided in the Public Safety Telecommunicator Training Act;

D. report annually to the governor;

E. in its discretion, accept donations, contributions, grants or gifts from whatever source for the benefit of the academy, which donations, contributions, grants or gifts are appropriated for the use of the academy;

F. adopt, publish and file, in accordance with the provisions of the State Rules Act [Chapter 14, Article 4 NMSA 1978], all regulations and rules concerning the operation of the academy and the implementation and enforcement of the provisions of the Law Enforcement Training Act and the Public Safety Telecommunicator Training Act;

G. issue, grant, deny, renew, suspend or revoke a:

(1) peace officer's certification for any cause set forth in the provisions of the Law Enforcement Training Act; and

(2) telecommunicator's certification for any just cause set forth in the Public Safety Telecommunicator Training Act;



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H. administer oaths, subpoena persons and take testimony on any matter within the board's jurisdiction; and

I. perform all other acts appropriate to the development and operation of the academy.

**History: 1953 Comp., § 39-6-6, enacted by Laws 1969, ch. 264, § 6; 1970, ch. 48, § 4; 1977, ch. 257, § 52; 1979, ch. 202, § 43; 1981, ch. 114, § 3; 1987, ch. 254, § 20; 1993, ch. 255, § 3; 2003, ch. 320, § 1.**

**The 2003 amendment,** effective July 1, 2003, in Subsection A deleted "of the academy" following "of the director" and deleted "of public safety" following "by the secretary"; rewrote former Subsection B to create present Subsection B and Paragraph B(1); added Subsection B(2); rewrote former Subsection C to create present Subsection C and Paragraph C(1); added Subsection C(2); inserted "and the Public Safety Telecommunicator Training Act" following "Law Enforcement Training Act" near the end of Subsection F; rewrote former Subsection G to create present Subsection G and Paragraph G(1); added Subsection G(2); and inserted "subpoena persons" following "administer oaths," in Subsection H.

**The 1993 amendment,** effective July 1, 1993, deleted former Subsection F, which read "promulgate rules concerning the operation of the academy; and"; added present Subsections F, G, and H; and redesignated former Subsection G as present Subsection I.

ANNOTATIONS

**Board is authorized to set qualifications for instructors at the academy.** 1982 Op. Att'y Gen. No. 82-10.

**Qualifications for instructors at facilities independent of academy.** — Police officers may receive basic law enforcement training at a facility which offers a program which is comparable to or exceeds the standards of the programs of the law enforcement academy. If such comparable programs are offered by a regional training facility certified by the director of the academy with the approval of the board, the board has the authority to prescribe qualifications for instructors. However, if such comparable programs are offered by facilities which are established independently of the law enforcement academy, the board cannot have given that authority. 1982 Op. Att'y Gen. No. 82-10.

## *29-7-4. Powers and duties of council. (Effective July 1, 2023.)*

*The council shall:*

*A. develop a planned program, to be implemented by the director, of:*

*(1) basic law enforcement training and in-service law enforcement training, a portion of which may be conducted on a regional basis; and*

*(2) basic telecommunicator training and in-service telecommunicator training, as provided in the Public Safety Telecommunicator Training Act [29-7C-1 to 29-7C-9 NMSA 1978], a portion of which may be conducted on a regional basis;*

*B. prescribe qualifications for instructors and prescribe courses of instruction for:*

*(1) basic law enforcement training and in-service law enforcement training; and*

*(2) basic telecommunicator training and in-service telecommunicator training, as provided in the Public Safety Telecommunicator Training Act;*

*C. report annually to the governor;*

*D. in its discretion, accept donations, contributions, grants or gifts from whatever source for the benefit of the academy, which donations, contributions, grants or gifts are appropriated for the use of the academy; and*

*E. adopt, publish and file, in accordance with the provisions of the State Rules Act [Chapter 14, Article 4 NMSA 1978], all rules concerning the implementation and enforcement of Sections 29-7-2 through 29-7-7.7, 29-7-12, 29-7-14, 29-7C-4, 29-7C-5 and 29-7C-7 NMSA 1978.*

***History:*** *1953 Comp., § 39-6-6, enacted by Laws 1969, ch. 264, § 6; 1970, ch. 48, § 4; 1977, ch. 257, § 52; 1979, ch. 202, § 43; 1981, ch. 114, § 3; 1987, ch. 254, § 20; 1993, ch. 255, § 3; 2003, ch. 320, § 1; 2022, ch. 56, § 5.*

*ANNOTATIONS*

***The 2022 amendment,*** *effective July 1, 2023, revised the powers and duties of the New Mexico law enforcement standards and training council; deleted former Subsection A, which provided "approve or disapprove the appointment of the director by the secretary", and redesignated former Subsections B through F as Subsections A through E, respectively; in Subsection A, after "develop", deleted "and implement", and after "a planned program", added "to be implemented by the director"; and in Subsection E, after "State Rules Act, all", deleted "regulations and", after "rules concerning", deleted "the operation of the academy and", and deleted "the provisions of the Law Enforcement Training Act and the Public Safety Telecommunicator Training Act" and added "Sections 29-7-2 through 29-7-7.7, 29-7-12, 29-7-14, 29-7C-4, 29-7C-5 and 29-7C-7 NMSA 1978"; and deleted former Subsections G through I.*

## 29-7-4.1. Domestic abuse incident training.

Domestic abuse incident training that includes information on strangulation shall be included in the curriculum of each basic law enforcement training class. Domestic abuse incident



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training shall be included as a component of in-service training each year for certified police officers.

**History: Laws 2002, ch. 34, § 3; 2002, ch. 35, § 3; 2018, ch. 37, § 1.**

**The 2018 amendment,** effective July 1, 2018, required that information on strangulation be included in domestic abuse incident training in the curriculum of each basic law enforcement training class; and after "Domestic abuse incident training", added "that includes information on strangulation".

## 29-7-4.2. Child abuse incident training.

Child abuse incident training shall be included in the curriculum of each basic law enforcement training class. Child abuse incident training shall be included as a component of in-service training each year for certified police officers.

**History: Laws 2011, ch. 49, § 1.**

**Effective dates.** — Laws 2011, ch. 49, § 2 made Laws 2011, ch. 49, § 1 effective July 1, 2011.

## *29-7-4.3. Law enforcement certification board; appointment; powers and duties. (Effective July 1, 2023.)*

*A. The "law enforcement certification board" is established and administratively attached to the department of public safety as an independent board in accordance with the Executive Reorganization Act [9-1-1 to 9-1-10 NMSA 1978]. The board consists of nine members appointed by the governor with the advice and consent of the senate. No more than five members of the board shall be members of the same political party. The members of the board shall be appointed for five-year terms. Two of the initial board members shall be appointed for one-year terms; two of the initial board members shall be appointed for two-year terms; two of the initial board members shall be appointed for three-year terms; two of the initial board members shall be appointed for four-year terms; and one of the initial board members shall be appointed for a five-year term.*

*B. The board shall include the following members:*

*(1) a retired judge, who shall serve as chair of the board;*

*(2) a municipal peace officer;*

*(3) a sheriff;*

*(4) a tribal law peace officer;*

*(5) an attorney in private practice who practices as a plaintiff's attorney in the area of civil rights or who represents criminal defendants;*

*(6) an attorney in private practice who represents public entities in civil rights claims; and*

*(7) an attorney who is employed by the public defender department.*

*C. The board shall:*

*(1) deny, suspend or revoke:*

*(a) a peace officer's certification for just cause as provided in the Law Enforcement Training Act; and*

*(b) a telecommunicator's certification for just cause as provided in the Public Safety Telecommunicator Training Act [29-7C-1 to 29-7C-9 NMSA 1978; and*

*(2) conduct investigations, administer oaths and subpoena persons as necessary to make determination regarding fitness of a law enforcement officer to execute a law enforcement officer's duties.*

*D. The board may require by subpoena the attendance of witnesses or the production of records and other evidence relevant to an investigation and shall have such other powers and duties and administer or enforce such other acts as further provided by law.*

*E. The board shall appoint a chief executive officer to assist the board in carrying out its functions. The chief executive officer shall employ persons as necessary to assist the board in carrying out its functions.*



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*F. The board shall adopt, publish and file, in accordance with the provisions of the State Rules Act [Chapter 14, Article 4 NMSA 1978], all rules concerning the implementation and enforcement of the Law Enforcement Training Act and Public Safety Telecommunicator Training Act except those sections enumerated in Subsection E of Section 29-7-4 NMSA 1978 for which rules shall be adopted, published and filed by the council.*

*G. The board shall issue or renew a certification to:*

*(1) graduates from an approved basic law enforcement training program who satisfy the qualifications for certification as set forth in Section 29-7-6 NMSA 1978; or*

*(2) graduates from an approved basic telecommunicator training program who satisfy the qualifications for certification as set forth in the Public Safety Telecommunicator Training Act.*

*H. Members of the board shall receive, for their service as members of the board, per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].*

***History: 1978 Comp., § 29-7-4.3, enacted by Laws 2022, ch. 56, § 13.*** ***Effective dates.*** *— Laws 2022, ch. 56, § 53 made Laws 2022, ch. 56, § 13 effective July 1, 2023.*

## *29-7-4.4. Law enforcement officer training. (Effective July 1, 2023.)*

*The curriculum of each basic law enforcement training class and in-service training each year for certified police officers shall include:*

*A. crisis management and intervention;*
*B. dealing with individuals who are experiencing mental health issues;*
*C. methods of de-escalation;*
*D. peer-to-peer intervention;*
*E. stress management;*
*F. racial sensitivity;*
*G. reality-based situational training; and*
*H. use of force training that includes the elimination of vascular neck restraints.*

***History: 1978 Comp., § 29-7-4.4, enacted by Laws 2022, ch. 56, § 6.*** ***Effective dates.*** *— Laws 2022, ch. 56, § 53 made Laws 2022, ch. 56, § 6 effective July 1, 2023.*

## 29-7-5. Powers and duties of the director.

The director shall:

A. be the chief executive officer of the academy and employ necessary personnel;

B. issue a certificate of completion to any person who:

(1) graduates from an approved basic law enforcement training program and who satisfies the qualifications for certification as set forth in Section 29-7-6 NMSA 1978; or

(2) graduates from an approved basic telecommunicator training program and who satisfies the qualifications for certification as set forth in the Public Safety Telecommunicator Training Act [29-7C-1 to 29-7C-9 NMSA 1978];

C. perform all other acts necessary and appropriate to the carrying out of his duties;

D. act as executive secretary to the board;

E. carry out the policy as set by the board; and

F. annually evaluate the courses of instruction being offered by the academy and make necessary modifications and adjustments to the programs.

**History: 1953 Comp., § 39-6-7, enacted by Laws 1969, ch. 264, § 7; 1977, ch. 257, § 53; 1978, ch. 2, § 1; 1979, ch. 202, § 44; 1981, ch. 114, § 4; 1993, ch. 255, § 4; 2003, ch. 320, § 2.**

**The 2003 amendment,** effective July 1, 2003, rewrote former Subsection B to create present Subsection B and Paragraph B(1) and added Paragraph B(2).

**The 1993 amendment,** effective July 1, 1993, deleted "as such" preceding "employ" in Subsection A; deleted former Subsection B, which read "certify graduates of approved basic law enforcement training programs in accordance with Section 29-7-8 NMSA 1978"; deleted former Subsection C, which read "issue appropriate certifications to graduates of the academy programs"; added present Subsection B; and redesignated Subsections D through G as C through F, respectively.



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## *29-7-5. Powers and duties of the director. (Effective July 1, 2023.)*

*The director shall be under the supervision and direction of the secretary of public safety. The director shall:*

*A. be the chief executive officer of the academy and employ necessary personnel;*

*B. issue a certificate of completion to any person who:*

*(1) graduates from an approved basic law enforcement training program and who satisfies the qualifications for certification as set forth in Section 29-7-6 NMSA 1978; or*

*(2) graduates from an approved basic telecommunicator training program and who satisfies the qualifications for certification as set forth in the Public Safety Telecommunicator Training Act [29-7C-1 to 29-7C-9 NMSA 1978];*

*C. perform all other acts necessary and appropriate to the carrying out of the director's duties;*

*D. implement the training standards and requirements developed and adopted by the council; and*

*E. annually evaluate the courses of instruction being offered by the academy and make necessary modifications and adjustments to the programs.*

***History: 1953 Comp., § 39-6-7, enacted by Laws 1969, ch. 264, § 7; 1977, ch. 257, § 53; 1978, ch. 2, § 1; 1979, ch. 202, § 44; 1981, ch. 114, § 4; 1993, ch. 255, § 4; 2003, ch. 320, § 2; 2022, ch. 56, § 7.***

***The 2022 amendment,*** *effective July 1, 2023, clarified that the director of the New Mexico law enforcement academy of the department of public safety is under the supervision and direction of the secretary of public safety, and revised the powers and duties of the director; added "The director shall be under the supervision and direction of the secretary of public safety"; and deleted former Subsections D and E, added a new Subsection D and redesignated former Subsection F as Subsection E.*

## 29-7-5.1. Removal of director.

The director may be removed by the board in accordance with the procedures provided in Section 29-2-11 NMSA 1978 for removal of members of the New Mexico state police holding permanent commissions. In the case of removal proceedings for the director under that section, "commission", as used in Subsections C and D of Section 29-2-11 NMSA 1978, shall be construed to mean the New Mexico law enforcement academy board.

**History: 1978 Comp., § 29-7-5.1, enacted by Laws 1979, ch. 202, § 45; 1993, ch. 255, § 5; 2015, ch. 3, § 23.**

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by clarifying language relating to the procedures for removal of the director of the New Mexico law enforcement academy; in the second sentence, after "section", deleted "the words 'New Mexico state police board' or 'board'", and added "'commission' as used in Subsections C and D of Section 29-2-11 NMSA 1978".

**The 1993 amendment,** effective July 1, 1993, in the first sentence, substituted "director" for "director of the New Mexico law enforcement academy" and substituted "board" for "New Mexico law enforcement academy board" and in the second sentence, substituted "that section" for "Section 29-2-11 NMSA".

## *29-7-5.1. Removal of director. (Effective July 1, 2023.)*

*The director may be removed by the secretary in accordance with the procedures provided in Section 29-2-11 NMSA 1978 for removal of members of the New Mexico state police holding permanent commissions. In the case of removal proceedings for the director under that section, "commission", as used in Subsections C and D of Section 29-2-11 NMSA 1978, shall be construed to mean the New Mexico law enforcement standards and training council.*

***History: 1978 Comp., § 29-7-5.1, enacted by Laws 1979, ch. 202, § 45; 1993, ch. 255, § 5; 2015, ch. 3, § 23; 2022, ch. 56, § 8.***

***The 2022 amendment,*** *effective July 1, 2023, provided that the director of the New Mexico law enforcement academy may be removed by the secretary of public safety and removed that authority from the former law enforcement academy board, and clarified that, in the case of removal proceedings under Section 29-2-11 NMSA 1978, "commission" shall be construed to mean the New Mexico law enforcement standards and training council; and after "The director may be removed", deleted "board" and added "secretary", and after "New Mexico law enforcement", deleted "academy board" and added "standards and training council".*



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## 29-7-6. Qualifications for certification.

A. An applicant for certification shall provide evidence satisfactory to the board that he:

(1) is a citizen of the United States and has reached the age of majority;

(2) holds a high school diploma or the equivalent;

(3) holds a valid driver's license;

(4) has not been convicted of or pled guilty to or entered a plea of nolo contendere to any felony charge or, within the three-year period immediately preceding his application, to any violation of any federal or state law or local ordinance relating to aggravated assault, theft, driving while intoxicated, controlled substances or other crime involving moral turpitude and has not been released or discharged under dishonorable conditions from any of the armed forces of the United States;

(5) after examination by a licensed physician, is free of any physical condition that might adversely affect his performance as a police officer or prohibit him from successfully completing a prescribed basic law enforcement training required by the Law Enforcement Training Act;

(6) after examination by a certified psychologist, is free of any emotional or mental condition that might adversely affect his performance as a police officer or prohibit him from successfully completing a prescribed basic law enforcement training required by the Law Enforcement Training Act;

(7) is of good moral character;

(8) has met any other requirements for certification prescribed by the board pursuant to regulations adopted by the board; and

(9) has previously been awarded a certificate of completion by the director attesting to the applicant's completion of an approved law enforcement training program.

B. A person employed as a police officer by any law enforcement agency in this state shall forfeit his position unless, no later than twelve months after beginning his employment as a police officer, the person satisfies the qualifications for certification set forth in Subsection A of this section and is awarded a certificate attesting to that fact.

**History: 1978 Comp., § 29-7-6, enacted by Laws 1993, ch. 255, § 6.**

**Repeals and reenactments.** — Laws 1993, ch. 255, § 6 repealed former 29-7-6 NMSA 1978, as amended by Laws 1988, ch. 58, § 1, and enacted a new section, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

**Cross references.** — For the inapplicability of the Criminal Offender Employment Act to law enforcement agencies, *see* 28-2-5 NMSA 1978.

### ANNOTATIONS

**Authority to act as a police officer prior to certification.** — An officer who becomes employed as a police officer after a break in service that was not intended to circumvent the certification requirement is provided twelve (12) months from the date of the officer's new employment to obtain certification. *State v. Reyes*, 2009-NMCA-091, 146 N.M. 776, 215 P.3d 85, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Where a police officer was employed by a municipal police department and attended the police academy; after two months of employment, the officer dropped out of the police academy due to traffic violations and for two years, obtained different employment; the officer then restarted a career as a police officer by re-enrolling in the police academy and obtaining a job as an officer with a municipal police department; after four months of employment with the police department and while the officer was still in the police academy, the officer arrested defendant; and after the officer arrested defendant, within twelve months of the officer's employment with the police department, the officer completed training in the police academy and received police certification, the officer was authorized to perform the duties of a police officer when the officer arrested defendant. *State v. Reyes*, 2009-NMCA-091, 146 N.M. 776, 215 P.3d 85, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

**Health inquiry not necessarily excepted from ADA.** — The fact that New Mexico law makes good health a prerequisite for police officer certification does not necessarily mean that inquiring into officer's health and terminating him as a result of his response falls within the "job-related and consistent with business necessity" exception of the Americans with Disabilities Act, 42 USC § 12112(d)(4)(A); whether an inquiry falls within this exception is a fact-intensive question, and the existence of the New Mexico law, although it supports such a finding, is only one fact to be considered. *Gonzales v. Sandoval Cnty.*, 2 F. Supp. 2d 1442 (D.N.M. 1998).

**Forfeiture of position for failure to receive certificate of completion.** — A deputy sheriff must forfeit the deputy sheriff's position if the deputy sheriff has not been awarded a certificate of completion by the director of the New Mexico law enforcement academy board attesting to the deputy sheriff's completion of an approved law enforcement training program within twelve months after beginning the deputy sheriff's employment as a deputy. 2009 Op. Att'y Gen. No. 09-01.

**Decommissioning process for failure to receive certificate of completion.** — The mechanical process of decommissioning a deputy sheriff, for failure to obtain a certificate under Subsection B of Section 29-7-6 NMSA 1978 or otherwise, is a matter for the reasonably exercised discretion of the sheriff. If a deputy sheriff fails to obtain a certificate, procedural due process would not require a hearing in order to terminate employment as a deputy sheriff and consequent revocation of



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the appointment or commission to act as such. 2009 Op. Att'y Gen. No. 09-01

**A merit system ordinance does not override the forfeiture provision.** — There is no indication that the legislature intended that a merit system ordinance enacted by a county pursuant to Section 4-41-5 NMSA 1978, as further authorized by Section 4-41-6 NMSA 1978, overrides the "forfeiture" provision of Subsection B of Section 29-7-6 NMSA 1978. 2009 Op. Att'y Gen. No. 09-01.

**Regulations cannot be waived.** — A county sheriff and a board of county commissioners do not have the authority to waive or otherwise disregard the regulations promulgated by the law enforcement academy board where a deputy sheriff fails to submit to the department of public safety training and recruiting division an application for certification and required supporting documentation within fourteen days of the deputy sheriff's employment as a deputy sheriff, as set forth in 10.29.9.18 (C) NMAC, or within thirty days of his employment, as set forth in 10.29.9.10 (B)(1) NMAC. 2009 Op. Att'y Gen. No. 09-01.

**Must reach eighteenth birthday.** — One who has reached his eighteenth birthday is entitled to apply for, and be admitted to, the New Mexico law enforcement academy, provided he meets the other requirements specified in the section. 1971 Op. Att'y Gen. No. 71-126.

**Candidate with general discharge from military may be certified.** — A candidate for admission to the law enforcement academy who received a general discharge from the military may be certified as a police officer. In order to comply with constitutional and statutory requirements, the academy should evaluate candidates who have received general discharges on an individual basis. The circumstances surrounding the discharge should be evaluated to determine if the discharge was predicated on reasons which would render the applicant ineligible for certification. In the absence of such circumstances, applicants with general discharges should not be excluded solely because they received a general discharge. 1989 Op. Att'y Gen. No. 89-23.

**Effect of gubernatorial pardon on eligibility of convicted felon.** — An unconditional gubernatorial pardon allows a person convicted of a felony to be eligible for certification by the law enforcement academy for permanent appointment as a police officer. However, if authorized by statute or regulation, a pardoned felon's character and the acts underlying the conviction may be considered in certification or licensing. 1992 Op. Att'y Gen. No. 92-09.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 70 Am. Jur. 2d Sheriffs, Police, and Constables § 10.

Sex discrimination in law enforcement and corrections employment, 53 A.L.R. Fed. 31.

63 C.J.S. Municipal Corporations § 478 et seq.

## 29-7-6.1. County sheriffs; training requirement.

A. Every county sheriff, except sheriffs who have previously been awarded a certificate attesting to completion of a basic law enforcement training program, shall participate in and complete an administrative law enforcement training program no later than twelve months after the date the sheriff assumes office as a county sheriff.

B. The director shall establish the administrative law enforcement training program for county sheriffs, subject to review and approval by the executive committee of the sheriff's affiliate of the New Mexico association of counties.

C. A county sheriff's per diem, mileage and tuition expenses attributed to attendance at the administrative law enforcement training shall be paid for by the governing body of the county served by that sheriff.

**History: 1978 Comp., § 29-7-6.1, enacted by Laws 1993, ch. 255, § 7; 2015, ch. 3, § 24.**

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by amending language relating to training requirements for county sheriffs; in Subsection A, after "date", deleted "he" and added "the sheriff"; and in Subsection B, after "director", deleted "of the training and recruiting division of the department of public safety".

## 29-7-7. Definitions.

For the purpose of the Law Enforcement Training Act:

A. "academy" means the New Mexico law enforcement academy;

B. "basic law enforcement training" means a course consisting of not less than four hundred hours of instruction in basic law enforcement training as required by the Law Enforcement Training Act;

C. "board" means the New Mexico law enforcement academy board;

D. "conviction" means an adjudication of guilt or a plea of no contest and includes convictions that are suspended or deferred;

E. "director" means the director of the division;

F. "division" means the New Mexico law enforcement academy of the department of public safety;

G. "in-service law enforcement training" means a course of instruction required of all certified peace officers and designed to train and equip all police officers in the state with specific law enforcement skills and to ensure the continuing development of all police officers in the state. The



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training and instruction shall be kept current and may be conducted on a regional basis at the discretion of the director;

H. "police officer" means any commissioned employee of a law enforcement agency that is part of or administered by the state or any political subdivision of the state, and includes any employee of a missile range civilian police department who is a graduate of a recognized certified regional law enforcement training facility and who is currently certifiable by the academy, which employee is responsible for the prevention and detection of crime or the enforcement of the penal, or traffic or highway laws of this state. The term specifically includes deputy sheriffs. Sheriffs are eligible to attend the academy and are eligible to receive certification as provided in the Law Enforcement Training Act. As used in this subsection, "commissioned" means an employee of a law enforcement agency who is authorized by a sheriff or chief of police to apprehend, arrest and bring before the court all violators within the state; and

I. "certified regional law enforcement training facility" means a law enforcement training facility within the state certified by the director, with the approval of the academy's board of directors, that offers basic law enforcement training and in-service law enforcement training that is comparable to or exceeds the standards of the programs of the academy.

**History: 1978 Comp., § 29-7-7, enacted by Laws 1981, ch. 114, § 6; 1988, ch. 58, § 2; 1993, ch. 255, § 8; 1997, ch. 213, § 1; 2015, ch. 3, § 25.**

**Repeals and reenactments.** — Laws 1981, ch. 114, § 6 repealed former 29-7-7 NMSA 1978, relating to basic course minimum requirements, and enacted a new 29-7-7 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by clarifying definitions of the Law Enforcement Training Act; in Subsection E, after "director of the", deleted "academy" and added "division"; added new Subsection F, and redesignated the subsequent subsections accordingly; in the present Subsection G, after "officers", added "and"; and in the present Subsection H, after "certifiable by the", deleted "New Mexico law enforcement".

**The 1997 amendment,** effective June 20, 1997, inserted "and includes any employee of a missile range civilian police department who is a graduate of a recognized certified regional law enforcement training facility, and who is currently certifiable by the New Mexico law enforcement academy" in the first sentence of Subsection G.

**The 1993 amendment,** effective July 1, 1993, substituted "the Law Enforcement Training Act" for "this Act" in Subsection B; added present Subsection D; redesignated former Subsections D through G as E through H; substituted "academy" for "New Mexico law enforcement academy" in Subsection E; rewrote Subsection F; and made minor stylistic changes in Subsections G and H.

**ANNOTATIONS**

**Police officers are public employees,** not public officers, and have no sovereign power. *Walck v. City of Albuquerque*, 1994-NMCA-058, 117 N.M. 651, 875 P.2d 407, cert. denied, 118 N.M. 695, 884 P.2d 1174.

An agent of the department of alcoholic beverage control (ABC) is a "police officer" as defined in Subsection G and is required to satisfy the law enforcement certification requirement of former Section 29-7-8 NMSA 1978, even if the agent was hired by the department before the enactment of this section in 1981, which expanded the definition of "police officer" to include agents such as those employed by ABC. *Serrano v. State Dep't of Alcoholic Beverage Control*, 1992-NMCA-015, 113 N.M. 444, 827 P.2d 159.

**"Police officer".** — The livestock board in its capacity of enforcing the law is a "law enforcement agency", its officers are "police officers" for purposes of this section, and livestock inspectors have 12 months after employment in which to receive their certification from the law enforcement academy or forfeit their positions. 1987 Op. Att'y Gen. No. 87-34.

## *29-7-7. Definitions. (Effective July 1, 2023.)*

*For the purpose of the Law Enforcement Training Act:*

*A. "academy" means the New Mexico law enforcement academy;*

*B. "basic law enforcement training" means a course consisting of not less than four hundred hours of instruction in basic law enforcement training as required by the Law Enforcement Training Act;*

*C. "board" means the law enforcement certification board;*

*D. "conviction" means an adjudication of guilt or a plea of no contest and includes convictions that are suspended or deferred;*

*E. "council" means the New Mexico law enforcement standards and training council;*

*F. "director" means the director of the division;*

*G. "division" means the New Mexico law enforcement academy of the department of public safety;*

*H. "in-service law enforcement training" means a course of instruction required of all certified peace officers and designed to train and equip all police officers in the state with specific law enforcement skills and to ensure the continuing development of all police officers in the state. The*



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*training and instruction shall be kept current and may be conducted on a regional basis at the discretion of the director;*

*I. "law enforcement agency" means an agency of the state or local political subdivision of the state that employs certified law enforcement officers or the police department of a tribe that has entered into an agreement with the department of public safety pursuant to Section 29-1-11 NMSA 1978;*

*J. "police officer" means any commissioned employee of a law enforcement agency that is part of or administered by the state or any political subdivision of the state, and includes any employee of a missile range civilian police department who is a graduate of a recognized certified regional law enforcement training facility and who is currently certifiable by the academy, which employee is responsible for the prevention and detection of crime or the enforcement of the penal, or traffic or highway laws of this state. The term specifically includes deputy sheriffs. Sheriffs are eligible to attend the academy and are eligible to receive certification as provided in the Law Enforcement Training Act. As used in this subsection, "commissioned" means an employee of a law enforcement agency who is authorized by a sheriff or chief of police to apprehend, arrest and bring before the court all violators within the law enforcement agency's jurisdiction; and*

*K. "certified regional law enforcement training facility" means a law enforcement training facility within the state certified by the director, with the approval of the academy's board of directors, that offers basic law enforcement training and in-service law enforcement training that is comparable to or exceeds the standards of the programs of the academy.*

***History: 1978 Comp., § 29-7-7, enacted by Laws 1981, ch. 114, § 6; 1988, ch. 58, § 2; 1993, ch. 255, § 8; 1997, ch. 213, § 1; 2015, ch. 3, § 25; 2022, ch. 56, § 9.***

***The 2022 amendment,*** *effective July 1, 2023, defined "council" and "law enforcement agency", and revised the definitions of "board" and "police officer", for purposes of the Law Enforcement Training Act; in Subsection C, after "means the", deleted "New Mexico" and after "law enforcement", deleted "academy" and added "certification"; added a new Subsection E and redesignated former Subsections E through G as Subsections F through H, respectively; added a new Subsection I and redesignated former Subsections H and I as Subsections J and K, respectively; and in Subsection J, after "all violators within the", deleted "state" and added "law enforcement agency's jurisdiction".*

## 29-7-7.1. In-service law enforcement training; requirements; eligibility.

A. In-service law enforcement training consists of at least forty hours of academic instruction, approved by the board, for each certified police officer during each twenty-four month period of employment or service with a political subdivision. The first training course shall commence no later than twelve months after graduation from an approved basic law enforcement training program.

B. All certified police officers who are eligible for in-service training shall, during each twenty-four month period of employment, complete a minimum of forty hours of in-service law enforcement training in courses approved by the board. All certified police officers shall provide proof of completing in-service law enforcement training requirements to the director no later than March 1 of the year in which the requirements must be met. The director shall provide annual notice to all certified police officers regarding in-service law enforcement training requirements. Failure to complete in-service law enforcement training requirements may be grounds for suspension of a certified police officer's certification. A police officer's certification may be reinstated by the board when the police officer presents the board with evidence of satisfying in-service law enforcement training requirements.

**History: 1978 Comp., § 29-7-7.1, enacted by Laws 1981, ch. 114, § 7; 1993, ch. 255, § 9.**

**The 1993 amendment,** effective July 1, 1993, rewrote this section.

**ANNOTATIONS**

**In-service training not mandatory.** — The legislature has required the establishment of in-service training programs by the law enforcement academy, but has not compelled attendance at such programs by imposing the sanction of forfeiture of employment. As police officers are not bound to obey the requirement for in-service training, it is not mandatory. 1981 Op. Att'y Gen. No. 81-10 (rendered under prior law).



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## 29-7-7.2. Reports.

Every law enforcement agency within the state shall submit quarterly a report to the director on the status of each police officer employed by the law enforcement agency. The reports shall include the status of in-service law enforcement training. The reporting forms and submittal dates shall be prescribed by the director.

**History: 1978 Comp., § 29-7-7.2, enacted by Laws 1981, ch. 114, § 8; 1988, ch. 58, § 3.**

**The 1988 amendment,** effective July 1, 1988, added the second sentence.

## *29-7-7.2. Reports. (Effective July 1, 2023.)*

*Every law enforcement agency within the state shall submit quarterly a report to the director and the board on the status of each police officer employed by the law enforcement agency. The reports shall include the status of in-service law enforcement training. The reporting forms and submittal dates shall be prescribed by the board.*

***History: 1978 Comp., § 29-7-7.2, enacted by Laws 1981, ch. 114, § 8; 1988, ch. 58, § 3; 2022, ch. 56, § 10.***

***The 2022 amendment,*** *effective July 1, 2023, amended an existing provision that required every law enforcement agency within the state to submit a quarterly report to the director of the law enforcement academy to also submit the report to the law enforcement certification board, and provided that the law enforcement certification board is required to prescribe the reporting forms and submittal dates, and removed this duty from the director of the law enforcement academy; after "report to the director", added "and the board", and after "prescribed by the", deleted "director" and added "board".*

## 29-7-7.3. Ensuring child safety upon arrest; training.

Training for ensuring child safety upon the arrest of a parent or guardian shall be included in the curriculum of each basic law enforcement training class and as a component of in-service training each year for certified police officers.

**History: Laws 2007, ch. 89, § 1.**

**Effective dates.** — Laws 2007, ch. 89, contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

## 29-7-7.4. Missing person and AMBER alert training.

A minimum of four hours of combined missing person and AMBER alert training shall be included in the curriculum of each basic law enforcement training class. Missing person and AMBER alert training shall be included as a component of in-service training each year for certified police officers.

**History: Laws 2010, ch. 33, § 1.**

**Effective dates.** — Laws 2010, ch. 33 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2010, 90 days after the adjournment of the legislature.

## 29-7-7.5. Interaction with persons with mental impairments; training.

A. A minimum of forty hours of crisis management, including crisis intervention, confrontation de-escalation practicum and proper interaction with persons with mental impairments training, shall be included in the curriculum of each basic law enforcement training class.

B. A minimum of two hours of crisis management, including crisis intervention, confrontation de-escalation practicum and proper interaction with persons with mental impairments training, shall be included as a component of in-service law enforcement training pursuant to Section 29-7-7.1 NMSA 1978.

C. A pre-recorded course on crisis management, including crisis intervention, confrontation de-escalation practicum and proper interaction with persons with mental impairments training,



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shall not satisfy the requirements of the basic law enforcement training class required pursuant to Subsection A of this section.

D. As used in this section, "mental impairment" includes a mental illness, developmental disability, posttraumatic stress disorder, dual diagnosis, autism, youth in crisis and traumatic brain injury.

**History: Laws 2011, ch. 180, § 1.**

**Effective dates.** — Laws 2011, ch. 180, § 6 made Laws 2011, ch. 180, § 1 effective July 1, 2011.

**Temporary provisions.** — Laws 2011, ch. 180, § 3 provided:

A. The chief law enforcement officer of a state, county or municipal law enforcement agency who was elected or appointed prior to July 1, 2011 shall complete a minimum of two hours of crisis management, including crisis intervention, confrontation de-escalation practicum and proper interaction with persons with mental impairments training, no later than July 1, 2012.

B. A law enforcement officer who on September 1, 2010 held an intermediate proficiency certificate or an advanced proficiency certificate issued pursuant to Section 29-7-7.1 NMSA 1978 shall complete a minimum of two hours of crisis management, including crisis intervention, confrontation de-escalation practicum and proper interaction with persons with mental impairments training, no later than July 1, 2012.

C. As used in this section, "mental impairment" includes a mental illness, developmental disability, posttraumatic stress disorder, dual diagnosis, autism, youth in crisis and traumatic brain injury.

## 29-7-7.6. Law enforcement officers; naloxone rescue kit.

A. As agency funding and agency supplies of naloxone rescue kits permit, each local and state law enforcement agency shall provide naloxone rescue kits to its law enforcement officers and require that officers carry the naloxone rescue kits in accordance with agency procedures so as to optimize the officers' capacity to timely assist in the prevention of opioid overdoses.

B. Nothing in this section shall be construed to impose civil or criminal liability on a local or state law enforcement agency or law enforcement officer when ordinary care is used in the administration or provision of naloxone in cases where an individual appears to be experiencing an opioid overdose.

C. As used in this section:

(1) "naloxone" means naloxone hydrochloride, which is an opioid antagonist for the treatment of opioid overdose; and

(2) "naloxone rescue kit" means a kit containing:

(a) two doses of naloxone in either a generic form or in a form approved by the federal food and drug administration; and

(b) overdose education materials that conform to department of health or federal substance abuse and mental health services administration guidelines for opioid overdose education that explain the signs and causes of an opioid overdose and instruct when and how to administer in accordance with medical best practices: 1) life-saving rescue techniques; and 2) an opioid antagonist.

**History: Laws 2017, ch. 59, § 2.**

**Effective dates.** — Laws 2017, ch. 59 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 29-7-7.7. Tourniquet and trauma kit training and distribution.

A. Tourniquet and trauma kit training shall be included in the curriculum of each basic law enforcement training class and as a component of in-service law enforcement training each year for certified police officers. The academy, in coordination with certified regional law enforcement training facilities, shall provide a tourniquet and trauma kit to each cadet who graduates from the academy or from a certified regional law enforcement training facility and to each previously certified police officer who attends a certification-by-waiver course.

B. The academy shall provide hands-on tourniquet and trauma kit training to all officers using tourniquet and trauma kit equipment designed for training purposes. The training shall be designed in a manner that will safely replicate field conditions without the risk of injury in order for officers to develop the necessary skills to use tourniquets and trauma kits. In order to supplement



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the hands-on training, the academy may produce a training video on the proper use of tourniquets and trauma kits for use in the academy and certified regional law enforcement training facilities.

C. The academy, in coordination with certified regional law enforcement training facilities, shall distribute a tourniquet and trauma kit to each police officer who has been certified pursuant to the Law Enforcement Training Act.

**History: Laws 2017, ch. 35, § 1.**

**Effective dates.** — Laws 2017, ch. 35, § 6 made Laws 2017, ch. 35, § 1 effective July 1, 2017.

## 29-7-8. Repealed.

**Repeals.** — Laws 1993, ch. 255, § 11 repealed 29-7-8 NMSA 1978, as enacted by Laws 1979, ch. 202, § 48, relating to prerequisites for permanent appointment and continued employment as a police officer, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 29-7-9. Repealed.

**Repeals.** — Laws 1988, ch. 58, § 7 repealed former 29-7-9 NMSA 1978, as enacted by Laws 1971, ch. 247, § 3, relating to the definition of "police officer", effective July 1, 1988. For present comparable provisions, *see* 29-7-7 NMSA 1978.

## 29-7-10. Certification by waiver.

A. The director shall, with the approval of the board, waive the basic law enforcement training program and certify applicants who are employed as full-time police officers and who furnish evidence of satisfactory completion of a basic law enforcement training program which is comparable to or exceeds the standards of the programs of the academy.

B. All individuals allowed a waiver under this section must meet the requirements set out in the Law Enforcement Training Act, and this section shall not be construed to exempt them from such requirements in any manner.

**History: 1953 Comp., § 39-6-12, enacted by Laws 1971, ch. 247, § 4; 1977, ch. 257, § 54; 1979, ch. 104, § 1; 1979, ch. 202, § 49; 1981, ch. 107, § 1; 1981, ch. 114, § 10.**

ANNOTATIONS

**Authority of director to consider qualifications of instructors.** — In exercising his authority to certify by waiver, the director should take into account the qualifications of instructors to determine if another basic law enforcement training program is comparable to the academy program. In that context, the director and the board are authorized to review and consider the qualifications of instructors at facilities not otherwise under the control of the law enforcement academy board. 1982 Op. Att'y Gen. No. 82-10.

## *29-7-10. Certification by waiver. (Effective July 1, 2023.)*

*A. The board may, with the approval of the council, waive the basic law enforcement training program and certify applicants who are employed as full-time police officers and who furnish evidence of satisfactory completion of a basic law enforcement training program which is comparable to or exceeds the standards of the programs of the academy.*

*B. All individuals allowed a waiver under this section shall meet the requirements set out in the Law Enforcement Training Act, and this section shall not be construed to exempt them from those requirements in any manner.*

***History: 953 Comp., § 39-6-12, enacted by Laws 1971, ch. 247, § 4; 1977, ch. 257, § 54; 1979, ch. 104, § 1; 1979, ch. 202, § 49; 1981, ch. 107, § 1; 1981, ch. 114, § 10; 2022, ch. 56, § 11.***

***The 2022 amendment,*** *effective July 1, 2023, provided duties to the law enforcement certification board that were previously held by the director of the law enforcement academy, and provided the law enforcement standards and training council with approval authority over certifications by waiver; and in Subsection A, after "The", deleted "director shall" and added "board may", and after "approval of the", deleted "board" and added "council".*



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## 29-7-11. Repealed.

**Repeals.** — Laws 1991, ch. 44, § 3 repealed 29-7-11 NMSA 1978, as enacted by Laws 1988, ch. 58, § 5, pertaining to the law enforcement training center fund, effective July 1, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 29-7-12 NMSA 1978.

## 29-7-12. Charges; fund created; use.

A. The division shall not charge local public bodies or New Mexico Indian tribes or pueblos for any expenses associated with providing basic law enforcement training programs to applicants for certification seeking commission pursuant to the provisions of the Law Enforcement Training Act. The division may charge state agencies and institutions and federal agencies and shall charge civilian participants for the cost of providing basic law enforcement training programs, which charges shall be specified in a tuition and fee schedule promulgated by the board and shall not exceed the actual cost of providing the training programs.

B. The division may charge state agencies and institutions, local public bodies, New Mexico Indian tribes and pueblos and federal agencies and shall charge civilian participants for the cost of providing advanced training programs, which charges shall be specified in a tuition and fee schedule promulgated by the board and shall not exceed the actual cost of providing the training programs.

C. The division may charge for the rental or other use of the academy's facility, personnel and equipment, which charges shall be specified in a tuition and fee schedule promulgated by the board and shall not exceed the actual cost of the facility, personnel or equipment.

D. The "law enforcement training and recruiting fund" is created in the state treasury. Money received by the division for activities specified in this section shall be deposited in the fund. The department of public safety shall administer the fund, and money in the fund is appropriated to the division to offset the operational costs of the division. Money in the fund shall be nonreverting. Money shall be expended on warrants issued by the secretary of finance and administration upon vouchers signed by the secretary of public safety or the secretary of public safety's authorized representative.

E. As used in this section, "local public body" means all political subdivisions of the state and their agencies, instrumentalities and institutions.

**History: 1978 Comp., § 29-7-12, enacted by Laws 1981, ch. 114, § 12; 1983, ch. 270, § 1; 2000, ch. 14, § 1; 2015, ch. 3, § 26.**

**Cross references.** — For department of public safety, *see* 9-19-1 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, provided for the reorganization of the department of public safety by amending language relating to the New Mexico law enforcement academy's charges for providing law enforcement training programs; in Subsection A, after "The", deleted "training and recruiting", after "division", deleted "of the department of public safety", after "bodies", deleted "and" and added "or", after tribes, deleted "and" and added "or", and after "promulgated by the", deleted "New Mexico law enforcement academy"; in Subsection B, after "The", deleted "training and recruiting", and after "promulgated by the", deleted "New Mexico law enforcement academy"; in Subsection C, after "The", deleted "training and recruiting", and after "promulgated by the", deleted "New Mexico law enforcement academy"; and in Subsection D, after "Money received by the", deleted "training and recruiting", after the second sentence, deleted the sentence "Unexpended unencumbered balances in the fund shall revert to the general fund at the end of the fiscal year." and added the new sentence "Money in the fund shall be nonreverting.", and after "public safety", deleted "his" and added "the secretary of public safety's".

**The 2000 amendment,** effective May 17, 2000, added "Fund created; Use" to the section heading; designated most of the existing provisions of the section as Subsection A; in Subsection A, substituted "training and recruiting division of the department of public safety" for "New Mexico law enforcement academy", substituted "and" for "or" following "local public bodies" and "New Mexico Indian tribes", and added the last sentence; added Subsections B, C and D; and designated the former last sentence of the section as Subsection E.

## *29-7-12. Charges; fund created; use. (Effective July 1, 2023.)*

*A. The division shall not charge local public bodies or New Mexico Indian tribes or pueblos for any expenses associated with providing basic law enforcement training programs to applicants for certification seeking commission pursuant to the provisions of the Law Enforcement Training Act. The division may charge state agencies and institutions and federal agencies and shall charge civilian participants for the cost of providing basic law enforcement training programs, which charges*



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*shall be specified in a tuition and fee schedule promulgated by the council and shall not exceed the actual cost of providing the training programs.*

*B. The division may charge state agencies and institutions, local public bodies, New Mexico Indian tribes and pueblos and federal agencies and shall charge civilian participants for the cost of providing advanced training programs, which charges shall be specified in a tuition and fee schedule promulgated by the council and shall not exceed the actual cost of providing the training programs.*

*C. The division may charge for the rental or other use of the academy's facility, personnel and equipment, which charges shall be specified in a tuition and fee schedule promulgated by the council and shall not exceed the actual cost of the facility, personnel or equipment.*

*D. The "law enforcement training and recruiting fund" is created in the state treasury. Money received by the division for activities specified in this section shall be deposited in the fund. The department of public safety shall administer the fund, and money in the fund is appropriated to the division to offset the operational costs of the division. Money in the fund shall be nonreverting. Money shall be expended on warrants issued by the secretary of finance and administration upon vouchers signed by the secretary of public safety or the secretary of public safety's authorized representative.*

*E. As used in this section, "local public body" means all political subdivisions of the state and their agencies, instrumentalities and institutions.*

***History: 1978 Comp., § 29-7-12, enacted by Laws 1981, ch. 114, § 12; 1983, ch. 270, § 1; 2000, ch. 14, § 1; 2015, ch. 3, § 26; 2022, ch. 56, § 12.***

***The 2022 amendment,*** *effective July 1, 2023, provided the law enforcement standards and training council with duties previously held by the board; and substituted each occurrence of "board" with "council" throughout the section.*

## 29-7-13. Refusal, suspension or revocation of certification.

A. After consultation with the employing agency, the board may refuse to issue, or may suspend or revoke a police officer's certification when the board determines that a person has:

(1) failed to satisfy the qualifications for certification, set forth in Section 29-7-6 NMSA 1978;

(2) committed acts that constitute dishonesty or fraud;

(3) been convicted of, pled guilty to or entered a plea of no contest to:

(a) any felony charge; or

(b) any violation of federal or state law or a local ordinance relating to aggravated assault, theft, driving while under the influence of intoxicating liquor or drugs, controlled substances or any law or ordinance involving moral turpitude;

(4) knowingly made any false statement in his application for certification.

B. The board shall develop, adopt and promulgate administrative procedures for suspension or revocation of a police officer's certification that include notice and an opportunity for the affected police officer to be heard as well as procedures for review of the board's decision.

**History: 1978 Comp., § 29-7-13, enacted by Laws 1993, ch. 255, § 10.**

## 29-7-14. Law enforcement officers as school resource officers; training required.

A. As used in this section, "school resource officer" means a commissioned and certified law enforcement officer who is designated to be responsible for school safety and crime prevention and the appropriate response to crimes in public schools and has completed the training specified in Subsection B of this section.

B. A law enforcement officer who is or will be assigned as a school resource officer shall receive specific training for the duty, including instruction on the following:



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(1) the differences in successful law enforcement when conducted inside a school environment, including understanding the adolescent brain, crisis management and de-escalation techniques;

(2) tools to be a positive role model for youth, including mentoring and informal counseling techniques;

(3) the school resource officer's role and responsibilities to school personnel and students and their families and strategies for connecting students and families to appropriate resources that will assist students to succeed in school, including strategies for mitigating truancy;

(4) a variety of instructional techniques as well as classroom management tools to provide law-related education to students;

(5) an understanding of adolescent development and adolescent mental health disorders and treatment; and

(6) identification and response to students who are suspected of having a mental health need, including critical skills and capacity for appropriately responding to behavior issues that are typically observed among adolescents with mental health needs.

C. Beginning with the 2022-2023 school year, a law enforcement officer who:

(1) is assigned as a school resource officer shall complete the training required in Subsection B of this section within twelve months of being assigned as a school resource officer; or

(2) was serving as a school resource officer prior to the 2022-2023 school year and who has not received specific training for the position of school resource officer shall complete the training required in Subsection B of this section no later than July 1, 2023.

D. The school resource officer training shall be provided by or approved by the New Mexico law enforcement academy in consultation with the public education department.

**History: Laws 2020, ch. 67, § 1.** **Effective dates.** — Laws 2020, ch. 67, § 7 made Laws 2020, ch. 67, § 1 effective July 1, 2022.

## 29-7-15. Revoke police officer certification after conviction or making certain pleas.

Notwithstanding any other provision of law, if any police officer is convicted of or pleads guilty or nolo contendere to a crime involving the unlawful use or threatened use of physical force or a crime involving the failure to intervene in the use of unlawful force, the board shall permanently revoke the police officer's certification. The board shall not, under any circumstance, reinstate the police officer's certification or grant new certification to the police officer unless the police officer is exonerated by a court or pardoned by the governor.

**History: Laws 2020 (1st S.S.), ch. 7, § 2.** **Effective dates.** — Laws 2020 (1st S.S.), ch. 7 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective September 20, 2020, 90 days after the adjournment of the legislature.

# ARTICLE 7A
# Radio Dispatcher Training Program

(Repealed by Laws 2003, ch. 320, § 12.)

## 29-7A-1 to 29-7A-7. Repealed.

**Repeals.** — Laws 2003, ch. 320, § 12 repealed 29-7A-1 to 29-7A-7 NMSA 1978, as enacted by Laws 1979, ch. 228, relating to the Radio Dispatcher Training Program, effective July 1, 2003. For provisions of former section, *see* the 2002 NMSA 1978 on *NMOneSource.com*. For the Public Safety Telecommunicator Training Act, *see* 29-7C-1 NMSA 1978 et seq.



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# ARTICLE 7B
# Law Enforcement Youth Cadet Corps

Sec.
29-7B-1. Short title.
29-7B-2. Findings and purpose.
29-7B-3. Definitions.
29-7B-4. Law enforcement leadership training and awareness program; administration.

## 29-7B-1. Short title.

This act [29-7B-1 to 29-7B-4 NMSA 1978] may be cited as the "Law Enforcement Youth Cadet Corps Act".

**History: Laws 1994, ch. 35, § 1.**

## 29-7B-2. Findings and purpose.

A. The legislature finds that:

(1) the level and increasingly violent nature of juvenile crime in New Mexico has reached alarming proportions; and

(2) alcohol and drug abuse among minors remains a serious social problem.

B. The purpose of the Law Enforcement Youth Cadet Corps Act is to:

(1) provide leadership training to students;

(2) improve awareness and appreciation among students regarding the functions and roles of law enforcement agencies in New Mexico; and

(3) prepare students to assist as volunteers in law enforcement programs in their own communities, including such programs as neighborhood watch, D.A.R.E. and pounders.

**History: Laws 1994, ch. 35, § 2.**

## 29-7B-3. Definitions.

As used in the Law Enforcement Youth Cadet Corps Act:

A. "academy" means the New Mexico law enforcement academy;

B. "department" means the department of public safety;

C. "program" means a law enforcement leadership training and awareness program conducted at the academy; and

D. "student" means an individual enrolled in a high school in New Mexico.

**History: Laws 1994, ch. 35, § 3.**

## 29-7B-4. Law enforcement leadership training and awareness program; administration.

The department shall:

A. provide information to high schools regarding the existence of the program and the availability of scholarships to students who apply to participate in the program;

B. approve or disapprove student applications to participate in the program, with priority given to students who express a desire to pursue a career in law enforcement;

C. organize and schedule no less than four programs at the academy annually, with each program to consist of not less than ten students; and

D. promulgate rules regarding the content of the program, including:

(1) providing students with leadership training;



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(2) improving students' awareness of the functions and roles of law enforcement agencies in New Mexico; and

(3) preparing students to assist as volunteers in law enforcement programs in their own communities, including neighborhood watch, D.A.R.E. and pounders.

**History: Laws 1994, ch. 35, § 4.**

# ARTICLE 7C

# Public Safety Telecommunicator Training

Sec.

29-7C-1. Short title.
29-7C-2. Definitions.
29-7C-2. Definitions. (Effective July 1, 2023.)
29-7C-3. Qualifications for certification.
29-7C-4. Basic telecommunicator training program.
29-7C-4. Basic telecommunicator training program. (Effective July 1, 2023.)
29-7C-4.1. Public safety telecommunicator training. (Effective July 1, 2023.)
29-7C-5. Minimum training standards for certification.
29-7C-5. Minimum training standards for certification. (Effective July 1, 2023.)
29-7C-6. Certification by waiver.
29-7C-6. Certification by waiver. (Effective July 1, 2023.)
29-7C-7. In-service telecommunicator training.
29-7C-8. Reports and rosters.
29-7C-8. Reports and rosters. (Effective July 1, 2023.)
29-7C-9. Refusal, suspension or revocation of certification.

## 29-7C-1. Short title.

Sections 3 through 11 [29-7C-1 to 29-7C-9 NMSA 1978] of this act may be cited as the "Public Safety Telecommunicator Training Act".

**History: Laws 2003, ch. 320, § 3.**

**Effective dates.** — Laws 2003, ch. 320, § 13 made Laws 2003, ch. 320, § 3 effective on July 1, 2003.

## 29-7C-2. Definitions.

As used in the Public Safety Telecommunicator Training Act:

A. "board" means the New Mexico law enforcement academy board;

B. "certified" means meeting the training standards established by statute and rule as determined by the board;

C. "director" means the director of the New Mexico law enforcement academy;

D. "dispatch" means the relay of information to public safety personnel by all forms of communication;

E. "safety agency" means a unit of state or local government, a special purpose district or a private business that provides police, firefighting or emergency medical services; and

F. "telecommunicator" means an employee or volunteer of a safety agency who:

(1) receives calls or dispatches the appropriate personnel or equipment in response to calls for police, fire or medical services; and

(2) makes decisions affecting the life, health or welfare of the public or safety employees.

**History: Laws 2003, ch. 320, § 4.**

**Effective dates.** — Laws 2003, ch. 320, § 13 made Laws 2003, ch. 320, § 4 effective on July 1, 2003.

## *29-7C-2. Definitions. (Effective July 1, 2023.)*

*As used in the Public Safety Telecommunicator Training Act:*

*A. "board" means the law enforcement certification board;*

*B. "certified" means meeting the training standards established by statute and rule as determined by the board;*

*C. "council" means the New Mexico law enforcement standards and training council;*

*D. "director" means the director of the New Mexico law enforcement academy;*

*E. "dispatch" means the relay of information to public safety personnel by all forms of communication;*



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*F. "safety agency" means a unit of state or local government, a special purpose district or a private business that provides police, firefighting or emergency medical services; and*

*G. "telecommunicator" means an employee or volunteer of a safety agency who:*

*(1) receives calls or dispatches the appropriate personnel or equipment in response to calls for police, fire or medical services; and*

*(2) makes decisions affecting the life, health or welfare of the public or safety employees.*

***History: Laws 2003, ch. 320, § 4; 2022, ch. 56, § 14.***

***The 2022 amendment,*** *effective July 1, 2023, defined "council" and revised the definition of "board"; in Subsection A, after "means the", deleted "New Mexico" and after "law enforcement", deleted "academy" and added "certification"; and added a new Subsection C and redesignated former Subsections C through F as Subsections D through G, respectively.*

## 29-7C-3. Qualifications for certification.

An applicant for certification shall provide evidence satisfactory to the board that the applicant:

A. is a citizen or legal resident of the United States and has reached the age of majority;

B. holds a high school diploma or high school equivalency credential from an accredited institution;

C. has not been convicted of, pled guilty to or entered a plea of nolo contendere to a:

(1) felony charge; or

(2) violation of a federal or state law, a local ordinance relating to aggravated assault or theft or a law involving moral turpitude within the three-year period immediately preceding the application;

D. has not received a dishonorable discharge from the armed forces of the United States;

E. is free from a physical, emotional or mental condition that might adversely affect the applicant's performance;

F. is of good moral character;

G. has met all other requirements for certification prescribed by the board; and

H. has received a certificate attesting to the applicant's completion of an approved basic telecommunicator training program from the director.

**History: Laws 2003, ch. 320, § 5; 2015, ch. 122, § 15.**

**The 2015 amendment,** effective July 1, 2015, replaced the term "high school general equivalency diploma" with "high school equivalency credential" in the provision relating to qualifications for certification as a telecommunicator in the Public Safety Telecommunicator Training Act; in the introductory sentence, after "to the board that", deleted "he" and added "the applicant"; in Subsection B, after "high school", added "diploma", after "or", deleted "general" and added "high school", and after "equivalency", deleted "diploma" and added "credential"; in Paragraph (2) of Subsection C, after "immediately preceding", deleted "his" and added "the"; in Subsection E, after "adversely affect", deleted "his" and added "the applicant's"; and in Subsection H, after "attesting to", deleted "his" and added "the applicant's".

## 29-7C-4. Basic telecommunicator training program.

The board shall develop and adopt a basic telecommunicator training program for telecommunicator certification. The program shall be constructed to meet the minimum basic needs of telecommunicators in New Mexico.

**History: Laws 2003, ch. 320, § 6.**

**Effective dates.** – Laws 2003, ch. 320, § 13 made Laws 2003, ch. 320, § 6 effective on July 1, 2003.

## *29-7C-4. Basic telecommunicator training program. (Effective July 1, 2023.)*

*The council shall develop and adopt a basic telecommunicator training program for telecommunicator certification. The program shall be constructed to meet the minimum basic needs of telecommunicators in New Mexico.*

***History: Laws 2003, ch. 320, § 6; 2022, ch. 56, § 15.***

***The 2022 amendment,*** *effective July 1, 2023, required the New Mexico law enforcement standards and training council to develop and adopt a basic telecommunicator training program for telecommunicator certification, and removed this duty from the former law enforcement academy board; and after "The", deleted "board" and added "council".*



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## *29-7C-4.1. Public safety telecommunicator training. (Effective July 1, 2023.)*

*The curriculum of each basic telecommunicator training class and in-service training each year for telecommunicators shall include:*

*A. crisis management and intervention;*
*B. dealing with individuals who are experiencing mental health issues;*
*C. methods of de-escalation;*
*D. peer-to-peer intervention;*
*E. stress management;*
*F. racial sensitivity; and*
*G. reality-based situational training.*

***History: Laws 2022, ch. 56, § 19.*** ***Effective dates.*** *— Laws 2022, ch. 56, § 53 made Laws 2022, ch. 56, § 19 effective July 1, 2023.*

## 29-7C-5. Minimum training standards for certification.

A. A telecommunicator shall satisfy the qualifications for certification set forth in the Public Safety Telecommunicator Training Act within twelve months after beginning employment and shall provide a certificate of completion to the director.

B. The director shall waive the training requirements set forth in Subsection A of this section for a police radio dispatcher who is certified as a police radio dispatcher and has met all other requirements set forth by the board.

**History: Laws 2003, ch. 320, § 7.** **Effective dates.** — Laws 2003, ch. 320, § 13 made Laws 2003, ch. 320, § 7 effective on July 1, 2003.

## *29-7C-5. Minimum training standards for certification. (Effective July 1, 2023.)*

*A. A telecommunicator shall satisfy the qualifications for certification set forth in the Public Safety Telecommunicator Training Act within twelve months after beginning employment and shall provide a certificate of completion to the director.*

*B. The director shall waive the training requirements set forth in Subsection A of this section for a police radio dispatcher who is certified as a police radio dispatcher and has met all other requirements set forth by the council.*

***History: Laws 2003, ch. 320, § 7; 2022, ch. 56, § 16.*** ***The 2022 amendment,*** *effective July 1, 2023, replaced "board" with "council"; and after "set forth by the", deleted "board" and added "council".*

## 29-7C-6. Certification by waiver.

A. The director shall waive the basic telecommunicator training program and certify applicants who furnish evidence of satisfactory completion of a basic telecommunicator training program that, in the director's opinion, is substantially equivalent to the board's basic telecommunicator training program.

B. A telecommunicator granted a waiver under this section shall meet all other requirements set out in the Public Safety Telecommunicator Training Act.

**History: Laws 2003, ch. 320, § 8.** **Effective dates.** — Laws 2003, ch. 320, § 13 made Laws 2003, ch. 320, § 8 effective on July 1, 2003.

## *29-7C-6. Certification by waiver. (Effective July 1, 2023.)*

*A. The board may, with the approval of the council, waive the basic telecommunicator training program and certify applicants who furnish evidence of satisfactory completion of a basic*



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*telecommunicator training program that, in the director's opinion, is substantially equivalent to the board's basic telecommunicator training program.*

*B. A telecommunicator granted a waiver under this section shall meet all other requirements set out in the Public Safety Telecommunicator Training Act.*

***History: Laws 2003, ch. 320, § 8; 2022, ch. 56, § 17.***

***The 2022 amendment,*** *effective July 1, 2023, provided the law enforcement certification board the authority, with the approval of the council, to issue certifications by waiver, and removed this authority from the director; and in Subsection A, after "The", deleted "director shall" and added "board may, with the approval of the council".*

## 29-7C-7. In-service telecommunicator training.

A. In-service telecommunicator training consists of at least twenty hours of board-approved advanced training, including one hour of crisis management, including crisis intervention, confrontation de-escalation practicum and proper interaction with persons with mental impairments training, for each certified telecommunicator during each two-year period. The first training course shall commence no later than twelve months after graduation from a board-approved basic telecommunicator training program.

B. A certified telecommunicator shall provide proof of completion of in-service training requirements to the director no later than March 1 of the year subsequent to the year in which the requirements are met. The director shall provide annual notice to all certified telecommunicators regarding in-service training requirements. Failure to complete in-service training requirements may be grounds for suspension of a telecommunicator's certification at the director's discretion. A telecommunicator may be reinstated at the discretion of the director when the telecommunicator presents to the director evidence the telecommunicator has satisfied the in-service training requirements.

C. As used in this section, "mental impairment" includes a mental illness, developmental disability, posttraumatic stress disorder, dual diagnosis, autism, youth in crisis and traumatic brain injury.

**History: Laws 2003, ch. 320, § 9; 2011, ch. 180, § 2.**

**The 2011 amendment,** effective July 1, 2011, required training in crisis management, including interaction with persons with mental impairments training, and added a definition of "mental impairment".

## 29-7C-8. Reports and rosters.

A. A safety agency that operates within the state shall submit a quarterly report to the director on the status of each telecommunicator. The reporting forms and submittal dates shall be prescribed by the director.

B. The director shall maintain a roster of all certified telecommunicators.

**History: Laws 2003, ch. 320, § 10.**

**Effective dates.** — Laws 2003, ch. 320, § 13 made Laws 2003, ch. 320, § 10 effective on July 1, 2003.

## *29-7C-8. Reports and rosters. (Effective July 1, 2023.)*

*A. A safety agency that operates within the state shall submit a quarterly report to the director and the board on the status of each telecommunicator. The reporting forms and submittal dates shall be prescribed by the director.*

*B. The director and the board shall maintain a roster of all certified telecommunicators.*

***History: Laws 2003, ch. 320, § 10; 2022, ch. 56, § 18.***

***The 2022 amendment,*** *effective July 1, 2023, amended an existing provision that required safety agencies that operate within the state to submit a quarterly report to the director of the law enforcement academy to also submit the report to the law enforcement certification board, and required the board, along with the director, to maintain a roster of all certified telecommunicators; in Subsection A, after "report to the director", added "and the board"; and in Subsection B, after "The director", added "and the board".*

## 29-7C-9. Refusal, suspension or revocation of certification.

A. The board shall refuse to issue or shall suspend or revoke a telecommunicator's certification, after consultation with his employing safety agency, if the board determines that a person has:



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(1) failed to satisfy the qualifications for certification set forth in Section 29-7A-3 NMSA 1978 [repealed];

(2) committed acts that constitute dishonesty or fraud;

(3) been convicted of, pled guilty to or entered a plea of nolo contendere to a:

(a) felony charge; or

(b) violation of a federal or state law, a local ordinance relating to aggravated assault or theft or a law involving moral turpitude; or

(4) knowingly made a false statement on his application.

B. The board shall develop, adopt and promulgate administrative procedures for suspension or revocation of a telecommunicator's certification that include:

(1) notice and opportunity for the affected telecommunicator to be heard; and

(2) procedures for review of the board's decision.

**History: Laws 2003, ch. 320, § 11.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Section 29-7A-3 was repealed by Laws 2003, Ch. 320, § 12, effective July 1, 2003. For present comparable provisions *see* 29-7C-3 NMSA 1978.

**Effective dates.** — Laws 2003, ch. 320, § 13 made Laws 2003, ch. 320, § 11 effective on July 1, 2003.

# ARTICLE 8

# Mutual Aid

Sec.
29-8-1. Short title.
29-8-2. Public agency defined.
Sec.
29-8-3. Mutual aid agreements.

## 29-8-1. Short title.

This act [29-8-1 to 29-8-3 NMSA 1978] may be cited as the "Mutual Aid Act".

**History: 1953 Comp., § 39-7-1, enacted by Laws 1971, ch. 153, § 1.**

## 29-8-2. [Public agency defined.]

As used in the Mutual Aid Act, "public agency" includes the federal government or any department or agency thereof, an Indian tribal council, Indian pueblo council and the state or any county or municipality thereof.

**History: 1953 Comp., § 39-7-2, enacted by Laws 1971, ch. 153, § 2.**

## 29-8-3. Mutual aid agreements.

Any state, county or municipal agency having and maintaining peace officers may enter into mutual aid agreements with any public agency as defined in the Mutual Aid Act, with respect to law enforcement, provided any such agreement shall be approved by the agency involved and the governor.

**History: 1953 Comp., § 39-7-3, enacted by Laws 1971, ch. 153, § 3.**

**ANNOTATIONS**

**Applicability to gaming compacts with Indian tribes.** — The Mutual Aid Act does not in any way pertain to gaming compacts and thus provides no statutory basis for the governor to enter into compacts and revenue-sharing agreements with Indian tribes which would permit gaming on Indian lands pursuant to the federal Indian gaming laws. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11.

**By adding the limiting language that mutual aid agreements must be approved by both the agency involved and the governor of the state of New Mexico,** the legislature contemplated a written agreement.



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*State v. Branham*, 2004-NMCA-131, 136 N.M. 579, 102 P.3d 646.

**Inconsistency between written agreements.** — It is inconsistent for the legislature to require a written agreement for the issuance of a cross commission under Section 29-1-11 NMSA 1978 between state law enforcement and Indian tribal police officers and not require a written agreement for mutual aid agreements under this section. *State v. Branham*, 2004-NMCA-131, 136 N.M. 579, 102 P.3d 646.

**Where state police officer initially stopped defendant for speeding on Mescalero reservation,** because the officer did not have authority to enforce Mescalero tribal traffic ordinances, defendant's motion to suppress evidence was properly granted. *State v. Branham*, 2004-NMCA-131, 136 N.M. 579, 102 P.3d 646.

**Deputization of city or county officials by state agency.** — The environmental improvement division (EID) (now Air Quality Bureau of Environment Department) may seek assistance from city and county law enforcement agencies to enforce asbestos disposal regulations pursuant to the Mutual Aid Act, Sections 29-8-1 to 29-8-3 NMSA 1978, but it cannot deputize city or county law enforcement officials to act as EID agents to enforce the division's asbestos disposal regulations. 1987 Op. Att'y Gen. No. 87-48.

# ARTICLE 9

# Organized Crime

Sec.
29-9-1. Short title.
29-9-2. Definitions.
29-9-3. Commission created; membership.
29-9-4. Purpose of commission.
29-9-5. Powers and duties of commission.
29-9-6. Repealed.
29-9-7. Construction.
29-9-8. Confidentiality; impounding of exhibits.
29-9-9. Immunity from criminal prosecution or penalty.
29-9-10. Receipt of grants and donations.
29-9-11. Investigators.
29-9-12 to 29-9-16. Repealed.
29-9-17. Code of fair procedure.
29-9-18. Repealed.

## 29-9-1. Short title.

Sections 29-9-1 through 29-9-17 NMSA 1978 may be cited as the "Organized Crime Act".

**History: 1953 Comp., § 39-9-1, enacted by Laws 1973, ch. 225, § 1; 1977, ch. 215, § 1.**

**Compiler's notes.** — Laws 1981, ch. 234, § 2 repealed Laws 1977, ch. 215, § 9, which had provided that the act shall terminate on July 1, 1981.

ANNOTATIONS

**Statute not amenable to vagueness claim.** — The Organized Crime Act [Sections 29-9-1 through 29-9-17 NMSA 1978] is not the type of statute that is amenable to a claim of unconstitutional vagueness because the vagueness doctrine is applied when a potential actor is exposed to criminal sanctions without a fair warning as to the nature of a proscribed activity, whereas the Organized Crime Act is not a penal statute; the only sanction that can come from the act is a contempt citation for failure to abide by a court order. *In re Governor's Organized Crime Prevention Comm'n*, 1978-NMSC-022, 91 N.M. 516, 577 P.2d 414.

**Word "racketeering" does not need to appear in title to Laws 1977, ch. 215,** which amends the Organized Crime Act; nor does the title violate N.M. Const., art. IV, § 16, although the 1977 amendment for the first time authorizes the commission to investigate racketeering, since racketeering is reasonably germane to the subject matter of organized crime. *In re Governor's Organized Crime Prevention Comm'n*, 1978-NMSC-022, 91 N.M. 516, 577 P.2d 414.

## 29-9-2. Definitions.

As used in the Organized Crime Act:

A. "organized crime" means the supplying for profit of illegal goods and services, including, but not limited to, gambling, loan sharking, narcotics and other forms of vice and corruption, by members of a structured and disciplined organization;

B. "public officer" means any elected or appointed officer of the state or any of its political subdivisions, serving with or without remuneration for his services; and

C. "commission" means the governor's organized crime prevention commission.

**History: 1953 Comp., § 39-9-2, enacted by Laws 1973, ch. 225, § 2.**



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## 29-9-3. Commission created; membership.

A. There is created the "governor's organized crime prevention commission". The commission shall consist of seven members appointed by the governor with the advice and the consent of the senate. No more than four members shall belong to the same political party and at least one member shall be a member of the New Mexico bar.

B. Persons appointed to the commission shall:

(1) be of unquestioned integrity and of high standing and influence within the state by virtue of their demonstrated capacity for leadership;

(2) be selected from the various parts of the state in such manner as to provide broad geographical representation on the commission; and

(3) be given a security clearance by an appropriate agency designated by the governor to conduct a clearance investigation.

C. Members of the commission shall be appointed for staggered terms of four years each, three ending on December 31, 1975, two ending on December 31, 1976, and two ending on December 31, 1977. Thereafter, appointments shall be made for terms of four years or less so that the terms of not more than three commission members expire on December 31 of any year.

D. Members of the commission shall receive per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

E. Any vacancy on the commission shall be filled for the unexpired term by the governor. A vacancy on the commission shall not impair the right of the remaining members to exercise all the powers of the commission, provided the commission has at least four members.

**History: 1953 Comp., § 39-9-3, enacted by Laws 1973, ch. 225, § 3; 1977, ch. 215, § 2.**

## 29-9-4. Purpose of commission.

The purpose of the commission is to forestall, check and prevent the infiltration and encroachment of organized crime into public and private affairs within New Mexico by:

A. investigating the extent to which organized crime and racketeering has or has not infiltrated and encroached into private and public affairs within New Mexico;

B. investigating those conditions, including the effectiveness of the execution and enforcement of the laws and the conduct of public officers and employees, which may lead to, or may have led to, the infiltration and encroachment of organized crime into public and private affairs within New Mexico; and

C. reporting to the proper authorities and making public as authorized by this act [29-9-1 through 29-9-17 NMSA 1978] the results of its investigations and recommending corrective measures and improvements.

**History: 1953 Comp., § 39-9-3.1, enacted by Laws 1977, ch. 215, § 3.**

## 29-9-5. Powers and duties of commission.

A. The commission shall:

(1) assess and evaluate the activities and problems involving organized crime within New Mexico;

(2) develop a comprehensive plan for the suppression and control of organized crime in New Mexico and its encroachment into the state;

(3) recommend programs to combat organized crime;

(4) examine matters relating to law enforcement extending across the boundaries of the state into other states and consult and exchange information with officers and agencies of other states with respect to law enforcement problems of mutual concern in regard to organized crime;



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(5) make an annual report to the governor and legislature which shall include its recommendations concerning matters within its jurisdiction and authority;

(6) keep the public informed as to the operation of organized crime and the problems of criminal law enforcement in New Mexico as they relate to organized crime by such means and to such extent as it deems appropriate;

(7) advise and assist, upon request, the attorney general, a district attorney or any other law enforcement official in the performance of his official powers and duties;

(8) cooperate with departments and officers of the federal government in the suppression of organized crime; and

(9) cooperate with agencies concerned with organized crime in coordinating efforts to investigate and suppress organized crime.

B. The commission shall conduct investigations as are necessary to carry out the purpose of the commission pursuant to Section 29-9-4 NMSA 1978.

C. The commission is authorized to:

(1) empower its staff to conduct any investigation authorized by this section and to maintain offices and hold meetings and functions at any place within New Mexico as it may deem necessary;

(2) conduct private and public hearings and designate one or more commission members or staff members to preside over any such hearings; provided staff members shall be without vote in such hearings;

(3) receive testimony from witnesses, request their attendance, examine them and request production of any books, records, documents or other evidence as it may deem relevant or material to an investigation. The commission may designate any of its members or members of its staff to exercise any such powers pursuant to regulations adopted by the commission;

(4) administer oaths or affirmations; examine witnesses under oath or affirmation; and subpoena witnesses, compel their attendance before the commission and require them to produce before the commission any books, records, documents or other evidence relevant or material to an investigation. No subpoena shall be issued without the adoption and acknowledgment, by resolution of five members of the commission, and further provided that a copy of said resolution with acknowledgments be attached to any and all subpoenas issued by the commission. The commission may designate any of its members or members of its staff to exercise any such powers, pursuant to regulations adopted by the commission. If any person subpoenaed pursuant to this section neglects or refuses to obey the command of the subpoena, any district court may, on proof by affidavit of service of the subpoena and of refusal or neglect by the person to obey the command of the subpoena, issue an order for the person to appear immediately before the court, which is authorized to proceed against the person as for a contempt of court. At any time before the return date of the subpoena, the person subpoenaed may file a petition to set aside the subpoena, modify the subpoena, or extend the return date thereon in the district court of any county in which the commission has an office or the district court of the county to which the person is subpoenaed to appear, and the court upon a showing of good cause may set aside the subpoena, modify it or extend the return date of the subpoena;

(5) petition a district court ex parte to order the attendance of witnesses before the commission and the production before the commission of any books, records, documents or other evidence relevant or material to an investigation, where it appears that the witness resides outside the state, may imminently depart the state or may secrete himself to avoid attendance before the commission or to avoid other lawful process. A witness may challenge execution of the order by filing a motion to quash the order with the district court before the return date named in the order;

(6) any and all proceedings brought before the court pursuant to Paragraphs 4 and 5 of this section, regarding subpoenas, shall be conducted in camera and shall be kept under the seal of the court.

D. Every witness appearing before the commission may request to be examined in private. Upon such request, the witness's testimony shall be in private with no persons present other than members of the commission, members of the commission's staff and the witness. The testimony and other evidence may be disseminated to law enforcement agencies as deemed proper by the commission but the content or details of the testimony and records produced by the witness shall not be made public, except that the commission, without disclosing the name of the witness, may



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issue a public report summarizing information obtained from its private hearings for the purpose of informing the public and its officials of the extent to which organized crime has infiltrated New Mexico and conditions which may lead to the infiltration of organized crime.

E. The commission shall not take testimony at a public hearing unless at least four of its members are present, or unless at least two members of the commission and at least two staff members are present. The commission shall not take testimony at a private hearing unless at least one of its members is present.

F. Witnesses appearing before the commission shall receive per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

**History: 1953 Comp., § 39-9-4, enacted by Laws 1973, ch. 225, § 4; 1977, ch. 215, § 4; 1979, ch. 148, § 1.**

**Cross references.** — For divisions of the corrections department, *see* 9-3-3 NMSA 1978.

ANNOTATIONS

**Limitations on subpoena power.** — Any exception or limitation to the express power of the commission should be strictly construed. *Doe v. State ex rel. Governor's Organized Crime Prevention Comm'n*, 1992-NMSC-022, 114 N.M. 78, 835 P.2d 76.

**Administrative subpoenas not subject to fourth amendment.** — The commission is an investigatory rather than an accusatory body, and, therefore, its subpoenas are administrative subpoenas. Administrative subpoenas, including subpoenas duces tecum, are not subject to the search and seizure provisions of the fourth amendment of the United States constitution. *In re Governor's Organized Crime Prevention Comm'n*, 1978-NMSC-022, 91 N.M. 516, 577 P.2d 414 (decided before 1979 amendment).

**Requirements for lawful subpoena.** — In order to obtain a subpoena, the commission must show, and the district court must decide, that the investigation is within the power of the commission, the subpoena is definite enough and the material sought is reasonably relevant to the purpose of the investigation; what is reasonably relevant depends on the nature and purpose of the investigation, and relevancy cannot be determined in the absence of a stated purpose. *In re Governor's Organized Crime Prevention Comm'n*, 1978-NMSC-022, 91 N.M. 516, 577 P.2d 414 (decided before 1979 amendment).

**Right to challenge subpoena.** — After a subpoena is issued the individual or institution upon whom it is served has an opportunity to challenge it. Since the subpoenas issued under the Organized Crime Act (Sections 29-9-1 to 29-9-17 NMSA 1978) ask only for voluntary compliance, and the commission is authorized to go to district court to seek enforcement, the legislature must have contemplated that the subpoenaed person would be allowed to show at that hearing why the subpoena should not be enforced. *In re Governor's Organized Crime Prevention Comm'n*, 1978-NMSC-022, 91 N.M. 516, 577 P.2d 414 (decided before 1979 amendment).

**Law reviews.** — For note, "Criminal Procedure - New Mexico Denies Fifth Amendment Protection to Corporations: John Doe and Five Unnamed Corporations v. State ex rel. Governor's Organized Crime Prevention Commission," see 23 N.M.L. Rev. 315 (1993).

## 29-9-6. Repealed.

**Repeals.** — Laws 1989, ch. 204, § 26 repealed 29-9-6 NMSA 1978, as enacted by Laws 1973, ch. 225, § 5, relating to employees, effective July 1, 1989. For provisions of former section, *see* the 1988 NMSA 1978 on *NMOneSource.com*.

## 29-9-7. Construction.

Nothing contained in the Organized Crime Act shall be construed to supersede, repeal or limit any power, duty or function of the executive department, or any agency of the state, or any political subdivision thereof, conferred by law.

**History: 1953 Comp., § 39-9-6, enacted by Laws 1973, ch. 225, § 6.**

## 29-9-8. Confidentiality; impounding of exhibits.

A. Upon application of the commission, a district court may impound an exhibit marked in evidence at any public or private hearing held by the commission, and may order the exhibit to be retained by or delivered to and placed in the custody of the commission. If impounded, an exhibit shall not be taken from the custody of the commission except upon order of the district court granted after five days' notice to the commission or at the request or with the consent of the commission. Upon the removal from the custody of the commission of any impounded exhibit, it shall be returned to the person lawfully entitled to its possession.



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B. The records, reports and files of the commission are not subject to the Public Records Act [Chapter 14, Article 3 NMSA 1978] or Sections 10-15-1 through 10-15-4 NMSA 1978. The records, reports and files of the commission shall not be subject to subpoena except by order of the supreme court of New Mexico.

C. Any person, except the governor or the commission, who discloses information contained in the records, reports and files of the commission or obtained in a private hearing conducted by the commission, shall be guilty of a misdemeanor and shall be punished by imprisonment in the county jail for not more than one year or the imposition of a fine of not more than one thousand dollars ($1,000), or both imprisonment and fine.

**History: 1953 Comp., § 39-9-7, enacted by Laws 1973, ch. 225, § 7; 1977, ch. 215, § 5.**

ANNOTATIONS

**Discovery of commission records only by supreme court order unconstitutional.** — The last sentence in Subsection B, allowing discovery of the records of the governor's organized crime prevention commission by supreme court order only, is unconstitutional, as the legislature lacks the power to prescribe and regulate practice, pleading and procedure. *In re Motion for a Subpoena Duces Tecum*, 1980-NMSC-010, 94 N.M. 1, 606 P.2d 539.

**Unconstitutional last sentence in Subsection B is severable;** the remainder of the organized crime act remains in full force and effect. *In re Motion for a Subpoena Duces Tecum*, 1980-NMSC-010, 94 N.M. 1, 606 P.2d 539.

**District courts authorized to hear duces tecum subpoena application for commission records.** — The district courts are authorized and directed, upon proper application for a subpoena duces tecum under Rule 1-045 NMRA, to hear and determine whether the records, reports and files of the governor's organized crime prevention commission may be subpoenaed, and, if so, upon what conditions. *In re Motion for a Subpoena Duces Tecum*, 1980-NMSC-010, 94 N.M. 1, 606 P.2d 539.

## 29-9-9. Immunity from criminal prosecution or penalty.

A. If, in the course of any investigation or hearing conducted by the commission pursuant to the Organized Crime Act, a person refuses to answer a question or questions or produce evidence of any kind on the ground that he will thereby be exposed to criminal prosecution or penalty or forfeiture, the commission may order the person to answer the question or questions or produce the requested evidence and confer immunity as provided in this section. No order to answer or produce evidence with immunity shall be made except by resolution of a two-thirds majority of all the members of the commission and after the attorney general and the appropriate district attorney have been given at least ten days' written notice of the commission's intention to issue such order and afforded an opportunity to be heard in respect to any objections they or either of them may have to the granting of immunity. Upon application of the attorney general or the appropriate district attorney within ten days of the written notice, the commission shall defer the issuance of any order under this subsection for such period, not longer than thirty days from the date of the application, as the attorney general or district attorney may specify.

B. If, upon issuance of an order pursuant to Subsection A of this section, the person complies with such order, he shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or forfeiture, except that such person may be prosecuted for any perjury committed in such answer or in producing such evidence, or for contempt for failing to give an answer or produce evidence in accordance with the order of the commission; and any such answer given or evidence produced shall be admissible against him upon any criminal investigation, proceeding or trial against him for such perjury, or upon any investigation, proceeding or trial against him for such contempt.

**History: 1953 Comp., § 39-9-8, enacted by Laws 1977, ch. 215, § 6.**

**Repeals and reenactments.** — Laws 1977, ch. 215, § 6 repealed 20-9-8, 1953 Comp., relating to immunity from prosecution, and enacted the above section.

ANNOTATIONS

**Privilege against self-incrimination not applicable to corporations.** — The evidentiary privilege against self-incrimination of the fifth amendment of the U.S. Constitution, N.M. Const., art. II, § 15 and this section do not apply to corporations or a corporation's agent in his representative capacity. *Doe v. State ex rel. Governor's Organized Crime Prevention Comm'n*, 1992-NMSC-022, 114 N.M. 78, 835 P.2d 76.

**Claims of privilege are premature before incriminatory information is specifically requested,** either in the form of questions or documents, by the investigating agency. *Governor's Organized Crime Prevention Comm'n v. Jaramillo*, 1979-NMSC-087, 93 N.M. 525, 602 P.2d 622.

**Law reviews.** — For note, "Criminal Procedure - New Mexico Denies Fifth Amendment Protection to Corporations: *John Doe and Five Unnamed Corporations v. State*



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*ex rel. Governor's Organized Crime Prevention Commission,"* see 23 N.M.L. Rev. 315 (1993).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Propriety, under state constitutional provisions, of granting use or transactional immunity for compelled incriminating testimony - post-Kastigar cases, 29 A.L.R.5th 1.

## 29-9-10. [Receipt of grants and donations.]

The commission is authorized to receive such grants, subsidies, donations, allotments or bequests as may be offered to the state, by the federal government or any department thereof, or by any public or private foundation or individuals for the investigation or suppression of organized crime.

**History: 1953 Comp., § 39-9-9, enacted by Laws 1973, ch. 225, § 9.**

## 29-9-11. Investigators.

Investigators appointed and employed by the commission shall be peace officers and have the powers and duties afforded peace officers.

**History: 1953 Comp., § 39-9-10, enacted by Laws 1973, ch. 225, § 10; 1977, ch. 215, § 7.**

## 29-9-12 to 29-9-16. Repealed.

**Repeals.** — Laws 2003, ch. 223, § 3 repealed 29-9-12 to 29-9-16 NMSA 1978, as enacted by Laws 1975, Ch. 230, §§ 1 through 5, relating to a legislative oversight committee on organized crime. For provisions of former sections, *see* the 2002 NMSA 1978 on *NMOneSource.com*.

## 29-9-17. Code of fair procedure.

A. As used in this section:

(1) "hearing" means any hearing in the course of an investigatory proceeding conducted before the commission at which testimony or the production of other evidence is compelled by subpoena;

(2) "public hearing" means any hearing open to the public, or any hearing, or such part thereof, as to which testimony or other evidence is made available or disseminated to the public by the commission; and

(3) "private hearing" means any hearing other than a public hearing.

B. No person may be required to appear at a hearing or to testify at a hearing unless there has been personally served upon him prior to the time when he is required to appear, a copy of the Organized Crime Act, and a general statement of the subject of the investigation. A copy of the resolution, statute, order or other provision of law authorizing the investigation shall be furnished by the commission upon request by the person summoned.

C. A witness summoned to a hearing shall have the right to be accompanied by counsel, who shall be permitted to advise the witness of his rights, subject to reasonable limitations to prevent obstruction of or interference with the orderly conduct of the hearing. Counsel for any witness who testifies at a public hearing may submit proposed questions to be asked of the witness relevant to the matters upon which the witness has been questioned, and the commission shall ask the witness such of the questions as it may deem appropriate to its inquiry.

D. A complete and accurate record shall be kept of each public hearing and a witness shall be entitled to receive a copy of his testimony at such hearing at his own expense. Where testimony which a witness has given at a private hearing becomes relevant in a criminal proceeding in which the witness is a defendant, or in any subsequent hearing in which the witness is summoned to testify, the witness shall be entitled to a copy of such testimony, at his own expense, provided a copy is available, and provided further that the furnishing of such copy will not prejudice the public safety or security.



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E. A witness who testifies at any hearing shall have the right at the conclusion of his examination to file a brief sworn statement relevant to his testimony for incorporation in the record of the investigatory proceeding.

F. Any person whose name is mentioned or who is specifically identified and who believes that testimony or other evidence given at a public hearing or comment made by any member of the commission or its counsel at such a hearing tends to defame him or otherwise adversely affect his reputation shall have the right, either to appear personally before the commission and testify in his own behalf as to matters relevant to the testimony or other evidence complained of, or in the alternative at the option of the commission, to file a statement of facts under oath relating solely to matters relevant to the testimony or other evidence complained of, which statement shall be incorporated in the record of the investigatory proceeding.

G. Nothing in the Organized Crime Act shall be construed to prevent the commission from granting to witnesses appearing before it, or to persons who claim to be adversely affected by testimony or other evidence adduced before it, such further rights and privileges as it may determine.

H. Nothing in the Organized Crime Act shall be construed to affect, diminish or impair the right, under any other provision of law, rule or custom, of any member or group of members of the commission to file a statement or statements of minority views to accompany and be released with or subsequent to the report of the commission.

**History: 1953 Comp., § 39-9-16, enacted by Laws 1977, ch. 215, § 8.**

**Compiler's notes.** — Laws 1981, ch. 234, § 2, repealed Laws 1977, ch. 215, § 9, which had provided that the act shall terminate on July 1, 1981.

## 29-9-18. Repealed.

**Repeals.** — Laws 2003, ch. 223, § 3 repealed 29-9-18 NMSA 1978, as enacted by Laws 1981, Ch. 234, § 1, relating to a task force studying the governor's organized crime prevention commission. For provisions of former section, *see* the 2002 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 10

# Arrest Record Information

Sec.
29-10-1. Short title.
29-10-2. Purpose of act.
29-10-3. Definition.
29-10-4. Confidentiality of arrest records.
29-10-5. Exchange of information.
29-10-6. Access by individuals.
29-10-7. Application.
29-10-8. Review of arrest record information; appeal.

## 29-10-1. Short title.

Chapter 29, Article 10 NMSA 1978 may be cited as the "Arrest Record Information Act".

**History: 1953 Comp., § 39-10-1, enacted by Laws 1975, ch. 260, § 1; 1993, ch. 260, § 2.**

**Cross references.** — For right to inspect public records, *see* 14-2-1 NMSA 1978.

For children's code, confidentiality of social and legal records, *see* 32A-2-32 NMSA 1978.

**The 1993 amendment,** effective June 18, 1993, substituted "Chapter 29, Article 10 NMSA 1978" for "This act".

### ANNOTATIONS

**Article does not authorize expungement.** — The Arrest Records Information Act [Chapter 29, Article 10 NMSA 1978] does not grant the courts authority to expunge or seal criminal records. *Toth v. Albuquerque Police Dep't*, 1997-NMCA-079, 123 N.M. 637, 944 P.2d 285.

**Arrest Record Information Act may be viewed as establishing statutory exceptions** to the fundamental right to inspect. It does so, however, in a rather conflicting manner, and it appears that virtually all arrest record information is subject to at least a limited or conditional disclosure. 1978 Op. Att'y Gen. No. 78-09.

**Identity of individuals arrested or charged with crime not protected.** — Neither the Arrest Record Information Act [Chapter 29, Article 10 NMSA 1978] nor the Inspection of Public Records Act [Chapter 14, Article 2 NMSA 1978] authorizes a law enforcement agency to protect the identity of persons who have been arrested or charged with a crime. 1994 Op. Att'y Gen. No. 94-02.

**Release of timely, accurate information.** — The Arrest Record Information Act does not prohibit release of timely, accurate information when a juvenile is arrested for a criminal act. 1987 Op. Att'y Gen. No. 87-29.



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## 29-10-2. Purpose of act.

The legislature finds and declares that the responsible exchange of complete and accurate information among law enforcement agencies is recognized as necessary and indispensable to effective law enforcement. Individual rights, however, may be infringed if information is inaccurate, incomplete or is disseminated irresponsibly. The Arrest Record Information Act is for the purpose of protecting those rights.

**History: 1953 Comp., § 39-10-2, enacted by Laws 1975, ch. 260, § 2.**

ANNOTATIONS

**Violation not limited.** — The Arrest Record Information Act does not limit the violation of the act to any particular class of persons. 1975 Op. Att'y Gen. No. 75-37 (opinion superseded by 1978 Op. Att'y Gen. No. 78-09).

**Release of juvenile's arrest information.** — A law enforcement agency is not prohibited by the Children's Code (Chapter 32A NMSA 1978), this act, or any other law from releasing to the public the names of juveniles who have been arrested for criminal acts and the charges for which they were arrested. 1987 Op. Att'y Gen. No. 87-29.

## 29-10-3. Definition.

As used in the Arrest Record Information Act, "arrest record information" means notations of the arrest or detention or indictment or filing of information or other formal criminal charge against an individual made by a law enforcement agency.

**History: 1953 Comp., § 39-10-3, enacted by Laws 1975, ch. 260, § 3; 1977, ch. 339, § 1; 1993, ch. 260, § 3.**

**The 1993 amendment,** effective June 18, 1993, made a minor stylistic change in the section heading, deleted the Subsection A designation which formerly preceded "arrest record information", deleted "which resulted in a negative disposition; and" which formerly followed "law enforcement agency", and deleted former Subsection B which defined "negative disposition".

ANNOTATIONS

**Section includes both felony and misdemeanor arrest records.** 1975 Op. Att'y Gen. No. 75-37 (opinion superseded by 1978 Op. Att'y Gen. No. 78-09).

**Definition of "arrest record information" does not include investigative reports.** 1978 Op. Att'y Gen. No. 78-09.

## 29-10-4. Confidentiality of arrest records.

Arrest record information that reveals confidential sources, methods, information or individuals accused but not charged with a crime and that is maintained by the state or any of its political subdivisions pertaining to any person charged with the commission of any crime is confidential and dissemination or revealing the contents of the record, except as provided in the Arrest Record Information Act or any other law, is unlawful.

**History: 1953 Comp., § 39-10-4, enacted by Laws 1975, ch. 260, § 4; 1993, ch. 260, § 4.**

**Cross references.** — For use of police reports for commercial solicitation, *see* 14-2A-1 NMSA 1978.

For crimes defined and classified, *see* 30-1-4 to 30-1-6 NMSA 1978.

**The 1993 amendment,** effective June 18, 1993, inserted "that reveals confidential sources, methods, information or individuals accused but not charged with a crime and that is", inserted "or any other law", and made minor stylistic changes throughout the section.

ANNOTATIONS

**Penalty provision repealed.** — While this section still provides that violations of the Arrest Record Information Act are "unlawful," there are no longer any criminal sanctions for releasing arrest record information in violation of the provisions of the act, since 39-10-7, 1953 Comp., the penalty provision, was repealed by Laws 1977, ch. 339, § 6. 1978 Op. Att'y Gen. No. 78-09.

**Limited protection of accused.** — This section protects the confidentiality of information concerning the identity of a person who has been accused but not charged with a crime only if that information has been collected in connection with an investigation of, or otherwise relates to, another person who has been charged with committing a crime. However, information in other records which identifies a person accused but not charged with or arrested for a crime may be protected from public disclosure under Section 14-2-1 NMSA 1978 et seq. Finally, even if it would otherwise be protected under either statute, information about a person accused but not charged with a crime is open to public inspection if it is contained in a document listed in Section 29-10-7 NMSA 1978. 1994 Op. Att'y Gen. No. 94-02.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 66 Am. Jur. 2d Records and Recording Laws § 27.

6A C.J.S. Arrest § 62.



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## 29-10-5. Exchange of information.

A law enforcement agency may disseminate arrest record information to a federal, state or local government law enforcement agency, provided that when the arrest record information is disseminated to a law enforcement agency situated outside this state, the information shall be accompanied by a statement substantially embodying the intent set forth in Section 29-10-4 NMSA 1978. Nothing in the Arrest Record Information Act prohibits direct access by the attorney general, the district attorney, the crime victims reparation commission or the courts to such information where it is deemed necessary in the performance of their functions under law. Nothing in that act prohibits direct access by a law enforcement agency to automated wanted information pertaining to a person or to stolen property information.

**History: 1953 Comp., § 39-10-5, enacted by Laws 1975, ch. 260, § 5; 1977, ch. 339, § 2; 1987, ch. 140, § 1.**

## 29-10-6. Access by individuals.

A. Upon satisfactory verification of his identity, any individual may inspect, in person, through counsel or through his authorized agent, arrest record information maintained by a law enforcement agency concerning him.

B. Personnel assigned to contractual research for a state or federally approved criminal justice project shall be permitted access to arrest record information. Approval personnel shall not further disseminate such information except as statistical or analytical records or reports in which individuals are not identified and from which their identities are not ascertainable.

**History: 1953 Comp., § 39-10-6, enacted by Laws 1975, ch. 260, § 6; 1977, ch. 339, § 3.**

## 29-10-7. Application.

A. Information contained in the following documents shall be available for public inspection:

(1) posters, announcements or lists for identifying or apprehending fugitives or wanted persons;

(2) original records of entry such as police blotters maintained by criminal justice agencies, compiled chronologically and required by law or long-standing custom to be made public, if the records are organized on a chronological basis;

(3) court records of public judicial proceedings;

(4) published court or administrative opinions or public judicial, administrative or legislative proceedings;

(5) records of traffic offenses and accident reports;

(6) announcements of executive clemency; and

(7) statistical or analytical records or reports in which individuals are not identified and from which their identities are not ascertainable.

B. Nothing prevents a law enforcement agency from disclosing to the public arrest record information related to the offense for which an adult individual is currently within the criminal justice system. A law enforcement agency is not prohibited from confirming prior arrest record information to members of the news media or any other person, upon specific inquiry as to whether a named individual was arrested, detained, indicted or whether an information or other formal charge was filed on a specified date, if the arrest record information disclosed is based on data enumerated by Subsection A of this section.

**History: 1953 Comp., § 39-10-8, enacted by Laws 1977, ch. 339, § 4; 1993, ch. 260, § 5.**

**Repeals and reenactments.** — Laws 1977, ch. 339, § 4 repealed 39-10-8, 1953 Comp., relating to the application of the Arrest Record Information Act, and enacted a new section.

**The 1993 amendment,** effective June 18, 1993, in Subsection A, in the introductory language, deleted "The provisions of the Arrest Record Information Act do not apply to criminal history record", inserted "the following documents shall be available for public inspection" and made stylistic changes; and, in Subsection B, deleted "in this act" following "Nothing" near the beginning of the first sentence and made stylistic changes.



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ANNOTATIONS

**Information to be included in police blotter.** — The following information may be appropriately included by a law enforcement agency in a police blotter or original record of entry: the name, physical description, place and date of birth, address and occupation of the individual arrested; the time and place of arrest; the offense for which the individual was arrested or detained; and the name of the arresting officer. This list should be interpreted as a minimum requirement but not to the exclusion of additional information which may presently appear on the initial records of entry or police blotters being used by some law enforcement agencies. 1975 Op. Att'y Gen. No. 75-37 (opinion superseded by 1978 Op. Att'y Gen. No. 78-09).

**Limited privacy of accused.** — Section 29-10-4 NMSA 1978 protects the confidentiality of information concerning the identity of a person who has been accused but not charged with a crime only if that information has been collected in connection with an investigation of, or otherwise relates to, another person who has been charged with committing a crime. However, information in other records which identifies a person accused but not charged with or arrested for a crime may be protected from public disclosure under Section 14-2-1 NMSA 1978 et seq. Finally, even if it would otherwise be protected under either statute, information about a person accused but not charged with a crime is open to public inspection if it is contained in a document listed in this section. 1994 Op. Att'y Gen. No. 94-02.

**Repeal and reenactment broadened exemption.** — In the repeal and reenactment of this section, the phrase "indexed chronologically" in Subsection A(2) became "compiled chronologically," thus removing the requirement that the records must be "indexed" to qualify as "original records of entry." The phrase "or long-standing custom" was added also, thereby legitimating a long-standing custom by which many law enforcement agencies had released information from police blotters and other such original records. 1978 Op. Att'y Gen. No. 78-09.

**Meaning of "within the criminal justice system".** — While the statute does not specify what is meant by "within the criminal justice system," the term appears to relate to the status of an adult who has been arrested or formally charged with a criminal offense until such time as there is a final "negative disposition." 1978 Op. Att'y Gen. No. 78-09.

## 29-10-8. Review of arrest record information; appeal.

A person who believes that arrest record information concerning him is inaccurate or incomplete is, upon satisfactory verification of his identity, entitled to review the information and obtain a copy of it for the purpose of challenge or correction. In the event a law enforcement agency refuses to correct challenged information to the satisfaction of the person to whom the inaccurate or incorrect information relates, the person is entitled to appeal to the district court to correct the information pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

**History: 1953 Comp., § 39-10-9, enacted by Laws 1977, ch. 339, § 5; 1998, ch. 55, § 41; 1999, ch. 265, § 43.**

**The 1999 amendment,** effective July 1, 1999, substituted "Section 39-3-1.1" for "Section 12-8A-1" in the last sentence.

**The 1998 amendment,** effective September 1, 1998, inserted "; appeal" in the section heading; substituted "is" for "shall"; deleted "be" preceding "entitled"; substituted "the" for "such" twice; substituted "is" for "shall be"; substituted "appeal to" for "petition"; and inserted "pursuant to the provisions of Section 12-8A-1 NMSA 1978" at the end of the section.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Expunction of federal arrest records in absence of conviction, 97 A.L.R. Fed. 652.

Effect of expungement of conviction on § 241(a)(4), (11) of Immigration and Nationality Act of 1952 (8 USCS § 1251(a)(4), (11)), making aliens deportable for crimes involving moral turpitude or drugs, 98 A.L.R. Fed. 750.

# ARTICLE 11

# Sexual Crimes Prosecution and Treatment

Sec.
29-11-1. Short title.
29-11-2. Purpose.
29-11-3. Definitions.
29-11-4. Fund created; administration.
29-11-5. Sexual crimes prosecution and treatment program.
29-11-6. Report.
29-11-7. Free forensic medical exams for victims of sexual crimes.

## 29-11-1. Short title.

This act [29-11-1 to 29-11-7 NMSA 1978] may be cited as the "Sexual Crimes Prosecution and Treatment Act".

**History: Laws 1978, ch. 27, § 1.**

ANNOTATIONS

**Law reviews.** — For article, "Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States," see 30 N.M.L. Rev. 69 (2000).



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## 29-11-2. Purpose.

The purpose of the Sexual Crimes Prosecution and Treatment Act is to promote effective law enforcement and prosecution of sexual crimes and to provide medical and psychological assistance for victims of such crimes. Implementation of the Sexual Crimes Prosecution and Treatment Act will serve to assist existing community-based victim treatment programs, to provide interagency cooperation, training of law enforcement, criminal justice and medical personnel and to effect proper handling and testing of evidence in sexual crime offenses.

**History: 1978 Comp., § 29-11-2, enacted by Laws 1978, ch. 27, § 2.**

## 29-11-3. Definitions.

As used in the Sexual Crimes Prosecution and Treatment Act:

A. "administrator" means the director of the mental health division of the department of health, or such person or office as the administrator may designate to act in his stead;

B. "evidence" means that evidence relating to the commission of a sexual crime;

C. "medical and psychological treatment" includes that medical, mental or emotional treatment provided a victim of a sexual crime. In addition to the improved physical and emotional condition of a victim, the treatment should result in the improved ability of a victim to make informed and rational choices about serving as a witness in the prosecution of a suspect of a sexual crime; and

D. "sexual crime" includes any act which may be alleged to be a sexual offense or an attempted sexual offense under the provisions of Sections 30-9-10 through 30-9-16 and 30-10-3 NMSA 1978.

**History: 1978 Comp., § 29-11-3, enacted by Laws 1978, ch. 27, § 3; 1995, ch. 91, § 1.**

**The 1995 amendment,** effective July 1, 1995, substituted "mental health division of the department of health" for "behavioral health services division of the health and environment department" in Subsection A; substituted "Sections 30-9-10 through 30-9-16 and 30-10-3 NMSA 1978" for "Sections 40A-9-20 through 40A-9-26 and 40A-10-3 NMSA 1953" in Subsection D; and made a minor stylistic change.

## 29-11-4. Fund created; administration.

A. There is created in the state treasury the "sexual crimes prosecution and treatment fund". Money appropriated to the fund shall be used to carry out the purposes of the Sexual Crimes Prosecution and Treatment Act.

B. The fund shall be administered by the administrator.

**History: 1978 Comp., § 29-11-4, enacted by Laws 1978, ch. 27, § 4.**

## 29-11-5. Sexual crimes prosecution and treatment program.

A. The administrator shall develop, with the cooperation of the criminal justice department [corrections department], the New Mexico state police, the New Mexico law enforcement academy, other authorized law enforcement agencies and existing community-based victim treatment programs, a statewide comprehensive plan to train law enforcement officers and criminal justice and medical personnel in the ability to deal with sexual crimes; to develop strategies for prevention of such crimes; to provide assistance in the assembly of evidence for the facilitation of prosecution of such crimes; and to provide medical and psychological treatment to victims of such crimes. This plan shall include, but not be limited to:

(1) education and training of law enforcement officers and criminal justice and medical personnel;



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(2) collection, processing and analysis of evidence which facilitates prosecution of suspects of sexual crimes; and

(3) medical and psychological treatment of victims of such crimes.

B. The comprehensive plan shall be implemented throughout the state, and the administrator may contract with appropriate persons, entities, agencies or community-based programs to provide the services to be rendered pursuant to Subsection A of this section and may pay a reasonable fee for such services.

C. Nothing in this section shall be construed to require criminal prosecution of a suspect of a sexual crime by the victim to whom services are rendered pursuant to the provisions of the Sexual Crimes Prosecution and Treatment Act.

D. Training for law enforcement officers in the proper treatment of victims of sexual crimes and collection of evidence and coordination among agencies shall be incorporated in the regular training program for recruits by the New Mexico state police; the basic course taught by the New Mexico law enforcement academy or by other authorized law enforcement agencies. Already-commissioned officers and sex-crime investigators shall receive advanced training through in-service programs.

**History: 1978 Comp., § 29-11-5, enacted by Laws 1978, ch. 27, § 5; 1979, ch. 202, § 50.**

**Compiler's notes.** — The bracketed phrase "corrections department" was inserted in Subsection A by the compiler, as Laws 1980, ch. 150 renames the criminal justice department as the corrections and criminal rehabilitation department. Laws 1981, chs. 73 and 127 rename the corrections and criminal rehabilitation department as the corrections department. The bracketed material was not enacted by the legislature and is not part of the law.

## 29-11-6. Report.

By December 15 of each year, a report shall be filed with the governor and the legislative council by the administrator concerning all aspects of the sexual crimes prosecution and treatment program and specifically the administrator's conclusions and recommendations regarding the effectiveness of the sexual crimes prosecution and treatment program implemented throughout the state.

**History: 1978 Comp., § 29-11-6, enacted by Laws 1978, ch. 27, § 6.**

## 29-11-7. Free forensic medical exams for victims of sexual crimes.

The administrator shall:

A. provide free forensic medical exams to victims of sexual crimes;

B. arrange for victims of sexual crimes to obtain free forensic medical exams; or

C. reimburse victims of sexual crimes for the cost of forensic medical exams, provided that:

(1) the reimbursement covers the full cost of the forensic medical exam, without any deductible requirement or limit on the amount of the reimbursement;

(2) the victim of a sexual crime is entitled to apply for reimbursement for a period of one year from the date of the forensic medical exam;

(3) reimbursement is provided not later than ninety days after the administrator receives written notification of the expense incurred by the victim for the forensic medical exam; and

(4) all victims of sexual crimes, including victims with limited or no English proficiency, are provided with information at the time of the forensic medical exam regarding how to obtain reimbursement for the cost of the exam.

**History: Laws 1995, ch. 91, § 2.**



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# ARTICLE 11A

# Sex Offender Registration and Notification

Sec.
29-11A-1. Short title.
29-11A-2. Findings; purpose.
29-11A-3. Definitions.
29-11A-4. Registration of sex offenders; information required; verification; criminal penalty for noncompliance.
29-11A-4.1. Procedures when a sex offender moves from New Mexico to another state.
29-11A-5. Local registry; central registry; administration by department of public safety; participation in the national sex offender registry; rules.
29-11A-5.1. Public access to information regarding certain registered sex offenders; active community notification; internet web site.
29-11A-6. Repealed.
29-11A-7. Notice to sex offenders of duty to register.
29-11A-8. Immunity.
29-11A-9. State preemption; saving clause.
29-11A-10. Severability.

## 29-11A-1. Short title.

Chapter 29, Article 11A NMSA 1978 may be cited as the "Sex Offender Registration and Notification Act".

**History: Laws 1995, ch. 106, § 1; 1999, ch. 19, § 1.**

**Cross references.** — For the DNA Identification Act, *see* Chapter 29, Article 16 NMSA 1978.

**The 1999 amendment,** effective July 1, 1999, substituted "Chapter 29, Article 11A NMSA 1978" for "This act" and inserted "and Notification".

**ANNOTATIONS**

**1999 amendments did not expressly apply retroactively** to convictions occurring before its effective date. *State v. Druktenis*, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

**Law reviews.** — For note and comment, "ACLU of New Mexico v. City of Albuquerque: Does Current Equal Protection Adequately Protect Some of the Most Hated Members of Our Society." See 37 N.M.L. Rev. 637 (2007).

## 29-11A-2. Findings; purpose.

A. The legislature finds that:

(1) sex offenders pose a significant risk of recidivism; and

(2) the efforts of law enforcement agencies to protect their communities from sex offenders are impaired by the lack of information available concerning convicted sex offenders who live within the agencies' jurisdictions.

B. The purpose of the Sex Offender Registration and Notification Act is to assist law enforcement agencies' efforts to protect their communities by:

(1) requiring sex offenders who are residents of New Mexico to register with the county sheriff of the county in which the sex offender resides;

(2) requiring sex offenders who are residents in other states, but who are employed in New Mexico or who attend school in New Mexico, to register with the county sheriff of the county in which the sex offender works or attends school;

(3) requiring the establishment of a central registry for sex offenders; and

(4) providing public access to information regarding certain registered sex offenders.

**History: Laws 1995, ch. 106, § 2; 1999, ch. 19, § 2.**

**The 1999 amendment,** effective July 1, 1999, inserted "and Notification" in Subsection B, inserted "who are residents of New Mexico" in Paragraph B(1), added Paragraphs B(2) and B(4), redesignated former Paragraph B(2) as Paragraph B(3), and made minor stylistic changes.

**ANNOTATIONS**

**Constitutionality of act.** — Sex Offender Registration and Notification Act does not violate either the federal or state ex post facto clause, does not violate either the federal or the state due process clause, and does not violate N.M. Const. art. IV, §ection 34. *State v. Druktenis*, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

Where a constitutionally permissible retroactive application of Sex Offender Registration and Notification Act requirements to defendant made him subject to a probation violation if he knowingly failed to register and if he were found to have committed a felony by failing to register, this does not constitute a legislative act that changes rules of evidence or procedure in a pending case. Therefore, the legislative changes are too indirect, remote, and



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attenuated to be considered unconstitutional under N.M. Const. art. IV, § 34. *State v. Druktenis*, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

Retroactive application of Sex Offender Registration and Notification Act does not violate the ex post facto clause of the United States or New Mexico constitutions. *State v. Druktenis*, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

**Sex Offender Registration and Notification Act is part of New Mexico's law enforcement code** and not part of the criminal code. *State v. Druktenis*, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

**Legislative intent.** — Legislature's intent in enacting Sex Offender Registration and Notification Act was to enact a civil, remedial, regulatory, nonpunitive law. *State v. Druktenis*, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

Notification provisions are rationally related to a legitimate governmental interest, purpose, and goal. *State v. Druktenis*, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

The State's interest in attempting to protect society from convicted sex offenders who pose a significant risk of recidivism is both legitimate and compelling. *State v. Druktenis*, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

**Purpose and principal effect of notification provisions** are to inform the public for its own safety, not to punish or stigmatize and ostracize the offender. *State v. Druktenis*, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

## 29-11A-3. Definitions.

As used in the Sex Offender Registration and Notification Act:

A. "business day" means a day that is not a Saturday, a Sunday or a state holiday;

B. "conviction" means a conviction in any court of competent jurisdiction and includes a deferred sentence, but does not include a conditional discharge;

C. "department" means the department of public safety;

D. "institution of higher education" means a:

(1) private or public post-secondary educational institution;

(2) trade school; or

(3) professional school;

E. "habitually lives" means any place where a sex offender lives for at least thirty days in any three-hundred-sixty-five-day period;

F. "out-of-state registrant" means any person who establishes a residence in New Mexico while the person is required to register as a sex offender in another state or territory;

G. "registration requirement" means any requirement set forth in Section 29-11A-4 NMSA 1978 that requires a sex offender to register; provide information, including a DNA sample; renew, revise or change registration information; or provide written notice or disclosure regarding the sex offender's status as a sex offender;

H. "sex offender" means a person who:

(1) is a resident of New Mexico who is convicted of a sex offense pursuant to state, federal, tribal or military law;

(2) changes residence to New Mexico, when that person has been convicted of a sex offense pursuant to state, federal, tribal or military law;

(3) does not have an established residence in New Mexico, but lives in a shelter, halfway house or transitional living facility or stays in multiple locations in New Mexico and who has been convicted of a sex offense pursuant to state, federal, tribal or military law; or

(4) is a resident of another state and who has been convicted of a sex offense pursuant to state, federal, tribal or military law, but who is:

(a) employed full time or part time in New Mexico for a period of time exceeding fourteen days or for an aggregate period of time exceeding thirty days during any calendar year, including any employment or vocation, whether financially compensated, volunteered or for the purpose of government or educational benefit; or

(b) enrolled on a full-time or part-time basis in a private or public school or an institution of higher education in New Mexico;

I. "sex offense" means any of the following offenses or their equivalents in any other jurisdiction:

(1) aggravated criminal sexual penetration or criminal sexual penetration in the first, second, third or fourth degree, as provided in Section 30-9-11 NMSA 1978;

(2) criminal sexual contact in the fourth degree, as provided in Section 30-9-12 NMSA 1978;

(3) criminal sexual contact of a minor in the second, third or fourth degree, as provided in Section 30-9-13 NMSA 1978;

(4) sexual exploitation of children, as provided in Section 30-6A-3 NMSA 1978;

(5) sexual exploitation of children by prostitution, as provided in Section 30-6A-4 NMSA 1978;



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(6) kidnapping, as provided in Section 30-4-1 NMSA 1978, when committed with the intent to inflict a sexual offense;

(7) false imprisonment, as provided in Section 30-4-3 NMSA 1978, when committed with the intent to inflict a sexual offense;

(8) aggravated indecent exposure, as provided in Section 30-9-14.3 NMSA 1978;

(9) enticement of child, as provided in Section 30-9-1 NMSA 1978;

(10) incest, as provided in Section 30-10-3 NMSA 1978, when the victim is younger than eighteen years of age;

(11) child solicitation by electronic communication device, as provided in Section 30-37-3.2 NMSA 1978, for convictions occurring on or after July 1, 2013;

(12) solicitation to commit criminal sexual contact of a minor in the second, third or fourth degree, as provided in Sections 30-9-13 and 30-28-3 NMSA 1978; or

(13) attempt to commit any of the sex offenses set forth in Paragraphs (1) through (11) of this subsection, as provided in Section 30-28-1 NMSA 1978; and

J. "social networking site" means an internet web site that facilitates online social interaction by offering a mechanism for communication with other users, where such users are likely to include a substantial number of minors under the age of sixteen, and allowing users, through the creation of web pages, profiles or other means, to provide information about themselves that is available to the public or to other users.

**History: Laws 1995, ch. 106, § 3; 1999, ch. 19, § 3; 2000, ch. 8, § 1; 2003 (1st S.S.), ch. 1, § 10; 2005, ch. 279, § 1; 2007, ch. 68, § 1; 2007, ch. 69, § 5; 2013, ch. 152, § 1.**

**The 2013 amendment,** effective July 1, 2013, added terms and definitions; added Subsections A, C, E, F and J; in Paragraph (6) of Subsection I, after "Section 30-4-1 NMSA 1978", deleted "the victim is less than eighteen years of age and the offender is not a parent of the victim" and added "committed with the intent to inflict a sexual offense"; in Paragraph (7) of Subsection I, after "Section 30-4-3 NMSA 1978, when", deleted "the victim is less than eighteen years of age and the offender is not a parent of the victim" and added "committed with the intent to inflict a sexual offense"; and in Paragraph (11) of Subsection I, after "Section 30-37-3.2 NMSA 1978", added "for convictions occurring on or after July 1, 2013":

**Applicability.** — Laws 2013, ch. 152, § 5 provided that the provisions of the amendments to the Sex Offender Registration and Notification Act enacted by Laws 2013, ch. 152 are applicable to a person who, on or after July 1, 2013, is found guilty of committing a sex offense.

**The 2007 amendment,** effective July 1, 2007, defined "sex offender" as a New Mexico resident who is convicted of a sex offense pursuant to state, federal, tribal or military law; and defined "sex offense" to mean offenses or their equivalents in any other jurisdiction, including aggravated criminal sexual penetration.

**Applicability.** — Laws 2007, ch. 69, § 8 provided that Laws 2007, ch. 69, § 5 was applicable to a person convicted of a sex offense on or after July 1, 1995 and a person convicted of a sexual offense prior to July 1, 1995 and who, on July 1, 1995, was still incarcerated, on probation or on parole for commission of that sex offense.

**The 2005 amendment,** effective July 1, 2005, added the definition of "conviction" in Subsection A; added the definition of "institution of higher education" in Subsection B; added the definition of "registration requirement" in Subsection C; deleted the requirement that a person be eighteen years of age or older in the definition of "sex offender" in Subsection D; added the reference to tribal law in Subsection D(2), (3) and (5); added Subsection D(4) to provide that a sex offender is a person who does not have an established residence in New Mexico, but stays in temporary quarters in New Mexico and who has been convicted of a sex offense; provided in Subsection B(5)(a) that employment includes any employment or vocation, whether financially compensated, volunteered or for the purpose of government or educational benefit; provided in Subsection B(5)(b) that the person is enrolled in an institution of higher education in New Mexico; deleted the former reference in Subsection B(5)(b) secondary school, trade school, professional institution or an institution of higher education; and added Subsections E(8) through (10) to provide that sex offense includes aggravated indecent exposure, enticement of child and incest respectively.

**Applicability.** — Laws 2005, ch. 279, §14, effective July 1, 2005, provided that Laws 2005, ch. 279, §§ 1 through 13 apply to a person convicted of a sex offense on or after July 1, 2005 and a person convicted of a sex offense prior to July 1, 2005 and who, on July 1, 2005, was still incarcerated, on probation or on parole for commission of that sex offense.

**The 2003 (1st S.S.) amendment,** effective February 3, 2004, inserted "second" in Paragraphs (3) and (8) of Subsection B, and deleted "Subsection A, B or C of" preceding "Section" in Paragraph (4) of that subsection.

**The 2000 amendment,** effective July 1, 2000, deleted "employed in New Mexico or attends school in New Mexico; and" from the end of Subsection A(4), added Subsections A(4)(a) and A(4)(b), added Subsections B(6) and B(7) and redesignated former Subsections B(6) and B(7) as present Subsections B(8) and B(9), substituted "(7)" for "(5)" in present Subsection B(9).

**The 1999 amendment,** effective July 1, 1999, inserted "and Notification" in the introductory language; added "a person eighteen years of age or older" in Subsection A; in Paragraph A(1), substituted "who is a resident of New Mexico who is" for "a person" and substituted "in New Mexico" for "on or after July 1, 1995; or"; in Paragraph A(2), deleted "a person" at the beginning, and substituted "pursuant to state, federal or military law" for "on or after July 1, 1995; and"; added Paragraphs A(3), A(4), B(6), and B(7); and made minor stylistic changes.

**ANNOTATIONS**

**Determination of equivalency of sex offenses.** — Where defendant, who had been convicted of taking indecent liberties with children in North Carolina, moved to New Mexico; although there was no one-to-one correlation



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between the North Carolina offense and a single New Mexico sex offense, indecent liberties with children encompassed several sex offenses in New Mexico, the district court was required to determine if defendant's actual conduct supporting defendant's North Carolina conviction would have constituted any of the sex offenses under the New Mexico Sex Offender Registration and Notification Act, Section 29-11A-1 NMSA 1978 et seq. *State v. Orr*, 2013-NMCA-069, 304 P.3d 449.

**Equivalent offense is based on actual conduct.** — An offense is "equivalent" to a New Mexico offense, for purposes of the New Mexico Sex Offender Registration and Notification Act, if the defendant's actual conduct that gave rise to the out-of-state conviction would have constituted one of the enumerated offenses requiring registration pursuant to the Act. When the defendant's out-of-state conviction results from a plea agreement, courts may look to the charging documents, the defendant's written plea agreement, and the transcript of the plea hearing to determine the defendant's actual conduct and whether the conduct would have constituted one of the enumerated offenses. *State v. Hall*, 2013-NMSC-001, 294 P.3d 1235, *rev'g* 2011-NMCA-047, 149 N.M. 546, 252 P.3d 770.

**Failure to prove equivalent offense.** — Where defendant had been convicted in California of a misdemeanor offense of annoying or molesting a child under the age of eighteen; the state alleged that the California offense was equivalent to the New Mexico crime of sexual contact of a minor in the fourth degree because defendant's California conviction was based on defendant inappropriately touching the private parts of several boys that defendant lifted up to look into a camera's viewfinder; and the state failed to provide evidence to support the elements of the New Mexico offense by establishing the California victim's ages at the time of the offense or, other than saying that defendant touched the victims' clothed private parts, where on their bodies defendant touched the California victims, a court could not determine whether defendant's conduct violated one of the enumerated offenses in Section 29-11A-3 NMSA 1978 because the record was insufficient for a court to determine in what conduct defendant engaged that gave rise to defendant's California conviction. *State v. Hall*, 2013-NMSC-001, 294 P.3d 1235, *rev'g* 2011-NMCA-047, 149 N.M. 546, 252 P.3d 770.

**Sex offense.** — Defendant's conviction in California of the misdemeanor offense of annoying or molesting a child, which does not require touching or application of force, was not the equivalent of sexual contact of a minor, which requires touching or the application of force, was not a "sex offense" as that term is defined in the Sex Offender Registration and Notification Act, and did not require defendant to register as a sex offender in New Mexico. *State v. Hall*, 2011-NMCA-047, 149 N.M. 546, 252 P.3d 770, cert. granted, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

**Determining equivalency under SORNA.** — Where defendant appealed from the judgment and sentence entered upon his conditional guilty plea to one count of failure to register as a sex offender, the trial court erred in ruling that defendant's Colorado conviction, had it occurred in New Mexico, required registration pursuant to SORNA, because the statute under which defendant was convicted in Colorado is not, on its face, equivalent to a SORNA offense, and the trial court's reliance on an unsigned and unfiled presentence report was not sufficient to determine actual conduct for purposes of an equivalency analysis under SORNA. The presentence report lacked proof of authenticity and reliability and therefore constituted inadmissible evidence that the trial court erred in considering and determining defendant's actual conduct underlying his Colorado sexual assault conviction. *State v. Winn*, 2019-NMCA-011.

**A *nolo contendere* plea which is a conviction in a foreign jurisdiction is a conviction in New Mexico.** — Where petitioner pled *nolo contendere* to engaging in a sex act with a child under eighteen years old in Florida; the Florida court required petitioner to serve thirty days imprisonment, two years of community control, five years of probation, pay restitution for mental counseling of the victim, have no unsupervised contact with children under eighteen years old, surrender the petitioner's teaching credentials and register as a sex offender in Florida; Florida did not adjudicate petitioner's guilt; and Florida law defined a conviction of a sex offense for purposes of sex offender registration to be a determination of guilt as the result of a plea of *nolo contendere* regardless of whether adjudication is withheld, Florida's disposition of petitioner's case was a conviction for purposes of SORNA. *Vives v. Verzino*, 2009-NMCA-083, 146 N.M. 673, 213 P.3d 823.

**"Sex offender".** — A court order granting defendant an early discharge from supervised probation and dismissing the charges against him did not eradicate his convictions and his status as a sex offender under Subsection A(1). *State v. Brothers*, 2002-NMCA-110, 133 N.M. 36, 59 P.3d 1268, cert. denied, 133 N.M. 30, 59 P.3d 1262.

**Application of multiple amendments of definition of "sex offense".** — Where in 2012, defendant pled guilty to the charge of solicitation of a child by electronic communication device; in 2007, the legislature enacted two acts amending Sections 29-11A-3 and 29-11A-5 NMSA 1978 which were signed on the same day by the governor; Laws 2007, ch. 68 created the new criminal offense of child solicitation by electronic communication device; Laws 2007, ch. 69 created the new crime of aggravated criminal sexual penetration; in 2012, Section 12-1-8 NMSA 1978 provided that if, in the same legislative session, the legislature enacted two or more acts amending the same section of the New Mexico Statutes Annotated, then the last act signed by the governor is presumed to be the law and shall be compiled into the NMSA; and Laws 2007, ch. 69 was compiled into the NMSA, child solicitation by electronic communication device was not a SORNA-covered crime in 2012 when defendant pled guilty and defendant was not subject to SORNA. *State v. Ho*, 2014-NMCA-038, cert. granted, 2014-NMCERT-003.

## 29-11A-4. Registration of sex offenders; information required; verification; criminal penalty for noncompliance.

A. A sex offender residing in this state shall register with the county sheriff for the county in which the sex offender resides.

B. A sex offender who is a resident of New Mexico shall initially register with the county sheriff no later than five business days after being released from the custody of the corrections department, a municipal or county jail or a federal, military or tribal correctional facility or detention center or being placed on probation or parole. A sex offender who changes residence to New



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Mexico shall register with the county sheriff no later than five business days after arrival in this state. When a sex offender initially registers with the county sheriff, the sex offender shall provide the following registration information:

(1) the sex offender's legal name and any other names or aliases that the sex offender is using or has used;

(2) the sex offender's date of birth;

(3) the sex offender's social security number;

(4) the sex offender's current physical and mailing address and the address of every place where the sex offender habitually lives;

(5) the sex offender's place of employment;

(6) the sex offense for which the sex offender was convicted;

(7) the date and place of the sex offense conviction;

(8) the sex offender's names, email addresses and monikers and other self-identifiers used on social networking sites, to be used only for law enforcement purposes;

(9) the sex offender's landline and cellular telephone numbers and any other telephone numbers primarily used by the sex offender;

(10) the sex offender's professional licenses;

(11) the license plate or other identifier and the description of any vehicle owned or primarily operated by the sex offender, including aircraft and watercraft;

(12) the name and address of any school or institution of higher education that the sex offender is attending; and

(13) copies of the sex offender's passport and immigration documents.

C. A sex offender who is a resident of another state but who is employed in New Mexico or attending public or private school or an institution of higher education in New Mexico shall register with the county sheriff for the county in which the sex offender is working or attending school or an institution of higher education.

D. A sex offender who is a resident of another state but who is employed in New Mexico or attending public or private school or an institution of higher education in New Mexico shall register with the county sheriff no later than five business days after beginning work or school. When the sex offender registers with the county sheriff, the sex offender shall provide the following registration information:

(1) the sex offender's legal name and any other names or aliases that the sex offender is using or has used;

(2) the sex offender's date of birth;

(3) the sex offender's social security number;

(4) the sex offender's current physical and mailing address in the sex offender's state of residence and, if applicable, the address of the sex offender's place of lodging in New Mexico while working or attending school or an institution of higher education;

(5) the sex offender's place of employment or the name of the school the sex offender is attending;

(6) the sex offense for which the sex offender was convicted; and

(7) the date and place of the sex offense conviction.

E. When a sex offender registers with a county sheriff, the sheriff shall obtain:

(1) a photograph of the sex offender and a complete set of the sex offender's fingerprints and a palm print;

(2) a physical description, including a description of any tattoos, scars or other distinguishing features on the sex offender's body that would assist in identifying the sex offender; and

(3) a DNA sample for inclusion in the sex offender DNA identification system pursuant to the provisions of the DNA Identification Act [Chapter 29, Article 16 NMSA 1978].

F. When a sex offender who is registered changes any information required under this section, the sex offender shall send written notice of the change on a form approved by the department to the county sheriff no later than five business days after the change occurs.

G. When a sex offender who is registered changes residence to a new county in New Mexico, the sex offender shall register with the county sheriff of the new county no later than five business days after establishing the new residence. The sex offender shall also send written notice of the



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change in residence to the county sheriff with whom the sex offender last registered no later than five business days after establishing the new residence.

H. When a sex offender who is registered or required to register is homeless or does not have an established residence, but lives in a shelter, halfway house or transitional living facility or stays in multiple locations in New Mexico, the sex offender shall register each address or temporary location with the county sheriff for each county in which the sex offender is living or temporarily located. The sex offender shall register no later than five business days after a change in living arrangements or temporary location.

I. When a sex offender who is registered or required to register is employed, begins a vocation or is enrolled as a student at an institution of higher education in New Mexico, the sex offender shall disclose the sex offender's status as a sex offender in writing to the county sheriff for the county in which the institution of higher education is located, the law enforcement entity responsible for the institution of higher education and the registrar for the institution of higher education no later than five business days after beginning employment, beginning a vocation or enrolling at the institution of higher education. The sex offender shall also send written notice of any change regarding employment, vocation or enrollment status at an institution of higher education to the county sheriff, the law enforcement entity and the registrar no later than five business days after the change in employment, vocation or enrollment status.

J. When a sex offender who is registered or required to register is employed or is enrolled as a student at a public or private school in New Mexico, the sex offender shall disclose the sex offender's status as a sex offender in writing to the county sheriff for the county in which the school is located and to the principal of the school no later than five business days after beginning employment or enrolling at the school. The sex offender shall also send written notice of any change regarding employment or enrollment status at a school to the county sheriff and the principal no later than five business days after the change in employment or enrollment status.

K. When a sex offender who is registered or required to register is employed, begins a vocation or volunteers services, regardless of whether the sex offender receives payment or other compensation, the sex offender shall disclose the sex offender's status as a sex offender in writing to the sex offender's employer, supervisor or person similarly situated. The written disclosure shall be made immediately upon beginning employment, vocation or volunteer service.

L. Following initial registration pursuant to the provisions of this section:

(1) a sex offender required to register pursuant to the provisions of Subsection D of Section 29-11A-5 NMSA 1978 shall verify registration information with the county sheriff as provided in Subsection N of this section not less than once in each ninety-day period following the date of the sex offender's initial registration for the remainder of the sex offender's natural life;

(2) a sex offender required to register pursuant to the provisions of Subsection E of Section 29-11A-5 NMSA 1978 shall verify registration information with the county sheriff as provided in Subsection N of this section once every six months for a period of ten years; and

(3) an out-of-state registrant shall verify registration information with the county sheriff for whichever is the longer of:

(a) the duration of time remaining in the registrant's convicting jurisdiction and at the same frequency as required in that state or territory, but no less than once every six months; or

(b) the duration of time remaining that would be required for the equivalent offense in New Mexico.

M. Notwithstanding the provisions of Paragraph (2) of Subsection L of this section, if a sex offender is convicted a second or subsequent time for a sex offense set forth in Subsection E of Section 29-11A-5 NMSA 1978, the sex offender shall verify registration information with the county sheriff as provided in Subsection N of this section not less than once in each ninety-day period following the date of the sex offender's initial registration for the remainder of the sex offender's natural life.

N. At least fifteen days prior to the time a sex offender is required to verify registration information, the department shall send a verification form to the sex offender, by first class mail, containing the sex offender's current registration information and a notice of the date that the sex offender's next verification is due. The sex offender shall appear in person at a location designated by the department to verify the information contained on the form, to change the information as



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necessary and to sign a statement under oath that the information is true and correct. The department may photograph the sex offender at that time if the sex offender's appearance is significantly different from the photograph already contained in the sex offender's file. If a sex offender does not receive a verification form before the time that the sex offender is required to verify registration pursuant to Subsection L of this section, the sex offender shall appear at a location designated by the department to verify registration information as required by this section.

O. The department shall establish a secure system that will permit a sex offender to notify the department electronically of any change in registration information.

P. A sex offender who willfully or knowingly fails to comply with the registration or verification requirements set forth in this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978. A sex offender who willfully or knowingly fails to comply with the registration or verification requirements set forth in this section after a first or subsequent conviction for a violation pursuant to this section is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978. The willful failure to comply with any registration or verification requirement set forth in this section shall be deemed part of a continuing transaction or occurrence. A conviction pursuant to this subsection shall not be considered a felony for purposes of the imposition of sentencing enhancements pursuant to the provisions of Section 31-18-17 NMSA 1978.

Q. A sex offender who willfully or knowingly provides false information when complying with the registration or verification requirements set forth in this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978. A sex offender who willfully or knowingly provides false information when complying with the registration or verification requirements set forth in this section after a first or subsequent conviction for a violation pursuant to this section is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978. The willful providing by a sex offender of false information with respect to the registration or verification requirements set forth in this section shall be deemed part of a continuing transaction or occurrence. A conviction pursuant to this subsection shall not be considered a felony for purposes of the imposition of sentencing enhancements pursuant to the provisions of Section 31-18-17 NMSA 1978.

**History: Laws 1995, ch. 106, § 4; 1999, ch. 19, § 4; 2000, ch. 8, § 2; 2005, ch. 279, § 2; 2013, ch. 152, § 2.**

**The 2013 amendment,** effective July 1, 2013, required sex offenders to register and update information within five business days; in the title, after "required", added "verification"; in Subsection B, in the first sentence of the introductory paragraph, after "New Mexico shall", added "initially", in the second sentence, after "no later than", deleted "ten" and added "five business", and in the third sentence, after "sex offender", added "initially"; in Paragraph (4) of Subsection B, after "sex offender's current", added "physical and mailing" and after "mailing address", added "and the address of every place where the sex offender habitually lives"; added Paragraphs (8) through (13) of Subsection B; in Subsection D, in the first sentence, after "no later than", deleted "ten" and added "five business"; in Paragraph (1) of Subsection E, after "fingerprints", added "and a palm print"; in Paragraph (2) of Subsection E, at the beginning of the sentence, added "a physical description, including"; in Subsection F, after "registered changes", deleted "his residence within the same county" and added "any information required under this section", after "notice of the change" deleted "of address" and added "on a form approve by the department", after "no later than", deleted "ten" and added "five business", and after "five business days after", deleted "establishing his new residence" and added "the change occurs"; in Subsection G, in the first sentence, after "no later than", deleted "ten" and added "five business" and in the second sentence, after "no later than", deleted "ten" and added "five business"; in Subsection H, in the first sentence, after "required to register", added "is homeless or" and after "sex offender shall register", added "each address or temporary location" and in the second sentence, after "no later than", deleted "ten" and added "five business"; in Subsection J, in the first sentence, after "no later than", deleted "ten" and added "five business" and after "five business days after", added "beginning employment or" and in the second sentence, after "any change regarding", added "employment or", after "no later than", deleted "ten" and added "five business", and after "after the change in", deleted "his" and added "employment or"; in Paragraph (1) of Subsection L, after "Section 29-11A-5 NMSA 1978 shall", deleted "renew his" and added "verify", after "verify registration", added "information", after "county sheriff", added "as provided in Subsection N of this section", and after "registration for the", deleted "entirety" and added "remainder"; in Paragraph (2) of Subsection L, after "Section 29-11A-5 NMSA 1978 shall', deleted "annually renew his" and added "verify", after "verify registration" added "information", after "county sheriff", deleted "prior to December 31 of each subsequent calendar year" and added "as provided in Subsection N of this section once every six months"; added Paragraph (3) of Subsection L; in Subsection M, after "sex offender shall", deleted "renew his" and added "verify", after "verify registration", added "information", after "county sheriff", added "as provided in Subsection N of this section", and after "initial registration for the", deleted "entirety" and added "remainder"; added Subsections N and O; in Subsection P, in the first sentence, after "registration", added "or verification", in the second sentence, after "registration", added "or verification", and in the third sentence, after "registration", added "or verification", and in Subsection Q, in the first, second and third sentences, after "registration", added "or verification.



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**Applicability.** — Laws 2013, ch. 152, § 5 provided that the provisions of the amendments to the Sex Offender Registration and Notification Act enacted by Laws 2013, ch. 152 are applicable to a person who, on or after July 1, 2013, is found guilty of committing a sex offense.

**The 2005 amendment,** effective July 1, 2005, provided in Subsection B that sex offender shall register after being released from a municipal or county jail, or a federal, military or tribal correctional facility, or detention center and that a sex offender shall register within ten days after his arrival in New Mexico; provided in Subsection C that a non-resident sex offender who is attending a public or private school or an institution of higher education in New Mexico shall register in the county in which the school or institution of higher education is located; provided in Subsection D that a sex offender who is attending a public or private school or an institution of higher education shall register within ten days after beginning school; provided in Subsection D(4) that a sex offender who is attending an institution of higher education must give his residence address and the address of his place of lodging in New Mexico; added Subsection E(3) to provide that the sheriff shall obtain a sample of the sex offender's DNA for inclusion in the sex offender DNA identification system; adds Subsection H to provide for the registration of a sex offender who does not have an established residence; added Subsection I to require a sex offender to disclose his status when he is employed, begins a vocation or is enrolled in an institution of higher education or changes his employment, vocation or enrollment status; added Subsection J to require a sex offender to disclose his status if he is employed or enrolled as a student at a public or private school; added Subsection K to require a sex offender to disclose his status when he is employed, begins a vocation or volunteers his services; deleted the former provisions in Subsection L that a sex offender annually renew his registration prior to December 31 of each subsequent calendar year for a period of twenty years; provided in Subsection L that a sex offender shall renew his registration not less than once in each ninety-day period for his natural life; added Subsection M to provide that a sex offender who is convicted of a sex offense set forth in Section 29-11A-5E NMSA 1978, he shall renew his registration once in each ninety-day period for his natural life; provided in Subsection N that if a sex offender knowingly fails to comply with the registration requirement he is guilty of a fourth degree felony, that a sex offender who willfully or knowingly fails to comply with the registration requirements of this section after a first or subsequent conviction under this section is guilty of a third degree felony, that a willful failure to comply with the requirements of this section is a continuing transaction or occurrence, and that a conviction under Subsection N is not a felony for purposes of imposing sentencing enhancements; and provided in Subsection O that a sex offender who knowingly provides false information is guilty of a fourth degree felony, that a sex offender who willfully or knowingly provides false information after a first or subsequent conviction under this section is guilty of a third degree felony, that the willful providing of false information is a continuing transaction or occurrence and that a conviction under Subsection N is not a felony for purposes of imposing sentencing enhancements.

**Applicability.** — Laws 2005, ch. 279, §14, effective July 1, 2005, provided that Laws 2005, ch. 279, §§ 1 through 13 apply to a person convicted of a sex offense on or after July 1, 2005 and a person convicted of a sex offense prior to July 1, 2005 and who, on July 1, 2005, was still incarcerated, on probation or on parole for commission of that sex offense.

**The 2000 amendment,** effective July 1, 2000, inserted "registration" near the end of the introductory paragraph in Subsection B and near the end of Subsection D; rewrote Subsection H, which formerly read "Following his initial registration pursuant to the provisions of this section, a sex offender shall annually renew his registration with the county sheriff prior to December 31 of each subsequent calendar year"; and substituted "fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978" for "misdemeanor and shall be punished by imprisonment for a definite term less than one year or a fine of not more than one thousand dollars ($1,000) or both" in Subsections I and J.

**The 1999 amendment,** effective July 1, 1999, in Subsection B substituted "ten days" for "thirty days" in the first sentence and "ten days" for "forty-five days" in the second sentence; substituted "he" for "the sex offender" in Paragraph B(1); added present Subsections C, D, and H; and redesignated former Subsections C through E, F, and G as Subsections E through G, I, and J, respectively.

## ANNOTATIONS

**Statutory elements of California and New Mexico offenses were not equivalent.** — Defendant's conviction in California of the misdemeanor offense of annoying or molesting a child, which does not require touching or application of force, was not the equivalent of sexual contact of a minor, which requires touching or the application of force, was not a "sex offense" as that term is defined in the Sex Offender Registration and Notification Act, and did not require defendant to register as a sex offender in New Mexico. *State v. Hall*, 2011-NMCA-047, 149 N.M. 546, 252 P.3d 770, cert. granted, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

**Assistance of counsel.** — Defense counsel has an affirmative duty to advise a defendant charged with a sex offense that a plea of guilty or no contest will almost certainly subject the defendant to the registration requirements of SORNA. Proper advice will also include a discussion regarding what SORNA registration will mean, both in terms of the specific registration and notification provisions set forth in this article, as well as the likely social consequences of being a registered sex offender. This is the minimum advice a defendant needs before deciding to waive his or her constitutional rights by entering into a plea agreement. Failure to so advise the defendant amounts to deficient performance under the *Strickland* test. *State v. Edwards*, 2007-NMCA-043, 141 N.M. 491, 157 P.3d 56, cert. quashed, 142 N.M. 436, 166 P.3d 1090.

**Court cannot stay registration pending appeal.** — Trial judges have neither the power nor the discretion to stay the application of the SORNA pending the outcome of an appeal. *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13, *rev'g* 2010-NMCA-007, 147 N.M. 574, 226 P.3d 673.

**A trial court has discretion to stay Sex Offender Registration and Notification Act registration pending appeal.** *State v. Myers*, 2010-NMCA-007, 147 N.M. 574, 226 P.3d 673, *rev'd*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

**Stay of registration pending appeal.** — Where defendant was convicted of sexual exploitation of children by manufacturing child pornography; the diagnostic evaluation of defendant concluded that defendant is not a pedophile and that with treatment, defendant's risk of re-offending was low; defendant was required to inform the sheriff's department of defendant's current residence and work location and update the information with any changes; and the trial court released defendant pending appeal, the trial court did not abuse its discretion by staying defendant's registration as a sex offender pending the outcome of the appeal. *State v. Myers*, 2010-NMCA-007, 147 N.M. 574, 226 P.3d 673, *rev'd*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

**Not applicable to Native Americans.** — The state does not have authority to require an Indian who was



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convicted of a sex offense in a court other than a New Mexico state court, is an Indian living in Indian country, and is not attending school or employed outside of Indian country, to comply with the requirements of Sex Offender Registration and Notification Act. *State v. Atcitty*, 2009-NMCA-086, 146 N.M. 781, 215 P.3d 90, cert. quashed, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

**Insufficient evidence that defendant willfully failed to register.** — Where the defendant was released from probation on the defendant's convictions for sex offenses in 1998; the defendant registered in 2003 after the defendant received a letter informing the defendant that the defendant was required to register; the defendant registered in 2004, but failed to register after 2004; the defendant's judgment and sentence for sex offenses, which was entered before the enactment of the Sex Offender Registration and Notification Act, did not mention any requirement that the defendant register as a sex offender; there was no evidence that when the defendant was released from probation, the defendant was informed of a duty to register as a sex offender; when the deputy sheriff validated the defendant's sex offender registry information he did not inform the defendant that the defendant had a continuing duty to register annually; there was no evidence that when the defendant registered in 2003 and 2004, the defendant was informed that he had the duty to register annually, the evidence failed to show that the defendant willfully failed to comply with the annual registration requirements. *State v. Billington*, 2009-NMCA-014, 145 N.M. 526, 201 P.3d 857, cert. denied, 2009-NMCERT-001, 145 N.M. 655, 203 P.3d 870.

**The only issue raised by an appeal of a conviction for failure to register as a sex offender** is whether the defendant's failure to register was willful. *State v. Burke*, 2008-NMSC-052, 144 N.M. 772, 192 P.3d 767, *rev'g* 2007-NMCA-093, 142 N.M. 218, 164 P.3d 99.

**The sheriff has discretion to adopt reasonable time, place and manner restrictions** on the process of registration of sex offenders. *State v. Burke*, 2007-NMCA-093, 142 N.M. 218, 164 P.3d 99, *rev'd*, 2008-NMSC-052, 144 N.M. 772, 192 P.3d 767.

**A protocol that restricted the time when sex offenders could register** to the hours between 1:00 and 4:00 on Wednesday afternoon was reasonable. *State v. Burke*, 2007-NMCA-093, 142 N.M. 218, 164 P.3d 99, *rev'd*, 2008-NMSC-052, 144 N.M. 772, 192 P.3d 767.

**No violation of due process.** — Court's failure to advise defendant, at the time of his plea, of sex offender registration consequences under New Mexico's Sex Offender Registration and Notification Act did not violate due process of law. *State v. Moore*, 2004-NMCA-035, 135 N.M. 210, 86 P.3d 635.

**Multiple convictions for failure to register violated double jeopardy.** — Where defendant was convicted of third degree criminal sexual penetration, and was thereafter required to register as a sex offender pursuant to the Sex Offender Registration and Notification Act, 29-11A-1 to -10 NMSA 1978, which required that he register every ninety days and also within ten days of changing his address, and where during a certain period of time defendant was evicted and required to move out of his home which resulted in defendant missing both statutory deadlines, defendant's multiple convictions for failure to register violated his right to be free from double jeopardy, because the legislature's use of "any" in Subsection P indicates that it contemplated that more than one violation may occur within a given period of non-compliance before the offender next registers, and expressly stated that those violations are part of a continuing transaction or occurrence such that defendant may only be charged with one offense. *State v. Cain*, 2019-NMCA-059, cert. denied.

**Act does not constitute punishment.** — Although the notification and registration provisions under Sex Offender Registration and Notification Act are immediate and automatic, they do not constitute punishment for a crime. *State v. Moore*, 2004-NMCA-035, 135 N.M. 210, 86 P.3d 635.

**Registration and notification consequences are collateral.** — Sex offender registration law consequences are collateral consequences of a plea and therefore not consequences that require a court, under the due process clause, to advise a defendant of the consequences of registration under Sex Offender Registration and Notification Act. *State v. Moore*, 2004-NMCA-035, 135 N.M. 210, 86 P.3d 635.

**Role of court.** — The court does not impose Sex Offender Registration and Notification Act provisions or have discretion to modify them in accepting a plea. *State v. Moore*, 2004-NMCA-035, 135 N.M. 210, 86 P.3d 635.

Where defendant was charged with crimes that require, on conviction, registration under SORNA and where defendant pleaded no contest to crimes that do not require registration, district court did not have the authority to include, as a condition of defendant's probation, that defendant provide the sheriff information required under SORNA and to give the sheriff the discretion to process the information under SORNA. *State v. Williams*, 2006-NMCA-092, 140 N.M. 194, 141 P.3d 538.

**Effect of vacated conviction.** — Where petitioner positioned petitioner's truck across the roadway to block the path of the victim's car, entered the victim's car and raped the victim; petitioner was convicted of first-degree kidnapping and second-degree criminal sexual penetration; petitioner was required to register as a sex offender; the court of appeals vacated the rape conviction because petitioner's conviction for both first-degree kidnapping and rape would result in double punishment for the same conduct in violation of the double jeopardy clause; petitioner argued that petitioner was no longer required to register as a sex offender; the jury found petitioner guilty of both first-degree kidnapping and rape based on the same conduct; and the elements of first-degree kidnapping were supported by the elements of the rape conviction, petitioner was required to register as a sex offender. *Montoya v. Driggers*, 2014-NMSC-009.

**Effect of dismissed charges.** — When a deferred sentence expires and charges are dismissed, a conviction is not eradicated under the Sex Offender Registration and Notification Act, Chapter 29, Article 11A NMSA 1978; therefore, the defendant is still subject to the registration requirements of this section. *State v. Brothers*, 2002-NMCA-110, 133 N.M. 36, 59 P.3d 1268, cert. denied, 133 N.M. 30, 59 P.3d 1262.

**Effect of conditional discharge.** — A person granted a conditional discharge under Section 31-20-13 NMSA 1978 is not required to register as a sex offender under this section. *State v. Herbstman*, 1999-NMCA-014, 126 N.M. 683, 974 P.2d 177.

**Effect of release from incarceration.** — A registered sex offender is required to renew the offender's registration upon release from custody of the corrections department on unrelated charges if the offender returns to the offender's previous registered residence. *State v. Parrish*, 2013-NMCA-066, 304 P.3d 730, cert. denied, 2013-NMCERT-004.

Where defendant was a convicted sex offender and was properly registered; defendant was subsequently incarcerated in a department of corrections facility on an unrelated matter; on the day of defendant's release from the facility, defendant was given a copy of the department's notice to register form, which defendant signed and which stated that a convicted sex offender was required to register after being released from custody; and defendant returned to defendant's registered residence, defendant was required to register upon release from custody. *State*



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*v. Parrish*, 2013-NMCA-066, 304 P.3d 730, cert. denied, 2013-NMCERT-004.

## 29-11A-4.1. Procedures when a sex offender moves from New Mexico to another state.

A. If a sex offender intends to move from New Mexico to another state, no later than thirty days prior to moving to the other state, he shall:

(1) notify the county sheriff of the county he resides in that he is moving to the other state; and

(2) provide the county sheriff with a written notice that identifies the state to which the sex offender is moving.

B. Within five days of receiving a sex offender's written notice of intent to move to another state, the county sheriff shall transmit that information to the department of public safety. Within five days of receiving that information from a county sheriff, the department shall contact the state agency responsible for registering sex offenders in the state to which the sex offender is moving. The department shall provide that state agency with registration information regarding the sex offender. The department shall also obtain information regarding registration requirements for sex offenders in the state to which the sex offender is moving. The department shall provide the sex offender with written notification of the registration requirements in the state to which the sex offender is moving.

C. A sex offender who willfully fails to comply with the requirements set forth in this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: Laws 2000, ch. 8, § 6; 2005, ch. 279, § 3.**

**The 2005 amendment,** effective July 1, 2005, deleted the former provision in Subsection C that the crime is a misdemeanor punishable by imprisonment for a definite term of not less that one year or a fine of not more that $1,000, or both; and provided in Subsection C that the crime is a fourth degree felony punishable as provided in Section 31-18-15 NMSA 1978.

**Applicability.** — Laws 2005, ch. 279, §14, effective July 1, 2005, provided that Laws 2005, ch. 279, §§ 1 through 13 apply to a person convicted of a sex offense on or after July 1, 2005 and a person convicted of a sex offense prior to July 1, 2005 and who, on July 1, 2005, was still incarcerated, on probation or on parole for commission of that sex offense.

## 29-11A-5. Local registry; central registry; administration by department of public safety; participation in the national sex offender registry; rules.

A. A county sheriff shall maintain a local registry of sex offenders in the sheriff's jurisdiction required to register pursuant to the provisions of the Sex Offender Registration and Notification Act.

B. The county sheriff shall forward:

(1) registration information obtained from sex offenders to the department of public safety. The initial registration information and any new registration information subsequently obtained from a sex offender shall be forwarded by the county sheriff no later than ten working days after the information is obtained from a sex offender. If the department of public safety receives information regarding a sex offender from a governmental entity other than a county sheriff, the department shall send that information to the sheriff for the county in which the sex offender resides; and

(2) samples of DNA obtained from sex offenders to the administrative center for the sex offender DNA identification system pursuant to the provisions of the DNA Identification Act [Chapter 29, Article 16 NMSA 1978].

C. The department of public safety shall maintain a central registry of sex offenders required to register pursuant to the provisions of the Sex Offender Registration and Notification Act. The department shall participate in the national sex offender registry administered by the United States department of justice. The department shall send conviction information and fingerprints



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for all sex offenders registered in New Mexico to the national sex offender registry administered by the United States department of justice and to the federal bureau of investigation.

D. The department of public safety shall retain registration information regarding a sex offender convicted for any of the following sex offenses for the entirety of the sex offender's natural life:

(1) aggravated criminal sexual penetration or criminal sexual penetration in the first, second or third degree, as provided in Section 30-9-11 NMSA 1978;

(2) criminal sexual contact of a minor in the second, third or fourth degree, as provided in Section 30-9-13 NMSA 1978;

(3) sexual exploitation of children, as provided in Section 30-6A-3 NMSA 1978;

(4) kidnapping, as provided in Section 30-4-1 NMSA 1978, when the victim is less than eighteen years of age and the offender is not a parent of the victim;

(5) criminal sexual contact in the fourth degree, as provided in Section 30-9-12 NMSA 1978; or

(6) attempt to commit any of the sex offenses set forth in Paragraphs (1) through (5) of this subsection, as provided in Section 30-28-1 NMSA 1978.

E. The department of public safety shall retain registration information regarding a sex offender convicted for the following offenses for a period of ten years following the sex offender's conviction, release from prison or release from probation or parole, whichever occurs later:

(1) criminal sexual penetration in the fourth degree, as provided in Section 30-9-11 NMSA 1978;

(2) sexual exploitation of children by prostitution, as provided in Section 30-6A-4 NMSA 1978;

(3) false imprisonment, as provided in Section 30-4-3 NMSA 1978, when the victim is less than eighteen years of age and the offender is not a parent of the victim;

(4) aggravated indecent exposure, as provided in Section 30-9-14.3 NMSA 1978;

(5) enticement of child, as provided in Section 30-9-1 NMSA 1978;

(6) incest, as provided in Section 30-10-3 NMSA 1978, when the victim is less than eighteen years of age;

(7) solicitation to commit criminal sexual contact of a minor in the second, third or fourth degree, as provided in Sections 30-9-13 and 30-28-3 NMSA 1978;

(8) child solicitation by electronic communication device, as provided in Section 30-37-3.2 NMSA 1978; or

(9) attempt to commit any of the sex offenses set forth in Paragraphs (1) through (6) of this subsection, as provided in Section 30-28-1 NMSA 1978.

F. Notwithstanding the provisions of Subsection E of this section, if a sex offender is convicted a second or subsequent time for a sex offense set forth in that subsection, the department of public safety shall retain information regarding the sex offender for the entirety of the sex offender's natural life.

G. The department of public safety shall adopt rules necessary to carry out the provisions of the Sex Offender Registration and Notification Act. Rules necessary for the collection of DNA samples and the administration and operation of the sex offender DNA identification system shall be adopted by the DNA identification system oversight committee pursuant to the provisions of the DNA Identification Act.

**History: Laws 1995, ch. 106, § 5; 1999, ch. 19, § 5; 2000, ch. 8, § 3; 2003 (1st S.S.), ch. 1, § 11; 2005, ch. 279, § 4; 2007, ch. 68, § 2; 2007, ch. 69, § 6.**

**2007 Multiple Amendments.** — Laws 2007, ch. 68, § 2 and Laws 2007, ch. 69, § 6 enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2007, ch. 69, § 6, as the last act signed by the governor, is set out above and incorporates both amendments. The amendments enacted by Laws 2007, ch. 68, § 2 and Laws 2007, ch. 69, § 6 are described below. To view the session laws in their entirety, *see* the 2007 session laws on *NMOneSource.com*.

Laws 2007, ch. 69, § 6, effective July 1, 2007, required the department of public safety to retain registration information regarding a sex offender convicted of aggravated criminal sexual penetration.

Laws 2007, ch. 68, § 2, effective July 1, 2007, required the department of public safety to retain registration information regarding sex offenders convicted of child solicitation by electronic communication device.

**The 2005 amendment,** effective July 1, 2005, added Subsection B(2) to provide that the sheriff shall forward samples of DNA obtained from sex offenders to the administrative center for the sex offender DNA identification system; deleted the former provision in Subsection D



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that the department shall retain registration information for a period of twenty years after a sex offender's conviction, release from prison or release from probation or parole, whichever is later; provided in Subsection D that the department shall retain registration information for the natural life of a sex offender; added criminal sexual penetration in the third degree in Subsection D(1); added criminal sexual contact of a minor in the fourth degree in Subsection D(2); added criminal sexual contract in the fourth degree, as provided in Section 30-9-12 NMSA 1978 in Subsection D(5); deleted the former reference to criminal sexual contact in the fourth degree as provided in Section 30-9-12 NMSA 1978 in Subsection E(2); deleted the former reference to criminal sexual contact of a minor in the fourth degree as provided in Section 30-9-13 NMSA 1978 in Subsection E(3); added the reference to aggravated indecent exposure in Subsection E(4); added enticement of child in Subsection E(5); added incest when the victim is less than eighteen years of age in Subsection E(6); added Subsection F to provide that if a sex offender is convicted a second or subsequent time for a sex offence set forth in Subsection E, the department shall retain information regarding that sex offender for the sex offender's natural life; and provided in Subsection G that the DNA identification system oversight committee shall adopt rules for the collection of DNA samples and the administration and operation of the sex offender DNA identification system.

**Applicability.** — Laws 2005, ch. 279, §14, effective July 1, 2005, provided that Laws 2005, ch. 279, §§ 1 through 13 apply to a person convicted of a sex offense on or after July 1, 2005 and a person convicted of a sex offense prior to July 1, 2005 and who, on July 1, 2005, was still incarcerated, on probation or on parole for commission of that sex offense.

**The 2003 (1st S.S.) amendment,** effective February 3, 2004, deleted "county" preceding "sheriff" near the end of the last sentence of Subsection B, inserted "second or" in Paragraph (2) and deleted "Subsection A, B or C of" preceding "Section" in Paragraph (3) of Subsection D, and inserted "second" in Paragraph (6) of Subsection E.

**The 2000 amendment,** effective July 1, 2000, inserted "initial" and "and any new registration information subsequently obtained from a sex offender" in the second sentence and added the last sentence in Subsection B; added the last sentence in Subsection C, added a new Subsection D(4) and redesignated former Subsection D(4) as present Subsection D(5); added a new Subsection E(5) and redesignated former Subsections E(5) and E(6) as present Subsections E(6) and E(7).

**The 1999 amendment,** effective July 1, 1999, in the section heading substituted "participation in the national sex offender registry" for "exchange of registration information with other states" and deleted "and regulations" following "rules"; inserted "and Notification" in Subsections A, C and F; substituted the language following "The department" through the end for "may enter into interstate compact agreements providing for the exchange of information regarding sex offenders, provided that the other state does not permit dissemination of information regarding sex offenders to any persons or entities other than law enforcement agencies" in the last sentence of Subsection C; added Paragraphs D(4), E(5) and E(6); and deleted "and regulations" following "rules" in Subsection F.

**ANNOTATIONS**

**Application of multiple amendments of definition of "sex offense".** — Where in 2012, defendant pled guilty to the charge of solicitation of a child by electronic communication device; in 2007, the legislature enacted two acts amending Sections 29-11A-3 and 29-11A-5 NMSA 1978 which were signed on the same day by the governor; Laws 2007, ch. 68 created the new criminal offense of child solicitation by electronic communication device; Laws 2007, ch. 69 created the new crime of aggravated criminal sexual penetration; in 2012, Section 12-1-8 NMSA 1978provided that if, in the same legislative session, the legislature enacted two or more acts amending the same section of the New Mexico Statutes Annotated, then the last act signed by the governor is presumed to be the law and shall be compiled into the NMSA; and Laws 2007, ch. 69 was compiled into the NMSA, child solicitation by electronic communication device was not a SORNA-covered crime in 2012 when defendant pled guilty and defendant was not subject to SORNA. *State v. Ho*, 2014-NMCA-038, cert. granted, 2014-NMCERT-003.

## 29-11A-5.1. Public access to information regarding certain registered sex offenders; active community notification; internet web site.

A. If a sex offender is convicted of one of the following sex offenses, the county sheriff shall forward registration information obtained from the sex offender to the district attorney for the judicial district in which the sex offender resides and, if the sex offender is a resident of a municipality, the chief law enforcement officer for the municipality in which the sex offender resides:

(1) aggravated criminal sexual penetration or criminal sexual penetration in the first, second or third degree, as provided in Section 30-9-11 NMSA 1978;

(2) criminal sexual contact of a minor in the second, third or fourth degree, as provided in Section 30-9-13 NMSA 1978;

(3) sexual exploitation of children, as provided in Section 30-6A-3 NMSA 1978;

(4) sexual exploitation of children by prostitution, as provided in Section 30-6A-4 NMSA 1978; or

(5) attempt to commit any of the sex offenses set forth in Paragraphs (1) through (4) of this subsection, as provided in Section 30-28-1 NMSA 1978.

B. A person who wants to obtain registration information regarding sex offenders described in Subsection A of this section may request that information from the:

(1) sheriff for the county in which the sex offenders reside;



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(2) chief law enforcement officer for the municipality in which the sex offenders reside;

(3) district attorney for the judicial district in which the sex offenders reside; or

(4) secretary of public safety.

C. Upon receiving a request for registration information regarding sex offenders described in Subsection A of this section, the county sheriff, chief municipal law enforcement officer, district attorney or secretary of public safety shall provide that registration information, with the exception of a sex offender's social security number and DNA information, within a reasonable period of time, and no later than seven days after receiving the request.

D. Within seven days of receiving registration information from a sex offender described in Subsection A of this section, the county sheriff shall contact every licensed daycare center, elementary school, middle school and high school within a one-mile radius of the sex offender's residence and provide them with the sex offender's registration information, with the exception of the sex offender's social security number and DNA information.

E. The department shall establish and manage an internet web site that provides the public with registration information regarding sex offenders described in Subsection A of this section, except that the department shall not provide registration information on the internet web site regarding a sex offender who was less than eighteen years of age when the sex offender committed the sex offense for which the sex offender was convicted as a youthful offender, as provided in Section 32A-2-3 NMSA 1978, unless at the time of sentencing, the court made a finding that the sex offender is not amenable to treatment and is a danger to the community. The registration information provided to the public pursuant to this subsection shall not include a sex offender's social security number or DNA information or the identity of a sex offender's place of employment, unless the sex offender's employment requires the sex offender to have direct contact with children. The internet web site shall provide only the following registration information:

(1) the sex offender's legal name and any other names or aliases that the sex offender is using or has used;

(2) the sex offender's current address and the address of every place where the sex offender habitually lives;

(3) if the sex offender's employment involves direct contact with children, the sex offender's place of employment;

(4) the sex offenses for which the sex offender has been convicted;

(5) a photograph of the sex offender;

(6) the sex offender's date of birth;

(7) a physical description, including a description of any tattoos, scars or other distinguishing features on the sex offender's body that would assist in identifying the sex offender; and

(8) a link that will pinpoint the location of the sex offender's place of employment if the sex offender has direct contact with children.

**History: Laws 1999, ch. 19, § 8; 2000, ch. 8, § 4; 2003 (1st S.S.), ch. 1, § 12; 2005, ch. 279, § 5; 2007, ch. 69, § 7; 2013, ch. 152, § 3.**

**The 2013 amendment,** effective July 1, 2013, provided for the availability of information on the sex offender internet web site; in Subsection E, in the introductory paragraph, in the second sentence, after "DNA information or", added "the identity", added the third introductory sentence; and added Paragraphs (1) through (8) of Subsection E.

**Applicability.** — Laws 2013, ch. 152, § 5 provided that the provisions of the amendments to the Sex Offender Registration and Notification Act enacted by Laws 2013, ch. 152 are applicable to a person who, on or after July 1, 2013, is found guilty of committing a sex offense.

**The 2007 amendment,** effective July 1, 2007, amended Subsection A to add a request that the sheriff forward registration information regarding a sex offender convicted of aggravated criminal sexual penetration to district attorneys and municipalities.

**The 2005 amendment,** effective July 1, 2005, adds criminal sexual penetration in the third degree in Subsection A(1); provides in Subsection C that DNA information shall not be disclosed to a person requesting registration information; provides in Subsection D that DNA information shall not be disclosed to daycare centers or schools; provides in Subsection E that the department shall establish a web site and that the department shall not provide information on the web site regarding a sex offender who was less than eighteen years of age when he committed the sex offense unless the sentencing court found that the sex offender is not amenable to treatment and is a danger to the community or regarding DNA information.

**The 2003 (1st S.S.) amendment,** effective February 3, 2004, deleted "Subsection A, B or C of" preceding "Section" in Paragraph (3) of Subsection A and "county" preceding "sheriff" in Paragraph (1) of Subsection B.

**The 2000 amendment,** effective July 1, 2000, inserted "active community notification; internet web site" in the section heading, rewrote Subsection C, which formerly read "All requests for registration information regarding a sex offender described in Subsection A of this section



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are subject to the provisions of the Inspection of Public Records Act", and added Subsections D and E.

**Applicability.** — Laws 1999, ch. 19, § 11 makes the provisions §§ 1 to 9 of the act applicable to persons convicted of a sex offense committed on or after July 1, 1999. As to persons convicted of a sex offense committed prior to July 1, 1999, the laws with respect to registration requirements for sex offenders in effect at the time the sex offense was committed shall apply.

Laws 2005, ch. 279, §14, effective July 1, 2005, provided that Laws 2005, ch. 279, §§ 1 through 13 apply to a person convicted of a sex offense on or after July 1, 2005 and a person convicted of a sex offense prior to July 1, 2005 and who, on July 1, 2005, was still incarcerated, on probation or on parole for commission of that sex offense.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and application of state statutes authorizing community notification of release of convicted sex offender, 78 A.L.R.5th 489.

## 29-11A-6. Repealed.

**Repeals.** — Laws 1999, ch. 19, § 9 repealed 29-11A-6 NMSA 1978, as enacted by Laws 1995, ch. 106, § 6, relating to restrictions on the dissemination of information regarding sex offenders. For provisions of former section, *see* the 1998 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 29-11A-5.1 NMSA 1978.

## 29-11A-7. Notice to sex offenders of duty to register.

A. A court shall provide a sex offender convicted in that court with written notice of his duty to register pursuant to the provisions of the Sex Offender Registration and Notification Act. The written notice shall be included in judgment and sentence forms provided to the sex offender. The written notice shall inform the sex offender that he is required to:

(1) register with the county sheriff for the county in which the sex offender will reside or, if the sex offender will not have an established residence, with the county sheriff for each county in which the sex offender will live or be temporarily located pursuant to the provisions of the Sex Offender Registration and Notification Act;

(2) report subsequent changes of address pursuant to the provisions of the Sex Offender Registration and Notification Act;

(3) notify the county sheriff of the county he resides in if the sex offender intends to move to another state and that the sex offender is required to register in the other state pursuant to the provisions of the Sex Offender Registration and Notification Act;

(4) disclose his status as a sex offender in writing when he begins employment, begins a vocation or enrolls as a student at an institution of higher education in New Mexico to the county sheriff for the county in which the institution of higher education is located and to the law enforcement entity and registrar for the institution of higher education pursuant to the provisions of the Sex Offender Registration and Notification Act;

(5) provide written notice of any change regarding his employment, vocation or enrollment status at an institution of higher education to the county sheriff, the law enforcement entity and the registrar pursuant to the provisions of the Sex Offender Registration and Notification Act;

(6) disclose his status as a sex offender in writing when he enrolls as a student at a private or public school in New Mexico, to the county sheriff for the county in which the school is located and to the principal of the school pursuant to the provisions of the Sex Offender Registration and Notification Act;

(7) provide written notice of any change regarding his enrollment status at a public or private school in New Mexico to the county sheriff and the principal of the school pursuant to the provisions of the Sex Offender Registration and Notification Act;

(8) disclose his status as a sex offender in writing to his employer, supervisor or other person similarly situated, when he begins employment, begins a vocation or volunteers his services, regardless of whether the sex offender receives payment or other compensation, pursuant to the provisions of the Sex Offender Registration and Notification Act; and

(9) read and sign a form that indicates that the sex offender has received the written notice and that a responsible court official, designated by the chief judge for that judicial district, has explained the written notice to the sex offender.



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B. The corrections department, a municipal or county jail or a detention center at the time of release of a sex offender in its custody, shall provide a written notice to the sex offender of his duty to register, pursuant to the provisions of the Sex Offender Registration and Notification Act. The written notice shall inform the sex offender that he is required to:

(1) register with the county sheriff for the county in which the sex offender will reside or, if the sex offender will not have an established residence, with the county sheriff for each county in which the sex offender will live or be temporarily located pursuant to the provisions of the Sex Offender Registration and Notification Act;

(2) report subsequent changes of address pursuant to the provisions of the Sex Offender Registration and Notification Act;

(3) notify the county sheriff of the county he resides in if the sex offender intends to move to another state and that the sex offender is required to register in the other state pursuant to the provisions of the Sex Offender Registration and Notification Act;

(4) disclose his status as a sex offender in writing when he begins employment, begins a vocation or enrolls as a student at an institution of higher education in New Mexico to the county sheriff for the county in which the institution of higher education is located and to the law enforcement entity and registrar for the institution of higher education pursuant to the provisions of the Sex Offender Registration and Notification Act;

(5) provide written notice of any change regarding his employment, vocation or enrollment status at an institution of higher education to the county sheriff, the law enforcement entity and the registrar pursuant to the provisions of the Sex Offender Registration and Notification Act;

(6) disclose his status as a sex offender in writing when he enrolls as a student at a private or public school in New Mexico, to the county sheriff for the county in which the school is located and to the principal of the school pursuant to the provisions of the Sex Offender Registration and Notification Act;

(7) provide written notice of any change regarding his enrollment status at a public or private school in New Mexico to the county sheriff and the principal of the school pursuant to the provisions of the Sex Offender Registration and Notification Act;

(8) disclose his status as a sex offender in writing to his employer, supervisor or other person similarly situated, when he begins employment, begins a vocation or volunteers his services, regardless of whether the sex offender receives payment or other compensation, pursuant to the provisions of the Sex Offender Registration and Notification Act; and

(9) read and sign a form that indicates that the sex offender has received the written notice and that a responsible corrections department official, designated by the secretary of corrections, or a responsible municipal or county jail official or detention center official has explained the written notice to the sex offender.

C. A court, the corrections department, a municipal or county jail or a detention center shall also provide written notification regarding a sex offender's release to the sheriff of the county in which the sex offender is released and to the department of public safety.

D. The department of public safety, at the time it is notified by officials from another state that a sex offender will be establishing residence in New Mexico, shall provide written notice to the sex offender of his duty to register pursuant to the provisions of the Sex Offender Registration and Notification Act.

**History: Laws 1995, ch. 106, § 7; 1999, ch. 19, § 6; 2000, ch. 8, § 5; 2005, ch. 279, § 6.**

**The 2005 amendment,** effective July 1, 2005, provided in Subsection A(1) that the notice shall inform the sex offender that if he does not have an established address, he shall register with the sheriff of each county in which he will live or be temporarily located; added Subsections A(4) through (8) to provide that the notice shall inform the sex offender that he is required to disclose his status when he begins employment or a vocation or enrolls in an institution of higher education, provide notice of any changes in his employment, vocation or enrollment status, disclose his status as a sex offender when he enrolls at a private or public school; provide notice of any changes in his enrollment at a public or private school; disclose his status as a sex offender when he begins employment, a vocation or volunteers his services; provided in Subsection B that a municipal or county jail or detention center at the time of release of a sex offender shall provide notice to the sex offender of this duty to register; provided in Subsection B(1) that the notice shall inform the sex offender that if he will not have an established residence, he must register with the sheriff of each county in which he will live or be temporarily located; added Subsections B(4) through (8) to provide that the notice shall inform the sex offender that he is required to disclose his status when he begins employment or a vocation or enrolls in an institution of higher education, provide notice of any changes in



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his employment, vocation or enrollment status, disclose his status as a sex offender when he enrolls at a private or public school; provide notice of any changes in his enrollment at a public or private school; disclose his status as a sex offender when he begins employment, a vocation or volunteers his services; provided in Subsection B(9) that the sex offender shall sign a form that he has received the notice and that a responsible municipal or county jail official or detention center official has explained the notice to him; and provided in Subsection C that a municipal or county jail or a detention center shall provide notification to the sheriff of the county in which the sex offender is released and to the department.

**Applicability.** — Laws 2005, ch. 279, §14, effective July 1, 2005, provided that Laws 2005, ch. 279, §§ 1 through 13 apply to a person convicted of a sex offense on or after July 1, 2005 and a person convicted of a sex offense prior to July 1, 2005 and who, on July 1, 2005, was still incarcerated, on probation or on parole for commission of that sex offense.

**The 2000 amendment,** effective July 1, 2000, rewrote Subsections A and B, adding Paragraphs (1) to (4); designated the former last sentence in Subsection B as present Subsection C and redesignated former Subsection C as present Subsection D, in present Subsection C, added "and to the department of public safety" at the end; and, in Subsection D, substituted "notice" for "notification".

**Applicability.** — Laws 2000, ch. 8, § 9 made the provisions of this 2000 version of the Sex Offender Registration and Notification Act applicable to persons convicted of a sex offense on or after July 1, 1995 and to persons convicted of a sex offense prior to July 1, 1995 and who, on July 1, 1995, were incarcerated, on probation or on parole.

**The 1999 amendment,** effective July 1, 1999, inserted "and Notification" in Subsections A, B, and C, and substituted "convicted" for "adjudicated guilty" in Subsection A.

ANNOTATIONS

**Conditional discharge.** — Notice requiring defendant to register as a sex offender pursuant to this section did not need to be placed in a conditional discharge order. *State v. Herbstman*, 1999-NMCA-014, 126 N.M. 683, 974 P.2d 177.

**Jurisdiction of district court.** — Under its broad grant of jurisdiction and under the Sex Offender Registration and Notification Act, Chapter 29, Article 11A NMSA 1978, a district court has jurisdiction to determine whether a defendant is a sex offender and to give the defendant written notice of the registration requirements under this section; however, the court is not authorized to order defendant to comply with the registration requirement, that is a statutorily mandated duty under Section 29-11A-4 NMSA 1978. *State v. Brothers*, 2002-NMCA-110, 133 N.M. 36, 59 P.3d 1268, cert. denied, 133 N.M. 30, 59 P.3d 1262.

**Failure to advise a defendant of collateral sex offender registration requirements is per se deficient performance.** — A defense attorney's failure to advise a defendant entering into a plea which requires Sex Offender Registration and Notification Act registration of that consequence is per se deficient performance under the first prong of the Strickland test. *State v. Trammell*, 2016-NMSC-030, *rev'g* 2014-NMCA-107, 336 P.3d 977.

Where defendant, who stole a truck, unaware that there was a twelve-year-old boy in the back seat, pleaded guilty to false imprisonment of a minor, which at the time was a sex offense requiring registration under the Sex Offender Registration and Notification Act (SORNA), and where, prior to defendant's plea, defense counsel failed to advise defendant of the SORNA registration consequences of his guilty plea, defendant's attorney's performance was per se deficient, because the failure to advise a defendant of collateral SORNA registration requirements has been a well-established prerequisite to the effective assistance of counsel when arranging a plea agreement, but defendant's claim of ineffective assistance of counsel failed, because defendant failed to establish a reasonable probability that, but for defense counsel's unprofessional errors, he would not have pleaded guilty and instead gone to trial, based on defendant's testimony that had he been advised that he was pleading to a sex offense, he would have tried to negotiate a different plea agreement, the fact that defendant received some benefits by accepting the plea, and that the state had a strong case against defendant. *State v. Trammell*, 2016-NMSC-030, *rev'g* 2014-NMCA-107, 336 P.3d 977.

## 29-11A-8. Immunity.

Nothing in the Sex Offender Registration and Notification Act creates a cause of action on behalf of a person against a public employer, public employee or public agency responsible for enforcement of the provisions of that act, so long as the public employer, public employee or public agency complies with the provisions of that act.

**History: Laws 1995, ch. 106, § 8; 1999, ch. 19, § 7.**

**The 1999 amendment,** effective July 1, 1999, inserted "and Notification".

**Severability.** — Laws 1995, ch. 106, § 9 provided for the severability of the act if any part or application thereof is held invalid.

## 29-11A-9. State preemption; saving clause.

A. The state preempts the field of sex offender registration and notification. Cities, counties, home rule municipalities and other political subdivisions of the state are prohibited from adopting or continuing in effect any ordinance, rule, regulation, resolution or statute on sex offender registration and notification and from imposing any other restrictions on sex offenders that are not included in the Sex Offender Registration and Notification Act. The department, cities, counties, home rule municipalities and other political subdivisions of the state shall not require a sex offender to report or to register more frequently or to provide information not required by the Sex Offender Registration and Notification Act.



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B. After January 18, 2005, cities, counties, home rule municipalities and other political subdivisions of the state are prohibited from adopting or amending an ordinance, rule, regulation or resolution on sex offender registration and notification. An ordinance in effect on January 18, 2005 shall continue in force and effect until repealed; provided that the ordinance shall only continue in force and effect with regard to sex offenders who are required to register pursuant to the provisions of the ordinance but who are not required to register pursuant to the provisions of the Sex Offender Registration and Notification Act. All other sex offenders shall register pursuant to the provisions of the Sex Offender Registration and Notification Act.

**History: Laws 2005, ch. 279, § 7; 2013, ch. 152, § 4.**

**The 2013 amendment,** effective July 1, 2013, reiterated state preemption of the field of sex offender registration; prohibited law enforcement from requiring additional registration or from imposing other restrictions; in Subsection A, in the second sentence, after "registration and notification", added the remainder of the sentence and added the second sentence.

**Applicability.** — Laws 2013, ch. 152, § 5 provided that the provisions of the amendments to the Sex Offender Registration and Notification Act enacted by Laws 2013, ch. 152 are applicable to a person who, on or after July 1, 2013, is found guilty of committing a sex offense.

Laws 2005, ch. 279, §14, effective July 1, 2005, provided that Laws 2005, ch. 279, §§ 1 through 13 apply to a person convicted of a sex offense on or after July 1, 2005 and a person convicted of a sex offense prior to July 1, 2005 and who, on July 1, 2005, was still incarcerated, on probation or on parole for commission of that sex offense.

ANNOTATIONS

**More restrictive city ordinance not preempted.** — The Albuquerque Sex Offender Registration and Notification Act ordinance did not conflict with state law even though the ordinance was more restrictive than state law because the ordinance required a broader class of sex offenders to register than did state law, sex offenders who are required to register under state law are not required to register under the ordinance, and the ordinance required sex offenders to provide more detailed information than did state law. *ACLU v. City of Albuquerque*, 2006-NMCA-078, 139 N.M. 761, 137 P.3d 1215.

## 29-11A-10. Severability.

If any part or application of the Sex Offender Registration and Notification Act is held invalid, the remainder of that act and its application to other situations or persons shall not be affected.

**History: Laws 2005, ch. 279, § 8.**

**Effective dates.** — Laws 2005, ch. 279, § 15 made the act effective July 1, 2005.

**Applicability.** — Laws 2005, ch. 279, §14, effective July 1, 2005, provided that Laws 2005, ch. 279, §§ 1 through 13 apply to a person convicted of a sex offense on or after July 1, 2005 and a person convicted of a sex offense prior to July 1, 2005 and who, on July 1, 2005, was still incarcerated, on probation or on parole for commission of that sex offense.

# ARTICLE 12

# Crime Stoppers Commission

(Repealed by Laws 1990, ch. 17, § 1.)

## 29-12-1 to 29-12-4. Repealed.

**Repeals.** — Laws 1990, ch. 17, § 1 repealed 29-12-1 to 29-12-4 NMSA 1978, as enacted by Laws 1979, ch. 142, § 1, and amended by Laws 1987, ch. 139, § 1, creating the crime stoppers commission, effective July 1, 2000. For provisions of former sections, *see* the 1989 NMSA 1978 on *NMOneSource.com*. For similar present provisions, *see* 29-12A-1 NMSA 1978.

# ARTICLE 12A

# Crime Stoppers

Sec.

29-12A-1. Short title.
29-12A-2. Advisory council; composition; vacancies; payment.
29-12A-3. Powers and duties of advisory council.
29-12A-4. Confidentiality of records.
29-12A-5. Confidentiality; penalty.
29-12A-6. Immunity from liability.



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## 29-12A-1. Short title.

This act [29-12A-1 to 29-12A-6 NMSA 1978] may be cited as the "Crime Stoppers Act".

**History: Laws 2003, ch. 249, § 1.**
**Effective dates.** — Laws 2003, ch. 249 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 20, 2003, 90 days after adjournment of the legislature.

## 29-12A-2. Advisory council; composition; vacancies; payment.

A. The "crime stoppers advisory council" is created. The council shall consist of five members from local crime stoppers programs, four of whom shall be from the four quadrants of the state and one from Albuquerque. All members of the council shall be appointed by the governor for two-year terms.

B. A vacancy on the council shall be filled by gubernatorial appointment for the remainder of the unexpired term. A vacancy on the council shall not impair the right of the remaining members to exercise all the powers and duties of the council.

C. Members of the council shall receive per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 NMSA 1978] and shall receive no other compensation or allowance.

**History: Laws 2003, ch. 249, § 2.**
**Effective dates.** — Laws 2003, ch. 249 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 20, 2003, 90 days after adjournment of the legislature.

## 29-12A-3. Powers and duties of advisory council.

A. The powers and duties of the crime stoppers advisory council are to:

(1) advise and assist in the creation and maintenance of local crime stoppers programs;

(2) certify local crime stoppers programs for the purposes of confidentiality of records, privileges and immunities set forth in the Crime Stoppers Act;

(3) encourage the media to promote the functions of local crime stoppers programs; and

(4) facilitate training for local crime stoppers programs.

B. The council shall not take part in the receipt of reports or tips regarding criminal activity.

**History: Laws 2003, ch. 249, § 3.**
**Effective dates.** — Laws 2003, ch. 249 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 20, 2003, 90 days after adjournment of the legislature.

## 29-12A-4. Confidentiality of records.

A. Evidence of a communication between a person submitting a report to a local crime stoppers program and the person accepting the report on behalf of the program is not admissible in a court or an administrative proceeding, except as provided in Subsection B of this section.

B. Records and reports of a local crime stoppers program are confidential and shall not be produced before a court or other tribunal, except on a motion by:

(1) a criminal defendant claiming that a record or report contains specific evidence that is exculpatory to the defendant on trial for that offense; or

(2) a person in civil court who has been exonerated of a criminal charge that was filed as a result of a report to a local crime stoppers program, and denial of access to a record or report would leave the person without the ability to offer prima facie proof that a legal injury was suffered through the wrongful acts of another.

C. Upon motion made pursuant to Subsection B of this section, a court may subpoena a record or report, but shall conduct an in camera inspection of the materials produced to determine whether there is evidence as alleged to warrant disclosure pursuant to Subsection B of this section. If the court finds such evidence, the court shall determine how much of the evidence to disclose and whether the identity of the person who submitted the report to the local crime stoppers program must be disclosed.



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D. The court shall protect the identity of a person who submits a report to a local crime stoppers program as it would protect the identity of a confidential police informer.

E. A local crime stoppers program shall be certified by the crime stoppers advisory council before it can claim confidentiality under this section.

**History: Laws 2003, ch. 249, § 4.**
**Effective dates.** — Laws 2003, ch. 249 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 20, 2003, 90 days after adjournment of the legislature.

## 29-12A-5. Confidentiality; penalty.

A. It is unlawful for any member, officer or employee of a local crime stoppers program to reveal to an individual, other than the proper law enforcement agencies:

(1) information gained through the program relating to criminal activity; or

(2) the contents of records and reports that are confidential.

B. A person who violates Subsection A of this section is guilty of a misdemeanor and shall be sentenced in accordance with Section 31-19-1 NMSA 1978.

**History: Laws 2003, ch. 249, § 5.**
**Effective dates.** — Laws 2003, ch. 249 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 20, 2003, 90 days after adjournment of the legislature.

## 29-12A-6. Immunity from liability.

A person who in good faith communicates a report of criminal activity to a crime stoppers program or who in good faith receives, forwards or acts upon such a report is immune from civil liability for any act or omission resulting in the arrest, filing of criminal charges or trial of a person who is later exonerated or acquitted of a criminal charge.

**History: Laws 2003, ch. 249, § 6.**
**Effective dates.** — Laws 2003, ch. 249 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 20, 2003, 90 days after adjournment of the legislature.

# ARTICLE 13

# Law Enforcement Protection Fund

Sec.
29-13-1. Short title.
29-13-2. Purpose of act.
29-13-2.1. Definitions.
29-13-3. Distribution of certain insurance collections; law enforcement protection fund created.
29-13-3. Distribution of certain insurance collections; law enforcement protection fund created. (Effective July 1, 2023.)
29-13-4. Determination of needs and rate of distribution.
29-13-5. Determination of needs; review.
29-13-6. Distribution of law enforcement protection fund.
29-13-7. Expenditure limitation; control.
29-13-8. Rules and regulations.
29-13-9. Expenditures of money distributed from the law enforcement protection fund; wrongful expenditure.

## 29-13-1. Short title.

Chapter 29, Article 13 NMSA 1978 may be cited as the "Law Enforcement Protection Fund Act".

**History: Laws 1983, ch. 289, § 1; 1993, ch. 179, § 2.**

**The 1993 amendment,** effective June 18, 1993, substituted "Chapter 29, Article 13 NMSA 1978" for "The provisions of Sections 1 through 9 of this act".



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## 29-13-2. Purpose of act.

The purpose of the Law Enforcement Protection Fund Act is to provide for the equitable distribution of money to state police, municipal police, university police, tribal police, county sheriff's and school district police departments for use in the maintenance and improvement of those departments in order to enhance the efficiency and effectiveness of law enforcement services and to sustain at a reasonable level the payments available to the surviving eligible family members of a peace officer killed in the line of duty.

**History: Laws 1983, ch. 289, § 2; 1993, ch. 179, § 3; 1998, ch. 83, § 1; 2002, ch. 78, § 4; 2020, ch. 67, § 2.**

**The 2020 amendment,** effective July 1, 2022, added state police and school district police to the departments that receive distributions from the law enforcement protection fund; and after "distribution of money to", added "state police" and after "county sheriff's", added "and school district police".

**The 2002 amendment,** effective May 15, 2002, inserted "and to sustain at a reasonable level the payments available to the surviving eligible family members of a peace officer killed in the line of duty" at the end of the section.

**The 1998 amendment,** effective March 9, 1998, substituted "police, university police" for "and" near the middle of the section.

**The 1993 amendment,** effective June 18, 1993, substituted "money" for "funds" and substituted "tribal police and county sheriff's departments" for "county police and sheriff departments".

## 29-13-2.1. Definitions.

As used in the Law Enforcement Protection Fund Act:

A. "academy" means the New Mexico law enforcement academy;

B. "division" means the local government division of the department of finance and administration;

C. "fund" means the law enforcement protection fund;

D. "governmental entity" means the academy, the department of public safety, a municipality, a county, a university, a tribe or a school district;

E. "school district police department" means a department of commissioned law enforcement officers who are charged with preventing, investigating and solving crimes on school district property;

F. "tribal police department" means the police department of a tribe that has entered into an agreement with the department of public safety pursuant to Section 29-1-11 NMSA 1978;

G. "tribe" means an Indian nation, tribe or pueblo located wholly or partly in New Mexico; and

H. "university" means a four-year post-secondary educational institution listed in Article 12, Section 11 of the constitution of New Mexico.

**History: 1978 Comp., § 29-13-2.1, enacted by Laws 1993, ch. 179, § 4; 1998, ch. 83, § 2; 2002, ch. 92, § 2; 2017, ch. 35, § 2; 2020, ch. 67, § 3.**

**The 2020 amendment,** effective July 1, 2022, revised the definition of "governmental entity" and defined "school district police department" as used in the Law Enforcement Protection Fund Act; in Subsection D, after "academy", added "the department of public safety", after "municipality", added "a county, a", and after "tribe or a", deleted "county" and added "school district"; and added a new Subsection E and redesignated the succeeding subsections accordingly.

**The 2017 amendment,** effective July 1, 2017, defined "academy" for purposes of the Law Enforcement Protection Fund Act; added a new Subsection A and redesignated the succeeding subsections accordingly; and in Subsection D, after "means", added "the academy".

**The 2002 amendment,** effective May 15, 2002, added Subsection E and redesignated former Subsection E as Subsection F.

**The 1998 amendment,** effective March 9, 1998, in Subsection C, inserted "university" near the middle and made a minor stylistic change, and added Subsection E.

## 29-13-3. Distribution of certain insurance collections; law enforcement protection fund created.

There is created in the state treasury the "law enforcement protection fund". Ten percent of all money received for fees, licenses and penalties from life, general casualty and title insurance business pursuant to the New Mexico Insurance Code [Chapter 59A NMSA 1978] shall be paid monthly to the state treasurer and credited to the fund. On or before June 30 of each year, the state treasurer shall transfer to the general fund any balance in the law enforcement protection



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fund in excess of one hundred thousand dollars ($100,000) that is not obligated for expenses in that current fiscal year.

**History: Laws 1983, ch. 289, § 3; 1985, ch. 29, § 1; 1988, ch. 96, § 1; 1993, ch. 179, § 5; 2003, ch. 202, § 1; 2004, ch. 122, § 1; 2017, ch. 1, § 1; 2018, ch. 57, § 12.**

**Cross references.** — For the general fund, *see* 6-4-2 NMSA 1978.

**The 2018 amendment,** effective January 1, 2020, removed the exception for the health insurance premium surtax from paying into the law enforcement protection fund; and after "New Mexico Insurance Code", deleted "except for money received from the health insurance premium surtax, imposed by Subsection C of Section 59A-6-2 NMSA 1978".

**Temporary provisions.** — Laws 2018, ch. 57, § 30 provided that:

A. On January 1, 2020, all personnel directly involved with the audit and collection of the taxes imposed pursuant to the New Mexico Insurance Code prior to the effective date of this act, functions, appropriations, money, records, furniture, equipment and other property of, or attributable to, the financial audit bureau of the office of superintendent of insurance shall be transferred to the taxation and revenue department.

B. On January 1, 2020, no contractual obligations of the office of superintendent of insurance shall be binding on the taxation and revenue department.

**The 2017 amendment,** effective June 16, 2017, modified the formula for the amount of funds that the state treasurer is required to transfer to the general fund from any balances in the law enforcement protection fund at the end each fiscal year; after "($100,000) that is not obligated", deleted "and that is in excess of the amount certified by the division to be distributed from that fund" and added "for expenses in that current fiscal year".

**The 2004 amendment,** effective July 1, 2004, amended this section to change "department" to "division" in the catchline and to insert after "New Mexico Insurance Code" "except for money received from the health insurance premium surtax imposed by Subsection C of Section 59A-6-2 NMSA 1978".

**The 2003 amendment,** effective June 20, 2003, substituted "monthly" for "daily" preceding "to the state treasurer".

**The 1993 amendment,** effective June 18, 1993, deleted "law enforcement protection" preceding "fund" near the end of the second sentence and rewrote the last sentence.

## *29-13-3. Distribution of certain insurance collections; law enforcement protection fund created. (Effective July 1, 2023.)*

*There is created in the state treasury the "law enforcement protection fund". Ten percent of all money received for fees, licenses and penalties from life, general casualty and title insurance business pursuant to the New Mexico Insurance Code [Chapter 59A NMSA 1978] shall be paid monthly to the state treasurer and credited to the fund. On or before June 30 of each year, the state treasurer shall transfer to the law enforcement retention fund any balance in the law enforcement protection fund in excess of one hundred thousand dollars ($100,000) that is not obligated for expenses in that current fiscal year.*

***History: Laws 1983, ch. 289, § 3; 1985, ch. 29, § 1; 1988, ch. 96, § 1; 1993, ch. 179, § 5; 2003, ch. 202, § 1; 2004, ch. 122, § 1; 2017, ch. 1, § 1; 2018, ch. 57, § 12; 2022, ch. 56, § 20.***

***The 2022 amendment,*** *effective July 1, 2023, redirected transfers from the law enforcement protection fund from the general fund to the law enforcement retention fund; and after "shall transfer to the", deleted "general fund" and added "law enforcement retention fund".*

## 29-13-4. Determination of needs and rate of distribution.

A. Annually on or before April 15, the division shall consider and determine the relative needs as requested by tribal, municipal, school district and university police departments, county sheriff's departments, the department of public safety and the academy for money in the fund in the succeeding fiscal year pursuant to the provisions of Subsections C and E of this section.

B. As necessary during the year, the division shall transfer an amount from the fund to the peace officers', New Mexico mounted patrol members' and reserve police officers' survivors fund that enables the balance of the peace officers', New Mexico mounted patrol members' and reserve police officers' survivors fund to be maintained at a minimum balance of three hundred fifty thousand dollars ($350,000) through fiscal year 2023 and one million dollars ($1,000,000) thereafter.

C. The division shall determine the rate of distribution of money in the fund as follows:

(1) all municipal police, school district police and county sheriff's departments shall be entitled to a rate of distribution of forty-five thousand dollars ($45,000) through fiscal year 2023 and ninety-five thousand dollars ($95,000) thereafter;



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(2) university police departments shall be entitled to a rate of distribution of forty-five thousand dollars ($45,000) through fiscal year 2023 and ninety-five thousand dollars ($95,000) thereafter;

(3) the academy shall be entitled to a rate of distribution of twenty-four thousand five hundred dollars ($24,500) to carry out the purposes of Section 29-7-7.7 NMSA 1978 and to a rate of distribution of two hundred thousand dollars ($200,000) to carry out the purposes of the Law Enforcement Training Act [Chapter 29, Article 7 NMSA 1978];

(4) tribal police departments shall be entitled, unless allocations are adjusted pursuant to the provisions of Subsection D of this section, to one thousand dollars ($1,000) through fiscal year 2023 and one thousand five hundred dollars ($1,500) thereafter for each commissioned peace officer in the tribe. To be counted as a commissioned peace officer for the purposes of this paragraph, a commissioned peace officer shall have been assigned to duty and have worked in New Mexico for no fewer than two hundred days in the calendar year immediately prior to the date of payment. Payments shall be made for only those divisions of the tribal police departments that perform services in New Mexico. A tribal police department shall not be eligible for any disbursement under the fund if commissioned peace officers cite non-Indians into the tribal court for civil or criminal citations;

(5) municipal, school district and university police and county sheriff's departments shall be entitled, unless allocations are adjusted pursuant to the provisions of Subsection D of this section, to one thousand dollars ($1,000) through fiscal year 2023 and one thousand five hundred dollars ($1,500) thereafter for each police officer or sheriff's deputy employed full time by that department who has been certified by the law enforcement certification board as a police officer or has been authorized to act as a New Mexico peace officer pursuant to the provisions of Section 29-1-11 NMSA 1978; and

(6) municipal police, sheriff's and school district police departments that assign officers as school resource officers shall be entitled to one thousand dollars ($1,000) through fiscal year 2023 and one thousand five hundred dollars ($1,500) thereafter for each assigned school resource officer's training pursuant to Section 29-7-14 NMSA 1978.

D. After distributions are determined in accordance with Subsection A, Subsection B and Paragraphs (1), (2), (3) and (6) of Subsection C of this section, if the balance in the fund is insufficient to permit the total allocations provided by Paragraphs (4) and (5) of Subsection C of this section, the division shall reduce that allocation to the maximum amount permitted by available money.

E. After all distributions have been made in accordance with Subsections A through D of this section, and if the balance in the fund is sufficient, the department of public safety shall be entitled to a rate of distribution of not more than two million dollars ($2,000,000).

F. The division shall confirm, before making any distribution under this section, that the beneficiary is in compliance with all of the beneficiary's statutory reporting requirements, including those described in Subsection C of Section 29-3-11 NMSA 1978, Subsection B of Section 29-7-7.1 NMSA 1978 and Sections 29-7-7.2, 29-7C-7 and 29-7C-8 NMSA 1978.

**History: 1978 Comp., § 29-13-4, enacted by Laws 1993, ch. 179, § 6; 1998, ch. 83, § 3; 2000, ch. 59, § 1; 2002, ch. 78, § 5; 2002, ch. 92, § 3; 2017, ch. 1, § 2; 2017, ch. 35, § 3; 2020, ch. 67, § 4; 2022, ch. 56, § 21.**

**Repeals and reenactments.** — Laws 1993, ch. 179, § 6 repealed former 29-13-4 NMSA 1978, as amended by Laws 1988, ch. 96, § 2, and enacted a new section, effective June 18, 1993.

**The 2022 amendment,** effective July 1, 2022, increased the amount of distributions from the law enforcement protection fund, and increased the distribution from the law enforcement protection fund by two hundred thousand dollars for the New Mexico law enforcement academy to implement the provisions of the Law Enforcement Training Act; in Subsection B, after "three hundred fifty thousand dollars ($350,000)", added "through fiscal year 2023 and one million dollars ($1,000,000) thereafter"; in Subsection C, Paragraphs C(1) and C(2), after "forty-five thousand dollars ($45,000)", added "through fiscal year 2023 and ninety-five thousand dollars ($95,000) thereafter", in Paragraph C(3), added "and to a rate of distribution of two hundred thousand dollars ($200,000) to carry out the purposes of the Law Enforcement Training Act", in Paragraphs C(4), C(5) and C(6), after "one thousand dollars ($1,000)", added "through fiscal year 2023 and one thousand five hundred dollars ($1,500) thereafter", and after "has been certified by the", deleted "academy, or by a regional law enforcement training facility in the state certified by the director of the academy" and added "law enforcement certification board", in Paragraph C(6), after "pursuant to Section", deleted "1 of this 2020 act" and added "29-7-14 NMSA 1978"; and added Subsection F.

**The 2020 amendment,** effective July 1, 2022, increased the amounts distributed from the law enforcement protection fund, and provided for distributions from the fund to the department of public safety and school districts; in Subsection A, after "municipal", added "school district", after "university police", added "departments", after "sheriff's departments", added "the department of public safety", after "the provisions of", deleted "Subsection" and added "Subsections", and after "C", added "and E"; in Subsection C, Paragraph C(1), after "municipal police",



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added "school district police", and after "departments shall be", deleted the remainder of the paragraph and added "entitled to a rate of distribution of forty-five thousand dollars ($45,000)", in Paragraph C(2), after "rate of distribution of", deleted "seventeen thousand dollars ($17,000)" and added "forty-five thousand dollars ($45,000)", in Paragraph C(3), changed "Section 1 of this 2017 act" to "29-7-7.7 NMSA 1978", in Paragraph C(4), after "Subsection D of this section, to", deleted "six hundred dollars ($600)" and added "one thousand dollars ($1,000)", in Paragraph C(5), after "municipal", added "school district", after "Subsection D of this section, to", deleted "six hundred dollars ($600)" and added "one thousand dollars ($1,000)", and added Paragraph C(6); in Subsection D, after "Paragraphs (1), (2), (3)", added "and (6)"; and added Subsection E.

**2017 Amendments.** — Laws 2017, ch. 35, § 3, effective July 1, 2017, included the New Mexico law enforcement academy for distribution of funds from the law enforcement protection fund, made a twenty-four thousand five hundred dollar ($24,500) distribution from the law enforcement protection fund to the New Mexico law enforcement academy to carry out the purposes of tourniquet and trauma kit training, and made technical changes; in Subsection A, after "county sheriff's departments", added "and the academy"; in Subsection B, after "transfer an amount from the", deleted "law enforcement protection", after the next occurrence of "fund", added "to the peace officers', New Mexico mounted patrol members' and reserve police officers' survivors fund", and added "New Mexico mounted patrol members' and reserve police officers'"; in Subsection C, in the introductory clause, after "remaining in the fund", deleted "to each tribal, municipal and university police and county sheriff's department", added a new Paragraph C(3) and redesignated former Paragraph C(3) as Paragraph C(4), in Paragraph C(4), after "Subsection", changed "C" to "D", and in the fourth sentence, deleted "No" and added "A", and after "shall", added "not", and in Paragraph C(5), after "certified by the", deleted "New Mexico law enforcement", and added "or by a regional law enforcement training facility in the state certified by the director of the academy"; and in Subsection D, after "Paragraphs (1)", deleted "and", after "(2)", added "and (3)", after the next occurrence of "Paragraphs", deleted "(3)" and added "(4)", and after the next occurrence of "and", deleted "(4)" and added "(5)".

Laws 2017, ch. 1, § 2, effective June 16, 2017, in Subsection A, after "money in the fund", added "in the succeeding fiscal year"; in Subsection B, added "to the peace officers', New Mexico mounted patrol members' and reserve police officers' survivors fund", and after "balance of the", deleted "peace officers' survivors" and added "latter"; and in Subsection C, in the introductory clause, after "distribution of money", deleted "remaining", in Paragraph C(3), after "Subsection", changed "C" to "D", in the fourth sentence, deleted "No" and added "A", and after "shall", added "not", and in Paragraph C(4), after "employed full time", deleted "by his department".

**2002 Amendments.** — Laws 2002, ch. 92, § 3, effective May 15, 2002, deleted Subsection A(2), relating to the calculation of considerations due to tribal police department under former Subsection C(10) of Section 29-1-11 NMSA 1978; and in Subsection B, added Paragraph (3) and redesignated former Paragraph (3) as Paragraph (4).

Laws 2002, ch. 78, § 5, effective May 15, 2002, added a new Subsection B and relettered the succeeding subsections accordingly.

**The 2000 amendment,** effective May 17, 2000, in Subsection B(1), changed the Class 1 funding amount from $17,000 to $20,000 and, in Subsection B(3), changed the amount for each officer or deputy from $300 to $600.

**The 1998 amendment,** effective March 9, 1998, inserted "and university" throughout the section; made a minor stylistic change in the table in Paragraph B(1); added Paragraph B(2), redesignated former Paragraph B(2) as Paragraph B(3); substituted "as a police officer" for "pursuant to the provisions of Section 29-7-8 NMSA 1978" near the end of Paragraph B(3); and, in Subsection C, substituted "Paragraphs (1) and (2)" for "Paragraph (1)" and "(3)" for "(2)", respectively.

## 29-13-5. Determination of needs; review.

No later than May 1 of each year, the division shall notify in writing each affected municipal police, school district police, university police, tribal police and county sheriff's department, the department of public safety and the academy of its determination of money to be distributed pursuant to the provisions of Section 29-13-4 NMSA 1978. Any affected governmental entity may appeal that determination by filing a notice of appeal with the secretary of finance and administration no later than May 15. If an appeal is filed, the secretary of finance and administration shall review the determination of the division in an informal and summary proceeding and shall certify the result of the appeal to the division no later than June 30, and the division shall adjust its determination accordingly. If no appeal is filed, the original determination of the division shall be final and binding and not subject to further review.

**History: Laws 1983, ch. 289, § 5; 1988, ch. 96, § 3; 1993, ch. 179, § 7; 1998, ch. 83, § 4; 2017, ch. 35, § 4; 2020, ch. 67, § 5.**

**The 2020 amendment,** effective July 1, 2022, added the department of public safety and affected school district police departments to the list of law enforcement departments required to receive notice in writing from the division of the amount of money they will receive from the law enforcement protection fund; and after "municipal police", added "school district police", and after "sheriff's department", added "the department of public safety".

**The 2017 amendment,** effective July 1, 2017, included the New Mexico law enforcement academy in the determination of needs from the law enforcement protection fund; after "county sheriff's department", added "and the academy", and after "Any affected", deleted "department" and added "governmental entity".

**The 1998 amendment,** effective March 9, 1998, substituted "police, university police" for "and" near the beginning of the section.

**The 1993 amendment,** effective June 18, 1993, throughout the section, substituted "division" for "local government division of the department of finance and administration" and "local government division"; substituted "tribal police and county sheriff's department" for "county police and sheriff department" and substituted "money" for "funds" in the first sentence; and substituted "filed" for "lodged" in the third and fourth sentences.



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## 29-13-6. Distribution of law enforcement protection fund.

A. Based on a periodic allotment approved by the division for the current fiscal year, the state treasurer shall distribute from the fund the amounts certified by the division to be distributed to governmental entities and the peace officers', New Mexico mounted patrol members' and reserve police officers' survivors fund as required in Section 29-13-4 NMSA 1978. Payments shall be made by the treasurer to the appropriate governmental entity or fund unless otherwise specified in Subsection C of this section.

B. The state treasurer is authorized to redirect a distribution to the New Mexico finance authority in an amount certified by the division, pursuant to an ordinance or a resolution passed by the municipality or county and a written agreement of the municipality or county and the New Mexico finance authority.

C. Based on a periodic allotment approved by the division for the current fiscal year, the state treasurer shall distribute from the money in the fund money certified by the division to be distributed to tribes. Payment shall be made to the chief financial officer of the tribe. If necessary, the fund may be decreased below the level of one hundred thousand dollars ($100,000) to enable payment to the tribes. If insufficient money remains in the fund to fully compensate the tribes, a report shall be made to the Indian affairs department and to an appropriate interim committee of the legislature that reviews issues having impact on tribes by September 1 of the year of the shortfall.

**History: Laws 1983, ch. 289, § 6; 1993, ch. 179, § 8; 1994, ch. 54, § 2; 1996, ch. 28, § 4; 1998, ch. 83, § 5; 2002, ch. 78, § 6; 2002, ch. 92, § 4; 2017, ch. 1, § 3.**

**The 2017 amendment,** effective June 16, 2017, created a new requirement for the local government division of the department of finance and administration to use periodic allotments approved by the division for the current fiscal year; in Subsection A, deleted "Annually on or before July 31" and added "Based on a periodic allotment approved by the division for the current fiscal year", after "distributed to governmental entities and", deleted "the transfer shall distribute money from the law enforcement protection fund to", after "the peace officers'", added "New Mexico mounted patrol members' and reserve police officers'", after "Payments shall be made", deleted "to" and added "by", and after "the treasurer", deleted "of" and added "to"; and in Subsection C, deleted "Annually on or before July 31" and added "Based on a periodic allotment approved by the division for the current fiscal year", after "report shall be made to the", deleted "New Mexico office of", and after "Indian affairs", added "department".

**2002 Amendments.** — Laws 2002, ch. 92, § 4, effective May 15, 2002, in Subsection A, substituted "governmental entities" for "municipalities, universities and counties" and added the phrase beginning "unless otherwise specified" at the end of the second sentence; in Subsection C, substituted "money" for "excess money remaining" and deleted "after distributions pursuant to Subsection A of this section are made" following "in the fund" in the first sentence and deleted all references to pueblos in the subsection.

Laws 2002, ch. 78, § 5, effective May 15, 2002, in Subsection A, at the end of the first sentence, added "and the transfer shall distribute money from the law enforcement protection fund to the peace officers' survivors fund as required in Section 29-13-4 NMSA 1978", and in the second sentence, after "governmental entity", added "or fund".

**The 1998 amendment,** effective March 9, 1998, inserted "universities" near the end of the second sentence in Subsection A.

**The 1996 amendment,** effective March 4, 1996, inserted "or a resolution" following "ordinance" and "or county" following "by the municipality" in Subsection B.

**The 1994 amendment,** effective May 18, 1994, inserted present Subsection B and redesignated former Subsection B as Subsection C, and deleted "of each year" following "July 31" in the first sentence thereof.

**The 1993 amendment,** effective June 18, 1993, designated the existing provision as Subsection A; in the first sentence of Subsection A, deleted "law enforcement protection" preceding "fund" and substituted "division" for "local government division of the department of finance and administration"; and added Subsection B.

## 29-13-7. Expenditure limitation; control.

A. Except as provided for the academy and the department of public safety in Subsections B and C of this section, amounts distributed from the fund shall be expended only for the following:

(1) the repair and purchase of law enforcement apparatus and equipment, including the financing and refinancing thereof, that meet minimum nationally recognized standards;

(2) the purchase of law enforcement equipment, including protective vests, for police dogs;

(3) expenses associated with advanced law enforcement planning and training;

(4) maintaining the balance of the peace officers', New Mexico mounted patrol members' and reserve police officers' survivors fund at a minimum amount of three hundred fifty thousand dollars ($350,000) through fiscal year 2023 and one million dollars ($1,000,000) thereafter;

(5) complying with match or contribution requirements for the receipt of federal funds relating to criminal justice programs;

(6) no more than fifty percent of the replacement salaries of municipal and county law enforcement personnel of municipalities or counties participating in basic law enforcement training;



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(7) a law enforcement officer retention differential in the amount of seven thousand five hundred dollars ($7,500); provided that:

(a) the distribution is requested by a municipality or county law enforcement agency to retain a law enforcement officer who is certified in accordance with the Law Enforcement Training Act [Chapter 29, Article 7 NMSA 1978] and has at least twenty years of actual service credit earned under a municipal police member coverage plan as determined by the public employees retirement association;

(b) the municipality or county law enforcement agency provides seven thousand five hundred dollars ($7,500) in matching funds to the law enforcement officer;

(c) the law enforcement officer remains employed with that municipality or county law enforcement agency for one additional year; and

(d) the distribution and the matching funds paid to a law enforcement officer shall not constitute the officer's base salary or wages and shall not be considered to be salary or otherwise be used to determine a pension for the purposes of the Public Employees Retirement Act [Chapter 10, Article 11 NMSA 1978]; and

(8) recruiting, providing stipends for and training law enforcement officers engaged in community-oriented policing; provided that any law enforcement officer who receives a stipend in accordance with this paragraph remains employed with the law enforcement agency providing the stipend for one additional year.

B. For the academy, amounts distributed from the fund shall be expended only for providing tourniquet and trauma kits and training on the use of tourniquet and trauma kits pursuant to Section 29-7-7.7 NMSA 1978 and to carry out the purposes of the Law Enforcement Training Act.

C. The amount distributed to the department of public safety:

(1) shall:

(a) be used only to offset overtime-pay-related expenses incurred directly by the department of public safety from the special deployment of state police officers or other emergency assistance to counties or municipalities in response to critical circumstances as authorized by the governor; and

(b) not be expended to hire new personnel; and

(2) may be expended for costs, including travel, fuel, overtime, per diem and ammunition.

D. Amounts distributed from the fund shall be expended only pursuant to approved budgets and upon duly executed vouchers approved as required by law.

**History: Laws 1983, ch. 289, § 7; 1985, ch. 29, § 2; 1988, ch. 96, § 4; 1993, ch. 179, § 9; 1994, ch. 53, § 2; 2002, ch. 78, § 7; 2013, ch. 10, § 1; 2017, ch. 35, § 5; 2018, ch. 74, § 3; 2020, ch. 54, § 1; 2020, ch. 67, § 6; 2022, ch. 56, § 22.**

**The 2022 amendment,** effective July 1, 2022, provided that the balance of the peace officers', New Mexico mounted patrol members' and reserve police officers' survivors fund shall be maintained at a minimum amount of one million dollars after fiscal year 2023, and added conditions under which distributions can be used for recruitment or retention payments; in Subsection A, Paragraph A(4), after "three hundred fifty thousand dollars ($350,000)", added "through fiscal year 2023 and one million dollars ($1,000,000) thereafter", in Paragraph A(7), after "officer retention", deleted "payment" and added "differential", in Subparagraph A(7)(a), after "county law enforcement agency", deleted "that on January 1, 2018 had a staffing vacancy rate of at least ten percent", added a new Subparagraph A(7)(c) and redesignated former Subparagraph A(7)(c) as Subparagraph A(7)(d), in Paragraph A(8), after "providing", deleted "bonuses" and added "stipends", and added "provided that any law enforcement officer who receives a stipend in accordance with this paragraph remains employed with the law enforcement agency providing the stipend for one additional year"; and in Subsection B, after "Section 29-7-7.7 NMSA 1978", added "and to carry out the purposes of the Law Enforcement Training Act".

**2020 Amendments.** — Laws 2020, ch. 67, § 6, effective July 1, 2022, placed certain limitations on how the department of public safety may use funds distributed from the law enforcement protection fund; in Subsection A, in the introductory clause, after "the academy", added "and the department of public safety", and after "Subsections B", added "and C", in Paragraph A(6), after "municipalities or counties", deleted "rated as class 1 in Paragraph (1) of Subsection C of Section 29-13-4 NMSA 1978"; and added new Subsection C and redesignated former Subsection C as Subsection D.

Laws 2020, ch. 54, § 1, effective July 1, 2020, expanded permissible expenditures from the law enforcement protection fund; in Subsection A, in Paragraph A(7), after the paragraph designation, deleted "contingent upon the availability of funding and until June 30, 2021", and added new Paragraph A(8).

**The 2018 amendment,** effective July 1, 2018, authorized distributions from the law enforcement protection fund for law enforcement retention payments, and added a statutory reference; added Paragraph A(7); and in Subsection B, after "pursuant to Section", deleted "1 of this 2017 act" and added "29-7-7.7".

**The 2017 amendment,** effective July 1, 2017, made provisions for the New Mexico law enforcement academy to receive funds from the law enforcement protection fund for tourniquet and trauma kit training; in Subsection A, added "Except as provided for the academy in Subsection B of this section", in Paragraph A(4), added "New Mexico



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mounted patrol members' and reserve police officers'", and in Paragraph A(6), after "Subsection", deleted "B" and added "C"; and added a new Subsection B, and redesignated former Subsection B as Subsection C.

**The 2013 amendment,** effective June 14, 2013, authorized the purchase of protective equipment for police dogs and in Subsection A, added Paragraph (2).

**The 2002 amendment,** effective May 15, 2002, in Subsection A, added Paragraph (3) and redesignated former Paragraphs (3) and (4) as Paragraphs (4) and (5).

**The 1994 amendment,** effective May 18, 1994, inserted "including the financing and refinancing thereof" in Paragraph A(1).

**The 1993 amendment,** effective June 18, 1993, deleted "law enforcement protection" preceding "fund" in Subsections A and B and substituted "that" for "which" in Paragraph (1) of Subsection A.

## 29-13-8. Rules and regulations.

The division shall promulgate necessary rules and regulations to administer the provisions of the Law Enforcement Protection Fund Act.

**History: Laws 1983, ch. 289, § 8; 1993, ch. 179, § 10.**

**The 1993 amendment,** effective June 18, 1993, substituted "division" for "local government division of the department of finance and administration".

## 29-13-9. Expenditures of money distributed from the law enforcement protection fund; wrongful expenditure.

A. Amounts distributed from the fund shall be expended only for the specific purposes for which they are distributed and shall not be distributed for accumulation, except as provided for the peace officers' survivors fund.

B. Any person who expends or directs or permits the expenditure of any money distributed from the fund for purposes other than those expressly authorized by the Law Enforcement Protection Fund Act shall be personally liable to the state for the amount of money wrongfully expended and interest and costs. An action to recover the amount of any wrongful expenditure may be commenced by the attorney general or the district attorney upon the filing with that officer of a verified statement describing the wrongful expenditure.

**History: Laws 1983, ch. 289, § 9; 1993, ch. 179, § 11; 2002, ch. 78, § 8.**

**The 2002 amendment,** effective May 15, 2002, added the exception clause in Subsection A.

**The 1993 amendment,** effective June 18, 1993, deleted "law enforcement protection" preceding "fund" in Subsections A and B.

# ARTICLE 14

# Peace Officer's Employer-Employee Relations

Sec.
29-14-1. Short title.
29-14-2. Findings and purpose.
29-14-3. Definition.
29-14-4. Investigations of peace officers; requirements.
29-14-5. Polygraph examinations.
29-14-6. Investigation of administrative matters.
29-14-7. Personnel files.
29-14-8. Constitutional rights; notification.
29-14-9. Forced disclosure of financial status prohibited.
29-14-10. Political activity.
29-14-11. Exercise of rights.

## 29-14-1. Short title.

Sections 1 through 11 [29-14-1 to 29-14-11 NMSA 1978] of this act may be cited as the "Peace Officer's Employer-Employee Relations Act".

**History: Laws 1991, ch. 117, § 1.**

**ANNOTATIONS**

**Private right of action.** — There is no express allowance of a private right of action anywhere in the POEERA. *Sedillo v. N.M. Dep't of Pub. Safety*, 2007-NMCA-002, 140 N.M. 858, 149 P.3d 955.



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## 29-14-2. Findings and purpose.

A. The legislature finds and declares that effective law enforcement is dependent upon the maintenance of stable relations between peace officers and their employers. Moreover, the existence of stable relations between peace officers and their employers will enhance law enforcement services provided to the citizens of New Mexico.

B. The purpose of the Peace Officer's Employer-Employee Relations Act is to prescribe certain rights for peace officers, particularly when they are placed under investigation by their employer.

C. Provisions of this act only apply to administrative actions and shall not apply to criminal investigations of a peace officer except as provided in Section 8 [29-14-8 NMSA 1978] of this act.

**History: Laws 1991, ch. 117, § 2.**

## 29-14-3. Definition.

As used in the Peace Officer's Employer-Employee Relations Act, "peace officer" or "officer" means any employee of a police or sheriff's department that is part of or administered by the state or any political subdivision of the state who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of the state.

**History: Laws 1991, ch. 117, § 3.**

## 29-14-4. Investigations of peace officers; requirements.

When any peace officer is under investigation by his employer for alleged actions that could result in administrative sanctions being levied against the officer, the following requirements shall be adhered to:

A. any interrogation of an officer shall be conducted when the officer is on duty or during his normal waking hours, unless the urgency of the investigation requires otherwise;

B. any interrogation of an officer shall be conducted at the employer's facility, unless the urgency of the investigation requires otherwise;

C. prior to commencement of any interrogation session:

(1) an officer shall be informed of the name and rank of the person in charge of the interrogation and all other persons who will be present during the interrogation;

(2) an officer shall be informed of the nature of the investigation, and the names of all known complainants shall be disclosed to the officer unless the chief administrator of the officer's employer determines that the identification of the complainant shall not be disclosed because it is necessary for the protection of an informant or because disclosure would jeopardize or compromise the integrity or security of the investigation; and

(3) a reasonable attempt shall be made to notify the officer's commanding officer of the pending interrogation;

D. during any interrogation session, the following requirements shall be adhered to:

(1) each interrogation session shall not exceed two hours unless the parties mutually consent to continuation of the session;

(2) there shall not be more than two interrogation sessions within a twenty-four hour period, unless the parties mutually consent to additional sessions, provided that there shall be at least a one-hour rest period between the sessions;

(3) the combined duration of an officer's work shift and any interrogation session shall not exceed fourteen hours within a twenty-four hour period, unless the urgency of the investigation requires otherwise;

(4) there shall not be more than two interrogators at any given time;

(5) an officer shall be allowed to attend to physical necessities as they occur in the course of an interrogation session; and

(6) an officer shall not be subjected to offensive language or illegal coercion by his interrogator in the course of an interrogation session;



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E. any interrogation of an officer shall be recorded, either mechanically or by a stenographer, and the complete interrogation shall be published as a transcript; provided that any recesses called during the interrogation shall be noted in the transcript; and

F. an accurate copy of the transcript or tape shall be provided to the officer, upon his written request, no later than fifteen working days after the investigation has been completed.

**History: Laws 1991, ch. 117, § 4.**

## 29-14-5. Polygraph examinations.

After reviewing all the information collected in the course of an investigation of a peace officer, the chief administrator of the officer's employer may order the officer to submit to a polygraph examination administered by a licensed polygraph examiner, provided that:

A. all other reasonable investigative means have been exhausted; and

B. the officer has been advised of the administrator's reasons for ordering the polygraph examination.

**History: Laws 1991, ch. 117, § 5.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Construction and application of Employee Polygraph Protection Act of 1988 (29 USCA §§ 2001 et seq.), 154 A.L.R. Fed. 315.

## 29-14-6. Investigation of administrative matters.

When any peace officer is under investigation for an administrative matter, the officer shall be permitted to produce any relevant documents, witnesses or other evidence to support his case and he may cross-examine any adverse witnesses during any grievance process or appeal involving disciplinary action.

**History: Laws 1991, ch. 117, § 6.**

## 29-14-7. Personnel files.

A. No document containing comments adverse to a peace officer shall be entered into his personnel file unless the officer has read and signed the document. When an officer refuses to sign a document containing comments adverse to him, the document may be entered into an officer's personnel file if:

(1) the officer's refusal to sign is noted on the document by the chief administrator of the officer's employer; and

(2) the notation regarding the officer's refusal to sign the document is witnessed by a third party.

B. A peace officer may file a written response to any document containing adverse comments entered into his personnel file and the response shall be filed with the officer's employer within thirty days after the document was entered into the officer's personnel file. A peace officer's written response shall be attached to the document.

**History: Laws 1991, ch. 117, § 7.**

## 29-14-8. Constitutional rights; notification.

When any peace officer is under administrative investigation and a determination is made to commence a criminal investigation, he shall be immediately notified of the investigation and shall be afforded all the protections set forth in the bill of rights of the United States and New Mexico constitutions.

**History: Laws 1991, ch. 117, § 8.**



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## 29-14-9. Forced disclosure of financial status prohibited.

A peace officer shall not be required by his police or sheriff's department employer to disclose information regarding his financial status, unless all other reasonable investigative means have been exhausted or except as otherwise required by law.

**History: Laws 1991, ch. 117, § 9.**

## 29-14-10. Political activity.

A. A peace officer shall not be prohibited by his police or sheriff's department employer from engaging in any political activity when the officer is off duty, except as otherwise required by law.

B. Notwithstanding the provisions of Subsection A of this section, any peace officer employed by the New Mexico state police department shall be governed by the provisions of regulations adopted by the department regarding political activity.

**History: Laws 1991, ch. 117, § 10.**

## 29-14-11. Exercise of rights.

A peace officer shall not be subjected to any retaliation by his employer due to the officer's lawful exercise of his rights under the Peace Officer's Employer-Employee Relations Act.

**History: Laws 1991, ch. 117, § 11.**

# ARTICLE 15

# Missing Persons Information and Reporting

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## 29-15-1. Short title.

Chapter 29, Article 15 NMSA 1978 may be cited as the "Missing Persons Information and Reporting Act".

**History: Laws 1995, ch. 146, § 1; 2010, ch. 32, § 1; 2010, ch. 33, § 2.**

**2010 Multiple Amendments.** — Laws 2010, ch. 32, § 1 and Laws 2010, ch. 33, § 2 enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2010, ch. 33, § 2, as the last act signed by the governor, is set out above and incorporates both amendments. The amendments enacted by Laws 2010, ch. 32, § 1 and Laws 2010, ch. 33, § 2 are described. To view the session laws in their entirety, *see* the 2010 session laws on *NMOneSource.com*.

Laws 2010, ch. 33, § 2, effective May 19, 2010, changed "This act" to "Chapter 29, Article 15 NMSA 1978" and changed the name of the act from the "Missing Persons Information Act" to the "Missing Persons Information and Reporting Act".

Laws 2010, ch. 32, § 1, effective May 19, 2010, deleted "This act" and added "Chapter 29, Article 15 NMSA 1978".



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## 29-15-2. Definitions.

As used in the Missing Persons Information and Reporting Act:

A. "Brittany alert" means a notification relating to an endangered person:

(1) who is a missing person; and

(2) about whom there is a clear indication that the person has a developmental disability as defined in Subsection A of Section 28-16A-6 NMSA 1978 and that the person's health or safety is at risk;

B. "child" means a person under the age of eighteen years who is not emancipated;

C. "clearinghouse" means the missing persons information clearinghouse;

D. "custodian" means a parent, guardian or other person who exercises legal physical control, care or custody of a child or of an adult with a developmental disability; or a person who performs one or more activities of daily living for an adult;

E. "endangered person" means a missing person who:

(1) is in imminent danger of causing harm to the person's self;

(2) is in imminent danger of causing harm to another;

(3) is in imminent danger of being harmed by another or who has been harmed by another;

(4) has been a victim of a crime as provided in the Crimes Against Household Members Act [30-3-10 through 30-3-18 NMSA 1978] or in Section 30-3A-3 or 30-3A-3.1 NMSA 1978, or their equivalents in any other jurisdiction;

(5) is or was protected by an order of protection pursuant to the Family Violence Protection Act [Chapter 40, Article 13 NMSA 1978];

(6) has Alzheimer's disease, dementia or another degenerative brain disorder or a brain injury; or

(7) has a developmental disability as defined in Subsection A of Section 28-16A-6 NMSA 1978 and that person's health or safety is at risk;

F. "immediate family member" means the spouse, nearest relative or close friend of a person;

G. "law enforcement agency" means a law enforcement agency of the state, a state agency or a political subdivision of the state;

H. "lead station" means an AM radio station that has been designated as the "state primary station" by the federal communications commission for the emergency alert system;

I. "missing person" means a person whose whereabouts are unknown to the person's custodian or immediate family member and the circumstances of whose absence indicate that:

(1) the person did not leave the care and control of the custodian or immediate family member voluntarily and the taking of the person was not authorized by law; or

(2) the person voluntarily left the care and control of the custodian without the custodian's consent and without intent to return;

J. "missing person report" means information that is:

(1) given to a law enforcement agency on a form used for sending information to the national crime information center; and

(2) about a person whose whereabouts are unknown to the reporter and who is alleged in the form submitted by the reporter to be missing;

K. "person" means an individual, regardless of age;

L. "possible match" means the similarities between unidentified human remains and a missing person that would lead one to believe they are the same person;

M. "reporter" means the person who reports a missing person;

N. "silver alert" means a notification relating to an endangered person:

(1) who is a missing person; and

(2) who is fifty years or older; or

(3) about whom there is a clear indication that the individual suffers from Alzheimer's disease or another form of dementia, regardless of age;

O. "state agency" means an agency of the state, a political subdivision of the state or a public post-secondary educational institution; and

P. "state registrar" means the employee so designated by the public health division of the department of health pursuant to the Vital Statistics Act [Chapter 24, Article 14 NMSA 1978].



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**History: Laws 1995, ch. 146, § 2; 2007, ch. 119, § 1; 2010, ch. 32, § 2; 2010, ch. 33, § 3; 2013, ch. 81, § 2; 2016, ch. 8, § 1; 2019, ch. 50, § 1.**

**The 2019 amendment,** effective June 14, 2019, revised the definition of "silver alert" as used in the Missing Persons Information and Reporting Act; and in Subsection N, Paragraph N(1), after the semicolon, added "and"; in Paragraph N(2), after the semicolon, deleted "and" and added "or", and in Paragraph N(3), after "individual", deleted "has an irreversible deterioration of intellectual faculties" and added "suffers from Alzheimer's disease or another form of dementia, regardless of age".

**The 2016 amendment,** effective July 1, 2016, added the definition of "Brittany alert" to the Missing Persons Information and Reporting Act, and made corresponding changes to the definitions of "custodian" and "endangered person" as used in the act; after the introductory sentence, added a new Subsection A and redesignated the succeeding subsections accordingly; in Subsection B, after "means", deleted "an individual" and added "a person"; in Subsection D, after "custody of a child", added "or of an adult with a developmental disability"; and in Subsection E, Paragraph (5), after the semicolon, deleted "or", in Paragraph (6), after the semicolon, added "or", and added a new Paragraph (7).

**The 2013 amendment,** effective July 1, 2013, broadened the definition of "custodian"; defined "silver alert"; in Subsection C, after "custody of a child", added the remainder of the sentence; in Paragraph (6) of Subsection D, after "Alzheimer's disease", added "dementia" and after "brain disorder", added "or a brain injury"; and added Subsection M.

**The 2010 amendment,** , effective May 19, 2010, in the introductory sentence, changed the name of the act from the "Missing Persons Information Act" to the "Missing Persons Information and Reporting Act"; in Paragraph (4) of Subsection D, after "Alzheimer's disease", added "or another degenerative brain disorder"; added Subsection F; in Subsection K, after "similarities between unidentified", deleted "body of a person" and added "human remains"; and added Subsection N.

**The 2007 amendment,** effective July 1, 2007, defined "endangered person" and "lead station".

## 29-15-3. Missing persons information clearinghouse; function.

A. The "missing persons information clearinghouse" is established in the department of public safety. The department of public safety shall provide for the administration of the clearinghouse. The department of public safety may adopt rules to carry out the provisions of the Missing Persons Information and Reporting Act [Chapter 29, Article 15 NMSA 1978] in the manner prescribed in Subsection E of Section 9-1-5 NMSA 1978.

B. The clearinghouse is a central repository of information on missing persons and shall be used by all law enforcement agencies, including tribal agencies, in this state.

C. The clearinghouse shall:

(1) establish a system of intrastate communication of information relating to missing persons;

(2) provide a centralized file for the exchange of information on missing persons and unidentified human remains within the state;

(3) communicate with the national crime information center for the exchange of information on missing persons suspected of interstate travel;

(4) collect, process, maintain and disseminate accurate and complete information on missing persons;

(5) provide a statewide toll-free telephone line for the reporting of missing persons and for receiving information on missing persons;

(6) disseminate to custodians, law enforcement agencies, the public education department, the children, youth and families department and the general public information that explains how to prevent child abduction and what to do if a child becomes missing;

(7) compile statistics relating to the incidence of missing persons within the state;

(8) provide training and technical assistance to law enforcement agencies and social services agencies pertaining to missing persons;

(9) establish a media protocol for disseminating information pertaining to missing persons; and

(10) host the annual missing in New Mexico event.

D. The clearinghouse shall print and distribute posters, flyers and other forms of information containing descriptions of missing persons.

E. The department of public safety may accept public or private grants, gifts and donations to assist the department in carrying out the provisions of the Missing Persons Information and Reporting Act.

**History: Laws 1995, ch. 146, § 3; 2010, ch. 33, § 4; 2022, ch. 3, § 2.**

**The 2022 amendment,** effective February 24, 2022, required the missing persons information clearinghouse



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to host the annual missing in New Mexico event; and in Subsection C, added new Paragraph 10.

**Temporary provisions.** — Laws 2019, ch. 106, § 1, effective March 28, 2019, provided:

A. The "missing and murdered indigenous women task force" is created and shall exist until the end of fiscal year 2021.

B. The task force consists of:

(1) the secretary of Indian affairs or the secretary's designee from the Indian affairs department, who shall be chair of the task force;

(2) the secretary of public safety or the secretary's designee from the department of public safety;

(3) a representative of the United State bureau of Indian affairs office of justice services designated by the southwest region's deputy regional director for Indian services of the bureau of Indian affairs;

(4) one person who is a member of a pueblo, appointed by the governor;

(5) one person who is a member of the Jicarilla Apache Nation, appointed by the governor;

(6) one person who is a member of the Mescalero Apache Tribe, appointed by the governor;

(7) one person who is a member of the Navajo Nation, appointed by the governor;

(8) one person from the office of the medical investigator;

(9) one person who is a representative of an indigenous women's nongovernmental organization that provides counseling services for indigenous women and girls who have been victims of violence, appointed by the governor;

(10) one person who is a representative of a statewide or local nongovernmental organization that provides legal services to indigenous women and girls who have been victims of violence, appointed by the governor; and

(11) one person who is an indigenous woman who has been a victim of violence or a family member of an indigenous woman who has been a victim of violence, appointed by the governor.

C. Vacancies by members of the task force appointed by the governor shall be filled by appointment by the governor.

D. Task force members appointed by the governor may receive per diem and mileage as provided for non-salaried public officers in the Per Diem and Mileage Act and shall receive no other compensation, perquisite or allowance.

E. The task force shall conduct a study to determine how to increase state resources for reporting and identifying missing and murdered indigenous women in the state. The task force shall collaborate with tribal law enforcement agencies to determine the scope of the problem, identify barriers to address the problem and create partnerships to improve the reporting of and the investigation of missing and murdered indigenous women.

F. The task force shall work with tribal governments and shall respect tribal sovereignty. The task force shall collaborate with the United States department of justice to improve its processes for information sharing and coordination of resources in regard to reporting and investigating cases of missing and murdered indigenous women in the state.

G. The task force shall report its findings and recommendations to the governor, the legislative council service library and the appropriate interim legislative committee and present those findings to the appropriate interim legislative committee prior to November 1, 2020.

**The 2010 amendment,** effective May 19, 2010, in Subsection A, in the third sentence, after "may adopt rules", deleted "and regulations" and changed the name of the act from the "Missing Persons Information Act" to the "Missing Persons Information and Reporting Act"; in Subsection C(2), after "persons and unidentified", deleted "bodies of persons" and added "human remains"; in Subsection C(6), changed "state department of public education" to "public education department"; and in Subsection E, changed the name of the act from the "Missing Persons Information Act" to the "Missing Persons Information and Reporting Act".

**Temporary provisions.** — Laws 2019, ch. 106, § 1, effective March 28, 2019 provided:

A. The "missing and murdered indigenous women task force" is created and shall exist until the end of fiscal year 2021.

B. The task force consists of:

(1) the secretary of Indian affairs or the secretary's designee from the Indian affairs department, who shall be chair of the task force;

(2) the secretary of public safety or the secretary's designee from the department of public safety;

(3) a representative of the United States bureau of Indian affairs office of justice services designated by the southwest region's deputy regional director for Indian services of the bureau of Indian affairs;

(4) one person who is a member of a pueblo, appointed by the governor;

(5) one person who is a member of the Jicarilla Apache Nation, appointed by the governor;

(6) one person who is a member of the Mescalero Apache Tribe, appointed by the governor;

(7) one person who is a member of the Navajo Nation, appointed by the governor;

(8) one person from the office of the medical investigator;

(9) one person who is a representative of an indigenous women's nongovernmental organization that provides counseling services for indigenous women and girls who have been victims of violence, appointed by the governor;

(10) one person who is a representative of a statewide or local nongovernmental organization that provides legal services to indigenous women and girls who have been victims of violence, appointed by the governor; and

(11) one person who is an indigenous woman who has been a victim of violence or a family member of an indigenous woman who has been a victim of violence, appointed by the governor.

C. Vacancies by members of the task force appointed by the governor shall be filled by appointment by the governor.

D. Task force members appointed by the governor may receive per diem and mileage as provided for non-salaried public officers in the Per Diem and Mileage Act and shall receive no other compensation, perquisite or allowance.

E. The task force shall conduct a study to determine how to increase state resources for reporting and identifying missing and murdered indigenous women in the state. The task force shall collaborate with tribal law enforcement agencies to determine the scope of the problem, identify barriers to address the problem and create partnerships to improve the reporting of and the investigation of missing and murdered indigenous women.

F. The task force shall work with tribal governments and shall respect tribal sovereignty. The task force shall collaborate with the United States department of justice to improve its processes for information sharing and coordination of resources in regard to reporting and investigating cases of missing and murdered indigenous women in the state.

G. The task force shall report its findings and recommendations to the governor, the legislative council service library and the appropriate interim legislative committee and present those findings to the appropriate interim legislative committee prior to November 1, 2020.



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## 29-15-3.1. Endangered person advisory.

A. The department of public safety shall issue an endangered person advisory if, after review and investigation of a missing person report of an endangered person, the department makes an independent determination that the missing person is an endangered person.

B. The department shall develop and implement endangered person advisory procedures for the purpose of disseminating, as rapidly as possible, information about an endangered person. The procedures shall include:

(1) notification to the lead station of the endangered person advisory;

(2) notification to other public and private media sources and members of the public as necessary; and

(3) providing information about the endangered person, including all identifying information, to the lead station and other media sources.

**History: Laws 2007, ch. 119, § 3.**

**Effective dates.** — Laws 2007, ch. 119, § 4 made the section effective July 1, 2007.

## 29-15-3.2. Silver alert advisory.

A. The department of public safety shall issue a silver alert if, after review and investigation of a missing person report of a person subject to the alert, the department makes an independent determination that the missing person is a person subject to the alert.

B. The department of public safety shall develop and implement a silver alert plan for the purpose of disseminating, as rapidly as possible, information about a person subject to the alert. The plan shall:

(1) provide a procedure for the department to notify the lead station that a silver alert has been declared. The procedure shall include codes for use by the department in communicating with the lead station to prevent false alerts;

(2) provide a procedure in which other state and private print, radio, television or other media may alert members of the public of the missing person;

(3) include a procedure for notifying the department of information technology that a silver alert has been declared. The department of information technology shall immediately transmit the notification and related information to all state field operations employees so that they may be aware and vigilant in the course of their regular activities;

(4) require cellular service companies to implement silver alerts in accordance with the federal communication commission's wireless emergency alerts processes;

(5) include a procedure for notifying all local and federal law enforcement agencies that a silver alert has been declared;

(6) provide for dissemination of information about the missing person to the lead station, the department of information technology and local law enforcement agencies when a silver alert has been declared; and

(7) provide for collecting and maintaining the following records regarding each silver alert issued:

(a) the municipality where the missing person report originated;

(b) the age of the missing person;

(c) the gender of the missing person;

(d) the date of the missing person report;

(e) the date the silver alert is issued; and

(f) the date of recovery of the missing person.

C. The department of public safety shall distribute the silver alert notification plan to all local law enforcement agencies and provide such training and other assistance as is necessary to ensure that the plan can be properly implemented.

D. Once a silver alert has been declared, only the department of public safety may terminate the silver alert.



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**History: Laws 2013, ch. 81, § 1; 2019, ch. 50, § 2.**

**The 2019 amendment,** effective June 14, 2019, expanded the notification and reporting requirements for missing persons who are fifty years or older or about whom there is a clear indication that the individual suffers from Alzheimer's disease or another form of dementia, regardless of age; in Subsection B, after "department", added "of public safety", deleted former Paragraphs B(1) through B(3) and added new Paragraphs B(1) through B(7); and added Subsections C and D.

## 29-15-3.3. Brittany alert advisory.

A. The department of public safety shall issue a Brittany alert if, after review and investigation of a missing person report of a person subject to the alert, the department makes an independent determination that the missing person is a person subject to the alert.

B. The department shall develop and implement Brittany alert procedures for the purpose of disseminating, as rapidly as possible, information about a person subject to the alert. The procedures shall include:

(1) notification to the lead station of the Brittany alert;

(2) notification to other public and private media sources and members of the public as necessary; and

(3) the provision of information about the subject of the Brittany alert, including all identifying information, to the lead station and other media sources.

**History: Laws 2016, ch. 8, § 2.**

**Effective dates.** — Laws 2016, ch. 8, § 3 made Laws 2016, ch. 8, § 2 effective July 1, 2016.

## 29-15-3.4. Department of public safety; Mark Daniel Aguilar information sharing requirement.

A. Within thirty days, the department of public safety shall share with the national missing and unidentified persons system created by the United States department of justice's national institute of justice:

(1) all information in the missing persons information clearinghouse; and

(2) all information the department receives pursuant to the Missing Persons Information and Reporting Act regarding the identification and location of missing and unidentified persons or human remains.

B. The requirements pursuant to this section shall be known as the "Mark Daniel Aguilar information sharing requirement".

**History: Laws 2019, ch. 120, § 1.**

**Effective dates.** — Laws 2019, ch. 120 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 29-15-4. State department of public education; cooperation with clearinghouse.

The state department of public education [public education department] shall cooperate with the clearinghouse in seeking to locate missing children who may be enrolled in New Mexico school systems, including private schools, and for the reporting of children who may be missing or who may be unlawfully removed from schools.

**History: Laws 1995, ch. 146, § 4.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For the public education department, *see* 9-24-4 NMSA 1978.



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## 29-15-5. Custodian or immediate family member request for information.

A. Upon written or oral request to a law enforcement agency by a custodian or immediate family member of a missing person, the law enforcement agency shall immediately request from the clearinghouse information concerning the missing person that may aid the custodian or immediate family member in the identification or location of the missing person.

B. A law enforcement agency to which a request has been made pursuant to Subsection A of this section shall report to the custodian or immediate family member on the results of its inquiry to the clearinghouse within seven calendar days after the day the request is received by the law enforcement agency, or as soon as the results of its inquiry become available, whichever occurs last.

C. A law enforcement agency shall not report to a custodian or immediate family member pursuant to Subsection B of this section if the missing person is not a minor, has been found and has informed a law enforcement agency or the clearinghouse that the person requests confidentiality regarding the person's status and location. If the missing person who requests confidentiality regarding the person's status and location is a person with a custodian appointed by a judge, the law enforcement agency shall inform the court that the person has been found and has requested confidentiality regarding the person's status and location. A law enforcement agency shall also report to the custodian that the person has been found unless there is competent evidence that to do so may cause harm to the incapacitated person.

D. The Inspection of Public Records Act [Chapter 14, Article 2 NMSA 1978] shall not apply to a request to inspect records regarding a person who has requested confidentiality pursuant to Subsection C of this section.

**History: Laws 1995, ch. 146, § 5; 2010, ch. 33, § 5; 2021, ch. 39, § 1.**

**The 2021 amendment,** effective June 18, 2021, required confidentiality in certain circumstances for a person who has been reported missing and is found by law enforcement, provided additional duties for law enforcement under these circumstances, and provided that the Inspection of Public Records Act shall not apply to a request to inspect records regarding a person who has been reported missing, is found by law enforcement and has requested confidentiality; and added Subsections C and D.

**The 2010 amendment,** effective May 19, 2010, in Subsection A, after "Upon written", deleted "notification" and added "or oral request"; after "information concerning the", added "missing"; and after "location of the", added "missing"; and in Subsection B, after "law enforcement agency to which", deleted "notification" and added "a request"; after "request has been", deleted "provided" and added "made"; after "results of its inquiry", added "to the clearinghouse"; and after "days after the day the", deleted "written notification" and added "request".

## 29-15-6. Missing person report forms.

A. The clearinghouse shall distribute missing person report forms to law enforcement agencies in the state.

B. A missing person report may be made to a law enforcement agency in person, or by telephone, electronic media or other indirect method of communication and the person taking the report may enter the information on the form for the reporter. A missing person report form may be completed by the reporter and delivered to a law enforcement officer.

C. A copy of the missing person report form shall be filed with the clearinghouse.

D. A missing person report form shall include, to the extent available, the following information:

(1) the missing person's:

(a) name, including any alternative names used;

(b) date of birth;

(c) identifying marks, including birthmarks, moles, tattoos and scars;

(d) height and weight;

(e) gender;

(f) race;

(g) current hair color and true or natural hair color;

(h) eye color;

(i) prosthetics, surgical implants or cosmetic implants;



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(j) physical anomalies;
(k) blood type;
(l) driver's license number; and
(m) social security number;

(2) a photograph of the missing person, with a recent photograph being preferable;

(3) a description of the clothing the missing person was believed to be wearing;

(4) a description of items that might be with the missing person, such as jewelry and accessories;

(5) information on the missing person's electronic communications devices, including cell phone numbers and email addresses;

(6) reasons why the reporting person believes that the person is missing;

(7) the name and location of the missing person's school or employer;

(8) the name and location of the missing person's dentist or primary care physician;

(9) any circumstances that may indicate that the disappearance of the missing person was not voluntary;

(10) any circumstances that indicate that the missing person may be at risk of injury or death;

(11) a description of the possible means of transportation of the missing person, including make, model, color, license and vehicle identification number of a vehicle;

(12) any identifying information about a known or possible abductor of the missing person or the person last seen with the missing person;

(13) any other information that can aid in locating the missing person; and

(14) the date of last contact with the missing person.

**History: Laws 1995, ch. 146, § 6; 2010, ch. 33, § 6.**

**The 2010 amendment,** effective May 19, 2010, in Subsection B, after "or by telephone," added "electronic media"; and added Subsection D.

## 29-15-7. Law enforcement requirements; missing person reports; unidentified human remains.

A. A law enforcement agency shall accept without delay and without exception for any reason any report of a missing person and, no later than two hours after receiving a missing person report or additional or supplemental information for the report, shall:

(1) start an appropriate investigation to determine the present location of the missing person and to determine whether the missing person is an endangered person;

(2) provide to the clearinghouse all information the law enforcement agency has relating to an investigation regarding or the location or identification of a missing person;

(3) enter the name of the missing person into the clearinghouse and the national crime information center missing person file; and

(4) if the missing person is determined to be an endangered person, notify the department of public safety in accordance with procedures prescribed by the department.

B. Information not immediately available shall be obtained as soon as possible by the law enforcement agency and, no later than two hours after receipt of the information, entered into the clearinghouse and the national crime information center file as a supplement to the original entry.

C. All New Mexico law enforcement agencies are required to enter information about all unidentified human remains found in their jurisdiction into the clearinghouse and the national crime information center unidentified person file, including all available identifying features of the human remains and a description of the clothing found on the human remains. If an information entry into the national crime information center file results in an automatic entry of the information into the clearinghouse, the law enforcement agency is not required to make a direct entry of that information into the clearinghouse.

**History: Laws 1995, ch. 146, § 7; 2007, ch. 119, § 2; 2010, ch. 32, § 3; 2010, ch. 33, § 7.**

**2010 Multiple Amendments.** — Laws 2010, ch. 32, § 3 and Laws 2010, ch. 33, § 7 both enacted amendments to



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this section. Pursuant to 12-1-8 NMSA 1978, Laws 2010, ch. 33, § 7, as the last act signed by the governor, has been compiled into the NMSA as set out above, and Laws 2010, ch. 32, § 3, while not compiled pursuant to 12-1-8 NMSA 1978, is set out below.

**Laws 2010, ch. 33, § 7 [set out above],** effective May 19, 2010, in the title of the section, after "unidentified", deleted "bodies" and added "human remains"; in Subsection A, after "law enforcement agency" deleted "upon" and added "shall accept without delay and without exception for any reason any report of a missing person and, no later than two hours after" and after "missing person report", added "or additional or supplemental information for the report"; in Subsection A(1) and (3), deleted "immediately" from the beginning of the each sentence; in Subsection A(4), after "an endangered person," deleted "immediately"; in Subsection B, after "law enforcement agency and" added "no later than two hours after receipt of the information"; and in Subsection C, in the first sentence, after "information about all unidentified", deleted "bodies of persons" and added "human remains"; after "identifying features of the", deleted "body" and added "human remains"; and after "clothing found on the" deleted "body" and added "human remains".

**Laws 2010, ch. 32, § 3 [set out below],** effective May 19, 2010, in the title of the section, after "unidentified", deleted "bodies" and added the "human remains"; in Paragraph (4) of Subsection A, after "endangered person", deleted "immediately" and after "department of public safety", added "within twelve hours of receiving the report"; and in Subsection C, in the first sentence, after "available identifying features of the", deleted "body" and inserted "human remains"; and after "description of the clothing found", deleted "of the body" and inserted "with the body", and provided:

"29-15-7. Law enforcement requirements; missing person reports; unidentified human remains.

A. A law enforcement agency, upon receiving a missing person report, shall:

(1) immediately start an appropriate investigation to determine the present location of the missing person and to determine whether the missing person is an endangered person;

(2) provide to the clearinghouse all information the law enforcement agency has relating to an investigation regarding, or the location or identification of, a missing person;

(3) immediately enter the name of the missing person into the clearinghouse and the national crime information center missing person file; and

(4) if the missing person is determined to be an endangered person, notify the department of public safety within twelve hours of receiving the report, in accordance with procedures prescribed by the department.

B. Information not immediately available shall be obtained as soon as possible by the law enforcement agency and entered into the clearinghouse and the national crime information center file as a supplement to the original entry.

C. All New Mexico law enforcement agencies are required to enter information about all unidentified human remains of persons found in their jurisdiction into the clearinghouse and the national crime information center unidentified person file, including all available identifying features of the human remains and a description of the clothing found with the human remains. If an information entry into the national crime information center file results in an automatic entry of the information into the clearinghouse, the law enforcement agency is not required to make a direct entry of that information into the clearinghouse."

**The 2007 amendment,** effective July 1, 2007, required law enforcement agencies to determine whether a missing person is an endangered person and if the missing person is an endangered person, to notify the department of public safety.

## 29-15-7.1. Missing child reports; law enforcement agencies; duties; registrar.

A. Upon receiving a report of a child believed to be missing, a law enforcement agency shall:

(1) no later than two hours after receiving the report, enter identifying and descriptive information about the child into the national crime information center computer. Law enforcement agencies having direct access to the national crime information center computer shall enter and retrieve the data directly and shall cooperate in the entry and retrieval of data on behalf of law enforcement agencies that do not have direct access to the system; and

(2) notify the state registrar within twenty-four hours, by telephone, facsimile or electronic transmission, of the missing child. Within three days of this initial notification, the law enforcement agency shall make a written notification in a manner and form prescribed by the state registrar. Both notifications shall include the missing child's name, date of birth and county and state of birth; the mother's maiden name; the name of the noncustodial parent if the parents are not married; the name and telephone number of a contact person at the reporting law enforcement agency; and any other information required by the state registrar.

B. Immediately after a missing child is located, the law enforcement agency that located or returned the missing child shall notify the law enforcement agency having jurisdiction over the investigation, and the originating agency shall clear the entry from the national crime information center computer and shall, within twenty-four hours, notify the state registrar in writing that the missing child has been located.

**History: 1978 Comp., § 29-15-7.1, as enacted by Laws 2010, ch. 33, § 8.**

**Effective dates.** — Laws 2010, ch. 33 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2010, 90 days after the adjournment of the legislature.



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## 29-15-7.2. Birth records of missing children; state registrar's duties.

A. Upon notification by a law enforcement agency that a child born in the state is missing, the state registrar shall flag the child's birth record in such a manner that whenever a copy of the birth certificate or information concerning the birth record is requested, the state registrar shall be alerted to the fact that the certificate is that of a missing child.

B. Upon notification by a law enforcement agency that a child born outside the state is missing, the state registrar shall notify the corresponding officer in the state where the child was born that the child has been reported missing.

C. In response to any inquiry, the state registrar or any local registrar appointed by the state registrar or any employee of the vital statistics bureau of the health services division of the department of health shall not provide a copy of a birth certificate or information concerning the birth record of any missing child whose birth record is flagged pursuant to this section, except following notification of the law enforcement agency having jurisdiction over the investigation of the missing child. Such inquiries shall be handled in the following manner:

(1) when a copy of the birth certificate of a missing child whose record has been flagged is requested in person, the local registrar or employee accepting the request shall immediately notify that person's supervisor or the state registrar. If possible, the person making the request shall complete a form supplying the requester's name, address, telephone number and relationship to the missing child and the name, address and birth date of the missing child. The driver's license of the requester, if available, shall be photocopied and returned. The requester shall be informed that a copy of the birth certificate will be mailed to the requester. The local registrar or employee shall note the physical description of the requester, and, upon that requester's departure from the vital statistics bureau office, the supervisor or state registrar shall immediately notify the law enforcement agency having jurisdiction of the request and the information obtained pursuant to this paragraph. The state registrar will retain the form completed by the person making the request; and

(2) when a copy of the birth certificate of a missing child whose birth record has been flagged is requested in writing, the state registrar shall immediately notify the law enforcement agency having jurisdiction of the request and shall provide a copy of the written request. The state registrar shall retain the original written request.

D. Upon notification by a law enforcement agency that a missing child has been recovered, the state registrar shall remove the flag from the child's birth record.

**History: 1978 Comp., § 29-15-7.2, as enacted by Laws 2010, ch. 33, § 9.**

**Cross references.** — For the vital statistics bureau, *see* 24-14-3 NMSA 1978.

**Effective dates.** — Laws 2010, ch. 33 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2010, 90 days after the adjournment of the legislature.

## 29-15-8. Release of dental records; immunity.

A. At the time a missing person report is made, the law enforcement agency to which the missing person report is given shall provide a dental record release form conforming to the requirements of the federal Health Insurance Portability and Accountability Act of 1996 to the custodian or immediate family member of the missing person, provided that the custodian or immediate family member is authorized pursuant to that federal act to execute a release on behalf of the missing person. The law enforcement agency shall endorse the dental record release form with a notation that a missing person report has been made in compliance with the provisions of the Missing Persons Information and Reporting Act. When the dental record release form is properly completed by the custodian or immediate family member of the missing person and contains the endorsement, the form is sufficient to permit a dentist or physician in this state to release dental records relating to the missing person to the law enforcement agency.

B. If a release form cannot be executed, the law enforcement agency shall seek disclosure of the dental records of a missing person directly from the records custodian pursuant to the provisions of the federal Health Insurance Portability and Accountability Act of 1996 that allow disclosure of health information for law enforcement purposes.



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C. The law enforcement agency shall send the dental records to the clearinghouse.

D. A dentist or physician who releases dental records pursuant to this section is immune from civil liability or criminal prosecution for the release of the dental records.

**History: Laws 1995, ch. 146, § 8; 2010, ch. 33, § 10.**

**The 2010 amendment,** effective May 19, 2010, in Subsection A, in the first sentence, after "dental record release form", added "conforming to the requirements of the federal Health Insurance Portability and Accountability Act of 1996" and after "family member of the missing person", added "provided that the custodian or immediate family member is authorized pursuant to that federal act to execute a release on behalf of the missing person"; and in the second sentence, after "Missing Persons Information", added "and Reporting"; deleted the former language of Subsection B, which authorized a district court judge to release dental records of a missing person to a law enforcement agency; added the current language of Subsection B; and in Subsection D, after "physician who releases dental records", deleted "to a person presenting a proper release executed or ordered".

## 29-15-9. Cross-checking and matching.

A. The clearinghouse shall cross-check and attempt to match unidentified human remains with descriptions of missing persons. When the clearinghouse discovers a possible match between unidentified human remains and a missing person description, the clearinghouse shall notify the appropriate law enforcement agencies.

B. Law enforcement agencies that receive notice of a possible match shall make arrangements for positive identification. If a positive identification is made, the law enforcement agency shall complete and close the investigation with written notification to the clearinghouse.

C. Law enforcement agencies that receive notice of a possible match between human remains and a missing person description shall notify the office of the state medical investigator.

**History: Laws 1995, ch. 146, § 9; 2010, ch. 33, § 11.**

**The 2010 amendment,** effective May 19, 2010, in Subsection A, in the first sentence, after "to match unidentified", deleted "bodies" and added "human remains"; and in the second sentence, after "possible match between unidentified", deleted "body" and added "human remains"; and added Subsection C.

## 29-15-10. Interagency cooperation.

A. State agencies and public and private schools shall cooperate with a law enforcement agency that is investigating a missing person report and shall furnish any information that will assist the law enforcement agency in completing the investigation.

B. Information provided by a state agency or a public or private school shall not be released to any person outside the law enforcement agency or the clearinghouse, except as provided by rule of the department of public safety.

**History: Laws 1995, ch. 146, § 10; 2010, ch. 33, § 12.**

**The 2010 amendment,** effective May 19, 2010, in Subsection B, after "except as provided by", deleted "regulation" and added "rule".

## 29-15-11. Confidentiality of records.

A. The department of public safety shall by rule provide for the classification of information and records as confidential that:

(1) are otherwise confidential under state or federal law or rules adopted pursuant to state or federal law;

(2) are related to the investigation by a law enforcement agency of a missing person or unidentified human remains, if the department of public safety, in consultation with the law enforcement agency, determines that release of the information would be deleterious to the investigation;

(3) are records or notations that the clearinghouse maintains for internal use in matters relating to missing persons and unidentified human remains and the department of public safety determines that release of the internal documents might interfere with an investigation by a law enforcement agency in New Mexico or any other jurisdiction; or



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(4) the department of public safety determines might interfere with an investigation or otherwise harm a person, custodian or reporter.

B. The rule may provide for the sharing of confidential information with the custodian or immediate family member of the missing person, except as provided pursuant to Section 29-15-5 NMSA 1978.

**History: Laws 1995, ch. 146, § 11; 2010, ch. 33, § 13; 2021, ch. 39, § 2.**

**The 2021 amendment,** effective June 18, 2021, provided an exception to the provision authorizing the sharing of confidential information with the custodian or immediate family member of a missing person; and in Subsection B, after "missing person", added "except as provided pursuant to Section 29-15-5 NMSA 1978".

**The 2010 amendment,** effective May 19, 2010, in Subsection A, after "public safety shall by", deleted "regulation" and added "rule"; in Paragraph (1) of Subsection A, after "state or federal law or", deleted "regulations" and added "rules"; in Paragraph (2) of Subsection A, after "missing person or unidentified", deleted "body" and added "human remains"; in Paragraph (3) of Subsection A, after "missing persons and unidentified", deleted "bodies" and added "human remains"; and in Subsection B, at the beginning of the sentence, after "The", deleted "regulation" and added "rule".

## 29-15-12. Attorney general to require compliance; removal or discipline.

A. The attorney general shall enforce state agency compliance with the provisions of the Missing Persons Information and Reporting Act as appropriate to assure the immediate response to a report of a missing person.

**History: Laws 1995, ch. 146, § 12; 2010, ch. 33, § 14.**

**The 2010 amendment,** effective May 19, 2010, in the catchline, after "compliance", added "; removal or discipline"; in Subsection A, after "The attorney general shall" deleted "require each law enforcement agency to comply with the provisions of the Missing Persons Information Act and may seek writs of mandamus or other appropriate remedies to enforce the provisions of that act" and added the remainder of the sentence.

## 29-15-13. Missing in New Mexico event.

Each year, the department of public safety, in collaboration with the clearinghouse, shall host a "missing in New Mexico event" in support of all New Mexicans who are searching for missing relatives. The missing in New Mexico event is designated to:

A. provide an opportunity for federal, state, local and tribal governments to come together in one location and virtually to assist families to file missing persons reports, update missing persons reports, submit DNA records or meet with an investigator;

B. provide a network for New Mexicans with missing relatives to heal, access support services and access media outlets to distribute information about missing relatives to the general public; and

C. encourage the department of public safety, local law enforcement agencies, the office of the attorney general, the office of the state medical investigator, the Indian affairs department, the department of health and the behavioral health services and income support divisions of the human services department to come together to provide support and services for New Mexican families with missing relatives.

**History: Laws 2022, ch. 3, § 1.**

**Emergency clauses.** — Laws 2022, ch. 3, § 3 contained an emergency clause and was approved February 24, 2022.

# ARTICLE 15A

# AMBER Alert

Sec.
29-15A-1. Short title.
29-15A-2. Definitions.
29-15A-3. State police; AMBER alert notification plan; declaration of AMBER alert.
29-15A-4. AMBER alert; initiation by other law enforcement agencies.
29-15A-5. Submission of false information; penalty.



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## 29-15A-1. Short title.

This act [29-15A-1 to 29-15A-5] may be cited as the "AMBER Alert Law".

**History: Laws 2003, ch. 93, § 1.** **Effective dates.** — Laws 2003, ch. 93, § 6 made Laws 2003, ch. 93, § 1 effective April 1, 2003.

## 29-15A-2. Definitions.

As used in the AMBER Alert Law:

A. "AMBER alert" means a declaration by the authorized requester that an abduction has occurred and that notifications and broadcasts should be made pursuant to the AMBER alert notification plan;

B. "authorized requester" means the person designated by the chief of the state police to implement the AMBER alert notification plan;

C. "chief of the state police" means the director of the New Mexico state police division of the department of public safety;

D. "lead station" means an AM radio station that has been designated as the "state primary station" by the federal communications commission for the emergency alert system; and

E. "state police" means the New Mexico state police division of the department of public safety.

**History: Laws 2003, ch. 93, § 2.** **Effective dates.** — Laws 2003, ch. 93, § 6 made Laws 2003, ch. 93, § 2 effective April 1, 2003.

## 29-15A-3. State police; AMBER alert notification plan; declaration of AMBER alert.

A. The state police shall develop and implement an AMBER alert notification plan for the purpose of disseminating, as rapidly as possible, information about a child abduction so that law enforcement agencies and citizens throughout the state may be aware and vigilant. The plan shall:

(1) provide a procedure for notifying the lead station by the authorized requester that an AMBER alert has been declared. The procedure shall include codes for use by the authorized requester in communicating with the lead station to prevent false alerts;

(2) provide a procedure in which other state and private print, radio, television or other media may alert the members of the public of the abduction;

(3) include a procedure for notifying the department of information technology that an AMBER alert has been declared. The department of information technology shall immediately transmit the notification and related information to all state field operations employees so that they may be aware and vigilant in the course of their regular activities;

(4) include a procedure for notifying a representative of each cellular service company and paging service company operating in New Mexico so that a text message may be sent to the company's customers at no additional expense to the recipient or to any service that accepts the information from the authorized requester and delivers it to the cellular service or paging service company;

(5) include a procedure for notifying all local and federal law enforcement agencies that an AMBER alert has been declared; and

(6) provide for dissemination of information about a child or a child's abductor to the lead station, the department of information technology and local law enforcement agencies when an AMBER alert has been declared.

B. The state police shall distribute the AMBER alert notification plan to all local law enforcement agencies and provide such training and other assistance as is necessary to ensure that the plan can be properly implemented.

C. The authorized requester may declare an AMBER alert when the requester has reason to believe that:

(1) a child under the age of eighteen has been abducted;

(2) the child is in imminent danger of serious bodily harm or death; and

(3) there is specific information available about the child or the child's abductor that may assist in an expedient and successful end to the abduction.



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D. Once an AMBER alert has been declared, only the authorized requester may terminate the AMBER alert.

**History: Laws 2003, ch. 93, § 3; 2005, ch. 142, § 1; 2007, ch. 290, § 24; 2013, ch. 51, § 1.**

**The 2013 amendment,** effective June 14, 2013, expanded the reasons for declaring an AMBER alert to include abduction by a person related to the child; and in Paragraph (1) of Subsection C, after "has been abducted", deleted "by an unrelated person".

**The 2007 amendment,** effective July 1, 2007, required the AMBER alert notification plan to provide for notification to and transmission of information by the department of information technology.

**The 2005 amendment,** effective July 1, 2005, added Subsection A(4) to require that the AMBER notification plan include a procedure for notifying each cellular and paging service company in New Mexico so that a message may be sent to the company's customers at no additional expense to the person who accepts the information and delivers it to the cellular or paging service company.

## 29-15A-4. AMBER alert; initiation by other law enforcement agencies.

A. The procedures for initiating an AMBER alert pursuant to the AMBER Alert Law are available to all law enforcement agencies in New Mexico; provided that nothing in that law prohibits a local law enforcement agency from developing and implementing its own similar notification plan; provided further that nothing in that act supercedes a provision or procedure in such a local notification plan.

B. If a law enforcement agency that has not developed and implemented its own similar plan desires that an AMBER alert be declared, it shall notify the authorized requester. The authorized requester shall declare an AMBER alert if, after evaluating the information, the authorized requester believes that the criteria for declaring an alert has been satisfied.

C. If an AMBER alert is initiated and there is information that the child's abductor may be traveling or has traveled across state lines, the authorized requester shall notify the other states or the Republic of Mexico in order for those governments to issue an alert. The state police shall work with all bordering states and the Republic of Mexico in order to establish agreements to carry out regional alerts.

**History: Laws 2003, ch. 93, § 4.**

**Effective dates.** — Laws 2003, ch. 93, § 6 made Laws 2003, ch. 93, § 4 effective April 1, 2003.

## 29-15A-5. Submission of false information; penalty.

A person who knowingly submits false information to a law enforcement agency regarding a child abduction is guilty of a petty misdemeanor and shall be sentenced in accordance with Section 31-19-1 NMSA 1978.

**History: Laws 2003, ch. 93, § 5.**

**Effective dates.** — Laws 2003, ch. 93, § 6 made Laws 2003, ch. 93, § 5 effective April 1, 2003.

# ARTICLE 16

# DNA Identification

Sec.
29-16-1. Short title.
29-16-2. Purpose of act.
29-16-3. Definitions.
29-16-4. Administrative center; powers and duties; head; location; written agreement.
29-16-5. DNA oversight committee; created; powers and duties.
29-16-6. Collection of samples.
29-16-6.1. Reimbursement of costs.
29-16-7. Procedures for collection of samples.
29-16-8. Confidentiality; disclosure and dissemination of DNA records.
29-16-8.1. DNA searches.
29-16-9. Enforcement.
29-16-10. Expungement of samples and DNA records from the DNA identification system and CODIS.
29-16-10.1. Expungement of samples and DNA records.
29-16-11. Assessment; collection; DNA fee.
29-16-12. Penalty.
29-16-13. DNA identification system fund created; purposes.



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## 29-16-1. Short title.

Chapter 29, Article 16 NMSA 1978 may be cited as the "DNA Identification Act".

**History: Laws 1997, ch. 105, § 1; 2003, ch. 256, § 4.**

**The 2003 amendment,** effective July 1, 2003 substituted "Chapter 29, Article 16 NMSA 1978" for "This act [29-16-1 to 29-16-13 NMSA 1978]" at the beginning of the section.

**ANNOTATIONS**

**Constitutionality.** — New Mexico's DNA Identification Act, which requires all persons arrested for certain crimes to provide a DNA sample, is not unconstitutional on its face, because weighing the law enforcement need to identify all persons it has arrested for committing a felony, and the sample's subsequent use in a database, against the minimally invasive means for securing the DNA sample from a defendant's cheek weighs in favor of concluding that the search is reasonable under the fourth amendment to the U.S. Constitution and of the N.M. Const., art. II, § 10. *State v. Blea*, 2018-NMCA-052, cert. denied.

Where defendant was convicted of multiple counts of first degree criminal sexual penetration and first degree kidnapping involving four separate victims, and where defendant claimed that New Mexico's DNA Identification Act, which requires all persons arrested for certain crimes to provide a DNA sample, is unconstitutional on its face, defendant's claim was denied, because weighing the law enforcement need to identify all persons it has arrested for committing a felony, and the sample's subsequent use under the combined DNA index system database, against the minimally invasive means for securing the DNA sample from a defendant's cheek weighs in favor of concluding that the search is reasonable under the fourth amendment to the U.S. Constitution and of the N.M. Const., art. II, § 10. *State v. Blea*, 2018-NMCA-052, cert. denied.

## 29-16-2. Purpose of act.

The purpose of the DNA Identification Act is to:

A. establish a DNA identification system for covered offenders and persons required to provide a DNA sample pursuant to the provisions of Section 1 [29-3-10 NMSA 1978] of this 2006 act;

B. facilitate the use of DNA records by local, state and federal law enforcement agencies in the:

(1) identification, detection or exclusion of persons in connection with criminal investigations; and

(2) registration of sex offenders required to register pursuant to the provisions of the Sex Offender Registration and Notification Act [Chapter 29, Article 11A NMSA 1978];

C. establish a missing persons DNA identification system consisting of the following DNA indexes:

(1) unidentified persons;

(2) unidentified human remains; and

(3) relatives of, or known reference samples from, missing persons; and

D. facilitate the use of DNA records by local, state and federal law enforcement agencies and the state medical investigator in the identification and location of missing and unidentified persons or human remains.

**History: Laws 1997, ch. 105, § 2; 2003, ch. 256, § 5; 2005, ch. 279, § 9; 2006, ch. 104, § 2.**

**The 2006 amendment,** effective January 1, 2007, in Subsection A, added "persons required to provide a DNA sample pursuant to the provisions of Section 1 of this 2006 act".

**Severability.** — Laws 2006, ch. 104, § 11, effective January 1, 2007, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

**The 2005 amendment,** effective July 1, 2005, added Subsection B(2) to provide that a purpose of the act is to facilitate the use of DNA records in the registration of sex offenders.

**Applicability.** — Laws 2005, ch. 279, §14, effective July 1, 2005, provided that Laws 2005, ch. 279, §§ 1 through 13 apply to a person convicted of a sex offense on or after July 1, 2005 and a person convicted of a sex offense prior to July 1, 2005 and who, on July 1, 2005, was still incarcerated, on probation or on parole for commission of that sex offense.

**ANNOTATIONS**

**Constitutionality.** — New Mexico's DNA Identification Act, which requires all persons arrested for certain crimes to provide a DNA sample, is not unconstitutional on its face, because weighing the law enforcement need to identify all persons it has arrested for committing a felony, and the sample's subsequent use in a database, against the minimally invasive means for securing the DNA sample from a defendant's cheek weighs in favor of concluding that the search is reasonable under the fourth amendment to the U.S. Constitution and of the N.M. Const., art. II, § 10. *State v. Blea*, 2018-NMCA-052, cert. denied.

Where defendant was convicted of multiple counts of first degree criminal sexual penetration and first degree kidnapping involving four separate victims, and where defendant claimed that New Mexico's DNA Identification Act, which requires all persons arrested for certain crimes to provide a DNA sample, is unconstitutional on its face, defendant's claim was denied, because weighing the law enforcement need to identify all persons it has arrested for committing a felony, and the sample's subsequent use



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under the combined DNA index system database, against the minimally invasive means for securing the DNA sample from a defendant's cheek weighs in favor of concluding that the search is reasonable under the fourth amendment to the U.S. Constitution and of the N.M. Const., art. II, § 10. *State v. Blea*, 2018-NMCA-052, cert. denied.

## 29-16-3. Definitions.

As used in the DNA Identification Act:

A. "administrative center" means the part of a law enforcement agency crime laboratory that participates in the national DNA index system and that administers and operates the DNA identification system;

B. "CODIS" means the federal bureau of investigation's national DNA index system for storage and exchange of DNA records submitted by forensic DNA laboratories;

C. "covered offender" means any person:

(1) convicted of a felony offense as an adult pursuant to state, federal or military law;

(2) convicted as an adult pursuant to youthful offender or serious youthful offender proceedings under the Children's Code [Chapter 32A NMSA 1978] or pursuant to comparable or equivalent proceedings under state, federal or military law; or

(3) required to register as a sex offender pursuant to the provisions of the Sex Offender Registration and Notification Act [Chapter 29, Article 11A NMSA 1978];

D. "department" means the department of public safety;

E. "DNA" means deoxyribonucleic acid as the basis of human heredity;

F. "DNA identification system" means the DNA identification system established pursuant to the DNA Identification Act;

G. "DNA oversight committee" means the DNA identification system oversight committee;

H. "DNA records" means the results of DNA testing and related information;

I. "DNA testing" means a forensic DNA analysis that includes restriction fragment length polymorphism, polymerase chain reaction or other valid methods of DNA typing performed to obtain identification characteristics of samples;

J. "fund" means the DNA identification system fund;

K. "missing persons DNA identification system" means the missing persons DNA identification system established by the DNA Identification Act;

L. "sample" means a sample of biological material sufficient for DNA testing; and

M. "sex offender DNA identification system" means the sex offender DNA identification system established by the DNA Identification Act.

**History: Laws 1997, ch. 105, § 3; 2003, ch. 256, § 6; 2005, ch. 279, § 10; 2009, ch. 24, § 1; 2013, ch. 208, § 1.**

**The 2013 amendment,** effective July 1, 2013, clarified definitions; in Subsection A, after "part of a", added "law enforcement agency crime laboratory that participates in the" and after "index system", deleted "qualified New Mexico crime laboratory"; in Paragraph (2) of Subsection C, after "Children's Code", added "or pursuant to comparable or equivalent proceedings under state, federal or military law" and after "military law; or" deleted "a sex offender", and in Paragraph (3) of Subsection C, after "register", added "as a sex offender".

**The 2009 amendment,** effective June 19, 2009, in Subsection A, added "part of a national DNA index system qualified New Mexico crime laboratory" and deleted former Subsection B, which defined "DNA oversight committee"; in Subsection C, deleted "under the Criminal Code, the Motor Vehicle Code or the constitution of New Mexico" and added "pursuant to state, federal, or military law"; and added Subsection G.

**The 2005 amendment,** effective July 1, 2005, defined "covered offender" in Subsection D to include a sex offender who is required to register; and added Subsection M to define "sex offender DNA identification system".

**Applicability.** — Laws 2005, ch. 279, §14, effective July 1, 2005, provided that Laws 2005, ch. 279, §§ 1 through 13 apply to a person convicted of a sex offense on or after July 1, 2005 and a person convicted of a sex offense prior to July 1, 2005 and who, on July 1, 2005, was still incarcerated, on probation or on parole for commission of that sex offense.

**The 2003 amendment,** effective July 1, 2003, added present Subsection K and redesignated former Subsection K as present Subsection L.

## 29-16-4. Administrative center; powers and duties; head; location; written agreement.

A. The administrative center shall:

(1) establish and administer the DNA identification system. The DNA identification system shall provide for collection, storage, DNA testing, maintenance and comparison of samples



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and DNA records for forensic and humanitarian purposes. Those purposes shall include generation of investigative leads, statistical analysis of DNA profiles and identification of missing persons and unidentified human remains. Procedures used for DNA testing shall be compatible with the procedures the federal bureau of investigation has specified, including comparable test procedures, laboratory equipment, supplies and computer software. Procedures used shall meet or exceed the provisions of the federal DNA Identification Act of 1994 regarding minimum standards for state participation in CODIS, including minimum standards for the acceptance, security and dissemination of DNA records;

(2) coordinate sample collection activities;

(3) perform or contract for DNA testing;

(4) serve as a repository for samples and DNA records;

(5) act as liaison with the federal bureau of investigation for purposes of CODIS;

(6) adopt rules and procedures governing:

(a) sample collection;

(b) DNA testing;

(c) the DNA identification system and DNA records;

(d) the acceptance, security and dissemination of DNA records; and

(e) communication between local, state and federal law enforcement agencies, the corrections department and local jails and detention facilities in order to minimize duplicate sample collections from the same individual;

(7) provide training to jail and detention facility personnel who are required to collect samples pursuant to Section 29-3-10 NMSA 1978;

(8) be reimbursed for, pursuant to the DNA Identification Act, the costs of sample collection and DNA testing of samples taken for the purposes of the identification of missing persons and unidentified human remains;

(9) establish and administer the missing persons DNA identification system as a part of the DNA identification system; and

(10) establish and administer the sex offender DNA identification system as part of the DNA identification system.

B. The chief of the law enforcement agency where the administrative center is located shall select the head of the administrative center with the approval of six members of the DNA oversight committee. The head of the administrative center shall manage the operations of the administrative center and shall have the education and experience to meet or exceed the requirements for a technical leader or a CODIS administrator pursuant to the federal bureau of investigation's quality assurance standards.

C. The administrative center shall be located at the crime laboratory of the law enforcement agency for the largest municipality in a class A county having a population of more than five hundred thousand at the most recent federal decennial census. If a relocation of the administrative center is required for continued compliance with the provisions of the DNA Identification Act, the DNA oversight committee shall designate any future locations of the administrative center upon approval of six voting members of the committee.

D. The DNA oversight committee shall enter into a written agreement with the law enforcement agency where the administrative center is located and may designate the attorney general to enter into the agreement on its behalf and with its approval.

**History: Laws 1997, ch. 105, § 4; 2003, ch. 256, § 7; 2005, ch. 279, § 11; 2006, ch. 104, § 3; 2009, ch. 24, § 2; 2013, ch. 208, § 2.**

**The 2013 amendment,** effective July 1, 2013, provided for the location and relocation of the administrative center and for the selection of the head of the administrative center; provided for the qualifications of the head of the administrative center; required a written agreement between the committee and the law enforcement agency where the administrative center will be located; in the title, after "duties", deleted "transfer to other law enforcement agency" and added "head; location; written agreement"; deleted former Subsection A, which required the secretary of public safety to designate the unit to which the administrative center would be attached; deleted former Subsections C and D, which authorized the secretary of public safety to designate the location of the administrative center; and added Subsections B through D.

**The 2009 amendment,** effective June 19, 2009, in Subsection A, at the end of the sentence, deleted "part of a crime laboratory" and added "that meets the requirements for participation in the national DNA index system".

**The 2006 amendment,** effective January 1, 2007, added Subparagraph (e) of Paragraph (6) of Subsection B to provide for communication in order to minimize duplicate sample collections; and added Paragraph (7) of



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Subsection B to provide for training to personnel to collect samples.

**Severability.** — Laws 2006, ch. 104, § 11, effective January 1, 2007, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

**The 2005 amendment,** effective July 1, 2005, added Subsection B(9) to provide that the administrative center shall establish and administer the sex offender DNA identification system as part of the DNA identification system.

**Applicability.** — Laws 2005, ch. 279, §14, effective July 1, 2005, provided that Laws 2005, ch. 279, §§ 1 through 13 apply to a person convicted of a sex offense on or after July 1, 2005 and a person convicted of a sex offense prior to July 1, 2005 and who, on July 1, 2005, was still incarcerated, on probation or on parole for commission of that sex offense.

## 29-16-5. DNA oversight committee; created; powers and duties.

A. The "DNA identification system oversight committee" is created. The DNA oversight committee shall be composed of nine voting members as follows:

(1) a scientific representative from the department crime laboratory appointed by the secretary of public safety;

(2) a scientific representative from the crime laboratory of the police department for the largest municipality in a class A county having a population of more than two hundred fifty thousand at the most recent federal decennial census;

(3) the secretary of corrections or the secretary's designated representative;

(4) the state medical investigator or the investigator's designated representative;

(5) the attorney general or the attorney general's designated representative;

(6) the president of the district attorneys' association or the president's designated representative;

(7) the chief public defender or the chief public defender's designated representative;

(8) the president of the New Mexico criminal defense lawyers association or the president's designated representative; and

(9) the head of the administrative center or the head's designated representative.

B. The DNA oversight committee shall adopt rules and procedures regarding the administration and operation of the DNA identification system.

C. The administrative center shall review and make recommendations to the DNA oversight committee regarding rules and procedures for the administration and operation of the DNA identification system.

D. The DNA oversight committee shall oversee the establishment and administration of the missing persons DNA identification system as part of the DNA identification system.

E. The DNA oversight committee shall adopt rules and procedures regarding the administration and operation of the missing persons DNA identification system as part of the DNA identification system.

F. The DNA oversight committee shall oversee the establishment and administration of the sex offender DNA identification system as part of the DNA identification system.

G. The DNA oversight committee shall adopt rules and procedures regarding the administration and operation of the sex offender DNA identification system as part of the DNA identification system.

H. The DNA oversight committee shall designate and approve the location of the administrative center as provided in Section 29-16-4 NMSA 1978.

I. The DNA oversight committee may award grants and loans pursuant to Section 29-16-13 NMSA 1978.

**History: Laws 1997, ch. 105, § 5; 2003, ch. 256, § 8; 2005, ch. 279, § 12; 2009, ch. 24, § 3; 2013, ch. 208, § 3.**

**The 2013 amendment,** effective July 1, 2013, required that the DNA identification system oversight committee designate and approve the location of the administrative center; and added Subsections H and I.

**The 2009 amendment** made no changes.

**The 2005 amendment,** effective July 1, 2005, added Subsection F to provide for the establishment and administration of the sex offender DNA identification system and added Subsection G to provide for the adoption of rules and procedures regarding the establishment and administration of the sex offender DNA identification system.

**Applicability.** — Laws 2005, ch. 279, §14, effective July 1, 2005, provided that Laws 2005, ch. 279, §§ 1 through 13 apply to a person convicted of a sex offense on or after July 1, 2005 and a person convicted of a sex offense prior to July 1, 2005 and who, on July 1, 2005, was still incarcerated, on probation or on parole for commission of that sex offense.

**The 2003 amendment,** effective July 1, 2003 substituted "attorneys" for "attorney's" in Subsection A(6); deleted "regulations" following "adopt rules" near the middle of Subsection B; and deleted "regulations" following "regarding rules" near the middle of Subsection C; and added Subsections D and E.



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## 29-16-6. Collection of samples.

A. A covered offender shall provide one or more samples to the administrative center, as follows:

(1) a covered offender convicted on or after July 1, 1997 shall provide a sample immediately upon request to the corrections department as long as the request is made before release from any correctional facility or, if the covered offender is not sentenced to incarceration, before the end of any period of probation or other supervised release;

(2) a covered offender incarcerated on or after July 1, 1997 shall provide a sample immediately upon request to the corrections department as long as the request is made before release from any correctional facility;

(3) a covered offender on probation or other supervised release on or after July 1, 1997 shall provide a sample immediately upon request to the corrections department as long as the request is made before the end of any period of probation or other supervised release; and

(4) a covered offender required to register or renew his registration pursuant to the provisions of the Sex Offender Registration and Notification Act [Chapter 29, Article 11A NMSA 1978] shall provide a sample immediately upon request to the county sheriff located in any county in which the sex offender is required to register, unless the sex offender provided a sample while in the custody of the corrections department or to the county sheriff of another county in New Mexico in which the sex offender is registered.

B. A person eighteen years of age or over who is arrested on or after January 1, 2007 for the commission of a felony as provided in Section 1 [29-3-10 NMSA 1978] of this 2006 act shall provide a sample immediately upon request to jail or detention facility personnel, unless:

(1) the person has previously provided a sample sufficient for DNA testing pursuant to the provisions of this section;

(2) the sample is in the possession of the administrative center; and

(3) the sample has not been expunged.

C. Samples from unidentified persons or relatives of a missing person shall be provided to the administrative center, as follows:

(1) upon the completion of a permission to search form authorizing the collection of a DNA sample;

(2) upon the receipt of a properly executed search warrant; or

(3) upon the issuance of a court order.

D. Samples from unidentified human remains shall be provided by the state medical investigator.

E. Samples of known reference materials from missing persons shall be provided by the investigating law enforcement agency.

**History: Laws 1997, ch. 105, § 6; 2003, ch. 256, § 9; 2005, ch. 279, § 13; 2006, ch. 104, § 4.**

**The 2006 amendment,** effective January 1, 2007, added Subsection B to provide with exception for the collection of samples from persons eighteen years of age or older, who are arrested for a felony.

**Severability.** — Laws 2006, ch. 104, § 11, effective January 1, 2007, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

**The 2005 amendment,** effective July 1, 2005, added Subsection A(4) to provide that a covered offender shall provide a sample upon request of the sheriff of any county in which the sex offender is required to register, unless the sex offender has given a sample while in custody of the corrections department of a sheriff of another county.

**Applicability.** — Laws 2005, ch. 279, §14, effective July 1, 2005, provided that Laws 2005, ch. 279, §§ 1 through 13 apply to a person convicted of a sex offense on or after July 1, 2005 and a person convicted of a sex offense prior to July 1, 2005 and who, on July 1, 2005, was still incarcerated, on probation or on parole for commission of that sex offense.

**ANNOTATIONS**

**Constitutionality.** — New Mexico's DNA Identification Act, which requires all persons arrested for certain crimes to provide a DNA sample, is not unconstitutional on its face, because weighing the law enforcement need to identify all persons it has arrested for committing a felony, and the sample's subsequent use in a database, against the minimally invasive means for securing the DNA sample from a defendant's cheek weighs in favor of concluding that the search is reasonable under the fourth amendment to the U.S. Constitution and of the N.M. Const., art. II, § 10. *State v. Blea*, 2018-NMCA-052, cert. denied.

Where defendant was convicted of multiple counts of first degree criminal sexual penetration and first degree kidnapping involving four separate victims, and where defendant claimed that New Mexico's DNA Identification Act, which requires all persons arrested for certain crimes to provide a DNA sample, is unconstitutional on its face, defendant's claim was denied, because weighing the law enforcement need to identify all persons it has arrested for committing a felony, and the sample's subsequent use under the combined DNA index system



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database, against the minimally invasive means for securing the DNA sample from a defendant's cheek weighs in favor of concluding that the search is reasonable under the fourth amendment to the U.S. Constitution and of the N.M. Const., art. II, § 10. *State v. Blea*, 2018-NMCA-052, cert. denied.

## 29-16-6.1. Reimbursement of costs.

A. When the DNA testing of samples listed in Section 29-16-6 NMSA 1978 is required, the administrative center shall be reimbursed for the costs of the sample collection and DNA testing:

(1) of unidentified persons by the investigating law enforcement agency;

(2) of unidentified human remains by the state medical investigator or by the investigating law enforcement agency; and

(3) for relatives of, or known reference samples from, a missing person by the relatives of the missing person or by the investigating law enforcement agency.

B. Reimbursements shall be deposited in the fund.

**History: Laws 2003, ch. 256, § 2.**

**Effective dates.** — Laws 2003, ch. 256, § 12 made Laws 2003, ch. 256, § 2 effective July 1, 2003.

## 29-16-7. Procedures for collection of samples.

A. The collection of samples pursuant to the provisions of Section 29-16-6 NMSA 1978 shall be conducted in a medically approved manner in accordance with rules and procedures adopted by the DNA oversight committee.

B. A person who collects samples shall be trained in procedures that meet the requirements and standards specified in Subsection A of this section.

C. A person authorized to collect samples and his employer shall be immune from liability in any civil or criminal action with regard to the collection of samples, if the collection is performed without negligence. This subsection shall not be deemed to create any additional liability or waive any immunity of public employees under the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978].

D. Samples shall be stored in accordance with rules and procedures adopted by the administrative center.

E. DNA testing shall be performed by the administrative center or a contract facility it may designate.

F. DNA records and samples shall be securely classified and stored by the administrative center.

**History: Laws 1997, ch. 105, § 7; 2003, ch. 256, § 10.**

**The 2003 amendment,** effective July 1, 2003, deleted "regulations" following "rules" throughout the section; in Subsection A substituted "29-16-6 NMSA 1978" for "6 of the DNA Identification Act" following "provisions of Section" near the beginning; and substituted "by" for "at" near the end of Subsection F.

## 29-16-8. Confidentiality; disclosure and dissemination of DNA records.

A. DNA records and samples are confidential and shall not be disclosed except as authorized in the DNA Identification Act pursuant to the rules and regulations developed and adopted by the DNA oversight committee.

B. The administrative center shall make DNA records available for identification, comparison and investigative purposes to local, state and federal law enforcement agencies and the state medical investigator pursuant to the rules developed and adopted by the DNA oversight committee. The administrative center may disseminate statistical or research information derived from samples and DNA testing if all personal identification is removed pursuant to the rules developed and adopted by the DNA oversight committee.

C. To minimize duplicate sample collection and testing, the administrative center may make information available, by secure electronic methods, to local, state and federal law enforcement



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agencies, the corrections department, jails and detention facilities for the purpose of verifying whether a sample has been collected from a specific individual. Information provided under this subsection shall not include DNA testing results.

**History: Laws 1997, ch. 105, § 8; 2003, ch. 256, § 11; 2006, ch. 104, § 5.**

**The 2006 amendment,** effective January 1, 2007, added Subsection C to provide for release of information in order to minimize duplicate sample collection and testing.

**Severability.** — Laws 2006, ch. 104, § 11, effective January 1, 2007, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

**The 2003 amendment,** effective July 1, 2003, in Subsection B inserted "and the state medical investigator" following "law enforcement agencies" near the middle and deleted "and regulations" following "to the rules" throughout the section.

## 29-16-8.1. DNA searches.

A. Searches of samples collected pursuant to the DNA Identification Act, for purposes of the missing persons DNA identification system, shall be limited to searches against DNA indexes consisting of:

(1) unidentified persons;

(2) unidentified human remains;

(3) relatives of, or known reference samples from, missing persons;

(4) covered offenders as defined by the DNA Identification Act and maintained by the DNA identification system; and

(5) persons arrested for the commission of a felony as provided in Section 1 of this 2006 act [29-3-10 NMSA 1978].

B. Searches of samples collected from unidentified persons or relatives of missing persons pursuant to the DNA Identification Act shall not be performed against DNA indexes consisting of evidentiary samples resulting from criminal investigations.

**History: Laws 2003, ch. 256, § 3; 2006, ch. 104, § 6.**

**The 2006 amendment,** effective January 1, 2007, added Paragraph (5) of Subsection A to add persons arrested for a felony.

**Severability.** — Laws 2006, ch. 104, § 11, effective January 1, 2007, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

**ANNOTATIONS**

**Constitutionality.** — New Mexico's DNA Identification Act, which requires all persons arrested for certain crimes to provide a DNA sample, is not unconstitutional on its face, because weighing the law enforcement need to identify all persons it has arrested for committing a felony, and the sample's subsequent use in a database, against the minimally invasive means for securing the DNA sample from a defendant's cheek weighs in favor of concluding that the search is reasonable under the fourth amendment to the U.S. Constitution and of the N.M. Const., art. II, § 10. *State v. Blea*, 2018-NMCA-052, cert. denied.

Where defendant was convicted of multiple counts of first degree criminal sexual penetration and first degree kidnapping involving four separate victims, and where defendant claimed that New Mexico's DNA Identification Act, which requires all persons arrested for certain crimes to provide a DNA sample, is unconstitutional on its face, defendant's claim was denied, because weighing the law enforcement need to identify all persons it has arrested for committing a felony, and the sample's subsequent use under the combined DNA index system database, against the minimally invasive means for securing the DNA sample from a defendant's cheek weighs in favor of concluding that the search is reasonable under the fourth amendment to the U.S. Constitution and of the N.M. Const., art. II, § 10. *State v. Blea*, 2018-NMCA-052, cert. denied.

## 29-16-9. Enforcement.

A. The attorney general or a district attorney may petition a district court for an order requiring a covered offender or a person required to provide a DNA sample pursuant to the provisions of Section 1 of this 2006 act [29-3-10 NMSA 1978] to:

(1) provide a sample; or

(2) provide a sample by alternative means if the covered offender or person will not cooperate.

B. Nothing in this section shall prevent the collection of samples by order of a court of competent jurisdiction or the collection of samples of covered offenders.

**History: Laws 1997, ch. 105, § 9; 2006, ch. 104, § 7.**

**The 2006 amendment,** effective January 1, 2007, in Subsection A, added a person required to provide a DNA sample pursuant to Section 1 of the 2006 act [29-3-10 NMSA 1978]; and added Subsection B to provide that nothing in this section prevents collection of samples by order or a court or the collection of samples of covered offenders.



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**Severability.** — Laws 2006, ch. 104, § 11, effective January 1, 2007, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 29-16-10. Expungement of samples and DNA records from the DNA identification system and CODIS.

A. A person may request expungement of the person's sample and DNA records from the DNA identification system on the following grounds:

(1) the conviction that led to the inclusion of the sample has been reversed; or

(2) the arrest that led to the inclusion of the sample has:

(a) resulted in a felony charge that has been resolved by a dismissal, nolle prosequi, successful completion of a pre-prosecution diversion program or a conditional discharge, misdemeanor conviction or acquittal; or

(b) not resulted in a felony charge within one year of arrest.

B. The administrative center shall expunge a person's sample and DNA records from the DNA identification system when the person provides the administrative center with the following materials:

(1) a written request for expungement of the sample and DNA records; and

(2) a certified copy of a court order that reverses the conviction that led to the inclusion of the sample; or

(3) for samples included pursuant to arrest:

(a) a certified copy of the dismissal, nolle prosequi, successful completion of a pre-prosecution diversion program or a conditional discharge, misdemeanor conviction or acquittal; or

(b) a sworn affidavit that no felony charges arising out of the arrest have been filed within one year.

C. When a person's sample and DNA records are expunged from the DNA identification system, the head of the administrative center shall ensure that the person's sample and DNA records are expunged from CODIS.

D. The administrative center shall not expunge a person's sample and DNA records from the DNA identification system if the person has a prior felony conviction or a pending felony charge for which collection of a sample is authorized pursuant to the provisions of the DNA Identification Act.

**History: Laws 1997, ch. 105, § 10; 2006, ch. 104, § 8.**

**The 2006 amendment,** effective January 1, 2007, in Paragraph (1) of Subsection A, deleted DNA records in the DNA identification system; added Paragraph (2) of Subsection A and Paragraph (3) of Subsection B to provide for expungement based on certain resolutions of an arrest; and added Subsection D to prohibit expungement in certain cases.

**Severability.** — Laws 2006, ch. 104, § 11, effective January 1, 2007, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

## 29-16-10.1. Expungement of samples and DNA records.

A. A person may request expungement of his sample and DNA records from the missing persons DNA identification system.

B. The administrative center shall expunge a person's sample and DNA records from the missing persons DNA identification system when the person provides the administrative center with the following materials:

(1) a written request for expungement of his sample and DNA records; and

(2) if applicable, a certified copy of a court order that overturns the original search warrant or court order that led to the inclusion of his sample and DNA records in the missing persons DNA identification system.

C. When a person's sample and DNA records are expunged from the missing persons DNA identification system, the head of the administrative center shall ensure that the person's sample and DNA records are expunged from CODIS.



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**History: Laws 2003, ch. 256, § 1.**

**Effective dates.** — Laws 2003, ch. 256, § 12 made Laws 2003, ch. 256, § 1 effective July 1, 2003.

## 29-16-11. Assessment; collection; DNA fee.

A. Each time that a covered offender is convicted, the court shall assess a DNA fee of one hundred dollars ($100) in addition to any other fee, restitution or fine. The corrections department shall collect the DNA fee from the covered offender for deposit in the fund.

B. When a covered offender is transferred to New Mexico from another state pursuant to an interstate compact, the corrections department shall assess and collect from the covered offender a DNA fee of one hundred dollars ($100) for deposit in the fund.

**History: Laws 1997, ch. 105, § 11; 2013, ch. 208, § 4.**

**The 2013 amendment,** effective July 1, 2013, provided for the collection of the DNA fee by the corrections department; in the title, after "assessment", deleted "of" and added "collection; DNA fee"; deleted the former introductory sentence "On and after the effective date of the DNA Identification Act"; in Subsection A, in the first sentence, deleted "When" and added "Each time that" and after "shall assess a", added "DNA", and deleted the former second sentence, which provided that "The fee shall be deposited in the fund" and added the second sentence; and added Subsection B.

## 29-16-12. Penalty.

A. Any person who by virtue of his employment or official position possesses or has access to samples or DNA records and who willfully discloses any of them to any person or in any manner not authorized by the DNA Identification Act is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

B. Any person who uses or attempts to use samples or DNA records for a purpose not authorized by the DNA Identification Act is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Any person who obtains or attempts to obtain samples or DNA records for a purpose not authorized by the DNA Identification Act is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: Laws 1997, ch. 105, § 12.**

## 29-16-13. DNA identification system fund created; purposes.

A. The "DNA identification system fund" is created in the state treasury. The fund shall consist of all money received by appropriation, gift or grant, all DNA fees collected pursuant to Section 29-16-11 NMSA 1978 and all investment income from the fund.

B. Money and investment income in the fund at the end of any fiscal year shall not revert to the general fund but shall remain in the fund. Money and investment income in the fund is appropriated to the administrative center for expenditure in fiscal year 1998 and subsequent fiscal years for the purposes provided in this section.

C. The fund shall be used to implement the purposes of the DNA Identification Act, including paying the expenses incurred by the administrative center and all other reasonable expenses. Money in the fund may be used for loans or grants of money, equipment or personnel to any law enforcement agency, correctional facility, jail, detention facility, judicial agency, the public defender department or the office of the medical investigator, upon approval of the DNA oversight committee.

**History: Laws 1997, ch. 105, § 13; 2006, ch. 104, § 9; 2013, ch. 208, § 5.**

**The 2013 amendment,** effective July 1, 2013, made grammatical changes; in the title, after "DNA", added "identification system" and after "purposes", deleted "procedure; accounting"; in Subsection A, after "gift or grant, all" deleted "money" and added "DNA fees"; in Subsection B, after "for the purposes", deleted "of the fund" and added "provided in this section"; and in Subsection C, in the first sentence, after "shall be used", deleted "for" and added "to implement", in the second sentence, deleted "The administrative center may use", and in the second sentence, after "Money in the fund", added "may be used" and after



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"medical investigator, upon", deleted "recommendation" and added "approval".

**The 2006 amendment,** effective January 1, 2007, changed "Section 11 of the DNA Identification Act" to "Section 29-16-11 NMSA 1978" in Subsection B; and added "jail, detention facility" in Subsection E.

**Severability.** — Laws 2006, ch. 104, § 11, effective January 1, 2007, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

# ARTICLE 17

# Criminal Records Screening for Caregivers

Sec.
29-17-1. Repealed.
29-17-2. Title.
29-17-3. Purpose.
Sec.
29-17-4. Definitions.
29-17-5. Criminal history screening required; regulatory implementation; appeals.

## 29-17-1. Repealed.

**Repeals.** — Laws 1998, ch. 68, § 6, repealed 29-17-1 NMSA 1978, as enacted by Laws 1997, ch. 202, § 1, relating to criminal records screening for caregivers, effective May 20, 1998. For provisions of former section, *see* the 1997 NMSA 1978 on *NMOneSource.com*.

## 29-17-2. Title.

Sections 1 though 5 [29-17-2 to 29-17-5 NMSA 1978] of this act may be cited as the "Caregivers Criminal History Screening Act".

**History: Laws 1998, ch. 68, § 1.**

**ANNOTATIONS**

**Law reviews.** — For note and comment, "Spence v. Health Force, Inc.: One Step Forward, Two Steps Back For New Mexico Tort Jurisprudence?", see 36 N.M.L. Rev. 687 (2006).

## 29-17-3. Purpose.

The purpose of the Caregivers Criminal History Screening Act and its requirement that caregivers undergo a nationwide criminal history screening is to ensure to the highest degree possible the prevention of abuse, neglect or financial exploitation of care recipients.

**History: Laws 1998, ch. 68, § 2.**

## 29-17-4. Definitions.

As used in the Caregivers Criminal History Screening Act:

A. "applicant" means a person who seeks and is offered employment or contractual service as a caregiver or hospital caregiver with a care provider;

B. "caregiver" means a person, not otherwise required to undergo a nationwide criminal history screening by the New Mexico Children's and Juvenile Facility Criminal Records Screening Act [Chapter 32A, Article 15 NMSA 1978], whose employment or contractual service with a care provider includes direct care or routine and unsupervised physical or financial access to any care recipient served by that provider;

C. "care provider" or "provider" means a skilled nursing facility; an intermediate care facility; a care facility for the mentally retarded; a general acute care facility; a psychiatric facility; a rehabilitation facility; a home health agency; a homemaker agency; a home for the aged or disabled; a group home; an adult foster care home; a guardian service provider; a case management entity that provides services to people with developmental disabilities; a private residence that provides personal care, adult residential care or nursing care for two or more persons not



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related by blood or marriage to the facility's operator or owner; an adult daycare center; a boarding home; an adult residential care home; a residential service or habilitation service authorized to be reimbursed by medicaid; any licensed or medicaid-certified entity or any program funded by the aging and long-term services department that provides respite, companion or personal care services; or programs funded by the children, youth and families department that provide homemaker or adult daycare services. "Care provider" or "provider" does not include resident care facilities located at or performing services exclusively for any correctional facility, outpatient treatment facilities, diagnostic and treatment facilities, ambulatory surgical centers and facilities, end-stage renal dialysis and treatment facilities, rural health clinics, private physicians' offices or other clinics that operate in the same manner as private physicians' offices in group practice settings;

D. "care recipient" means any person under the care of a provider who has a physical or mental illness, injury or disability or who suffers from any cognitive impairment that restricts or limits the person's activities;

E. "conviction" means a plea, judgment or verdict of guilty, a plea of nolo contendere, an Alford plea or any plea or judgment entered in connection with a suspended sentence, in this state or any other state or jurisdiction;

F. "hospital caregiver" means a person who provides direct unsupervised patient care in an inpatient setting and is not a licensed New Mexico health care professional practicing within the scope of a profession's license;

G. "nationwide criminal history screening" means a criminal history background investigation of an applicant, caregiver or hospital caregiver through the use of fingerprints collected by the department of public safety and submitted to the federal bureau of investigation, resulting in generation of a nationwide criminal history record for that applicant, caregiver or hospital caregiver;

H. "nationwide criminal history record" means information concerning a person's arrests, indictments or other formal criminal charges and any dispositions arising therefrom, including convictions, dismissals, acquittals, sentencing and correctional supervision and collected by criminal justice agencies; and

I. "statewide criminal history screening" means a criminal history background investigation of an applicant or caregiver through the comparison of identifying information with the department of public safety's criminal record repository.

**History: Laws 1998, ch. 68, § 3; 1999, ch. 112, § 1; 2005, ch. 226, § 1.**

**The 2005 amendment,** effective June 17, 2005, defined "applicant" in Subsection A to include a hospital caregiver; defined "care provider" or "provider" in Subsection C to include a general acute care facility; added the definition of "conviction" in Subsection E; added the definition of "hospital caregiver" in Subsection F; defined "nationwide criminal history screening" in Subsection G to include a hospital caregiver; deleted from the definition of "nationwide criminal history record" in Subsection H information stored in computerized data bases of the federal bureau of investigation, national law enforcement telecommunications system, department of public safety or the repositories of criminal history or other states; and added the definition of "statewide criminal history screening" in Subsection I.

**The 1999 amendment,** effective June 18, 1999, in Subsection B, deleted "(32A-15-1 to 32A-15-4)" following "New Mexico Children's and Juvenile Facility Criminal Records Screening Act," and deleted "or volunteer service" following "contractual service"; in Subsection C, divided the existing provisions into two sentences, and in the first sentence inserted "a guardian service provider; a case management entity that provides services to people with developmental disabilities", deleted "providers" following "habilitation service," substituted "or any program" for "programs" and deleted "however, it" from the end, and in the second sentence inserted "'Careprovider' or 'provider'" at the beginning and added "outpatient treatment facilities . . . group practice settings" to the end; and made stylistic changes throughout the section.

## 29-17-5. Criminal history screening required; regulatory implementation; appeals.

A. The department of health is authorized to receive an applicant's, caregiver's or hospital caregiver's nationwide criminal history record obtained by the department of public safety as a result of a nationwide criminal history screening pursuant to an applicant's, caregiver's or hospital caregiver's authorization for such nationwide criminal history screening. Providers shall submit a set



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of fingerprints of applicants, caregivers and hospital caregivers to the department of health for a nationwide criminal history screening, and the department of public safety shall accept from the department of health such fingerprints for the purpose of conducting a nationwide criminal history screening.

B. The department of health is authorized to promulgate rules to implement the Caregivers Criminal History Screening Act, including rules establishing a three-year phased implementation based upon provider type; fingerprint submission procedures; fees; confidentiality; time frames for an applicant's or caregiver's nationwide criminal history screening; procedures for clarifying incomplete or confusing criminal history information; provider sanctions for noncompliance; and employment procedures pending the results of the nationwide criminal history screening relating to applicants and caregivers.

C. No caregiver or hospital caregiver may be employed by a care provider unless the caregiver or hospital caregiver first has submitted to a request for a nationwide criminal history screening prior to beginning employment in accordance with procedures established by rule by the departments of health and public safety. A caregiver or hospital caregiver shall apply for statewide criminal history screening when applying for employment with a care provider within twelve months of the caregiver's or hospital caregiver's most recent nationwide criminal history screening.

D. The following felony convictions disqualify an applicant, caregiver or hospital caregiver from employment as a caregiver:

(1) homicide;

(2) trafficking controlled substances;

(3) kidnapping, false imprisonment, aggravated assault or aggravated battery;

(4) rape, criminal sexual penetration, criminal sexual contact, incest, indecent exposure or other related sexual offenses;

(5) crimes involving adult abuse, neglect or financial exploitation;

(6) crimes involving child abuse or neglect;

(7) robbery, larceny, burglary, fraud, extortion, forgery, embezzlement, credit card fraud or receiving stolen property; or

(8) an attempt, solicitation or conspiracy involving any of the felonies in this subsection.

E. Upon receipt by the department of health of the results of the applicant's, caregiver's or hospital caregiver's nationwide criminal history screening, the department of health shall give notice to the submitting care provider whether the applicant or caregiver has a disqualifying conviction of a crime specified in Subsection D of this section. No other results of the applicant's, caregiver's or hospital caregiver's nationwide criminal history screening shall be provided to the care provider. Except as provided in Subsection F of this section, a care provider shall not employ an applicant or continue to employ a caregiver or hospital caregiver whose nationwide criminal history screening record reflects a disqualifying conviction. When the department of health provides notice to the care provider of a disqualifying conviction of a crime specified in Subsection D of this section, it shall also notify the applicant, caregiver or hospital caregiver, stating with specificity the convictions on which its decision is based and identifying the agency that provided the records.

F. An applicant, caregiver or hospital caregiver whose nationwide criminal history record, obtained through the applicant's, caregiver's or hospital caregiver's nationwide criminal history screening and other clarifying endeavors of the department of health, reflects a disqualifying conviction of a crime specified in Subsection D of this section may request from the department of health an administrative reconsideration. The care provider may, in its discretion, continue to employ such person during the pendency of the reconsideration. A care provider may employ the applicant or caregiver if the reconsideration proceeding results in a determination by the department of health that the applicant's, caregiver's or hospital caregiver's nationwide criminal history record inaccurately reflects a disqualifying conviction of a crime specified in Subsection D of this section or that the employment presents no risk of harm to a care recipient or that the conviction does not directly bear upon the applicant's, caregiver's or hospital caregiver's fitness for the employment.



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G. The department of health is authorized to adopt rules for the administrative reconsideration proceeding available to an applicant or caregiver whose nationwide criminal history record reflects a disqualifying conviction. The rules shall take into account the requirements of the Criminal Offender Employment Act [28-2-1 to 28-2-6 NMSA 1978].

H. A care provider shall maintain records evidencing compliance with the requirements of this section with respect to all applicants and caregivers employed on or after May 20, 1998.

I. All criminal history records obtained pursuant to this section by the department of health are confidential. No criminal history records obtained pursuant to this section shall be used for any purpose other than determining whether an applicant, caregiver or hospital caregiver has a criminal conviction that would disqualify the applicant, caregiver or hospital caregiver from employment as a caregiver or hospital caregiver. Except on court order or with the written consent of the applicant, caregiver or hospital caregiver, criminal records obtained pursuant to this section and the information contained therein shall not be released or otherwise disclosed to any other person or agency. A person who discloses confidential records or information in violation of this section is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Subsection A of Section 31-19-1 NMSA 1978.

J. The department of health shall maintain a registry of all applicants who are disqualified from employment or contractual service as caregivers or hospital caregivers. An applicant's arrest record information shall not be released except upon request of the applicant as provided in the Arrest Record Information Act [Chapter 29, Article 10 NMSA 1978].

K. A care provider, including its administrators and employees, is not civilly liable to an applicant or a caregiver for a good faith decision to employ, not employ or terminate employment pursuant to the Caregivers Criminal History Screening Act.

L. Failure to comply with the requirements of this section are grounds for the state agency having enforcement authority with respect to the care provider to impose appropriate administrative sanctions and penalties.

**History: Laws 1998, ch. 68, § 4; 1999, ch. 112, § 2; 2005, ch. 226, § 2.**

**The 2005 amendment,** effective June 17, 2005, provided in Subsection A that the department is authorized to receive a hospital caregiver's nationwide criminal history record or a hospital caregiver's authorization for nationwide criminal history screening and requires providers to provide a set of fingerprints of hospital caregivers to the department; changed "regulations" to "rules" in Subsection B; provided that no hospital caregiver may be employed by a care provider unless the hospital caregiver has submitted a request for a nationwide criminal history screening and provides that a caregiver or hospital caregiver shall apply for a statewide criminal history screening when applying for employment with a care provider within twelve months of the caregiver's or hospital caregiver's most recent nationwide criminal history screening; provided in Subsection D that the listed felony convictions disqualifies a hospital caregiver from employment as a caregiver; added Subsection D(8); provided in Subsection E that the department shall not give the care provider any results of the nationwide criminal screening other than whether the hospital caregiver has a disqualifying conviction, that a care provider shall not employ a hospital caregiver who has a disqualifying conviction, and that the department shall give the hospital caregiver notice of the disqualifying conviction; provided in Subsection F that a hospital caregiver who has a disqualifying conviction may request a reconsideration from the department, that a care provider may employ the ccaregiver if the department determines that the hospital caregiver's record inaccurately reflects a disqualifying conviction or that the conviction does not directly bear on the hospital caregiver's fitness for employment; provided in subsection I that criminal history records shall be used only to determine whether a hospital caregiver has a disqualifying conviction, and that criminal records shall not be released or disclosed unless the hospital caregiver consents; and provided in Subsection J that the department shall maintain a registry of disqualified hospital caregivers.

**The 1999 amendment,** effective June 18, 1999, in Subsection A, in the first sentence, twice deleted "records" preceding "screening", and inserted "nationwide" preceding the second occurrence of "criminal screening"; in the second sentence, substituted "department of health" for "department of public safety", and inserted "from the department of health" preceding "such fingerprints"; and deleted "New Mexico" preceding "department" throughout the subsection; in Subsection B, substituted "the Caregivers Criminal History Screening Act" for "this act", deleted "but not limited to" following "including," and deleted "volunteers" preceding "applicants and caregivers"; inserted Subsection D(7); in Subsection E, twice substituted "screening" for "records" and twice inserted "nationwide" preceding "criminal history"; in Subsection F, in the first sentence, deleted "records" preceding "screening" and inserted "nationwide" preceding "criminal history", and, in the third sentence, substituted "department of health" for "agency on aging"; in Subsection G, deleted "20-2-1- to 20-2-6, NMSA 1978" following "Criminal Offender Employment Act"; in Subsection H, substituted "May 20, 1998" for "the effective date of this act"; in Subsection I, in the second sentence, substituted "has a criminal conviction that would disqualify him" for "has criminal records that disqualify him"; in Subsection K, substituted "the Caregivers Criminal History Screening Act" for "this act"; and made stylistic changes throughout the section.



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# ARTICLE 18

# Concealed Handgun Carry

(Repealed by Laws 2003, ch. 255, § 14.)

## 29-18-1 to 29-18-12. Repealed.

**Repeals.** — Laws 2003, ch. 255, § 14 repealed 29-18-1 to 29-18-12 NMSA 1978, as enacted by Laws 2001, ch. 219, the former Concealed Handgun Carry Act, effective July 1, 2003. For provisions of former sections, *see* the 2002 NMSA 1978 on *NMOneSource.com*. For similar present provisions, *see* 29-19-1 NMSA 1978 et seq.

# ARTICLE 19

# Concealed Handgun Carry

Sec.
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29-19-15. Military service persons; requirements.

## 29-19-1. Short title.

Chapter 29, Article 19 NMSA 1978 may be cited as the "Concealed Handgun Carry Act".

**History: Laws 2003, ch. 255, § 1; 2005, ch. 242, § 1.**

**The 2005 amendment,** effective June 17, 2005, added the statutory reference to the act.

### ANNOTATIONS

**Constitutionality of act.** — The Concealed Handgun Carry Act does not violate N.M. Const., art. II, § 6. *State ex rel. N.M. Voices for Children, Inc. v. Denko*, 2004-NMSC-011, 135 N.M. 439, 90 P.3d 458.

**Exception to general prohibition.** — Under Section 30-7-2 NMSA 1978, the Concealed Handgun Carry Act does no more than add another exception to the general prohibition against carrying concealed weapons: carrying with a concealed handgun license. *State ex rel. N.M. Voices for Children, Inc. v. Denko*, 2004-NMSC-011, 135 N.M. 439, 90 P.3d 458.

## 29-19-2. Definitions.

As used in the Concealed Handgun Carry Act:

A. "applicant" means a person seeking a license to carry a concealed handgun;

B. "caliber" means the diameter of the bore of a handgun;

C. "category" means whether a handgun is semiautomatic or not semiautomatic;

D. "concealed handgun" means a loaded handgun that is not visible to the ordinary observations of a reasonable person;

E. "department" means the department of public safety;

F. "handgun" means a firearm that will, is designed to or may readily be converted to expel a projectile by the action of an explosion and the barrel length of which, not including a revolving, detachable or magazine breech, does not exceed twelve inches; and

G. "licensee" means a person holding a valid concealed handgun license issued to him by the department.



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**History: Laws 2003, ch. 255, § 2.**

**Effective dates.** — Laws 2003, ch. 255, § 16 made Laws 2003, ch. 255, § 2 effective July 1, 2003.

## 29-19-3. Date of licensure; period of licensure.

Effective January 1, 2004, the department is authorized to issue concealed handgun licenses to qualified applicants. Original and renewed concealed handgun licenses shall be valid for a period of four years from the date of issuance, unless the license is suspended or revoked.

**History: Laws 2003, ch. 255, § 3; 2005, ch. 242, § 2.**

**The 2005 amendment,** effective June 17, 2005, increased the period of licensure for original and renewal license from two to four years.

## 29-19-4. Applicant qualifications.

A. The department shall issue a concealed handgun license to an applicant who:

(1) is a citizen of the United States;

(2) is a resident of New Mexico or is a member of the armed forces whose permanent duty station is located in New Mexico or is a dependent of such a member;

(3) is twenty-one years of age or older;

(4) is not a fugitive from justice;

(5) has not been convicted of a felony in New Mexico or any other state or pursuant to the laws of the United States or any other jurisdiction;

(6) is not currently under indictment for a felony criminal offense in New Mexico or any other state or pursuant to the laws of the United States or any other jurisdiction;

(7) is not otherwise prohibited by federal law or the law of any other jurisdiction from purchasing or possessing a firearm;

(8) has not been adjudicated mentally incompetent or committed to a mental institution;

(9) is not addicted to alcohol or controlled substances; and

(10) has satisfactorily completed a firearms training course approved by the department for the category and the largest caliber of handgun that the applicant wants to be licensed to carry as a concealed handgun.

B. The department shall deny a concealed handgun license to an applicant who has:

(1) received a conditional discharge, a diversion or a deferment or has been convicted of, pled guilty to or entered a plea of nolo contendere to a misdemeanor offense involving a crime of violence within ten years immediately preceding the application;

(2) been convicted of a misdemeanor offense involving driving while under the influence of intoxicating liquor or drugs within five years immediately preceding the application for a concealed handgun license;

(3) been convicted of a misdemeanor offense involving the possession or abuse of a controlled substance within ten years immediately preceding the application; or

(4) been convicted of a misdemeanor offense involving assault, battery or battery against a household member.

C. Firearms training course instructors who are approved by the department shall not be required to complete a firearms training course pursuant to Paragraph (10) of Subsection A of this section.

**History: Laws 2003, ch. 255, § 4; 2005, ch. 242, § 3.**

**The 2005 amendment,** effective June 17, 2005, lowered the minimum age of applicants from 25 to 21 years in Subsection A(3); provided in Subsection A(10) that the applicant complete training for the largest caliber of handgun that will be licensed; provided in Subsections B(1) and (3) respectively that the department shall deny a license if the offense involved a crime of violence or possession or abuse of a controlled substance within ten years immediately preceding the application; and added Subsection C to provide that firearms training course instructors are not required to complete a firearms training course.

**ANNOTATIONS**

**Pardoned felony conviction.** — A pardoned felony conviction is not, itself, sufficient grounds to deny the person convicted on the felony a concealed handgun license and if the person is otherwise qualified, the person may obtain a concealed carry license. 2014 Op. Att'y Gen. No. 14-02.



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## 29-19-5. Application form; screening of applicants; fee; limitations on liability.

A. Effective July 1, 2003, applications for concealed handgun licenses shall be made readily available at locations designated by the department. Applications for concealed handgun licenses shall be completed, under penalty of perjury, on a form designed and provided by the department and shall include:

(1) the applicant's name, current address, date of birth, place of birth, social security number, height, weight, gender, hair color, eye color and driver's license number or other state-issued identification number;

(2) a statement that the applicant is aware of, understands and is in compliance with the requirements for licensure set forth in the Concealed Handgun Carry Act;

(3) a statement that the applicant has been furnished a copy of the Concealed Handgun Carry Act and is knowledgeable of its provisions; and

(4) a conspicuous warning that the application form is executed under penalty of perjury and that a materially false answer or the submission of a materially false document to the department may result in denial or revocation of a concealed handgun license and may subject the applicant to criminal prosecution for perjury as provided in Section 30-25-1 NMSA 1978.

B. The applicant shall submit to the department:

(1) a completed application form;

(2) a nonrefundable application fee in an amount not to exceed one hundred dollars ($100);

(3) two full sets of fingerprints;

(4) a certified copy of a certificate of completion for a firearms training course approved by the department;

(5) two color photographs of the applicant;

(6) a certified copy of a birth certificate or proof of United States citizenship, if the applicant was not born in the United States; and

(7) proof of residency in New Mexico.

C. A law enforcement agency may fingerprint an applicant and may charge a reasonable fee.

D. Upon receipt of the items listed in Subsection B of this section, the department shall make a reasonable effort to determine if an applicant is qualified to receive a concealed handgun license. The department shall conduct an appropriate check of available records and shall forward the applicant's fingerprints to the federal bureau of investigation for a national criminal background check. The department shall comply with the license-issuing requirements set forth in Section 29-19-7 NMSA 1978. However, the department shall suspend or revoke a license if the department receives information that would disqualify an applicant from receiving a concealed handgun license after the thirty-day time period has elapsed.

E. A state or local government agency shall comply with a request from the department pursuant to the Concealed Handgun Carry Act within thirty days of the request.

**History: Laws 2003, ch. 255, § 5; 2005, ch. 242, § 4.**

**The 2005 amendment,** effective June 17, 2005, added Subsection E to provide that every state or local governmental agency shall comply with a request from the department pursuant to the Concealed Handgun Carry Act within thirty days.

## 29-19-6. Appeal; license renewal; refresher firearms training course; suspension or revocation of license.

A. Pursuant to rules adopted by the department, the department, within thirty days after receiving a completed application for a concealed handgun license and the results of a national criminal background check on the applicant, shall:

(1) issue a concealed handgun license to an applicant; or

(2) deny the application on the grounds that the applicant failed to qualify for a concealed handgun license pursuant to the provisions of the Concealed Handgun Carry Act.

B. Information relating to an applicant or to a licensee received by the department or any other law enforcement agency is confidential and exempt from public disclosure unless an order to



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disclose information is issued by a court of competent jurisdiction. The information shall be made available by the department to a state or local law enforcement agency upon request by the agency.

C. A concealed handgun license issued by the department shall include:

(1) a color photograph of the licensee;

(2) the licensee's name, address and date of birth;

(3) the expiration date of the concealed handgun license; and

(4) the category and the largest caliber of handgun that the licensee is licensed to carry, with a statement that the licensee is licensed to carry smaller caliber handguns but shall carry only one concealed handgun at any given time.

D. A licensee shall notify the department within thirty days regarding a change of the licensee's name or permanent address. A licensee shall notify the department within ten days if the licensee's concealed handgun license is lost, stolen or destroyed.

E. If a concealed handgun license is lost, stolen or destroyed, the license is invalid and the licensee may obtain a duplicate license by furnishing the department a notarized statement that the original license was lost, stolen or destroyed and paying a reasonable fee. If the license is lost or stolen, the licensee shall file a police report with a local law enforcement agency and include the police case number in the notarized statement.

F. A licensee may renew a concealed handgun license by submitting to the department:

(1) a completed renewal form, under penalty of perjury, designed and provided by the department;

(2) a payment of a seventy-five-dollar ($75.00) renewal fee; and

(3) a certificate of completion of a four-hour refresher firearms training course approved by the department.

G. The department shall conduct a national criminal records check of a licensee seeking to renew a license. A concealed handgun license shall not be renewed more than sixty days after it has expired. A licensee who fails to renew a concealed handgun license within sixty days after it has expired may apply for a new concealed handgun license pursuant to the provisions of the Concealed Handgun Carry Act.

H. A licensee shall complete a two-hour refresher firearms training course two years after the issuance of an original or renewed license. The refresher course shall be approved by the department and shall be taken twenty-two to twenty-six months after the issuance of an original or renewed license. A certificate of completion shall be submitted to the department no later than thirty days after completion of the course.

I. The department shall suspend or revoke a concealed handgun license if:

(1) the licensee provided the department with false information on the application form or renewal form for a concealed handgun license;

(2) the licensee did not satisfy the criteria for issuance of a concealed handgun license at the time the license was issued; or

(3) subsequent to receiving a concealed handgun license, the licensee violated a provision of the Concealed Handgun Carry Act.

**History: Laws 2003, ch. 255, § 6; 2005, ch. 242, § 5.**

**The 2005 amendment,** effective June 17, 2005, provided in Subsection C(4) that a license shall include the largest caliber of handgun that is licensed and a statement that the licensee is licensed to carry smaller caliber handguns, but shall carry only one handgun at a time; provided in Subsection E that if a license is lost or stolen, the licensee shall file a police report and include the police case number in the notarized statement; increased the renewal fee from $50 to $75 in Subsection F(2); required that a certificate of completion of a training course approved by the department be submitted with a request to renew a license; and added Subsection H to provide that a licensee must complete a refresher course approved by the department two years after licensure.

## 29-19-7. Demonstration of ability and knowledge; course requirement; proprietary interest; exemptions.

A. The department shall prepare and publish minimum standards for approved firearms training courses that teach competency with handguns. A firearms training course shall include



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classroom instruction and range instruction and an actual demonstration by the applicant of his ability to safely use a handgun. An applicant shall not be licensed unless he demonstrates, at a minimum, his ability to use a handgun of .32 caliber. An approved firearms training course shall be a course that is certified or sponsored by a federal or state law enforcement agency, a college, a firearms training school or a nationally recognized organization, approved by the department, that customarily offers firearms training. The firearms training course shall be not less than fifteen hours in length and shall provide instruction regarding:

(1) knowledge of and safe handling of single- and double-action revolvers and semiautomatic handguns;

(2) safe storage of handguns and child safety;

(3) safe handgun shooting fundamentals;

(4) live shooting of a handgun on a firing range;

(5) identification of ways to develop and maintain handgun shooting skills;

(6) federal, state and local criminal and civil laws pertaining to the purchase, ownership, transportation, use and possession of handguns;

(7) techniques for avoiding a criminal attack and how to control a violent confrontation; and

(8) techniques for nonviolent dispute resolution.

B. Every instructor of an approved firearms training course shall annually file a copy of the course description and proof of certification with the department.

**History: Laws 2003, ch. 255, § 7.** **Effective dates.** — Laws 2003, ch. 255, § 16 made Laws 2003, ch. 255, § 7 effective July 1, 2003.

## 29-19-8. Limitation on license.

A. Nothing in the Concealed Handgun Carry Act shall be construed as allowing a licensee in possession of a valid concealed handgun license to carry a concealed handgun into or on premises where to do so would be in violation of state or federal law.

B. Nothing in the Concealed Handgun Carry Act shall be construed as allowing a licensee in possession of a valid concealed handgun license to carry a concealed handgun on school premises, as provided in Section 30-7-2.1 NMSA 1978.

C. Nothing in the Concealed Handgun Carry Act shall be construed as allowing a licensee in possession of a valid concealed handgun license to carry a concealed handgun on the premises of a preschool.

**History: Laws 2003, ch. 255, § 8.** **Effective dates.** — Laws 2003, ch. 255, § 16 made Laws 2003, ch. 255, § 8 effective July 1, 2003.

## 29-19-9. Possession of license.

A licensee shall have his concealed handgun license in his possession at all times while carrying a concealed handgun.

**History: Laws 2003, ch. 255, § 9.** **Effective dates.** — Laws 2003, ch. 255, § 16 made Laws 2003, ch. 255, § 9 effective July 1, 2003.

## 29-19-10. Validity of license on tribal land.

A concealed handgun license shall not be valid on tribal land, unless authorized by the governing body of an Indian nation, tribe or pueblo.

**History: Laws 2003, ch. 255, § 10.** **Effective dates.** — Laws 2003, ch. 255, § 16 made Laws 2003, ch. 255, § 10 effective July 1, 2003.



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## 29-19-11. Validity of license in a courthouse or court facility.

A concealed handgun license shall not be valid in a courthouse or court facility, unless authorized by the presiding judicial officer for that courthouse or court facility.

**History: Laws 2003, ch. 255, § 11.**

**Effective dates.** — Laws 2003, ch. 255, § 16 made Laws 2003, ch. 255, § 11 effective July 1, 2003.

## 29-19-12. Rules; department to administer; reciprocal agreements with other states.

The department shall promulgate rules necessary to implement the provisions of the Concealed Handgun Carry Act. The rules shall include:

A. grounds for the suspension and revocation of concealed handgun licenses issued pursuant to the provisions of the Concealed Handgun Carry Act;

B. provision of authority for a law enforcement officer to confiscate a concealed handgun license when a licensee violates the provisions of the Concealed Handgun Carry Act;

C. provision of authority for a private property owner to disallow the carrying of a concealed handgun on the owner's property;

D. creation of a sequential numbering system for all concealed handgun licenses issued by the department and display of numbers on issued concealed handgun licenses; and

E. provision of discretionary state authority for the transfer, recognition or reciprocity of a concealed handgun license issued by another state if the issuing authority for the other state:

(1) includes provisions at least as stringent as or substantially similar to the Concealed Handgun Carry Act;

(2) issues a license or permit with an expiration date printed on the license or permit;

(3) is available to verify the license or permit status for law enforcement purposes within three business days of a request for verification;

(4) has disqualification, suspension and revocation requirements for a concealed handgun license or permit; and

(5) requires that an applicant for a concealed handgun license or permit:

(a) submit to a national criminal history record check;

(b) not be prohibited from possessing firearms pursuant to federal or state law; and

(c) satisfactorily complete a firearms safety program that covers deadly force issues, weapons care and maintenance, safe handling and storage of firearms and marksmanship.

**History: Laws 2003, ch. 255, § 12; 2005, ch. 242, § 6.**

**The 2005 amendment,** effective June 17, 2005, provided in Subsection E that the rules shall include provision of discretionary authority for the recognition or reciprocity of a license issued by another state; and added Subsections E(1) through (5)(c) to provide the criteria for reciprocity with the license issued by an authority of another state.

## 29-19-13. Fund created.

A. The "concealed handgun carry fund" is created in the state treasury.

B. All money received by the department pursuant to the provisions of the Concealed Handgun Carry Act shall be deposited by the state treasurer for credit to the concealed handgun carry fund. The state treasurer shall invest the fund as all other state funds are invested, and income from the investment of the fund shall be credited to the fund. Balances remaining at the end of any fiscal year shall not revert to the general fund and may be used to maintain the state's criminal history database.

C. Money in the concealed handgun carry fund is appropriated to the department to carry out the provisions of the Concealed Handgun Carry Act.

**History: Laws 2003, ch. 255, § 13.**

**Effective dates.** — Laws 2003, ch. 255, § 16 made Laws 2003, ch. 255, § 13 effective July 1, 2003.

**Severability.** — Laws 2003, ch. 255, § 15 provided for the severability of the act if any part or application thereof is held invalid.



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## 29-19-14. Current and retired law enforcement officers and New Mexico mounted patrol members.

A. An application fee, a renewal fee and a firearms training course are not required for an applicant or licensee who is:

(1) a current or retired certified law enforcement officer pursuant to the Law Enforcement Training Act [Chapter 29, Article 7 NMSA 1978]; or

(2) a current member of the New Mexico mounted patrol who has successfully completed a law enforcement academy basic law enforcement training program for New Mexico mounted patrol members pursuant to Section 29-6-4.1 NMSA 1978.

B. A law enforcement officer or New Mexico mounted patrol member shall submit to the department two full sets of fingerprints and a color photograph of the law enforcement officer or New Mexico mounted patrol member. The department shall conduct an appropriate check of available records and shall forward the fingerprints to the federal bureau of investigation for a national criminal background check.

C. A retired law enforcement officer is not required to submit an application fee or a renewal fee if:

(1) the officer was a certified law enforcement officer pursuant to the Law Enforcement Training Act for at least fifteen years prior to retirement; and

(2) the retirement is in good standing as shown by a letter from the agency from which the officer retired.

D. A retired law enforcement officer who has been retired ten years or less is not required to complete a firearms training course.

E. A retired law enforcement officer who has been retired for more than ten years shall be required to complete a firearms training course. The officer shall be allowed to attend any local law enforcement agency's firearms qualification course; provided that the officer supplies the officer's own ammunition, handgun, targets and range equipment. A local law enforcement agency shall not be liable under the Tort Claims Act [41-4-1 through 41-4-27 NMSA 1978] for providing a firearms training course to a retired law enforcement officer pursuant to this subsection.

F. A retired law enforcement officer's concealed handgun license shall have printed on the license "retired police officer" and shall be valid for a period of five years.

**History: Laws 2005, ch. 242, § 7; 2015, ch. 157, § 1.**

**The 2015 amendment,** effective June 19, 2015, provided an exception to the fee and firearms training course requirements of the Concealed Handgun Carry Act for certain certified law enforcement officers and New Mexico mounted patrol members, and required the department of public safety to obtain fingerprints and available records and forward fingerprints to the FBI for a national criminal background check; in the catchline, added "and New Mexico mounted patrol members"; in Subsection A, after "licensee who is", added the paragraph designation "(1)", in new Paragraph (1) of Subsection A, added "current or retired", and after the semicolon, added "or"; added new Paragraph (2) of Subsection A; and added new Subsection B and redesignated the succeeding subsections accordingly.

## 29-19-15. Military service persons; requirements.

A. For a concealed handgun license applicant or licensee who submits with a concealed handgun license application documentation satisfactory to the department that the applicant is a military service person as defined in Subsection E of this section, an application fee or renewal fee is not required. For a military service person discharged from military service within twenty years of the application for a license or renewal of a license, a firearms training course or refresher firearms training course is not required.

B. A military service person shall submit to the department two full sets of fingerprints and a color photograph of the military service person. The department shall conduct an appropriate check of available records and shall forward the fingerprints to the federal bureau of investigation for a national criminal background check.

C. A military service person's concealed handgun carry license shall have printed on the license "military service person" and shall be valid for a period of five years.



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D. The department shall suspend or revoke a military service person's concealed handgun license if:

(1) the military service person provided the department with false information on the application form or renewal form;

(2) the military service person did not satisfy the criteria for issuance of a concealed handgun license at the time the license was issued; or

(3) subsequent to receiving a concealed handgun license, the military service person violated a provision of the Concealed Handgun Carry Act.

E. As used in this section, "military service person" means a person who was accepted into the United States armed forces and:

(1) is on active duty with the United States armed forces;

(2) is on reserve or guard duty with the United States armed forces; or

(3) is a veteran or a retiree who received an honorable discharge as indicated on a United States department of defense form 214.

**History: Laws 2015, ch. 157, § 2.**

**Effective dates.** — Laws 2015, ch. 157 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2015, 90 days after the adjournment of the legislature.

# ARTICLE 20

# Law Enforcement Safe Pursuit

Sec.
29-20-1. Short title.
29-20-2. Definition.
29-20-3. Police training.
29-20-4. Pursuit policies.

## 29-20-1. Short title.

Sections 1 through 4 [29-20-1 to 29-20-4 NMSA 1978] of this act may be cited as the "Law Enforcement Safe Pursuit Act".

**History: Laws 2003, ch. 260, § 1.**

**Effective dates.** — Laws 2003, ch. 260, § 6 made Laws 2003, ch. 260, § 1 effective July 1, 2003.

## 29-20-2. Definition.

As used in the Law Enforcement Safe Pursuit Act, "high speed pursuit" means an attempt by a law enforcement officer in an authorized emergency vehicle to apprehend an occupant of a motor vehicle, the driver of which is actively attempting to avoid apprehension by exceeding the speed limit.

**History: Laws 2003, ch. 260, § 2.**

**Effective dates.** — Laws 2003, ch. 260, § 6 made Laws 2003, ch. 260, § 2 effective July 1, 2003.

## 29-20-3. Police training.

A. No later than December 31, 2004, the New Mexico law enforcement academy board shall develop and incorporate into the basic law enforcement training required pursuant to the Law Enforcement Training Act [Chapter 29, Article 7 NMSA 1978] a course of instruction of at least sixteen hours concerning the safe initiation and conduct of high speed pursuits.

B. The course of instruction shall emphasize the importance of protecting the public at all times and the need to balance the known offense and risk posed by a fleeing suspect against the danger to law enforcement officers and other people by initiating a high speed pursuit.

C. The course of instruction shall include adequate consideration of each of the following subjects:

(1) when to initiate a high speed pursuit;

(2) when to terminate a high speed pursuit;



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(3) evaluating risks due to conditions of the vehicle, driver, roadway, weather and traffic during a high speed pursuit;

(4) evaluating dangers to uninvolved motorists and bystanders during a high speed pursuit;

(5) the number of law enforcement units permitted to participate in the high speed pursuit;

(6) the responsibilities of primary, secondary and supervisory law enforcement units during a high speed pursuit;

(7) proper communication and coordination procedures when a high speed pursuit enters another law enforcement agency's jurisdiction, including a tribal jurisdiction;

(8) driving tactics during a high speed pursuit;

(9) communications during a high speed pursuit;

(10) capture of suspects following a high speed pursuit;

(11) supervisory responsibilities during a high speed pursuit;

(12) use of blocking, ramming, boxing and roadblocks as high speed pursuit tactics;

(13) use of alternative methods and technologies for apprehending suspects during a high speed pursuit; and

(14) preparing a report and evaluation and analysis of a high speed pursuit after it has concluded.

D. The New Mexico law enforcement academy board shall develop the program of instruction, learning and performance objectives and standards for training in conjunction with appropriate groups and individuals that have an interest in and expertise regarding high speed pursuits, including law enforcement agencies, law enforcement academy instructors, experts on the subject and members of the public.

E. In-service law enforcement training, as required pursuant to Section 29-7-7.1 NMSA 1978, shall include at least four hours of instruction that conform with the requirements set forth in Subsection C of this section.

F. Each certified regional law enforcement training facility shall incorporate into its basic law enforcement training and in-service law enforcement training a course of training in the safe initiation and conduct of high speed pursuits that is comparable to or exceeds the standards of the course of instruction developed by the New Mexico law enforcement academy board.

**History: Laws 2003, ch. 260, § 3.**

**Effective dates.** — Laws 2003, ch. 260, § 6 made Laws 2003, ch. 260, § 3 effective July 1, 2003.

## 29-20-4. Pursuit policies.

A. The chief law enforcement officer of every state, county and municipal law enforcement agency shall establish and enforce a written policy governing the conduct of law enforcement officers employed by the agency who are involved in high speed pursuits. A copy of the written policy shall be submitted to the director of the New Mexico law enforcement academy and the traffic safety bureau of the state highway and transportation department.

B. The policy shall specify, at a minimum:

(1) the conditions under which a law enforcement officer may engage in a high speed pursuit and the conditions when the officer shall terminate a high speed pursuit;

(2) measures other than a high speed pursuit that may be employed to apprehend a suspect in a fleeing motor vehicle or to impede the movement of the vehicle;

(3) the coordination and responsibility, including control over the high speed pursuit, of supervisory personnel and the law enforcement officers engaged in the pursuit; and

(4) the procedures to be followed to notify and coordinate high speed pursuits with law enforcement agencies in other jurisdictions, including tribal jurisdictions.

C. The written policy shall, at a minimum, require that:

(1) a law enforcement officer may initiate a high speed pursuit to apprehend a suspect who the officer has reasonable grounds to believe poses a clear and immediate threat of death or



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serious injury to others or who the officer has probable cause to believe poses a clear and immediate threat to the safety of others that is ongoing and that existed prior to the high speed pursuit;

(2) a law enforcement officer shall not initiate or continue a high speed pursuit when the immediate danger to the officer and the public created by the high speed pursuit exceeds the immediate danger to the public if the occupants of the motor vehicle being pursued remain at large;

(3) when deciding whether to initiate or continue a high speed pursuit, the following factors, at a minimum, shall be taken into consideration:

(a) the seriousness of the offense for which the high speed pursuit was initiated;

(b) whether a suspect poses a clear and immediate threat of death or serious injury to others;

(c) road, weather, environmental and vehicle conditions;

(d) the amount of motor vehicle and pedestrian traffic; and

(e) knowledge of the suspect's identity, possible destination and previous activities that may make apprehension at a later time feasible; and

(4) no more than two law enforcement vehicles shall become actively involved in a high speed pursuit, unless specifically authorized by a supervisor.

**History: Laws 2003, ch. 260, § 4.** **Effective dates.** — Laws 2003, ch. 260, § 6 made Laws 2003, ch. 260, § 4 effective July 1, 2003.

# ARTICLE 21

# Prohibition of Profiling Practices

Sec.
29-21-1. Short title.
29-21-2. Profiling practices prohibited.
29-21-3. Policies and procedures; required.
29-21-4. Independent oversight; complaints; confidentiality.

## 29-21-1. Short title.

This act [29-21-1 to 29-21-4 NMSA 1978] may be cited as the "Prohibition of Profiling Practices Act".

**History: Laws 2009, ch. 177, § 1.** **Effective dates.** — Laws 2009, ch. 177, § 1 was effective June 19, 2009.

## 29-21-2. Profiling practices prohibited.

A. In conducting a routine or spontaneous investigatory activity, including an interview, a detention, a traffic stop, a pedestrian stop, a frisk or other type of bodily search or a search of personal or real property, or in determining the scope, substance or duration of the routine or spontaneous investigatory activity, a law enforcement agency or a law enforcement officer shall not rely on race, ethnicity, color, national origin, language, gender, gender identity, sexual orientation, political affiliation, religion, physical or mental disability or serious medical condition, except in a specific suspect description related to a criminal incident or suspected criminal activity, to select a person for or subject a person to the routine or spontaneous investigatory activity.

B. In conducting an investigatory activity in connection with an investigation, a law enforcement agency or a law enforcement officer shall not rely on race, ethnicity, color, national origin, language, gender, gender identity, sexual orientation, political affiliation, religion, physical or mental disability or serious medical condition, except to the extent that credible information, relevant to the locality or time frame, links a person with those identifying characteristics to an identified criminal incident or criminal activity.

**History: Laws 2009, ch. 177, § 2.** **Effective dates.** — Laws 2009, ch. 177, § 2 was effective June 19, 2009.



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## 29-21-3. Policies and procedures; required.

A. A law enforcement agency shall:

(1) maintain written policies and procedures designed to eliminate practices by its law enforcement officers that violate the provisions of Section 2 [29-21-2 NMSA 1978] of the Prohibition of Profiling Practices Act; and

(2) provide training to its law enforcement officers, during orientation and at least once every two years, that the law enforcement agency determines will assist its law enforcement officers in adhering to the applicable provisions of the Prohibition of Profiling Practices Act and to the law enforcement agency's policies and procedures.

B. As part of a law enforcement agency's administrative complaint procedures, the law enforcement agency shall, at a minimum:

(1) investigate a complaint alleging its law enforcement officer violated the provisions of Section 2 of the Prohibition of Profiling Practices Act;

(2) take appropriate measures to discipline a law enforcement officer, including facilitating mediation or other restorative justice measures, when it is determined that the law enforcement officer violated the provisions of Section 2 of the Prohibition of Profiling Practices Act;

(3) provide appropriate forms for submitting the complaint against its law enforcement officer;

(4) publish the policies and procedures designed to eliminate practices that violate the provisions of Section 2 of the Prohibition of Profiling Practices Act; and

(5) submit a redacted copy of the complaint and the disposition to the attorney general, which shall disclose the nature and disposition of the complaint but shall not disclose personal identifying information of a law enforcement officer or complainant.

C. A law enforcement agency shall establish a time frame within which a complaint alleging a violation of the provisions of Section 2 of the Prohibition of Profiling Practices Act may be made; provided that in no event shall the time frame be less than ninety days or exceed one hundred eighty days after the commission of the alleged violation of the provisions of Section 2 of the Prohibition of Profiling Practices Act. A law enforcement agency shall allow a complaint alleging a violation of the provisions of Section 2 of the Prohibition of Profiling Practices Act by its law enforcement officer to be made:

(1) in person or in writing sent by mail, facsimile or electronic mail and signed by the complainant; or

(2) by telephone, anonymously or by a third party; provided that the law enforcement agency shall determine the complaint to be valid before taking appropriate measures pursuant to Paragraph (2) of Subsection B of this section and shall comply with the provisions of Section 29-14-4 NMSA 1978.

**History: Laws 2009, ch. 177, § 3.**

**Effective dates.** — Laws 2009, ch. 177, § 5 made Laws 2009, ch. 177, § 3 effective December 31, 2009.

## 29-21-4. Independent oversight; complaints; confidentiality.

The attorney general shall establish independent procedures for receiving, and for maintaining a record of, complaints alleging profiling by a law enforcement officer or agency. The attorney general may initiate an investigation of a complaint alleging a violation, or a systematic pattern of violations, of the provisions of Section 2 [29-21-2 NMSA 1978] of the Prohibition of Profiling Practices Act and take necessary actions as the attorney general deems appropriate. The attorney general may publish a report or summary of the attorney general's findings regarding violations of the provisions of the Prohibition of Profiling Practices Act; provided that personal and identifying information shall not be published or released to the public.

**History: Laws 2009, ch. 177, § 4.**

**Effective dates.** — Laws 2009, ch. 177, § 5 made Laws 2009, ch. 177, § 4 effective December 31, 2009.



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# CHAPTER 30

# Criminal Offenses

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# ARTICLE 1

# General Provisions

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30-1-1. Name and effective date of code.
30-1-2. Application of code.
30-1-3. Construction of Criminal Code.
30-1-4. Crime defined.
30-1-5. Classification of crimes.
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30-1-9.1. Offenses against children; tolling of statute of limitations.
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30-1-11. Criminal sentence permitted only upon conviction.
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30-1-13. Accessory.
30-1-14. Venue.
30-1-15. Alleged victims of domestic abuse, stalking or sexual assault; forbearance of costs.
30-1-16. Defense based on victim's gender, gender identity, gender expression or sexual orientation prohibited.

## 30-1-1. Name and effective date of code.

This act is called and may be cited as the "Criminal Code". It shall become effective on July 1, 1963.

**History: 1953 Comp., § 40A-1-1, enacted by Laws 1963, ch. 303, § 1-1.**

**Meaning of "this act".** — The words "this act" refer to Laws 1963, ch. 303, which enacted the original Criminal Code. Most of the provisions of Laws 1963, ch. 303, that have not been repealed are compiled in arts. 1 to 28 of this chapter, but some are compiled in Chapter 31. See the Table of Disposition of Acts. In addition, the Criminal Code includes later acts in which the legislature specifically stated its intention to add to the Criminal Code.

### ANNOTATIONS

**Law reviews.** — For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961)

For article, "Survey of New Mexico Law, 1982-83: Criminal Law," see 14 N.M.L. Rev. 89 (1984).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For article, "Survey of New Mexico Law, 1982-83: Criminal Law," see 14 N.M.L. Rev. 89 (1984).

For comment, "Survey of New Mexico Law: Criminal Law," see 15 N.M.L. Rev. 231 (1985).

For article, "Coopting the Journalist's Privilege: Of Sources and Spray Paint," see 23 N.M.L. Rev. 435 (1993).

For note and comment, "Criminal Procedure — A Criminal Defendant is Entitled to a Specific Jury Instruction When Supporting Evidence Exists: State v. Arias," see 24 N.M.L. Rev. 485 (1994).

For article, "The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis," see 27 N.M.L. Rev. 101 (1997).

For note, "Criminal Procedure — New Mexico Court of Appeals Defines the Scope of a Lawful Inventory Search



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of a Detainee Under the New Mexico Detoxification Act — State v. Johnson," see 28 N.M.L. Rev. 115 (1998).

For note, "Criminal Law — Home Alone: Why House Arrest Doesn't Qualify for Presentence Confinement Credit in New Mexico — State v. Fellhauer," see 28 N.M.L. Rev. 519 (1998).

For note and comment, "State v. Urioste: A Prosecutor's Dream and Defendant's Nightmare," see 34 N.M.L. Rev. 517 (2004).

For article, "Criminal Justice and the 2003-2004 United States Supreme Court Term", see 35 N.M.L. Rev. 123 (2005).

For article, "Reflections on Fifteen Years of the Teague v. Lane Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness and Perversity of the Court's Doctrine", see 35 N.M.L. Rev. 161 (2005).

For note and comment, "Immigration Consequences of Guilty Pleas: What State v. Paredez Means to New Mexico Criminal Defendants and Defense Attorneys," see 36 N.M.L. Rev. 603 (2006).

For article, "Developing a State Constitutional Law Strategy in New Mexico Criminal Prosecutions," see 39 N.M.L. Rev. 407 (2009).

## 30-1-2. Application of code.

The Criminal Code [30-1-1 NMSA 1978] has no application to crimes committed prior to its effective date.

A crime is committed prior to the effective date of the Criminal Code if any of the essential elements of the crime occurred before that date.

Prosecutions for prior crimes shall be governed, prosecuted and punished under the laws existing at the time such crimes were committed.

**History: 1953 Comp., § 40A-1-2, enacted by Laws 1963, ch. 303, § 1-2.**

**ANNOTATIONS**

**Indian country.** — Where a state road, which was built on land owned by the federal government and administered by the United States forest service pursuant to an easement granted to the state by the forest service, served as the border between two pueblos, but was not within either pueblo and where there has been no explicit congressional or executive action recognizing the property as Indian country or transferring the property for the use of Indians or to the bureau of Indian affairs, the road was not located in Indian country for purposes of criminal jurisdiction. *State v. Quintana*, 2008-NMSC-012, 143 N.M. 535, 178 P.3d 820, *aff'g* 2008-NMCA-025, 143 N.M. 538, 178 P.3d 823.

**A person need not be enrolled in a tribe to be recognized as an Indian for purposes of criminal jurisdiction.** — Where the state filed a petition to revoke defendant's probation, alleging that he violated a condition of his probation by committing two new offenses, battery on a household member and criminal damage to property, and that the charged offenses occurred on the Mescalero Apache reservation and that the offenses involved two non-tribal members, but where defendant presented additional facts by proffer that he is 7/32 Mescalero by blood, that he is an affiliate of the tribe, that he attended school on the reservation, and that he receives services on the reservation, the district court erred in denying defendant's motion to dismiss for lack of jurisdiction because enrollment as a member of a recognized tribe or pueblo is not a mandatory prerequisite for Indian status. A court must consider other factors to determine whether tribal or federal recognition as an Indian is satisfied. *State v. Salazar*, 2020-NMCA-021.

**This section was enacted as a transitional rule** prior to the enactment of the Criminal Code. *State v. Shay*, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. quashed, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

**Application of savings clause of this section.** — Based upon the savings clause of the Criminal Code, found in this section, and N.M. Const., art. IV, § 33, providing that no person shall be exempt from prosecution for any crime by reason of repeal of the law in question, the court correctly applied former 41-16-1, 1953 Comp., the Habitual Criminal Act (now Section 31-18-17 NMSA 1978), when sentence was imposed on defendant. *State v. Tipton*, 1967-NMSC-270, 78 N.M. 600, 435 P.2d 430.

**Section conflict with Section 12-2A-16 NMSA 1978.** — To the extent 12-2A-16 NMSA 1978, enacted in 1997, and this section, enacted in 1963, conflict, the latter enactment supercedes the prior. *State v. Shay*, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. quashed, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

## 30-1-3. Construction of Criminal Code.

In criminal cases where no provision of this code is applicable, the common law, as recognized by the United States and the several states of the Union, shall govern.

**History: 1953 Comp., § 40A-1-3, enacted by Laws 1963, ch. 303, § 1-3.**

**ANNOTATIONS**

I. GENERAL CONSIDERATION.
II. COMMON-LAW CRIMES.
A. IN GENERAL.
B. PARTICULAR OFFENSES.
III. CRIMINAL INTENT.
IV. INDICTMENT, TRIAL AND JUDGMENT.

I. GENERAL CONSIDERATION.

**Cross references.** — For provision making the common law the rule of practice and decision, *see* 38-1-3 NMSA 1978.

II. COMMON-LAW CRIMES.

A. IN GENERAL.

**Common-law crimes recognized.** — Common-law crimes were recognized and enforced by virtue of Laws



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1851, p. 144 (41-11-1, 1953 Comp.). *Musgrave v. McManus*, 1918-NMSC-075, 24 N.M. 227, 173 P. 196; *Ex parte De Vore*, 1913-NMSC-072, 18 N.M. 246, 136 P. 47.

**Common-law crimes recognized only where applicable to state.** — Only so much of the common law was adopted as was applicable to New Mexico's conditions and circumstances. *Blake v. Hoover Motor Co.*, 1923-NMSC-005, 28 N.M. 371, 212 P. 738; *Childers v. Talbott*, 1888-NMSC-003, 4 N.M. (Gild.) 336, 16 P. 275; *Bent v. Thompson*, 1890-NMSC-005, 5 N.M. 408, 23 P. 234, *aff'd*, 138 U.S. 114, 11 S. Ct. 238, 34 L. Ed. 902 (1891); *Ex parte De Vore*, 1913-NMSC-072, 18 N.M. 246, 136 P. 47; *Gurule v. Duran*, 1915-NMSC-043, 20 N.M. 348, 149 P. 302, L.R.A. 1915F. 648 (1915).

**Common-law crimes recognized when not in conflict with constitution or laws.** — The territorial legislature adopted the common law, as the rule of practice and decision in criminal cases, thereby incorporating into the body of our law the common law, lex non scripta, of England, and such British statutes of a general nature not local to that kingdom, nor in conflict with the constitution or laws of the United States, nor of this territory, which were applicable to our condition and circumstances, and which were in force at the time of the revolution. *State v. Hartzler*, 1967-NMCA-022, 78 N.M. 514, 433 P.2d 231; *Ex parte De Vore*, 1913-NMSC-072, 18 N.M. 246, 136 P. 47.

**Application of common law.** — The common law of crimes applies except where the common law has been changed by statute. *State v. Willis*, 1982-NMCA-151, 98 N.M. 771, 652 P.2d 1222 (specially concurring opinion).

**Strict construction of statutes.** — The common-law rule for strict construction of criminal statutes was in force in *New Mexico. Territory v. Davenport*, 1912-NMSC-023, 17 N.M. 214, 124 P. 795.

**Common-law year-and-a-day rule abolished.** — The common-law year-and-a-day rule, under which, if a person injured by an assailant survived beyond a year and a day after receiving the injuries, the defendant was excused from criminal culpability for the death, should no longer be recognized in this jurisdiction. Due to modern advances in medical and criminal science and technology, the rationale behind the rule no longer exists. *State v. Gabehart*, 1992-NMCA-074, 114 N.M. 183, 836 P.2d 102.

## B. PARTICULAR OFFENSES.

**Perjury.** — At common law, perjury was committed when a lawful oath was administered in some judicial proceeding to a person who swore willfully, absolutely and falsely in matters material to the issue, and it was perjury to take a false oath in justifying bail in any of the courts or before any person acting as a court, justice or tribunal, having power to hold such proceedings. Hence, a surety on an appeal bond from a justice of the peace (now magistrate) who swore falsely regarding his property was guilty of perjury even where the statute did not require an oath from him. *Territory v. Weller*, 1883-NMSC-004, 2 N.M. 470.

**Prison breach.** — Prison breach, a common-law practice, was punishable in New Mexico under laws 1851, p. 144 (41-11-1, 1953 Comp.). *Ex parte De Vore*, 1913-NMSC-072, 18 N.M. 246, 136 P. 47 (decided under prior law).

**Offense against public decency.** — The common law is sufficiently broad to punish as a misdemeanor, although there may be no exact precedent, any act which directly injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrongdoer, as in the case of acts which injuriously affect public morality or obstruct or pervert public justice or the administration of government; and it is the common law of this commonwealth that whatever openly outrages decency and is injurious to public morals is a misdemeanor and punishable at law. *State v. Hartzler*, 1967-NMCA-022, 78 N.M. 514, 433 P.2d 231.

**Indecent treatment of dead body.** — The offense, which was and is punishable at common law, is that of indecency in the treatment or handling of a dead human body. That which outrages or shocks the public sense of decency and morals, or that which contravenes the established and known public standards of decency and morals, relative to the care, treatment or disposition of a dead human body, is punishable as an act of indecency. *State v. Hartzler*, 1967-NMCA-022, 78 N.M. 514, 433 P.2d 231.

The length of time the body was kept, the manner and places in which it was kept, the obvious facts of changes in and decomposition of the body, and the concealment of the body from the police officers, all evidence failure to conform to the acceptable standards of decency and morals of our society in the treatment or handling of a dead human body. *State v. Hartzler*, 1967-NMCA-022, 78 N.M. 514, 433 P.2d 231.

**Act relating to embezzlement not part of state's common law.** — The act of parliament passed in 1799 (39 Geo. III), relating to embezzlement and the decisions construing it, was not part of the common law of New Mexico. *Territory v. Maxwell*, 1882-NMSC-010, 2 N.M. 250.

## III. CRIMINAL INTENT.

**Existence of criminal intent essential.** — Generally speaking, when an act is prohibited and made punishable by statute only, the statute is to be construed in the light of the common law and the existence of a criminal intent is to be regarded as essential, although the terms of the statute do not require it. *State v. Austin*, 1969-NMCA-095, 80 N.M. 748, 461 P.2d 230.

**Instruction on intent jurisdictional absent legislative indication to contrary.** — Except where the legislature clearly indicates a desire to eliminate the requirement of criminal intent, criminal statutes will be construed in the light of the common law and criminal intent will be required, and failure to instruct on this required element will be considered jurisdictional. *State v. Fuentes*, 1973-NMCA-069, 85 N.M. 274, 511 P.2d 760, cert. denied, 85 N.M. 265, 511 P.2d 751.

**Legislative indication must clearly appear.** — The legislature may forbid the doing of an act and make its commission criminal, without regard to the intent with which such act is done; but in such case it must clearly appear from the act, from its language or clear inference, that such was the legislative intent. *State v. Austin*, 1969-NMCA-095, 80 N.M. 748, 461 P.2d 230.

**Whether criminal intent is essential is matter of construction.** *State v. Craig*, 1962-NMSC-072, 70 N.M. 176, 372 P.2d 128.

## IV. INDICTMENT, TRIAL AND JUDGMENT.

**Constitutional provisions for presentments,** indictments and information were self-executing. *State v. Rogers*, 1926-NMSC-028, 31 N.M. 485, 247 P. 828.

**Indictment for murder.** — The common-law procedure being in force in New Mexico, where the statutes have adopted the common-law definition of murder, an indictment may omit a direct charge of a purpose or intent to kill as an overt act. *Territory v. Montoya*, 1912-NMSC-015, 17 N.M. 122, 125 P. 622.

**Charging assault with intent to murder.** — In indictment for assault with intent to commit murder, the means or instrument of committing the assault should be stated, the common law being made, by statute, the rule of decision and practice, where not specifically changed. *Territory v. Carrera*, 1892-NMSC-023, 6 N.M. 594, 30 P. 872 (decided under prior law, now Rule 5-205 NMRA).

**Raising defense of former jeopardy.** — Common law required defense of former jeopardy to be specially



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pleaded. It could not be raised by motion for instructed verdict at conclusion of state's case. *Territory v. Lobato*, 1913-NMSC-030, 17 N.M. 666, 134 P. 222, *aff'd*, 242 U.S. 199, 37 S. Ct. 107, 61 L. Ed. 244 (1916) (decided under prior law, now Section 30-1-10 NMSA 1978).

**Trial by jury.** — The constitution preserves the right of trial by jury already existing, which means as it existed in the territory prior to adoption of constitution. *Guiterrez v. Gober*, 1939-NMSC-008, 43 N.M. 146, 87 P.2d 437.

**Common-law presumption relating to spouses.** — The presumption of the common law that a married woman committing a crime in presence of her husband was under coercion was rebuttable. *State v. Asper*, 1930-NMSC-098, 35 N.M. 203, 292 P. 225.

**Opportunity for defendant to speak before judgment.** — On failure of trial court to ask defendant before judgment was passed whether he had anything to say why judgment should not be pronounced upon him, or to have the record affirmatively show that fact, the cause must be remanded upon that ground alone. *Territory v. Herrera*, 1901-NMSC-018, 11 N.M. 129, 66 P. 523 (decided under prior law).

**Discretion in sentencing.** — The common law gives trial courts the discretion to make sentences consecutive or concurrent. *State v. Crouch*, 1965-NMSC-131, 75 N.M. 533, 407 P.2d 671.

**Assessment of costs in criminal cases** was unknown at common law and therefore requires statutory authority. *State v. Valley Villa Nursing Ctr., Inc.*, 1981-NMCA-133, 97 N.M. 161, 637 P.2d 843.

**Review of judgments.** — The common law, vested the supreme court with jurisdiction to review judgments in criminal cases by writ of error. *Borrego v. Territory*, 1896-NMSC-011, 8 N.M. 446, 46 P. 349, cert. denied, 8 N.M. 655, 46 P. 211, *aff'd sub nom. Gonzales v. Cunningham*, 164 U.S. 612, 17 S. Ct. 182, 41 L. Ed. 572 (1896).

**Law reviews.** — For article, "Disclosure of Medical Information - Criminal Prosecution of Medicaid Fraud in New Mexico," see 9 N.M.L. Rev. 321 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 7, 9.

Modern status of test of criminal responsibility - state cases, 9 A.L.R.4th 526.

Voluntary absence when sentence is pronounced, 59 A.L.R.5th 135.

22 C.J.S. Criminal Law § 24.

## 30-1-4. Crime defined.

A crime is an act or omission forbidden by law and for which, upon conviction, a sentence of either death, imprisonment or a fine is authorized.

**History: 1953 Comp., § 40A-1-4, enacted by Laws 1963, ch. 303, § 1-4.**

ANNOTATIONS

**Nature of criminal intent.** — Criminal intent is more than intentional taking. It is a mental state of conscious wrongdoing. *State v. Austin*, 1969-NMCA-095, 80 N.M. 748, 461 P.2d 230.

**Crime as public offense.** — A crime is a public offense, and all public offenses are expressly defined to be crimes in New Mexico. 1959-60 Op. Att'y Gen. No. 59-154 (opinion rendered under 40-1-2 to 40-1-4, 1953 Comp.).

**Violation of public law.** — A "public offense" is the same as a "crime," and may include a breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights. It is an act committed or omitted in violation of public law. 1959-60 Op. Att'y Gen. No. 59-154 (opinion rendered under 40-1-2 to 40-1-4, 1953 Comp.).

## 30-1-5. Classification of crimes.

Crimes are classified as felonies, misdemeanors and petty misdemeanors.

**History: 1953 Comp., § 40A-1-5, enacted by Laws 1963, ch. 303, § 1-5.**

ANNOTATIONS

**Meaning of "crime" in Detoxification Act.** — The Criminal Code makes it clear that the prohibition in the Detoxification Act (Section 43-2-16 NMSA 1978) against charging an individual held in protective custody with any "crime" includes misdemeanors and petty misdemeanors. 1973-74 Op. Att'y Gen. No. 73-52.

## 30-1-6. Classified crimes defined.

A. A crime is a felony if it is so designated by law or if upon conviction thereof a sentence of death or of imprisonment for a term of one year or more is authorized.

B. A crime is a misdemeanor if it is so designated by law or if upon conviction thereof a sentence of imprisonment in excess of six months but less than one year is authorized.

C. A crime is a petty misdemeanor if it is so designated by law or if upon conviction thereof a sentence of imprisonment for six months or less is authorized.

**History: 1953 Comp., § 40A-1-6, enacted by Laws 1963, ch. 303, § 1-6.**



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ANNOTATIONS

**Police officer may make warrantless arrest for misdemeanor** if he has probable cause to believe the offense occurred in his presence. *Tanberg v. Shlotis*, 401 F.3d 1151 (10th Cir. 2005).

**Special statute controls over general.** — This section and Section 31-19-1 NMSA 1978 refer generally to the sentence for misdemeanors; former 64-10-1, 1953 Comp., relating to fraudulent applications in motor vehicle registration and the like, provides a specific sentence for that misdemeanor. If the general statute, standing alone, would include the same matter as the special statute and thus conflict with the special statute, the special statute controls since it is considered an exception to the general statute. *State v. Sawyers*, 1968-NMCA-051, 79 N.M. 557, 445 P.2d 978.

**Classification of criminal contempt in discretion of courts.** — Where the sole punishment of the criminal contemnor is a fine the New Mexico courts are free to make their own determination as to what is a "petty" and what is a "serious" offense, guided by the standards of District of *Columbia v. Clawans*, 300 U.S. 617, 57 S. Ct. 660, 81 L. Ed. 843 (1937) and other federal cases. *Seven Rivers Farm, Inc. v. Reynolds*, 1973-NMSC-039, 84 N.M. 789, 508 P.2d 1276.

**Penalty imposed as indication of nature of offense.** — Under the rule in *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S.Ct. 1523, 16 L. Ed. 2d 629 (1966), when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, the court is to look to the penalty actually imposed as the best evidence of the seriousness of the offense. *Seven Rivers Farm, Inc. v. Reynolds*, 1973-NMSC-039, 84 N.M. 789, 508 P.2d 1276; *In re D'Angelo*, 1986-NMSC-052, 105 N.M. 391, 733 P.2d 360.

**Falsely obtaining unemployment benefits is petty misdemeanor.** — When Subsection C is read together with Section 51-1-38 NMSA 1978, it is clear that the crime of falsely obtaining unemployment benefits is a petty misdemeanor, for which the statute of limitations is one year under Section 30-1-8F NMSA 1978. *Robinson v. Short*, 1979-NMSC-099, 93 N.M. 610, 603 P.2d 720 (decided under prior law, now Section 30-1-8 NMSA 1978).

**Violation of municipal ordinance constitutes petty misdemeanor** because imprisonment may not exceed 90 days. *State v. Luna*, 1980-NMSC-009, 93 N.M. 773, 606 P.2d 183 (decided under prior law, now Section 3-17-11 NMSA 1978).

**Effect of altering classification of crime.** — Statute under which the placing of poison in food for dogs would be a misdemeanor (Laws 1912, ch. 38, § 2, 40-4-1, 1953 Comp.) was impliedly repealed by subsequent statute (Laws 1919, ch. 82, § 1, 40-4-2, 1953 Comp.) making such offense a felony, under rule that if the same offense, identified by name or otherwise, is altered in degree or incidents, or if a felony is changed to a misdemeanor, or vice versa, the statute making such changes has the effect of repealing the former act. *State v. Anderson*, 1936-NMSC-016, 40 N.M. 173, 56 P.2d 1134.

**Federal right to jury trial for contempt.** — So long as the fine for criminal contempt which is, or may be, imposed is not more than $1000, there is no federal constitutional right to jury trial as the crime is a petty offense, nor need prosecution be by information. *Seven Rivers Farm, Inc. v. Reynolds*, 1973-NMSC-039, 84 N.M. 789, 508 P.2d 1276.

**Jury trial of misdemeanor.** — Those misdemeanors triable in district court do not provide for a trial by jury unless such crime was of the type which enjoyed and permitted trial by jury at the time of the adoption of N.M. Const., art. II, § 12. 1964 Op. Att'y Gen. No. 64-37.

**Jury trial of misdemeanor.** — Persons charged with offenses classified as misdemeanors under the Motor Vehicle Code may under Rule 23, N.M.R. Crim. P. (Magis. Cts.) (*now see* Rule 6-602) demand a jury trial but are not afforded one as a matter of right. 1979 Op. Att'y Gen. No. 79-17.

**Law reviews.** — For annual survey of New Mexico criminal procedure, see 16 N.M.L. Rev. 25 (1986).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 19, 28 to 30.

Determination of character of former crime as a felony, so as to warrant punishment of an accused as a second offender, 19 A.L.R.2d 227.

22 C.J.S. Criminal Law §§ 9 to 12.

## 30-1-7. Degrees of felonies.

Felonies under the Criminal Code are classified as follows:

A. capital felonies;
B. first degree felonies;
C. second degree felonies;
D. third degree felonies; and
E. fourth degree felonies.

A felony is a capital, first, second, third or fourth degree felony when it is so designated under the Criminal Code. A crime declared to be a felony, without specification of degree, is a felony of the fourth degree.

**History: 1953 Comp., § 40A-1-7, enacted by Laws 1963, ch. 303, § 1-7.**

ANNOTATIONS

**Law reviews.** — For article, "The Proposed New Mexico Criminal Code", see 1 Nat. Resources J. 122 (1961).

## 30-1-8. Time limitations for commencing prosecution.

A person shall not be prosecuted, tried or punished in any court of this state unless the indictment is found or information or complaint is filed within the time as provided:



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A. for a second degree felony, within six years from the time the crime was committed;

B. for a third or fourth degree felony, within five years from the time the crime was committed;

C. for a misdemeanor, within two years from the time the crime was committed;

D. for a petty misdemeanor, within one year from the time the crime was committed;

E. for any crime against or violation of Section 51-1-38 NMSA 1978, within three years from the time the crime was committed;

F. for a felony pursuant to Section 7-1-71.3, 7-1-72 or 7-1-73 NMSA 1978, within five years from the time the crime was committed; provided that for a series of crimes involving multiple filing periods within one calendar year, the limitation shall begin to run on December 31 of the year in which the crimes occurred;

G. for an identity theft crime pursuant to Section 30-16-24.1 NMSA 1978, within five years from the time the crime was discovered;

H. for any crime not contained in the Criminal Code [30-1-1 NMSA 1978] or where a limitation is not otherwise provided for, within three years from the time the crime was committed; and

I. for a capital felony, a first degree violent felony or second degree murder pursuant to Subsection B of Section 30-2-1 NMSA 1978, no limitation period shall exist and prosecution for these crimes may commence at any time after the occurrence of the crime.

**History: 1953 Comp., § 40A-1-8, enacted by Laws 1963, ch. 303, § 1-8; 1979, ch. 5, § 1; 1980, ch. 50, § 1; 1997, ch. 157, § 1; 2005, ch. 108, § 7; 2009, ch. 95, § 2; 2022, ch. 56, § 23.**

**Cross references.** — For limitation on prosecutions for violations of municipal ordinances, *see* 35-15-5 NMSA 1978.

For raising pre-trial motions, defenses and objections, *see* Rule 5-601 NMRA.

For time limits for arraignment and commencement of trial, *see* Rule 5-604 NMRA.

**The 2022 amendment,** effective May 18, 2022, eliminated the statute of limitations for second degree murder; and in Subsection I, after "first degree violent felony", added "or second degree murder pursuant to Subsection B of Section 30-2-1 NMSA 1978".

**The 2009 amendment,** effective July 1, 2009, in Subsection F, added Section 7-1-71.3 NMSA 1978, and after "NMSA 1978", deleted "or Section 4 of this 2005 act"; and added Subsection G.

**The 2005 amendment,** effective June 17, 2005, added Subsection F to a five year limitation for commencing a felony prosecution pursuant to Sections 7-1-72 or 7-1-73 NMSA 1978 from the time the crime was committed or if the prosecution is for a series of crimes involving multiple filing periods within one calendar year, from December 31 of the year in which the crimes occurred.

**The 1997 amendment,** effective July 1, 1997, deleted former Subsections A and B providing for 15 year limitations for capital murder and first degree murder, added Subsection G, and redesignated the remaining subsections accordingly.

## ANNOTATIONS

**Application of 1997 amendment.** — The 1997 amendment, which abolished the fifteen year statute of limitations for all capital felonies and first degree violent felonies, applies to unexpired criminal conduct committed before the amendment's effective date of July 1, 1997. *State v. Morales*, 2010-NMSC-026, 148 N.M. 305, 236 P.3d 24, *rev'g* 2008-NMCA-155, 145 N.M. 259, 196 P.3d 490.

Where defendant was charged with aggravated criminal sexual penetration of a child less that thirteen years of age, a first degree felony, based on conduct that occurred between January 1, 1978 and December 30, 1985, the crimes committed by defendant after July 1, 1982 were not time barred as of July 1, 1997 and the 1997 amendment, which abolished the fifteen year statute of limitations for all capital felonies and first degree violent felonies applied to the crimes committed by defendant. *State v. Morales*, 2010-NMSC-026, 148 N.M. 305, 236 P.3d 24, *rev'g* 2008-NMCA-155, 145 N.M. 259, 196 P.3d 490.

**The 1997 amendment, which eliminated the statute of limitations on the prosecution of first degree felonies, applies prospectively.** *State v. Morales*, 2008-NMCA-155, 145 N.M. 269, 196 P.3d 490, cert. granted, 2008-NMCERT-011, *rev'd*, 2010-NMSC-026, 148 N.M. 305, 236 P.3d 24.

**Waiver.** — The statute of limitations is a substantive right that may only be waived by a defendant after consultation with counsel, and only if the waiver is knowing, intelligent and voluntary. *State v. Kerby*, 2007-NMSC-014, 141 N.M. 413, 156 P.3d 704.

**Waiver of statute of limitations.** — Where defendant pleaded no contest to two second-degree felonies, attempted first-degree murder and aggravated burglary with a deadly weapon, for acts that were committed in 2010, and where, following the district court's denial of defendant's motion to dismiss which asserted that the statute of limitations had run on those counts before the state filed an indictment that named him as a defendant, defendant and the state entered into an unconditional plea agreement in which defendant agreed to plead no contest to attempted first-degree murder and aggravated burglary with a deadly weapon, defendant's no contest plea waived his statute of limitations defense, and where defendant was advised of the statute of limitations, the factual and legal basis for asserting the defense, and the range of outcomes that could result from its assertion or waiver, the waiver was knowing, intelligent and voluntary. *State v. Hansen*, 2021-NMCA-048, cert. denied.

**Where state alleges that defendant committed criminal sexual penetration of minor under 13** between September and December of 1988 and in January of 1989, the applicable statute of limitations at the time defendant allegedly committed the crime is 15 years. *State v. Hill*, 2005-NMCA-143, 138 N.M. 693, 125 P.3d 1175, cert. denied, 2005-NMCERT-012, 138 N.M. 772, 126 P.3d 1136.

**Limitation "not otherwise provided for".** — A limitation is "otherwise provided for" for purposes of Subsection H (now F), based on Subsection F (now D), which limits the prosecution of petty misdemeanors, if the punishment for the crime is such as to make it a petty misdemeanor under Section 30-1-6 NMSA 1978, even if the statute under which the defendant was charged does not



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expressly state the degree of the crime. *Robinson v. Short*, 1979-NMSC-099, 93 N.M. 610, 603 P.2d 720.

**Period begins running when crime completed.** — Where the final "taking" under a fraudulent loan occurred on July 17, 1973, the crimes of fraud and conspiracy to defraud were completed on that date, and the limitation period began to run. *State v. Thoreen*, 1978-NMCA-024, 91 N.M. 624, 578 P.2d 325, cert. denied, 91 N.M. 610, 577 P.2d 1256.

**Limitations against prosecution for conspiracy run from time last overt act** in furtherance of the conspiracy was committed. *State v. Thoreen*, 1978-NMCA-024, 91 N.M. 624, 578 P.2d 325, cert. denied, 91 N.M. 610, 577 P.2d 1256.

**Time of filing superseding indictment or information not controlling.** — Although a felony charge may be initiated by the filing of a complaint, the felony must be prosecuted by indictment or information, so that at some point the complaint is superseded by an indictment or information. This section, however, does not distinguish among complaint, indictment or information, and by providing for a complaint charging a felony within the time limitation, the legislature intended that the time of filing a superseding indictment or information should not control the limitation question. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

**Charges initiated by complaint continued by later indictment.** — Since upon being advised that a defendant has been indicted prior to a preliminary examination, a magistrate takes no further action in the case, charges initiated by a complaint in a magistrate court should be considered as continued by a later indictment, and for purposes of this section the prosecution should be considered as commenced by the filing of the complaint. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

**Jury to consider solely date charged.** — Although it is not error to instruct the jury that it must find that the crime occurred within the applicable statute of limitations, it is error not to limit the jury's consideration to the date charged in the information. *State v. Foster*, 1974-NMCA-150, 87 N.M. 155, 530 P.2d 949.

**New prosecution potentially barred after dismissal for failure to prosecute.** — If there is a dismissal of a charge for failure to prosecute, a new prosecution would be barred if initiated after the limitation period expires. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

**Filing complaint within period tolls statute.** — An indictment filed prior to dismissal of a complaint but more than three years after the commission of a third degree felony may be timely because the limitation period was tolled by the filing of the complaint within the three-year period. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

**The statute of limitations prescribe time limits within which the state must commence a prosecution** by filing the initial charging documents in a case, not time limits within which a defendant must be brought to trial. *State v. Collier*, 2013-NMSC-015, 301 P.3d 370.

**Statute did not bar retrial of lesser-included offense.** — Where, on February 13, 2006, defendant injured a horse causing the horse's death; on August 31, 2006, less than seven months after the horse's death, the grand jury returned an indictment charging defendant with felony extreme cruelty to animals; defendant's first trial in March 2008 resulted in a mistrial due to jury deadlock; at defendant's second trial in January 2009, after the statute of limitations period for misdemeanors had run, the district court, at the state's request and without objection from defendant, instructed the jury on the lesser included offense of misdemeanor cruelty to animals; the jury acquitted defendant of the felony charge; and the district court declared a mistrial on the misdemeanor charge due to jury deadlock, the statute of limitations did not bar retrial of the misdemeanor charge because the state commenced the prosecution by timely filing the indictment on the felony charge, which necessarily included the lesser-included misdemeanor charge, within the two-year statute of limitations period for the misdemeanor charge. *State v. Collier*, 2013-NMSC-015, 301 P.3d 370.

**Time limitation instruction.** — Generally, the time limitation instruction is a necessary part of the instructions; however, where the uncontradicted evidence shows the offenses were committed within the time limitation, the instruction stating the time limitation is not a required instruction, but giving it is not error. *State v. Salazar*, 1974-NMCA-026, 86 N.M. 172, 521 P.2d 134.

**Error not prejudicial.** — Although the offense of unlawfully drawing or discharging a firearm in a settlement was barred by the statute of limitations, which defense was timely raised in the district court, so that the trial court erred in not dismissing this count, nevertheless, no sentence was imposed for this offense, and furthermore, the elements of the offense were embraced in the crime of assault with intent to kill, for which defendant was properly convicted, so that the error was without prejudice to him. *State v. Shawan*, 1967-NMSC-013, 77 N.M. 354, 423 P.2d 39.

**Falsely obtaining unemployment benefits is petty misdemeanor.** — When Section 30-1-6C NMSA 1978 is read together with Section 51-1-38 NMSA 1978, it is clear that the crime of falsely obtaining unemployment benefits is a petty misdemeanor, for which the statute of limitations is one year under Subsection F. *Robinson v. Short*, 1979-NMSC-099, 93 N.M. 610, 603 P.2d 720(decided under prior law, now Section 30-1-8 NMSA 1978).

**Contributions payable under Section 51-1-19 NMSA 1978** are not "revenues" within meaning of Subsection G. *Robinson v. Short*, 1979-NMSC-099, 93 N.M. 610, 603 P.2d 720 (decided under prior law).

**Prosecution for sale of property of another not barred.** — Under former law, prosecution for unlawful sale of one head of neat cattle, the property of another, was not barred where commenced within three years from time of alleged offense. *State v. Stone*, 1937-NMSC-050, 41 N.M. 547, 72 P.2d 9.

**Prosecution of misdemeanor.** — Under former 41-9-1, 1953 Comp., as well as this section, the maximum time for commencing prosecution for a misdemeanor was within two years from the time the offense was committed. 1957-58 Op. Att'y Gen. No. 57-74.

**Law reviews.** — For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 223 to 233.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Right to require bail or recognizance where, at time of filing, prosecution of principal is barred by statute of limitations, 75 A.L.R.2d 1431.

Finding or return of indictment, or filing of information, as tolling limitation period, 18 A.L.R.4th 1202.

Waivability of bar of limitations against criminal prosecution, 78 A.L.R.4th 693.

Commencement of limitation period for criminal prosecution under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USCS §§ 1961-1968, 89 A.L.R. Fed. 887.

When is conspiracy continuing offense for purposes of statute of limitations under 18 USCS § 3282, 109 A.L.R. Fed. 616.

22 C.J.S. Criminal Law §§ 196 to 207.



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## 30-1-9. Tolling of time limitation for prosecution for crimes.

A. If after any crime has been committed the defendant shall conceal himself, or shall flee from or go out of the state, the prosecution for such crime may be commenced within the time prescribed in Section 1-8 [30-1-8 NMSA 1978], after the defendant ceases to conceal himself or returns to the state. No period shall be included in the time of limitation when the party charged with any crime is not usually and publicly a resident within the state.

B. When

(1) an indictment, information or complaint is lost, mislaid or destroyed;

(2) the judgment is arrested;

(3) the indictment, information or complaint is quashed, for any defect or reason; or

(4) the prosecution is dismissed because of variance between the allegations of the indictment, information or complaint and the evidence; and a new indictment, information or complaint is thereafter presented, the time elapsing between the preferring of the first indictment, information or complaint and the subsequent indictment, information or complaint shall not be included in computing the period limited for the prosecution of the crime last charged; provided that the crime last charged is based upon and grows out of the same transaction upon which the original indictment, information or complaint was founded, and the subsequent indictment, information or complaint is brought within five years from the date of the alleged commission of the original crime.

**History: 1953 Comp., § 40A-1-9, enacted by Laws 1963, ch. 303, § 1-9.**

**Cross references.** — For defects, errors and omissions in a complaint, indictment or information, and variances between the allegations therein and the evidence, *see* Rule 5-204 NMRA.

ANNOTATIONS

**This section is a tolling statute, not a statute of limitations,** and does not independently limit the period within which prosecution must commence. *State v. Hill*, 2008-NMCA-117, 144 N.M. 775, 192 P.3d 770, cert. quashed, 2009-NMCERT-009, 147 N.M. 423, 224 P.3d 650.

**Constitutionality.** — The application of the tolling provision did not violate either defendant's right to travel or his constitutional guarantee of equal protection of the laws. *State v. Cawley*, 1990-NMSC-088, 110 N.M. 705, 799 P.2d 574.

**Statute not exclusive.** — Although this section does show a legislative intent that the limitation period is not to be utilized to bar a prosecution delayed by procedural problems, it does not evince an intent to bar prosecutions not beset with procedural problems. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

**Indictment timely because complaint had tolled statute.** — An indictment filed prior to dismissal of a complaint but more than three years after the commission of a third degree felony is timely because the limitation period was tolled by the filing of the complaint within the three-year period. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

**Evidence of absence from state insufficient.** — Where there was no evidence tending to show defendant's whereabouts from the time of his escape from prison on September 17, 1956 until his apprehension in Oklahoma on January 24, 1960, defendant's plea of not guilty put the statute of limitations in issue, and his motion for a directed verdict on the grounds that the three-year statute of limitations was a bar to prosecution should have been granted. *State v. Oliver*, 1963-NMSC-015, 71 N.M. 317, 378 P.2d 135.

**Evidence negating residence insufficient.** — There being no substantial evidence in record that defendant was not usually and publicly a resident of state, after commission of crime for sufficient time to toll statute of limitations, he was entitled to instructed verdict in his favor. *State v. Mersfelder*, 1927-NMSC-049, 34 N.M. 465, 284 P. 113.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 227, 228, 231, 233.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Imprisonment as tolling the statute of limitations, 76 A.L.R.3d 743.

Finding or return of indictment, or filing of information, as tolling limitation period, 18 A.L.R.4th 1202.

Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations, 71 A.L.R.4th 554.

22 C.J.S. Criminal Law §§ 202 to 204.

## 30-1-9.1. Offenses against children; tolling of statute of limitations.

The applicable time period for commencing prosecution pursuant to Section 30-1-8 NMSA 1978 shall not commence to run for an alleged violation of Section 30-6-1, 30-9-11 or 30-9-13 NMSA 1978 until the victim attains the age of eighteen or the violation is reported to a law enforcement agency, whichever occurs first.

**History: Laws 1987, ch. 117, § 1.**



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**Applicability.** — Laws 1987, ch. 117, § 2 provided that the provisions of Laws 1987, ch. 117, § 1 apply only to crimes committed on or after June 19, 1987.

ANNOTATIONS

**Report of a violation to a law enforcement agency.** — The statute of limitations to commence a prosecution for a violation of Section 30-6-1, 30-9-11 or 30-9-13 NMSA 1978 is triggered only for the specific violation that was reported to a law enforcement agency and does not commence to run until the facts that form the basis for the violation that is being prosecuted were reported to a law enforcement agency. *State v. Whittington*, 2008-NMCA-063, 144 N.M. 85, 183 P.3d 97.

## 30-1-9.2. Criminal sexual penetration; tolling of statute of limitations.

A. When DNA evidence is available and a suspect has not been identified, the applicable time period for commencing a prosecution pursuant to Section 30-1-8 NMSA 1978 shall not commence to run for an alleged violation of Section 30-9-11 NMSA 1978 until a DNA profile is matched with a suspect.

B. As used in this section, "DNA" means deoxyribonucleic acid."

**History: Laws 2003, ch. 257, § 1.**

**Effective dates.** — Laws 2003, ch. 257, § 3 made the act effective on July 1, 2003.

**Applicability.** — Laws 2003, ch. 257, § 2 provided that the provisions of Laws 2003, ch. 257, § 1 apply to an alleged violation of Section 30-9-11 NMSA 1978 for which the applicable time period for commencing a prosecution as provided in Section 30-1-8 NMSA 1978 had not expired as of July 1, 2003.

## 30-1-10. Double jeopardy.

No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment. When the indictment, information or complaint charges different crimes or different degrees of the same crime and a new trial is granted the accused, he may not again be tried for a crime or degree of the crime greater than the one of which he was originally convicted.

**History: 1953 Comp., § 40A-1-10, enacted by Laws 1963, ch. 303, § 1-10.**

**Cross references.** — For constitutional provision on former jeopardy, *see* N.M. Const., art. II, § 15.

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I. GENERAL CONSIDERATION.
II. TESTS.
  A. LESSER INCLUDED OFFENSE.
  B. SAME EVIDENCE.
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III. MISTRIAL.
IV. RAISING THE DEFENSE.

I. GENERAL CONSIDERATION.

**Waiver of rights.** — Double jeopardy rights may not be waived and may be raised by the accused at any stage of a criminal prosecution either before or after judgment. Defendant may raise the issue of violation of double jeopardy even though he expressly waived the issue during a plea hearing. *State v. Jackson*, 1993-NMCA-092, 116 N.M. 130, 860 P.2d 772.

**Finality of decision.** — The trial court's oral and written statements during the proceedings did not constitute acquittals and therefore there was no violation of double jeopardy protections when the court subsequently found the defendant guilty in the same proceedings. *State v. Vaughn*, 2005-NMCA-076, 137 N.M. 674, 114 P.3d 354, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229.

**Removal of child from the custody of the child's parents pending an investigation of child abuse is not a punishment.** — Where the children, youth and families department investigated defendants for child abuse and found the allegations to be unsubstantiated; a tribal court held a custody hearing on the same allegations and ultimately returned the child to defendants; the defendant who was the primary caretaker agreed to temporary guardianship of the child during the investigation and tribal court proceeding; and the removal of the child from the custody of defendants for fourteen months during the child abuse investigation by the department and the custody proceeding in tribal court was not intended to punish defendants, the state's prosecution of defendants for criminal child abuse did not violate double jeopardy. *State v. Diggs*, 2009-NMCA-099, 147 N.M. 122, 217 P.3d 608, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

**Identical counts and jury instructions.** — Where multiple counts of criminal sexual penetration of a minor in the indictment and the counts in the jury instructions were carbon-copy counts of each other and where the child's testimony distinguished facts for each count and the defendant admitted to having sexual intercourse with the child on several occasions, there was sufficient evidence from which a jury could find separate incidents of criminal sexual penetration and there was no violation of double jeopardy. *State v. Martinez*, 2007-NMCA-160, 143 N.M. 96, 173 P.3d 18, cert. denied, 2007-NMCERT-011, 143 N.M. 155, 173 P.3d 762.

**Constitutional provision.** — This section provides the same protections as N.M. Const., art. II, § 15, although those protections are more clearly stated in the statute. *State v. Lynch*, 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73.

**Reinstatement of convictions.** — Where one of two otherwise valid convictions must be vacated to avoid violation of double jeopardy protections, the conviction carrying the shorter sentence must be vacated. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426.



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Where defendant and defendant's companions were accosted by a rival gang in front of defendant's family home, guns were pulled on both sides and defendant's sibling was severely wounded by gunshots in the leg and abdomen; while defendant's group were trying to help defendant's sibling in the driveway and stop the bleeding from the gunshot wounds, the person in the rival gang who had been shooting at defendant and defendant's companions returned in a Ford Expedition; when defendant saw gunfire coming from the Expedition, defendant ran into the house and retrieved an AK-47 rifle and began shooting at the Expedition; the driver of Expedition was shot seven times and died; the jury convicted defendant of voluntary manslaughter and shooting into a motor vehicle resulting in great bodily harm, the conviction for voluntary manslaughter should be vacated and the conviction for shooting into a motor vehicle upheld because the conviction for shooting into a motor vehicle carried a more severe potential sentence. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426.

**State protections broader than those of federal constitution.** — The differences between N.M. Const., art. II, § 15, and this section suggest that the legislature was attempting to articulate the protections of the state constitution as being broader than those of the federal constitution. *State v. Lynch*, 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73.

**When section applied.** — The double jeopardy clause only comes to the aid of defendants subjected to multiple prosecutions for the identical offense, or in such situations in which collateral estoppel, the concept of lesser included offenses or the same evidence test apply. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

This section precludes retrial of a greater offense only after an acquittal of that offense and does not address the situation in which the state prosecutes various crimes or degrees of crimes and the jury returns a verdict on less than all of the crimes charged. *State v. Martinez*, 1995-NMSC-064, 120 N.M. 677, 905 P.2d 715.

The New Mexico supreme court's statement in *State v. Martinez*, 1995-NMSC-064, 120 N.M. 677, 905 P.2d 715, that this section precludes a retrial of a greater offense only after an acquittal of that offense, was not intended to introduce a new principle of law into its double jeopardy jurisprudence, but rather was a summary of existing case law. *State v. Lynch*, 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73.

This section precludes a retrial of a greater offense only after an (implied or explicit) acquittal of that offense, provided that the greater offense was charged in the first trial. *State v. Lynch*, 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73.

**Section applies to children's court proceedings** involving delinquent child. *State v. Doe*, 1977-NMCA-058, 90 N.M. 536, 565 P.2d 1053.

**Acquittal of accused protects against second prosecution for same crime.** *Borrego v. Territory*, 1896-NMSC-011, 8 N.M. 446, 46 P. 349, *aff'd sub nom. Gonzales v. Cunningham*, 164 U.S. 612, 17 S. Ct. 182, 41 L. Ed. 572 (1896).

**No jeopardy if information fails to state offense.** — Where information failed to state an offense at time of arraignment and entry of plea of not guilty, defendant was not placed in jeopardy. *State v. Ardovino*, 1951-NMSC-018, 55 N.M. 161, 228 P.2d 947.

**No jeopardy if court lacks jurisdiction.** — Since marijuana is not defined as a narcotic drug under the relevant statutes, a charge of violating Section 30-31-20 NMSA 1978 (trafficking) in the first proceeding brought against defendant for selling marijuana did not charge defendant with a public offense. Hence, as the court lacked jurisdiction in the first proceeding, there was no basis for a claim of double jeopardy where defendant was later charged under the proper section. *State v. Mabrey*, 1975-NMCA-098, 88 N.M. 227, 539 P.2d 617.

**No jeopardy on retrial after appeal.** — The former jeopardy clause does not preclude retrial of defendant whose sentence is set aside because of error in the proceedings leading to sentence or conviction. *State v. Sneed*, 1967-NMSC-272, 78 N.M. 615, 435 P.2d 768; *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Constitutional protection against double jeopardy does not prevent a second trial for the same offense where the defendant himself, by an appeal, has invoked the action which resulted in the second trial. *State v. Sneed*, 1967-NMSC-272, 78 N.M. 615, 435 P.2d 768.

**No jeopardy after collateral attack.** — Where a conviction is overturned on collateral rather than direct attack, retrial is not precluded on double jeopardy grounds. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

**Waiver of defense by plea agreement.** — The defendant waived his double jeopardy defense by entering a plea agreement which provided that the state could pursue additional habitual offender proceedings to enhance the defendant's sentence in the event his probation was revoked or he otherwise failed to fulfill his obligations under the agreement, and the provision precluding waiver of a double jeopardy defense did not apply to prevent waiver in such case. *Montoya v. New Mexico*, 55 F.3d 1496 (10th Cir. 1995).

**Charging in alternative.** — The concept of double jeopardy was not involved in charging defendant with fraud or in the alternative embezzlement since the charges were in the alternative; nor were the concepts of included offenses, same evidence or merger. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

**Trial de novo on alternative means of committing offense did not violate double jeopardy.** — When a defendant is convicted based on one of two alternative means of committing a single crime, there is not an implied acquittal of the other alternative unless the conviction logically excludes guilt of the other alternative; if there is no implied acquittal, there is no constitutional prohibition against retrial of both alternatives after a conviction is set aside. *State v. Ben*, 2015-NMCA-118, cert. denied, 2015-NMCERT-011.

Where defendant was charged in magistrate court with multiple means of committing DWI, per se DWI and impaired to the slightest degree, and was convicted on the per se theory of DWI, defendant's double jeopardy rights were not violated when he was retried de novo on the impaired theory in the district court, because his conviction on the per se theory of DWI was not logically inconsistent with a finding of impaired DWI. *State v. Ben*, 2015-NMCA-118, cert. denied, 2015-NMCERT-011.

**Prosecution and forfeiture generally.** — *State v. Nunez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264, does not stand for the proposition that a criminal prosecution may never advance independently of a forfeiture proceeding. Rather, *Nunez* appears to mandate only proper initiation of the dual penalty proceeding, meaning that the criminal charges and the forfeiture proceeding must be merged or consolidated prior to the occurrence of any event that signals the attachment of jeopardy. *State v. Esparza*, 2003-NMCA-075, 133 N.M. 772, 70 P.3d 762, cert. denied, 133 N.M. 771, 70 P.3d 761.

**Civil penalty and criminal prosecution under the Voter Action Act.** — The civil penalty authorized under Section 1-19A-17 NMSA 1978 is remedial and does not constitute punishment for double jeopardy purposes. The imposition of a civil penalty does not bar a subsequent criminal prosecution under the Voter Action Act for the same conduct for which the secretary of state assessed the



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civil penalty. *State v. Block*, 2011-NMCA-101, 150 N.M. 598, 263 P.3d 940.

Where the secretary of state assessed civil penalties against defendant for violations of the Voter Action Act and the attorney general subsequently filed criminal charges against defendant for the same violations of the act, the assessment of the civil penalties and the subsequent criminal prosecution did not violate double jeopardy. *State v. Block*, 2011-NMCA-101, 150 N.M. 598, 263 P.3d 940.

**Civil forfeiture under Controlled Substances Act.** — Because civil forfeiture under the Controlled Substances Act is punishment for double-jeopardy purposes under the New Mexico constitution, all forfeiture complaints and criminal charges for violations of the Controlled Substances Act may both be brought only in a single, bifurcated proceeding. *State v. Nunez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264.

The legislature is not prevented from assessing both civil and criminal penalties for violations of the Controlled Substances Act, Sections 30-31-1 to 30-31-41 NMSA 1978. *State v. Esparza*, 2003-NMCA-075, 133 N.M. 772, 70 P.3d 762, cert. denied, 133 N.M. 771, 70 P.3d 761.

**Civil penalties and criminal prosecution under Securities Act.** — Criminal prosecutions under the Securities Act, Sections 58-13B-1 to 58-13B-57 NMSA 1978 (now Sections 58-13C-101 to 58-13C-701 NMSA 1978), following administratively imposed civil penalties under that Act, do not place defendants in double jeopardy under N.M. Const., art. II, § 15, or under this section. *State v. Kirby*, 2003-NMCA-074, 133 N.M. 782, 70 P.3d 772, cert. denied, 133 N.M. 771, 70 P.3d 761.

**City ordinance.** — The clear intent and purpose of the city ordinance is to establish a remedial measure to protect the public from those drivers who persist in driving after license revocation and from multiple driving while intoxicated offenses; therefore, civil forfeiture proceedings are not punitive, and the drivers are not subjected to double jeopardy. *City of Albuquerque ex rel. Albuquerque Police Dep't v. One (1) 1984 White Chevy UT.*, 2002-NMSC-014, 132 N.M. 187, 46 P.3d 94.

**Trial de novo after magistrate court conviction.** — In a trial de novo resulting from a defendant's appeal of a magistrate court conviction, the district court has jurisdiction as well as a constitutional and statutory obligation to consider the defendant's pretrial double jeopardy claim. *State v. Foster*, 2003-NMCA-099, 134 N.M. 224, 75 P.3d 824, cert. denied, 134 N.M. 179, 74 P.3d 1071.

**Greater sentence after trial de novo.** — The greater sentence imposed by the district court for violation of certain municipal ordinances after a trial de novo did not deprive defendant of due process, nor did it amount to double jeopardy. *City of Farmington v. Sandoval*, 1977-NMCA-022, 90 N.M. 246, 561 P.2d 945.

**Double jeopardy was not violated by amendment of defendant's sentence.** — Where the district court initially determined that defendant's 1972 uncounseled misdemeanor DWI conviction could not be used to enhance defendant's sentence for a 2009 aggravated DWI; the state asked the court to reconsider its ruling as a legal error six days after the court entered the sentence; the state did not present any new or supplemental evidence; the court determined that it had erred as a matter of law because defendant had not been sentenced to jail for the 1972 conviction; and the court amended defendant's sentence based on the legal error regarding the 1972 conviction, defendant did not have a reasonable expectation of finality in the original sentence because the state moved for reconsideration of the court's ruling on the validity of the 1972 sentence within the thirty days of the court's entry of the sentence and double jeopardy did not preclude the modification of defendant's sentence based on the legal error. *State v. Redhouse*, 2011-NMCA-118, 269 P.3d 8, cert. denied, 2011-NMCERT-011.

**Larceny of cattle distinct from disposition of hides.** — Larceny of cattle, completed on one day by driving the cattle away or killing them with intent to steal, was a distinct offense from that of killing cattle and failing to keep the hides and an acquittal of former was no bar to prosecution for latter. *State v. Knight*, 1929-NMSC-049, 34 N.M. 217, 279 P. 947.

**Conspiracy and completed offense are separate offenses** and conviction of both does not amount to double jeopardy. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

The commission of a substantive offense and a conspiracy to commit it are separate and distinct offenses, and a conviction for the conspiracy may be had though the substantive offense was completed. The plea of double jeopardy is not a defense to conviction for both offenses. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

Evidence that a conspiracy to commit burglary was entered on the evening of November 16th, that the conspirators unsuccessfully attempted to carry out the conspiracy at 10:30 p.m. of that day, and that the burglary was performed between 9:00 and 9:30 a.m. of November 17th, showed two distinct crimes, and there was no factual basis for the contention that they were either the same or so similar that multiple convictions were prohibited. *State v. Watkins*, 1975-NMCA-126, 88 N.M. 561, 543 P.2d 1189, cert. denied, 89 N.M. 6, 546 P.2d 71.

**Double use of prior felony.** — It is not legally permissible for the state to present evidence of the same prior felony to prove an essential element of the crime of felon in possession of a firearm, and to rely upon this same evidence for purposes of enhancing the defendants' sentences under the habitual offender criminal statute. *State v. Haddenham*, 1990-NMCA-048, 110 N.M. 149, 793 P.2d 279, cert. denied, 110 N.M. 72, 792 P.2d 49, and 110 N.M. 183, 793 P.2d 865.

## II. TESTS.

### A. LESSER INCLUDED OFFENSE.

**Effect of conviction or acquittal of lesser included offense.** — Conviction or acquittal of a lesser offense necessarily included in a greater offense bars a subsequent prosecution for the greater offense. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Meaning of included offense.** — For an offense to be included within another offense, the offense must be necessarily included in the offense charged in the indictment, and for an offense to be necessarily included, the greater offense cannot be committed without also committing the lesser. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Indictment source for determining lesser offense.** — For a lesser offense to be necessarily included, the greater offense cannot be committed without also committing the lesser, and in determining whether an offense is necessarily included, the court will look to the offense charged in the indictment. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Exception to rule.** — Conviction of a lesser included offense bars prosecution of a greater offense, subject to one exception: if the court does not have jurisdiction to try the crime, double jeopardy cannot attach, since double jeopardy requires that a court have sufficient jurisdiction to try the charge. Where the magistrate court had no jurisdiction to try the charge of vehicular homicide while driving while intoxicated or recklessly driving, double jeopardy should not bar the vehicular homicide by driving



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while intoxicated charge. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

**Armed robbery and aggravated battery.** — The concept of lesser included offenses is not involved in a prosecution for armed robbery and aggravated battery because either offense can be committed without committing the other offense. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Aggravated burglary involving battery and aggravated battery involving deadly weapon.** — Where defendant entered the victims' home with intent to commit theft and stabbed and beat the victims, defendant's convictions of aggravated burglary involving battery and aggravated burglary involving a deadly weapon did not violate double jeopardy. *State v. Swick*, 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462, cert. granted, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

**Driving under the influence and homicide by vehicle.** — Where the indictment against defendant was phrased in the alternative charging him with homicide by vehicle (former Section 64-22-1, 1953 Comp.) while violating either Section 64-22-2, 1953 Comp.(former driving under the influence) or Section 64-22-3, 1953 Comp. (former reckless driving), the prosecution was not barred by a conviction in municipal court for driving under the influence since the lesser offense of driving while under the influence of intoxicating liquor is not necessarily included in the greater offense of homicide by vehicle. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

**Possession and distribution.** — Possession of marijuana was a lesser offense necessarily included in the greater offense of distribution, arising out of the same events, and since defendant was convicted of the lesser offense, double jeopardy barred his prosecution for the greater. *State v. Medina*, 1975-NMCA-033, 87 N.M. 394, 534 P.2d 486.

**Criminal sexual contact of minor and attempted criminal sexual penetration.** — The offenses of criminal sexual contact of a minor and attempted criminal sexual penetration of a minor cannot be characterized as lesser included and greater inclusive crimes because they each contain different elements and stand independently in relation to one another. *State v. Mora*, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, cert. denied, 133 N.M. 727, 69 P.3d 237.

B. SAME EVIDENCE.

**Nature of test.** — The test for determining whether two offenses are the same so as to bring into operation the prohibition against double jeopardy is the "same evidence" test which asks whether the facts offered in support of one offense would sustain a conviction of the other. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813; *Owens v. Abram*, 1954-NMSC-096, 58 N.M. 682, 274 P.2d 630, cert. denied, 348 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 719 (1955).

**Same evidence test.** — The "same evidence" test is whether the facts offered in support of one offense would sustain a conviction of the other offense. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Unitary test.** — Where a defendant convicted of multiple offenses claims double jeopardy, a reviewing court first determines whether defendant's conduct was unitary in nature so that the same acts were used to prove both offenses; where the conduct is unitary, the court must then examine the statutes in question to determine whether the legislature intended that multiple punishments could be imposed for different criminal offenses resulting from the same conduct. *State v. Duran*, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352, *overruled on other grounds, State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Proof of different facts.** — If either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486; *Owens v. Abram*, 1954-NMSC-096, 58 N.M. 682, 274 P.2d 630, cert. denied, 348 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 719 (1955).

**If test met, section does not bar consecutive sentencing.** — Under the "same evidence" test, where different elements are required to be proved in order to sustain each of three convictions, and different evidence is admitted to prove the different elements, it appears that the three convictions are based in part on separate evidence and the prohibition against double jeopardy does not bar consecutive sentencing under the circumstances of the case. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**Harassment and stalking.** — Where the state relies on identical acts of an accused involving the same course of conduct to prove both the offenses of harassment and of stalking, double jeopardy provisions preclude multiple punishment, and the offense of harassment is subsumed into the offense of misdemeanor stalking. *State v. Duran*, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352, *overruled on other grounds by State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Felony murder and armed robbery are separate offenses,** although they may arise out of the same transaction. *State v. Martinez*, 1981-NMSC-016, 95 N.M. 421, 622 P.2d 1041.

**Armed robbery and aggravated battery.** — Since taking the victim's purse was a fact required to be proved under the armed robbery charge, but not under the aggravated battery charge, and application of force was a fact required to be proved under the aggravated battery charge, while threatened use of force would be acceptable proof under the armed robbery charge, the elements of the two crimes were not the same, and the "same evidence" test did not apply. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Drunk driving and homicide by vehicle.** — Where the facts offered in municipal court to support a conviction for driving while under the influence of intoxicating liquors would not necessarily sustain a conviction for homicide by vehicle in district court, under the "same evidence" test there was no double jeopardy when the state sought to prosecute the defendant for homicide by vehicle. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

C. MERGER, COLLATERAL ESTOPPEL AND SAME TRANSACTION.

**Definition of merger.** — Merger is the name applied to the concept of multiple punishment when multiple charges are brought in a single trial; it is an aspect of double jeopardy, concerned with whether more than one offense has occurred and is applied to prevent a person from being punished twice for the same offense. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Nature of test.** — The test of whether one criminal offense has merged in another is not whether two criminal acts are successive steps in the same transaction (the rejected "same transaction" test), but whether one offense necessarily involves the other. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.



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**Factors considered.** — In determining whether the defendant's acts constituted a single offense or multiple offenses for purposes of double jeopardy, factors considered include the time between the acts, the location of the victim at the time of each act, the existence of any intervening event, distinctions in the manner of committing the acts, the defendant's intent, and the number of victims. *State v. Handa*, 1995-NMCA-042, 120 N.M. 38, 897 P.2d 225, cert. denied, 119 N.M. 771, 895 P.2d 671.

**Merger concept has aspects of "same evidence" test** because merger and the "same evidence" test are both concerned with whether more than one offense has been committed. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Merger has aspects of included offense concept.** — The merger concept has aspects of the included offense concept, and in determining whether one offense necessarily involves another offense so that merger applies, the decisions have looked to the definitions of the crimes to see whether the elements are the same; this approach is similar to the approach used in determining whether an offense is an included offense (a determination of whether the greater offense can be committed without also committing the lesser). *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Offense of aggravated battery did not merge with armed robbery.** *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Homicide.** — Homicide resulting from great bodily harm was sufficient evidence for the jury to find aggravated sodomy and first degree kidnapping, and there was no merger with the murder charge on which defendant was acquitted. *State v. Melton*, 1977-NMSC-014, 90 N.M. 188, 561 P.2d 461.

**Assault.** — An assault arising from a series of three successive shots fired at a single victim, not separated by a significant amount of time, and arising from a single, continuous intent constituted one offense, and conviction of the defendant on two counts of assault violated his double jeopardy rights. *State v. Handa*, 1995-NMCA-042, 120 N.M. 38, 897 P.2d 225, cert. denied, 119 N.M. 771, 895 P.2d 671.

**Definition of collateral estoppel.** — Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. *State v. Nagel*, 1975-NMCA-026, 87 N.M. 434, 535 P.2d 641, cert. denied, 87 N.M. 450, 535 P.2d 657.

Under the rule of collateral estoppel any right, fact or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose or subject matter of the two suits is the same or not. *State v. Nagel*, 1975-NMCA-026, 87 N.M. 434, 535 P.2d 641, cert. denied, 87 N.M. 450, 535 P.2d 657.

**Part of constitutional guarantee.** — The principle of collateral estoppel is embodied in the U.S. Const., amend. V guaranty against double jeopardy and is fully applicable to states by force of U.S. Const., amend. XIV. *State v. Nagel*, 1975-NMCA-026, 87 N.M. 434, 535 P.2d 641, cert. denied, 87 N.M. 450, 535 P.2d 657.

**When constitutionally required.** — The principle of collateral estoppel is only constitutionally required after a previous acquittal on issues raised in a second prosecution, and bars relitigation between the same parties of issues actually determined at the previous trial. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

**Double use of conditional discharge.** — Use of the defendant's prior conditional discharge to prove that he was a felon in order to convict him of the crime of felon in possession of a firearm and to enhance his sentence for underlying assault convictions did not violate his double jeopardy rights. *State v. Handa*, 1995-NMCA-042, 120 N.M. 38, 897 P.2d 225, cert. denied, 119 N.M. 771, 895 P.2d 671.

**Sanity during commission of different crimes.** — Where defendant's sanity was raised as an affirmative defense in a first trial, was actually litigated and was absolutely necessary to a decision in that trial, the sanity of the defendant in a second trial for offenses committed some 16 hours prior to the crime which was the subject of the first trial was the same issue of fact as the question of his insanity at the first trial and having been decided there in his favor collateral estoppel was a bar to the second trial. *State v. Nagel*, 1975-NMCA-026, 87 N.M. 434, 535 P.2d 641, cert. denied, 87 N.M. 450, 535 P.2d 657.

**Traffic violations and homicide by vehicle.** — Where defendant was convicted in municipal court of violation of certain traffic ordinances, he had no acquittal to raise in his defense in district court on charges of homicide by vehicle, and application of the principle of collateral estoppel was therefore inappropriate. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

**Same transaction test rejected.** — The "same transaction" test, which is concerned with whether offenses were committed at the same time, were part of a continuous criminal act and inspired by the same criminal intent, has not been imposed by the United States supreme court on the states in double jeopardy cases, and its use is not mandated by N.M. Const., art. II, § 15. It is rejected and disapproved. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

## III. MISTRIAL.

**Manifest necessity.** — Where a mistrial is granted not at the behest of defendant, a second trial is precluded by the double jeopardy clause of the U.S. Const., amend. V unless it can be said that there was a "manifest necessity" or " compelling reason" for the granting of a mistrial. Upon appellate review, the question to be decided is whether the trial court exercised sound judicial discretion to ascertain that there was a manifest necessity for the declaration of the mistrial. *State v. Sedillo*, 1975-NMCA-089, 88 N.M. 240, 539 P.2d 630.

**Basis of manifest necessity.** — The court of appeals would decline to hold there was a manifest necessity for a mistrial based on the state's supposedly prejudiced right to appeal when no appeal was attempted. *State v. Aragon*, 1976-NMCA-018, 89 N.M. 91, 547 P.2d 574, cert. denied, 89 N.M. 206, 549 P.2d 284, *overruled by State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183.

**Ends of public justice.** — In determining whether a mistrial should be declared, the trial court must consider whether the ends of public justice would be defeated by carrying the first trial to a final verdict; this consideration for the ends of public justice is a concept separate from manifest necessity. *State v. Aragon*, 1976-NMCA-018, 89 N.M. 91, 547 P.2d 574, cert. denied, 89 N.M. 206, 549 P.2d 284, *overruled by State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183.

**Prejudice to state.** — The failure of defendant to file a timely motion to suppress his statement resulted in prejudice to the state, and since in such circumstances it would be contrary to the ends of public justice to carry the first trial to a final verdict, the trial court did not abuse its discretion in declaring a mistrial; there was no double jeopardy. *State v. Aragon*, 1976-NMCA-018, 89 N.M. 91, 547 P.2d 574, cert. denied, 89 N.M. 206, 549 P.2d 284, *overruled by State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183.



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**Need for responsible professional conduct.** — In considering whether a mistrial was proper unquestionably an important factor to be considered is the need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process. *State v. Aragon*, 1976-NMCA-018, 89 N.M. 91, 547 P.2d 574, cert. denied, 89 N.M. 206, 549 P.2d 284, *overruled by State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183.

**Further interests of defendant.** — In determining whether a defendant's retrial will place him in double jeopardy after a prior trial has ended with a declaration of a mistrial not at defendant's request include defendant's interest in having his fate determined by the jury first impaneled, which encompasses not only his right to have his trial completed by a particular panel, but also his interest in ending the dispute then and there with an acquittal, which factor would weigh heavily against retrial in all situations where jeopardy has attached, and also the factor of avoiding giving the state a second bite of the apple in order to either strengthen its case or to alter its trial strategy to obtain a conviction. *State v. C. De Baca*, 1975-NMCA-120, 88 N.M. 454, 541 P.2d 634, cert. denied, 89 N.M. 6, 546 P.2d 71.

**Discretion of trial court.** — The law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated; they are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances, which would render it proper to interfere, but the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. *State v. C. De Baca*, 1975-NMCA-120, 88 N.M. 454, 541 P.2d 634, cert. denied, 89 N.M. 6, 546 P.2d 71.

Upon appellate review of the declaration of a mistrial the question is whether the trial court exercised a sound discretion to ascertain that there was a manifest necessity for a mistrial. *State v. C. De Baca*, 1975-NMCA-120, 88 N.M. 454, 541 P.2d 634, cert. denied, 89 N.M. 6, 546 P.2d 71.

**Mistrial on abuse of discretion.** — Where, after the second day of a trial, when jury instructions had already been settled, one of the jurors was frightened by a telephone call unrelated to the trial, and exploring her possible bias for use on voir dire in a future case, and the record did not show that the juror's fear involved either the state or the defendant, the trial court failed to exercise that sound discretion required of him in determining whether a manifest necessity or proper judicial administration mandated a mistrial. *State v. C. De Baca*, 1975-NMCA-120, 88 N.M. 454, 541 P.2d 634, cert. denied, 89 N.M. 6, 546 P.2d 71.

**Duty of court before declaring mistrial.** — Where there is no manifest necessity for declaring a mistrial, the trial court has some duty to inquire as to possible alternatives thereto; affecting the scope of inquiry required are the factors of magnitude of prejudice and the point at which the proceedings are terminated, and as the magnitude of possible prejudice increases, less effort need be expended in seeking alternative resolutions, while conversely, as the length of trial wears on, more effort should be expended. *State v. C. De Baca*, 1975-NMCA-120, 88 N.M. 454, 541 P.2d 634, cert. denied, 89 N.M. 6, 546 P.2d 71.

**Failure to oppose mistrial.** — Defense counsel's silence after declaration of a mistrial by the trial court, sua sponte, where simultaneously the defense attorney himself had been held in contempt for implicitly challenging a police officer on recross-examination to take a polygraph test, could not, under the circumstances, be construed as an intentional relinquishment of a known right, the right against double jeopardy, or as the mere play of wits of the sharp practitioner. *State v. Sedillo*, 1975-NMCA-089, 88 N.M. 240, 539 P.2d 630.

**Retrial after mistrial.** — Two considerations must be balanced against the weighty interests of the defendant against retrial after declaration of a mistrial not at his request, namely, whether there was a manifest necessity for the discharge of the first jury, and also whether the ends of public justice would have been defeated by carrying the first trial to final verdict. When the irregularity occurring at trial is of a procedural nature, not rising to the level of jurisdictional error, the necessity to discharge the jury has been held to be not manifest, but where the irregularity involves possible partiality within the jury, it has been more often held that the public interest in fair verdicts outweighs defendant's interest in obtaining a verdict by his first choice of jury. *State v. C. De Baca*, 1975-NMCA-120, 88 N.M. 454, 541 P.2d 634, cert. denied, 89 N.M. 6, 546 P.2d 71. A retrial after a mistrial is not barred by double jeopardy unless the mistrial was caused by prosecutorial overreaching. *State v. Mazurek*, 1975-NMCA-066, 88 N.M. 56, 537 P.2d 51.

**Retrial prohibited for prosecutorial misconduct.** — Retrial is barred when improper official conduct is so unfairly prejudicial that it cannot be cured by means short of a mistrial or a motion for a new trial, and the official knows that the conduct is improper and prejudicial and the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal. *State v. Breit*, 1996-NMSC-067, 122 N.M. 655, 930 P.2d 792.

**Prosecutorial misconduct not bar to retrial.** — Double jeopardy did not bar reprosecution where a mistrial was declared on motion of defendants for the prosecutor's discovery abuses because the defendants failed to show why any prejudice resulting from the prosecutor's late disclosure could not have been cured by a remedy short of a mistrial. *State v. Lucero*, 1999-NMCA-102, 127 N.M. 672, 986 P.2d 468, cert. denied, 128 N.M. 149, 990 P.2d 823.

**To bar a retrial on double jeopardy grounds, the misconduct must be extraordinary.** — Where defendant was charged with multiple crimes following a two-vehicle collision, including homicide by vehicle, great bodily harm by vehicle, driving under the influence of intoxicating liquor or drugs, and reckless driving, and where, prior to trial, the district court judge specifically excluded by motion in limine hearsay testimony that defendant had confessed to another officer about being behind the wheel at the time of the accident, and where, at trial, the officer failed to adhere to the court's admonishment, double jeopardy did not bar a retrial where it was the state's witness, not the prosecutor, that injected the precluded testimony into the trial, and where there was no evidence that the prosecutor intentionally elicited testimony about the purported confession that had been suppressed. *State v. Hernandez*, 2017-NMCA-020, cert. denied.

**Mistrial on one of two separate charges.** — Since the defendant was charged with attempted murder and aggravated battery and was convicted of aggravated battery, and since the two offenses were in separate counts and the jury was not instructed that it could convict on only one offense, its inability to return a verdict on the attempted murder charge was not an implicit acquittal and the state was not barred from pursuing an attempted murder charge on remand. *State v. Martinez*, 1995-NMSC-064, 120 N.M. 677, 905 P.2d 715.

**Reprosecution after unnecessary mistrial.** — Defense counsel's implicit challenge to a police officer to take a polygraph test, absent repeated misconduct, was not a type of misconduct that would go to the very vitals of the trial itself, and hence, where the trial judge sua sponte declared a mistrial, having made no effort to cure the error or to assure that there was manifest necessity for such a step, reprosecution of the defendant would violate his right under the U.S. Const., amend. V not to be put in jeopardy twice for the same offense. *State v. Sedillo*, 1975-NMCA-089, 88 N.M. 240, 539 P.2d 630.



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IV. RAISING THE DEFENSE.

**Estoppel.** — An accused is estopped at a second trial to plead the bar of a prior conviction, judgment and sentence of which have been reversed on appeal. *State v. Sneed*, 1967-NMSC-272, 78 N.M. 615, 435 P.2d 768.

**Factual basis must appear in record** in order to support a double jeopardy defense. *State v. Wood*, 1994-NMCA-060, 117 N.M. 682, 875 P.2d 1113, cert. denied, 117 N.M. 744, 877 P.2d 44.

Defendants could raise their state-based double jeopardy claim for the first time on appeal, provided the factual basis for the state constitutional argument could be found in the record of proceedings below. *State v. Lucero*, 1999-NMCA-102, 127 N.M. 672, 986 P.2d 468, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Raising issue on appeal despite failure to object below.** — Even though defendant made no objection at second trial (held after remand of initial trial which had resulted in verdict of first degree murder with recommendation of clemency) to instruction that the jury could find defendant guilty of murder in the first degree and might or might not recommend clemency, the question of whether this constituted double jeopardy could nevertheless be raised on appeal. *State v. Sneed*, 1967-NMSC-272, 78 N.M. 615, 435 P.2d 768.

Defendant's argument that the state split one criminal defense into five separate prosecutions and that his convictions were not authorized by the legislature under the statute prohibiting the unauthorized practice of law amounted to a defense of double jeopardy which the defendant could raise for the first time on appeal. *State v. Edwards*, 1984-NMCA-070, 102 N.M. 413, 696 P.2d 1006, cert. quashed, 102 N.M. 412, 696 P.2d 1005 (1985).

The defense of double jeopardy may be raised on appeal even though the defendant failed to argue that issue in the court below. *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656; *State v. Jensen*, 1998-NMCA-034, 124 N.M. 726, 955 P.2d 195.

Defendant may raise a double jeopardy challenge on appeal regardless of preservation. *State v. Rodriguez*, 2004-NMCA-125, 136 N.M. 494, 100 P.3d 200, cert. granted, 2004-NMCERT-010, 136 N.M. 542, 101 P.3d 808, *rev'd*, 2006-NMSC-018, 139 N.M. 450, 134 P.3d 737.

**Guilty plea not bar to raising issue on appeal.** — The defendant was not barred by pleading guilty to two counts in a three count indictment, which contained identical language for all three counts including the name of the victim, from raising the double jeopardy claim on appeal. *State v. Handa*, 1995-NMCA-042, 120 N.M. 38, 897 P.2d 225, cert. denied, 119 N.M. 771, 895 P.2d 671.

**Law of case doctrine not bar.** — When a trial court's decision that double jeopardy barred reprosecution of defendant was reversed by the court of appeals, the law of the case doctrine did not bar consideration of the double jeopardy issue on appeal of the defendant's conviction at the second trial. *State v. Breit*, 1996-NMSC-067, 122 N.M. 655, 930 P.2d 792.

**Waiver of defense.** — Plea of former jeopardy must be interposed at the earliest opportunity, otherwise it is waived; it cannot be raised for first time after verdict. *State v. Mares*, 1921-NMSC-048, 27 N.M. 212, 199 P. 111 (decided under prior law).

**Law reviews.** — For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

For note, "Criminal Procedure – Civil Forfeiture and Double Jeopardy: State v. Nunez," see 31 N.M.L. Rev. 401 (2001).

For student article, "Criminal Law: Applying the General/Specific Statute Rule in New Mexico – State v. Santillanes," see 32 N.M.L. Rev. 313 (2002).

For note and comment, "Adding Charges on Retrial: Double Jeopardy, Interstitialism and State v. Lynch," see 34 N.M.L. Rev. 539 (2004).

For note and comment, "complying With Nunez: The Necessary Procedure for Obtaining Forfeiture of Property and Avoiding Double Jeopardy After State v. Esparza," see 34 N.M.L. Rev. 516 (2004).

For article, "Developing a State Constitutional Law Strategy in New Mexico Criminal Prosecutions," see 39 N.M.L. Rev. 407 (2009).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 243 to 320.

Occurrences during a view as warranting the jury's discharge without letting in plea of former jeopardy upon subsequent trial, 4 A.L.R. 1266.

Statutes relating to sexual psychopaths, 24 A.L.R.2d 350.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation, 29 A.L.R.2d 1074.

Homicide: acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa, 37 A.L.R.2d 1068.

Discharge of accused for holding him excessive time without trial as bar to subsequent prosecution for same offense, 50 A.L.R.2d 943.

Conspiracy: conviction or acquittal of attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa, 53 A.L.R.2d 622.

Lesser offense: conviction of lesser offense as bar to prosecution for greater on new trial, 61 A.L.R.2d 1141.

Appeal: conviction from which appeal is pending as bar to another prosecution for same offense under rule against double jeopardy, 61 A.L.R.2d 1224.

Plea of guilty as basis of claim of double jeopardy in attempted subsequent prosecution for same offense, 75 A.L.R.2d 683.

Propriety, and effect as double jeopardy, of court's grant of new trial on own motion in criminal case, 85 A.L.R.2d 486.

Plea of nolo contendere or non vult contendere, 89 A.L.R.2d 540.

Conviction or acquittal of one offense, in court having no jurisdiction to try offense arising out of same set of facts, later charged in another court, as putting accused in jeopardy of latter offense, 4 A.L.R.3d 874.

Subsequent trial, after stopping former trial to try accused for greater offense, as constituting double jeopardy, 6 A.L.R.3d 905.

Earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide, 11 A.L.R.3d 834.

Increased punishment: propriety of increased punishment on new trial for same offense, 12 A.L.R.3d 978.

Larceny: single or separate larceny predicated upon stealing property from different owners at the same time, 37 A.L.R.3d 1407.

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial, 98 A.L.R.3d 997.

Right of defendant sentenced after revocation of probation to credit for jail time served as condition of probation, 99 A.L.R.3d 781.

Applicability of double jeopardy to juvenile court proceedings, 5 A.L.R.4th 234.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts, 6 A.L.R.4th 802.

Retrial on greater offense following reversal of plea-based conviction of lesser offense, 14 A.L.R.4th 970.

What constitutes "manifest necessity" for state prosecutor's dismissal of action, allowing subsequent trial despite jeopardy's having attached, 14 A.L.R.4th 1014.

Presence of alternate juror in jury room as ground for reversal of state criminal conviction, 15 A.L.R.4th 1127.

Seizure or detention for purpose of committing rape, robbery, or other offense as constituting separate crime of kidnapping, 39 A.L.R.5th 283.

Double jeopardy considerations in federal criminal cases - supreme court cases, 162 A.L.R. Fed. 415.

22 C.J.S. Criminal Law §§ 208 to 276.



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## 30-1-11. Criminal sentence permitted only upon conviction.

No person indicted or charged by information or complaint of any crime shall be sentenced therefor, unless he has been legally convicted of the crime in a court having competent jurisdiction of the cause and of the person. No person shall be convicted of a crime unless found guilty by the verdict of the jury, accepted and recorded by the court; or upon the defendant's confession of guilt or a plea of nolo contendere, accepted and recorded in open court; or after trial to the court without jury and the finding by the court that such defendant is guilty of the crime for which he is charged.

**History: 1953 Comp., § 40A-1-11, enacted by Laws 1963, ch. 303, § 1-11.**

**Cross references.** — For constitutional right to trial by jury, *see* N.M. Const., art. II, §§ 12 and 14.

For arraignment and plea procedure, *see* Rules 5-303 and 5-304 NMRA.

For right to jury trial, and waiver of same, *see* Rule 5-605 NMRA.

### ANNOTATIONS

**Conviction refers to finding of guilt and does not include imposition of sentence.** *State v. Garcia*, 1983-NMCA-017, 99 N.M. 466, 659 P.2d 918.

**To justify conviction evidence must establish every essential element** of the offense charged, and whatever is essential must affirmatively appear from the record. *State v. Losolla*, 1972-NMCA-085, 84 N.M. 151, 500 P.2d 436.

**Guilty pleas authorized.** — The power of a court to accept a plea of guilty is traditional and fundamental and specifically authorized by this section. *State v. Daniels*, 1968-NMSC-039, 78 N.M. 768, 438 P.2d 512.

**Waiver of jury permissible.** — Though charged with a felony, a defendant may waive a trial by jury. *State v. Hernandez*, 1942-NMSC-010, 46 N.M. 134, 123 P.2d 387.

**Guilty plea as waiver of rights, defenses.** — By pleading guilty the defendant admitted the acts well pleaded in the charge, waived all defenses other than that the indictment or information charges no offense, and waived the right to trial and the incidents thereof, and the constitutional guarantees with respect to the conduct of criminal prosecutions, including right to jury trial, right to counsel subsequent to guilty plea and right to remain silent. *State v. Daniels*, 1968-NMSC-039, 78 N.M. 768, 438 P.2d 512.

**Withdrawal of guilty plea appropriate where defendant was not properly advised of the nature of the charges.** — Where the state filed three criminal informations against defendant, each of which charged defendant with fraud and embezzlement against separate victims, and where defendant and the state entered into plea agreements under which defendant agreed to plead guilty to the fraud and embezzlement charges in all three cases, and where, during the change of plea hearing, defendant stated that he understood the charges to which he was pleading and acknowledged that the state had some evidence to prove his guilt of all the charges in all three cases, and where, following the district court's acceptance of the guilty pleas in all three cases and sentencing defendant to twenty-one years imprisonment, defendant moved to withdraw his guilty plea, claiming that he did not understand the basis for his fraud and embezzlement convictions, the trial court erred in denying defendant's motion to withdraw his guilty plea, because defendant did not knowingly and voluntarily plead guilty. The district court accepted defendant's guilty pleas without providing him with any explanation of the charges to which he pleaded guilty, much less an explanation of how his conduct in each case satisfied the essential elements of both fraud and embezzlement, which under the circumstances of this case were mutually exclusive because the same conduct cannot satisfy the essential elements of both fraud and embezzlement. *State v. Yancey*, 2021-NMCA-009, *cert. denied*.

**Judgment and sentence entered pursuant to a plea agreement is void in the absence of an express guilty plea on the record.** — Where defendant was charged with three counts of fraud, three counts of embezzlement and two counts of racketeering in three separate criminal complaints, and where defendant made a separate plea agreement in each case, and where at the plea hearing on all three complaints, the district court complied with the prerequisites set forth in Rules 5-303 and 5-304 NMRA, ensuring that the proposed guilty plea was voluntary and intelligent, but where the district court never specifically asked defendant to plead, and defendant never expressly admitted his guilt to anything in open court on the record in the hearing, the district court was without authority to sentence defendant, because in the absence of an express guilty plea on the record, a judgment and sentence that is entered pursuant to the plea agreement is void. *State v. Yancey*, 2017-NMCA-090, cert. granted.

**Guilty plea as confession to charge.** — Where appellant admittedly incriminated himself by his plea of guilty, he could not be heard to complain since by his plea he confessed the charge contained in the information. *State v. Daniels*, 1968-NMSC-039, 78 N.M. 768, 438 P.2d 512.

**Express adjudication of conviction or finding of guilt is not necessary if** it is apparent from other matters in the record that the court made a judicial determination of conviction or guilt. *State v. Gallegos*, 1978-NMCA-114, 92 N.M. 370, 588 P.2d 1045, cert. denied, 92 N.M. 353, 588 P.2d 554.

**Safeguards in admitting confession.** — Before a confession may be admitted into evidence it should first be determined by the court, on an inquiry out of the presence of the jury, and as a preliminary matter, that the confession, prima facie at least, possesses all the earmarks of voluntariness. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

**State must overcome evidence of excuse or justification** in the form of tangible affirmative defensive or factual matter capable of specific disproof included in a confession or admission. *State v. Casaus*, 1963-NMSC-194, 73 N.M. 152, 386 P.2d 246.

**Defendant to be heard on integrity of confession.** — Any time a defendant makes it known that he has something to say touching the integrity of a confession claimed to have been made by him, however incredible it may appear to the trial court, the judge must hear him. In declining to do so, the court committed reversible error. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

**Plea of nolo contendere with deferred sentence.** — Where defendant entered a plea of nolo contendere, which was accepted and defendant's counsel after conferring with defendant made an explanation to the court about defendant feeling sorry for what he had done, there can be no real doubt from what was said and recorded at the arraignment proceedings, from the entry of the "judgment and sentence," and from the entry of the "order of probation" that the court and defendant both understood that defendant's plea had been accepted, that defendant had been adjudged guilty of the charge on the basis of this plea, that his sentence for the offense was being deferred and that he was being placed on probation for two years



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upon certain expressly recited conditions. *State v. Apodaca*, 1969-NMCA-020, 80 N.M. 155, 452 P.2d 489.

**Procedural irregularities not constitutionally significant.** — Where defendant's attorney pleaded guilty for the defendant, who was present, after plea bargaining, the fact that the defendant himself did not enter the plea, that the court did not inquire whether the plea was made voluntarily and that the plea was not accepted and recorded in open court, as required by this section, did not deprive defendant of due process or raise any constitutional questions for federal habeas corpus review. *Anaya v. Rodriguez*, 372 F.2d 683 (10th Cir.), cert. denied, 389 U.S. 863, 88 S. Ct. 123, 19 L. Ed. 2d 133 (1967).

**Misuse of word in verdict not jurisdictional.** — Since the trial court unquestionably had jurisdiction over the person of defendant and over the subject matter of the offense charged, the inadvertent use of the word "information" in the jury's verdict did not raise a jurisdictional question. *State v. Ortega*, 1968-NMCA-097, 79 N.M. 744, 449 P.2d 346.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 525.

Propriety and effect of court's indication to jury that court would suspend sentence, 8 A.L.R.2d 1001.

Plea of nolo contendere or non vult contendere, 89 A.L.R.2d 540.

24 C.J.S. Criminal Law §§ 1458, 1480, 1481.

## 30-1-12. Definitions.

As used in the Criminal Code:

A. "great bodily harm" means an injury to the person which creates a high probability of death; or which causes serious disfigurement; or which results in permanent or protracted loss or impairment of the function of any member or organ of the body;

B. "deadly weapon" means any firearm, whether loaded or unloaded; or any weapon which is capable of producing death or great bodily harm, including but not restricted to any types of daggers, brass knuckles, switchblade knives, bowie knives, poniards, butcher knives, dirk knives and all such weapons with which dangerous cuts can be given, or with which dangerous thrusts can be inflicted, including swordcanes, and any kind of sharp pointed canes, also slingshots, slung shots, bludgeons; or any other weapons with which dangerous wounds can be inflicted;

C. "peace officer" means any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes;

D. "another" or "other" means any other human being or legal entity, whether incorporated or unincorporated, including the United States, the state of New Mexico or any subdivision thereof;

E. "person" means any human being or legal entity, whether incorporated or unincorporated, including the United States, the state of New Mexico or any subdivision thereof;

F. "anything of value" means any conceivable thing of the slightest value, tangible or intangible, movable or immovable, corporeal or incorporeal, public or private. The term is not necessarily synonymous with the traditional legal term "property";

G. "official proceeding" means a proceeding heard before any legislative, judicial, administrative or other governmental agency or official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or depositions in any proceeding;

H. "lawful custody or confinement" means the holding of any person pursuant to lawful authority, including, without limitation, actual or conseructive [constructive] custody of prisoners temporarily outside a penal institution, reformatory, jail, prison farm or ranch;

I. "public officer" means any elected or appointed officer of the state or any of its political subdivisions, and whether or not he receives remuneration for his services; and

J. "public employee" means any person receiving remuneration for regular services rendered to the state or any of its political subdivisions.

**History: 1953 Comp., § 40A-1-13, enacted by Laws 1963, ch. 303, § 1-13.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

### ANNOTATIONS

**Furlough as "lawful custody or confinement".** — Where, after defendant began serving a sentence for driving under the influence of intoxicating liquor or drugs, the metropolitan court released defendant on furlough and the furlough order imposed limitations on defendant's movement, required defendant to return to custody at the end of the furlough period, and informed defendant that failure to return would result in a charge of escape, Defendant continued to serve the sentence while on furlough because defendant was in "lawful custody or confinement" while on furlough and defendant was entitled to credit for the time defendant was on furlough. *State v. Padilla*, 2011-NMCA-029, 150 N.M. 344, 258 P.3d 1136.

**Great bodily harm: evidence that injury has actually caused death** may be used to demonstrate the element of great bodily harm because, consistent with



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Subsection A of this section, it establishes an injury that creates a high probability of death. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

**Great bodily harm: death not equated with great bodily harm.** — Comparing the voluntary manslaughter statute with the shooting at or from a motor vehicle statute and the statutory definition of great bodily harm in Subsection A of Section 30-1-12 NMSA 1978, it is clear that the legislature does not "equate" death with great bodily harm. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

**Great bodily harm: construction with other laws.** — Section 30-3-8A NMSA 1978, construed with the definition of "great bodily harm" in Subsection A, includes a shooting at a dwelling that results in death. *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280.

**Great bodily harm: protracted impairment.** — Section 66-8-101B NMSA 1978, which defines great bodily injury by a motor vehicle as "the injuring of a human being, to the extent defined in Section 30-1-12 NMSA 1978, in the unlawful operation of a motor vehicle," is not unconstitutionally vague. The term "protracted impairment" in Section 30-1-12A NMSA 1978 is capable of reasonable application by a jury of common intelligence after consideration of the circumstances involved. *State v. Jim*, 1988-NMCA-092, 107 N.M. 779, 765 P.2d 195, cert. denied, 107 N.M. 720, 764 P.2d 491.

**Great bodily harm: serious disfigurement.** — Under this section, the word "disfigurement" has no technical meaning and should be considered in the ordinary sense, as should the word "serious." *State v. Ortega*, 1966-NMSC-186, 77 N.M. 312, 422 P.2d 353.

**Great bodily harm: high probability of death.** — Sheriff's description of being choked by defendant was evidence that the choking created a "high probability of death", which is one part of the definition of great bodily harm. *State v. Hollowell*, 1969-NMCA-105, 80 N.M. 756, 461 P.2d 238.

**Sufficient evidence of great bodily harm.** — Where defendant was convicted of causing great bodily injury by vehicle following a collision in which defendant's vehicle, while traveling on a state road, crossed the center lane and struck a group of motorcyclists, there was sufficient evidence to support a finding of "prolonged impairment" where the victim testified that she experienced severe bruising, road rash, and bruised ribs as a result of the collision, that the bruising and road rash covered her right side, that she was unable to work for approximately a month, that for the first two weeks, she was unable to move because of the extreme pain resulting from her bruised ribs and that she still experiences pain resulting from the bruised ribs. *State v. Cordova*, 2016-NMCA-019, cert. granted, 2015-NMCERT-008.

**Great bodily harm: mayhem.** — The legislature adopted the definition in Subsection A of Section 30-1-12 NMSA 1978 in an effort to cover, among others, the crime of mayhem, originally enacted in 1853 to 1854 and compiled as former 40-30-1, 1953 Comp. *State v. Ortega*, 1966-NMSC-186, 77 N.M. 312, 422 P.2d 353.

**Great bodily harm: establishing.** — The conditions in Subsection A of Section 30-1-12 NMSA 1978 are not cumulative, and only one need be shown in order to establish "great bodily harm". *State v. Bell*, 1977-NMSC-013, 90 N.M. 134, 560 P.2d 925.

**Great bodily harm** does not require that disfigurement be permanent. *State v. Bell*, 1977-NMSC-013, 90 N.M. 134, 560 P.2d 925.

**Great bodily harm: need not be proved solely by medical experts.** — Furthermore, the law does not require that "great bodily harm" be proved exclusively by medical testimony. The jury is entitled to rely upon rational inferences deducible from the evidence. *State v. Bell*, 1977-NMSC-013, 90 N.M. 134, 560 P.2d 925.

**Great bodily harm: degree of bodily harm a question of fact.** — Where the evidence showed that defendants forcibly tattooed victim with a needle and India ink, which tattoo extended from the back of the victim's neck to the center part of the waist and recited an offensive sentence, it became a question of fact as to whether or not the injuries sustained were sufficiently substantial to come within the statutory definition of "great bodily harm". *State v. Ortega*, 1966-NMSC-186, 77 N.M. 312, 422 P.2d 353.

**Great bodily harm: instruction on personal injury.** — In a prosecution for criminal sexual penetration, where the trial court gave the statutory definition of personal injury appearing at Section 30-9-10C (now D) NMSA 1978, and also gave the statutory definition of great bodily harm in Subsection A of this section in the instruction on first degree criminal sexual penetration, the lack of additional definition of personal injury was not error; if defendant desired that personal injury be further defined, he should have submitted a requested instruction to that effect, and since he did not do so, he could not complain of the lack of additional definition of the term. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

**Deadly weapon: knife.** — For a knife to be a deadly weapon it must come within the portion of this statute as to any other deadly weapons with which dangerous wounds can be inflicted. *State v. Martinez*, 1953-NMSC-031, 57 N.M. 174, 256 P.2d 791.

**Deadly weapon: butterfly knife.** — Where a defendant was charged with carrying a concealed deadly weapon, the prosecution was not required to prove that the knife could actually be used to inflict great bodily harm; the prosecution needed to prove only that a butterfly knife was a switchblade. There was sufficient evidence that the knife carried by defendant was a switchblade as defined in Section 30-7-8 NMSA 1978. *State v. Riddall*, 1991-NMCA-033, 112 N.M. 78, 811 P.2d 576, cert. denied, 112 N.M. 21, 810 P.2d 1241.

**Deadly weapon: wounds establishing deadliness of knife.** — Where no one directly testified the knife was one with which dangerous wounds could be inflicted, but the wounds were described by the physician who treated the victim, and they were sufficiently severe to keep him in a hospital under the doctor's care for a week, and in addition, the scars caused by the knife wounds were shown to the jury, in view of the depth and the length of the wounds the jury was fully justified in finding the knife used was a deadly weapon, although the blade used was only about two inches in length. *State v. Martinez*, 1953-NMSC-031, 57 N.M. 174, 256 P.2d 791.

**Deadly weapon: other deadly weapons.** — Under an aggravated stalking charge, when the object or instrument in question is an unlisted one that falls within the catchall language of Section 30-1-12B NMSA 1978, the jury must be instructed: (1) that the defendant must have possessed the object or instrument with the intent to use it as a weapon, and (2) the object or instrument is one that, if so used, could inflict dangerous wounds. *State v. Anderson*, 2001-NMCA-027, 130 N.M. 295, 24 P.3d 327.

**Deadly weapon: tire iron.** — Defendant's use of a tire iron to break into a house fell under the definition that defendant was "armed" with a weapon under this section. *State v. Alvarez-Lopez*, 2003-NMCA-039, 133 N.M. 404, 62 P.3d 1286, *rev'd on other grounds*, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699.

**Deadly weapon: bullets not deadly weapon.** — Defendant's mere possession of bullets did not constitute possession of a deadly weapon under Subsection B of this section. *State v. Galaz*, 2003-NMCA-076, 133 N.M. 794, 70 P.3d 784.

**Deadly weapon: jury to determine character of weapon.** — The question of whether a weapon is capable of producing death or great bodily harm or is a weapon with which dangerous wounds can be inflicted is ordinarily



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for the jury who are to determine the question by considering the character of the instrument and the manner of its use, either by a description thereof (even though the weapon is not in evidence), or by viewing the weapon admitted into evidence (even though it is not described). *State v. Gonzales*, 1973-NMCA-153, 85 N.M. 780, 517 P.2d 1306.

**Deadly weapon: factual considerations.** — Factors to be considered in determining whether an instrument is a deadly weapon include the nature of the instrument, that is, its size, shape, condition and possible alteration; the circumstances under which it is carried, that is, the time, place and situation in which defendant is found with the instrument; defendant's actions with regard to the instrument; and the place of concealment. *State v. Blea*, 1983-NMCA-089, 100 N.M. 237, 668 P.2d 1114.

**Deadly weapon: screwdriver.** — Although the screwdriver was not introduced into evidence, the jury could determine the factual question of whether a deadly weapon was used by a description of the weapon and its use. *State v. Candelaria*, 1981-NMCA-122, 97 N.M. 64, 636 P.2d 883.

**Deadly weapon: brick wall.** — Determination of whether a brick wall is a deadly weapon is a question of fact for the jury or fact finder to determine, given the evidence presented as to the manner and use of the wall. *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861, cert. denied, 126 N.M. 533, 972 P.2d 352, and cert. denied, 127 N.M. 390, 981 P.2d 1208 .

**Deadly weapon: baseball bat.** — In a prosecution for aggravated battery with a deadly weapon, the question of whether a baseball bat was a deadly weapon should have been left to the jury; however, when such a determination is made by the trial judge, the error is not fundamental and must be preserved for appeal. *State v. Traeger*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

**Deadly weapon: jury to determine existence of weapon.** — Whether defendant actually had gun, defined in this section as a deadly weapon, whether loaded or unloaded, in her hand as testified to by robbery victim was for the jury to resolve. *State v. Encee*, 1968-NMCA-012, 79 N.M. 23, 439 P.2d 240.

**Deadly weapon: insufficient evidence to show deadly character of weapon.** — Evidence that defendant raised an undescribed tire tool over attendant's head "like a threat," without more, was insufficient for a determination that the tire tool was a deadly weapon capable of producing death or great bodily harm or a weapon with which dangerous wounds could be inflicted. *State v. Gonzales*, 1973-NMCA-153, 85 N.M. 780, 517 P.2d 1306.

**Deadly weapon: pocketknife.** — An ordinary pocketknife is not a per se deadly weapon, without regard to its actual or intended use. *State v. Nick R.*, 2009-NMSC-050, 147 N.M. 182, 218 P.3d 868.

**Deadly weapon: BB gun.** — The defendant's use of a BB gun during a robbery provided a sufficient factual basis to permit a jury to determine that a deadly weapon had been used because the jury could have concluded that the manner and character of use of the weapon satisfied the definition of a deadly weapon. *State v. Fernandez*, 2007-NMCA-091, 142 N.M. 231, 164 P.3d 112.

**Deadly weapon: the human mouth** is a deadly weapon if the mouth is used in a manner that could cause death or great bodily harm. *State v. Neatherlin*, 2007-NMCA-035, 141 N.M. 328, 154 P.3d 703.

**Peace officer: Subsection C inapplicable to capital felony sentencing.** — The definition of "peace officer" in Subsection C of this section is not directly applicable to Section 31-20A-5 NMSA 1978 because that definition applies only to the Criminal Code. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

**Peace officer: legislature did not exclude jailers from definition of peace officers:** a jailer is an officer in the public domain, charged with the duty to maintain public order. *State v. Rhea*, 1980-NMSC-033, 94 N.M. 168, 608 P.2d 144.

**Peace officer: juvenile correctional officers were not peace officers** within the meaning of this section, where, although they may have had the power to maintain order and make arrests in their particular domain, they were not vested by law with a duty to do so. *State v. Tabaha*, 1986-NMCA-009, 103 N.M. 789, 714 P.2d 1010.

**Public officer: officers of state game commission** are state officers. *Allen v. McClellan*, 1967-NMSC-114, 77 N.M. 801, 427 P.2d 677, *overruled on other grounds by New Mexico Livestock Bd. v. Dose*, 1980-NMSC-022, 94 N.M. 68, 607 P.2d 606.

**Peace officer: CSO.** — Community service officers are peace officers. *State v. Ogden*, 1994-NMSC-029, 118 N.M. 234, 880 P.2d 845.

**Person: MFA.** — The mortgage finance authority, a state agency established to raise funds through the issuance of tax-exempt bonds is a person within the meaning of the victim restitution statute. *State v. Griffin*, 1983-NMCA-072, 100 N.M. 75, 665 P.2d 1166

**Person: corporate defendant.** — Although a corporate defendant may be charged and convicted of the offense of racketeering, it was error to submit the racketeering charge against the corporate defendant to the jury because the corporate defendant was not specifically charged with commission of such crime in the indictment. *State v. Crews*, 1989-NMCA-088, 110 N.M. 723, 799 P.2d 592; cert. denied, 109 N.M. 232, 784 P.2d 419.

**Lawful custody: electronic monitor.** — The use of a conventional jail to hold the person is not necessary for there to be a "lawful custody or confinement" under the plain language of the statute. A "lawful custody or confinement" simply consists of the holding of any person pursuant to lawful authority", and the actual means used to accomplish holding the person is without limitation. A mandatory sentence or imprisonment may be served under house arrest by an electronic monitor. *State v. Woods*, 2010-NMCA-017, 148 N.M. 89, 230 P.3d 836, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

**Special deputy.** — Absent a limitation of authority a special deputy is a peace officer and is cloaked with all of the powers and duties of such. 1965-66 Op. Att'y Gen. No. 66-92.

**School security force.** — Use of the term "peace officer" in describing security officers who were regular employees of the school system organized into a security and patrol force to guard school buildings and property would be improper. 1969-70 Op. Att'y Gen. No. 70-87 (unofficial opinion issued to superintendent of Albuquerque public schools).

**Law reviews.** — For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For note and comment, "Criminal Law — Home Alone: Why House Arrest Doesn't Qualify for Presentence Confinement Credit in New Mexico — State v. Fellhauer," see 28 N.M.L. Rev. 519 (1998).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse, 25 A.L.R.4th 1213.

Corporation's criminal liability for homicide, 45 A.L.R.4th 1021.



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## 30-1-13. Accessory.

A person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission and although he did not directly commit the crime and although the principal who directly committed such crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or has been acquitted, or is a child under the Children's Code [Chapter 32A NMSA 1978].

**History: 1953 Comp., § 40A-1-14, enacted by Laws 1963, ch. 303, § 1-14; 1972, ch. 97, § 66.**

ANNOTATIONS

**Aiding and abetting and conspiracy are distinct and separate concepts.** *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

**Accessory is one who** "procures" commission of a crime. *State v. Holden*, 1973-NMCA-092, 85 N.M. 397, 512 P.2d 970, cert. denied, 85 N.M. 380, 512 P.2d 953.

**Meaning of terms.** — The word "crime," as used in the statute, means the principal offense, as in this case "armed robbery," and the term "as an accessory" is merely describing in different terms one who aids and abets in the commission of the crime, and authorizes such person to be charged with and convicted of the crime. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

**Abolition of distinction between principal and accessory** places defendant on notice that he or she could be charged as a principal and convicted as an accessory or vice versa. *State v. Wall*, 1980-NMSC-034, 94 N.M. 169, 608 P.2d 145.

**Aiding and abetting not distinct offense.** — There is nothing in this section indicating an intent to make one who aids and abets in the commission of a crime a separate offense distinct and different from the crime committed by the one actually perpetrating it, and the purpose of the legislature to authorize charging and convicting an accessory as a principal is made evident by the fact that no different penalty is provided by law for one who aids and abets. Hence, this section is to be read as though the words "as an accessory" were omitted. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

**Distinctions abolished.** — The distinction between an accessory before the fact and a principal was abolished in this state so that every person concerned in the commission may be prosecuted, tried and punished as a principal. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

**Earned Meritorious Deductions Act.** — Accessory liability is merely a different theory of liability, but is not a distinct offense. Accessories are therefore not convicted of a separate crime, but of the crime itself. Where defendant was convicted for violating Section 30-3-8 NMSA 1978 as an accessory to the crime, his sentence may be a serious violent offense under the Earned Meritorious Deductions Act as enumerated in Section 33-2-34L(4)(j) NMSA 1978. The fact that he pleaded guilty as an accessory and not a principal is irrelevant for purposes of the act. *State v. Flores*, 2005-NMCA-092, 138 N.M. 61, 116 P.3d 852.

**Accessory charged as principal.** — New Mexico, like many other states, long ago abolished the distinction between conviction as a principal and an accessory, so that the charge as principal includes a corresponding accessory charge. An indictment need only allege the offense, not necessarily charge the defendant as accessory. *Tapia v. Tansy*, 926 F.2d 1554, 1562 (10th Cir. 1991).

**Charging accessory as principal.** — An accessory may be charged and convicted as a principal. *State v. Roque*, 1977-NMCA-094, 91 N.M. 7, 569 P.2d 417, cert. denied, 91 N.M. 4, 569 P.2d 414.

Accused may be indicted as principal even though at common law it would have been necessary to charge him as an accessory. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Although charged with disturbing meeting, defendants could be convicted of aiding and abetting that disturbance. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

The contention that defendant could not be charged as a principal and convicted on the basis of being an accomplice is answered by this section. *State v. Smith*, 1976-NMCA-048, 89 N.M. 777, 558 P.2d 46, *rev'd on other grounds*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

**Effect of rule.** — Rule 5(d), N.M.R. Crim. P. (*now see* Paragraph D of Rule 5-201), which requires that the indictment allege "essential facts constituting the offense," does not change the procedure authorized by this section, since "the offense," as used in Rule 5(d), N.M.R. Crim. P., means the principal offense; thus, defendant was not required to be charged as an accessory and indictment was sufficient where the language contained therein informed defendant of the essential facts of the charge of armed robbery. *State v. Roque*, 1977-NMCA-094, 91 N.M. 7, 569 P.2d 417, cert. denied, 91 N.M. 4, 569 P.2d 414.

**Elements of accessory liability.** — Accomplice liability requires that the defendant share the criminal intent of the principal. There must be community of purpose, partnership in the unlawful undertaking. Indicia of such criminal intent may be as broad and varied as are the means of communicating thought from one individual to another. Mere presence and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient. *State v. Johnson*, 2004-NMSC-029, 136 N.M. 348, 98 P.3d 998, cert. denied, 543 U.S. 117, 125 S.Ct. 1334, 161 L.Ed.2d 162 (2005).

**Intent.** — The accessory must share the criminal intent of the principal. *State v. Carrasco*, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075; *State v. Montes*, 2007-NMCA-083, 142 N.M. 221, 164 P.3d 102.

**Intent of accomplice.** — One who solicits an end, or aids or agrees to aid in its achievement, is an accomplice in whatever means may be fairly employed, insofar as they constitute or commit an offense fairly envisaged in the purposes of the association. But when a wholly different crime has been committed, thus involving conduct not within the objectives of the conscious accomplice, the accomplice is not liable for it. *Valdez v. Bravo*, 373 F.3d 1093 (10th Cir. 2004).

**Criminal intent and purpose required.** — Conviction could stand only if the record supported a conclusion that defendant shared the criminal intent and purpose of the principals, and mere presence without some outward manifestation of approval was insufficient. *State v. Salazar*, 1967-NMSC-187, 78 N.M. 329, 431 P.2d 62.

In order for an individual to be guilty as an aider and abettor, all that was necessary was that he share the criminal intent of defendant and that a community of purpose and partnership in the unlawful undertaking be present. *State v. Ortega*, 1966-NMSC-185, 77 N.M. 7, 419 P.2d 219; *State v. Luna*, 1979-NMCA-048, 92 N.M. 680, 594 P.2d 340.



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**Criminal intent a jury question.** — The question of whether the alleged aider and abettor did share the principal's criminal intent, and whether he knew the latter acted with criminal intent is one of fact for the jury and may be inferred from circumstances. *State v. Riley*, 1970-NMCA-015, 82 N.M. 298, 480 P.2d 693.

**Intent may be inferred.** — Where one defendant completed the crime of burglary by an unauthorized entry with the necessary intent and his partner knew this fact and was present and participated, the partner's intent, as an element of the crime, although not susceptible of proof by direct evidence, may be inferred from his acts. *State v. Riley*, 1970-NMCA-015, 82 N.M. 298, 480 P.2d 693 (Ct. App. 1971).

**Specific intent required.** — The "natural and probable result" standard does not apply to determine accessory liability; thus, a jury cannot convict a defendant on accessory liability for a crime unless the defendant intended the principal's acts. *State v. Carrasco*, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

**Shooting at police car indicative of intent.** — Defendant's theory that there is no evidence that he knew of the robbery until after its commission and thus could not have been an aider and abetter is invalid, as evidence of aiding and abetting is as broad and varied as are the means of communicating thought from one individual to another; shooting at the pursuing police car was evidence that defendant approved of the robbery and shared the robber's criminal intent. *State v. O'Dell*, 1973-NMCA-124, 85 N.M. 536, 514 P.2d 55.

**While mere presence is insufficient, relationship to victim relevant.** — Although mere presence is insufficient to establish that defendant aided and abetted a crime, defendant's relationship with victim is a factor invoking criminal liability. Where defendant is charged with care and welfare of child, he stands in position of parent and may be convicted on the basis that he failed to take reasonable steps to prevent the molestation, coupled with his friendship with perpetrator. *State v. Orosco*, 1991-NMCA-084, 113 N.M. 789, 833 P.2d 1155, *aff'd*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

**Manifestation of approval required.** — Neither presence nor presence with mental approbation is sufficient to sustain a conviction as an aider or abettor. Presence must be accompanied by some outward manifestation or expression of approval. *State v. Phillips*, 1971-NMCA-114, 83 N.M. 5, 487 P.2d 915; *State v. Luna*, 1979-NMCA-048, 92 N.M. 680, 594 P.2d 340.

**Defendant's particular role not important.** — Where the evidence as to which of the robbers took the change is sparse and conflicting, it does not matter that the evidence fails to establish, with any particularity, that defendant was the one who took the change as the jury was instructed on aiding and abetting and the evidence is substantial that defendant was at least an aider and abettor of the robbery of the change. *State v. Urban*, 1974-NMCA-046, 86 N.M. 351, 524 P.2d 523.

**Foreseeability of result immaterial.** — The fact that defendant did not bargain for the result is not material; the material fact is that he did "procure" another to perform an "unlawful act." *State v. Holden*, 1973-NMCA-092, 85 N.M. 397, 512 P.2d 970, cert. denied, 85 N.M. 380, 512 P.2d 953.

**Means of aiding and abetting varied.** — The evidence of aiding and abetting may be as broad and varied as are the means of communicating thought from one individual to another; by acts, conduct, words, signs or by any means sufficient to incite, encourage or instigate commission of the offense or calculated to make known that commission of an offense already undertaken has the aider's support or approval. Mere presence, of course, and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient. *State v. Salazar*, 1967-NMSC-187, 78 N.M. 329, 431 P.2d 62; *State v. Ochoa*, 1937-NMSC-051, 41 N.M. 589, 72 P.2d 609; *State v. Luna*, 1979-NMCA-048, 92 N.M. 680, 594 P.2d 340.

**Accessory may be convicted regardless of principal's fate.** — It was the obvious intent of the legislature to extend the statute then in force so as to permit an accessory to be prosecuted even though the one who directly committed the crime was either not prosecuted, had been acquitted, was a juvenile or had been convicted of a different crime or degree thereof. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Aider and abettor may be tried and convicted even though the actual slayer is never apprehended or has been tried and acquitted. *State v. Ochoa*, 1937-NMSC-051, 41 N.M. 589, 72 P.2d 609.

**Varying degrees of conviction permissible.** — The fact that the accessory was convicted of involuntary manslaughter while the principal was convicted of voluntary manslaughter is a permissible result under the accessory statute. *State v. Holden*, 1973-NMCA-092, 85 N.M. 397, 512 P.2d 970, cert. denied, 85 N.M. 380, 512 P.2d 953.

**Instruction on burden of proof.** — Where trial court instructed on the presumption of innocence and the state's burden of proof, it was not improper to refuse defendant's proffered instruction that there was no presumption that defendant was an accessory and that he did not have burden of proving that he was not an accessory. *State v. Gunzelman*, 1973-NMCA-121, 85 N.M. 535, 514 P.2d 54.

**Evidence.** — The evidence shows aiding and abetting if it shows that by any of the means of communicating thought defendant incited, encouraged or instigated commission of the offense or made it known that commission of an offense already undertaken has the aider's support or approval. *State v. Gonzales*, 1971-NMCA-007, 82 N.M. 388, 482 P.2d 252, cert. denied, 82 N.M. 377, 482 P.2d 241.

**Evidence sufficient to go to jury.** — Evidence that the defendants threw objects when others also threw them, and also evidence from which community of intent can be reasonably inferred, was sufficient for the issue of aiding and abetting to be submitted to the jury and was also sufficient to submit the issue of disturbing a lawful assembly. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

**Jury may find defendant aided and abetted, but did not personally commit, crime.** — That the jury could have refused to find that the defendant personally committed the crime in question is not alone a sufficient reasonable hypothesis that he did not aid and abet its commission. *State v. Ballinger*, 1983-NMCA-034, 99 N.M. 707, 663 P.2d 366, *rev'd on other grounds*, 1984-NMSC-003, 100 N.M. 583, 673 P.2d 1316.

**Evidence sufficient.** — Evidence was sufficient to support defendant's conviction as an accessory to armed robbery, where his confession, found to be voluntary, was corroborated by other evidence at trial. *Church v. Sullivan*, 942 F.2d 1501 (10th Cir. 1991).

Evidence that the defendant's role in the robbery of a store was to remain outside in the car with the engine running in order to facilitate a fast getaway after others committed the robbery was sufficient to support his convictions. *State v. Carrasco*, 1996-NMCA-114, 122 N.M. 554, 928 P.2d 939, *rev'd on other grounds*, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

Evidence is constitutionally sufficient to support a finding of accessory liability where the testimony viewed in the light most favorable to the prosecution establishes that accused and his companions went to victim's mobile home with the intention of fighting; accused willingly drove to the mobile home in his own vehicle; accused broke through the front door with his four companions and attacked victim's friend as he slept in a chair; accused fought victim's friend outside the back door of the house while his four companions attacked victim; accused then reentered the



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mobile home and warned the others as the police arrived; and accused's actions prevented victim's friend from assisting victim who died from the attack. *Valdez v. Bravo*, 373 F.3d 1093 (10th Cir.), cert. denied, 543 U.S. 1008, 125 S. Ct. 622, 160 L. Ed.2d 473 (2004).

**Sufficient evidence of intentional child abuse by torture.** — Where a child victim testified that defendant, the child's foster father, purchased a stun gun and gave it to his son, that the child was stunned by defendant's son approximately fifteen times, was stunned by defendant's other son approximately three times, that defendant was present during the assaults by one of the sons and would laugh in response, and where there was corroborating testimony from the child's sister, a rational jury could have found defendant guilty beyond a reasonable doubt as an accessory to child abuse inflicted by another. *State v. Vargas*, 2016-NMCA-038.

**Evidence insufficient.** — Where defendant was involved in an altercation between defendant's friend and the victim; the victim and defendant unexpectedly encountered each other later the same day; defendant went into a rage at seeing the victim and punched the victim who was seated in the victim's truck; the victim then shot defendant several times; defendant fell to the ground; the victim backed the victim's truck down the driveway; one of the victim's passengers started shooting a gun from the victim's truck; defendant's friends arrived at the scene of the shooting and began firing shots at the victim's truck, killing the victim; the jury acquitted defendant of the charge of shooting at a motor vehicle; and there was no evidence that defendant called for help to anyone after defendant was shot, that defendant summoned the defendant's friends who shot at the victim's truck, that defendant made any statement, that defendant took any action that indicated that defendant was aware that defendant's friends were in the vicinity, or that defendant had any communication with defendant's friends who shot at the victim's truck after the earlier altercation with the victim, the evidence was insufficient to support defendant's conviction for aiding and abetting the murder of the victim. *State v. Vigil*, 2010-NMSC-003, 147 N.M. 537, 226 P.3d 636.

**Circumstantial evidence which was not incompatible with defendant's innocence** nor incapable of explanation upon any reasonable hypothesis of same was insufficient to permit a finding that defendant aided a forger by procuring checks for her; there were too many other explanations to account for her possession of the checks. *State v. Hermosillo*, 1975-NMCA-113, 88 N.M. 424, 540 P.2d 1313.

The fact that the defendant accompanied the forger of certain checks at the time that she cashed them was not sufficient to support a finding of aiding and abetting, for mere presence and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient. *State v. Hermosillo*, 1975-NMCA-113, 88 N.M. 424, 540 P.2d 1313.

**Knowledge of the method of the crime and presence when the crime is committed are not required.** — There is no legal requirement that an accessory know in advance the exact method by which a crime is to be carried out or even that the accessory be physically present when the crime is committed. *State v. Bahney*, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003.

**Sufficient evidence.** — Where defendant's primary co-conspirator beat, drugged, and tied the victim to a bed in defendant's residence; defendant did not object to the treatment of the victim; defendant chided a secondary co-conspirator for being nervous and smoked marijuana with co-conspirator to calm the co-conspirator's nerves; defendant did not object when the primary co-conspirator considered killing the victim and burning the victim's car, but defended a secondary co-conspirator against the primary co-conspirator's violence; while the primary co-conspirator was absent from the residence for a lengthy period of time, defendant watched the victim and did not assist the victim or call the police; defendant demanded that the primary co-conspirator determine what to do with the victim before defendant's child returned from school; defendant left the residence to take the child to a store where, at the direction of the primary co-conspirator, defendant purchased charcoal liter fluid; and while defendant remained at the residence with the child, defendant's co-conspirators put the victim in the trunk of the victim's car, drove the car to a school, doused the car with the liter fluid, and burned the car, there was sufficient evidence to convict defendant of kidnapping, second-degree murder and aggravated arson, as an accessory, beyond a reasonable doubt. *State v. Bahney*, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For comment, "The Natural and Probable Consequences Doctrine Is Not a Natural Result for New Mexico - State v. Carrasco," see 28 N.M.L. Rev. 505 (1998).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 166, 167, 169 to 173.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory, or aider and abettor, 9 A.L.R.4th 972.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault, 24 A.L.R.4th 243.

Prosecution of female as principal for rape, 67 A.L.R.4th 1127.

22 C.J.S. Criminal Law §§ 132 to 139.

## 30-1-14. Venue.

All trials of crime shall be had in the county in which they were committed. In the event elements of the crime were committed in different counties, the trial may be had in any county in which a material element of the crime was committed. In the event death results from the crime, trial may be had in the county in which any material element of the crime was committed, or in any county in which the death occurred. In the event that death occurs in this state as a result of criminal action in another state, trial may be had in the county in which the death occurred. In the event that death occurs in another state as a result of criminal action in this state, trial may be had in the county in which any material element of the crime was committed in this state.

**History: 1953 Comp., § 40A-1-15, enacted by Laws 1963, ch. 303, § 1-15.**

**Cross references.** — For rights of persons accused of crime, *see* N.M. Const., art. II, § 14.



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For provisions on change of venue, *see* 38-3-3 to 38-3-7 NMSA 1978.

For venue in prosecution for violation of act regulating motion pictures, *see* 57-5-20 NMSA 1978.

**ANNOTATIONS**

I. GENERAL CONSIDERATION.
II. NATURE OF VENUE.
III. PROOF.
IV. WAIVER.
V. SPECIFIC SITUATIONS.

I. GENERAL CONSIDERATION.

**This section merely reiterates constitutional right of venue** in N.M. Const., art. II, § 14. *State v. Lopez*, 1973-NMSC-041, 84 N.M. 805, 508 P.2d 1292.

**Continuing crime.** — For purposes of a continuing crime, venue is proper in any county in which the continuing conduct has occurred. *State v. Roybal*, 2006-NMCA-043, 139 N.M. 341, 132 P.3d 598, cert. denied, 2006-NMCERT-003, 139 N.M. 353, 132 P.3d 1039.

**Venue.** — Where police officer chased defendant, who was speeding, from Santa Fe county into Rio Arriba county where defendant was placed under arrest for an outstanding warrant and where police officer discovered drugs and drug paraphernalia during an inventory search of defendant's car, Santa Fe county venue was proper because trafficking by possession with intent to distribute is a continuing offense which occurred in each county through which defendant traveled while in possession of the drugs. *State v. Roybal*, 2006-NMCA-043, 139 N.M. 341, 132 P.3d 598, cert. denied, 2006-NMCERT-003, 139 N.M. 353, 132 P.3d 1039.

**Meaning of "trial".** — In its strict definition, the word "trial" in criminal procedure means the proceedings in open court after the pleadings are finished and the prosecution is otherwise ready, down to and including the rendition of the verdict; and the term "trial" does not extend to such preliminary steps as the arraignment and giving of the pleas, nor does it comprehend a hearing in error. *State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36.

**"Material element of offense" of contempt.** — The act of causing the service of a restraining order to be made in Eddy county constituted a material element of the alleged offense of criminal contempt and under those circumstances the venue properly laid in Eddy county. *Norton v. Reese*, 1966-NMSC-154, 76 N.M. 602, 417 P.2d 205.

**Proper venue when elements of offense committed in different counties.** — In the event elements of a crime were committed in different counties, the trial may be had in any county in which a material element of the crime was committed. Interfering with or depriving a custodial parent of their right to custody is an essential element of the crime of custodial interference as are the methods for accomplishing the interference or deprivation. Because deprivation is an element, where the person was deprived of the right of custody establishes a proper venue for the trial of the offense of custodial interference. *State v. Lefthand*, 2015-NMCA-117, cert. denied, 2015-NMCERT-011.

Where defendant violated an order of custody, issued by a Taos county district court, by depriving the father of the child of his right to custody, the father's right to custody exists with him in his county of residence, the county in which he was given custody, and the county in which he was deprived of the custody of his son. Under the custodial interference statute, 30-4-4 NMSA 1978, a person may be charged in the place where the harm sought to be prevented by the statute results, and therefore venue may lie in Taos county district court. *State v. Lefthand*, 2015-NMCA-117, cert. denied, 2015-NMCERT-011.

II. NATURE OF VENUE.

**Distinction between jurisdiction and venue.** — Jurisdiction refers to the judicial power to hear and determine a criminal prosecution, whereas venue relates to and defines the particular county or territorial area within a state or district in which the prosecution is to be brought or tried. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**Privilege personal to accused.** — Venue provision of the constitution confers a personal privilege of venue upon an accused, and this privilege may be waived. *State v. Lopez*, 1973-NMSC-041, 84 N.M. 805, 508 P.2d 1292.

**Extent of constitutional venue provision.** — The framers of the constitution sought to guarantee the right to trial by an impartial jury, rather than an absolute right to trial by a jury of the county wherein the crime is alleged to have occurred. *State v. Lopez*, 1973-NMSC-041, 84 N.M. 805, 508 P.2d 1292.

**Assertion of privilege.** — A defendant may insist on personal right or privilege of venue, and the correctness of a venue decision is reviewable to determine whether defendant was tried in the proper county. *State v. Wise*, 1977-NMCA-074, 90 N.M. 659, 567 P.2d 970, cert. denied, 91 N.M. 4, 569 P.2d 414.

**Change of venue effective in overcoming local bias and prejudice.** *State v. White*, 1967-NMSC-016, 77 N.M. 488, 424 P.2d 402.

III. PROOF.

**Venue need not be proven beyond a reasonable doubt.** *State v. Wise*, 1977-NMCA-074, 90 N.M. 659, 567 P.2d 970, cert. denied, 91 N.M. 4, 569 P.2d 414.

**Affirmative proof of venue unnecessary.** — It is not necessary in a trial for murder that venue be affirmatively proven. *Territory of N.M. v. Hicks*, 1892-NMSC-024, 6 N.M. 596, 30 P. 872, *overruled on other grounds by Haynes v. United States*, 1899-NMSC-003, 9 N.M. 519, 56 P. 282.

**Venue may be proved by circumstantial evidence,** and when there is nothing in the record to raise an inference to the contrary, slight circumstances are sufficient to prove venue by a preponderance of the evidence. *State v. Nelson*, 1959-NMSC-023, 65 N.M. 403, 338 P.2d 301, cert. denied, 361 U.S. 877, 80 S. Ct. 142, 4 L. Ed. 2d 115.

Venue, like any other fact in a case, may be proven by circumstantial evidence. *State v. Mares*, 1921-NMSC-048, 27 N.M. 212, 199 P. 111.

**Venue proved by incidental evidence.** — If evidence incidentally given in connection with facts in case shows that venue was properly laid, it is a sufficient proof of venue. *Territory of N.M. v. Hicks*, 1892-NMSC-024, 6 N.M. 596, 30 P. 872, *overruled on other grounds by Haynes v. United States*, 1899-NMSC-003, 9 N.M. 519, 56 P. 282.

**Omission in indictment not fatal.** — Trial of one charged with homicide may take place either where the mortal wound was inflicted or where the person died, and where prosecution was in county where the mortal wound was inflicted, an indictment omitting allegation of place of death was not fatally defective. *State v. Montes*, 1917-NMSC-026, 22 N.M. 530, 165 P. 797.

**Credibility of venue testimony.** — Attacks upon the credibility of the witnesses who testified concerning venue is a matter for the jury to decide. *State v. Garcia*, 1967-NMSC-140, 78 N.M. 136, 429 P.2d 334.

**No instruction on venue is required,** because so long as the crime occurred in New Mexico, the county of the crime is not necessary for jury determination. *State v. Wise*, 1977-NMCA-074, 90 N.M. 659, 567 P.2d 970, cert. denied, 91 N.M. 4, 569 P.2d 414.



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Although prior to the adoption of U.J.I. Criminal the practice was to instruct on venue, this practice is discontinued therein, since venue is not jurisdictional, but is a personal right or privilege of the accused which may be waived. *State v. Wise*, 1967-NMSC-140, 90 N.M. 659, 567 P.2d 970, cert. denied, 91 N.M. 4, 569 P.2d 414.

**Instruction and finding sufficient.** — Where a jury was specifically instructed that it must find, beyond a reasonable doubt, that the fatal blow and the death occurred in the county of the venue and this the jury did so find, any argument that the blow or the cause of death may have occurred elsewhere was of no consequence. *Nelson v. Cox*, 1960-NMSC-005, 66 N.M. 397, 349 P.2d 118; *State v. Wise*, 1977-NMCA-074, 90 N.M. 659, 567 P.2d 970, cert. denied, 91 N.M. 4, 569 P.2d 414.

IV. WAIVER.

**Venue provision confers personal privilege upon accused which may be waived.** *State v. Lopez*, 1973-NMSC-041, 84 N.M. 805, 508 P.2d 1292.

**Venue unlike jurisdiction.** — Venue does not affect the power of the court and can be waived, but a jurisdictional defect can never be waived because it goes to the very power of the court to entertain the action, and such a defect can be raised at any stage of the proceedings, even sua sponte by the appellate court. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**Failure to object.** — Right to trial in the county or district in which the offense is alleged to have been committed is waived by failure to make timely objection. *City of Roswell v. Gallegos*, 1966-NMSC-246, 77 N.M. 170, 420 P.2d 438.

Right to be tried in a certain county or district is a right or privilege to a particular venue which may be waived by an accused person in a number of ways, and when defendant goes to trial in another judicial district, without objection on his part, he has waived the privilege, and cannot be heard to say that the court trying him was without jurisdiction. *State v. Lopez*, 1973-NMSC-041, 84 N.M. 805, 508 P.2d 1292.

**Acquiescence in venue change.** — Defendant who agreed to a change of venue waived any right he may have had to insist on a continuance of the case. *State v. White*, 1967-NMSC-016, 77 N.M. 488, 424 P.2d 402.

**Record of affirmative waiver unnecessary.** — The record need not affirmatively show that the trial court fully informed defendant of his right of venue and of his privilege to waive this right, or was advised that defendant had been so fully informed, that defendant affirmatively waived this right or that the trial court announced its satisfaction as to the genuineness of this waiver. *State v. Lopez*, 1973-NMSC-041, 84 N.M. 805, 508 P.2d 1292.

V. SPECIFIC SITUATIONS.

**Venue proper.** — Where defendant signed checks in Bernalillo county to pay the wages of three members of an Indian tribe for performing work on a construction project that was located on Indian land in McKinley county; defendant gave the checks to an employee of defendant's construction company at a meeting place that was located outside McKinley county for delivery to the payees; the checks were delivered to the payees in McKinley county; the payees cashed the checks at a store that was located in McKinley county; and defendant's bank dishonored the checks for insufficient funds, venue was proper in McKinley county. *State v. Cruz*, 2010-NMCA-011, 147 N.M. 753, 228 P.3d 1173, *rev'd on other grounds*, 2011-NMSC-038, 150 N.M. 548, 263 P.3d 890.

**Venue for violation of municipal ordinance** must be laid in the municipality where the violation presumably occurred. *City of Roswell v. Gallegos*, 1966-NMSC-246, 77 N.M. 170, 420 P.2d 438.

**Prosecution for embezzlement.** — Venue in embezzlement is properly laid in the county where the possession becomes adverse to the owner. *Territory v. Hale*, 1905-NMSC-021, 13 N.M. 181, 81 P. 583.

**Murder trial in county of death.** — In a trial for murder, the evidence that the person alleged to have been murdered died in county where venue was laid, is a sufficient proof of venue. *Territory of N.M. v. Hicks*, 1892-NMSC-024, 6 N.M. 596, 30 P. 872, *overruled on other grounds by Haynes v. United States*, 1899-NMSC-003, 9 N.M. 519, 56 P. 282.

**Death in Texas after wounding in New Mexico.** — Where decedent dies in Texas of wound inflicted in a county in New Mexico, defendant may be prosecuted in that New Mexico county. *Bourguet v. Atchison, Topeka & Santa Fe R.R.*, 1958-NMSC-148, 65 N.M. 200, 334 P.2d 1107.

Although the deceased died in Texas, the blow was struck in Quay county, and hence venue was proper in that county. *State v. Justus*, 1959-NMSC-008, 65 N.M. 195, 334 P.2d 1104, cert. denied, 365 U.S. 828, 81 S. Ct. 714, 5 L. Ed. 2d 706 (1961).

**Venue proper in New Mexico where theft occurred out of state.** — A person who steals property outside New Mexico and brings the stolen property into this state may be prosecuted, convicted, and punished for larceny in New Mexico. *State v. Stephens*, 1990-NMCA-081, 110 N.M. 525, 797 P.2d 314, cert. denied, 110 N.M. 533, 797 P.2d 983.

**Venue improper where offenses completed before reaching county.** — Where the first six criminal sexual penetration offenses were completed before reaching Bernalillo county, trial in Bernalillo county as to those offenses was improper. *State v. Ramirez*, 1978-NMCA-102, 92 N.M. 206, 585 P.2d 651.

**Absent prejudice venue provisions inapplicable to Rule 93 hearing.** — Neither constitutional nor statutory provisions on venue apply to a hearing under Rule 93, N.M.R. Civ. P. (considering defendant's motion to vacate judgment and sentence against him, now withdrawn), because such a hearing is neither a criminal trial nor a criminal prosecution, but rather a civil proceeding. *State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36 (decided under prior law).

Since defendant had no right to be present at a hearing under Rule 93, N.M.R. Civ. P. (now withdrawn), a fortiori he had no right to be heard in a particular place, absent a showing of prejudice. *State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36 (decided under prior law).

**Section is consistent with present constitutional and statutory provisions** regarding the place of prosecution. 1979 Op. Att'y Gen. No. 79-12.

**Right of venue is legal concept separate and distinct from territorial jurisdiction of magistrate,** and a statute affecting one does not necessarily affect the other. 1979 Op. Att'y Gen. No. 79-12.

**Law reviews.** — For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 361 to 371.

Mail or telegraph, where offense of obtaining money by fraud through use of, is deemed to be committed, 43 A.L.R. 545.

Constitutionality of statute for prosecution of offense in county other than that in which it was committed, 76 A.L.R. 1034.

Desertion: venue of criminal charge for child desertion or nonsupport as affected by nonresidence of parent or child, 44 A.L.R.2d 886.

Criminal conspiracies as to gambling, 91 A.L.R.2d 1148.



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Venue: change of venue by state in criminal case, 46 A.L.R.3d 295.

Venue in homicide cases where crime is committed partly in one county and partly in another, 73 A.L.R.3d 907.

Venue: where is embezzlement committed for purposes of territorial jurisdiction or venue, 80 A.L.R.3d 514.

Venue in rape cases where crime is committed partly in one place and partly in another, 100 A.L.R.3d 1174.

Venue in bribery cases where crime is committed partly in one county and partly in another, 11 A.L.R.4th 704.

Venue for currency reporting offense under Currency and Foreign Transactions Reporting Act (CFTRA) (31 USC § 5311 et seq.), 113 A.L.R. Fed. 639.

22 C.J.S. Criminal Law §§ 177 to 181.

## 30-1-15. Alleged victims of domestic abuse, stalking or sexual assault; forbearance of costs.

A. An alleged victim of an offense specified in Subsection B of this section is not required to bear the cost of:

(1) the prosecution of a misdemeanor or felony domestic violence offense, including costs associated with filing a criminal charge against an alleged perpetrator of the offense;

(2) the filing, issuance or service of a warrant;

(3) the filing, issuance or service of a witness subpoena; or

(4) the filing, issuance, registration or service of a protection order.

B. The provisions of Subsection A of this section apply to:

(1) alleged victims of domestic abuse as defined in Section 40-13-2 NMSA 1978;

(2) sexual offenses described in Sections 30-9-11 through 30-9-14 and 30-9-14.3 NMSA 1978;

(3) crimes against household members described in Sections 30-3-12 through 30-3-16 NMSA 1978;

(4) harassment, stalking and aggravated stalking described in Sections 30-3A-2 through 30-3A-3.1 NMSA 1978; and

(5) the violation of an order of protection that is issued pursuant to the Family Violence Protection Act [Chapter 40, Article 13 NMSA 1978] or entitled to full faith and credit.

**History: Laws 2002, ch. 34, § 1; 2002, ch. 35, § 1; 2008, ch. 40, § 1.**

**Cross references.** — For costs of criminal processes associated with domestic abuse offenses, *see* 40-13-3.1 NMSA 1978.

**The 2008 amendment,** effective July 1, 2008, provided for cost-free prosecution of a misdemeanor or felony domestic violence offense, filing of a warrant and a witness subpoena, and the filing and registration of a protection order.

## 30-1-16. Defense based on victim's gender, gender identity, gender expression or sexual orientation prohibited.

A. It shall not be a defense, justification or excuse in a criminal proceeding that the defendant's conduct was a reaction to the discovery of, knowledge about or potential disclosure of a victim's or witness's actual or perceived:

(1) gender;

(2) gender expression;

(3) gender identity; or

(4) sexual orientation.

B. It shall not be a defense, justification or excuse in a criminal proceeding that the defendant was romantically propositioned in a nonviolent or non-threatening manner by a person of the same gender or a person who is transgender.

C. Nothing in this section shall prevent a defendant from raising other recognized affirmative defense.

D. As used in this section:

(1) "gender expression" means the external appearance of a person's gender identity, often expressed through the person's behavior, physical appearance or voice, which expression may or may not conform to socially defined behaviors and characteristics typically associated with masculinity or femininity;



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(2) "gender identity" means a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth; and

(3) "sexual orientation" means heterosexuality, homosexuality or bisexuality, whether actual or perceived.

**History: Laws 2022, ch. 56, § 52.**

**Effective dates.** — Laws 2022, ch. 56, § 52 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

# ARTICLE 2

# Homicide

Sec.
30-2-1. Murder.
30-2-2. Repealed.
30-2-3. Manslaughter.
30-2-4. Assisting suicide.
30-2-5. Excusable homicide.
30-2-6. Justifiable homicide by public officer or public employee.
30-2-7. Justifiable homicide by citizen.
30-2-8. When homicide is excusable or justifiable defendant to be acquitted.
30-2-9. Murderer may not profit from wrongdoing; public policy.

## 30-2-1. Murder.

A. Murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused:

(1) by any kind of willful, deliberate and premeditated killing;

(2) in the commission of or attempt to commit any felony; or

(3) by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life.

Whoever commits murder in the first degree is guilty of a capital felony.

B. Unless he is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who kills another human being without lawful justification or excuse commits murder in the second degree if in performing the acts which cause the death he knows that such acts create a strong probability of death or great bodily harm to that individual or another.

Murder in the second degree is a lesser included offense of the crime of murder in the first degree.

Whoever commits murder in the second degree is guilty of a second degree felony resulting in the death of a human being.

**History: 1953 Comp., § 40A-2-1, enacted by Laws 1963, ch. 303, § 2-1; 1980, ch. 21, § 1; 1994, ch. 23, § 1.**

**Cross references.** — For attempt to commit a felony, *see* 30-28-1 NMSA 1978.

For homicide by vehicle, *see* 66-8-101 NMSA 1978.

For homicide instructions, *see* UJI 14-201 NMRA et seq.

For instruction on the essential elements of felony murder, *see* UJI 14-202 NMRA.

**The 1994 amendment,** effective July 1, 1994, added "resulting in the death of a human being" at the end of the last paragraph of Subsection B.

**Applicability.** — Laws 1994, ch. 23, § 4 provided that the provisions of Laws 1994, ch. 23, § 1 apply only to persons sentenced for crimes committed on or after July 1, 1994.

**ANNOTATIONS**

I. GENERAL CONSIDERATION.
II. DELIBERATION AND PREMEDITATION.
III. FELONY MURDER.
IV. GREATLY DANGEROUS ACTS.
V. SECOND DEGREE MURDER.
VI. MANSLAUGHTER.
VII. DEFENSES.
VIII. INDICTMENT AND INFORMATION.
IX. EVIDENCE AND PROOF.
X. JURY INSTRUCTIONS.

I. GENERAL CONSIDERATION.

**Depraved mind murder.** — A number of elements must be considered in appraising whether a defendant has displayed the requisite depraved mind pursuant to Section 30-2-1A(3) NMSA 1978. Conviction requires that more than one person be endangered by the defendant's act. The defendant's act must be intentional and of an extremely reckless character. The defendant must possess subjective knowledge that his act was "greatly dangerous to the lives of others". *State v. Dowling*, 2011-NMSC-016, 150 N.M. 110, 257 P.3d 930.

Courts have distinguished depraved mind murder by the number of persons exposed to danger by a defendant's extremely reckless behavior. In general, depraved mind murder convictions have been limited to acts that



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are dangerous to more than one person. In addition to the number of people endangered, courts have construed depraved mind murder as requiring proof that the defendant had "subjective knowledge" that his act was greatly dangerous to the lives of others. This requirement of subjective knowledge serves as proof that the accused "acted with 'a depraved mind' or 'wicked or malignant heart' and with utter disregard for human life". To further narrow the class of killings eligible for depraved mind murder, courts have concluded "that the legislature intended the offense of depraved mind murder to encompass an intensified malice or evil intent." In describing that intensified malice, courts have defined the phrase "depraved mind" used in the statute and uniform jury instructions as "[a] corrupt, perverted, or immoral state of mind constituting the highest grade of malice [that equates] with malice in the commonly understood sense of ill will, hatred, spite or evil intent". *State v. Reed*, 2005-NMSC-031, 138 N.M. 365, 120 P.3d 447.

**Double jeopardy.** — Felony murder has its own particular double jeopardy analysis. If the predicate felony and felony murder are unitary, then the predicate felony must be dismissed because it is subsumed within the elements of felony murder. *State v. Bernal*, 2006-NMSC-050, 140 N.M. 644, 146 P.3d 289.

**Convictions of attempted murder and aggravated battery violated double jeopardy.** — Where defendant was convicted of attempted murder and aggravated battery with a deadly weapon; defendant's conduct was unitary; the indictment for attempted murder required the state to prove that defendant attempted to commit murder and "began to do an act which constituted a substantial part of murder" but failed to commit the offense; the indictment for aggravated battery required the state to prove that defendant touched or applied force to the victims with a deadly weapon intending to injure the victims; the state's theory of the case to support both charges was that defendant beat, stabbed, and slashed the victims; and the state offered the same testimony to prove both charges, the aggravated battery elements were subsumed within the attempted murder elements and defendant's convictions violated the prohibition against double jeopardy. *State v. Swick*, 2012-NMSC-018, 279 P.3d 747, *rev'g* 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462, *overruling State v. Armendariz*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

**Intent.** — "Deliberate intention" is defined as, arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action. Intent is subjective and is almost always inferred from other facts in the case, as it is rarely established by direct evidence. *State v. Sosa*, 2000-NMSC-036, 129 N.M. 767, 14 P.3d 32.

**Corpus delicti.** — In homicide cases the corpus delicti is established upon proof of the death of the person charged in the information or indictment, and that the death was caused by the criminal act or agency of another. The corpus delicti of a particular offense is established simply by proof that the crime was committed; the identity of the perpetrator is not material. *State v. Sosa*, 2000-NMSC-036, 129 N.M. 767, 14 P.3d 32.

**Jury's specification of death penalty is not freakish, capricious, or arbitrary** where defendant killed the victim in a particularly brutal fashion by striking her in the head three to five times with a sledgehammer and this occurred after the defendant kidnapped the victim by deception, chased her as she attempted to escape and stabbed her two inches deep in the chest with a knife when she struggled, and completely disrobed the victim in an attempt to rape her. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516 (decided under prior law).

**Fair trial.** — Where the prosecutor did no more than repeat what the judge had already said to the jury, that is, that the photographs of the victim contained more graphic material than the jurors were allowed to see, and relied on reasonable inferences from the medical investigator's testimony about the graphic nature of the wounds, the prosecutor did not introduce any new information to the jury, and viewing this isolated remark in context with the judge's comments to the jury, with the testimony of the medical investigator, and with the overwhelming evidence of guilt, the remark did not result in a verdict based on passion or prejudice or otherwise deprive defendant of a fair trial. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

**Constitutionality.** — Because the statute and court decisions clearly indicate that the element of deliberation is what distinguishes first degree murder from second degree murder, and the distinction between first and second degree murder has been clearly enunciated by the supreme court, this section and former Section 30-2-2 NMSA 1978, relating to malice (now repealed), are not unconstitutional on the grounds that they make impossible an ascertainable distinction between first and second degree murder. *State v. Valenzuela*, 1976-NMSC-079, 90 N.M. 25, 559 P.2d 402.

New Mexico Const., art. IV, § 18, relating to the amendment of statutes, did not apply to 40-24-4, 1953 Comp., the former felony murder statute, which was enacted prior to adoption of the constitutional provision. *State v. Hines*, 1967-NMSC-237, 78 N.M. 471, 432 P.2d 827.

**Open charge of murder gives defendant notice** that he must defend against a charge of unlawfully taking a human life. *State v. Stephens*, 1979-NMSC-076, 93 N.M. 458, 601 P.2d 428, *overruled in part on other grounds by State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228.

**Double jeopardy.** — Defendant's right to freedom from double jeopardy was not violated by punishment for attempted first degree murder, aggravated battery with a deadly weapon, and criminal sexual penetration. *State v. Traeger*, 2000-NMCA-015, 128 N.M. 668, 997 P.2d 142, *aff'd in part, rev'd in part on other grounds*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

**Element of intent is seldom susceptible to direct proof,** since it involves the state of mind of the defendant, and it thus may be proved by circumstantial evidence. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**Elements of depraved mind murder.** — The elements that are required to support a depraved mind murder conviction are that more than one person must be endangered by defendant's act; defendant's act must be intentional and extremely reckless; defendant must possess subjective knowledge that defendant's act was greatly dangerous to the lives of others; and the act must encompass an intensified malice and evil intent. *State v. Dowling*, 2011-NMSC-016, 150 N.M. 110, 257 P.3d 930.

**Sufficient evidence of depraved mind murder.** — Where defendant drove a truck at approximately 80 miles per hour for approximately one mile on a four-lane suburban street during the middle of a weekday, striking and injuring a jogger on the street's raised median, then driving onto a sidewalk and striking and killing a second pedestrian; all the while speeding and weaving in and out of traffic, including into oncoming traffic, almost colliding with other vehicles, until defendant crossed all four lanes of the street and finally crashed into a boulder on the raised median, the evidence was sufficient to support defendant's conviction of depraved mind murder. *State v. Dowling*, 2011-NMSC-016, 150 N.M. 90, 257 P.3d 930.

**Act indicating depraved mind not affected by intent to kill particular individual.** — A murder committed by an act which indicates a depraved mind is a first degree murder. The existence of an intent to kill any



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particular individual does not remove the act from this class of murder. *State v. Sena*, 1983-NMSC-005, 99 N.M. 272, 657 P.2d 128.

**For legislative history of term "human being"** in definition of murder, as found throughout homicide statutes. *State v. Willis*, 1982-NMCA-151, 98 N.M. 771, 652 P.2d 1222.

**Fair trial.** — Defendant's right to fair trial was not violated when, in a prosecution for first degree murder, the state secured an instruction for the lesser included offense of second degree murder and then argued against this lesser included offense at closing, contending that the evidence could only support a first degree murder conviction. *State v. Armendarez*, 1992-NMSC-012, 113 N.M. 335, 825 P.2d 1245.

**Cumulative punishment is precluded for shooting at a vehicle and homicide.** — New Mexico jurisprudence precludes cumulative punishment for the offenses of causing great bodily harm to a person by shooting at a motor vehicle and the homicide resulting from the penetration of the same bullet into the same person. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426, *overruling State v. Gonzales*, 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023, *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563 and *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

Where defendant and defendant's companions were accosted by a rival gang in front of defendant's family home, guns were pulled on both sides and defendant's sibling was severely wounded by gunshots in the leg and abdomen; while defendant's group were trying to help defendant's sibling in the driveway and stop the bleeding from the gunshot wounds, the person in the rival gang who had been shooting at defendant and defendant's companions returned in a Ford Expedition; when defendant saw gunfire coming from the Expedition, defendant ran into the house and retrieved an AK-47 rifle and began shooting at the Expedition; the driver of Expedition was shot seven times and died; the jury convicted defendant of voluntary manslaughter and shooting into a motor vehicle resulting in great bodily harm, the Double Jeopardy Clause protected defendant from being punished both for the homicide of the victim and for shooting into a vehicle causing great bodily harm to the victim where both convictions were premised on the unitary act of shooting the victim. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426, *overruling State v. Gonzales*, 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023, *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563 and *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

**Legislature intended to provide multiple punishments** for the offenses of second degree murder and shooting into or from a vehicle. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

A consideration of second degree murder and shooting from a motor vehicle shows that the sections setting forth these crimes are designed to combat distinct evils, which provides further indicia of legislative intent confirming the presumption that the offenses are separately punishable. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

**Conviction of lesser offense only if supported by evidence.** — No statute which purports to authorize an appellate court to sustain a conviction unsupported by the evidence may be approved, and accordingly Laws 1937, ch. 199, § 1 (not compiled), is invalid to the extent that it authorizes a conviction for a lesser included homicide offense when no evidence was contained in the record to prove the essentials of the elements of the offense of which the defendant stands convicted. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

**Unsupported conviction unconstitutional.** — A conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

**"Torture".** — Murder by strangling and suffocation was not murder by "torture," which was conclusively made first degree murder by Laws 1907, ch. 36, § 1 (40-24-4, 1953 Comp.). *State v. Bentford*, 1935-NMSC-051, 39 N.M. 293, 46 P.2d 658 (decided under prior law).

**Conviction of principal in second degree.** — A principal in the second degree was guilty of crime the same as the principal in the first degree, and might be tried and convicted, even though the latter has been acquitted or convicted of a lesser degree of the offense. *State v. Martino*, 1920-NMSC-069, 27 N.M. 1, 192 P. 507.

**Double jeopardy.** — Defendant's convictions under two theories of first degree murder did not result in contradictory convictions in violation of due process and double jeopardy principles because the two crimes were not inherently or factually contradictory and the jury could have concluded that defendant was guilty under both alternatives, given the evidence. *State v. Reyes*, 2002-NMSC-024, 132 N.M. 576, 52 P.3d 948.

Guilty verdicts for two alternative theories of first degree murder should be regarded, for sentencing purposes, as a general verdict of first degree murder based on the two theories, thereby avoiding multiple punishments. *State v. Reyes*, 2002-NMSC-024, 132 N.M. 576, 52 P.3d 948.

Convictions of defendant for both second degree murder and intentional child abuse resulting in death violated his right not to be placed in double jeopardy. *State v. Mann*, 2000-NMCA-088, 129 N.M. 600, 11 P.3d 564, *aff'd*, 2002-NMSC-001, 131 N.M. 459, 39 P.3d 124.

Defendant's conviction for both shooting into an occupied motor vehicle under Section 30-3-8 NMSA 1978 and first degree murder under this section was not double jeopardy because the legislature intended to have separate punishments for similar conduct that can result in a violation of both statutes. *State v. Gonzales*, 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023.

There was no double jeopardy violation for convictions for second degree murder and shooting at or from a motor vehicle because the testimony at trial permitted the inference that each conviction was based on distinct conduct and because the two statutes evince legislative intent to impose separate punishments for each crime. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Conviction for shooting at a motor vehicle under Section 30-3-8B NMSA 1978 did not preclude the state from seeking a further conviction for first or second degree murder under this section. *State v. Garcia*, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, cert. denied, 2005-NMCERT-004, 137 N.M. 454, 112 P.3d 1111.

**Homicide charge not merged.** — The homicide resulting from the great bodily harm was sufficient evidence for the jury to find aggravated sodomy and first degree kidnapping, and there was no merger with the charge of murder of which defendant was acquitted. *State v. Melton*, 1977-NMSC-014, 90 N.M. 188, 561 P.2d 461.

**Aggravated burglary and first degree murder not unitary.** — First degree murder and aggravated burglary were not unitary acts, and imposition of sentences for both offenses did not violate double jeopardy. *State v. Livernois*, 1997-NMSC-019, 123 N.M. 128, 934 P.2d 1057.

**Merger of lesser offense found.** — Where a defendant was charged with numerous counts of child abuse resulting in death or great bodily injury and with murder, but the state did not charge or offer proof that the acts of child abuse arose as separate and distinct episodes, the rule of merger precluded the defendant's conviction



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and sentence for a crime that is a lesser included offense of a greater charge upon which defendant has also been convicted. Although the state properly may charge in the alternative, where the defendant was convicted of one or more offenses which were merged into the greater offense, he could be punished for only one. *State v. Pierce*, 1990-NMSC-049, 110 N.M. 76, 792 P.2d 408 (events occurred prior to 1989 amendment to Section 30-6-1 NMSA 1978).

**Bail.** — To be admitted to bail on habeas corpus petition, if proof of capital crime is plain and presumption great, court would not weigh it against other, apparently contradictory, facts and circumstances. *Ex parte Wright*, 1929-NMSC-093, 34 N.M. 422, 283 P. 53.

**Prosecutor's comments on defendant's story appropriate.** — Prosecutor's comments on the veracity of defendant's story did not deprive defendant of a fair trial. If after a case is presented, the evidence is essentially reduced to which of two conflicting stories is true, a party may reasonably infer, and thus argue, that the other side is lying. *State v. Aguilar*, 1994-NMSC-046, 117 N.M. 501, 873 P.2d 247, cert. denied, 513 U.S. 859, 115 S. Ct. 168, 130 L. Ed. 2d 105, and cert. denied, 513 U.S. 865, 115 S. Ct. 182, 130 L. Ed. 2d 116 (1994).

## II. DELIBERATION AND PREMEDITATION.

**Substantial evidence of deliberate intention.** — A deliberate intention refers to the state of mind of the defendant, is rarely subject to proof by direct evidence, and often must be inferred from all the facts and circumstances of the killing. *State v. Astorga*, 2015-NMSC-007.

Where law enforcement officer was murdered during a traffic stop, evidence established that defendant had a motive to kill the officer, wanting to avoid arrest because defendant knew that he was wanted on an outstanding warrant, that defendant initially complied with the officer when the officer pulled defendant's vehicle over, that defendant then retrieved his gun while he waited for the officer to approach the vehicle, and when the officer neared the window, defendant fired the gun twice at the officer from point-blank range, that defendant, after the killing, made incriminating statements about having "blasted that cop", there was substantial evidence of defendant's deliberate intention to take away the life of the law enforcement officer. *State v Astorga*, 2015-NMSC-007.

Where the evidence at trial established that defendant threatened the victim during a confrontation the day prior to the murder and cell phone records revealed that defendant sought out the victim the same morning of the murder, that the victim suffered approximately ninety stab wounds during the attack, indicating that the attack upon victim spanned a prolonged period of time, and that defendant disposed of the murder weapon and clothes he wore during the attack, there was sufficient evidence of defendant's deliberate intent to murder the victim. *State v. Smith*, 2016-NMSC-007.

**Sufficient evidence of first-degree deliberate murder.** — There was sufficient evidence to allow a trier of fact to reasonably infer that the defendant killed the victim with the deliberate intention to take away her life, where the physical evidence containing a full DNA profile matching defendant was found on the victim's body in semen on her thigh and under the fingernails of her right hand, and also on the paver stone presumed to be the murder weapon, and where evidence of deliberation was established by evidence of a prolonged struggle and a large number of wounds to the victim. *State v. Thomas*, 2016-NMSC-024.

**Sufficient evidence of first-degree willful and deliberate murder.** — Where defendant was charged with first-degree murder (willful and deliberate), related to the killing of his estranged wife, there was sufficient evidence to support defendant's first-degree murder conviction where, at trial, the state presented testimony establishing that strangulation was a likely cause of death that defendant's training as a police officer familiarized him with chokeholds, that defendant and the victim had an abusive relationship where the victim repeatedly informed friends and family of her fear of defendant and concern that he would hurt her or kill her, and that defendant and the victim were involved in a contentious divorce with much dispute about the custody of their children. *State v. Farrington*, 2020-NMSC-022.

**Sufficient evidence of deliberate murder.** — Where defendant was playing with a folding pocket knife at a party; a fight broke out between defendant and the victim; the victim ran away bleeding heavily and later died at a hospital; defendant made the statement that "I think I stabbed that fool seven or eight times. I stabbed that fool"; defendant and defendant's friends acted "fine, like nothing, like high-fiving each other"; defendant stabbed the victim thirteen times in the left side of the chest; and the wounds were consistent with a single-edged knife, the evidence was sufficient to support defendant's conviction of willful and deliberate murder. *State v. Guerra*, 2012-NMSC-027, 284 P.3d 1076.

Where an altercation occurred between defendant and the victim; the victim was kneeling on the ground as defendant stood over the victim pointing a rifle at the victim's head; the victim attempted to push the rifle away from the victim's head twice and defendant repositioned the rifle so the rifle it pointed directly at the victim's face; as defendant pointed the rifle at the victim, the victim was pleading with defendant; a witness testified that defendant fired four close range shots directly at the victim; there were five wounds in the victim's body, four of which had penetrated the victim's body; and within an hour after the shooting, defendant interacted with a witness who testified that defendant did not appear to be intoxicated and that defendant made a telephone call to tell someone that defendant would not be at work for a week because defendant was in a "heap of trouble", there was sufficient evidence for a jury to find that defendant acted with deliberate intent when defendant killed the victim. *State v. Largo*, 2012-NMSC-015, 278 P.3d 532.

Jury could reasonably find that defendant acted with deliberate intent because the physical evidence of the stabbing of the victim showed that the attack was part of a prolonged struggle and that the victim was stabbed multiple times as she tried to escape, and because defendant later made statements that he had hurt, stabbed and murdered a woman. *State v. Duran*, 2006-NMSC-035, 140 N.M. 94, 140 P.3d 515.

Where defendant was embittered by the victim's rejection of defendant and the breakup of the relationship between defendant and the victim; defendant tried to hurt the victim by making scandalous accusations to the victim's ex-wife and the police; defendant made methodical plans for a trip from Nevada to New Mexico in pursuit of the victim; defendant surreptitiously followed the victim to the victim's home town in New Mexico and stalked the victim over a period of days; defendant ascertained that the victim was taking an alcohol server class at a local motel, inquired about the time and place of the class, and ascertained when defendant could get the victim alone during a class recess; defendant deliberately lay in wait for the victim; defendant carried a screwdriver with him to the fatal confrontation with the victim; defendant stabbed the victim twenty-one times with the screwdriver; after the stabbing, defendant immediately and calmly walked away and fled the scene of the murder; defendant tried to deceive and evade the authorities; and defendant attempted to concoct a false alibi, the evidence was sufficient to support the jury's determination that defendant



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committed the murder with deliberate intent to kill. *State v. Flores*, 2010-NMSC-002, 147 N.M. 542, 226 P.3d 641.

**Sufficient evidence of willful and deliberate murder.** — In defendant's trial for first-degree murder for the killing of a police officer and aggravated fleeing, the state presented sufficient evidence for a rational jury to find beyond a reasonable doubt that defendant manifested a deliberate intention to kill the officer, where the evidence established that during a traffic stop, the officer attempted to approach the vehicle when the vehicle suddenly accelerated out of a parking lot, and where defendant later brought the vehicle to a stop and waited for the pursuing officer to catch up, and when the officer approached the vehicle a second time, defendant fired his gun four times at the officer. Moreover, testimony from defendant's accomplice established that prior to the shooting, defendant moved his pistol from a hidden position into a firing position, that defendant stated that he would kill an officer to avoid going back to prison, and that defendant shot the officer twice, paused for a moment, and then shot the officer two more times, which was probative of deliberation and intent to kill. *State v. Romero*, 2019-NMSC-007.

**Sufficient evidence to prove identity in first-degree murder trial.** — In defendant's trial for first-degree murder, where identity was at issue, there was sufficient evidence to support defendant's conviction where the victim's wife and three children witnessed the shooting of victim and testified that defendant was the shooter, where a bystander also testified that she witnessed defendant shoot the victim while he was sitting in a vehicle, and where the state presented physical evidence including a latent print of defendant's palm on the vehicle in which the victim was murdered. *State v. Ramirez*, 2018-NMSC-003.

**Insufficient evidence of deliberate murder.** — Where defendant was charged with attempted first degree murder after attending a party that ended with one person dead and the victim seriously injured from multiple gunshot wounds; after arriving at the party, defendant waited outside the hall while defendant's friend went into the hall; defendant was carrying a revolver and the friend was carrying a semiautomatic pistol; when a fight erupted in the hall, defendant walked to the entrance of the hall; defendant's friend shot at the victim several times with the pistol; several witnesses, including the victim, testified that they did not see defendant during the fight; after the shooting started, defendant was seen running with the friend away from the fight as other people were firing at them; defendant returned home and hid the pistol; defendant's friend told the police that defendant had admitted shooting the victim, but at trial denied that defendant had admitted shooting the victim; there was no evidence that defendant had a motive to kill the victim; defendant had a concealed weapon permit; other guests at the party were also carrying weapons; and defendant lied to the police and told one friend not to talk about what happened, the evidence was insufficient to demonstrate that defendant acted willfully, deliberately and with premeditated intent to kill the victim. *State v. Slade*, 2014-NMCA-088, cert. granted, 2014-NMCERT-008.

Where defendant and the victims had been drinking and taking drugs earlier in the day; while defendant and the victims were aimlessly driving around, drinking and taking more drugs, defendant, without any evidence of motive, shot and killed the driver and when the passenger, who was sitting in the front seat, screamed and turned around to look at defendant, defendant shot and wounded the passenger; and although multiple shots were fired in quick succession, each victim was shot only once, there was insufficient evidence of deliberation to support defendant's conviction for attempted first degree murder of the passenger. *State v. Tafoya*, 2012-NMSC-030, 285 P.3d 604.

**Evidence of condition of mind of accused at time of crime may be introduced,** not only for the purpose of proving the inability to deliberate, but also to prove that the conditions were such that defendant did not in fact, at the time of the killing, form a deliberate intent to kill. *State v. Balderama*, 2004-NMSC-008, 135 N.M. 329, 88 P.3d 845.

**Schizophrenia did not limit defendant's capacity to form deliberate intent to kill.** — Where defendant was convicted of first-degree murder and third-degree criminal sexual penetration, based on defendant's admission that he killed the victim and then had sexual intercourse with the victim after she died, and where defendant argued that schizophrenia limited his capacity to form the deliberate intent required to sustain a first-degree murder conviction, evidence that defendant took conscious steps to walk through his house to retrieve a knife, address the victim in a theatrical manner saying that he had a "present" for her, and finally manipulate her neck before stabbing her was sufficient for a rational jury to find beyond a reasonable doubt the essential facts required for conviction of first-degree, deliberate intent murder. *State v. Martinez*, 2021-NMSC-012.

**Exclusion of expert testimony held error.** — The trial court committed reversible error when it sua sponte excluded the expert testimony of defendant's sole witness, a neuropsychologist, who was prepared to testify regarding defendant's neurological deficits, which defendant contends were relevant to whether he formed the deliberate intent to kill. *State v. Balderama*, 2004-NMSC-008, 135 N.M. 329, 88 P.3d 845.

**Period of deliberation.** — Murder in the first degree is a willful, deliberate and premeditated killing, and although a deliberate intention means an intention or decision arrived at after careful thought and after a weighing of the reasons for the commission of the killing, such a decision may be reached in a short period of time. *State v. Lucero*, 1975-NMSC-061, 88 N.M. 441, 541 P.2d 430.

**Burden of proof.** — The burden is on the state to prove that a defendant not only had an opportunity to form deliberate intent but did in fact form a deliberate intent to kill. *State v. Motes*, 1994-NMSC-115, 118 N.M. 727, 885 P.2d 648.

**Transferred intent to kill.** — In a homicide case where A shot at B, and the bullet struck C and killed him, the malice or intent followed the bullet. *State v. Carpio*, 1921-NMSC-063, 27 N.M. 265, 199 P. 1012.

Charge that murder was done willfully, deliberately and premeditatedly and with malice aforethought was sustained by proof that it was committed with a mind imbued with those qualities, though they were directed against a person other than the one killed. *State v. Carpio*, 1921-NMSC-063, 27 N.M. 265, 199 P. 1012.

**Transferred intent applicable to murder and attempted murder.** — The doctrine of transferred intent applies to both murder and attempted murder. *State v. Gillette*, 1985-NMCA-037, 102 N.M. 695, 699 P.2d 626.

**Period of time to abandon intent.** — Just as it requires no period of time to form a deliberate intent to kill, so too, it does not require a certain period of time to abandon a pre-existing depraved mind. Although the initial act of defendant shooting indiscriminately at two people at two different times could have been found by the jury to be a depraved-mind action and one done with a wicked and malignant heart, these actions did not wound or kill the victim or anyone else. It is the criminal intent at the time of the commission of the crime that is determinative. *State v. Hernandez*, 1994-NMSC-045, 117 N.M. 497, 873 P.2d 243.

**Question of deliberation and premeditation in murder case was for jury** to determine upon a consideration of all the surrounding circumstances tending to show the relation of the parties to each other and



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the animus of the accused toward the deceased. *State v. Smith*, 1966-NMSC-128, 76 N.M. 477, 416 P.2d 146.

**Direct or circumstantial evidence.** — While deliberation and premeditation are essential elements of murder in the first degree, these, like other elements, may be shown by direct evidence or by circumstances from which their existence may be inferred by the jury. *State v. Montoya*, 1963-NMSC-098, 72 N.M. 178, 381 P.2d 963.

The essential elements of murder in the first degree, including the elements of deliberation and premeditation, may be shown not only by direct evidence but by circumstances from which their existence may be inferred. *State v. Smith*, 1966-NMSC-128, 76 N.M. 477, 416 P.2d 146.

**Evidence of wounds inflicted in fight was sufficient** to support a finding of premeditation, intent to kill and malice. *State v. Garcia*, 1956-NMSC-058, 61 N.M. 291, 299 P.2d 467.

**Striking victim with car.** — In case where the defendant struck the deceased with his automobile after an argument between the two and after deceased was seen to strike defendant's mother, the facts and surrounding circumstances warranted a finding by the jury that the killing was malicious, deliberate and premeditated. *State v. Montoya*, 1963-NMSC-098, 72 N.M. 178, 381 P.2d 963.

**Forcing car off road.** — From evidence that in the course of a high speed police chase defendant made a deliberate sharp turn into the police car, forcing it off the road while driving at a speed of 110 m.p.h., the jury could reasonably have inferred that defendant intended to murder the police officers. *State v. Bell*, 1972-NMCA-101, 84 N.M. 133, 500 P.2d 418 (affirming conviction of assault on police officers with intent to commit a violent felony).

**Shooting deceased's fleeing wife.** — Where defendant's shooting of decedent's wife occurred within a second or so after the shooting of decedent and as she sought to escape, shooting her under the circumstances had real probative value upon the issues of deliberation and intent, and constituted evidence of a preconceived plan to kill her as well as her husband. *State v. Lucero*, 1975-NMSC-061, 88 N.M. 441, 541 P.2d 430.

**Premeditation is a necessary element in proof of second degree murder.** *State v. White*, 1956-NMSC-038, 61 N.M. 109, 295 P.2d 1019.

## III. FELONY MURDER.

**Requirements that a felony must meet before it can be a predicate to felony murder.** — There must be a causal relationship between the felony and the homicide, the felony must be independent of or collateral to the homicide, and the felony must be inherently or foreseeably dangerous to human life. *State v. Groves*, 2021-NMSC-003.

**The felonious purpose test.** — A crime's objective is its felonious purpose, and if that purpose is something other than "to injure or kill," the felony may serve as a predicate felony to felony murder. *State v. Groves*, 2021-NMSC-003.

**Aggravated fleeing a law enforcement officer does not violate the collateral felony rule and may serve as a predicate felony for felony murder.** — The felonious purpose of the aggravated fleeing statute is to flee from law enforcement to avoid apprehension, not to endanger or harm someone. Aggravated fleeing, therefore, does not violate the collateral felony rule and may serve as a predicate felony for felony murder if the defendant acted with the requisite mens rea. *State v. Groves*, 2021-NMSC-003.

**District court erred in concluding that aggravated fleeing may not serve as a predicate felony for felony murder.** — Where defendants stole a van from an Albuquerque business, and rather than stopping when they realized that police were in pursuit, they fled, and where, during the pursuit through residential neighborhoods, defendants, driving at speeds of up to 78 mph in a 35 mph zone, ran a stop sign and hit another car resulting in the deaths of two people, the district court erred in concluding that aggravated fleeing a law enforcement officer may not serve as the predicate felony for a felony murder charge. Aggravated fleeing a law enforcement officer may serve as a predicate felony for felony murder because it satisfies the causal requirement, the collateral felony rule, and the requirement that the felony be inherently or foreseeably dangerous to human life. *State v. Groves*, 2021-NMSC-003.

**Sufficient evidence.** — Where the non-conflicting testimony of witnesses established that while defendant was attending a party, defendant visited the victim's apartment several times to buy marijuana; when the supply of marijuana was exhausted, defendant gestured to a screwdriver in defendant's waistband and said that defendant was going to "jack" the victim; defendant went to the victim's apartment, started punching the victim and held the screwdriver against the victim's neck; when the victim reached for a gun, defendant took a gun away from the victim, put the gun to the victim's head and pulled the trigger; when the gun failed to fire, defendant pulled the trigger a second time and shot and killed the victim; defendant returned to the party with the gun in defendant's hand; and defendant was showing off the gun and stated that defendant had taken the gun from the victim and "blasted" the victim, the evidence was sufficient to support the finding that defendant committed the predicate offense of armed robbery and then intentionally killed the victim during the robbery. *State v. Garcia*, 2011-NMSC-003, 149 N.M. 185, 246 P.3d 1057.

**The felony murder statute expresses a clear legislative intent** that a killing during the commission of a felony constitutes unitary conduct in every case and a conviction of both the predicate felony and felony murder violates double jeopardy. *State v. Frazier*, 2007-NMSC-032, 142 N.M. 120, 164 P.3d 1.

**Where there is only one first degree felony conviction** which also serves as the predicate felony for a felony murder conviction, the legislature did not intend to allow a separate conviction for that same felony. *State v. Frazier*, 2007-NMSC-032, 142 N.M. 120, 164 P.3d 1.

**It is per se fundamental error for aggravated battery** to be used as an alternative predicate for felony murder. *Campos v. Bravo*, 2007-NMSC-021, 141 N.M. 801, 161 P.3d 846.

**Not all underlying felonies constitute an aggravating circumstance.** In fact, the only underlying felonies for felony murder that can serve as an aggravating circumstance for capital sentencing are kidnapping, criminal sexual contact of a minor, and criminal sexual penetration. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

**When state proves elements of felony murder,** it has proved all of the elements of the capital felony of first degree murder. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

**Eligibility for death penalty.** — New Mexico requires an aggravating circumstance, in addition to the commission of felony murder, in order to be eligible for the death penalty. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516 (decided under prior law).

**Limitations to felony murder doctrine.** — While the wording of this section is broad, New Mexico has created five main limitations to the felony murder doctrine. *State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, 84 P.3d 88, cert. quashed, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 578.

All of New Mexico's felony murder limitations work together to ensure that defendants convicted of felony murder have a culpable mental state consistent with the legislature's retributive and punitive goals. *State v. O'Kelly*,



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2004-NMCA-013, 135 N.M. 40, 84 P.3d 88, cert. quashed, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 578.

**Accomplices.** — A defendant cannot be charged with felony murder based on the lethal acts of another person who is not an accomplice. *State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, 84 P.3d 88, cert. quashed, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 578.

Defendant may not be held liable for depraved mind murder when he or his accomplice did not commit the lethal act that killed an innocent bystander. *State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, 84 P.3d 88, cert. quashed, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 578.

**Felony murder statute constitutional.** — Constitutional objection that felony murder statute under which petitioner was convicted was so broad and vague as to be unconstitutional was rejected. *Hines v. Baker*, 309 F. Supp. 1017 (D.N.M. 1968), *aff'd*, 422 F.2d 1002 (10th Cir. 1970).

**Purpose.** — In our felony-murder statute the legislature has permissibly determined that a killing in the commission or attempted commission of a felony is deserving of more serious punishment than other killings in which the killer's mental state might be similar but the circumstances of the killing are not as grave. *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

**Intent to kill for felony murder** need not be a "willful, deliberate and premeditated" intent as contemplated by the definition of first degree murder in Subsection A(1) of this section, nor need the act be "greatly dangerous to the lives of others, indicating a depraved mind regardless of human life", as contemplated by the definition in Subsection (A)(3). *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

An intent to kill in the form of knowledge that the defendant's acts "create a strong probability of death or great bodily harm" to the victim or another, so that the killing would be only second degree murder under Subsection B of this section if no felony were involved, is sufficient to constitute murder in the first degree when a felony is involved - or so the legislature has determined. *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

The "malice" required for murder (both first and second degree), as opposed to manslaughter, is an intent to kill or an intent to do an act greatly dangerous to the lives of others or with knowledge that the act creates a strong probability of death or great bodily harm. The same intent should be required to invest with first degree murder status a killing in the commission of or attempt to commit a first degree or other inherently dangerous felony. *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

In addition to proof that the defendant caused (or aided and abetted) the killing, there must be proof that the defendant intended to kill (or was knowingly heedless that death might result from his conduct). An unintentional or accidental killing will not suffice. *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

Felony murder does have a mens rea element, which cannot be presumed simply from the commission or attempted commission of a felony. *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

**Intent requirement.** — The felony-murder intent requirement is satisfied if there is proof that the defendant intended to kill, knew that his actions created a strong probability of death or great bodily harm to the victim or another person, or acted in a manner greatly dangerous to the lives of others. *State v. Griffin*, 1993-NMSC-071, 116 N.M. 689, 866 P.2d 1156.

**Conclusive presumption disapproved.** — To presume conclusively that one who commits any felony has the requisite mens rea to commit first degree murder is a legal fiction which can no longer be supported where the felony is of lesser than first degree. *State v. Harrison*, 1977-NMSC-038, 90 N.M. 439, 564 P.2d 1321.

**Murder during commission of first degree felony.** — In a felony murder case where the collateral felony is a first degree felony, the res gestae test shall be used. *State v. Harrison*, 1977-NMSC-038, 90 N.M. 439, 564 P.2d 1321.

**Murder during commission of dangerous lesser degree felony.** — In a felony murder charge, involving a collateral felony, which is not of the first degree, that felony must be inherently dangerous or committed under circumstances that are inherently dangerous to support a felony murder conviction. *State v. Harrison*, 1977-NMSC-038, 90 N.M. 439, 564 P.2d 1321.

**Robbery may raise second degree murder to first.** — Robbery can be the predicate offense to raise second degree murder to first degree felony murder, under Subsection A(2), where there is a causal relationship between the robbery and the murder, the robbery is independent of or collateral to the murder, and the nature of the robbery is inherently or foreseeably dangerous to human life. *State v. Duffy*, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807.

**Dangerous lesser degree felony high probability of death.** — Of the felonies which are not of the first degree, only those known to have a high probability of death may be utilized for a conviction of first degree murder. *State v. Harrison*, 1977-NMSC-038, 90 N.M. 439, 564 P.2d 1321.

**Underlying felony need not be dangerous.** — It is irrelevant that, in the abstract, trafficking a controlled substance by possession with intent to distribute is not necessarily a dangerous crime. The standard applied to defendant was, while engaging in that particular felony, and as a consequence of the felony, defendant intended to kill. *State v. Bankert*, 1994-NMSC-052, 117 N.M. 614, 875 P.2d 370.

**Jury to determine dangerousness.** — Both the nature of the felony and the circumstances of its commission may be considered to determine whether it was inherently dangerous to human life; this is for the jury to decide, subject to review by the appellate courts. *State v. Harrison*, 1977-NMSC-038, 90 N.M. 439, 564 P.2d 1321.

It was proper for the jury to determine whether the crime of criminal sexual contact was inherently dangerous for purposes of felony murder. *State v. Mora*, 1997-NMSC-060, 124 N.M. 346, 950 P.2d 789.

**Sequence not determinative.** — If a homicide occurs within the res gestae of a felony, the felony murder provision of the statute is applicable, and whether the homicide occurred before or after the actual commission of the felony is not determinative of the applicability of the felony murder provision. *State v. Flowers*, 1971-NMSC-091, 83 N.M. 113, 489 P.2d 178; *Nelson v. Cox*, 1960-NMSC-005, 66 N.M. 397, 349 P.2d 118.

**Intent not determinative.** — Killing by person engaged in commission of a felony was first degree murder by both the principal and accessory present aiding and abetting, whether the killing was intentional or accidental. *State v. Smelcer*, 1924-NMSC-059, 30 N.M. 122, 228 P. 183.

**Voluntary intoxication no defense to first degree felony murder.** — Intoxication is not a defense to second degree murder and, therefore, is also not a defense to first degree felony murder. *State v. Pando*, 1996-NMCA-078, 122 N.M. 167, 921 P.2d 1285.

**Felony murder applicable to attempts.** — The felony murder provision is clearly applicable once conduct in furtherance of the commission of a felony has progressed sufficiently to constitute an attempt to commit the felony, and an attempt has been accomplished when an overt act, in furtherance of and tending to effect the commission of the felony, has been performed or undertaken with intent to commit the felony. *State v. Flowers*, 1971-NMSC-091, 83 N.M. 113, 489 P.2d 178.

Where the evidence clearly supported a reasonable inference that defendant had already formed the intent to take the automobile and was in the process of executing that intent when the shooting occurred and before the



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death of decedent, an instruction on the felony murder rule was appropriate. *State v. Flowers*, 1971-NMSC-091, 83 N.M. 113, 489 P.2d 178.

**Crime of attempted felony murder does not exist in New Mexico** and the trial court cannot have jurisdiction over such a charge. Since the trial court lacks jurisdiction, there is no basis for a claim of double jeopardy, and on remand, the prosecution may file an alternate, proper charge. *State v. Price*, 1986-NMCA-036, 104 N.M. 703, 726 P.2d 857, cert. quashed, 104 N.M. 702, 726 P.2d 856.

**Precise felony to be named in charge.** — Before defendant can be convicted of felony murder, he must be given notice of the precise felony with which he is being charged and the name of the felony underlying the charge must be either contained in the information or indictment or furnished to the defendant in sufficient time to enable him to prepare his defense. *State v. Hicks*, 1976-NMSC-069, 89 N.M. 568, 555 P.2d 689.

**Attempt subsumed under offense named.** — Conviction of first degree murder under the felony murder rule for an attempt to commit a felony when the charge under the indictment alleged the completion of the felony did not infringe fundamental rights of defendant, since the attempt to commit the crime charge is a necessarily included offense. *State v. Turnbow*, 1960-NMSC-081, 67 N.M. 241, 354 P.2d 533.

**Felony murder requires absence of independent intervening force.** — In a felony murder, the death must be caused by the acts of the defendant or his accomplice without an independent intervening force. *State v. Adams*, 1979-NMSC-032, 92 N.M. 669, 593 P.2d 1072; *State v. Perrin*, 1979-NMSC-050, 93 N.M. 73, 596 P.2d 516.

**Criminal sexual penetration as predicate felony.** — Applying the strict-elements test, first degree criminal sexual penetration (CSP) is not a lesser included offense of second degree murder and, accordingly, first degree CSP could properly serve as a predicate for applying the felony-murder doctrine. *State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266.

**False imprisonment as predicate felony.** — Based on evidence that the victim was forced into the back of a two-door car at gunpoint and was beaten with a gun as he was driven to an isolated location where he was shot, and that defendant and her accomplices were armed and had been drinking throughout the evening, a rational jury could find that defendant committed the crime of false imprisonment "under circumstances or in a manner dangerous to human life" as the predicate felony for felony murder. *State v. Smith*, 2001-NMSC-004, 130 N.M. 117, 19 P.3d 254.

**Shooting at or from a motor vehicle may not serve as the predicate felony for felony murder.** — Under the collateral felony rule, the predicate felony must be independent of or collateral to the homicide, and the predicate felony cannot be a lesser-included offense of second-degree murder. Shooting at or from a motor vehicle is an elevated form of aggravated battery, a lesser-included offense of second-degree murder, and thus cannot be used as a predicate for felony murder, so where defendant was convicted of first-degree felony murder, the underlying felony of which was shooting from a motor vehicle, defendant's felony murder conviction was vacated because the crime of shooting at or from a motor vehicle lacks an independent felonious purpose from that required under second-degree murder. *State v. Marquez*, 2016-NMSC-025.

**Shooting at or from a motor vehicle cannot serve as the underlying felony sustaining a felony murder conviction.** — Where defendant was convicted of first-degree felony murder predicated on the underlying felony of shooting at or from a motor vehicle, the New Mexico supreme court vacated defendant's conviction of felony murder because shooting at or from a motor vehicle is an elevated form of aggravated battery, and thus cannot be used as a predicate for felony murder. *State v. Baroz*, 2017-NMSC-030.

**Shooting at dwelling as predicate felony.** — Applying the strict-elements test, shooting at a dwelling is not a lesser included offense of second degree murder, and the offense could serve as a predicate for applying the felony-murder doctrine. *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280.

**Convictions for felony murder and shooting at a dwelling** violated defendant's right to be protected from double jeopardy. *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280.

**Insufficient evidence that defendant committed the predicate felony of shooting at a dwelling or occupied building.** — Where defendant was convicted of felony murder predicated on the felony of shooting at a dwelling or occupied building, the evidence established that defendant and his companions targeted the victims in the course of a gunfight that took place in front of a dwelling, but did not shoot at or target the dwelling. Therefore, the evidence is not sufficient to support a conviction of felony murder predicated on the felony of shooting at a dwelling. *State v. Comitz*, 2019-NMSC-011.

**Sentences for kidnapping and felony murder not double jeopardy.** — Sentences for both kidnapping and felony murder did not violate double jeopardy since the kidnapping was sufficiently separated in time and space from the murder to establish two distinct crimes. *State v. Kersey*, 1995-NMSC-054, 120 N.M. 517, 903 P.2d 828.

Where the conduct underlying defendant's convictions for aggravated kidnapping and first degree felony murder was not unitary, the district court did not violate double jeopardy by convicting and sentencing defendant for both first degree felony murder and aggravated kidnapping. *State v. Foster*, 1999-NMSC-007, 126 N.M. 646, 974 P.2d 140.

**Unitary conduct in commission of murder and robbery.** — Since the defendant's conduct in stabbing and robbing a cabdriver was unitary, the elements of armed robbery were subsumed by the elements of felony murder in the course of an armed robbery and conviction and sentencing of the defendant for both felony murder and the underlying felony of armed robbery violated double jeopardy. *State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228.

Convictions for felony murder and robbery, because they arise out of unitary conduct, violate the defendant's right to be free from double jeopardy. *State v. Duffy*, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807.

Where armed robbery provided the underlying felony for defendant's first degree murder conviction, the elements of the former crime were subsumed within the elements of the murder offense and, therefore, reversal of defendant's conviction and sentence for armed robbery was required. *State v. Foster*, 1999-NMSC-007, 126 N.M. 646, 974 P.2d 140.

**Conduct not unitary.** — Convictions for both felony murder and armed robbery do not violate double jeopardy principles where the evidence supports an inference that there were two distinct uses of force. *State v. Reyes*, 2002-NMSC-024, 132 N.M. 576, 52 P.3d 948.

**Evidence of holdups inadmissible.** — Evidence of two "holdups" perpetrated by defendant just prior to murder for which he is charged, and concerning which there is no evidence of robbery, was inadmissible. *Roper v. Territory*, 1893-NMSC-026, 7 N.M. 255, 33 P. 1014.

**Not felony murder of cofelon where killing committed by resisting victim.** — A coperpetrator of a felony cannot be charged under this section with the felony murder of a cofelon when the killing is committed by the intended robbery victim while resisting the commission of the offense. *Jackson v. State*, 1979-NMSC-013, 92 N.M. 461, 589 P.2d 1052.



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**Defendant was not entitled to a manslaughter instruction where there was no evidence that the victim was the source of the provocation.** — Where defendant was convicted of felony murder, the trial court's refusal to instruct the jury on voluntary manslaughter was not improper where defendant argued at trial that the source of the provocation was his accomplice, not the victim, and it is settled law that the victim of voluntary manslaughter must be the source of the provocation. A third party, such as an accomplice, cannot properly support a provocation defense under New Mexico law, and thus there was no evidence of provocation that could reduce the charge of murder to manslaughter. *State v. Sloan*, 2019-NMSC-019.

IV. GREATLY DANGEROUS ACTS.

**Depraved mind murder requires extremely reckless conduct** evidencing indifference for the value of human life. *State v. Ibn Omar-Muhammad*, 1985-NMSC-006, 102 N.M. 274, 694 P.2d 922.

**Indicators of a depraved mind.** — The four indicators of a depraved mind are as follows: (1) more than one person was endangered by the defendant's act, (2) the defendant's act was intentional and extremely reckless, (3) the defendant had subjective knowledge that his act was greatly dangerous to the lives of others, and (4) the defendant's act encompassed an intensified malice or evil intent. *State v. Candelaria*, 2019-NMSC-004.

In defendant's trial for depraved mind murder, there was sufficient evidence to support the conviction where defendant fired a gun at a vehicle occupied by four people, striking and killing an eight-year-old child sitting in the backseat of the vehicle, and where the evidence presented at trial established that defendant admitted firing two shots at the vehicle and that defendant knew that there were multiple people in the vehicle, and from the evidence presented the jury could have reasonably come to the conclusion that defendant acted intentionally, that shooting at a vehicle full of people qualifies as outrageously reckless conduct with a depraved kind of wantonness or total indifference for the value of human life, that defendant's act of shooting at the vehicle was greatly dangerous to the life of more than one person, and that defendant had subjective knowledge of the risk he posed to the lives of those in the vehicle. *State v. Candelaria*, 2019-NMSC-004.

**No such crime as attempted "depraved mind" murder.** — The crime of attempted "depraved mind" murder does not exist since in order to convict for such an offense, the jury would have to find that the defendant intended to perpetrate an unintentional killing, a logical impossibility. *State v. Johnson*, 1985-NMCA-074, 103 N.M. 364, 707 P.2d 1174, cert. quashed, 103 N.M. 344, 707 P.2d 552.

**Defendant must subjectively know of risks.** — The depraved mind provision of this section requires proof that the defendant had subjective knowledge of the risk involved in his actions. *State v. Ibn Omar-Muhammad*, 1985-NMSC-006, 102 N.M. 274, 694 P.2d 922.

**Subjective knowledge that acts are "greatly dangerous to the lives of others".** — Where defendants fired at a truck they presumed was empty, killing the victim inside, subjective knowledge that their acts were greatly dangerous to the lives of others is present if those acts were very risky and, under the circumstances known to them, the defendants should have realized this very high degree of risk. *State v. McCrary*, 1984-NMSC-005, 100 N.M. 671, 675 P.2d 120.

**Intoxication may be considered.** — In a prosecution for depraved mind murder, evidence of intoxication may be considered by the jury when determining the required mens rea of "subjective knowledge," and failure to give the defendant's instruction on intoxication was reversible error. *State v. Brown*, 1996-NMSC-073, 122 N.M. 724, 931 P.2d 69.

**Vehicular homicide by reckless conduct** is lesser included offense of depraved mind murder by vehicle. *State v. Ibn Omar-Muhammad*, 1985-NMSC-006, 102 N.M. 274, 694 P.2d 922, modified by *State v. Cleve*, 1999-NMSC-017, 127 N.M. 240, 980 P.2d 23.

V. SECOND DEGREE MURDER.

**Second degree murder statute is designed** to discourage and punish the unlawful killing of people. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

**General-intent crime.** — As a "knowledge crime," second degree murder is a general-intent crime. *State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266.

**Knowledge required of defendant.** — Second degree murder requires that the defendant know that his actions create a strong probability of death or great bodily harm. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

**The district court erred in modifying the mens rea element in the uniform jury instruction for second-degree murder.** — In defendant's trial for second-degree murder, where defendant claimed that he did not know that his shotgun was loaded prior to shooting and killing his friend, the district court erred in accepting the state's modified jury instruction which changed the mens rea element for second-degree murder to "knew or should have known" that defendant's acts created a strong probability of death or great bodily harm to the victim, because adding "should have known" to the mens rea element was a misstatement of law, and when a jury instruction directs the jury to find guilt based upon a misstatement of the law, a finding of juror misdirection is unavoidable. The second-degree murder statute's plain language and New Mexico's uniform jury instructions on second-degree murder require that the defendant possess knowledge of the probable consequences of his or her acts. *State v. Suazo*, 2017-NMSC-011.

**Sufficient evidence supports retrial after reversal of second-degree murder conviction.** — Where defendant's conviction for second-degree murder was reversed on appeal, there was sufficient evidence to support a retrial where it was undisputed that defendant killed his friend with a shotgun and there was sufficient evidence to support a reasonable jury's conclusion that, based on ambiguous evidence regarding who loaded the gun and when it was loaded, and the steps defendant took after the crime to conceal evidence, that defendant knew the gun was loaded and knew that pulling the trigger would cause great bodily harm or death to the victim, and that there was not enough evidence to constitute sufficient provocation to reduce the crime to manslaughter. *State v. Suazo*, 2017-NMSC-011.

**Element of deliberation excluded.** — The legislature intended to exclude from second degree murder the element of deliberation but not to exclude otherwise intentional killings from that crime; under New Mexico's statutory scheme, murder consists of two categories of intentional killings: those that are willful, deliberate, and premeditated; and those that are committed without such deliberation and premeditation but with knowledge that the killer's acts create a strong probability of death or great bodily harm. *State v. Garcia*, 1992-NMSC-048, 114 N.M. 269, 837 P.2d 862.

**Includes intentional murder.** — Fact that 1980 amendments require only the elements of a killing in the performance of an act which the defendant knows creates the requisite probability does not mean that second degree murder excludes intentional murders. *State v. Johnson*, 1985-NMCA-074, 103 N.M. 364, 707 P.2d 1174, cert. quashed, 103 N.M. 344, 707 P.2d 552.



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**Mens rea with respect to actual victim not necessary.** — To be guilty of second degree murder, it is sufficient that the defendant have the necessary mens rea with respect to the individual toward whom the defendant's lethal act was directed; it is not necessary, however, that the defendant have this mens rea with respect to the actual victim of that act. *State v. Lopez*, 1996-NMSC-036, 122 N.M. 63, 920 P.2d 1017.

**Second degree murder, assisted suicide, not same offense.** — The second degree murder statute (Subsection B) is aimed at preventing an individual from actively causing the death of someone contemplating suicide, whereas the assisting suicide statute (Section 30-2-4 NMSA 1978) is aimed at preventing an individual from providing someone contemplating suicide with the means to commit suicide. Thus, the two statutes do not condemn the same offense. *State v. Sexson*, 1994-NMCA-004, 117 N.M. 113, 869 P.2d 301, cert. denied, 117 N.M. 215, 870 P.2d 753.

**Suicide pact not exemption from conviction for murder.** — The existence of a suicide pact does not exempt someone from a conviction for committing murder. However, that general rule may not apply if the means of attempted suicide used presents the same risk to both of the parties at the same time, such as when a couple drive off a cliff together. Such is not the case when the victim is killed by a rifle, the trigger of which is pulled by the defendant. *State v. Sexson*, 1994-NMCA-004, 117 N.M. 113, 869 P.2d 301, cert. denied, 117 N.M. 215, 870 P.2d 753.

There was enough evidence to support a conviction of second degree murder because there was sufficient evidence to show that the defendant actively participated in a suicide by holding the gun to the victim's head and pulling the trigger. *State v. Sexson*, 1994-NMCA-004, 117 N.M. 113, 869 P.2d 301, cert. denied, 117 N.M. 215, 870 P.2d 753.

**Cause of death.** — Evidence that defendant orchestrated the beating of the victim, that he used both his fists and a baseball bat to hit the victim, that the victim's condition worsened shortly thereafter, and that the victim died, permitted the jury to make a reasonable inference that the acts of the defendant constituted a significant cause of the victim's death and that there was no other independent event that broke the chain of events from the beating to the victim's death. *State v. Huber*, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096, cert. denied, 2006-NMCERT-007, 140 N.M. 279, 142 P.3d 360.

**Sufficient evidence of second degree murder.** — Where defendant lived with the victim for approximately one and a half months before the victim disappeared; a few weeks later, the victim's decomposed body was discovered wrapped in a blue air mattress and sheets, and covered with a mattress in an alley approximately 500 feet from defendant's apartment; defendant's parent testified that the parent sent a blue air mattress and a set of sheets to defendant; grid marks on the air mattress resembled the grid marks of a shopping cart; there was a shopping cart at the scene; shopping carts were found in defendant's apartment; DNA found on a pair of jeans near the body provided a possible link between the body and defendant; and the victims' blood was found on the carpet in defendant's apartment, the evidence was sufficient to permit the jury to find defendant guilty of second degree murder. *State v. Schwartz*, 2014-NMCA-066, cert. denied, 2014-NMCERT-006.

**Sufficient evidence of second degree murder.** — In defendant's murder trial, where the evidence showed that defendant was in the passenger seat of a truck that drove by the victim's residence, that a witness observed the "muzzle flash" from shots fired from the passenger side window of the truck in which defendant was the passenger, that the shots fired resulted in the victim's death, and where defendant admitted at trial that he knew that shooting in the direction of a group of people in a residential area presented a danger to human life, there was sufficient evidence for a jury to find beyond a reasonable doubt that defendant killed the victim and knew that his acts created a strong probability of death or great bodily harm to the victim or any other human being; the evidence was sufficient to support a conviction of second-degree murder. *State v. Baroz*, 2017-NMSC-030.

## VI. MANSLAUGHTER.

**Distinction between murder and manslaughter.** — To reduce the killing from murder to voluntary manslaughter all that is required is sufficient provocation to excite in the mind of the defendant such emotions as either anger, rage, sudden resentment or terror as may be sufficient to obscure the reason of an ordinary man, and to prevent deliberation and premeditation, and to exclude malice, and to render the defendant incapable of cool reflection. *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382.

**Manslaughter is included in charge of murder.** *State v. Rose*, 1968-NMSC-091, 79 N.M. 277, 442 P.2d 589, cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969); *State v. Lopez*, 1942-NMSC-064, 46 N.M. 463, 131 P.2d 273; *State v. La Boon*, 1960-NMSC-118, 67 N.M. 466, 357 P.2d 54.

Under appropriate circumstances, where there is evidence that the defendant acted as a result of sufficient provocation, a charge of manslaughter could properly be said to be included in a charge of murder, and, accordingly, it would not be error to submit N.M.U.J.I. Crim. 2.20 (*now see* UJI 14-220) to the jury; however, it cannot seriously be maintained that manslaughter is invariably "necessarily included" in murder, since different kinds of proof are required to establish the distinct offenses. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

**One indicted of murder could be found guilty of manslaughter,** provided there was sufficient evidence on that issue. *United States v. Densmore*, 1904-NMSC-004, 12 N.M. 99, 75 P. 31.

**Effect of unsupported manslaughter conviction.** — It is error for the court to submit to the jury an issue of whether defendant was guilty of voluntary manslaughter when the facts establish either first or second degree murder, but could not support a conviction of voluntary manslaughter and, accordingly, upon acquittal of murder and conviction of voluntary manslaughter, a reversal and discharge of the accused is required. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

**Instruction not appropriate.** — In prosecution for first degree murder, where the uncontradicted evidence was that defendant killed her husband with two and possibly three well placed shots into his person, which shots were fired at close range while the victim was lying down on the couch and while defendant stood over him, immediately after a discussion about the victim leaving the defendant, and that the shots came from a pistol purchased by appellant earlier the day of the homicide, no foundation existed for instruction on involuntary manslaughter. *State v. Gardner*, 1973-NMSC-034, 85 N.M. 104, 509 P.2d 871, cert. denied, 414 U.S. 851, 94 S. Ct. 145, 38 L. Ed. 2d 100 (1973).

**Voluntary manslaughter instruction refused where no provocation.** — Defendant could not create the provocation which would reduce murder to manslaughter, and his requested instruction on attempted voluntary manslaughter was therefore properly refused. *State v. Durante*, 1986-NMCA-024, 104 N.M. 639, 725 P.2d 839.

Defendant in first degree murder prosecution was not entitled to voluntary manslaughter instruction where there was no evidence of provocation on the part of victim. *State v. Brown*, 1998-NMSC-037, 126 N.M. 338, 969 P.2d 313.



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**Use of too great force as manslaughter.** — Defendant's choice of deadly force when confronted with a possible battery of less than deadly force would sustain a conviction of voluntary manslaughter, but not for murder. *State v. McLam*, 1970-NMCA-129, 82 N.M. 242, 478 P.2d 570.

## VII. DEFENSES.

**General rule as to insanity.** — The rule of law applicable to the defense of insanity in criminal cases is that, at the time of committing the act, the accused, as a result of disease of the mind, (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it. *State v. White*, 1954-NMSC-050, 58 N.M. 324, 270 P.2d 727.

**The state met its burden of showing that defendant was sane when he murdered the victim.** — Where defendant was convicted of first-degree murder and third-degree criminal sexual penetration (CSP), based on defendant's admission that he killed the victim and then had sexual intercourse with the victim after she died, and where defendant argued that the state failed to present sufficient evidence that he was sane at the time the crimes were committed, but where the state presented expert testimony that although defendant suffered from schizophrenia, he could have prevented himself from committing the crimes, the state met its burden by presenting evidence sufficient for a reasonable juror to find that defendant could have stopped himself from killing the victim, despite defendant's schizophrenia diagnosis. *State v. Martinez*, 2021-NMSC-012.

**Proof of derangement short of insanity.** — In a murder trial, proof of mental derangement short of insanity is admissible, as evidence of lack of deliberation or premeditated design; this contemplates full responsibility, but only for the crime actually committed. *State v. Padilla*, 1959-NMSC-100, 66 N.M. 289, 347 P.2d 312.

**Reduction of charge to second degree murder.** — The court should have instructed the jury that they might consider mental defects and mental condition in ascertaining whether or not defendant had the power to deliberate the acts charged, so as to reduce the charge from first degree murder to second degree murder. *State v. Padilla*, 1959-NMSC-100, 66 N.M. 289, 347 P.2d 312.

**No reduction of charge to manslaughter.** — While a disease or defect of the mind may render an accused incapable of cool deliberation and premeditation and may be sufficient to reduce the charge against him from first to second degree murder, it does not follow that such mental condition may reduce the charge to voluntary manslaughter. *State v. Chambers*, 1972-NMSC-069, 84 N.M. 309, 502 P.2d 999.

**Use of expert evidence on incapacity.** — Nothing compels the trier of the facts to disregard the nonexpert testimony and to accept the opinions of defendant's medical experts as to his probable state of mind and incapacity to control his will at the time of committing a criminal act. The jury is not required to accept these expert opinions and disregard all other evidence bearing on the question of his mental and emotional state, nor is the trial court bound to accept these expert opinions and dismiss the charges of first and second degree murder. *State v. Smith*, 1969-NMCA-016, 80 N.M. 126, 452 P.2d 195.

**Voluntary intoxication is no defense to murder in second degree.** *State v. Gray*, 1969-NMCA-102, 80 N.M. 751, 461 P.2d 233; *State v. Williams*, 1966-NMSC-145, 76 N.M. 578, 417 P.2d 62.

In this state, no specific intent to kill is required for a conviction for second degree murder; hence, voluntary intoxication is no defense to such a charge. *State v. Tapia*, 1970-NMSC-004, 81 N.M. 274, 466 P.2d 551.

**Intoxication may reduce depraved mind murder.** — Evidence of intoxication may be considered to reduce first degree depraved mind murder to second degree murder, but it may not be used to reduce second degree murder to voluntary manslaughter or involuntary manslaughter, or to completely excuse the defendant from the consequences of his unlawful act. *State v. Brown*, 1996-NMSC-073, 122 N.M. 724, 931 P.2d 69.

**Jury to determine effect of intoxication.** — In a homicide case the defendant is entitled to have the jury determine the degree and effect of his intoxication upon his mental capacity and deliberative powers; however, the evidence as to intoxication must be substantial and must relate to defendant's condition as of the time of the commission of the homicide, or be so closely related in time that it can reasonably be inferred that the condition continued to the time of the commission of the homicide. *State v. Williams*, 1966-NMSC-145, 76 N.M. 578, 417 P.2d 62.

**Lack of justification not element of homicide.** — Every killing of a person by another is presumed to be unlawful, and only when it can be shown to be excusable or justifiable will it be held otherwise; when the evidence permits, excuse of justification may be raised as a defense and decided by the fact finder, but initially, the absence of excuse or justification is not an element of homicide to be proven by the prosecution. *State v. Noble*, 1977-NMSC-031, 90 N.M. 360, 563 P.2d 1153.

**Defendant to raise reasonable doubt.** — Defendant, of course, did not have the burden of proving that he killed in self-defense. All he was required to do was produce evidence which would raise a reasonable doubt in the minds of the jurors. *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382.

**Issue of self-defense for jury.** — The line of demarcation between a homicide which amounts to voluntary manslaughter and one which amounts to justifiable homicide in self-defense is not always clearly defined and depends upon the facts of each case as it arises. Those facts are for the jury, under instructions from the court, laying down the principles of law governing the same, as was done in this case. *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382.

**Defendant not entitled to self-defense instruction.** — In defendant's murder trial, where the evidence demonstrated that defendant provoked the situation when defendant and his father drove to the victim's residence and shouted "southside," and where the victim and others in the yard of the residence approached the truck in which defendant was the passenger, it was not reasonable for defendant to have used deadly force, and because defendant voluntarily entered into the situation, he cannot avail himself of the law of self-defense; the district court did not err in rejecting defendant's self-defense instruction. *State v. Baroz*, 2017-NMSC-030.

**Instruction improper.** — Defendant in homicide prosecution claiming self-defense was not entitled to instruction on justifiable homicide under belief that deceased was about to have carnal intercourse with defendant's wife. *State v. Greenlee*, 1928-NMSC-020, 33 N.M. 449, 269 P. 331.

**Justifiable killing.** — Where defendant was violently assaulted by deceased, and then defendant drew his pistol and fired two shots at deceased which killed him instantly, such killing was not cruel and unusual within statutes defining murder, since the killing was justifiable. *Territory v. Fewel*, 1888-NMSC-018, 5 N.M. 34, 17 P. 569.

**Defense of chastity.** — In murder prosecution, the refusal of an instruction that the defense of one's person included, in the case of a woman, the protection of her chastity and that if, under the circumstances, she had reason



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to believe that the attack would lead to the sexual abuse of her person, she would be justified in using such force as was necessary, even to the extent of taking the life of her assailant, to protect her honor and chastity and her body from sexual abuse, was erroneous where the defense was that accused killed decedent to protect herself from an attempted rape. *State v. Martinez*, 1924-NMSC-075, 30 N.M. 178, 230 P. 379.

**Defense of habitation.** — Where defense of habitation was invoked in homicide case, the danger or apparent danger was to be considered from standpoint of prisoner at time shot was fired, and not according to facts as they developed at trial. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

Instruction that injury to dwelling to be felonious so as to justify killing must be of a substantial character constituted prejudicial error. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

**Killing in prevention of crime.** — A well-founded belief that a known felony was about to be committed will extenuate a homicide committed in prevention of the supposed crime, and this upon a principle of necessity; but when the necessity ceases, and the supposed felon flees, and thereby abandons his proposed design, a killing in pursuit, however well-grounded the belief may be that he intended to commit a felony, will not extenuate the offense of the pursuer. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

**Murder while resisting arrest.** — Killing of person making authorized arrest is murder but where the arrest is illegal, the offense is reduced to manslaughter, unless the proof shows express malice toward the deceased. If the outrage of an attempted illegal arrest has not excited the passions, a killing will be murder. *Territory v. Lynch*, 1913-NMSC-038, 18 N.M. 15, 133 P. 405, *overruled by State v. Chamberlain*, 1991-NMSC-094, 112 N.M. 723, 819 P.2d 673.

**Instruction not proper in absence of awareness of arrest.** — Where defendant in homicide case was unaware that an attempt to arrest him was to be made, his action in killing the officer was to be viewed as in any other case, and instruction as to illegality of arrest reducing the offense to manslaughter was properly refused. *State v. Middleton*, 1920-NMSC-066, 26 N.M. 353, 192 P. 483.

**Murder while resisting search.** — Homicide committed in resisting deputy sheriff who was searching defendant's house without a warrant was first degree murder if such resistance constituted a felony, as when the deputy had been engaged in serving any process, rule or order of court, or judicial writ, and instruction leaving jury to determine degree of murder was erroneous. *State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211.

## VIII. INDICTMENT AND INFORMATION.

**Open charge of murder sufficient notice.** — A charge of murder in violation of statutes pertaining to first and second degree murder and voluntary and involuntary manslaughter is not a charge of mutually exclusive crimes, nor is it a charge of distinct and separate offenses; rather, the charge is an open charge of murder, a form of charging approved, under which the jury is to be instructed on the degrees of the unlawful killing for which there is evidence, and it gave defendant notice that he must defend against a charge of unlawfully taking a human life. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170, *overruled on other grounds by State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

**Allegation of murderous intent not required.** — Murder indictment may omit direct charge of purpose or intent to kill, as part of overt act alleged as a crime. *Territory v. Montoya*, 1912-NMSC-015, 17 N.M. 122, 125 P. 622.

**Transferred intent need not be charged.** — Where the defendant, indicted on an "open" charge of murder, contends that since he was not charged under the specific transferred intent subsection that the instruction on that theory was improper, the defendant misapprehends the nature of this theory. Transferred intent is merely the doctrine that allows the elements of malice or intent to be demonstrated when an "innocent" nonoriginal victim is killed, and therefore, it is not necessary to charge the defendant with transferred intent because the indictment specifically informed the defendant of the crime and what he must be prepared to meet. *State v. Hamilton*, 1976-NMSC-082, 89 N.M. 746, 557 P.2d 1095.

**Aggravating circumstances not alleged.** — Death penalty proceedings are not precluded where the indictment does not allege the existence of aggravating circumstances. Since aggravating circumstances are not elements of the crime of murder, an indictment is not deficient for failure to allege them. *State v. Morton*, 1988-NMCA-063, 107 N.M. 478, 760 P.2d 170 (decided under prior law).

**Charge sufficiently specific.** — The charge, "by shooting him with a gun," gave defendant sufficient particulars of the offense alleged to enable the defendant to prepare a defense. *State v. Smith*, 1966-NMSC-128, 76 N.M. 477, 416 P.2d 146.

**Adequate charge on cause of victim's death.** — An indictment for first degree murder, in other respects sufficient, which concluded in the following language, "did strike and beat the said Juan Trujillo, giving to him, the said Juan Trujillo, in and upon the top of the head of him the said Juan Trujillo, one mortal contusion bruise, fracture and wound, of which said mortal wound, the said Juan Trujillo thence continually languished until . . . he there died" charged that deceased died of the mortal wound alleged to have been inflicted by defendant. *Territory v. Lobato*, 1913-NMSC-030, 17 N.M. 666, 134 P. 222, *aff'd*, 242 U.S. 199, 37 S. Ct. 107, 61 L. Ed. 244 (1916).

**District attorney may obtain indictment for first degree murder following second degree indictment.** — Where a defendant is originally indicted for second degree murder, but later the district attorney reviews the case and decides the evidence supports first degree murder, he may seek and obtain a second indictment, this time for first degree murder. *State v. Sena*, 1983-NMSC-005, 99 N.M. 272, 657 P.2d 128.

**May not charge first degree murder in information based on second degree bind-over.** — A prosecutor is not authorized to charge first degree murder in an information based on a magistrate's bind-over order for trial on second degree murder. *State v. McCrary*, 1982-NMCA-003, 97 N.M. 306, 639 P.2d 593.

**Indictment charging first degree murder would support second degree murder conviction.** *Territory v. McGinnis*, 1900-NMSC-019, 10 N.M. 269, 61 P. 208, *overruled on other grounds by State v. Deltenre*, 1966-NMSC-187, 77 N.M. 497, 424 P.2d 782, cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

**Waiver of indictment not constitutionally required.** — Defendant's rights under the fifth and fourteenth amendments to the United States constitution were not violated when his murder prosecution was based upon an information filed by the district attorney, despite the fact that he never waived his right to be tried by indictment. *State v. Vaughn*, 1971-NMSC-015, 82 N.M. 310, 481 P.2d 98, cert. denied, 403 U.S. 933, 91 S. Ct. 2262, 29 L. Ed. 2d 712 (1971).

**Information charging murder sufficient.** — Information charging that defendant did "murder" a named person was sufficient apprisal of offense charged. *State v. Roy*, 1936-NMSC-048, 40 N.M. 397, 60 P.2d 646.



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**Information permits submission of felony murder.** — Under an information charging murder in the ordinary form, it was not improper to permit introduction of proof that murder was committed in perpetrating a felony. *State v. Smith*, 1947-NMSC-035, 51 N.M. 184, 181 P.2d 800.

**Information permits voluntary manslaughter.** — Although information charged only first degree murder, submission of voluntary manslaughter was not error. *State v. Burrus*, 1934-NMSC-036, 38 N.M. 462, 35 P.2d 285.

**Appropriate crime charged.** — The offense of murder and the offense of child abuse resulting in the child's death are not the same, nor is the same proof required for the two offenses, since generally speaking, murder requires an intent, whereas child abuse does not require an intent, and therefore, the indictment properly charged defendant with first degree murder. *State v. Gutierrez*, 1975-NMCA-121, 88 N.M. 448, 541 P.2d 628.

## IX. EVIDENCE AND PROOF.

**Evidence sufficient for conviction.** — Where defendant testified that the victim pounded on the door of defendant's house, that the victim stated that the victim would spray defendant's house with bullets, and that as the victim started to drive away, the victim leaned over in a way that made defendant believe that the victim was reaching for a gun; defendant then shot and killed the victim; and there was evidence that the victim had been shot in the back, there was sufficient evidence to permit the jury to determine that defendant was not acting in self-defense or as a result of legally sufficient provocation and to support defendant's conviction of second degree murder. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2013-NMCERT-012.

**Sufficient evidence to prove first-degree murder.** — Where defendant was charged with first-degree murder, aggravated burglary, unlawful taking of a motor vehicle, larceny of a firearm, and theft of a credit card, and where the state presented evidence that defendant possessed a rifle of the same caliber used to kill the victim, that he threatened someone with the rifle on the same day of the murder and just across the street from the victim's home, that DNA was present on a water bottle found in the victim's home, that, after the murder, defendant drove the victim's truck, that he attempted to sell the victim's jewelry, that he carried a pistol matching the description of the victim's stolen gun, that he recruited accomplices to use the victim's stolen credit cards and checks to commit additional crimes, that he admitted to multiple people that he shot a woman after he broke into her home, and that he instructed his girlfriend where to find more of the victim's stolen property, there was sufficient evidence that a rational jury could find beyond a reasonable doubt that defendant committed the murder. *State v. Stallings*, 2020-NMSC-019.

**Aggravating circumstances outweigh mitigating circumstances.** — Standard of proof in the weighting process that the jury must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances is neither constitutionally nor statutorily required. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

**Admission of unavailable accomplice's tape recorded custodial police interview** was not harmless error because it provided key evidence directly inculpating defendant convicted of felony murder, and remaining circumstantial evidence against him, although strong, was disputed. *State v. Johnson*, 2004-NMSC-029, 136 N.M. 348, 98 P.3d 998.

**Defendant entitled to details.** — A defendant in a murder case is entitled to know the exact date and the approximate time of day, the exact place where the body was found, and a description and identification details of the means or weapon used. *State v. Mosley*, 1965-NMSC-081, 75 N.M. 348, 404 P.2d 304.

**Admissibility of evidence in discretion of court.** — The admissibility of evidence is a matter addressed to the sound discretion of the trial court. *State v. Armstrong*, 1956-NMSC-053, 61 N.M. 258, 298 P.2d 941.

**Corpus delicti rule.** — A defendant's extrajudicial statements may be used to establish the corpus delicti when the prosecution is able to demonstrate the trustworthiness of the confession and introduce some independent evidence of a criminal act. *State v. Wilson*, 2011-NMSC-001, 149 N.M. 273, 248 P.3d 315.

**Proof of corpus delicti.** — Where defendant was charged with first degree abuse of a child resulting in death; the child died without any physical signs of trauma; defendant confessed to suffocating the child with a blanket; the evidence confirmed the statements made by defendant in the confession; the evidence also showed that the child was in normal respiratory and cardiovascular health on the day prior to the child's death, the child had not been breathing before the child was taken to an emergency room even though there was no underlying medical condition that would kill the child, defendant made false statements to police and medical personnel about the child's medical record suggesting that defendant portrayed the child as chronically sick to cover up a crime, and the cause of death was consistent with a blockage to the mouth and nose, the corpus delicti of the crime was established because the evidence corroborated the trustworthiness of defendant's confession and independently showed that the child died from a criminal act. *State v. Wilson*, 2011-NMSC-001, 149 N.M. 273, 248 P.3d 315.

To prove the corpus delicti in a homicide case, the state must show that the person whose death is alleged is in fact dead and that his death was criminally caused. *State v. Coulter*, 1973-NMCA-019, 84 N.M. 647, 506 P.2d 804.

In homicide cases the corpus delicti is established upon proof of the death of the person charged in the information or indictment, and that the death was caused by the criminal act or agency of another. *State v. Armstrong*, 1956-NMSC-053, 61 N.M. 258, 298 P.2d 941.

In homicide cases, if it was shown that person whose death was alleged in indictment was in fact dead, and that his death was criminally caused, the corpus delicti was sufficiently proven; circumstantial evidence would be sufficient, and eyewitness testimony was unnecessary. *State v. Chaves*, 1921-NMSC-105, 27 N.M. 504, 202 P. 694.

**Proof adequate.** — Where it is obvious from the evidence that deceased died as a result of wounds inflicted by someone with some sharp object at the time in question, the corpus delicti has been adequately proven. *State v. Casaus*, 1963-NMSC-194, 73 N.M. 152, 386 P.2d 246.

**Effect of lack of proof of corpus delicti.** — Where there was no substantial evidence of corpus delicti in homicide case, verdict finding defendant guilty of second degree murder would be set aside on appeal. *State v. Woodman*, 1920-NMSC-028, 26 N.M. 55, 188 P. 1101.

**"Substantial evidence" of cause of death.** — Where the pathologist testified that death " . . . was the direct result of complications from the bullet wounds, the complications being infection . . . ," and that the cause of death was gunshot wounds, this is "substantial evidence" as that term has been defined in New Mexico decisions. *State v. Ewing*, 1968-NMCA-071, 79 N.M. 489, 444 P.2d 1000.

**Effect of medical treatment of victim on cause of death.** — Surgical operation undertaken to save one from the probable fatal effect of a wound did not preclude homicide conviction unless it clearly appeared that maltreatment of the wound, and not the wound itself, was the sole



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cause of the death. *Territory v. Yee Dan*, 1894-NMSC-004, 7 N.M. 439, 37 P. 1101.

**Use of circumstantial evidence.** — Circumstantial evidence is sufficient to establish guilt in a prosecution for homicide; those circumstances must point unerringly to the defendant and be incompatible with and exclude every reasonable hypothesis other than guilt. *State v. Coulter*, 1973-NMCA-019, 84 N.M. 647, 506 P.2d 804.

**Threats made by accused admissible.** — Threats made by accused to kill some person not definitely designated were admissible with other explanatory matter on issue of corpus delicti especially when made shortly before commission of crime. *State v. Martinez*, 1919-NMSC-022, 25 N.M. 328, 182 P. 868.

**Evidence of motive.** — Evidence of facts which could not operate on mind of defendant were inadmissible to show motive. *State v. Allen*, 1920-NMSC-015, 25 N.M. 682, 187 P. 559.

**Deceased's reputation and disposition.** — Trial court in second degree murder prosecution properly excluded proffered testimony which defense wanted to use to corroborate the testimony of other witnesses which showed the deceased's reputation and disposition for fighting, his violent temper and his conduct as a bully. *State v. Snow*, 1972-NMCA-138, 84 N.M. 399, 503 P.2d 1177, cert. denied, 84 N.M. 390, 503 P.2d 1168.

**Escape evidence admitted to show depraved mind.** — District court did not abuse its discretion in determining that evidence of defendant's unauthorized departure from a Colorado juvenile detention facility was admissible at his trial for murder, where the court properly could have concluded that defendant's reasons for eluding the police were circumstantial evidence relevant to the jury's determination of whether his acts indicated a depraved mind regardless of human life and whether he had a subjective knowledge of the risk involved in his actions. *State v. Omar-Muhammad*, 1987-NMSC-043, 105 N.M. 788, 737 P.2d 1165.

**Polygraph test results.** — Polygraph test results may be admitted when qualifications of the polygraph operator establish his expertise, there is testimony to establish the reliability of the testing procedure employed as approved by the authorities in the field and there is evidence to show the validity of the tests made on the particular subject. However, requirements that polygraph tests be stipulated to by both parties and that no objection be made at trial to their introduction are mechanistic, inconsistent with due process and repugnant to the New Mexico rules of evidence. *State v. Dorsey*, 1975-NMSC-040, 88 N.M. 184, 539 P.2d 204 (affirming court of appeals, which had ruled polygraph results offered by defendant admissible to show intent and provocation); *aff'g*, 1975-NMCA-022, 87 N.M. 323, 532 P.2d 912.

**Photographs of body.** — Question of inflammation and possible prejudice, created by admission into evidence of photographs of body of alleged victim in murder trial, is left to the discretion of the trial judge absent a showing of abuse of that discretion. *State v. Gardner*, 1973-NMSC-034, 85 N.M. 104, 509 P.2d 871, cert. denied, 414 U.S. 851, 94 S. Ct. 145, 38 L. Ed. 2d 100 (1973).

The admission into evidence in a murder trial of photographs of the decedent taken during her autopsy is proper if they are reasonably relevant to material issues in the trial, showing the identity of the victim, and the number and location of the wounds inflicted upon her body. *State v. Ho'o*, 1982-NMCA-158, 99 N.M. 140, 654 P.2d 1040, cert. denied, 99 N.M. 148 655 P.2d 160.

Photographs of the body of the victim were relevant to the issues of the case in that they were used by the doctors to describe the injuries and condition of the body, and served to clarify and illustrate the testimony of witnesses and to corroborate other evidence. The admission of photographs into evidence rests within the sound discretion of the trial court and absent a showing of an abuse the trial court's discretion will not be disturbed. *State v. Coulter*, 1973-NMCA-019, 84 N.M. 647, 506 P.2d 804.

**Admission of hearsay constitutionally impermissible under circumstances.** — Admission of extra-judicial statements attributed to children of murder victim was reversible error where the children were not called as witnesses, because defendant was thereby denied his constitutional right of confrontation. *State v. Lunn*, 1971-NMCA-048, 82 N.M. 526, 484 P.2d 368.

**Effect of admission of illegal evidence.** — In prosecution for first or second degree murder under Laws 1891, ch. 80, §§ 4, 5, 1063, 1064, 1897 C.L., repealed by Laws 1907, ch. 36, § 23, verdict of first degree murder could not stand unless it was apparent that no injury resulted from admission of illegal evidence. *Territory v. Armijo*, 1894-NMSC-003, 7 N.M. 428, 37 P. 1113.

**Transcript of taped confession.** — Where the state conceded (during closing arguments) that the transcript of defendant's taped confession was erroneous, and the district court, counsel for the prosecution, and the defense counsel urged the jury to rely upon the tapes over the transcript as evidence, any misleading statements in the transcript were adequately corrected so that defendant's due process rights were not violated. *State v. Boeglin*, 1987-NMSC-002, 105 N.M. 247, 731 P.2d 943.

**Accomplice testimony sufficient.** — Evidence, consisting primarily of accomplice testimony, was sufficient to allow a reasonable jury to find that defendant participated in a conspiracy to commit a murder, and actually participated in the murder, as well as the attempted murder of another victim. *State v. Sarracino*, 1998-NMSC-022, 125 N.M. 511, 964 P.2d 72.

**Evidence that defendant and the defendant's accomplice threw victim into the well while he was alive,** then covered and finally resealed the well supports an inference that they reached an agreement to kill victim in the course of the robbery, and that both intended his death, supports the jury's verdict of guilty of first degree (felony) murder. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754. *overruled on other grounds by State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

**Sufficient evidence of first-degree willful, deliberate and premediated murder.** — Where defendant was charged with first-degree murder, and where at trial, defendant's first wife testified that defendant brought her to the crime scene to help him locate the shotgun shells used in the murder, that she saw the victim's body lying face down on the floor of the boxcar where the victim lived, that she knew defendant destroyed or concealed the clothes and shoes he wore during the murder, and that she lied to police about defendant's role in the killing because she was afraid of him, and where defendant's second wife testified that defendant told her that he shot the victim because the victim molested defendant's first wife when she was a teenager, and where an expert witness's testimony, that the victim died of being shot in the head with a shotgun fired at close range, corroborated defendant's ex-wives' testimony, there was sufficient evidence to support defendant's conviction for willful, deliberate and premeditated murder. *State v. Gutierrez*, 2021-NMSC-008.

**Evidence sufficient for conviction.** — Where defendant admitted that defendant shot toward a house multiple times with two different weapons while a party was in progress; other witnesses testified that defendant opened fire on the house without any one firing back at defendant; and the shots defendant fired at the house killed one victim, there was sufficient evidence to support defendant's felony murder conviction. *State v. Torrez*, 2013-NMSC-034.

Where, following a fight at a bar between the victim and a conspirator, defendant and a conspirator assaulted the victim at a conspirator's residence and tied the victim up; defendant guarded the victim with a knife; another conspirator



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gave the victim an overdose of heroin; defendant and conspirators carried the victim to the victim's car and drove the car to a church; the victim was still alive; defendant tried three times to snap the victim's neck, a conspirator tried to suffocate the victim with a plastic bag, and defendant tried to strangle the victim with the victim's shoelaces; defendant and the conspirators left the church; after consulting with other conspirators, defendant and a conspirator returned to the church and set the victim and the victim's car on fire; and the victim's death was caused by the drug overdose and the fire, there was substantial evidence that defendant willfully, deliberately murdered the victim. *State v. Gallegos*, 2011-NMSC-027, 149 N.M. 704, 254 P.3d 655.

Evidence that on the day deceased was shot, defendant visited the deceased's home on three different occasions, an argument developing between the two during the second visit and that when defendant returned for the third time he shot a witness and the deceased, along with the inferences the jury was entitled to draw from the evidence, was sufficient to sustain conviction of first degree murder. *State v. Riggsbee*, 1973-NMSC-109, 85 N.M. 668, 515 P.2d 964.

Where defendant had armed himself with a rock before entering victim's apartment, admitted striking the victim with the rock when she caught him in the house, and stated that she fell and hit her head against a table, the facts and circumstances unerringly established appellant's guilt of first degree murder beyond any reasonable doubt. *State v. Jimenez*, 1972-NMSC-073, 84 N.M. 335, 503 P.2d 315; *State v. Sanders*, 1994-NMSC-043, 117 N.M. 452, 872 P.2d 870; *State v. Rojo*, 1999-NMSC-001, 126 N.M. 438, 971 P.2d 829; *State v. Trujillo*, 2002-NMSC-005, 131 N.M. 709, 42 P.3d 814.

There was sufficient evidence to support a conviction for second degree murder where there was testimony that the defendant was present at the stabbing scene and argued with the victim, the knife belonged to the defendant, a witness saw the defendant with the knife, observed him open it, and testified that he washed blood off of it and instructed the witness to dispose of it, and where nobody else was involved in the altercation, the medical examiner testified that the fatal stab wound could have been made with the defendant's knife, and the defendant was apprehended fleeing from the scene shortly after the stabbing occurred. *State v. Gurule*, 2004-NMCA-008, 134 N.M. 804, 82 P.3d 975.

Where defendant was upset and depressed after defendant's girlfriend ended their six-year relationship; defendant made futile attempts to reconcile with defendant's girlfriend; defendant was obsessive about the relationship; defendant's girlfriend began dating the victim; defendant moved to California; while defendant was in California, defendant made statements to a witness in New Mexico that defendant was returning to New Mexico because defendant "didn't take care of things" before defendant left New Mexico and how defendant would "just get everything done"; when defendant returned to New Mexico, defendant broke into defendant's girlfriend's apartment and left a letter stating that defendant wished to reconcile and making threats regarding the victim; on the day of the murder, defendant and the victim began to argue about defendant's girlfriend; defendant went into defendant's apartment and immediately came running out of the apartment yelling "I'll kill you" as defendant began to shoot at the victim; defendant shot first about thirty-eight feet away from the victim and then ran towards the victim and fired four or five more shots; and defendant fired two shots less than four inches from the victim and then shot the victim a final time as the victim was attempting to escape from a car, there was substantial evidence to support the jury's conclusion that defendant killed the victim with deliberate intent. *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

**Sufficient evidence of first-degree murder.** — Where defendant was convicted of two counts of first-degree murder, there was sufficient evidence to support the conviction where cell phone records showed that defendant and one of the shooting victims were in contact on the night of the murders, that text messages from the victim to defendant showed that the victim was upset with defendant, which could support an inference of a conflict between the two, where cell phone tower records indicated that defendant was in the area where the victim was murdered at the approximate time when the murders were believed to have occurred, and where a witness reported seeing defendant with a firearm only a few hours after the approximate time of the murders. *State v. Carrillo*, 2017-NMSC-023.

**Sufficient evidence of first-degree murder and attempted first-degree murder.** — Where defendant was convicted of first-degree murder and attempted first-degree murder, and where the state presented evidence at trial that defendant spent the day before the murder with another man who had a motive to kill the victim, that defendant secured for himself and the other man a ride to the apartment complex where the victim lived, that defendant and the other man disappeared from sight before gunshots were heard, that defendant and the other man were seen running back to their vehicle before driving off, and that occupants of the vehicle testified that defendant smelled like burnt matches, which is similar to the smell of gunpowder, there was sufficient evidence to support a jury finding that defendant had the deliberate intent to kill the victim, that he helped in the planning of the crime, and that he actively participated in the actual attempt to kill the victim. *State v. Torres*, 2018-NMSC-013.

**Limitations to felony murder doctrine.** — While the wording of this section is broad, New Mexico has created five main limitations to the felony murder doctrine to ensure that defendants convicted of felony murder have a culpable mental state consistent with the legislature's retributive and punitive goals. *State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, 84 P.3d 88, cert. quashed, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 578.

**Accomplices.** — A defendant may not be held liable for depraved mind murder when he or his accomplice did not commit the lethal act that killed an innocent bystander. *State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, 84 P.3d 88, cert. quashed, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 578.

Evidence that defendant and the defendant's accomplice threw victim into the well while he was alive, then covered and finally resealed the well supports an inference that they reached an agreement to kill victim in the course of the robbery, and that both intended his death, supports the jury's verdict of guilty of first degree (felony) murder. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, *overruled on other grounds by State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

## X. JURY INSTRUCTIONS.

**Requisites of instructions.** — All that can be required of court's instructions is that they properly give to the jury the essential facts which must be established beyond a reasonable doubt before the defendant can be convicted. *State v. Anaya*, 1969-NMSC-130, 80 N.M. 695, 460 P.2d 60.

**Failure to define crime.** — An instruction on second degree murder which did not define the offense was insufficient. *Territory v. Gutierrez*, 1905-NMSC-018, 13 N.M. 138, 79 P. 716.

**Instruction on motive required.** — Where all the evidence is circumstantial and there is no proof of motive, it was incumbent on trial judge to present a properly framed instruction on motive, instructing the jury that absence of evidence thereof should be considered along with all other



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circumstances in determining guilt or innocence of one accused of murder. *State v. Vigil*, 1975-NMSC-013, 87 N.M. 345, 533 P.2d 578.

**Offenses submitted depend on supporting evidence.** — Defendant in murder trial had the right to have instructions on lesser included offenses submitted to the jury, but this right depended on there being some evidence tending to establish the lesser included offenses. *State v. Anaya*, 1969-NMSC-130, 80 N.M. 695, 460 P.2d 60.

The court was only required to charge as to such degrees of murder as evidence tended to sustain. It was the duty of the court to charge as to all such degrees, and failure to do so was error. *Territory v. Romero*, 1883-NMSC-006, 2 N.M. 474.

An accused is entitled to an instruction on second degree murder if there is some evidence in the record to support it. *State v. Stephens*, 1979-NMSC-076, 93 N.M. 458, 601 P.2d 428, *overruled in part on other grounds by State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228.

**Evidence to support instruction on intoxication.** — To authorize an instruction on intoxication the record must contain some evidence showing or tending to show that defendant consumed an intoxicant and that the intoxicant affected his mental state at or near the time of the homicide. The instruction does not, however, require expert evidence regarding the effect of intoxication upon defendant's ability to form a deliberate intent to kill. *State v. Privett*, 1986-NMSC-025, 104 N.M. 79, 717 P.2d 55.

Testimony from accomplices that murder defendant had consumed alcohol and methamphetamine on the evening of the murder, and expert testimony about the effect of those substances on the ability to form intent, was sufficient to warrant an instruction on intoxication. *State v. Begay*, 1998-NMSC-029, 125 N.M. 541, 964 P.2d 102.

**Voluntary intoxication instruction was not appropriate for second degree murder.** — Where defendant, who had consumed a large quantify of alcohol and who was walking along a ditch with friends, encountered the victim; the friend began punching and kicking the victim; defendant provided the friend with a knife that the friend used to fatally stab the victim; and at trial, defendant requested an instruction on voluntary intoxication; and defendant was acquitted of conspiring to commit first degree murder and convicted of being an accessory to second degree murder, the voluntary intoxication instruction was not appropriate in the context of accessory liability for second degree murder, because second degree murder is a general intent crime. *State v. Jim*, 2014-NMCA-089, cert. denied, 2014-NMCERT-006.

Where defendant, who had consumed a large quantify of alcohol and who was walking along a ditch with friends, encountered the victim; the friend began punching and kicking the victim; defendant provided the friend with a knife that the friend used to fatally stab the victim; and at trial, defendant requested an instruction on voluntary intoxication; and defendant was acquitted of conspiring to commit first degree murder and convicted of being an accessory to second degree murder, the voluntary intoxication instruction was not appropriate in the context of accessory liability for second degree murder, because second degree murder is a general intent crime. *State v. Jim*, 2014-NMCA-089, cert. denied, 2014-NMCERT-006.

**Submission of first degree charge required.** — As there was evidence to the effect that the killing occurred while the defendant was in the commission of or an attempt to commit robbery, there was evidence from which the jury could have found that the homicide was committed while in the act of perpetrating a felony and the submission of the charge of first degree murder became a statutory mandate. *State v. Torres*, 1971-NMSC-039, 82 N.M. 422, 483 P.2d 303, *overruled on other grounds by State v. Wilson*, 1973-NMSC-093, 85 N.M. 552, 514 P.2d 603. But *see State v. Harrison*, 1977-NMSC-038, 90 N.M. 439, 564 P.2d 1321.

Where the defendant was engaged in committing a felony at time gun was accidentally discharged, trial court did not err in instructing that under the circumstances the accidental discharge did not reduce the homicide below first degree murder. *State v. Smith*, 1947-NMSC-035, 51 N.M. 184, 181 P.2d 800.

Under former law, it was not error for court to charge that there was no evidence to show that the killing of the deceased was justifiable, or that there was any circumstance to bring it within the definition of any degree of murder less than the first where all evidence showed that the killing took place during a robbery. *Territory v. Romero*, 1883-NMSC-006, 2 N.M. 474.

**Depraved mind instruction held improper.** — Where defendant was charged with depraved mind murder involving a motor vehicle and the trial court instructed the jury that to find defendant guilty of first degree murder, the jury had to find that defendant drove defendant's vehicle erratically and recklessly for a long distance striking the victims, the jury instruction misstated the law on depraved mind murder, because the instruction did not require the jury to find that defendant's conduct was extremely reckless. *State v. Dowling*, 2011-NMSC-016, 150 N.M. 110, 257 P.3d 930.

**Defendant has burden to introduce evidence for lesser included offense instruction.** — The defendant has the burden to come forward with evidence establishing sufficient provocation in order to be entitled to an instruction on voluntary manslaughter as a lesser included offense. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**Instruction on lesser degree improper.** — Where state established a case which would have sustained conviction of first degree murder, instruction of the court permitting conviction of second degree murder was reversible error. *State v. Reed*, 1934-NMSC-085, 39 N.M. 44, 39 P.2d 1005.

Where evidence on charge of first degree murder did not tend to reduce crime to murder in the second degree, court was not authorized to instruct on second degree murder. *State v. Granado*, 1913-NMSC-017, 17 N.M. 542, 131 P. 497.

Where evidence showed either first degree murder or excusable homicide, it was proper to instruct the jury that in their verdict they must either find defendant guilty of first degree murder or not guilty, and court properly refused to give instructions in the second or third degrees. *Sandoval v. Territory*, 1896-NMSC-020, 8 N.M. 573, 45 P. 1125 (decided under prior law).

In murder prosecution, where evidence showed either murder in the first degree, or nothing, court properly instructed on first degree murder only. *Faulkner v. Territory*, 1892-NMSC-015, 6 N.M. 464, 30 P. 905.

Refusal by the trial court to give an instruction on second degree murder is appropriate when the evidence simply did not support a finding of second degree murder. There was no evidence that the killing was anything less than deliberate and intentional. *State v. Aguilar*, 1994-NMSC-046, 117 N.M. 501, 873 P.2d 247, cert. denied, 513 U.S. 859, 115 S. Ct. 168, 130 L. Ed. 2d 105, and cert. denied, 513 U.S. 865, 115 S. Ct. 182, 130 L. Ed. 2d 116 (1994).

**Instructions on lesser degree mandatory.** — Where there was no eyewitness to killing and death resulted from gunshot wound, and there was no evidence showing the murder was by poison or torture or lying in wait, or that it was perpetrated in committing, or attempting to commit a felony, failure to instruct jury other than on first degree murder was reversible error. *Territory v. Padilla*, 1896-NMSC-013, 8 N.M. 510, 46 P. 346; *Aguilar v. Territory*, 1896-NMSC-012, 8 N.M. 496, 46 P. 342.



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**Adequate felony murder instruction described.** — A jury instruction which requires the state to prove, beyond a reasonable doubt, a causal relationship between the felony committed and the death of the victim is adequate. *State v. Perrin*, 1979-NMSC-050, 93 N.M. 73, 596 P.2d 516.

**Failure to instruct on the defining element of felony murder is fundamental error.** - In a felony murder prosecution where the evidence will support a conviction for either second-degree murder or voluntary manslaughter, it is fundamental error for the felony murder essential elements jury instruction to omit the defining requirement that the accused did not act in the heat of passion as a result of the legally adequate provocation that would reduce murder to manslaughter. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426.

Where defendant and defendant's companions were accosted by a rival gang in front of defendant's family home, guns were pulled on both sides and defendant's sibling was severely wounded by gunshots in the leg and abdomen; while defendant's group were trying to help defendant's sibling in the driveway and stop the bleeding, the person in the rival gang who had been shooting at defendant and defendant's companions returned in a Ford Expedition; when defendant saw gunfire coming from the Expedition, defendant ran into the house and retrieved an AK-47 rifle and began shooting at the Expedition; the driver of Expedition was shot seven times and died; the jury was instructed to consider felony murder based on the felony of shooting at the Expedition; the felony murder essential elements instruction omitted any reference to the concept of legally sufficient provocation that distinguished heat of passion voluntary manslaughter from cold blooded second degree murder; and there was ample evidence that the victim's provocative conduct against defendant and defendant's family occurred before defendant shot into the Expedition, the failure to include the distinction between second degree murder and voluntary manslaughter was fundamental error. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426.

**Instruction on intent when intent clear.** — Failure to include the essential element of intent in a jury instruction for felony murder did not constitute fundamental error since the evidence was such that there could be no dispute that the defendant possessed the requisite intent. *State v. Livernois*, 1997-NMSC-019, 123 N.M. 128, 934 P.2d 1057.

**Evidence of premeditation.** — Evidence that defendant had talked on numerous occasions of committing violent acts, including murder, and had made such statements on the night of the murder, was sufficient to establish premeditation. *State v. Begay*, 1998-NMSC-029, 125 N.M. 541, 964 P.2d 102.

**Waiver of instructions on lesser included offenses.** — Consistent with the constitutional guarantees of a fair trial, the defendant in a first degree murder prosecution may take his chances with the jury by waiving instructions on lesser included offenses, even against the express advice of counsel, and cannot be heard to complain on appeal if he has gambled and lost. *State v. Boeglin*, 1987-NMSC-002, 105 N.M. 247, 731 P.2d 943.

**Missing element cured by separate instruction.** — Trial court did not commit fundamental error by omitting the element of unlawfulness from the elements instruction on deliberate-intent first degree murder when the jury also received a separate proper instruction on self-defense. *State v. Cunningham*, 2000-NMSC-009, 128 N.M. 711, 998 P.2d 176.

**First and second degree properly submitted.** — Where there was evidence presented which tended to indicate that sufficient time elapsed during which the defendant could have weighed his actions and considered their consequences and that the shooting was not in the heat of argument, instructions on first and second degree murder were proper. *State v. Aragon*, 1973-NMCA-102, 85 N.M. 401, 512 P.2d 974.

**Absent request for instruction, no fundamental error.** — Where the defendant does not request that an instruction be given and, consequently, it is not given, the trial court does not commit a fundamental error. *State v. Stephens*, 1979-NMSC-076, 93 N.M. 458, 601 P.2d 428, *overruled in part on other grounds by State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228.

**Submission of second degree generally required, in absence of exceptions.** — Except in a case where the very means employed in committing a homicide, as by torture, poison or lying in wait supply proof of the deliberation, the intensified malice, necessary to raise the grade of the offense to first degree as a matter of law, or unless it be one committed in the perpetration of, or attempt to perpetrate, a felony where by legislative fiat the circumstances under which the killing occurred render conclusive the presence of such deliberation, it is always necessary to submit second degree and thus permit the jury to say whether it is the one or the other - first or second degree. *State v. Ortega*, 1966-NMSC-185, 77 N.M. 7, 419 P.2d 219.

It was necessary to submit second as well as first degree murder to jury to permit them to determine degree of murder except when means employed in perpetrating crime supplied proof of deliberation or when homicide was committed in perpetrating or attempting another felony. *State v. Kappel*, 1949-NMSC-024, 53 N.M. 181, 204 P.2d 443.

**Second degree instruction on intent.** — In a prosecution for felony murder, giving of an unmodified form of UJI 14-210 on second degree murder, which allows for a verdict of guilt provided that, among other things, the state has proven beyond a reasonable doubt that "[t]he defendant intended the killing to occur or knew that he was helping to create a strong probability of death or great bodily harm" was sufficient without giving a general criminal intent instruction, which requires a higher level of criminal intent. *State v. Nieto*, 2000-NMSC-031, 129 N.M. 688, 12 P.3d 442.

**Second degree instruction with sudden impulse theory.** — Where confession of accused had been admitted and in it he stated that he had killed his wife on sudden impulse, it was error to refuse to instruct on second degree murder. *State v. Wickman*, 1935-NMSC-035, 39 N.M. 198, 43 P.2d 933.

**Second degree instruction with self-defense theory.** — Where prosecution attempted to prove first degree murder, perpetrated by lying in wait, and defendant pleaded self-defense, the court properly instructed jury on murder in the second degree. *State v. Smith*, 1921-NMSC-014, 26 N.M. 482, 194 P. 869.

**Failure to instruct on second degree.** — When the defendant was convicted of felony murder and related crimes, the refusal to give an instruction on second degree murder was correct because the state proved a nexus between two felonies and the murder that excluded the possibility the murder was not committed in the commission of a felony. *State v. McGruder*, 1997-NMSC-023, 123 N.M. 302, 940 P.2d 150.

**Self-defense instruction refused where defendant entered store with weapon, prepared to rob.** — Where the defendant entered a store with a weapon, prepared to commit armed robbery if the circumstances permitted it, such facts can only reasonably point to the commission of a felony in a situation which is, of itself, "inherently or foreseeably dangerous to human life," and a self-defense instruction is properly refused. *State v. Chavez*, 1983-NMSC-037, 99 N.M. 609, 661 P.2d 887.

**Instruction on defense of another.** — Where defendant and the occupants of a house exchanged multiple gun shots; the shots defendant fired at the house killed one victim; defendant was tried for first degree



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murder with the predicate felony of shooting at a dwelling; defendant requested a jury instruction on defense of another on the grounds that shots from the house were fired in the direction of defendant's vehicle where two of defendant's friends were waiting; defendant's friends testified that they were not aware of any bullets reaching the vicinity of the car; defendant testified that defendant shot back at the house because people in the house were shooting at defendant; and there was no evidence that defendant shot to protect anyone other than defendant, the district court did not err in refusing to instruct on defense of another. *State v. Torrez*, 2013-NMSC-034.

**Question as to manner of killing.** — Where evidence presented jury question as to manner in which killing occurred, instruction on second degree murder was properly given although state contended that crime constituted first degree murder. *State v. Parks*, 1919-NMSC-041, 25 N.M. 395, 183 P. 433.

**It was not error to submit issue of second degree murder,** where the accused was convicted of a degree of crime properly within the evidence. *State v. Armstrong*, 1956-NMSC-053, 61 N.M. 258, 298 P.2d 941.

**Failure to instruct on lesser included offense of vehicular homicide.** — District court committed reversible error in refusing to instruct the jury on the lesser included offense of vehicular homicide, where the evidence of the defendant's use of marijuana the night before and the morning of the killing could have supported a conviction of vehicular homicide while under the influence of drugs. *State v. Omar-Muhammad*, 1987-NMSC-043, 105 N.M. 788, 737 P.2d 1165.

**Aggravated battery lesser included offense of attempted murder.** — In a prosecution for attempted murder, the trial court properly instructed the jury on aggravated battery as a lesser included offense at the state's request, because the elements of the lesser crime were a subset of the elements of the charged crime and, further, the defendant could not have committed the greater offense in the manner charged in the indictment without also committing the lesser offense. *State v. Meadors*, 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731.

**Convictions of attempted murder and aggravated battery violated double jeopardy.** — Where defendant was convicted of attempted murder and aggravated battery with a deadly weapon; defendant's conduct was unitary; the indictment for attempted murder required the state to prove that defendant attempted to commit murder and "began to do an act which constituted a substantial part of murder" but failed to commit the offense; the indictment for aggravated battery required the state to prove that defendant touched or applied force to the victims with a deadly weapon intending to injure the victims; the state's theory of the case to support both charges was that defendant beat, stabbed, and slashed the victims; and the state offered the same testimony to prove both charges, the aggravated battery elements were subsumed within the attempted murder elements and defendant's convictions violated the prohibition against double jeopardy. *State v. Swick*, 2012-NMSC-018, 279 P.3d 747, *rev'g* 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462, *overruling State v. Armendariz*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

**Failure to instruct on aggravated battery.** — The jury found the defendant guilty of attempted first degree murder, in that he had a deliberate intention to take the life of the victim, not that he simply had knowledge that his acts created a strong probability of great bodily harm. The jury having thus failed to find the lesser included offense of attempted murder in the second degree, the failure to instruct on aggravated battery was harmless. *State v. Escamilla*, 1988-NMSC-066, 107 N.M. 510, 760 P.2d 1276.

**When court has no duty to instruct on voluntary manslaughter.** — Where neither prosecution nor defense in a murder trial requested an instruction on voluntary manslaughter, and both defendant and counsel stated that they did not desire such an instruction despite the court's explanation that there was sufficient evidence to warrant it, there was no duty for the trial court to instruct on voluntary manslaughter. *State v. Najar*, 1980-NMCA-033, 94 N.M. 193, 608 P.2d 169, cert. denied, 94 N.M. 628, 614 P.2d 545.

**No instruction on provocation.** — Defendant was not entitled to instructions specifically relating to his theory that a police officer's search of his house was illegal and constituted provocation so as to reduce murder to manslaughter. *State v. Chamberlain*, 1991-NMSC-094, 112 N.M. 723, 819 P.2d 673.

**Instruction on manslaughter improper.** — It was error for the court to submit to the jury an issue of whether defendant was guilty of voluntary manslaughter when the facts established either first or second degree murder, but could not support a conviction of voluntary manslaughter and, accordingly, upon acquittal of murder and conviction of voluntary manslaughter, a reversal and discharge of the accused was required. *State v. Lopez*, 1968-NMSC-092, 79 N.M. 282, 442 P.2d 594.

Where evidence in prosecution for murder made it clear that defendant did not kill deceased "upon a sudden quarrel, or in the heat of passion," or "in the commission of an unlawful act not amounting to a felony," or "of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection," so as to make the act "manslaughter," instruction on manslaughter was not warranted. *Territory v. Archuleta*, 1911-NMSC-028, 16 N.M. 219, 114 P. 285.

**Instruction on voluntary manslaughter improper.** — Where defendant, who was walking along a ditch with friends, encountered the victim; defendant's friend began punching and kicking the victim; defendant provided the friend with a knife that the friend used to fatally stab the victim; defendant was convicted of second degree murder; defendant argued that the district court should have instructed the jury on voluntary manslaughter because defendant was provoked by the instigation of the fight by defendant's friends, defendant perceived the victim to be a member of a rival gang that was responsible for a stabbing attack on defendant's friend that occurred within the preceding weeks, and the victim's reaction to the attack provoked defendant's response, defendant failed to establish sufficient provocation to support a voluntary manslaughter instruction. *State v. Jim*, 2014-NMCA-089, cert. denied, 2014-NMCERT-006.

**Various theories submitted.** — Where the evidence on provocation sufficient to reduce the killing from murder to voluntary manslaughter and the evidence of self-defense was conflicting, such questions were factual ones to be resolved by the jury, and the trial court properly submitted the issues of second degree murder, voluntary manslaughter and self-defense to the jury. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170, *overruled on other grounds by State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

**Overinclusive instruction intolerably confusing.** — Defendant convicted of first degree murder for killing the victim by striking her with a cinder block after allegedly raping her was entitled to reversal of conviction, even in absence of objection by defendant at trial, where evidence supported judge's instruction on willful, deliberate or premeditated killing, but did not support instructions on theories of felony murder; murder by act dangerous to others, indicating depraved mind; or murder from deliberate and premeditated design unlawfully and maliciously to effect death of any human being (transferred intent). Such error was fundamental, since an intolerable amount of confusion was introduced into the case, and defendant could have been convicted without proof of all necessary



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elements. *State v. DeSantos*, 1976-NMSC-034, 89 N.M. 458, 553 P.2d 1265.

**Overinclusiveness reversible error.** — Where defendant was indicted only under Subsection A(3) of this section (for felony murder), it was reversible error to include the willful, deliberate language of Subsection A(1) in the jury instructions. *State v. Trivitt*, 1976-NMSC-004, 89 N.M. 162, 548 P.2d 442.

**Confusing instruction on self-defense,** critical issue in case, required reversal. *State v. Garcia*, 1971-NMCA-121, 83 N.M. 51, 487 P.2d 1356.

**Confusing instruction raised on appeal.** — Giving of a confusing instruction on second degree murder which first included, then excluded, premeditation, was jurisdictional error, and could be first raised on appeal. *State v. Buhr*, 1971-NMCA-017, 82 N.M. 371, 482 P.2d 74.

**Objections to form must be preserved.** — Where instructions on second degree murder included the elements of the offense, without uncertainty, and were not misleading, they contained neither jurisdictional defect nor fundamental error; asserted inadequacy as to their form, not called to the attention of the trial court, was not preserved for review. *State v. Moraga*, 1971-NMCA-103, 82 N.M. 750, 487 P.2d 178.

**Error in instructions harmless.** — Although the jury, not the judge or the district attorney, was to determine the sentence imposed for first degree murder, so that the trial court was in error in failing to submit to the jury a form of verdict calling for the death sentence, the error was harmless and could not be prejudicial to the accused. *State v. Sanchez*, 1954-NMSC-010, 58 N.M. 77, 265 P.2d 684.

**Failure to instruct on lesser charges upheld.** — In the murder trial of a prisoner for killing a guard in which the death penalty was sought but not imposed, there was no fundamental miscarriage of justice because of the failure to instruct on second degree murder and voluntary manslaughter with respect to the officer's death, even though as an initial matter the evidence might have been sufficient to support such instructions, where the evidence supporting these lesser included offense instructions was not "unequivocally strong." *Trujillo v. Sullivan*, 815 F.2d 597 (10th Cir.), cert. denied, 484 U.S. 929, 108 S. Ct. 296, 98 L. Ed. 2d 256 (1987) (decided under prior law).

**Refusal of cumulative instructions.** — Where the trial court instructed the jury as to the statutory definition of murder in the first degree; in another instruction listed the essential elements thereof and instructed the jury that each of these elements must be proven to the jury's satisfaction beyond a reasonable doubt; defined each of the essential terms, such as willfully, express malice, deliberation, etc.; and gave an instruction concerning the effect on defendant's state of mind from intoxication, it was not error in refusing defendant's requested instructions which were merely cumulative of the court's instruction. *State v. Rushing*, 1973-NMSC-092, 85 N.M. 540, 514 P.2d 297.

Trial court was not in error when it refused to give defendant's requested instruction on exculpatory statements contained in his confession, since the court adequately instructed on self-defense, and since defendant's own testimony corresponded to the exculpatory matter contained in the confession. *State v. Casaus*, 1963-NMSC-194, 73 N.M. 152, 386 P.2d 246.

**Use of jury instructions.** — New Mexico U.J.I. Crim. 2.00 (*now see* UJI 14-201) does not change the necessary elements to be proven for a conviction of first degree murder, and it was not error to use it in advance of the effective date. *State v. Noble*, 1977-NMSC-031, 90 N.M. 360, 563 P.2d 1153.

**Answering jury's questions.** — Since, under 40-24-10, 1953 Comp., the jury had sole responsibility for fixing the penalty for murder in the first degree, it was not error for the trial court to answer the jury's inquiry for information relating to the possibility of parole or pardon or a verdict of life imprisonment by quoting applicable constitutional and statutory provisions. *State v. Nelson*, 1959-NMSC-023, 65 N.M. 403, 338 P.2d 301, cert. denied, 361 U.S. 877, 80 S. Ct. 142, 4 L. Ed. 2d 115 (1959) (decided under prior law).

**Review.** — On appeal from conviction for second- degree murder, the court must review the evidence as to cause of death in the light most favorable to the state. *State v. Ewing*, 1968-NMCA-071, 79 N.M. 489, 444 P.2d 1000.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For comment, "State v. Jackson: A Solution to the Felony-Murder Rule Dilemma," see 9 N.M.L. Rev. 433 (1979).

For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

For note, "Criminal Law - The Use of Transferred Intent in Attempted Murder, a Specific Intent Crime: State v. Gillette," see 17 N.M.L. Rev. 189 (1987).

For comment, "An Equal Protection Challenge to First Degree Depraved Mind Murder Under the New Mexico Constitution", see 19 N.M.L. Rev. 511 (1989).

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

For note, "Whether the Elements of Deliberation and Premeditation Adequately Distinguish First Degree Murder from Second Degree Murder: *State v. Garcia*," see 24 N.M.L. Rev. 437 (1994).

For note, "New Mexico Applies the Strict Elements Test to the Collateral Felony Doctrine - State v. Campos," see 28 N.M.L. Rev. 535 (1998).

For note, "The Anomaly of a Murder: Not All First-Degree Murder Mens Rea Standards Are Equal - State v. Brown," see 28 N.M.L. Rev. 553 (1998).

For note and comment, "Death in the Desert: A New Look at the Involuntary Intoxication Defense in New Mexico," see 34 N.M.L. Rev. 243 (2002).

For note and comment, "Adding Charges on Retrial: Double Jeopardy, Interstitialism and State v. Lynch," see 34 N.M.L. Rev. 539 (2004).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide, §§ 41 to 53.

Malice: inference of malice or intent where killing is by blow without weapon, 22 A.L.R.2d 854.

Hunting accident: criminal responsibility for injury or death resulting from, 23 A.L.R.2d 1401.

Threats: causing one, by threats or fright, to leap or fall to his death, 25 A.L.R.2d 1186.

Fright or shock, homicide by, 47 A.L.R.2d 1072.

Premeditation: presumption of deliberation or premeditation from the fact of killing, 86 A.L.R.2d 656.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, 89 A.L.R.2d 396.

"Lying in wait," what constitutes, 89 A.L.R.2d 1140.

Medical or surgical attention, failure to provide, 100 A.L.R.2d 483.

Homicide: liability where death immediately results from treatment or mistreatment of injury inflicted by defendant, 100 A.L.R.2d 769.



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Insulting words as provocation of homicide or as reducing the degree thereof, 2 A.L.R.3d 1292.

Intoxication: modern status of the rules as to voluntary intoxication as defense to criminal charge, 8 A.L.R.3d 1236.

Automobile: homicide by automobile as murder, 21 A.L.R.3d 116.

Mental or emotional condition as diminishing responsibility for crime, 22 A.L.R.3d 1228.

Intoxicants: criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another, 32 A.L.R.3d 589.

Arrest: private person's authority, in making arrest for felony, to shoot or kill alleged felon, 32 A.L.R.3d 1078.

Killing by set gun or similar device on defendant's own property, 47 A.L.R.3d 646.

Unintentional killing or injury to third person during attempted self-defense, 55 A.L.R.3d 620.

Felony: homicide in commission of felony where the killing was the act of one not a participant in the felony, 56 A.L.R.3d 239.

Homicide as affected by time elapsing between wound and death, 60 A.L.R.3d 1316.

Withholding food, clothing or shelter, 61 A.L.R.3d 1207.

Intoxication: when deemed involuntary so as to constitute a defense to criminal charge, 73 A.L.R.3d 195.

Torture: what constitutes murder by torture, 83 A.L.R.3d 1222.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour, 93 A.L.R.3d 925.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 A.L.R.3d 287.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Judicial abrogation of felony-murder doctrine, 13 A.L.R.4th 1226.

Admissibility of expert testimony as to whether accused had specific intent necessary for conviction, 16 A.L.R.4th 666.

Modern status of the rules requiring malice "aforethought," "deliberation" or "premeditation," as elements of murder in the first degree, 18 A.L.R.4th 961.

Admissibility of expert or opinion testimony on battered wife or battered woman syndrome, 18 A.L.R.4th 1153.

Propriety of manslaughter conviction in prosecution for murder, absent proof of necessary elements of manslaughter, 19 A.L.R.4th 861.

Validity and construction of statute defining homicide by conduct manifesting "depraved indifference," 25 A.L.R.4th 311.

Homicide: sufficiency of evidence of mother's neglect of infant born alive, in minutes or hours immediately following unattended birth, to establish culpable homicide, 40 A.L.R.4th 724.

Homicide by causing victim's brain-dead condition, 42 A.L.R.4th 742.

Corporation's criminal liability for homicide, 45 A.L.R.4th 1021.

Homicide: physician's withdrawal of life supports from comatose patient, 47 A.L.R.4th 18.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Application of felony-murder doctrine where person killed was co-felon, 89 A.L.R.4th 683.

Validity and construction of "extreme indifference" murder statute, 7 A.L.R.5th 758.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired, 11 A.L.R.5th 497.

Admissibility of evidence in homicide case that victim was threatened by one other than defendant, 11 A.L.R.5th 831.

Ineffective assistance of counsel: battered spouse syndrome as defense to homicide or other criminal offense, 11 A.L.R.5th 871.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 A.L.R.5th 628.

Homicide: liability where death immediately results from reatment or mistreatment of injury inflicted by defendant, 50 A.L.R.5th 467.

Admissibility of threats to defendant made by third parties to support claim of self-defense in criminal prosecution for assault or homicide, 55 A.L.R.5th 449.

Adequacy of defense counsel's representation of criminal client - conduct occurring at time of trial regarding issues of diminished capacity, intoxication, and unconsciousness, 78 A.L.R.5th 197.

Adequacy of defense counsel's representation of criminal client - pretrial conduct or conduct at unspecified time regarding issues of diminished capacity, intoxication, and unconsciousness, 79 A.L.R.5th 419.

What constitutes "puts in jeopardy" within enhanced penalty provision of federal bank robbery act, 32 A.L.R. Fed. 279.

40 C.J.S. Homicide §§ 29 to 68.

## 30-2-2. Repealed.

**Repeals.** — Laws 1980, ch. 21, § 2, repealed 30-2-2 NMSA 1978, as enacted by Laws 1963, ch. 303, § 2-2, relating to malice.

## 30-2-3. Manslaughter.

Manslaughter is the unlawful killing of a human being without malice.

A. Voluntary manslaughter consists of manslaughter committed upon a sudden quarrel or in the heat of passion.

Whoever commits voluntary manslaughter is guilty of a third degree felony resulting in the death of a human being.

B. Involuntary manslaughter consists of manslaughter committed in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection.

Whoever commits involuntary manslaughter is guilty of a fourth degree felony.



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**History: 1953 Comp., § 40A-2-3, enacted by Laws 1963, ch. 303, § 2-3; 1994, ch. 23, § 2.**

**Cross references.** — For homicide by vehicle, *see* 66-8-101 NMSA 1978.

For instruction on voluntary manslaughter, *see* UJI 14-220.

**The 1994 amendment,** effective July 1, 1994, added "resulting in the death of a human being" at the end of the second paragraph of both Subsections A and B.

**Applicability.** — Laws 1994, ch. 23, § 4 provided that the provisions of Laws 1994, ch. 23, § 2 apply only to persons sentenced for crimes committed on or after July 1, 1994.

ANNOTATIONS

I. GENERAL CONSIDERATION.
II. VOLUNTARY MANSLAUGHTER.
III. INVOLUNTARY MANSLAUGHTER.
A. IN GENERAL.
B. PROXIMATE CAUSE.
IV. EVIDENCE.
V. JURY INSTRUCTIONS.

I. GENERAL CONSIDERATION.

**Crime and punishment properly separated.** — The fact that the former manslaughter statute, 40-24-7, 1953 Comp., merely defined the offense, while 40-24-10, 1953 Comp., provided the penalty, does not mean that the statute was defective or the acts defined not crimes; crime and punishment can be separated and distinguished by the legislature. *State v. McFall*, 1960-NMSC-084, 67 N.M. 260, 354 P.2d 547 (decided under former law).

**Applicability to motor vehicle accidents.** — This section, the involuntary manslaughter statute, was in no sense repealed by adoption of the negligent homicide statute (64-22-1, 1953 Comp.), but has been in full force and effect at all times; although cases of death resulting from driving while under the influence of intoxicating liquor were taken out from under its operation by adoption of Section 66-8-102 NMSA 1978, which made driving under the influence a felony, because when a death resulted it would not be "in the commission of an unlawful act not amounting to a felony," upon repeal of the negligent homicide statute by Laws 1957, ch. 239, § 7, and reinstatement of the offense of driving under the influence as a misdemeanor by Laws 1955, ch. 184, § 8, the reapplicability of the involuntary manslaughter statute automatically ensued. *State v. Deming*, 1959-NMSC-074, 66 N.M. 175, 344 P.2d 481 (decided under former law).

**Manslaughter is one of the four kinds of homicide,** and is included within a charge of murder. *State v. La Boon*, 1960-NMSC-118, 67 N.M. 466, 357 P.2d 54; *State v. McFall*, 1960-NMSC-084, 67 N.M. 260, 354 P.2d 547.

**Manslaughter included in murder.** — Manslaughter is included in the charge of murder. *State v. Rose*, 1968-NMSC-091, 79 N.M. 277, 442 P.2d 589, cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969).

**Manslaughter not "necessarily included" in murder.** — Under appropriate circumstances, where there is evidence that the defendant acted as a result of sufficient provocation, a charge of manslaughter could properly be said to be included in a charge of murder, and, accordingly, it would not be error to submit N.M.U.J.I. Crim. 2.20 (*see* UJI 14-220 NMRA) to the jury; however, it cannot seriously be maintained that manslaughter is invariably "necessarily included" in murder, since different kinds of proof are required to establish the distinct offenses. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

**Open charge of murder adequate.** — A charge of murder in violation of statutes pertaining to first and second degree murder and voluntary and involuntary manslaughter is not a charge of mutually exclusive crimes, nor is it a charge of distinct and separate offenses; rather, the charge is an open charge of murder, a form of charging approved, under which the jury is to be instructed on the degrees of the unlawful killing for which there is evidence, and it gave defendant notice that he must defend against a charge of unlawfully taking a human life. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170, *overruled on other grounds by State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

**Information sufficiently particular.** — Information charging manslaughter, which enumerated the section defining the offense and the section fixing the penalty, did not contravene N.M. Const., art. II, § 14; although defendant was entitled "to demand the nature and cause of the accusation," against him, that remedy was available by way of a bill of particulars. *State v. Romero*, 1961-NMSC-139, 69 N.M. 187, 365 P.2d 58.

**Information insufficient.** — An information was insufficient which charged that defendants willfully and feloniously killed named person contrary to statute. *State v. Gray*, 1934-NMSC-018, 38 N.M. 203, 30 P.2d 278.

**Permissible to convict accessory of lesser offense.** — The fact that the accessory was convicted of involuntary manslaughter while the principal was convicted of voluntary manslaughter is a permissible result under the accessory statute. *State v. Holden*, 1973-NMCA-092, 85 N.M. 397, 512 P.2d 970, cert. denied, 85 N.M. 380, 512 P.2d 953.

**Suspension of convicted attorney.** — Plea of guilty to crime of involuntary manslaughter, resulting from driving under the influence, supported recommendation of suspension of defendant attorney from practice of law. *In re Morris*, 1964-NMSC-235, 74 N.M. 679, 397 P.2d 475.

II. VOLUNTARY MANSLAUGHTER.

**Meaning of "unlawful".** — Subsection A defines voluntary manslaughter as "the unlawful killing of a human being without malice upon a sudden quarrel or in the heat of passion". From Section 30-2-1 NMSA 1978 it may be inferred that "unlawful" means "without lawful justification or excuse." *State v. Parish*, 1994-NMSC-073, 118 N.M. 39, 878 P.2d 988.

**Provocation part of voluntary manslaughter.** — Although the court has not ruled unequivocally either that provocation is or is not an "element" of voluntary manslaughter, there must be some evidence that the killing was committed upon a sudden quarrel or in the heat of passion in order for a conviction of voluntary manslaughter to stand; in this sense, provocation is a part of voluntary manslaughter. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

**Intent.** — Although voluntary manslaughter is a general intent crime, where attempted second degree murder is offered as a greater included offense and sufficient provocation is at issue in the trial, voluntary manslaughter may be a specific intent crime. *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537.

**Attempt.** — Under limited circumstances, where attempted second degree murder is offered as a greater included offense and sufficient provocation is at issue in the trial, attempted voluntary manslaughter is a crime in New Mexico. *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537.

Attempted voluntary manslaughter is a lesser included offense of attempted second degree murder where sufficient provocation is at issue in the trial. *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537.

**Provocation and disclosure of provocation.** — The provocation and the disclosure of the events constituting the provocation may occur at different times. *State v. Munoz*, 1992-NMCA-004, 113 N.M. 489, 827 P.2d 1303, cert. denied, 113 N.M. 352, 826 P.2d 573.



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**Nature of sufficient provocation.** — To reduce the killing from murder to voluntary manslaughter all that is required is sufficient provocation to excite in the mind of the defendant such emotions as either anger, rage, sudden resentment or terror as may be sufficient to obscure the reason of an ordinary man, and to prevent deliberation and premeditation, and to exclude malice, and to render the defendant incapable of cool reflection. *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382.

Evidence of provocation sufficient to reduce a charge of second degree murder to voluntary manslaughter must be such as would affect the ability to reason and cause a temporary loss of self control in ordinary person of average disposition. *State v. Jackson*, 1983-NMCA-007, 99 N.M. 478, 660 P.2d 120, *rev'd on other grounds*, 1983-NMSC-098, 100 N.M. 487, 672 P.2d 660.

**Provocation has subjective and objective components.** — Provocation is not strictly subjective. Defendant must demonstrate that defendant's extreme emotions would affect the ability to reason in an ordinary person. *State v. Taylor*, 2000-NMCA-072, 129 N.M. 376, 8 P.3d 863, cert. quashed, 131 N.M. 64, 33 P.3d 24.

The law does not permit one who intentionally instigates an assault on another to then rely on the victim's reasonable response to that assault as evidence of provocation sufficient to mitigate the subsequent killing of the victim from murder to manslaughter. *State v. Gaitan*, 2002-NMSC-007, 131 N.M. 758, 42 P.3d 1207; *State v. Munoz*, 1992-NMCA-004, 113 N.M. 489, 827 P.2d 1303, cert. denied, 113 N.M. 352, 826 P.2d 573.

**Words insufficient provocation.** — No mere words, however opprobrious or indecent, were deemed sufficient to arouse ungovernable passion, so as to reduce a homicide from murder to manslaughter. *State v. Trujillo*, 1921-NMSC-111, 27 N.M. 594, 203 P. 846. *See State v. Lujan*, 1980-NMSC-036, 94 N.M. 232, 608 P.2d 1114, but *see Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**Words alone,** however scurrilous or insulting, will not furnish adequate provocation to make a homicide voluntary manslaughter. *State v. Castro*, 1982-NMSC-125, 592 P.2d 185, cert. denied, 92 N.M. 621, 593 P.2d 62 (1979), but *see Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**Words and push insufficient provocation.** — Even if it was true, as the defendant had told a witness, that his stepdaughter had pushed him and threatened that her father would come from California and kill him, this would not be adequate to constitute sufficient provocation and to require a jury charge on voluntary manslaughter. *State v. Stills*, 1998-NMSC-009, 125 N.M. 66, 957 P.2d 51.

**"Informational words" may constitute adequate provocation.** — Informational words, as distinguished from mere insulting words, may constitute adequate provocation. The substance of the informational words spoken, the meaning conveyed by those informational words and the ensuing arguments and other actions of the parties, when taken together, can amount to provocation. *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**Discipline of child not provocation.** — Parent disciplining the parent's child, even with a slap to the child's face, is insufficient provocation as a matter of law to reduce the charge of second degree murder to voluntary manslaughter. *State v. Taylor*, 2000-NMCA-072, 129 N.M. 376, 8 P.3d 863, cert. quashed, 131 N.M. 64, 33 P.3d 284 (2001).

**Sudden quarrel or passion mandatory.** — Evidence of a sudden quarrel or heat of passion, tending to show provocation sufficient to negate malice and reduce the degree of felonious homicide from murder to manslaughter, is indispensable to a conviction for voluntary manslaughter. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

To convict of voluntary manslaughter, the jury must have evidence that there was a sudden quarrel or heat of passion at the time of the commission of the crime (in order, under the common-law theory, to show that the killing was the result of provocation sufficient to negate the presumption of malice). *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39. *See State v. Castro*, 1979-NMCA-023, 92 N.M. 585, 592 P.2d 185, cert. denied, 92 N.M. 621, 593 P.2d 62.

It is voluntary manslaughter when the killing is committed upon a sudden quarrel or in the heat of passion. *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382.

**Sudden anger or heat of passion and provocation must concur** to make a homicide voluntary manslaughter. *State v. Castro*, 1979-NMCA-023, 92 N.M. 585, 592 P.2d 185, cert. denied, 92 N.M. 621, 593 P.2d 62.

Provocation must concur with sudden anger or heat of passion, such that an ordinary person would not have cooled off before acting. *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**Evidence of passion or quarrel sufficient.** — Where there was sufficient evidence, even under the circumstances testified to by the appellant herself, from which the jury could find that the shooting occurred in the heat of passion or as the result of a sudden quarrel, there was sufficient evidence to sustain the manslaughter conviction. *State v. Rose*, 1968-NMSC-091, 79 N.M. 277, 442 P.2d 589, cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969).

**Evidence of "sudden quarrel" insufficient.** — Evidence which may support an inference of a smoldering desire within the defendant to avenge his former girl friend dating another male by doing away with both of them would not support an inference of a "sudden quarrel"; nor can such facts be held to give rise to that provocation recognized in the law as being adequate and proper to negate the presumption of malice. *State v. Robinson*, 1980-NMSC-049, 94 N.M. 693, 616 P.2d 406.

**Passion engendered by fear.** — Instruction as to voluntary manslaughter was not error where, from defendant's own testimony, he shot deceased during heat of passion engendered by fear or terror. *State v. Vargas*, 1937-NMSC-049, 42 N.M. 1, 74 P.2d 62.

**Transference of passion theory unauthorized.** — Where there was no evidence that such a condition as a sudden quarrel or the heat of passion existed between defendant and his baby boy, the only evidence of quarrel or heat of passion being between defendant and his wife, there was no evidence tending to establish voluntary manslaughter, since the weight of authority is against allowing transference of one's passion from the object of the passion to a related bystander. *State v. Gutierrez*, 1975-NMCA-121, 88 N.M. 448, 541 P.2d 628.

**To reduce murder to voluntary manslaughter,** victim must be source of provocation. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**Defendant initiates the provocation.** — If the defendant intentionally caused the victim to do acts which the defendant could claim provoked him, he cannot kill the victim and claim that he was provoked; in such case, the circumstances show that he acted with malice aforethought, and the offense is murder. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**Acts of peace officer insufficient.** — Acts of a peace officer exercising his duties in a lawful manner cannot rise to the level of sufficient provocation. *State v. Martinez*, 1982-NMCA-020, 97 N.M. 540, 641 P.2d 1087, cert. denied, 98 N.M. 50, 644 P.2d 1039; *State v. Manus*,



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1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**Exercise of legal right insufficient.** — The exercise of a legal right, no matter how offensive, is not such provocation as lowers the grade of homicide from murder to voluntary manslaughter. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162; *State v. Marquez*, 1981-NMCA-105, 96 N.M. 746, 634 P.2d 1298.

**Distinction between manslaughter and self-defense.** — The line of demarcation between a homicide which amounts to voluntary manslaughter and one which amounts to justifiable homicide in self-defense is not always clearly defined and depends upon the facts of each case as it arises; those facts are for the jury, under instructions from the court. *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382.

**Sufficient evidence of voluntary manslaughter.** — In defendant's trial for voluntary manslaughter, where the evidence established that the victim's actions in repeatedly charging at defendant aroused sufficient fear in defendant, which would affect his ability to reason and cause a temporary loss of self control, but that a reasonable person in the same circumstances would not have used a knife to stab the victim when the victim did not have a weapon, the evidence was sufficient for a jury to find sufficient provocation and that defendant's actions were not taken in self-defense. *State v. Fox*, 2017-NMCA-029, cert. granted.

**Self-defense and provocation.** — Self-defense and provocation supporting a conviction for voluntary manslaughter are not mutually incompatible. *State v. Melendez*, 1982-NMSC-039, 97 N.M. 738, 643 P.2d 607.

**Conviction for manslaughter on failure of self-defense plea.** — When facts are present which give rise to a plea of self-defense, it is not unreasonable that if the plea fails, the accused should be found guilty of voluntary manslaughter. *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382; *State v. Lopez*, 1968-NMSC-092, 79 N.M. 282, 442 P.2d 594.

Whenever the evidence is sufficient to raise a question of self-defense, an instruction on voluntary manslaughter should also be submitted to the jury if the evidence supports sufficient provocation of fear for one's own safety. *State v. Abeyta*, 1995-NMSC-052, 120 N.M. 233, 901 P.2d 164, *overruled on other grounds by State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266.

**Not manslaughter absent supporting evidence.** — Where defendant contended he shot deceased solely to protect himself from a threatened attack, and stated that at the time he shot and killed deceased he was calm and cool, being by nature so disposed, the trial court was correct in refusing to submit the issue of voluntary manslaughter to the jury. *State v. Luttrell*, 1923-NMSC-024, 28 N.M. 393, 212 P. 739.

**Unnecessary force in defending self.** — Defendant's choice of deadly force when confronted with a possible battery of less than deadly force would sustain a conviction of voluntary manslaughter but not for murder. *State v. McLam*, 1970-NMCA-129, 82 N.M. 242, 478 P.2d 570.

**Killing of fleeing, would-be felon.** — A well-founded belief that a known felony was about to be committed will extenuate a homicide committed in prevention of the supposed crime, and this upon a principle of necessity; but when the necessity ceases, and the supposed felon flees, and thereby abandons his proposed design, a killing in pursuit, however well-grounded the belief may be that he intended to commit a felony, will not extenuate the offense of the pursuer. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

**Elements distinguished between crimes.** — Voluntary manslaughter and shooting at or from a motor vehicle resulting in great bodily harm have distinct elements. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

**Death not equated with great bodily harm.** — Comparing the voluntary manslaughter statute with the shooting at or from a motor vehicle statute and the statutory definition of great bodily harm in Section 30-1-12 NMSA 1978, it is clear that the legislature does not "equate" death with great bodily harm. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

**Voluntary manslaughter, aggravated battery and kidnapping.** — Where defendant shot the victim in the chest in defendant's vehicle, drove the unconscious victim in the vehicle to an isolated area, and shot the victim twice in the head while the victim was still alive; and defendant used two different types of force to shoot the victim in the chest and to keep the victim's unconscious body in the vehicle, defendant's convictions of voluntary manslaughter for shooting the victim in the chest, aggravated battery for shooting the victim in the head, and kidnapping for keeping the victim in defendant's vehicle and transporting the victim to the isolated area were not based on unitary conduct and did not violate defendant's right to be free from double jeopardy. *State v. Urioste*, 2011-NMCA-121, 267 P.3d 820, cert. granted, 2011-NMCERT-012.

**No double jeopardy violation for convictions.** — Defendant's convictions of voluntary manslaughter and shooting at or from a motor vehicle do not violate double jeopardy. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

**Separate punishments intended.** — The legislature intended to punish the crimes of voluntary manslaughter and shooting at or from a motor vehicle separately. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

**Cumulative punishment is precluded for shooting at a vehicle and homicide.** — New Mexico jurisprudence precludes cumulative punishment for the offenses of causing great bodily harm to a person by shooting at a motor vehicle and the homicide resulting from the penetration of the same bullet into the same person. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426, *overruling State v. Gonzales*, 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023, *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563 and *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

Where defendant and defendant's companions were accosted by a rival gang in front of defendant's family home, guns were pulled on both sides and defendant's sibling was severely wounded by gunshots in the leg and abdomen; while defendant's group were trying to help defendant's sibling in the driveway and stop the bleeding from the gunshot wounds, the person in the rival gang who had been shooting at defendant and defendant's companions returned in a Ford Expedition; when defendant saw gunfire coming from the Expedition, defendant ran into the house and retrieved an AK-47 rifle and began shooting at the Expedition; the driver of Expedition was shot seven times and died; the jury convicted defendant of voluntary manslaughter and shooting into a motor vehicle resulting in great bodily harm, the Double Jeopardy Clause protected defendant from being punished both for the homicide of the victim and for shooting into a vehicle causing great bodily harm to the victim where both convictions were premised on the unitary act of shooting the victim. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426, *overruling State v. Gonzales*, 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023, *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563 and *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.



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**Accidental killing** will not support conviction of voluntary manslaughter. *State v. Lopez*, 1968-NMSC-092, 79 N.M. 282, 442 P.2d 594.

**Diminished responsibility for manslaughter.** — The defense of diminished responsibility is analogous to that of insanity, in that expert testimony on the issue of diminished responsibility by reason of mental disease or defect is not conclusive on the fact finder. The jury is free to believe or disbelieve such testimony, and if such testimony is disbelieved the presumption of full responsibility, which is viewed as included in the presumption of sanity, remains in effect. *State v. Holden*, 1973-NMCA-092, 85 N.M. 397, 512 P.2d 970, cert. denied, 85 N.M. 380, 512 P.2d 953.

**Issue of responsibility properly submitted.** — Evidence of insanity may be so overwhelming as to require the direction of a verdict of acquittal, as may be evidence of diminished responsibility. Where the evidence was not of such a quality as to require a directed verdict, the issue of defendant's responsibility for the crime of voluntary manslaughter was properly submitted to the jury. *State v. Holden*, 1973-NMCA-092, 85 N.M. 397, 512 P.2d 970, cert. denied, 85 N.M. 380, 512 P.2d 953.

**Effect of conviction unsupported by evidence.** — It is error for the court to submit to the jury an issue of whether defendant was guilty of voluntary manslaughter when the facts establish either first or second degree murder, but could not support a conviction of voluntary manslaughter and, accordingly, upon acquittal of murder and conviction of voluntary manslaughter, a reversal and discharge of the accused is required. *State v. Lopez*, 1968-NMSC-092, 79 N.M. 282, 442 P.2d 594.

**No double jeopardy violations for sentence enhancements.** — Upon conviction of voluntary manslaughter, with firearm enhancement, imposition of a three-year sentence under this section, plus an additional three-year sentence under 31-18-15 NMSA 1978, and an additional one-year firearm enhancement, did not result in multiple punishments for the same offense in violation of double jeopardy. *State v. Alvarado*, 1997-NMCA-027, 123 N.M. 187, 936 P.2d 869.

**Sufficient evidence.** — Where the victim was smoking and injecting methamphetamine; the victim's behavior became increasingly erratic; the victim was playing with two knives; defendant wrestled with the victim, attempting to disarm and restrain the victim; the victim was uncontrollable, violent, and wild; defendant put the victim in a "choke hold" on three occasions, but did not choke the victim to unconsciousness; each time defendant released the victim, the victim continued to violently struggle; even though defendant eventually duct taped the victim, the victim continued to struggle; the victim eventually stopped breathing and could not be revived; and the victim's death was caused by cervical compression or neck compression with physical restraint and methamphetamine intoxication as contributing causes, there was sufficient evidence to support defendant's conviction of voluntary manslaughter. *State v. Maples*, 2013-NMCA-052, 300 P.3d 739, cert. granted, 2013-NMCERT-004.

## III. INVOLUNTARY MANSLAUGHTER.

### A. IN GENERAL.

**Involuntary manslaughter statute excludes all cases of intentional killing,** and includes only unintentional killings by acts unlawful, but not felonious, or lawful, but done in an unlawful manner, or without due caution and circumspection; the killing must be unintentional to constitute involuntary manslaughter, and, if it is intentional and not justifiable, it belongs in some one of the classes of unlawful homicide of a higher degree than involuntary manslaughter. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170, *overruled on other grounds*, *State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

Involuntary manslaughter was confined to cases where the killing was unintentional. *State v. Pruett*, 1921-NMSC-110, 27 N.M. 576, 203 P. 840.

**Involuntary manslaughter may be committed** by both unlawful and lawful acts. *State v. Grubbs*, 1973-NMCA-096, 85 N.M. 365, 512 P.2d 693, *overruled on other grounds*, *Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358; *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209.

**Distinction between lawful and unlawful acts.** — In distinguishing between unlawful and lawful acts, the statute applies the language, defined by the courts to mean criminal negligence, only to the lawful act portion of the statute. *State v. Grubbs*, 1973-NMCA-096, 85 N.M. 365, 512 P.2d 693, *overruled on other grounds*, *Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358; *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209.

**Criminal negligence is not element of involuntary manslaughter by unlawful act** under Subsection B, nor the negligence which is a part of Section 30-7-4 NMSA 1978 (relating to negligent use or handling of a weapon). *State v. Grubbs*, 1973-NMCA-096, 85 N.M. 365, 512 P.2d 693, *overruled on other grounds*, *Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358; *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209.

**Criminal negligence required for involuntary manslaughter by lawful act.** — A killing by lawful act, to be involuntary manslaughter, depends on whether the lawful act was done in an unlawful manner or without due caution and circumspection. The phrase "without due caution and circumspection" has been held to involve the concept of "criminal negligence," which concept includes conduct which is reckless, wanton or willful. *State v. Grubbs*, 1973-NMCA-096, 85 N.M. 365, 512 P.2d 693, *overruled on other grounds*, *Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358; *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209.

**Showing of criminal negligence is required** for conviction of involuntary manslaughter, whether based on an "unlawful act" or "lawful act". *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209, *aff'd*, 1996-NMSC-068, 122 N.M. 596, 930 P.2d 131.

**Reckless disregard of others.** — Merely driving on the wrong side of the road could be inadvertence and not sufficient to convict, but driving on the wrong side of the road coming up a hill, where visibility was obstructed, showed a heedless and reckless disregard of the rights of others. *Garrett v. Howden*, 1963-NMSC-222, 73 N.M. 307, 387 P.2d 874.

Inadvertently allowing an automobile to encroach upon the wrong side of the road while going up an incline so steep cars beyond its crest may not be seen constitutes a reckless, willful and wanton disregard of consequences to others, and will support conviction for manslaughter if one be killed as a result thereof. *State v. Rice*, 1954-NMSC-037, 58 N.M. 205, 269 P.2d 751.

**Negligent use of weapon.** — A conviction of involuntary manslaughter by negligent use of a weapon requires negligence which is ordinary. *State v. Grubbs*, 1973-NMCA-096, 85 N.M. 365, 512 P.2d 693, *overruled on other grounds*, *Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358; *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209.

**Use of firearm enhancement for negligent use.** — Under the facts of this case, the state was required to prove that the defendant negligently used a firearm to commit a noncapital felony and this conduct resulted in the death of a human being. Use of a firearm is the same conduct required to enhance the defendant's sentence



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under Section 31-18-16A NMSA 1978. Because the state would not be required to prove any additional facts in order to have the defendant's sentence enhanced, the firearm enhancement statute is subsumed within the offense of involuntary manslaughter by negligent use of a firearm. *State v. Franklin*, 1993-NMCA-135, 116 N.M. 565, 865 P.2d 1209.

**Defense to involuntary manslaughter.** — Defendant charged with involuntary homicide could raise the theory of self-defense and was entitled to a jury instruction on her theory of defense of another. Any anomalies in the evidence will be resolved by the properly instructed jury. *State v. Gallegos*, 2001-NMCA-021, 130 N.M. 221, 22 P.3d 689, cert. denied, 130 N.M. 459, 26 P.3d 103.

**Negligent self-defense as involuntary manslaughter.** — If defendant could be viewed as in a position where his safety or the safety of his friend was threatened, and if in an attempt to protect himself or ward off the attackers, defendant inadvertently shot the victim, then his actions could be viewed as a lawful act of self-defense committed in a unlawful manner or without due caution and circumspection, such that an instruction on involuntary manslaughter based on negligent self-defense should have been given. *State v. Arias*, 1993-NMCA-007, 115 N.M. 93, 847 P.2d 327, *overruled on other grounds*, *State v. Abeyta*, 1995-NMSC-052, 120 N.M. 233, 901 P.2d 164, *overruled on other grounds*, *State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266.

If a defendant shoots someone in imperfect self-defense, the charge of murder can only be mitigated to voluntary manslaughter and an instruction on involuntary manslaughter is inappropriate. *State v. Abeyta*, 1995-NMSC-052, 120 N.M. 233, 901 P.2d 164, *overruled on other grounds*, *State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266.

**Accidental shooting in process of imperfect self-defense.** — While a claim of imperfect self-defense does not give rise to the need for an involuntary manslaughter instruction, a claim of accidental shooting might; furthermore, it is possible for an accidental shooting to occur in the process of imperfect self-defense. *State v. Abeyta*, 1995-NMSC-052, 120 N.M. 233, 901 P.2d 164, *overruled on other grounds*, *State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266.

**Resisting search.** — Homicide committed in resisting deputy sheriff who was searching defendant's house without a warrant was involuntary manslaughter if the resistance constituted a misdemeanor, as when the deputy was merely engaged in the "execution of his office," and instruction leaving jury to determine the degree of murder was erroneous. *State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211.

**Inflicting a beating is unlawful act.** *State v. Holden*, 1973-NMCA-092, 85 N.M. 397, 512 P.2d 970, cert. denied, 85 N.M. 380, 512 P.2d 953.

**Involuntary manslaughter instruction improper.** — Inflicting a beating is an unlawful act, and accordingly, there was no basis for an instruction on involuntary manslaughter by lawful act, nor was there any basis for an instruction on manslaughter by unlawful act not amounting to a felony at defendant's trial for murder of his baby boy. *State v. Gutierrez*, 1975-NMCA-121, 88 N.M. 448, 541 P.2d 628.

**No foundation for involuntary theory.** — Where the uncontradicted evidence showed that defendant killed her husband with two and possibly three well-placed shots into his person fired at close range while he lay on the couch and defendant stood over him with a pistol purchased by defendant earlier in the day, and immediately following a discussion about the victim leaving the defendant, no foundation existed for an instruction on involuntary manslaughter, and the trial court properly refused to instruct on this theory of the case. *State v. Gardner*, 1973-NMSC-034, 85 N.M. 104, 509 P.2d 871, cert. denied, 414 U.S. 851, 94 S. Ct. 145, 38 L. Ed. 2d 100 (1973).

**Intentional shooting not involuntary manslaughter.** — The killing of a person by intentionally shooting him with a rifle, if not justified by the law of self-defense, would constitute at least an assault with a deadly weapon, and would be a felony, and hence not involuntary manslaughter. *State v. Pruett*, 1921-NMSC-110, 27 N.M. 576, 203 P. 840.

**Homicide by vehicle statute preempts manslaughter statute.** — The specific homicide by vehicle statute, Section 66-8-101 NMSA 1978, preempts the involuntary manslaughter statute in unintentional vehicular homicide cases. *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209, *aff'd*, 1996-NMSC-068, 122 N.M. 596, 930 P.2d 131.

**Careless driving statute,** Section 66-8-114 NMSA 1978, which requires a showing of only civil negligence, cannot be used as the basis for involuntary manslaughter. *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209, *aff'd*, 1996-NMSC-068, 122 N.M. 596, 930 P.2d 131.

**Evidence insufficient to convict.** — Evidence that defendant was driving an unfamiliar car over relatively unfamiliar roads, that 800 feet north of where the accident occurred defendant drove over a hill with a 2% grade with a curve at the bottom of it and did not slow down, that defendant had consumed two beers before the accident, and that, unknown to defendant, the tire that blew out was defective, even when considered cumulatively, failed to disclose the state of mind required to be shown for a conviction under this section. *State v. Hayes*, 1966-NMSC-260, 77 N.M. 225, 421 P.2d 439.

B. PROXIMATE CAUSE.

**Proximate cause requisite for conviction.** — Unlawful act must constitute proximate cause of the homicide to warrant a conviction of involuntary manslaughter. *State v. Seward*, 1942-NMSC-002, 46 N.M. 84, 121 P.2d 145.

**Proximate cause not necessarily direct immediate cause.** — The act of defendant must be a proximate cause of death but need not be the direct immediate cause; it is sufficient if the direct cause resulted naturally from the act of accused. *State v. Fields*, 1964-NMSC-230, 74 N.M. 559, 395 P.2d 908.

**Proximate cause in reckless driving.** — Wanton and reckless operation of an automobile which must be shown as proximate cause of a death in order to secure a conviction for involuntary manslaughter is not different from that required to be shown under former guest statute (Section 64-24-1, 1953 Comp.) before one injured may recover against driver host. *State v. Hayes*, 1966-NMSC-260, 77 N.M. 225, 421 P.2d 439; *State v. Clarkson*, 1954-NMSC-007, 58 N.M. 56, 265 P.2d 670.

**Heedless or reckless disregard of others.** — To establish heedlessness or reckless disregard of the right of others, a particular state of mind that comprehends evidence of an utter irresponsibility on the part of the defendant or of a conscious abandonment of any consideration for the safety of passengers must be established. *State v. Hayes*, 1966-NMSC-260, 77 N.M. 225, 421 P.2d 439.

**Criminal negligence in driving while intoxicated.** — The act of an intoxicated person in driving an automobile recklessly might be such criminal negligence as would warrant a finding of manslaughter if such operation of the automobile was the proximate cause of death. *State v. Sisneros*, 1938-NMSC-049, 42 N.M. 500, 82 P.2d 274.

**Contributory negligence no defense.** — Conduct of the driver of car struck by defendant had no application in trial for manslaughter, since it was the criminal negligence of defendant that caused the deaths of the two



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victims. *State v. Romero*, 1961-NMSC-139, 69 N.M. 187, 365 P.2d 58.

**Evidence of reckless driving as proximate cause sufficient.** — Evidence that defendant struck vehicle in which decedents were riding on a well-lighted street from the rear, that he was driving at a speed of between 60 to 80 m.p.h. in a 35 m.p.h. zone immediately prior to the collision and that he was intoxicated, established beyond any reasonable doubt that his conduct in driving was the proximate cause of the accident, and that it was so reckless, wanton and willful as to show an utter disregard for the rights of others. *State v. Romero*, 1961-NMSC-139, 69 N.M. 187, 365 P.2d 58.

**Proximate cause not recklessness.** — Where statements of defendant and his companion, which were introduced by the state, and not controverted, negatived any wanton or reckless operation of the car, or any high speed, and were corroborated to a great extent by a witness for the state who was a companion of the deceased at the time of the accident, the evidence did not establish that the proximate cause of the fatal striking of deceased was the wanton or reckless operation of the vehicle by the defendant. *State v. Clarkson*, 1954-NMSC-007, 58 N.M. 56, 265 P.2d 670.

**Nor unlawfully carrying weapon.** — Involuntary manslaughter was not proved by evidence that a loaded revolver fell to the floor at a public dance and discharged, killing another, since unlawful act of carrying the weapon was not proximate cause of death. *State v. Nichols*, 1930-NMSC-032, 34 N.M. 639, 288 P. 407.

**Instruction on unlawful act improper absent proximate cause.** — Unless it could be said that failure of a defendant to have a driver's license in his possession at time and place of accident was the proximate cause of death, an instruction that defendant was guilty of involuntary manslaughter if it was found he operated the automobile without a license or was under influence of intoxicating liquor would be erroneous. *State v. Seward*, 1942-NMSC-002, 46 N.M. 84, 121 P.2d 145.

## IV. EVIDENCE.

**Proof beyond reasonable doubt.** — The burden of proof on the part of the state to support a charge of manslaughter by automobile beyond a reasonable doubt is clearly established in New Mexico. *State v. Rice*, 1954-NMSC-037, 58 N.M. 205, 269 P.2d 751.

**Establishment of corpus delicti.** — In homicide cases, proof of the corpus delicti is established when it is shown that the person whose death is alleged in the information is in fact dead, and that the death was criminally caused. *State v. Romero*, 1961-NMSC-139, 69 N.M. 187, 365 P.2d 58.

Proof of corpus delicti was established beyond a reasonable doubt where witness testified that his wife and son were dead at the scene of the accident, that he took the bodies to South Carolina, and was present when they were interred there. *State v. Romero*, 1961-NMSC-139, 69 N.M. 187, 365 P.2d 58.

**Proof of victim's identity mandatory.** — In this state, proof that the person killed is the same person as the one charged in the indictment to have been killed is part of the corpus delicti; failure so to prove is more than a variance between the charge and the proof, it is a failure to prove that the crime charged has been committed. *State v. Vallo*, 1970-NMCA-002, 81 N.M. 148, 464 P.2d 567 (ordering defendant discharged since the judgment was reversed for failure of proof rather than error in the trial proceedings).

**Misrepresentation of polygraph's accuracy.** — Verdict of jury finding defendant guilty of voluntary manslaughter was tainted by introduction of testimony calculated to prejudice the jury by implying that polygraph test was the ultimate in tests for truth, which testimony cast doubts upon the truth and veracity of the defendant in a manner not countenanced by the courts; it would not be allowed to stand. *State v. Varos*, 1961-NMSC-099, 69 N.M. 19, 363 P.2d 629, distinguished in, *State v. Chavez*, 1969-NMCA-109, 80 N.M. 786, 461 P.2d 919 (decided under former law).

**Unrelated crimes.** — Interjection of criminal offenses of narcotics pushing and heroin smuggling in the opening statement and on cross-examination, which offenses were irrelevant to the homicide for which defendant was being tried, constituted reversible error under the circumstances. *State v. Garcia*, 1971-NMCA-121, 83 N.M. 51, 487 P.2d 1356.

**Threat inadmissible.** — Threat made by defendant against narcotics agent some 14 months prior to the crime, which did not point with any reasonable certainty to deceased, a police officer, individually or as a member of a class, and about which deceased was not shown to have had any knowledge, was not admissible as bearing on defendant's actions toward deceased or to show why deceased acted as he did. *State v. Garcia*, 1971-NMCA-121, 83 N.M. 51, 487 P.2d 1356.

**Admitting evidence of threats prejudicial error.** — Since a basic contention of defense was that defendant acted in self-defense, improper admission of testimony as to a threat made by defendant was prejudicial error. *State v. Garcia*, 1971-NMCA-121, 83 N.M. 51, 487 P.2d 1356.

**Photographs of body.** — The admission into evidence in a murder trial of photographs of the decedent taken during her autopsy is proper if they are reasonably relevant to material issues in the trial, showing the identity of the victim, and the number and location of the wounds inflicted upon her body. *State v. Ho'o*, 1982-NMCA-158, 99 N.M. 140, 654 P.2d 1040, cert. denied, 99 N.M. 148, 655 P.2d 160.

## V. JURY INSTRUCTIONS.

**Criminal negligence instruction.** — A showing of criminal negligence is required for a conviction of involuntary manslaughter, and it was fundamental error for the trial court to have not so instructed the jury. *State v. Kirby*, 1996-NMSC-069, 122 N.M. 609, 930 P.2d 144.

Where defendant's testimony provided a factual basis for an instruction on the lesser included offense of voluntary manslaughter, the trial court committed reversible error in denying defendant's requested instruction. A trial court must instruct the jury on voluntary manslaughter if the defense requests such an instruction and the instruction is warranted under the facts of the case. *State v. Munoz*, 1992-NMCA-004, 113 N.M. 489, 827 P.2d 1303, cert. denied, 113 N.M. 352, 826 P.2d 573.

**Provocation.** — Words alone, however scurrilous or insulting, will not furnish adequate provocation to require submission of a voluntary manslaughter instruction. However, if there is evidence to raise the inference that by reason of actions and circumstances the defendant was sufficiently provoked, then the jury should be given the voluntary manslaughter instruction. The substance of the informational words spoken, the meaning conveyed by those informational words, the ensuing arguments and other actions of the parties, when taken together, could amount to provocation. The defendant is entitled to an instruction on voluntary manslaughter as a lesser included offense of murder in the first degree if there is evidence to support, or tending to support, such an instruction. *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**Involuntary manslaughter instruction.** — Where there is sufficient evidence of both criminal negligence and accident, it is proper to grant an involuntary manslaughter instruction. *State v. Skippings*, 2011-NMSC-021, 150 N.M. 196, 258 P.3d 1008.



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**The *mens rea* for involuntary manslaughter is criminal negligence.** — An involuntary manslaughter jury instruction is proper only when the evidence presented at trial permits the jury to find the defendant had a mental state of criminal negligence when engaging in the act causing the victim's death. *State v. Henley*, 2010-NMSC-039, 148 N.M. 359, 237 P.3d 103.

**Evidence of excessive self-defense and accident are not a substitute for evidence of criminal negligence.** — The confluence of evidence of imperfect self-defense with evidence of accidental shooting is not a substitute for evidence of the criminal negligence mental state required for an involuntary manslaughter conviction, because if the homicide is accidental, defendant acted without a criminally culpable state of mind in performing a lawful act unintentionally killing the victim, and if the homicide occurred as a result of imperfect self-defense, defendant acted intentionally in self-defense and the use of excessive force rendered the killing lawful, whereas, an involuntary manslaughter instruction is proper only where there is evidence of an unintentional killing and a *mens rea* of criminal negligence. *State v. Henley*, 2010-NMSC-039, 148 N.M. 359, 237 P.3d 103.

**Evidence did not support instruction on involuntary manslaughter.** — Where the evidence most favorable to defendant showed that defendant was sitting in a car; the victim approached the car and held a gun to defendant's head; defendant grabbed the gun and it discharged; defendant gained control of the gun and fired it at the victim; and defendant then drove away without realizing that the victim had been shot, the evidence failed to establish a mental state of criminal negligence, which is required to support a jury instruction on involuntary manslaughter. *State v. Henley*, 2010-NMSC-039, 148 N.M. 359, 237 P.3d 103.

**Evidence supported instruction on involuntary manslaughter.** — Where defendant shot and killed an intruder that failed to identify himself while pounding on defendant's front door at 1:30 a.m., an instruction on involuntary manslaughter was warranted because a reasonable jury could have determined that defendant was either criminally negligent because firing a gun at the door while someone was on the other side of it was a willful disregard of the rights or safety of others and endangered that unknown intruder, that defendant unintentionally killed the intruder based on defendant's theory that he fired a warning shot, or that defendant committed the lawful act of self-defense and unintentionally killed the victim without due caution or circumspection. *State v. Cardenas*, 2016-NMCA-042, cert. denied.

**Defendant was entitled to an involuntary manslaughter instruction as a lesser included offense of second-degree murder.** — Where defendant was convicted of second-degree murder based on evidence that he shot and killed the victim, a friend of defendant's, while defendant was playing with a gun that he believed to be unloaded, the district court erred in denying defendant's requested jury instruction on involuntary manslaughter as a lesser included offense of second-degree murder, because there was evidence to support both charges and reasonable minds could differ regarding whether defendant committed involuntary manslaughter by negligent use of a firearm or second-degree murder by aggravated assault with a deadly weapon. *State v. Young*, 2021-NMCA-049.

**Submission of issue proper.** — In prosecution on information charging first degree murder, the submission of voluntary manslaughter was not error. *State v. Burrus*, 1934-NMSC-036, 38 N.M. 462, 35 P.2d 285.

**Question of provocation.** — Generally, it is for the jury to determine whether there is sufficient provocation under an appropriate instruction on voluntary manslaughter. *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**Question of degree for jury.** — Where the evidence on provocation sufficient to reduce the killing from murder to voluntary manslaughter and the evidence of self-defense was conflicting, such questions were factual ones to be resolved by the jury, and the trial court properly submitted the issues of second degree murder, voluntary manslaughter and self-defense to the jury. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170, *overruled on other grounds*, *State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

**Defendant entitled to manslaughter instruction.** — Any evidence tending to bring homicide within grade of manslaughter entitled defendant to instruction on the law of manslaughter, and it was fatal error to refuse it. *State v. Crosby*, 1920-NMSC-037, 26 N.M. 318, 191 P. 1079.

If there is enough circumstantial evidence to raise an inference that the defendant was sufficiently provoked to kill the victim, he is entitled to an instruction on manslaughter. *State v. Martinez*, 1981-NMSC-016, 95 N.M. 421, 622 P.2d 1041.

**Defendant is entitled to instruction on voluntary manslaughter** if there is some evidence to support it. *State v. Maestas*, 1981-NMSC-006, 95 N.M. 335, 622 P.2d 240; *State v. Marquez*, 1981-NMCA-105, 96 N.M. 746, 634 P.2d 1298.

The defendant is entitled to an instruction on voluntary manslaughter as a lesser included offense of murder in the first degree if there is evidence to support, or tending to support, such an instruction. *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**When court has no duty to instruct on voluntary manslaughter.** — Where neither prosecution nor defense in a murder trial requested an instruction on voluntary manslaughter, and both defendant and counsel stated that they did not desire such an instruction despite the court's explanation that there was sufficient evidence to warrant it, there was no duty for the trial court to instruct on voluntary manslaughter. *State v. Najar*, 1980-NMCA-033, 94 N.M. 193, 608 P.2d 169, cert. denied, 94 N.M. 628, 614 P.2d 545.

Trial court's refusal to instruct the jury on voluntary and involuntary manslaughter was not improper where defendant was guilty of transporting a gun by a convicted felon and of endangering another by handling a firearm in a negligent manner, and where there was evidence that he intentionally fired at the victim's vehicle. *State v. Salazar*, 1997-NMSC-044, 123 N.M. 778, 945 P.2d 996.

**Attempted voluntary manslaughter instruction.** — Defendant's testimony that he was scared when he believed other party was reaching for a gun provides evidence of sufficient provocation to support an attempted voluntary manslaughter instruction. *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537.

**Instructions incomplete.** — In homicide prosecution where one of defendant's theories was involuntary manslaughter, and record was replete with testimony that defendant was drunk while he rode around in automobile with deceased and witness, holding and handling sawed-off shotgun, court's refusal to instruct the jury that negligent use of a weapon while under the influence of intoxicant was a petty misdemeanor left jury without a guide to determine whether this was a killing while in the commission of a misdemeanor, and was reversible error. *State v. Durham*, 1971-NMCA-168, 83 N.M. 350, 491 P.2d 1161.

**Overinclusive instruction erroneous.** — Where trial court, at commencement of trial, removed the issue of manslaughter by "commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection" from the case, it was reversible error to reinject this false issue into the case by including it in the definition of involuntary manslaughter given the jury in the instructions, and instructing the



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jury that in order to find defendant guilty it must find that his conduct was of the kind described in the definition. *State v. Salazar*, 1954-NMSC-062, 58 N.M. 489, 272 P.2d 688.

**Sufficiency of the evidence assessed against the elements of the crime charged.** — Where defendant was charged with involuntary manslaughter, and where the jury was instructed on the essential elements of involuntary manslaughter, but the jury instruction contained an additional element not contained in UJI 14-231 NMRA, the additional element did not become an essential element under the statute, because the sufficiency of the evidence is assessed against the elements of the crime charged. Therefore, where the defendant did not dispute that he was properly charged with the statutory elements for involuntary manslaughter, that he was given a meaningful opportunity to defend himself against those charges, or that the evidence was sufficient to convict him of the statutory elements of involuntary manslaughter, defendant was properly convicted of involuntary manslaughter. *State v. Carpenter*, 2016-NMCA-058.

**Separate instructions not necessary.** — Claim that the trial court should have instructed separately on the law applicable to crime of homicide resulting from driving under the influence and resulting from reckless driving was without merit, where jury was adequately instructed as to the proof required in either circumstance. *State v. Fields*, 1964-NMSC-230, 74 N.M. 559, 395 P.2d 908.

**Erroneous to submit unsupported issue of manslaughter.** — It is error for the court to submit to the jury an issue of whether defendant was guilty of voluntary manslaughter when the facts establish either first or second degree murder, but could not support a conviction of voluntary manslaughter and, accordingly, upon acquittal of murder and conviction of voluntary manslaughter, a reversal and discharge of the accused is required. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

It is reversible error to submit, in a murder case, the issue of voluntary manslaughter to the jury where no such issue is involved in the evidence. *State v. Luttrell*, 1923-NMSC-024, 28 N.M. 393, 212 P. 739; *State v. Trujillo*, 1921-NMSC-111, 27 N.M. 594, 203 P. 846; *State v. Pruett*, 1921-NMSC-110, 27 N.M. 576, 203 P. 840; *State v. Lujan*, 1980-NMSC-036, 94 N.M. 232, 608 P.2d 1114.

**Because misleading to jury.** — A party is entitled to have the jury instructed on all correct legal theories of his case which are supported by substantial evidence but in this case the court's refusal to give the involuntary manslaughter instruction was correct where to have given the requested instruction, which included acts for which there was no evidentiary support, would have introduced false issues and would have been misleading to the jury. *LaBarge v. Stewart*, 1972-NMCA-119, 84 N.M. 222, 501 P.2d 666, cert. denied, 84 N.M. 219, 501 P.2d 663.

**No right to instruction on blood alcohol test refusal.** — Nothing in N.M. Const., art. II, §§ 14 or 15, or in statutory or case law, gives defendant in prosecution for manslaughter the legal right to have jury instructed that he had right to refuse to take a blood alcohol test. *State v. Fields*, 1964-NMSC-230, 74 N.M. 559, 395 P.2d 908.

**Standing to complain.** — Where the appellant was convicted of involuntary manslaughter, he could not complain of error in court's instruction in regard to murder. *State v. Carabajal*, 1920-NMSC-086, 26 N.M. 384, 193 P. 406.

**Review of requested instruction.** — Since the instruction on voluntary manslaughter was given at defendant's request, the appeals court can refuse to review since the trial court merely instructed the jury as the defendant requested. *State v. Young*, 1994-NMCA-061, 117 N.M. 688, 875 P.2d 1119, cert. denied, 117 N.M. 773, 877 P.2d 579.

**Omission of words "without malice".** — Omission of words "without malice" in instruction in prosecution for voluntary manslaughter did not decrease amount of proof required to convict. *Territory v. Trapp*, 1911-NMSC-073, 16 N.M. 700, 120 P. 702, *rev'd on other grounds*, 225 F. 968 (8th Cir. 1915).

Instruction upon manslaughter which did not tell jury that the killing must be without malice was beneficial rather than harmful to defendant, and he could not complain thereof. *State v. Carabajal*, 1920-NMSC-086, 26 N.M. 384, 193 P. 406.

**Failure to preserve error in instruction.** — Defective instruction which failed to advise the jury that defendant's reckless and wanton operation of his automobile must have been proximate cause of victim's death would not be considered on appeal where not raised in the trial court prior to reading of instruction to jury. *State v. Clarkson*, 1954-NMSC-007, 58 N.M. 56, 265 P.2d 670.

**Health and safety violations.** — Subsection B of this section is applicable to violations of the New Mexico Occupational Health and Safety Act. 1973-74 Op. Att'y Gen. No. 73-32.

Willful violation of a state occupational health and safety standard which causes the death of an employee would appear to constitute a violation of Subsection B of this section. 1973-74 Op. Att'y Gen. No. 73-32.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

For article, "Survey of New Mexico Law, 1982-83: Criminal Law," see 14 N.M.L. Rev. 89 (1984).

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide §§ 54 to 70.

Wanton or reckless use of firearm without express intent to inflict injury, 5 A.L.R. 603, 23 A.L.R. 1554.

Negligent homicide as affected by negligence or other misconduct of the decedent, 67 A.L.R. 922.

Test or criterion of term "culpable negligence," "criminal negligence" or "gross negligence," appearing in statute defining or governing manslaughter, 161 A.L.R. 10.

Sleep or drowsiness of operator of automobile as affecting charge of negligent homicide, 63 A.L.R.2d 983.

Manslaughter, who other than actor is liable for, 95 A.L.R.2d 175.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour, 93 A.L.R.3d 925.

Criminal liability for injury or death caused by operation of pleasure boat, 8 A.L.R.4th 886.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Propriety of manslaughter conviction in prosecution for murder, absent proof of necessary elements of manslaughter, 19 A.L.R.4th 861.

Corporation's criminal liability for homicide, 45 A.L.R.4th 1021.

Homicide: physician's withdrawal of life supports from comatose patient, 47 A.L.R.4th 18.

40 C.J.S. Homicide §§ 69 to 92.



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## 30-2-4. Assisting suicide.

A. Assisting suicide consists of deliberately aiding another in the taking of the person's own life, unless the person aiding another in the taking of the person's own life is a person acting in accordance with the provisions of the End-of-Life Options Act [24-7C-1 to 24-7C-8 NMSA 1978].

B. A person who commits assisting suicide is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-2-5, enacted by Laws 1963, ch. 303, § 2-5; 2021, ch. 132, § 10.**

**The 2021 amendment,** effective June 18, 2021, removed criminal liability for aiding another in the taking of another person's life if the person is acting in accordance with the provisions of the End-of-Life Options Act; added new subsection designations "A" and "B"; in Subsection A, after "own life", deleted "Whoever" and added "unless the person aiding another in the taking of the person's own life is a person acting in accordance with the provisions of the End-of-Life Options Act"; and in Subsection B, added "A person who".

ANNOTATIONS

**Physician aid in dying is prohibited by this section.** — The practice of aid in dying involves a physician deliberately prescribing a lethal dose of barbiturates with the understanding that the patient will self-administer the entire dose to end his or her life, should the patient choose to do so, conduct clearly encompassed by the plain language of 30-2-4 NMSA 1978. *Morris v. Brandenburg*, 2016-NMSC-027, *aff'g* 2015-NMCA-100, 356 P.3d 564.

**Constitutionality.** — Where petitioners, two doctors and their patient, sought declaratory and injunctive relief to the effect that either 30-2-4 NMSA 1978, New Mexico's criminal statute prohibiting assisted suicide, did not apply to the conduct defined by petitioners as physician aid in dying, or even if the statute did apply to physician aid in dying, such an application would be unconstitutional, petitioners failed to establish a fundamental liberty interest protected by the inherent rights clause or the due process clause of the New Mexico constitution, because the inherent rights clause has never been interpreted to be the exclusive source for a fundamental constitutional right, and on its own has always been subject to reasonable regulation, and there is a firm legal rationale behind the interest in protecting the integrity and ethics of the medical profession, the interest in protecting vulnerable groups, including the poor, the elderly, and disabled persons, from abuse, neglect, and mistakes due to the risk of subtle coercion and undue influence in end-of-life situations, and the legitimate concern that recognizing a right to physician aid in dying will lead to voluntary or involuntary euthanasia. *Morris v. Brandenburg*, 2016-NMSC-027, *aff'g* 2015-NMCA-100, 356 P.3d 564.

**Constitutionality.** — Aid in dying is not a fundamental liberty interest under the New Mexico constitution, and therefore a mentally competent, terminally ill patient's interest in a physician's assistance in dying is not a fundamental liberty interest protected by the due process clause of N.M. Const., Art. II, § 18 and is not entitled to protection under the state constitutional provision protecting inherent individual rights to life, liberty and happiness provided for in N.M. Const. Art. II, § 4. The district court, holding otherwise, erred in permanently enjoining the state from enforcing 30-2-4 NMSA 1978. *Morris v. Brandenberg*, 2015-NMCA-100, cert. denied, 2015-NMCERT-008.

**Aid in dying is prohibited by this section.** — A patient's choice to achieve a peaceful end of life through aid in dying, or the practice of a willing physician providing a lethal dose of a prescribed medication at the request of a mentally competent, terminally ill patient, is the taking of one's own life, and thus suicide within the meaning of this section; a physician's conduct of providing a patient a lethal dose of a prescribed medication, and thus the means to take his or her own life, is prohibited by this section. *Morris v. Brandenberg*, 2015-NMCA-100, cert. denied, 2015-NMCERT-008.

**Second degree murder, assisted suicide, not same offense.** — The second degree murder statute (Section 30-2-1B NMSA 1978) is aimed at preventing an individual from actively causing the death of someone contemplating suicide, whereas the assisting suicide statute is aimed at preventing an individual from providing someone contemplating suicide with the means to commit suicide. Thus, the two statutes do not condemn the same offense. *State v. Sexson*, 1994-NMCA-004, 117 N.M. 113, 869 P.2d 301, cert. denied, 117 N.M. 215, 870 P.2d 753.

**Suicide pact not exemption from conviction for murder.** — The existence of a suicide pact does not exempt someone from a conviction for committing murder. However, that general rule may not apply if the means of attempted suicide used presents the same risk to both of the parties at the same time, such as when a couple drive off a cliff together. Such is not the case when the victim is killed by a rifle, the trigger of which is pulled by the defendant. *State v. Sexson*, 1994-NMCA-004, 117 N.M. 113, 869 P.2d 301, cert. denied, 117 N.M. 215, 870 P.2d 753.

**Suicide pact not assisting suicide.** — There was enough evidence to support a conviction of second degree murder because there was sufficient evidence to show that the defendant actively participated in a suicide by holding the gun to the victim's head and pulling the trigger. "Aiding", in the context of determining whether one is criminally liable for their involvement in the suicide of another, is intended to mean providing the means to commit suicide, not actively performing the act which results in death. *State v. Sexson*, 1994-NMCA-004, 117 N.M. 113, 869 P.2d 301, cert. denied, 117 N.M. 215, 870 P.2d 753.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide § 585.

Criminal liability for death of another as result of accused's attempt to kill self or assist another's suicide, 40 A.L.R.4th 702.

83 C.J.S. Suicide § 4.

## 30-2-5. Excusable homicide.

Homicide is excusable in the following cases:

A. when committed by accident or misfortune in doing any lawful act, by lawful means, with usual and ordinary caution and without any unlawful intent; or



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B. when committed by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, if no undue advantage is taken, nor any dangerous weapon used and the killing is not done in a cruel or unusual manner.

**History: 1953 Comp., § 40A-2-6, enacted by Laws 1963, ch. 303, § 2-6.**

**ANNOTATIONS**

**Limited instruction erroneous.** — Instruction limiting defendant's defense of excusable homicide, by omitting homicide committed in doing a lawful act, by lawful means, and with ordinary caution, constituted reversible error. *State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211.

**Law reviews.** — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide §§ 110 to 138.

Discharge of firearm without intent to inflict injury as proximate cause of homicide resulting therefrom, 55 A.L.R. 921.

Hunting accident: criminal responsibility for injury or death resulting from, 23 A.L.R.2d 1401.

Druggist's criminal responsibility for death or injury in consequence of mistake, 55 A.L.R.2d 714.

Criminal responsibility for injury or death in operation of mechanically defective motor vehicle, 88 A.L.R.2d 1165.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, 89 A.L.R.2d 396.

Retreat: duty to retreat where assailant and assailed share the same living quarters, 26 A.L.R.3d 1296.

Improper treatment of disease, 45 A.L.R.3d 114.

Homicide: physician's withdrawal of life supports from comatose patient, 47 A.L.R.4th 18.

Homicide: duty to retreat where assailant and assailed share the same living quarters, 67 A.L.R.5th 637.

40 C.J.S. Homicide §§ 101 to 138.

## 30-2-6. Justifiable homicide by public officer or public employee.

A. Homicide is justifiable when committed by a public officer or public employee or those acting by their command and in their aid and assistance:

(1) in obedience to any judgment of a competent court;

(2) when necessarily committed in overcoming actual resistance to the execution of some legal process or to the discharge of any other legal duty;

(3) when necessarily committed in retaking felons who have been rescued or who have escaped or when necessarily committed in arresting felons fleeing from justice; or

(4) when necessarily committed in order to prevent the escape of a felon from any place of lawful custody or confinement.

B. For the purposes of this section, homicide is necessarily committed when a public officer or public employee has probable cause to believe he or another is threatened with serious harm or deadly force while performing those lawful duties described in this section. Whenever feasible, a public officer or employee should give warning prior to using deadly force.

**History: 1953 Comp., § 40A-2-7, enacted by Laws 1963, ch. 303, § 2-7; 1989, ch. 222, § 1.**

**The 1989 amendment,** effective June 16, 1989, added the present designation for Subsection A, redesignated former Subsections A through D as Paragraphs (1) through (4) of present Subsection A, and added present Subsection B.

**ANNOTATIONS**

**Legislative recognition of common law.** — This section and Section 30-2-7 NMSA 1978 are in reality a legislative recognition of the common law which empowered officers to perform their duty of apprehending and bringing felons to the bar of justice. *Alaniz v. Funk*, 1961-NMSC-140, 69 N.M. 164, 364 P.2d 1033.

**Arresting officer to use best judgment.** — When the state sends an officer to make an arrest for a felony, he must use his best judgment to make the arrest, peaceably if he can, but forcibly if he must. *Alaniz v. Funk*, 1961-NMSC-140, 69 N.M. 164, 364 P.2d 1033.

**Use of necessary force in making arrest.** — An officer having the right to arrest an offender may use such force as is necessary to effect his purpose, to the extent of taking life. *State v. Vargas*, 1937-NMSC-049, 42 N.M. 1, 74 P.2d 62.

**Danger of the suspect.** — Under this section the crucial consideration is the conduct and dangerousness of the suspect, not the classification of the crime that he or she has committed or is alleged to have committed. *State v. Mantelli*, 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842.

**Use of deadly force.** — While this section speaks of justifiable homicide, the appellate court reads it as authorizing the use of deadly force by law enforcement officers whether or not the suspect is ultimately killed. *State v. Mantelli*, 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842.

**Reasonableness a jury question.** — Generally, the question of the reasonableness of the actions of the officer in using lethal force to apprehend a felon is a question of fact for the jury. *Alaniz v. Funk*, 1961-NMSC-140, 69 N.M. 164, 364 P.2d 1033.

It is apparent, through the inclusion of "probable cause" in Subsection B, that the reasonableness of an individual police officer's actions is an objective analysis evaluated from his perspective at the time of the incident and is necessarily a factual inquiry. *State v. Mantelli*, 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842.

**Self-defense authorized.** — A self-defense instruction is required whenever a defendant presents evidence



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sufficient to allow reasonable minds to differ as to all elements of the defense; this is also the standard that should be applied when determining if the jury should be instructed on justifiable homicide by a police officer in accordance with this section. *State v. Mantelli*, 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842.

Although an officer must not kill for an escape where the party is in custody for a misdemeanor, if the party assaults the officer with such violence that he had reasonable ground to believe his life in peril, he may justify killing the party. *State v. Vargas*, 1937-NMSC-049, 42 N.M. 1, 74 P.2d 62.

Large rocks, hurled by misdemeanant at deputy sheriff in resisting arrest, were dangerous weapons, justifying resort to extreme measures on part of deputy. *State v. Vargas*, 1937-NMSC-049, 42 N.M. 1, 74 P.2d 62.

**Duty not to retreat.** — In a wrongful death suit, where the evidence showed that decedent committed at least two felonies in the presence of police officers, the officers' duty, when he fired upon them, was not to retreat but to press forward and place him under physical restraint, and, in so doing, the officers could defend themselves and use deadly force if such were justified by the circumstances. *Cordova v. City of Albuquerque*, 1974-NMCA-101, 86 N.M. 697, 526 P.2d 1290.

**Instruction appropriate.** — Officer charged with killing one resisting an arrest for felony was entitled to have jury instructed as to what constitutes justifiable homicide. *Territory of New Mexico v. Gutierrez*, 1905-NMSC-018, 13 N.M. 138, 79 P. 716.

**Law reviews.** — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide §§ 121, 134 to 137.

Misdemeanor, degree of force that may be employed in arresting one charged with, 3 A.L.R. 1170, 42 A.L.R. 1200.

Peace officers' criminal responsibility for killing or wounding one whom they wished to investigate or identify, 18 A.L.R. 1368, 61 A.L.R. 321.

40 C.J.S. Homicide §§ 104 to 107.

## 30-2-7. Justifiable homicide by citizen.

Homicide is justifiable when committed by any person in any of the following cases:

A. when committed in the necessary defense of his life, his family or his property, or in necessarily defending against any unlawful action directed against himself, his wife or family;

B. when committed in the lawful defense of himself or of another and when there is a reasonable ground to believe a design exists to commit a felony or to do some great personal injury against such person or another, and there is imminent danger that the design will be accomplished; or

C. when necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed in his presence, or in lawfully suppressing any riot, or in necessarily and lawfully keeping and preserving the peace.

**History: 1953 Comp., § 40A-2-8, enacted by Laws 1963, ch. 303, § 2-8.**

### ANNOTATIONS

**Imperfect self-defense.** — Imperfect self-defense, which occurs when a person uses excessive force while otherwise lawfully engaging in self-defense, is not a true affirmative defense for which a defendant is entitled to an instruction. Any issues raised by a defendant's claim of imperfect self-defense are properly addressed when the jury is instructed on voluntary manslaughter. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2013-NMCERT-012.

**Recognition of common law.** — This section and Section 30-2-6 NMSA 1978 are in reality a legislative recognition of the common law which empowered officers to perform their duty of apprehending and bringing felons to the bar of justice. *Alaniz v. Funk*, 1961-NMSC-140, 69 N.M. 164, 364 P.2d 1033.

**Three elements necessary before self-defense instruction can be given** are: (1) an appearance of immediate danger of death or great bodily harm to the defendant; (2) the defendant was in fact put in such fear; and (3) a reasonable person would have reacted in a similar manner. *State v. Martinez*, 1981-NMSC-016, 95 N.M. 421, 622 P.2d 1041.

**Multiple attacker.** — While a person may act in self-defense against multiple attackers acting in concert, this principle applies only to the extent that each accomplice poses an immediate danger of death or great bodily harm, thereby necessitating an act of self-defense. *State v. Coffin*, 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

**Retaliation.** — Self-defense is defined by the objectively reasonable necessity of the action and does not extend to a defendant's act of retaliation for another's involvement in a crime against the defendant. *State v. Coffin*, 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

**Provocation by defendant.** — A defendant who provokes an encounter, as a result of which the defendant finds it necessary to use deadly force in defense, cannot claim defendant was acting in self-defense. *State v. Lucero*, 1998-NMSC-044, 126 N.M. 552, 972 P.2d 1143; *State v. Chavez*, 1983-NMSC-037, 99 N.M. 609, 661 P.2d 887.

**Excessive force.** — The use of excessive force in self-defense is not reasonable and does not entitle one to a self-defense instruction. *State v. Sutphin*, 2007–NMSC-045, 142 N.M. 191, 164 P.3d 72.

**To warrant self-defense instruction evidence must raise reasonable doubt** in the minds of the jury as to whether or not a defendant accused of homicide did act in self-defense. *State v. Martinez*, 1981-NMSC-016, 95 N.M. 421, 622 P.2d 1041.

**Subjective apprehension of harm necessary.** — It was not sufficient to justify the taking of human life that a person had reason to apprehend death or great bodily harm to himself unless he killed his assailant; he must entertain such belief and must be acting upon it. *State v. Parks*, 1919-NMSC-041, 25 N.M. 395, 183 P. 433.

**Threat of great personal injury.** — Laws 1853-1854, p. 86, (former 40-24-13, 1953 Comp.), defining homicide as justifiable when committed in lawful self-defense on reasonable ground to apprehend some great personal injury meant something more than apprehension, however imminent, of a mere battery, not amounting to a felony, and required an apparent design either to take the life or inflict great personal injury on the person assailed, amounting to a felony, if carried out, and imminent danger of such design being accomplished. *Territory v. Baker*, 1887-NMSC-021, 4 N.M. (Gild.) 236, 13 P. 30.



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**Defense of chastity.** — Woman accused of voluntary manslaughter was entitled, on written request, to special instruction on her claim of defense of her chastity. *State v. Martinez*, 1924-NMSC-075, 30 N.M. 178, 230 P. 379.

**Defense of habitation authorized.** — The defense of habitation alone, without a statute making it a felony to unlawfully and maliciously injure a house, gave householder the right to meet force with force, and "an attack upon a dwelling, and especially in the night, the law regards as equivalent to an assault on a man's person, for a man's house is his castle." *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

While no law countenances wanton slaying, the protection and security of life being the most vital interest of society, the law of habitation and the resistance to the commission of a felony thereon gave householder the right to kill the aggressor, if such killing was necessary or apparently necessary to prevent or repel the felonious aggression. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

**Householder not obliged to retreat.** — When one's home was attacked in the middle of a dark night by persons riding in an automobile, the householder, being unable to determine what weapons the assailants had, was not obliged to retreat but might pursue his adversaries until out of danger. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

**Substantial injury to dwelling not necessary.** — Instruction that injury to a dwelling, to be felonious so as to justify killing, must be of a substantial character constituted a prejudicial error. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

**Property other than dwelling.** — Under former law, trespass upon real estate not the dwelling house of accused did not of itself justify or excuse killing of trespasser. *State v. Martinez*, 1929-NMSC-040, 34 N.M. 112, 278 P. 210.

**Apprehension of suspected felon.** — Deadly force in the apprehension of suspected felons is justifiable only when the citizen has probable cause to believe he or she is threatened with serious bodily harm or the use of deadly force. *State v. Johnson*, 1998-NMCA-019, 124 N.M. 647, 954 P.2d 79.

**Requisites of instructions.** — It is not imperative that the charge to the jury use the precise terms of the statute; instructions are sufficient which substantially follow the language of the statute or use equivalent language, adequately covering every phase of the case raised by the evidence on which the defendant is entitled to have the jury instructed. *State v. Maestas*, 1957-NMSC-057, 63 N.M. 67, 313 P.2d 337.

**Jury to consider threat of danger from defendant's standpoint.** — Where defense of habitation is invoked in homicide case, the danger or apparent danger must be considered from the standpoint of accused, and not according to the actual facts as they developed at the trial. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

The jury was adequately instructed where it was charged that if it reasonably appeared to the defendant that his brother was in imminent danger of death or great bodily injury, then the defendant had a right to use such force as would appear reasonably necessary to repel the attack, and the jury was further instructed to view the matter from defendant's viewpoint, even though it afterward appeared that no injury was intended and no danger existed. *State v. Maestas*, 1957-NMSC-057, 63 N.M. 67, 313 P.2d 337.

**Instruction on right to act in view of wife's health.** — Refusal of instruction relating to defendant's right to act in view of his wife's condition and effect which repeated assaults upon the habitation had had upon her health was reversible error. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

**When self-defense instruction mandatory.** — Where self-defense is involved in a criminal case and there is any evidence, although slight, to establish the same, it is not only proper for the court, but its duty as well, to instruct the jury fully and clearly on all phases of the law on the issues that are warranted by the evidence, even though such defense is supported only by the defendant's own testimony. *State v. Heisler*, 1954-NMSC-032, 58 N.M. 446, 272 P.2d 660.

**Evidence held to support theory of self-defense.** — The recovery of a spent bullet, after trial, from under the hood of the defendant's car, and evidence regarding its angle of entry and rifling characteristics consistent with its having been fired by a gun of the type and caliber known by police to be owned by the victim, was not merely cumulative evidence, but was a material piece of demonstrative evidence strengthening the defendant's theory of self-defense. *State v. Melendez*, 1981-NMCA-027, 97 N.M. 740, 643 P.2d 609, *rev'd on other grounds*, 1982-NMSC-039, 97 N.M. 738, 643 P.2d 607.

**When inappropriate.** — If the evidence in the case is insufficient to raise a reasonable doubt as to whether a defendant accused of a homicide did act in self-defense, any instruction on that issue is properly refused. *State v. Heisler*, 1954-NMSC-032, 58 N.M. 446, 272 P.2d 660.

**Instructions properly refused.** — In prosecution for assault with intent to kill, refusal to instruct that person has a right to defend his property from trespass or larceny, and that jury should acquit defendant if it found he shot at prosecuting witness to stop him from removing defendant's property and that such action was necessary to prevent, it was not error where evidence did not show prosecuting witness was on land leased by defendant at time of assault and in light of instructions given. *State v. Waggoner*, 1946-NMSC-001, 49 N.M. 399, 165 P.2d 122.

**Law reviews.** — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 40 Am. Jur. 2d Homicide §§ 110 to 126, 138.

Duty to retreat as affected by illegal character of premises on which homicide occurs, 2 A.L.R. 518.

Right of self-defense as affected by defendant's violation of law only casually related to the encounter, 10 A.L.R. 861.

Killing of third person by shot or blow aimed at another in self-defense, 18 A.L.R. 917.

Duty to retreat when not on one's premises, 18 A.L.R. 1279.

Homicide in defense of habitation or property, 25 A.L.R. 508, 32 A.L.R. 1541, 34 A.L.R. 1488.

Evidence of improper conduct by deceased toward defendant's wife as admissible in support of plea of self-defense, 44 A.L.R. 860.

Retreat: extent of premises which may be defended without retreat under right of self-defense, 52 A.L.R.2d 1458.

Instructions: duty of trial court to instruct on self-defense, in absence of request by accused, 56 A.L.R.2d 1170.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for homicide, 98 A.L.R.2d 6.

Relationship with assailant's wife as provocation depriving defendant of right of self-defense, 9 A.L.R.3d 933.

Retreat: duty to retreat where assailant and assailed share the same living quarters, 26 A.L.R.3d 1296.

Arrest: private person's authority, in making arrest for felony, to shoot or kill alleged felon, 32 A.L.R.3d 1078.

Duty to retreat as condition of self-defense when one is attacked at his office, or place of business or employment, 41 A.L.R.3d 584.

Killing by set gun or similar device on defendant's own property, 47 A.L.R.3d 646.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant, 56 A.L.R.3d 239.

Duty to retreat where assailant is social guest on premises, 100 A.L.R.3d 532.



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Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Construction and application of statutes justifying the use of force to prevent the use of force against another, 71 A.L.R.4th 940.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary - modern cases, 73 A.L.R.4th 993.

Admissibility of threats to defendant made by third parties to support claim of self-defense in criminal prosecution for assault or homicide, 55 A.L.R.5th 449.

Homicide: duty to retreat where assailant and assailed share the same living quarters, 67 A.L.R.5th 637.

40 C.J.S. Homicide §§ 108 to 138.

## 30-2-8. When homicide is excusable or justifiable defendant to be acquitted.

Whenever any person is prosecuted for a homicide, and upon his trial the killing shall be found to have been excusable or justifiable, the jury shall find such person not guilty and he shall be discharged.

**History: 1953 Comp., § 40A-2-9, enacted by Laws 1963, ch. 303, § 2-9.**

## 30-2-9. Murderer may not profit from wrongdoing; public policy.

A. The acquiring, profiting or anticipating of benefits by reason of the commission of murder where the person committing such crime is convicted of either a capital, first or second degree felony, is against the public policy of this state and is prohibited.

B. In all cases involving devises or bequests, or heirships under the laws of descent and distribution, or cotenancies, or future interests, or community estates, or contracts, whether of real, personal or mixed properties, where a person, who, by committing murder and where such person is convicted of either a capital, first or second degree felony, and might receive some benefit therefrom either directly or indirectly, the common-law maxim to the effect that one cannot take advantage of his own wrong, shall control and be applied to the interpretation, construction and application of all statutes or decisions of this state in order to deprive and prevent him from profiting from such wrongful acts.

**History: 1953 Comp., § 40A-2-10, enacted by Laws 1963, ch. 303, § 2-10.**

### ANNOTATIONS

**Applicability.** — This statute clearly requires a conviction of murder. Where defendant was convicted of vehicular homicide, a third degree felony, the forfeiture provision does not apply. *Aranda v. Camacho*, 1997-NMCA-010, 122 N.M. 763, 931 P.2d 757.

**Section distinct from common law.** — This section is not merely declaratory of the common law, nor is it a mere extension of or addition to the common-law maxim that a beneficiary may not profit by his own crime. *Rose v. Rose*, 1968-NMSC-115, 79 N.M. 435, 444 P.2d 762.

**Nature of prohibition.** — If the legislature had intended it as merely declaratory of the common law, it would have been easy to have said that one who is convicted of feloniously causing the death of another shall not benefit therefrom. However, the legislature, by express and unambiguous language, prohibited only those convicted of murder from so profiting. *Rose v. Rose*, 1968-NMSC-115, 79 N.M. 435, 444 P.2d 762.

**Matter for legislature.** — This is a legislative matter, and where, in 1942, prior to passage of Laws 1955, ch. 61, providing that a murderer could not inherit the estate of his victim, defendant killed his mother, pleading guilty to murder in the second degree for the crime, the court would refuse to amend or set aside the unambiguous statutes of descent and distribution under which the property of the mother descended to the son. *Reagan v. Brown*, 1955-NMSC-064, 59 N.M. 423, 285 P.2d 789.

**Criminal proceeding determinative.** — The question of whether the insured was murdered by the person to whom the property would ordinarily go is one to be judicially determined, the legislature having seen fit to provide that such determination must be ascertained in a criminal proceeding. *Rose v. Rose*, 1968-NMSC-115, 79 N.M. 435, 444 P.2d 762.

**Law reviews.** — For article, "The Perils of Intestate Succession in New Mexico and Related Will Problems," see 7 Nat. Resources J. 555 (1967).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 23 Am. Jur. 2d Descent and Distribution §§ 101 to 109, 134; 41 Am. Jur. 2d Husband and Wife § 49; 44 Am. Jur. 2d Insurance § 1715.

Murder of life tenant by remainderman or reversioner as affecting latter's rights to remainder or reversion, 24 A.L.R.2d 1120.

Insurance: right to proceeds of life insurance, as between estate of murdered insured and alternative beneficiary named in policy, where murderer was made primary beneficiary, 26 A.L.R.2d 987.

Insurance: killing of insured by beneficiary as affecting life insurance or its proceeds, 27 A.L.R.3d 794.

Felonious killing of one cotenant by the other as affecting latter's rights in the property, 42 A.L.R.3d 1116.

Homicide as precluding taking under will or by intestacy, 25 A.L.R.4th 787.

26A C.J.S. Descent and Distribution § 47; 41 C.J.S. Husband and Wife § 32; 46A C.J.S. Insurance § 1429; 94 C.J.S. Wills § 104.



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# ARTICLE 3

## Assault and Battery

Sec.
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30-3-19. Threatening a judge or an immediate family member of a judge; penalty.
30-3-20. Malicious sharing of personal information of a judge or an immediate family member of a judge; penalty.

## 30-3-1. Assault.

Assault consists of either:

A. an attempt to commit a battery upon the person of another;

B. any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery; or

C. the use of insulting language toward another impugning his honor, delicacy or reputation.

Whoever commits assault is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-3-1, enacted by Laws 1963, ch. 303, § 3-1.**

**Cross references.** — For assault and battery upon revenue division employees, *see* 7-1-75 NMSA 1978.

For assault by prisoner, *see* 30-22-17 NMSA 1978.

For assaults upon peace officers, *see* 30-22-21 to 30-22-26 NMSA 1978.

### ANNOTATIONS

**Requisites of assault.** — An assault under New Mexico law requires an act, threat or menacing contact, which causes the plaintiff to reasonably believe she is in danger of receiving an immediate battery. *Chavez v. Thomas & Betts, Corp.*, 396 F.3d 1088 (10th Cir. 2005).

**Specific intent is not an essential element of aggravated assault.** — Where defendant was charged with aggravated assault with a deadly weapon, and where the state presented evidence at trial that the victim of the assault was standing next to the shooting victim when the shooting occurred and that the assault victim reasonably believed that she was also going to be shot, and where the jury was properly instructed on general criminal intent, there was sufficient evidence to support defendant's conviction for aggravated assault with a deadly weapon. Specific intent is not an essential element of aggravated assault. *State v. Branch*, 2018-NMCA-031, *replacing* 2016-NMCA-071, 387 P.3d 250, cert. denied.

**Sufficient evidence of aggravated assault.** — Where defendant was charged with aggravated assault with a deadly weapon, the evidence that the victim of the assault was standing right next to the shooting victim when the shooting occurred, that the assault victim believed that she was also going to be shot, and where the jury was properly instructed on general criminal intent, there was sufficient evidence to support defendant's conviction for aggravated assault with a deadly weapon. *State v. Branch*, 2016-NMCA-071, 387 P.3d 250, *replaced by* 2018-NMCA-031, and cert. quashed.

**Constitutional infirmity in Subsection C may exist** insofar as first and fourteenth amendment rights are concerned. *State v. Parrillo*, 1979-NMCA-135, 94 N.M. 98, 607 P.2d 636, cert. denied, 94 N.M. 629, 614 P.2d 546.

**Insulting language.** — Language that meant "follow the road, don't go" did not, as a matter of law, tend toward impugning the honor, delicacy or reputation of another. *State v. Vasquez*, 1971-NMCA-182, 83 N.M. 388, 492 P.2d 1005.

**Requisites of assault.** — For there to have been an assault upon a victim, there must have been an act, threat or conduct which caused him to reasonably believe he was in danger of receiving an immediate battery. *State v. Mata*, 1974-NMCA-067, 86 N.M. 548, 525 P.2d 908, cert. denied, 86 N.M. 528, 525 P.2d 888.

**Batteries do not include assault.** — While assault and battery are closely related, one may exist without the other. All batteries do not include an assault. For there to be an assault, there must have been an act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery. *Baca v. Velez*, 1992-NMCA-053, 114 N.M. 13, 833 P.2d 1194, cert. denied, 113 N.M. 636, 830 P.2d 553.

**Evidence of victim's apprehension.** — Where there was no direct evidence of an alleged victim's belief that he was in danger of receiving an immediate battery, the evidence was insufficient to show that any assault had been committed. *State v. Mata*, 1974-NMCA-067, 86 N.M. 548, 525 P.2d 908, cert. denied, 86 N.M. 528, 525 P.2d 888.

**Sufficient evidence of assault by a corrections officer against an inmate.** — Where defendant was charged with two counts of assault and attempted battery



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committed against an inmate, allegedly committed while defendant was employed as a corrections officer, and where evidence was presented at trial that defendant, while escorting the victim out of a courtroom following a hearing, attempted to kiss the victim multiple times, that the victim pushed defendant away each time, but gave defendant her phone number because she was nervous, uncomfortable, and scared that defendant would try to do more than kiss her, and where defendant claimed that his two convictions for assault were not supported by sufficient evidence because there was no evidence that defendant was angry at the time of either of his attempts to kiss the victim, there was sufficient evidence to support defendant's convictions for assault where evidence established that the victim was under defendant's physical control, restrained by shackles, and isolated within the courthouse when defendant attempted to kiss her. The victim's testimony provided relevant direct and circumstantial evidence from which a reasonable jury could conclude that under these specific circumstances, defendant's attempts to kiss her were done in an offensive or insulting manner. *State v. Arvizo*, 2021-NMCA-055, cert. denied.

**Evidence of threats following assault and attempted battery was relevant.** — Where defendant was charged with two counts of assault and attempted battery committed against an inmate, allegedly committed while defendant was employed as a corrections officer, and where evidence was presented that defendant, while escorting the victim out of a courtroom following a hearing, attempted to kiss the victim multiple times, that the victim pushed defendant away each time, but gave defendant her phone number because she was nervous, uncomfortable, and scared that defendant would try to do more than kiss her, and that following the victim's release from jail, she received messages on her cell phone from defendant, including a threat from defendant that he would call the victim's "tracker" if she continued to refuse to return his calls, which the victim interpreted as a threat to send her back to jail, the district court did not abuse its discretion by admitting evidence of defendant's voicemail messages because it was not against the logic and effect of the facts and circumstances of the case for the district court to allow testimony about defendant's voicemail message threatening the victim with penal consequences if she continued to refuse his calls. *State v. Arvizo*, 2021-NMCA-055, cert. denied.

**Improperly admitted evidence of menacing conduct not unfairly prejudicial.** — Where defendant was improperly charged and convicted of aggravated assault with a deadly weapon along with tampering with evidence, and the district court admitted evidence that defendant stated that he robbed the neighborhood in the course of the overall incident at issue, the admission of defendant's statement was not unfairly prejudicial because although the evidence related to defendant's menacing conduct, which related solely to the improperly charged, assault-based offense, the testimony about defendant's statement that he robbed the neighborhood was elicited from the victim, not law enforcement, was offered in the context of other blustering comments from defendant, defendant makes no showing that the state placed emphasis on the statement, there was no indication that the state attempted to relate the statement to the conduct that supported defendant's conviction for tampering, and there was other sufficient evidence to supporting defendant's conviction for tampering with evidence. *State v. Radosevich*, 2016-NMCA-060, 376 P.3d 871, *rev'd on other grounds*, 2018-NMSC-028.

**Definition mandatory part of instructions.** — The definition of assault found in this section contains essential elements of the crime of which defendant was convicted, assault with intent to commit a violent felony, and hence, failure to instruct on the definition of assault constituted jurisdictional error. *State v. Jones*, 1973-NMCA-107, 85 N.M. 426, 512 P.2d 1262.

**Instruction on assault as lesser included offense.** — In trial of Indian for rape under the federal Major Crimes Act (18 U.S.C. §§ 1153, 3242, conferring federal jurisdiction over certain enumerated major crimes committed by Indians on Indian reservations), it was reversible error for trial court to refuse to instruct on the non-enumerated offenses of attempted rape, simple assault and battery, all of which were lesser included offenses under New Mexico law. *Joe v. United States*, 510 F.2d 1038 (10th Cir. 1974).

**Law reviews.** — For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For note, "Municipal Assumption of Tort Liability for Damage Caused by Police Officers," see 1 N.M.L. Rev. 263 (1971).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery §§ 8 to 36.

Indecent proposal to woman as assault, 12 A.L.R.2d 971.

Homicide: acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa, 37 A.L.R.2d 1068.

Motor vehicle: criminal responsibility for assault and battery by operation of mechanically defective motor vehicle, 88 A.L.R.2d 1165.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, 89 A.L.R.2d 396.

Deadly or dangerous weapon, intent to do serious harm as essential to crime of assault with, 92 A.L.R.2d 635.

Unintentional killing of or injury to third person during attempted self-defense, 55 A.L.R.3d 620.

Automobile as dangerous or deadly weapon within meaning of assault or battery statute, 89 A.L.R.3d 1026.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 A.L.R.3d 718.

Criminal liability as barring or mitigating recovery of punitive damages, 98 A.L.R.3d 870.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Civil liability for insulting or abusive language - modern status, 20 A.L.R.4th 773.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault, 24 A.L.R.4th 243.

Liability of hotel or motel operator for injury to guest resulting from assault by third party, 28 A.L.R.4th 80.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary - modern cases, 73 A.L.R.4th 993.

Franchisor's tort liability for injuries allegedly caused by assault or other criminal activity on or near franchise premises, 2 A.L.R.5th 369.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 A.L.R.5th 628.

Admissibility of threats to defendant made by third parties to support claim of self-defense in criminal prosecution for assault or homicide, 55 A.L.R.5th 449.

Attempt to commit assault as criminal offense, 93 A.L.R.5th 683.

Effect of federal assault statute (18 USCS § 113) on prosecutions under Assimilative Crimes Act (18 USCS § 13) making state criminal laws applicable to acts committed on federal reservations, 57 A.L.R. Fed. 957.

6A C.J.S. Assault and Battery § 64.



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## 30-3-2. Aggravated assault.

Aggravated assault consists of either:

A. unlawfully assaulting or striking at another with a deadly weapon;

B. committing assault by threatening or menacing another while wearing a mask, hood, robe or other covering upon the face, head or body, or while disguised in any manner, so as to conceal identity; or

C. wilfully [willfully] and intentionally assaulting another with intent to commit any felony.

Whoever commits aggravated assault is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-3-2, enacted by Laws 1963, ch. 303, § 3-2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For aggravated assault upon peace officer, *see* 30-22-22 NMSA 1978.

For instruction on general criminal intent, *see* UJI 14-141 NMRA.

ANNOTATIONS

I. GENERAL CONSIDERATION.
II. ELEMENTS OF AGGRAVATED ASSAULT.
III. EVIDENCE AND PROOF.
IV. DOUBLE JEOPARDY.
V. JURY INSTRUCTIONS.

I. GENERAL CONSIDERATION.

**Legislative intent for separate punishments.** — As each offense includes one statutory element not included in the other, the presumption is that the legislature intended to punish separately the two offenses of aggravated assault and armed robbery. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

**Multiple victims.** — Defendant's convictions for two counts of aggravated assault stemming from defendant's one act of pointing a shotgun at two victims at the same time did not violate the double jeopardy clause, because each victim suffered distinct mental harm protected by the statute. *State v. Roper*, 2001-NMCA-093, 131 N.M. 189, 34 P.3d 133, cert. quashed, 131 N.M. 619, 41 P.3d 345 (2002).

**State v. Maes,** 1983-NMCA-073, 100 N.M. 78, 665 P.2d 1169 is no longer considered to be controlling authority in determining whether there has been a violation of the prohibition against double jeopardy, because the analysis contained therein predates, and has been replaced by, the two-pronged analysis of *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223. State v. Armijo, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

**Use of deadly weapon to protect property.** — The use of a deadly weapon in the protection of property is generally held, except in extreme cases, to be the use of more than justifiable force, and to render the owner of the property liable, both civilly and criminally, for the assault. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

**Resisting arrest with deadly weapon.** — Resistance of lawful arrest with deadly weapon was not excused by fact that the officer acted from personal motives. *State v. Nieto*, 1929-NMSC-060, 34 N.M. 232, 280 P. 248.

**Intentional shooting.** — The killing of a person by intentionally shooting him with a rifle, if not justified by the law of self-defense, would constitute at least an assault with a deadly weapon and would be a felony, and hence not involuntary manslaughter. *State v. Pruett*, 1921-NMSC-110, 27 N.M. 576, 203 P. 840.

**Prosecution after acquittal of other charges.** — State did not violate guarantee against double jeopardy in prosecuting defendant for assault with intent to commit a violent felony and false imprisonment, after an acquittal on charges of assault on a jail and false imprisonment and kidnapping of another individual, arising out of the same incident, since where the jury in the first trial acquitted defendant they did not necessarily conclude that he was not present at the jail that day and thus did not commit any crimes, but simply that he was not guilty of the crimes alleged. *State v. Tijerina*, 1973-NMSC-105, 86 N.M. 31, 519 P.2d 127, cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

**Statutory language to be used.** — An indictment for drawing or handling deadly weapon in threatening manner under Laws 1887, ch. 30, § 2 (former 40-17-3, 1953 Comp.) was required to follow language of statute. *Territory v. Armijo*, 1894-NMSC-011, 7 N.M. 571, 37 P. 1117 (decided under prior law).

**Word "unlawfully" was not necessary in indictment** if other words were used which conveyed the same meaning. *Ruiz v. Territory*, 1900-NMSC-013, 10 N.M. 120, 61 P. 126.

**Allegation that gun was loaded unnecessary.** — In prosecution for an assault with a deadly weapon, a gun, it was not necessary to allege that the gun was loaded. *Territory v. Gonzales*, 1907-NMSC-007, 14 N.M. 31, 89 P. 250.

**Indictment failing to specify appropriate statutory section.** — An indictment framed under Laws 1887, ch. 30, prescribing penalties for drawing or handling deadly weapon in threatening manner, assault with a deadly weapon and drawing or discharging firearm in public place was insufficient when the offense charged did not come within scope of any section of that act. *Territory v. Armijo*, 1894-NMSC-011, 7 N.M. 571, 37 P. 1117 (decided under prior law).

Where the state originally charged defendant with assault with intent to commit the violent felony of robbery but later amended the indictment to charge assault with intent to commit the felony of larceny, the fact that the amended indictment continued to contain the statutory references to assault with intent to commit a violent felony was not fatal to the indictment, since misreference to statutory sections is not a sufficient reason to dismiss the indictment. *State v. Gallegos*, 1989-NMCA-066, 109 N.M. 55, 781 P.2d 783, cert. denied, 108 N.M. 771, 779 P.2d 549.

**Failing to describe weapon or allege unlawful assault.** — An indictment for assault with a deadly weapon under Laws 1907, ch. 36, § 19 (former 40-17-6, 1953 Comp.) was insufficient if it did not describe the knife used or failed to charge that it was one with which dangerous cuts could be given or dangerous thrusts inflicted or that defendant "did unlawfully assault." *Territory v. Armijo*, 1894-NMSC-011, 7 N.M. 571, 37 P. 1117 (decided under prior law).

**Defense of citizen's arrest.** — When the defendant asserted the defense of citizen's arrest in a prosecution for aggravated assault with a deadly weapon, the issue of notice of his intent to make an arrest and proof that a felony was in fact committed by the arrestee were not elements of the defense. *State v. Johnson*, 1996-NMSC-075, 122 N.M. 696, 930 P.2d 1148.

**Where evidence on charge is overwhelming, defendant cannot be prejudiced** by the testimony as to the extent of a victim's injuries after the jury is told to disregard that testimony. *State v. Davis*, 1979-NMCA-015, 92 N.M. 563, 591 P.2d 1160.



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**No double jeopardy for sentence enhancement.** — Double jeopardy did not prohibit the trial court from enhancing defendant's sentence for aggravated assault with a deadly weapon under the firearm enhancement section, 31-18-16A NMSA 1978, since each section contains an element or elements not included in the other and the phrase "a noncapital felony" means "any noncapital offense". *State v. Charlton*, 1992-NMCA-124, 115 N.M. 35, 846 P.2d 341, cert. denied, 114 N.M. 577, 844 P.2d 827.

**Sentence improper.** — Sentence of 7 to 15 years for convictions of assault with intent to kill and assault with a deadly weapon were not in accordance with the so-called indeterminate sentence law, former 41-17-1, 1953 Comp., which required a trial judge to sentence a person found guilty of an offense to the minimum and maximum provided by statute for the offense. *State v. Romero*, 1963-NMSC-168, 73 N.M. 109, 385 P.2d 967 (decided under prior law).

## II. ELEMENTS OF AGGRAVATED ASSAULT.

**Threat of bodily harm.** — A defendant could be convicted of aggravated assault by merely threatening the victim with bodily harm. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

**Aggravated assault and armed robbery distinguished.** — Aggravated assault contains an element that armed robbery does not: striking at a victim instead of just threatening him. Armed robbery contains an element that aggravated assault does not: taking victim's property with the intent to permanently deprive victim of the property. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

**Meaning of "deadly weapon".** — Deadly weapons shall be construed to mean any kind or class of pistol or gun, whether loaded or unloaded. *State v. Montano*, 1961-NMSC-174, 69 N.M. 332, 367 P.2d 95.

**Apprehension of danger required.** — For there to be an aggravated assault there must first be an assault; for there to be an assault upon a victim, there must have been an act, threat or conduct which caused him to reasonably believe he was in danger of receiving an immediate battery. *State v. Mata*, 1974-NMCA-067, 86 N.M. 548, 525 P.2d 908, cert. denied, 86 N.M. 528, 525 P.2d 888.

**General criminal intent is necessary element of aggravated assault** although the terms of the statute do not require it. Consequently, something done "not with an evil purpose, but for fun, or as a practical joke" is not done with the requisite criminal intent necessary to constitute the crime of aggravated assault. *State v. Cruz*, 1974-NMCA-077, 86 N.M. 455, 525 P.2d 382.

**Intent defined as conscious wrongdoing.** — Although Subsection A does not refer to intent, intent is required; the intent involved is that of conscious wrongdoing. *State v. Mascarenas*, 1974-NMCA-100, 86 N.M. 692, 526 P.2d 1285.

**Intent to harm not requisite.** — An intent to do physical or bodily injury is not an element of Subsection A of this section. *State v. Cruz*, 1974-NMCA-077, 86 N.M. 455, 525 P.2d 382.

Specific intent to do bodily harm is not a necessary element of aggravated assault under New Mexico law. Proof of intent under the aggravated assault statute is achieved by showing the defendant intended to commit a simple assault and did so with a deadly weapon. *United States v. Boone*, 347 F. Supp. 1031 (D.N.M. 1972).

**Great bodily harm** is not element of aggravated assault charge. *State v. Davis*, 1979-NMCA-015, 92 N.M. 563, 591 P.2d 1160.

## III. EVIDENCE AND PROOF.

**State is not required to prove that accused intended to assault victim,** but only that he did an unlawful act which caused the victim to reasonably believe that she was in danger of receiving an immediate battery, that the act was done with a deadly weapon, and that it was done with a general criminal intent. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds, Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

**Specific intent is not an essential element of aggravated assault.** — Where defendant was charged with aggravated assault with a deadly weapon, and where the state presented evidence at trial that the victim of the assault was standing next to the shooting victim when the shooting occurred and that the assault victim reasonably believed that she was also going to be shot, and where the jury was properly instructed on general criminal intent, there was sufficient evidence to support defendant's conviction for aggravated assault with a deadly weapon. Specific intent is not an essential element of aggravated assault. *State v. Branch*, 2018-NMCA-031, *replacing* 2016-NMCA-071, 387 P.3d 250, cert. denied.

**Sufficient evidence of aggravated assault.** — Where defendant was charged with aggravated assault with a deadly weapon, the evidence that the victim of the assault was standing right next to the shooting victim when the shooting occurred, that the assault victim believed that she was also going to be shot, and where the jury was properly instructed on general criminal intent, there was sufficient evidence to support defendant's conviction for aggravated assault with a deadly weapon. *State v. Branch*, 2016-NMCA-071, 387 P.3d 250, *replaced by* 2018-NMCA-031, and cert. quashed.

**Sufficient evidence of aggravated assault with a deadly weapon.** — Where, in defendant's trial for first-degree murder, child abuse and aggravated assault with a deadly weapon, the jury heard evidence that defendant fired a gun at the shooting victim nine times at point-blank range, that the victim was seated in the front passenger seat of his vehicle, and that the victim's wife was seated in the driver's seat of the vehicle, and where the victim's wife testified that when the shooting began, she closed her eyes and believed that she was going to die, there was sufficient evidence for a jury to reasonably infer that when defendant pointed the gun at the victim, he was simultaneously point it in the direction of the victim's wife, and there was sufficient evidence to support the jury's determination that the victim's wife believed she was in danger of receiving an immediate battery and that this belief was reasonable. *State v. Ramirez*, 2018-NMSC-003.

**"Use" of a deadly weapon in the context of assault with a deadly weapon construed.** — A defendant *uses* a deadly weapon to commit assault where a defendant makes *facilitative use* of the deadly weapon. Facilitative use of a deadly weapon may be found if (1) a deadly weapon is present at some point during the encounter, (2) the victim knows or, based on the defendant's words or actions, has reason to know that the defendant has a deadly weapon, and (3) the presence of the weapon is intentionally used by the defendant to facilitate the commission of the assault. *State v. Zachariah G.*, 2022-NMSC-003, *aff'g* 2021-NMCA-036.

**Sufficient evidence of assault on a school employee with a deadly weapon.** — Where a child was adjudicated a delinquent for committing aggravated assault with a deadly weapon on a school employee, there was sufficient evidence to support the adjudication where, although the child did not brandish the BB gun he had concealed in his waistband, the child refused to reveal the object to the school principal and asked the principal menacing questions, including "What would happen if somebody shot up the school?", "Are you afraid to die?", and "How would you feel if a twelve-year old shot you?". There was sufficient evidence to satisfy the essential element that the child *used* the deadly weapon where the evidence supported findings that a deadly weapon was present, that the principal knew or had reason to know from the child's words and actions that the child had a BB gun when the child threatened him, and that the presence of the weapon was intentionally used by the child to facilitate the commission of an assault on



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the principal. Based on the child's verbal threats that took advantage of the presence of the BB gun, it was reasonable for the jury to determine that the child's conduct caused the principal to reasonably believe that he was in danger of receiving an immediate battery, and thus the child *used* the deadly weapon to facilitate the assault. *State v. Zachariah G.*, 2022-NMSC-003, *aff'g* 2021-NMCA-036.

**Sufficient evidence of aggravated assault by "use" of a deadly weapon.** — Where a child was adjudicated a delinquent for committing aggravated assault with a deadly weapon on a school employee, there was sufficient evidence to support the adjudication where, although the child did not brandish or retrieve a BB gun he had concealed in his waistband, the child refused to reveal the object to the school principal and asked the school principal menacing questions, including "What would happen if somebody shot up the school?", "Are you afraid to die?", and "How would you feel if a twelve-year-old shot you?". A reasonable juror could have determined that the child threatened the principal with the BB gun and that the BB gun was instrumental to the child's assault because the child's menacing and threatening questions instilled fear in the principal while the BB gun was bulging from the child's pants and of which the child knew the principal was aware. *State v. Zachariah G.*, 2021-NMCA-036, cert. granted.

**Sufficient evidence of aggravated assault.** — Where defendant was convicted of three counts of aggravated assault for unlawfully assaulting or striking at another with a deadly weapon, there was sufficient evidence to support the convictions where the evidence presented at trial established that defendant admitted to police that he discharged his firearm twice in the air and twice at a vehicle that he knew to be occupied by multiple people, because the evidence was such that the jury could have concluded that defendant's act of shooting at the occupied vehicle caused the occupants of the vehicle to believe defendant was about to intrude on their bodily integrity or personal safety. *State v. Candelaria*, 2019-NMSC-004.

**Use of circumstantial evidence.** — On trial of charge of assault with deadly weapon, whether the weapon was in fact used may be shown by circumstantial evidence. *State v. Conwell*, 1932-NMSC-042, 36 N.M. 253, 13 P.2d 554.

**Proof of motive is not indispensable to conviction.** — Without contention that defendant did not shoot victim, the state is not required to prove motive. *State v. Brito*, 1969-NMCA-027, 80 N.M. 166, 452 P.2d 694.

**Evidence of victim's prior conviction.** — Exclusion of bare fact that person threatened with deadly weapon had been convicted of voluntary manslaughter, offered as bearing on self-defense, was within discretion of trial court. *State v. Nieto*, 1929-NMSC-060, 34 N.M. 232, 280 P. 248.

**Sufficient evidence of aggravated assault.** — Where co-defendant held a knife at the victim's throat and told the victim that he was going to kill him, the facts were sufficient to support the jury's finding that a reasonable person in the victim's position would believe that his bodily integrity was threatened by co-defendant's use of the knife. *State v. Herrera*, 2015-NMCA-116, cert. denied, 2015-NMCERT-010.

**Evidence sufficient.** — Evidence that defendant pulled the loaded gun from his pocket and made threat to kill after argument over girlfriend was substantial evidence of an attempt to apply force in either an insolent or angry manner and therefore sufficient evidence of aggravated assault. *State v. Woods*, 1971-NMCA-026, 82 N.M. 449, 483 P.2d 504.

Evidence that defendant told victim to leave, fired revolver within one foot of and in the direction of victim, and called victim a son of a bitch and told him to get up, supports conviction for aggravated assault. *State v. Brito*, 1969-NMCA-027, 80 N.M. 166, 452 P.2d 694.

The evidence was sufficient to sustain defendant's conviction for offense of aggravated assault when he pointed a gun at victim and asked for money, which was handed over, victim testifying that he was worried because the gun was loaded. *State v. Anaya*, 1968-NMCA-014, 79 N.M. 43, 439 P.2d 561.

Sufficient evidence to support conviction, despite failure to preserve fingerprints or trace ownership of weapon. *State v. Peterson*, 1985-NMCA-109, 103 N.M. 638, 711 P.2d 915, cert. denied, 475 U.S. 1052, 106 S. Ct. 1279, 89 L. Ed. 2d 586 (1986).

A defendant's acts of specifically pointing a rifle at each of several victims on two or more separate instances, accompanied by verbal threats, constituted evidence from which the jury could properly determine that defendant committed the separate offenses of aggravated assault and false imprisonment against each victim. Moreover, the jury could find that defendant falsely imprisoned his victims at the beginning of the episode and thereafter committed additional independent aggravated assaults for which he could be separately punished. *State v. Bachicha*, 1991-NMCA-014, 111 N.M. 601, 808 P.2d 51, cert. denied, 111 N.M. 529, 807 P.2d 227.

Because the aggravated assault statute and the armed robbery statute share common ground in theory, a defendant's conviction could rely on similar, if not identical, evidence. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

## IV. DOUBLE JEOPARDY.

**Prosecution under Assimilative Crimes Act.** — A person may be prosecuted and convicted of the lesser included offense of aggravated assault, in violation of New Mexico law, when congress has enacted a statute (18 U.S.C. § 113) making simple assault and its more aggravated forms federal offenses. *United States v. Johnson*, 967 F.2d 1431 (10th Cir. 1992).

**Lesser included offense of aggravated battery.** — Aggravated assault by use of a threat with a deadly weapon is a lesser included offense of aggravated battery. *State v. DeMary*, 1982-NMSC-144, 99 N.M. 177, 655 P.2d 1021.

**No double jeopardy where facts differ.** — If the factual basis for the alleged conviction for assault in municipal court and the factual basis for the aggravated assault conviction differ, then there would be no double jeopardy and the burden will be on defendant to prove a factual basis showing double jeopardy. *State v. Woods*, 1973-NMCA-114, 85 N.M. 452, 513 P.2d 189.

**Separate criminal acts.** — Assault with a deadly weapon, even though committed in connection with a larceny is a separate criminal act, as distinguished from a necessary ingredient of the crime of larceny, and, accordingly, there may be a conviction and punishment for both. *State v. Martinez*, 1967-NMSC-103, 77 N.M. 745, 427 P.2d 260.

**Separate punishment for aggravated assault and arson.** — The legislature intended separate punishment for the crimes of arson and aggravated assault. While these statutes may be violated together, they are not necessarily violated together. Punishment for a violation of either statute is not enhanced for a violation of the other. The legislature intended separate punishment for unitary conduct violating both statutes. *State v. Rodriguez*, 1992-NMCA-035, 113 N.M. 767, 833 P.2d 244, cert. denied, 113 N.M. 636, 830 P.2d 553.

**Shooting into occupied vehicle.** — Separate punishments are intended for the offenses of shooting into an occupied vehicle and aggravated assault with a deadly weapon. *State v. Sosa*, 1997-NMSC-032, 123 N.M. 564, 943 P.2d 1017, *abrogated by State v. Porter*, 2020-NMSC-020.

**Aggravated assault not lesser included offense.** — Assault with intent to kill can be committed without use of a deadly weapon; thus, aggravated assault with a deadly weapon was not a lesser included offense. *State v. Patterson*, 1977-NMCA-084, 90 N.M. 735, 568 P.2d 261.

**Lesser included offense of federal crime.** — The New Mexico offense of aggravated assault is a lesser



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included offense of the federal crime of assault with a dangerous weapon with specific intent to do bodily harm, 18 U.S.C. § 113(c) (now 18 U.S.C. § 113(a)(3)). *United States v. Abeyta*, 27 F.3d 470 (10th Cir. 1994).

**Merger of conviction for aggravated assault into offense of false imprisonment.** — Even though a defendant's acts of threatening each of multiple victims with a deadly weapon constituted the means by which his victims were restrained or confined against their will so as to cause the assault to merge into the crime of false imprisonment, the trial court did not err in refusing to merge defendant's convictions of aggravated assault into the offenses of false imprisonment, because there was evidence of multiple acts of aggravated assault committed against each victim. *State v. Bachicha*, 1991-NMCA-014, 111 N.M. 601, 808 P.2d 51, cert denied, 111 N.M. 529, 807 P.2d 227.

## V. JURY INSTRUCTIONS.

**Jury instructions on aggravated assault as lesser included offense.** — In prosecution for assault with a deadly weapon with specific intent to do bodily harm (18 U.S.C. § 113(c)) (now 113(a)(3)), where the record was rife with testimony that alcohol might have affected defendant's ability to appreciate the import of his actions, defendant was entitled to an instruction on the lesser included New Mexico offense of aggravated assault, which has the same action elements but does not include a specific intent to injure. *United States v. Abeyta*, 27 F.3d 470 (10th Cir. 1994).

**Instruction's definitions sufficient.** — Instruction defining "assault" as an attempt to commit a battery upon the person of another and "unlawful" as means contrary to law and without legal excuse or justification, held not to be error. *State v. Woods*, 1971-NMCA-026, 82 N.M. 449, 483 P.2d 504.

**Instructions on intent insufficient.** — Conscious wrongdoing is an essential element of Subsection A of this statute, and instructions in the language of the statute were insufficient to inform the jury of the intent required. Hence, defendant's conviction was reversed. *State v. Cutnose*, 1974-NMCA-130, 87 N.M. 307, 532 P.2d 896, cert. denied, 87 N.M. 299, 532 P.2d 888.

**Word "unlawful" insufficient description of intent.** — When a statute sets forth the requisite intent, instructions in the language of the statute sufficiently instruct on the required intent. However, where the applicable statute speaks of "unlawfulness," instructions informing the jury that defendant's conduct must have been unlawful does not inform the jury that conscious wrongdoing is an element of the crime of aggravated assault. *State v. Mascarenas*, 1974-NMCA-100, 86 N.M. 692, 526 P.2d 1285.

**Use of word "unlawfully" unnecessary.** — It was not necessary to use the word "unlawfully" in an instruction, where the jury was informed that the assault must have been committed without excuse or justification, and another instruction defined an assault as an "unlawful attempt." *Territory v. Gonzales*, 1907-NMSC-007, 14 N.M. 31, 89 P. 250.

**Use of "feloniously" unnecessary.** — Although an indictment for assault with a deadly weapon under Laws 1907, ch. 36, § 19 (former Section 40-17-4, 1953 Comp.) used the word "feloniously," there was no error in omitting it from the instruction as to elements of crime, as the use of the word in the indictment was unnecessary, and the jury was not required to fix the penalty. *Territory v. Gonzales*, 1907-NMSC-007, 14 N.M. 31, 89 P. 250.

**Use of phrase "without excuse or justification" proper.** — In prosecution for assault with a deadly weapon under Laws 1907, ch. 36, § 19 (former Section 40-17-4, 1953 Comp.), it was not error to use the words "without excuse or justification" in an instruction. *Territory v. Gonzales*, 1907-NMSC-007, 14 N.M. 31, 89 P. 250.

**Failure to instruct on essential elements.** — The trial court committed reversible error when it instructed the jury on the elements of aggravated assault with intent to commit felony aggravated battery, but then failed to instruct on the essential elements of felony aggravated battery and, instead, instructed on the essential elements of misdemeanor aggravated battery. *State v. Armijo*, 1999-NMCA-087, 127 N.M. 594, 985 P.2d 764.

**Breaking-and-entering instruction refused since defendant intended to threaten.** — A requested instruction on breaking and entering as a lesser included offense was properly refused, where although the evidence was susceptible to inferences that defendant did not have the requisite intent to commit any batteries or homicides until he got inside, there was no evidence other than he had the intent, when he entered a house, to threaten someone while masked. *State v. Durante*, 1986-NMCA-024, 104 N.M. 639, 725 P.2d 839.

**Law reviews.** — For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For note, "Criminal Law - The Use of Transferred Intent in Attempted Murder, a Specific Intent Crime: State v. Gillette," see 17 N.M.L. Rev. 189 (1987).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery §§ 48 to 55.

Sense of shame, or other disagreeable emotion on part of female, as essential to an aggravated or indecent assault, 27 A.L.R. 859.

Deadly or dangerous weapon, intent to do physical harm as essential element of crime of assault with, 92 A.L.R.2d 635.

Sexual nature of physical contact as aggravating offense, 63 A.L.R.3d 225.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 A.L.R.3d 718.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 A.L.R.3d 287.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 7 A.L.R.4th 607.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary - modern cases, 73 A.L.R.4th 993.

Criminal assault or battery statutes making attack on elderly person a special or aggravated offense, 73 A.L.R.4th 1123.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Sufficiency of bodily injury to support charge of aggravated assault, 5 A.L.R.5th 243.

Stationary object or attached fixture as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 8 A.L.R.5th 775.

Kicking as aggravated assault, or assault with dangerous or deadly weapon, 19 A.L.R.5th 823.

6A C.J.S. Assault and Battery §§ 72 to 82.



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## 30-3-3. Assault with intent to commit a violent felony.

Assault with intent to commit a violent felony consists of any person assaulting another with intent to kill or commit any murder, mayhem, criminal sexual penetration in the first, second or third degree, robbery or burglary.

Whoever commits assault with intent to commit a violent felony is guilty of a third degree felony.

**History: 1953 Comp., § 40A-3-3, enacted by Laws 1963, ch. 303, § 3-3; 1977, ch. 193, § 2.**

**Cross references.** — For offense of murder, *see* 30-2-1 NMSA 1978.

For offense of criminal sexual penetration, *see* 30-9-11 NMSA 1978.

For offenses of robbery and burglary, *see* 30-16-2 and 30-16-3 NMSA 1978.

For assault with intent to commit violent felony upon peace officer, *see* 30-22-23 NMSA 1978.

### ANNOTATIONS

**No double jeopardy bar to punishment.** — There was no double jeopardy bar to punishment for the offenses of assault with intent to commit rape and criminal sexual penetration, where the victim testified at trial that defendant bound her to a bed, struck her several times, and threatened her verbally for a period of time before commencing the sexual assault. *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223.

**Essential elements of offense.** — Essential elements and ingredients of assault with intent to murder were willfully and unlawfully to assault a person with intent to murder such person, so that intent was an essential ingredient of the crime. *Territory v. Baca*, 1903-NMSC-001, 11 N.M. 559, 71 P. 460.

**Aggravated assault not lesser included offense.** — Assault with intent to kill can be committed without use of a deadly weapon; thus, aggravated assault with a deadly weapon was not a lesser included offense. *State v. Patterson*, 1977-NMCA-084, 90 N.M. 735, 568 P.2d 261.

**No merger with aggravated battery.** — The double jeopardy clause does not prohibit sentencing for both assault with intent to commit a violent felony murder and for aggravated battery with a deadly weapon; one offense does not subsume the other and other indicia of legislative intent suggests an intent to punish separately. *State v. Cowden*, 1996-NMCA-051, 121 N.M. 703, 917 P.2d 972, cert. denied, 121 N.M. 644, 916 P.2d 844.

**No merger with kidnapping conviction.** — Merger of kidnapping and assault with intent to commit criminal sexual penetration convictions was not required by double jeopardy considerations where there was evidence apart from the defendant's subsequent sexual assault from which the jury could infer that the defendant restrained the victim with the intent of holding her for services and where, under the facts, the assault with intent to commit criminal sexual penetration occurred after the victim had been restrained and held for services. *State v. Williams*, 1986-NMCA-122, 105 N.M. 214, 730 P.2d 1196, cert. denied, 105 N.M. 111, 729 P.2d 1365.

**No merger with shooting at an inhabited dwelling.** — This section and Section 30-3-8 NMSA 1978 (shooting at an inhabited dwelling) are two sections directed toward the protection of different social norms and indicate an intention on the part of the legislature to allow for multiple punishment for the same conduct. The legislature was concerned with conduct typically designed to terrorize or intimidate in 30-3-8 NMSA 1978. In contrast, this section is directed toward conduct which is motivated by an intention to effect another's death. *State v. Highfield*, 1992-NMCA-020, 113 N.M. 606, 830 P.2d 158, cert. denied, 113 N.M. 503, 828 P.2d 415.

**Double jeopardy not found.** — Convictions for accessory to assault with intent to commit a violent felony, accessory to aggravated battery with great bodily harm, and accessory to false imprisonment did not violate the constitutional prohibition against double jeopardy. *State v. Carrasco*, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

**Collateral estoppel not applicable to facts.** — Acquittal of defendant on charge of assault on a jail did not collaterally estop state from bringing subsequent prosecution against him on charge of assault with intent to commit a violent felony, even where both offenses allegedly occurred at same time and place, since charge of assault with intent to commit a violent felony required a jury to consider facts not required in the first trial. *State v. Tijerina*, 1973-NMSC-105, 86 N.M. 31, 519 P.2d 127, cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

**Justification insufficient.** — An attempt to recover property in the absence of a threatened trespass to one's habitation did not justify an attempt to take the life of a trespasser. *State v. Waggoner*, 1946-NMSC-001, 49 N.M. 399, 165 P.2d 122.

**Manner and means of assault to be charged.** — Indictment for assault with intent to commit murder must state the manner and means of the assault so far, at least, as to show that the crime would have been murder had not the acts stopped short of their full effect. *Territory v. Carrera*, 1892-NMSC-023, 6 N.M. 594, 30 P. 872; *Territory v. Sevailles*, 1855-NMSC-001, 1 N.M. 119.

**Averment of use of deadly weapon.** — An indictment for an assault with intent to kill was insufficient unless it averred that the assault was committed with a deadly weapon and with every ingredient necessary to have constituted the crime of murder if death had ensued. *Territory v. Sevailles*, 1855-NMSC-001, 1 N.M. 119.

**Knife as deadly weapon.** — An indictment averring an assault with a knife with intent to kill was sufficient, although not stating the knife to be a deadly weapon. *Territory v. Sevailles*, 1855-NMSC-001, 1 N.M. 119.

**Conviction under section other than that charged.** — Under count charging assault with intent to murder, alleging essentials of assault with deadly weapon, defendant could not be convicted of latter offense. *State v. Taylor*, 1927-NMSC-081, 33 N.M. 35, 261 P. 808.

**Evidence of victim's character.** — Absent any claim of self-defense, the victim's asserted character traits were not essential elements of the defense in a prosecution for assault with intent to commit a violent felony and were not provable by specific acts of conduct, but were only provable by reputation or opinion evidence. *State v. Bazan*, 1977-NMCA-011, 90 N.M. 209, 561 P.2d 482, cert. denied, 90 N.M. 254, 561 P.2d 1347.

**Evidence of other crime.** — In prosecution for assault with pistol with intent to kill, where there was some evidence that accused intended to kill the prosecuting witness as a "stool pigeon," it was not error to permit inquiry, on cross-examination of accused, whether he had not been indicted the day before the assault for a prohibition violation. *State v. Solis*, 1934-NMSC-077, 38 N.M. 538, 37 P.2d 539.

**Statements of deceased victim as hearsay.** — The oral statements of one who died after an assault with intent to kill and before trial were not admissible on a prosecution for the offense since they constituted hearsay and were incompetent and irrelevant. *State v. Waggoner*, 1946-NMSC-001, 49 N.M. 399, 165 P.2d 122.



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**Weight of defendant's statements of intent.** — Statement by defendant that he wanted to indulge in a lascivious act other than intercourse upon the person of prosecutrix did not negative possible intent to compel sexual intercourse since jury might well have believed that defendant's announced intention was only preliminary to raping her. *State v. Compos*, 1952-NMSC-016, 56 N.M. 89, 240 P.2d 228.

**Evidence sufficient to go to jury.** — There was sufficient evidence to take case to jury where elements of unlawfulness, deliberateness and premeditated design together with an intent to take the life of the person assaulted were amply shown. *State v. Waggoner*, 1946-NMSC-001, 49 N.M. 399, 165 P.2d 122.

**Instructions to contain definition of assault.** — The definition of assault found in Section 30-3-1 NMSA 1978 contains essential elements of the crime of which defendant was convicted, assault with intent to commit a violent felony, and failure of the trial judge to define assault was jurisdictional error. *State v. Jones*, 1973-NMCA-107, 85 N.M. 426, 512 P.2d 1262.

**Charge on right to defend property properly refused.** — In prosecution for assault with intent to kill, trial court did not err in refusing an instruction that a person has a right to defend his property from trespass or larceny and that jury should acquit defendant if it found that he shot at prosecuting witness to stop him from removing defendant's property and such action was necessary to prevent it, where evidence did not show prosecuting witness was on land leased by defendant at time of assault and in light of instructions given. *State v. Waggoner*, 1946-NMSC-001, 49 N.M. 399, 165 P.2d 122.

**Refusal to instruct not prejudicial.** — Defendant was not prejudiced by refusal to give requested instruction on accidental discharge of gun, while not engaged in the commission of a felony, where the subject was adequately covered in the court's general charge. *State v. Smith*, 1947-NMSC-035, 51 N.M. 184, 181 P.2d 800.

**Instruction improper.** — Where defendant was convicted of assault with intent to commit a violent felony against the adult child of the victim whom defendant shot and killed; defendant fired shots into a house that was occupied by the victim's adult child and others; and the jury was instructed that for it to find defendant guilty of assault with intent to commit a violent felony on the victim's adult child, the jury had to find that defendant intended to kill the victim's child or any other person or commit murder or mayhem on the victim's adult child or any other person, the instruction misstated the law regarding assault with intent to commit a violent felony and because the jury instruction allowed the jury to convict defendant of assaulting the victim's adult child on the ground that defendant intended to commit a violent felony against the victim, not the victim's adult child, the jury may have convicted defendant of crime that did not exist. *State v. Arrendondo*, 2012-NMSC-013, 278 P.3d 517.

Where gun accidentally discharged while defendant was engaged in committing a felony or misdemeanor at the time of the homicide, an instruction which did not recognize defendant's liability to conviction was improper. *State v. Smith*, 1947-NMSC-035, 51 N.M. 184, 181 P.2d 800.

**Informing jury of co-defendant's guilty plea deemed error.** — The fact that a co-defendant has pled guilty to conspiracy to commit murder, presented to the jury in a case involving the defendant's conspiracy, does not come within Rule 803(22), N.M.R. Evid. (now Paragraph V of Rule 11-803 NMRA) is hearsay, and informing the jury of this guilty plea is error. *State v. Urioste*, 1980-NMCA-103, 94 N.M. 767, 617 P.2d 156, cert. denied, 94 N.M. 806, 617 P.2d 1321.

**Sentence not excessive.** — Where minimum sentence was less than a third of the maximum which could have been imposed for conviction of assault with intent to rape, sentence was not excessive, particularly in view of liberal policy of giving prisoners time off for good behavior, and liberal commutations. *State v. Compos*, 1952-NMSC-016, 56 N.M. 89, 240 P.2d 228.

**Sentence improper.** — Sentence of 7 to 15 years for convictions of assault with intent to kill and assault with a deadly weapon were not in accordance with the so-called indeterminate sentence law, former 41-17-1, 1953 Comp., which required a trial judge to sentence a person found guilty of an offense to the minimum and maximum provided by statute for the offense. *State v. Romero*, 1963-NMSC-168, 73 N.M. 109, 385 P.2d 967 (decided under prior law).

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery §§ 48 to 55.

Assault with intent to kill in connection with the use of automobile for unlawful purpose or in violation of law, 99 A.L.R. 756.

Impotency as defense to charge of rape, attempt to rape or assault with intent to commit rape, 23 A.L.R.3d 1351.

What constitutes offense of "sexual battery," 87 A.L.R.3d 1250.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 A.L.R.3d 1309.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 A.L.R.3d 718.

Propriety of, or prejudicial effect of omitting or of giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge, 92 A.L.R.3d 866.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Constitutionality of assault and battery laws limited to protection of females or which provide greater penalties for males than for females, 5 A.L.R.4th 708.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Criminal responsibility of husband for rape, or assault to commit rape, on wife, 24 A.L.R.4th 105.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary - modern cases, 73 A.L.R.4th 993.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

6A C.J.S. Assault and Battery §§ 72, 75 to 81.

## 30-3-4. Battery.

Battery is the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner.

Whoever commits battery is guilty of a petty misdemeanor.



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**History: 1953 Comp., § 40A-3-4, enacted by Laws 1963, ch. 303, § 3-4.**

**Cross references.** — For assault and battery upon revenue division employees, *see* 7-1-75 NMSA 1978.

For battery upon peace officers, *see* 30-22-24 NMSA 1978.

## ANNOTATIONS

**Lesser included offense.** — Petty-misdemeanor battery is a lesser included offense of aggravated battery. The difference is that simple battery does not require an intent to injure. *State v. Garcia*, 2009-NMCA-107, 147 N.M. 150, 217 P.3d 1048.

**Battery is a lesser included offense of aggravated battery** upon a peace officer under Section 30-22-25 NMSA 1978. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Battery of spouse.** — There is no language in this statute indicating that different standards should be employed when the victim of a battery is the spouse of the defendant. *State v. Seal*, 1966-NMSC-123, 76 N.M. 461, 415 P.2d 845.

**Angry and insolent manner.** — Where there was testimony that appellant grabbed his wife, pushed or "slammed" her against a parked car, held her there and after she broke away, followed her to her car where he proceeded to talk to her for at least an hour while she cried and screamed for him to let her go, there was ample evidence for the trial court to conclude that appellant acted in a rude, insolent or angry manner as defined in this section when he applied force to the person of his wife. *State v. Seal*, 1966-NMSC-123, 76 N.M. 461, 415 P.2d 845.

**Parent common law discipline privilege.** — A parent has a privilege to use moderate or reasonable physical force, without criminal liability, when engaged in the discipline of his or her child. *State v. Lefevre*, 2005-NMCA-101, 138 N.M. 174, 117 P.3d 980.

An isolated instance of moderate or reasonable physical force that results in nothing more than transient pain or temporary marks or bruises is protected under the parental discipline privilege. *State v. Lefevre*, 2005-NMCA-101, 138 N.M. 174, 117 P.3d 980.

**Battery is included within offense of aggravated battery.** *State v. Duran*, 1969-NMCA-048, 80 N.M. 406, 456 P.2d 880.

**Battery does not merge with false imprisonment.** — Since false imprisonment requires a constraining or confining with knowledge of lack of legal authority and battery does not, and the elements for proving the two offenses differ, the two offenses do not merge. *State v. Muise*, 1985-NMCA-090, 103 N.M. 382, 707 P.2d 1192, cert. denied, 103 N.M. 287, 705 P.2d 1138, *overruled on other grounds*, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Proof of battery demands conviction or acquittal thereon.** — Regardless of whether either assault or aggravated assault is included in the charge of battery since there was proof of a battery, defendant should be convicted of some degree of battery (either aggravated or simple) or acquitted. *State v. Duran*, 1969-NMCA-048, 80 N.M. 406, 456 P.2d 880.

**Charge of unlawfulness mandatory.** — Indictment charging that defendant "did beat, bruise and wound" a person, but omitting to aver it was done "unlawfully" was bad; by using the word "unlawfully" the statute intended to discriminate between lawful and unlawful acts of violence. *Territory v. Miera*, 1866-NMSC-004, 1 N.M. 387.

**Double jeopardy.** — Where the evidence established that defendant committed three separate and distinct battery offenses, double jeopardy did not preclude the first two batteries supporting a conviction for battery, even though the third battery satisfied elements of a charge of criminal sexual penetration. *Brecheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

Where provision in an order prohibiting domestic violence (OPDV), prohibiting "battering in any manner," contained all elements of the statutorily defined offense of battery, a criminal prosecution for battery following a contempt proceeding for violating the OPDV violated defendant's right against double jeopardy. *State v. Powers*, 1998-NMCA-133, 126 N.M. 114, 967 P.2d 454., cert. quashed, 127 N.M. 392, 981 P.2d 1210 (1999).

**Kidnapping and battery.** — Where defendant drove the victim to a deserted area, pulled the victim out of the vehicle, pulled the victim's hair, kicked the victim, threw the victim into bushes, and beat the victim; defendant held the victim by the arm and drove to a second location where defendant again beat the victim; when the victim attempted to run away, defendant put the victim in the vehicle and drove to a third location and again beat the victim and forced the victim to have intercourse with defendant; and defendant was convicted of kidnapping in the first degree and battery, defendant's convictions did not violate double jeopardy because defendant's conduct was not factually unitary or legally unitary because the jury could have determined that the victim suffered physical injuries when defendant dragged the victim from the vehicle, threw the victim into the bushes, pulled the victim's hair, or otherwise restrained the victim, all actions distinct from the hitting and kicking on which the battery charge was based. *State v. Sotelo*, 2013-NMCA-028, 296 P.3d 1232, cert. denied, 2013-NMCERT-001.

**Instruction on simple battery wrongly refused.** — Battering a peace officer while in the lawful discharge of his duties is battering the person of another, and where there was evidence that the victim police officer was not in the lawful discharge of his duties in connection with the altercation, the trial court erred in refusing to instruct on simple battery as well as on battery on an officer. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

Where there was evidence tending to establish the included offense of battery in charge of aggravated battery, trial court erred in refusing to instruct on lesser included offense. *State v. Duran*, 1969-NMCA-048, 80 N.M. 406, 456 P.2d 880.

In trial of Indian for rape under the federal Major Crimes Act (18 U.S.C. §§ 1153, 3242, conferring federal jurisdiction over certain enumerated major crimes committed by Indians on Indian reservations), it was reversible error for trial court to refuse to instruct on the non-enumerated offenses of attempted rape, simple assault and battery, all of which were lesser included offenses under New Mexico law. *Joe v. United States*, 510 F.2d 1038 (10th Cir. 1974).

**Right to de novo appeal.** — Where defendant was convicted in metropolitan court of battery against a household member in violation of this section, because the state did not prosecute the battery under Section 30-3-15 NMSA 1978, state could not contend that defendant was convicted of a crime involving domestic violence and he was entitled to a de novo appeal in district court rather than just an on-record review of the proceeding. *State v. Trujillo*, 1999-NMCA-003, 126 N.M. 603, 973 P.2d 855.

**Law reviews.** — For note, "Criminal Law: Applying the General/Specific Statute Rule in New Mexico – State v. Santillanes," see 32 N.M.L. Rev. 313 (2002).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For note, "Municipal Assumption of Tort Liability for Damage Caused by Police Officers," see 1 N.M.L. Rev. 263 (1971).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery §§ 37 to 41.



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Peace officers' criminal responsibility for wounding one whom they wished to investigate or identify, 18 A.L.R. 1368, 61 A.L.R. 321.

Right of one in loco parentis other than teacher to punish child, 43 A.L.R. 507.

Liability of parent or person in loco parentis for personal tort against minor child, 19 A.L.R.2d 423.

Criminal liability as barring or mitigating recovery of punitive damages, 98 A.L.R.3d 870.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary - modern cases, 73 A.L.R.4th 993.

6A C.J.S. Assault and Battery §§ 70, 71.

## 30-3-5. Aggravated battery.

A. Aggravated battery consists of the unlawful touching or application of force to the person of another with intent to injure that person or another.

B. Whoever commits aggravated battery, inflicting an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.

C. Whoever commits aggravated battery inflicting great bodily harm or does so with a deadly weapon or does so in any manner whereby great bodily harm or death can be inflicted is guilty of a third degree felony.

**History: 1953 Comp., § 40A-3-5, enacted by Laws 1963, ch. 303, § 3-5; 1969, ch. 137, § 1.**

**Cross references.** — For aggravated battery upon peace officer, *see* 30-22-25 NMSA 1978.

**ANNOTATIONS**

I. GENERAL CONSIDERATION.
II. ELEMENTS OF AGGRAVATED BATTERY.
III. EVIDENCE AND PROOF.
IV. DOUBLE JEOPARDY.
V. JURY INSTRUCTIONS.

I. GENERAL CONSIDERATION.

**Section not violative of constitution's title requirements.** — Although this section provides that an aggravated battery may be either a misdemeanor or a felony, depending on the circumstances, N.M. Const., art. IV, § 16 is not violated, since title clearly shows that the subject of the act is aggravated battery and that more than one penalty is provided. *State v. Segura*, 1973-NMCA-006, 83 N.M. 432, 492 P.2d 1295.

**Section not void for vagueness.** — This section is not void for vagueness because a defendant's aggravated battery may be either a felony or misdemeanor or that it depends entirely on the view of the evidence taken by the trier of facts. *State v. Segura*, 1973-NMCA-006, 83 N.M. 432, 492 P.2d 1295.

This section is not unconstitutionally vague either when its subsections are compared or when the entire section is compared with Section 30-3-4 NMSA 1978. *State v. Chavez*, 1971-NMCA-030, 82 N.M. 569, 484 P.2d 1279, cert. denied, 82 N.M. 562, 484 P.2d 1272.

**Section not in conflict with Section 31-18-15.1 NMSA 1978.** — This section and Section 31-18-15.1 NMSA 1978 (aggravating circumstances affecting sentencing) do not provide punishment for the same offense, and these sections are not in conflict. *State v. Wilson*, 1982-NMCA-019, 97 N.M. 534, 641 P.2d 1081, cert. denied, 98 N.M. 50, 644 P.2d 1039.

The elements of an offense do no more than establish the offense. The circumstances surrounding the offense, including the circumstances surrounding each of the elements of the offense, may be considered under Section 31-18-15.1 NMSA 1978. *State v. Wilson*, 1982-NMCA-019, 97 N.M. 534, 641 P.2d 1081, cert. denied, 98 N.M. 50, 644 P.2d 1039.

**Defendant charged in the alternative.** — Aggravated battery is a third degree felony if it causes great bodily harm or if it was committed with a deadly weapon. There is nothing unfair in charging a defendant in the alternative, where the evidence supports a third degree felony conviction under both alternatives. *State v. Kenny*, 1991-NMCA-094, 112 N.M. 642, 818 P.2d 420, cert. denied, 112 N.M. 499, 816 P.2d 1121.

**Consent is not defense to crime of aggravated battery,** irrespective of whether the victim invites the act and consents to the battery. *State v. Fransua*, 1973-NMCA-071, 85 N.M. 173, 510 P.2d 106.

**Intoxication a valid defense.** — A showing of intoxication to a degree that would make specific intent impossible would establish a valid defense to the charge of aggravated battery and since the evidence in defendant's case raised an issue of fact for the jury on the question of intent to injure by showing intoxication to such a degree that defendant was unable to form the necessary intent, defendant was entitled to an instruction on this defense; the failure to so instruct was reversible error. *State v. Crespin*, 1974-NMCA-104, 86 N.M. 689, 526 P.2d 1282.

**Protection of property.** — The use of a deadly weapon in the protection of property is generally held, except in extreme cases, to be the use of more than justifiable force, and to render the owner of the property liable, both civilly and criminally, for the assault. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

**Right of confrontation not violated.** — Where no prior statement of any kind by the victim of an aggravated assault was brought to the attention of the jury or offered by the state, and defendant neither sought a continuance nor indicated that he desired to call the victim as a witness or what evidence he believed might be developed from the victim, his constitutional right of confrontation was not violated by absence of victim from trial. *State v. James*, 1966-NMSC-110, 76 N.M. 376, 415 P.2d 350.

**Continuance properly refused.** — Defendant's effort to have aggravated battery case continued and to have victim examined by another doctor was properly refused where there was nothing to show that defense was surprised by doctor's testimony or that defendant was



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prejudiced in his defense on the merits. *State v. Foster*, 1971-NMCA-064, 82 N.M. 573, 484 P.2d 1283.

**Aggravation of sentence.** — Rule against use of elements of a crime as the basis for aggravating the sentence for that crime was not violated where the defendant's failure to aid the victim and the brutality of the crime were used to aggravate the defendant's sentence; defendant's failure to aid the victim after the beating is clearly not an element of aggravated battery and the brutality of the crime, although it is a fact used to prove great bodily harm, does not equate to great bodily harm for purposes of the aggravation statute. *State v. Kurley*, 1992-NMCA-105, 114 N.M. 514, 841 P.2d 562, cert denied, 114 N.M. 413, 839 P.2d 623.

Where the defendant pleaded guilty to aggravated battery with great bodily harm, the defendant's sentence could be aggravated without actual evidence that his own acts, rather than the acts of his companions, were brutal; defendant's participation in the beating, which was brutal enough to actually cause death, standing alone, was sufficient. *State v. Kurley*, 1992-NMCA-105, 114 N.M. 514, 841 P.2d 562, cert denied, 114 N.M. 413, 839 P.2d 623.

**Waiver of error.** — Where defendant pleaded not guilty when arraigned and proceeded to trial without questioning propriety of magistrate's bind over, his claim that criminal information charged him with offense of aggravated battery, rather than attempted aggravated battery, concerning which there had been no preliminary examination, was waived. *State v. Hibbs*, 1971-NMCA-100, 82 N.M. 722, 487 P.2d 150.

**Defendant was bound by plea of guilty** to attempt to commit aggravated battery and was not entitled to post-conviction relief either on grounds that his actions did not constitute attempt to commit aggravated battery or that state had failed to establish his intent. *State v. Bonney*, 1971-NMCA-041, 82 N.M. 508, 484 P.2d 350.

**Withdrawal of plea properly denied.** — Trial court's denial of defendant's motion to withdraw his plea of guilty to a charge of aggravated assault after sentence was imposed did not violate due process where the only basis asserted for withdrawal of the plea was that the trial court refused to follow the sentencing recommendation of the district attorney. *State v. Ramos*, 1973-NMCA-103,85 N.M. 438, 512 P.2d 1274.

**Firearm enhancement statute constitutionally applied to conviction under section.** — Neither the rules of statutory construction nor the federal and state constitutional provisions against double jeopardy prohibit the application of the firearm enhancement statute to a person convicted of aggravated battery with a deadly weapon when the weapon used was a firearm. *State v. Gonzales*, 1981-NMCA-023, 95 N.M. 636, 624 P.2d 1033, *overruled on other grounds*, *Buzbee v. Donnelly*, 1981-NMSC-097, 96 N.M. 692, 634 P.2d 1244.

II. ELEMENTS OF AGGRAVATED BATTERY.

**The question of whether an individual has used his mouth as a deadly weapon** is strictly a question of fact, reserved for the jury. *State v. Neatherlin*, 2007-NMCA-035, 141 N.M. 328, 154 P.3d 703.

**This section requires intent to injure,** of which there must be substantial evidence for there to be proof that the crime of aggravated battery has been committed. *State v. Mora*, 1970-NMCA-072, 81 N.M. 631, 471 P.2d 201, cert. denied, 81 N.M. 668, 472 P.2d 382.

**Specific intent to injure is essential element of crime** of aggravated battery, and the state must prove beyond a reasonable doubt that the defendant knowingly committed the crime purposely intending to violate the law. *State v. Crespin*, 1974-NMCA-104, 86 N.M. 689, 526 P.2d 1282; *State v. Mills*, 1980-NMCA-005, 94 N.M. 17, 606 P.2d 1111, cert. denied, 94 N.M. 628, 614 P.2d 545.

**Intent to injure may be inferred.** — Intent to injure, as required by this section, need not be established by direct evidence but may be inferred from conduct and the surrounding circumstances. *State v. Michael S.*, 1995-NMCA-112, 120 N.M. 617, 904 P.2d 595, cert. denied, 120 N.M. 533, 903 P.2d 844.

Under former law, specific intent to commit mayhem was inferred as a matter of law. Where the defendant deliberately committed the crime of assault and battery, in so doing, he committed mayhem. *State v. Hatley*, 1963-NMSC-110, 72 N.M. 377, 384 P.2d 252 (decided under prior law).

**Great bodily harm.** — Subsection C of this section requires only that great bodily harm could result, not that it must result. *State v. Pettigrew*, 1993-NMCA-095, 116 N.M. 135, 860 P.2d 777, cert. denied, 116 N.M. 71, 860 P.2d 201.

Great bodily harm includes permanent loss or impairment (permanent injury). *State v. Chavez*, 1971-NMCA-030, 82 N.M. 569, 484 P.2d 1279, cert. denied, 82 N.M. 562, 484 P.2d 1272.

**Proximate cause of harm.** — Whether battery caused great bodily harm is to be determined by "proximate cause" and a defendant's act need not be a direct, that is, immediate, cause. *State v. Chavez*, 1971-NMCA-030, 82 N.M. 569, 484 P.2d 1279, cert. denied, 82 N.M. 562, 484 P.2d 1272.

**Nature of injury determines degree of crime.** — Whether crime is a misdemeanor or a felony depends largely, as shown by Subdivisions B and C, on the nature of the injury inflicted. *State v. Chavez*, 1971-NMCA-030, 82 N.M. 569, 484 P.2d 1279, cert. denied, 82 N.M. 562, 484 P.2d 1272.

The nature of the injury was an important element of mayhem. *State v. Martin*, 1926-NMSC-048, 32 N.M. 48, 250 P. 842 (decided under prior law).

**Degree of harm for jury.** — It was a question of fact for the jury whether forcible tattooing of victim with needle and India ink from back of neck to center part of waist, which tattoo recited an offensive sentence in large letters and could be removed only with strenuous and extensive skin grafting, was "great bodily harm" as required under this section and defined at 30-1-12 NMSA 1978. *State v. Ortega*, 1966-NMSC-186, 77 N.M. 312, 422 P.2d 353.

**Degree of harm.** — It was for the jury to determine whether the injuries inflicted on gasoline station attendant who was robbed, beaten and set on fire with gasoline were likely to cause death or great bodily harm, and defendant's motion for dismissal of the indictment, which charged him with a felony, on his assertion that doctor's testimony "proved" he was guilty only of misdemeanor, was properly refused. *State v. Foster*, 1971-NMCA-064, 82 N.M. 573, 484 P.2d 1283.

**Knife as deadly weapon.** — For a knife to be a deadly weapon it must come within the portion of this statute as to any other deadly weapons with which dangerous wounds can be inflicted. *State v. Martinez*, 1953-NMSC-031, 57 N.M. 174, 256 P.2d 791.

**Baseball bat as deadly weapon.** — In a prosecution for aggravated battery with a deadly weapon, the question of whether a baseball bat was a deadly weapon should have been left to the jury; however, the error is not fundamental and must be preserved for appeal. *State v. Traeger*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

**Jury justified in so finding.** — Where no one directly testified the knife was one with which dangerous wounds could be inflicted, but the wounds were described by the physician who treated the victim, and they were sufficiently severe to keep him in a hospital under the doctor's care for a week, and in addition, the scars caused by the knife wounds were shown to the jury, in view of the depth and length of the wounds the jury was fully justified in finding the knife used was a deadly weapon, although the



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blade used was only about two inches in length. *State v. Martinez*, 1953-NMSC-031, 57 N.M. 174, 256 P.2d 791.

III. EVIDENCE AND PROOF.

**Sufficient evidence.** — Where the victim was shot multiple times at close range outside a friend's home; after hearing shots, the friend went outside and saw defendant fleeing and the victim on the ground severely wounded; the victim told the friend and a police officer that defendant was the shooter; a forensic scientist identified a gun found in defendant's vehicle as the same gun used to shoot the victim; and a neighbor identified the vehicle shown in a photograph of defendant's vehicle as identical to the vehicle that sped way from the scene of the shooting, there was substantial evidence to support defendant's conviction of aggravated battery with a deadly weapon causing great bodily harm. *State v. Fuentes*, 2010-NMCA-027, 147 N.M. 761, 228 P.3d 1181, cert. denied, 2010-NMCERT-002, 147 N.M. 704, 228 P.3d 488.

**Evidence sufficient to provide defendant used his mount as a deadly weapon.** — Where defendant bit the victim during an altercation, defendant's bite broke the victim's skin, defendant admitted that he had hepatitis C, a medical expert testified that transmission of the hepatitis C virus is possible through a bite that breaks the skin, that hepatitis C could result in liver cancer, ultimately leading to death, and defendant told the victim when he bit the victim that he hoped the victim would die, there was sufficient evidence to prove that defendant used his mouth as a deadly weapon. *State v. Neatherlin*, 2007-NMCA-035, 141 N.M. 328, 154 P.3d 703.

**Conviction or acquittal of proved offense.** — Regardless of whether either assault or aggravated assault is included in charge of battery, where there is proof of a battery, defendant should be convicted of some degree of battery (either aggravated or simple) or acquitted. *State v. Duran*, 1969-NMCA-048, 80 N.M. 406, 456 P.2d 880.

**Corroboration of victim's testimony unnecessary.** — Victim's testimony supported determination that defendant committed battery with a gun and with intent to injure, and did not require corroboration. *State v. Tafoya*, 1969-NMCA-073, 80 N.M. 494, 458 P.2d 98.

**Testimony corroborated.** — Defendant's testimony that he threw gun away after leaving scene of burglary and aggravated battery, along with photographs of victim showing facial cuts and abrasions, corroborated victim's testimony that defendant used a gun in commission of crimes. *State v. Tafoya*, 1969-NMCA-073, 80 N.M. 494, 458 P.2d 98.

**Circumstantial evidence was sufficient** for a reasonable mind to infer defendant shot the victim with a pellet gun, where there was evidence that defendant came out of his house with a rifle or other gun in his hand and shouted at the victim and his companions to "go somewhere else and play," after they had been shooting off fireworks, and five or ten minutes later the victim was struck with a pellet as a noise was heard from the direction of defendant's house. *State v. Stenz*, 1990-NMCA-005, 109 N.M. 536, 787 P.2d 455, cert. denied, 109 N.M. 562, 787 P.2d 842.

**Sufficient evidence.** — Evidence that defendant jumped on the victim's leg and shattered it was sufficient to support defendant's conviction for aggravated battery. *State v. Garcia*, 2009-NMCA-107, 147 N.M. 150, 217 P.3d 1048, cert. denied, 2009-NMCERT-008, 147 N.M. 395, 223 P.3d 940.

**Evidence sufficient to support conviction.** — Where evidence, though disputed, showed that defendant was playing pool with several persons, that an argument began and that in the resulting altercation defendant pulled a gun, shot at one person and missed, and shot at another and hit him in the leg, held that it was sufficient to support a verdict of aggravated battery. *State v. Santillanes*, 1974-NMCA-092, 86 N.M. 627, 526 P.2d 424.

**Evidence for felony conviction.** — Where the victim testified that she was hit on the head three times with an object which she described as "very hard" and it appeared from the record that following the attack she was taken to the hospital and six stitches were required to close the wound on her head, this evidence sufficiently established an aggravated battery under Subsection C. *State v. Turner*, 1970-NMCA-024, 81 N.M. 450, 468 P.2d 421, cert. denied, 81 N.M. 506, 469 P.2d 151.

There was substantial evidence to support the charge since the evidence established that the defendant acted in a way that would have likely resulted in great bodily harm or even death to the victim, despite the lack of evidence of such harm. *State v. Dominguez*, 1993-NMCA-042, 115 N.M. 445, 853 P.2d 147, cert. denied, *sub nom., Ortega v. State*, 115 N.M. 409, 852 P.2d 682 (1993).

**Sufficient evidence.** — Since the victims testified that the two defendants intruded into their home, beat and kicked the husband, and dragged both him and his wife around the house in search of money, this evidence sufficiently established an aggravated battery under Subsection A. *State v. Ibarra*, 1993-NMCA-040, 116 N.M. 486, 864 P.2d 302, cert. quashed, 117 N.M. 744, 877 P.2d 44 (1994), and cert. denied, 513 U.S. 1157, 115 S. Ct. 1116, 130 L. Ed. 2d 1080 (1995).

Evidence that the defendant stabbed or slashed the victim with a knife constituted evidence upon which the jury could find that the defendant committed the offense of aggravated battery; also, the trial court could properly find that the defendant's acts of repeatedly stabbing the victim constituted circumstances surrounding the offense, warranting enhancement of the defendant's sentence. *State v. Fuentes*, 1994-NMCA-158, 119 N.M. 104, 888 P.2d 986, cert. denied, 119 N.M. 168, 889 P.2d 203 (1995).

**Evidence of mayhem insufficient.** — Under former law conviction of mayhem was not sustained by proof of an assault and a blow which cut prosecuting witness' lip, requiring some stitches, but resulting in no permanent injury or disfigurement. Court would take notice of such lack of evidence even though defendant failed to preserve proper exceptions. *State v. Raulie*, 1936-NMSC-039, 40 N.M. 318, 59 P.2d 359 (decided under prior law).

IV. DOUBLE JEOPARDY.

**Lesser included offense.** — Where defendant was charged with felony aggravated battery for using his mouth as a deadly weapon, evidence was presented that tended to establish the lesser included offense, and the only difference between misdemeanor aggravated battery and felony aggravated battery was whether defendant used his mouth as a deadly weapon, defendant was entitled to a jury instruction on the lesser include offense. *State v. Neatherlin*, 2007-NMCA-035, 141 N.M. 328, 154 P.3d 703.

**Double jeopardy.** — Where defendant pushed and punched the victim and after a third person knocked the victim down, the defendant jumped on the victim, shattering the victim's leg, defendant's acts were not distinct and defendant's convictions for aggravated battery and misdemeanor battery violated the double jeopardy clause. *State v. Garcia*, 2009-NMCA-107, 147 N.M. 150, 217 P.3d 1048, cert. denied, 2009-NMCERT-008, 147 N.M. 395, 223 P.3d 940.

Defendant's convictions for aggravated battery with a deadly weapon and attempted murder arising out of unitary conduct did not violate the double jeopardy clause. *State v. Armendariz*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

It was not double jeopardy to try defendant on charge of aggravated battery when lesser charge of attempt was dismissed prior to trial, and no issue as to double punishment or merged offenses was involved. *State v. Hibbs*, 1971-NMCA-100, 82 N.M. 722, 487 P.2d 150.



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Convictions for accessory to assault with intent to commit a violent felony, accessory to aggravated battery with great bodily harm, and accessory to false imprisonment did not violate the constitutional prohibition against double jeopardy. *State v. Carrasco*, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

Defendant's right to freedom from double jeopardy was not violated by punishment for attempted first degree murder, aggravated battery with a deadly weapon, and criminal sexual penetration. *State v. Traeger*, 2000-NMCA-015, 128 N.M. 668, 997 P.2d 142, *aff'd in part, rev'd in part on other grounds*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

Defendant's convictions for both attempted first degree murder and aggravated battery did not constitute double jeopardy. *State v. Vallejos*, 2000-NMCA-075, 129 N.M. 424, 9 P.3d 668, cert. denied, 129 N.M. 385, 9 P.3d 68.

Defendant's convictions of aggravated battery and shooting at or from a motor vehicle do not violate double jeopardy. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

**No merger with assault with intent to commit violent felony.** — The double jeopardy clause does not prohibit sentencing for both assault with intent to commit a violent felony murder and for aggravated battery with a deadly weapon; one offense does not subsume the other and other indicia of legislative intent suggests an intent to punish separately. *State v. Cowden*, 1996-NMCA-051, 121 N.M. 703, 917 P.2d 972, cert. denied, 121 N.M. 644, 916 P.2d 844.

**Aggravated assault is lesser included offense.** — Aggravated assault by use of a threat with a deadly weapon is a lesser included offense of aggravated battery. *State v. DeMary*, 1982-NMSC-144, 99 N.M. 177, 655 P.2d 1021.

**Merger with robbery.** — Aggravated battery merges with a robbery offense when a defendant's intent to take the victim's purse includes an intent to injure the victim. *State v. Gammil*, 1989-NMCA-005, 108 N.M. 208, 769 P.2d 1299, *overruled in part on other grounds*, *State v. Fuentes*, 119 N.M. 104, 888 P.2d 986, cert. denied, 119 N.M. 168, 889 P.2d 203.

**No merger with armed robbery.** — Offense of aggravated battery did not merge with the armed robbery. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Separate punishment for armed robbery and aggravated battery is consistent with legislative intent and does not constitute double jeopardy. *State v. Fuentes*, 1994-NMCA-158, 119 N.M. 104, 888 P.2d 986, cert. denied, 119 N.M. 168, 889 P.2d 203.

**Aggravated battery lesser included offense of attempted murder.** — In a prosecution for attempted murder, the trial court properly instructed the jury on aggravated battery as a lesser included offense at the state's request, because the elements of the lesser crime were a subset of the elements of the charged crime and, further, the defendant could not have committed the greater offense in the manner charged in the indictment without also committing the lesser offense. *State v. Meadors*, 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731.

**Battery is included** within offense of aggravated battery. *State v. Duran*, 1969-NMCA-048, 80 N.M. 406, 456 P.2d 880.

**Concept inapplicable.** — The concept of lesser included offenses is not involved in a prosecution for armed robbery and aggravated battery because either offense can be committed without committing the other offense. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Separate punishments intended.** — The legislature intended to create separately punishable offenses between shooting at or from a motor vehicle and aggravated battery. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

V. JURY INSTRUCTIONS.

**When instruction on battery required.** — Where there was evidence tending to establish the included offense of battery in charge of aggravated battery, trial court erred in refusing to instruct on lesser included offense. *State v. Duran*, 1969-NMCA-048, 80 N.M. 406, 456 P.2d 880.

In prosecution for aggravated battery, lesser offense of simple battery may necessarily be included in court's charge to jury only in the event there is some evidence which would justify a conviction of the lesser offense. *State v. James*, 1966-NMSC-110, 76 N.M. 376, 415 P.2d 350.

There was no evidence to support a finding that defendant did not intend to injure victim, and therefore the trial court did not err in refusing to give an instruction on simple battery, which is a lesser included offense of aggravated battery. *State v. Pettigrew*, 1993-NMCA-095, 116 N.M. 135, 860 P.2d 777, cert. denied, 116 N.M. 71, 860 P.2d 201.

**Instruction must be tendered.** — Alleged error of court in failing to instruct on lesser included offense of simple battery in prosecution for aggravated battery was not properly before appellate court for review where no instruction on lesser offense was ever submitted to the trial court. *State v. James*, 1966-NMSC-110, 76 N.M. 376, 415 P.2d 350.

**Instruction not warranted.** — Where defendant, convicted of aggravated battery, admitted that he had pistol in his possession at time of fight with which he shot victim and that he intended to hit victim with it, instruction on lesser included offense was not warranted. *State v. Jaramillo*, 1971-NMCA-057, 82 N.M. 548, 484 P.2d 768.

**Instructions erroneous.** — In a prosecution for aggravated battery with a deadly weapon, since there was a finding of sufficient evidence to support jury instructions on self-defense and defense of another, the instruction on the charged offense was erroneous because it did not include the essential element of unlawfulness, and the error was not cured by separate instructions on self-defense and defense of another, and the instructions on self-defense and defense of another were erroneous because they did not clearly place the burden of proof on the state. *State v. Acosta*, 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285.

**Instructing on intent.** — Subsection C of this section requires an "intent to injure" and where requested instruction referred to "a specific intent to commit an aggravated battery," this would have been misleading to the jury and was properly denied. *State v. Vasquez*, 1971-NMCA-182, 83 N.M. 388, 492 P.2d 1005.

**Defendant need not intend particular result.** — In a prosecution for aggravated battery, the defendants requested the following instruction, which was properly refused: "A defendant may not be held guilty as aider and abettor for independent act of another person, even though same victim was assaulted by both, since sharing of criminal intent is absent." The evidence demonstrated that the defendants and the principal defendant did not act independently of each other, even if the defendants did not intend or foresee the stabbing of the victim by the principal defendant. *State v. Dominguez*, 1993-NMCA-042, 115 N.M. 445, 853 P.2d 147, cert. denied, *sub nom., Ortega v. State*, 115 N.M. 409, 852 P.2d 682 (1993).

**Material element of offense.** — In instruction defining the material elements of crime in this section, one of the elements to be proved beyond a reasonable doubt was that defendant inflicted great bodily harm. *State v. Chavez*, 1971-NMCA-030, 82 N.M. 569, 484 P.2d 1279, cert. denied, 82 N.M. 562, 484 P.2d 1272.

**General instruction superfluous.** — An instruction generally defining aggravated battery was not needed to guide the jury and was superfluous where the trial court instructed the jury as to the material elements of the aggravated battery elements of the aggravated battery charge. *State v. Urban*, 1974-NMCA-046, 86 N.M. 351, 524 P.2d 523.



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**Allegedly inconsistent instruction not jurisdictional error.** — Defendant's claim that instruction defining aggravated battery covered three alternatives and thus was inconsistent with the specific charge of aggravated battery by use of a deadly weapon did not amount to jurisdictional error. *State v. Urban*, 1974-NMCA-046, 86 N.M. 351, 524 P.2d 523.

**Inconsistent instruction not fundamental error.** — In conviction for aggravated battery, where the evidence was clear that a deadly weapon was used, even if the giving of general definition of aggravated battery was error, it did not shock the conscience to let defendant's conviction stand, and there was no basis for applying the doctrine of fundamental error. *State v. Urban*, 1974-NMCA-046, 86 N.M. 351, 524 P.2d 523.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico law relating to constitutional law, see 12 N.M.L. Rev. 191 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery §§ 48, 49.

Danger or apparent danger of death or great bodily harm as condition of self-defense in prosecution for assault as distinguished from prosecution for homicide, 114 A.L.R. 634.

Danger or apparent danger of great bodily harm or death as condition of self-defense in civil action for assault and battery, personal injury or death, 25 A.L.R.2d 1215.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 A.L.R.3d 287.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 7 A.L.R.4th 607.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Criminal assault or battery statutes making attack on elderly person a special or aggravated offense, 73 A.L.R.4th 1123.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Sufficiency of bodily injury to support charge of aggravated assault, 5 A.L.R.5th 243.

Adequacy of defense counsel's representation of criminal client - conduct occurring at time of trial regarding issues of diminished capacity, intoxication, and unconsciousness, 78 A.L.R.5th 197.

Adequacy of defense counsel's representation of criminal client - pretrial conduct or conduct at unspecified time regarding issues of diminished capacity, intoxication, and unconsciousness, 79 A.L.R.5th 419.

6A C.J.S. Assault and Battery § 72.

## 30-3-6. Reasonable detention; assault, battery, public affray or criminal damage to property.

A. As used in this section:

(1) "licensed premises" means all public and private rooms, facilities and areas in which alcoholic beverages are sold or served in the customary operating procedures of establishments licensed to sell or serve alcoholic liquors;

(2) "proprietor" means the owner of the licensed premises or his manager or his designated representative; and

(3) "operator" means the owner or the manager of any establishment or premises open to the public.

B. Any law enforcement officer may arrest without warrant any persons he has probable cause for believing have committed the crime of assault or battery as defined in Sections 30-3-1 through 30-3-5 NMSA 1978 or public affray or criminal damage to property. Any proprietor or operator who causes such an arrest shall not be criminally or civilly liable if he has actual knowledge, communicated truthfully and in good faith to the law enforcement officer, that the persons so arrested have committed the crime of assault or battery as defined in Sections 30-3-1 through 30-3-5 NMSA 1978 or public affray or criminal damage to property.

**History: Laws 1981, ch. 255, § 1; 1983, ch. 268, § 1.**

**The 1983 amendment** deleted "on licensed premises" following "detention" in the catchline, added "or criminal damage to property" at the end of the catchline, inserted Paragraph (3) of Subsection A, substituted "Sections" for "Section" in the first sentence of Subsection B, added "or criminal damage to property" at the end of the first and second sentences of Subsection B and inserted "or operator" and "communicated truthfully and in good faith to the law enforcement officer" in the second sentence of Subsection B.

## 30-3-7. Injury to pregnant woman.

A. Injury to [a] pregnant woman consists of a person other than the woman injuring a pregnant woman in the commission of a felony causing her to suffer a miscarriage or stillbirth as a result of that injury.

B. As used in this section:

(1) "miscarriage" means the interruption of the normal development of the fetus, other than by a live birth and which is not an induced abortion, resulting in the complete expulsion or extraction from a pregnant woman of a product of human conception; and



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(2) "stillbirth" means the death of a fetus prior to the complete expulsion or extraction from its mother, irrespective of the duration of pregnancy and which is not an induced abortion; and death is manifested by the fact that after the expulsion or extraction the fetus does not breathe spontaneously or show any other evidence of life such as heart beat, pulsation of the umbilical cord or definite movement of voluntary muscles.

C. Whoever commits injury to [a] pregnant woman is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: Laws 1985, ch. 239, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For injury to pregnant woman by vehicle, *see* 66-8-101.1 NMSA 1978.

## 30-3-8. Shooting at dwelling or occupied building; shooting at or from a motor vehicle.

A. Shooting at a dwelling or occupied building consists of willfully discharging a firearm at a dwelling or occupied building. Whoever commits shooting at a dwelling or occupied building that does not result in great bodily harm to another person is guilty of a fourth degree felony. Whoever commits shooting at a dwelling or occupied building that results in injury to another person is guilty of a third degree felony. Whoever commits shooting at a dwelling or occupied building that results in great bodily harm to another person is guilty of a second degree felony.

B. Shooting at or from a motor vehicle consists of willfully discharging a firearm at or from a motor vehicle with reckless disregard for the person of another. Whoever commits shooting at or from a motor vehicle that does not result in great bodily harm to another person is guilty of a fourth degree felony. Whoever commits shooting at or from a motor vehicle that results in injury to another person is guilty of a third degree felony. Whoever commits shooting at or from a motor vehicle that results in great bodily harm to another person is guilty of a second degree felony.

C. This section shall not apply to a law enforcement officer discharging a firearm in the lawful performance of his duties.

**History: Laws 1987, ch. 213, § 1; 1993, ch. 78, § 1.**

**The 1993 amendment,** effective July 1, 1993, deleted "Inhabited" preceding "Dwelling" and inserted "shooting at or from a motor vehicle" in the section heading; designated the formerly undesignated provisions as Subsection A and rewrote the provisions thereof; and added Subsections B and C.

### ANNOTATIONS

**This section reflects legislature's judgment** that traditional homicide and assault and battery crimes are inadequate to respond to the particular dangers involved with motor vehicle shootings. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

**No double jeopardy violation.** — Defendant's convictions of voluntary manslaughter and shooting at or from a motor vehicle do not violate double jeopardy. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

Where the facts support non-unitary conduct for two violations of this section, defendant's double jeopardy claim is rejected. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

Conviction for shooting at a motor vehicle under Subsection B of this section did not preclude the state from seeking a further conviction for first or second degree murder under Section 30-2-1 NMSA 1978. *State v. Garcia*, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, cert. denied, 2005-NMCERT-004, 137 N.M. 454, 112 P.3d 1111.

**Violation of double jeopardy.** — There was no double jeopardy violation for convictions for second degree murder and shooting at or from a motor vehicle because the testimony at trial permitted the inference that each conviction was based on distinct conduct and because the two statutes evince legislative intent to impose separate punishments for each crimes. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Convictions for felony murder and shooting at a dwelling violated defendant's right to be protected from double jeopardy. *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280.

**Cumulative punishment is precluded for shooting at a vehicle and homicide.** — New Mexico jurisprudence precludes cumulative punishment for the offenses of causing great bodily harm to a person by shooting at a motor vehicle and the homicide resulting from the penetration of the same bullet into the same person. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426, *overruling State v. Gonzales*, 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023, *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563 and *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

Where defendant and defendant's companions were accosted by a rival gang in front of defendant's family home, guns were pulled on both sides and defendant's sibling was severely wounded by gunshots in the leg and abdomen; while defendant's group were trying to help defendant's sibling in the driveway and stop the bleeding from the gunshot wounds, the person in the rival gang who had been shooting at defendant and defendant's companions returned in a Ford Expedition; when defendant saw gunfire coming from the Expedition, defendant ran into the house



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and retrieved an AK-47 rifle and began shooting at the Expedition; the driver of Expedition was shot seven times and died; the jury convicted defendant of voluntary manslaughter and shooting into a motor vehicle resulting in great bodily harm, the Double Jeopardy Clause protected defendant from being punished both for the homicide of the victim and for shooting into a vehicle causing great bodily harm to the victim where both convictions were premised on the unitary act of shooting the victim. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426, *overruling State v. Gonzales*, 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023, *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563 and *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

**Legislature intended to provide multiple punishments** for the offenses of second degree murder and shooting into or from a vehicle. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

**Acts must be done while in vehicle.** — Shooting from a motor vehicle requires that the acts be done while in a motor vehicle. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

**Shooting entirely within a vehicle.** — Shooting entirely within a vehicle is neither shooting "at" nor "from" a vehicle pursuant to Subsection B of 30-3-8 NMSA 1978. *State v. Tafoya*, 2012-NMSC-030, 285 P.3d 604.

Where defendant, who was riding in the back seat of a vehicle, shot the driver of the vehicle and the passenger who was riding in the front seat of the vehicle, Subsection B of 30-3-8 NMSA 1978 did not apply to defendant's conduct. *State v. Tafoya*, 2012-NMSC-030, 285 P.3d 604.

**This section does not require proof of death** or include death as an alternative to great bodily harm. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

**Elements distinguished between crimes.** — Voluntary manslaughter and shooting at or from a motor vehicle resulting in great bodily harm have distinct elements. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

**Evidence sufficient.** — Where defendant shot multiple times into a house, wounding one victim; witnesses testified that defendant opened fire on the house without any one firing back at defendant; and the victim testified that the victim was wounded by the gunfire, there was sufficient evidence to support defendant's conviction of shooting at a dwelling. *State v. Torrez*, 2013-NMSC-034.

Where defendant fired two gunshots into a house; the bullets found in the house matched those fired from defendant's handgun; the trajectory of the bullets indicated that the shooter was aiming directly at the house; defendant had expressed hostility towards one of the occupants of the house whom defendant knew was in the house; after defendant fired into the house, defendant aimed the gun downward and shot and killed the victim; the trajectory of the bullets that entered the body of the victim was different from the trajectory of the bullets that entered the house, there was sufficient evidence to support defendant's conviction for shooting at a dwelling. *State v. Arrendondo*, 2012-NMSC-013, 278 P.3d 517.

Evidence is sufficient under this section which supports conviction, which requires proof that the defendant willfully discharged a firearm from a motor vehicle with reckless disregard for another. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

**"Reckless disregard" requires** that defendant's conduct created a substantial and foreseeable risk and that defendant disregarded such risk and was wholly indifferent to the consequences of his conduct and the welfare and safety of others. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

**Vehicle not required to be in motion.** — The unambiguous language of this section does not require that the vehicle be in motion. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

**Evidence insufficient.** — Evidence was insufficient to sustain defendant's conviction where the evidence showed that he fired shots from a balcony downward, but there was no evidence that he fired in the direction of any building. *State v. Trujillo*, 2002-NMSC-005, 131 N.M. 709, 42 P.3d 814.

**No merger with aggravated assault with a deadly weapon.** — Separate punishments are intended for the offenses of shooting into an occupied vehicle and aggravated assault with a deadly weapon. *State v. Sosa*, 1997-NMSC-032, 123 N.M. 564, 943 P.2d 1017, *abrogated by State v. Porter*, 2020-NMSC-020.

**Knowledge that building occupied required.** — The statute requires not only that the discharge of the firearm be intentional and that it be discharged at a building intentionally, but that the discharge occur with the knowledge or reason to believe that the building was occupied at the time of the shooting. *State v. Elmquist*, 1992-NMCA-119, 114 N.M. 551, 844 P.2d 131.

**Knowledge of occupation is not an element** of shooting at a dwelling. *State v. Coleman*, 2011-NMCA-087, 150 N.M. 622, 264 P.3d 523, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

**Evidence sufficient to prove conspiracy to commit shooting at a dwelling.** — Where defendant's friends asked defendant for a ride from a party; one of the friends suggested that they go "do some shootings"; defendant agreed to the plan and drove to the location of a trailer selected by the friend; the friend exited defendant's vehicle and fired three shots at the trailer; the owner of the trailer had recently moved from the trailer, but kept some possessions in the trailer and parked two vehicles in front of the trailer; and defendant claimed that defendant had no reason to know that the trailer was occupied at the time of the shooting, the evidence was sufficient to prove that defendant had the requisite intent to agree and the intent to commit shooting at a dwelling. *State v. Coleman*, 2011-NMCA-087, 150 N.M. 622, 264 P.3d 523, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

**Conspiracy to shoot from vehicle.** — To be guilty of conspiracy to shoot from a motor vehicle, there must have been an agreement that one of the parties thereto would shoot a firearm recklessly from the vehicle; the agreement could be explicit or a mutually implied understanding, but mere passive submission or acquiescence in the conduct of others would not suffice. *State v. Mariano R.*, 1997-NMCA-018, 123 N.M. 121, 934 P.2d 315.

**Conviction as accessory.** — Where defendant was convicted of violating this section as an accessory to the crime and the crime is one enumerated in Section 33-2-34L(4)(j) NMSA 1978, the fact that he pleaded guilty as an accessory and not a principal is irrelevant for purposes of the Earned Meritorious Deductions Act. *State v. Flores*, 2005-NMCA-092, 138 N.M. 61, 116 P.3d 852, cert. denied, 2005-NMCERT-007, 138 N.M. 145, 117 P.3d 951.

**Separate punishments intended.** — The legislature intended to punish the crimes of voluntary manslaughter and shooting at or from a motor vehicle separately. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

**Shooting at or from a motor vehicle may not serve as the predicate felony for felony murder.** — Under the collateral felony rule, the predicate felony must be independent of or collateral to the homicide, and the predicate felony cannot be a lesser-included offense of second-degree murder. Shooting at or from a motor vehicle is an elevated form of aggravated battery, a lesser-included



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offense of second-degree murder, and thus cannot be used as a predicate for felony murder, so where defendant was convicted of first-degree felony murder, the underlying felony of which was shooting from a motor vehicle, defendant's felony murder conviction was vacated because the crime of shooting at or from a motor vehicle lacks an independent felonious purpose from that required under second-degree murder. *State v. Marquez*, 2016-NMSC-025.

**Shooting at or from a motor vehicle cannot serve as the underlying felony sustaining a felony murder conviction.** — Where defendant was convicted of first-degree felony murder predicated on the underlying felony of shooting at or from a motor vehicle, the New Mexico supreme court vacated defendant's conviction of felony murder because shooting at or from a motor vehicle is an elevated form of aggravated battery, and thus cannot be used as a predicate for felony murder. *State v. Baroz*, 2017-NMSC-030.

**Shooting resulting in death.** — Subsection A of this section, construed with the definition of "great bodily harm" in Section 30-1-12A NMSA 1978 includes a shooting at a dwelling that results in death. *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280.

**Felony murder.** — Applying the strict-elements test, shooting at a dwelling is not a lesser included offense of second degree murder, and the offense could serve as a predicate for applying the felony-murder doctrine. *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280.

**Insufficient evidence that defendant committed the predicate felony of shooting at a dwelling or occupied building.** — Where defendant was convicted of felony murder predicated on the felony of shooting at dwelling or occupied building, the evidence established that defendant and his companions targeted the victims in the course of a gunfight that took place in front of a dwelling, but did not shoot at or target the dwelling. Therefore, the evidence is not sufficient to support a conviction of felony murder predicated on the felony of shooting at a dwelling. *State v. Comitz*, 2019-NMSC-011.

**Instruction on defense of another.** — Where defendant and the occupants of a house exchanged multiple gun shots; the shots defendant fired at the house killed one victim; defendant was tried for shooting at a dwelling; defendant requested a jury instruction on defense of another on the grounds that shots from the house were fired in the direction of defendant's car where two of defendant's friends were waiting; defendant testified that defendant shot back at the house, because people in the house were shooting at defendant; defendant's friends testified that they were not aware of any bullets reaching the vicinity of the car; and there was no evidence that defendant shot to protect anyone other than defendant, the district court did not err in refusing to instruct on defense of another. *State v. Torrez*, 2013-NMSC-034.

**Exception to best-evidence rule for inaccessible text messages.** — Where defendant was charged with shooting at a motor vehicle and aggravated assault with a deadly weapon, and where the state presented testimony from the victim's nephew that he had seen threatening text messages from defendant on the victim's phone on the day of the incident, the district court did not abuse its discretion in admitting the testimony of the victim's nephew where the court found that the state had met its burden of showing that it had made a diligent, but unsuccessful, effort to obtain the original text messages and that there was no evidence indicating that additional efforts may have been successful. *State v. Stevenson*, 2020-NMCA-005, cert. denied.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Weapons and Firearms § 29.

94 C.J.S. Weapons §§ 19, 20.

## 30-3-8.1. Seizure and forfeiture of motor vehicle; procedure.

A. A motor vehicle shall be subject to seizure and forfeiture when the vehicle is used or intended for use in the commission of the offense of shooting at or from a motor vehicle pursuant to Subsection B of Section 30-3-8 NMSA 1978.

B. The provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of a motor vehicle subject to forfeiture pursuant to Subsection A of this section.

**History: Laws 1993, ch. 78, § 2; 2002, ch. 4, § 11.**

**The 2002 amendment,** effective July 1, 2002, deleted former Subsections B through F, which contained standards and procedures for the forfeiture of motor vehicles used or intended for use in the commission of the offense of shooting at or from a motor vehicle pursuant to Subsection B of Section 30-3-8 NMSA 1978; and added present Subsection B.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Who is exempt from forfeiture of conveyances under "innocent owner" provision of 21 USC § 881(a)(4), 112 A.L.R. Fed. 589.

## 30-3-8.2. Court record of conviction; revocation of driver's license.

Upon a conviction for the offense of shooting at or from a motor vehicle pursuant to Subsection B of Section 30-3-8 NMSA 1978, or of a conviction for a conspiracy or attempt to commit that offense, the district court shall send a record of the conviction to the motor vehicle division of the taxation and revenue department. The division shall immediately revoke the driver's licenses or driving privileges of all persons convicted of the offense of shooting at or from a motor vehicle, or convicted of conspiring or attempting to commit that offense, pursuant to the provisions of Subsection E of Section 66-5-29 NMSA 1978.

**History: Laws 1993, ch. 78, § 3.**

**Effective dates.** — Laws 1993, ch. 78, § 5 makes the act effective on July 1, 1993.



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## 30-3-9. Assault; battery; school personnel.

A. As used in this section:

(1) "in the lawful discharge of his duties" means engaged in the performance of the duties of a school employee; and

(2) "school employee" includes a member of a local public school board and public school administrators, teachers and other employees of that board.

B. Assault upon a school employee consists of:

(1) an attempt to commit a battery upon the person of a school employee while he is in the lawful discharge of his duties; or

(2) any unlawful act, threat or menacing conduct which causes a school employee while he is in the lawful discharge of his duties to reasonably believe that he is in danger of receiving an immediate battery.

Whoever commits assault upon a school employee is guilty of a misdemeanor.

C. Aggravated assault upon a school employee consists of:

(1) unlawfully assaulting or striking at a school employee with a deadly weapon while he is in the lawful discharge of his duties;

(2) committing assault by threatening or menacing a school employee who is engaged in the lawful discharge of his duties by a person wearing a mask, hood, robe or other covering upon the face, head or body, or while disguised in any manner so as to conceal identity; or

(3) willfully and intentionally assaulting a school employee while he is in the lawful discharge of his duties with intent to commit any felony.

Whoever commits aggravated assault upon a school employee is guilty of a third degree felony.

D. Assault with intent to commit a violent felony upon a school employee consists of any person assaulting a school employee while he is in the lawful discharge of his duties with intent to kill the school employee.

Whoever commits assault with intent to commit a violent felony upon a school employee is guilty of a second degree felony.

E. Battery upon a school employee is the unlawful, intentional touching or application of force to the person of a school employee while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner.

Whoever commits battery upon a school employee is guilty of a fourth degree felony.

F. Aggravated battery upon a school employee consists of the unlawful touching or application of force to the person of a school employee with intent to injure that school employee while he is in the lawful discharge of his duties.

Whoever commits aggravated battery upon a school employee, inflicting an injury to the school employee which is not likely to cause death or great bodily harm but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a fourth degree felony.

Whoever commits aggravated battery upon a school employee, inflicting great bodily harm, or does so with a deadly weapon or in any manner whereby great bodily harm or death can be inflicted, is guilty of a third degree felony.

G. Every person who assists or is assisted by one or more other persons to commit a battery upon any school employee while he is in the lawful discharge of his duties is guilty of a fourth degree felony.

**History: Laws 1989, ch. 344, § 1.**

**ANNOTATIONS**

**School employee.** — Security guards providing services for a school district pursuant to a contact with a school board are school employees. *State v. Johnson*, 2009-NMSC-049, 147 N.M. 177, 218 P.3d 863, *rev'g* 2008-NMCA-106, 144 N.M. 629, 190 P.3d 350.

Where a private security company and a school district entered into a contract to provide security services to the school district; the security company hired and paid security guards to work at a high school; the security guards were neither hired directly by the school board nor paid directly by the school board for their services pursuant to the contract; the principal of the high school determined what hours the security guards should work and at what locations; the principal could dictate that a particular security guard could not work at the high school; and the site administrator had full direction over security guard assignments, including temporary assignments at other school district schools, the security guards were school employees. *State v. Johnson*, 2009-NMSC-049, 147 N.M. 177, 218 P.3d 863, *rev'g* 2008-NMCA-106, 144 N.M. 629, 190 P.3d 350.

**Contract security guards.** — Where a school district contracted with a third party to provide school security guards; the school district set the hours worked by the guards, supervised them on a daily basis and required the guards to adhere to policies and procedures of the school district; the third party retained the ability to hire, fire and discipline the guards; the third party was required



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to insure the guards; and the third party paid the guards' salaries, the security guards were not school employees. *State v. Johnson*, 2008-NMCA-106, 144 N.M. 629, 190 P.3d 350, *rev'd*, 2009-NMSC-049, 147 N.M. 177, 218 P.3d 863.

**"Use" of a deadly weapon in the context of assault with a deadly weapon construed.** — A defendant *uses* a deadly weapon to commit assault where a defendant makes *facilitative use* of the deadly weapon. Facilitative use of a deadly weapon may be found if (1) a deadly weapon is present at some point during the encounter, (2) the victim knows or, based on the defendant's words or actions, has reason to know that the defendant has a deadly weapon, and (3) the presence of the weapon is intentionally used by the defendant to facilitate the commission of the assault. *State v. Zachariah G.*, 2022-NMSC-003, *aff'g* 2021-NMCA-036.

**Sufficient evidence of assault on a school employee with a deadly weapon.** — Where a child was adjudicated a delinquent for committing aggravated assault with a deadly weapon on a school employee, there was sufficient evidence to support the adjudication where, although the child did not brandish the BB gun he had concealed in his waistband, the child refused to reveal the object to the school principal and asked the principal menacing questions, including "What would happen if somebody shot up the school?", "Are you afraid to die?", and "How would you feel if a twelve-year old shot you?". There was sufficient evidence to satisfy the essential element that the child *used* the deadly weapon where the evidence supported findings that a deadly weapon was present, that the principal knew or had reason to know from the child's words and actions that the child had a BB gun when the child threatened him, and that the presence of the weapon was intentionally used by the child to facilitate the commission of an assault on the principal. Based on the child's verbal threats that took advantage of the presence of the BB gun, it was reasonable for the jury to determine that the child's conduct caused the principal to reasonably believe that he was in danger of receiving an immediate battery, and thus the child *used* the deadly weapon to facilitate the assault. *State v. Zachariah G.*, 2022-NMSC-003, *aff'g* 2021-NMCA-036.

**Sufficient evidence of aggravated assault with a deadly weapon on a school employee.** — Where a child was adjudicated a delinquent for committing aggravated assault with a deadly weapon on a school employee, there was sufficient evidence to support the adjudication where, although the child did not brandish or retrieve a BB gun he had concealed in his waistband, the child refused to reveal the object to the school principal and asked the school principal menacing questions, including "What would happen if somebody shot up the school?", "Are you afraid to die?", and "How would you feel if a twelve-year-old shot you?". A reasonable juror could have determined that the child threatened the principal with the BB gun and that the gun was instrumental to the child's assault because the child's menacing and threatening questions instilled fear in the principal while the gun was bulging from the child's pants and of which the child knew the principal was aware. *State v. Zachariah G.*, 2021-NMCA-036, cert. granted.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Sufficiency of bodily injury to support charge of aggravated assault, 5 A.L.R.5th 243.

## 30-3-9.1. Assault; battery; sports officials.

A. As used in this section:

(1) "in the lawful discharge of his duties" means engaged in the performance of the duties of a sports official;

(2) "sports official" means a person who:

(a) serves as a referee, umpire linesman, timer or scorer, or who serves in a similar capacity, while working, supervising or administering a sports event; and

(b) is registered as a member of a local, state, regional or national organization that is engaged in providing education and training to sports officials.

B. Assault upon a sports official consists of:

(1) an attempt to commit a battery upon the person of a sports official while he is in the lawful discharge of his duties; or

(2) any unlawful act, threat or menacing conduct that causes a sports official while he is in the lawful discharge of his duties to reasonably believe that he is in danger of receiving an immediate battery.

C. Whoever commits assault upon a sports official is guilty of a misdemeanor.

D. Aggravated assault upon a sports official consists of unlawfully assaulting or striking at a sports official with a deadly weapon while he is in the lawful discharge of his duties.

E. Whoever commits aggravated assault upon a sports official is guilty of a third degree felony.

F. Battery upon a sports official is the unlawful, intentional touching or application of force to the person of a sports official while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner.

G. Whoever commits battery upon a sports official is guilty of a misdemeanor.

H. Aggravated battery upon a sports official consists of the unlawful touching or application of force to the person of a sports official with intent to injure that sports official while he is in the lawful discharge of his duties.

I. Whoever commits aggravated battery upon a sports official, inflicting an injury to the sports official that is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a fourth degree felony.



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J. Whoever commits aggravated battery upon a sports official, inflicting great bodily harm, or does so with a deadly weapon or in any manner whereby great bodily harm or death can be inflicted, is guilty of a third degree felony.

**History: Laws 2001, ch. 92, § 1.**

**Cross references.** — For interference with an athletic event, *see* 30-20-18 NMSA 1978.

**Effective dates.** — Laws 2001, ch. 92, § 2, makes the act effective on July 1, 2001.

## 30-3-9.2. Assault; battery; health care personnel.

A. As used in this section:

(1) "health facility" means a public or private hospital, outpatient facility, diagnostic and treatment center, rehabilitation center or infirmary. "Health facility" also includes those facilities that, by federal regulation, must be licensed by the state to obtain or maintain full or partial, permanent or temporary federal funding, but "health facility" does not include a skilled nursing facility, a nursing facility or other long-term residential care facility;

(2) "health care worker" means an employee of a health facility or a licensed emergency medical technician; and

(3) "in the lawful discharge of the health care worker's duties" means engaged in the performance of the duties of a health care worker.

B. Assault upon a health care worker consists of:

(1) an attempt to commit a battery upon the person of a health care worker who is in the lawful discharge of the health care worker's duties; or

(2) any unlawful act, threat or menacing conduct that causes a health care worker who is in the lawful discharge of the health care worker's duties to reasonably believe that the health care worker is in danger of receiving an immediate battery.

Whoever commits assault upon a health care worker is guilty of a misdemeanor.

C. Aggravated assault upon a health care worker consists of:

(1) unlawfully assaulting or striking at a health care worker with a weapon while the health care worker is in the lawful discharge of the health care worker's duties; or

(2) willfully and intentionally assaulting a health care worker who is in the lawful discharge of the health care worker's duties with intent to commit any felony.

Whoever commits aggravated assault upon a health care worker is guilty of a third degree felony.

D. Assault with intent to commit a violent felony upon a health care worker consists of assaulting a health care worker who is in the lawful discharge of the health care worker's duties with intent to kill the health care worker.

Whoever commits assault with intent to commit a violent felony upon a health care worker is guilty of a second degree felony.

E. Battery upon a health care worker is the unlawful, intentional touching or application of force to the person of a health care worker who is in the lawful discharge of the health care worker's duties, when done in a rude, insolent or angry manner.

Whoever commits battery upon a health care worker is guilty of a fourth degree felony.

F. Aggravated battery upon a health care worker consists of the unlawful touching or application of force to the person of a health care worker with intent to injure that health care worker while the health care worker is in the lawful discharge of the health care worker's duties.

Whoever commits aggravated battery upon a health care worker, inflicting an injury to the health care worker that is not likely to cause death or great bodily harm but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a fourth degree felony.

Whoever commits aggravated battery upon a health care worker, inflicting great bodily harm or does so with a deadly weapon or in any manner whereby great bodily harm or death can be inflicted, is guilty of a third degree felony.

G. A person who assists or is assisted by one or more other persons to commit a battery upon a health care worker who is in the lawful discharge of the health care worker's duties is guilty of a fourth degree felony.



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**History: Laws 2006, ch. 27, § 1.**

**Effective dates.** — Laws 2006, ch. 27 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

ANNOTATIONS

**Not unconstitutionally vague.** — Section 30-3-9.2 NMSA 1978 is not unconstitutionally vague. *State v. Tsosie*, 2011-NMCA-115, 150 N.M. 754, 266 P.3d 34, cert. denied, 2011-NMCERT-010.

**The element of knowledge of the victim's identity as a health care worker is an essential element for the crime of battery upon a health care worker.** *State v. Valino*, 2012-NMCA-105, 287 P.3d 372, cert. denied, 2012-NMCERT-009, 296 P.3d 1207.

**Knowledge of the identity of the victim is an essential element.** — Where defendant was charged with battery upon a health care worker for striking a security guard at a medical center, and the trial court instructed the jury on the elements of battery upon a health care worker, but omitted the requirement that defendant had knowledge that the victim was a health care worker, the failure to instruct the jury that a conviction for battery on a health care worker required the element of knowledge that the victim was a health care worker was fundamental error. *State v. Valino*, 2012-NMCA-105, 287 P.3d 372, cert. denied, 2012-NMCERT-009, 296 P.3d 1207.

**Meaning of "health care worker".** — A security guard who was employed by a medical center, who was not a medical professional, who was not employed for the purpose of providing medical care, who was not licensed in any medical field, and whose employment duties related to security, not medicine, was a "health care worker" under Section 30-3-9.2(A)(2) NMSA 1978. *State v. Valino*, 2012-NMCA-105, 287 P.3d 372, cert. denied, 2012-NMCERT-009, 296 P.3d 1207.

**Battery committed while in protective custody due to intoxication.** — The Detoxification Reform Act, Sections 43-2-1.1 NMSA 1978 et seq., does not preclude the criminal prosecution of a defendant for battery upon a health care worker merely because the defendant was in protective custody due to intoxication at the time of the offense. *State v. Tsosie*, 2011-NMCA-115, 150 N.M. 754, 266 P.3d 34, cert. denied, 2011-NMCERT-010.

**Health facility.** — Where the victim of defendant's battery was employed by a facility that was licensed as an adult residential health facility, provided protective custody to alcohol-impaired persons, and identified substance abuse issues based upon patients' medical history, vital signs, laboratory testing, and formal assessments and developed treatment plans based upon those observations, which included prescribing and dispensing of medications and behavioral therapy, the facility was a "health facility" and the victim qualified as a health care worker. *State v. Tsosie*, 2011-NMCA-115, 150 N.M. 754, 266 P.3d 34, cert. denied, 2011-NMCERT-010.

**Sufficient evidence.** — Where defendant was brought to a medical center for detoxification evaluation; the medical staff determined that defendant was not free to be released and requested security guards employed by the medical center to restrain defendant until defendant's parents arrived to pick defendant up; the security guards' job description included restraining persons brought in for detoxification evaluation; defendant tried to leave and the security guards restrained defendant; and defendant struck one of the security guards, there was sufficient evidence that the security guard was a health care worker lawfully performing the security guard's duties. *State v. Valino*, 2012-NMCA-105, 287 P.3d 372, cert. denied, 2012-NMCERT-009, 296 P.3d 1207.

## 30-3-10. Short title.

Sections 30-3-10 through 30-3-18 NMSA 1978 may be cited as the "Crimes Against Household Members Act".

**History: Laws 1995, ch. 221, § 1; 2009, ch. 255, § 1.**

**The 2009 amendment,** effective June 19, 2009, changed the reference of the act to Sections 30-3-10 through 30-3-18 NMSA 1978.

## 30-3-11. Definitions.

As used in the Crimes Against Household Members Act:

A. "household member" means a spouse, former spouse, parent, present or former stepparent, present or former parent in-law, grandparent, grandparent-in-law, a co-parent of a child or a person with whom a person has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member for the purposes of the Crimes Against Household Members Act;

B. "continuing personal relationship" means a dating or intimate relationship;

C. "strangulation" means the unlawful touching or application of force to another person's neck or throat with intent to injure that person and in a manner whereby great bodily harm or death can be inflicted, the result of which impedes the person's normal breathing or blood circulation; and

D. "suffocation" means the unlawful touching or application of force that blocks the nose or mouth of another person with intent to injure that person and in a manner whereby great bodily harm or death can be inflicted, the result of which impedes the person's normal breathing or blood circulation.

**History: Laws 1995, ch. 221, § 2; 2008, ch. 16, § 1; 2010, ch. 85, § 1; 2018, ch. 30, § 1.**

**The 2018 amendment,** effective July 1, 2018, added definitions of "strangulation" and "suffocation" to the Crimes Against Household Members Act; added Subsections C and D.

**The 2010 amendment,** effective July 1, 2010, in Subsection A, after "former spouse", deleted "or family



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member, including a relative"; after second instance of "present or former", added "parent"; and after "parent in-law", added "grandparent, grandparent-in-law".

**The 2008 amendment,** effective July 1, 2008, added the definition of "continuing personal relationship" in Subsection B.

**ANNOTATIONS**

**Minor child of accused** is not included in the definition of "household member". *State v. Stein*, 1999-NMCA-065, 127 N.M. 362, 981 P.2d 295.

**Adult children** — A plain reading of this section supports a conclusion that the definition of "household member" includes adult children of the accused. *State v. Montoya*, 2005-NMCA-005, 136 N.M. 674, 104 P.3d 540, cert. quashed, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

**Victim need not cohabit or reside with defendant in order to be a household member.** *State v. Montoya*, 2005-NMCA-005, 136 N.M. 674, 104 P.3d 540, cert. quashed, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

## 30-3-12. Assault against a household member.

A. Assault against a household member consists of:

(1) an attempt to commit a battery against a household member; or

(2) any unlawful act, threat or menacing conduct that causes a household member to reasonably believe that he is in danger of receiving an immediate battery.

B. Whoever commits assault against a household member is guilty of a petty misdemeanor.

**History: Laws 1995, ch. 221, § 3.**

**Effective dates.** — Laws 1995, ch. 221, § 8 made the Crimes Against Household Members Act effective on July 1, 1995.

## 30-3-13. Aggravated assault against a household member.

A. Aggravated assault against a household member consists of:

(1) unlawfully assaulting or striking at a household member with a deadly weapon; or

(2) willfully and intentionally assaulting a household member with intent to commit any felony.

B. Whoever commits aggravated assault against a household member is guilty of a fourth degree felony.

**History: Laws 1995, ch. 221, § 4.**

**Effective dates.** — Laws 1995, ch. 221, § 8 made the Crimes Against Household Members Act effective on July 1, 1995.

**ANNOTATIONS**

**Sufficient evidence.** — Where defendant pointed a gun at the victim and told the victim that defendant was going to shoot the victim; the victim believed defendant was going to shoot the victim; the victim grabbed the gun away and threw the gun into a field; the police found the gun in the field; the gun was a Raven brand gun; the police found a Raven brand firearms box in defendant's home; and defendant and the victim had ended their relationship a week before, the evidence was sufficient to convict defendant of aggravated assault against a household member. *State v. Quintana*, 2009-NMCA-115, 147 N.M. 169, 218 P.3d 87.

## 30-3-14. Assault against a household member with intent to commit a violent felony.

A. Assault against a household member with intent to commit a violent felony consists of any person assaulting a household member with intent to kill or commit any murder, mayhem, criminal sexual penetration in the first, second or third degree, robbery, kidnapping, false imprisonment or burglary.

B. Whoever commits assault against a household member with intent to commit a violent felony is guilty of a third degree felony.

**History: Laws 1995, ch. 221, § 5.**

**Effective dates.** — Laws 1995, ch. 221, § 8 made the Crimes Against Household Members Act effective on July 1, 1995.

**ANNOTATIONS**

**Separate punishable offenses.** — Criminal sexual penetration and assault with intent to commit criminal sexual penetration on a household member statutes create separate punishable offenses. *State v. Jensen*, 2005-NMCA-113, 138 N.M. 254, 118 P.3d 762, cert. quashed, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

**Double jeopardy.** — Where an assault was with an intent to commit criminal sexual penetration, followed then by criminal sexual penetration, the fear, and the acts of penetration with resulting personal injury, are reasonably



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separable conduct that the defendant was not placed in double jeopardy. *State v. Jensen*, 2005-NMCA-113, 138 N.M. 254, 118 P.3d 762, cert. quashed, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

## 30-3-15. Battery against a household member.

A. Battery against a household member consists of the unlawful, intentional touching or application of force to the person of a household member, when done in a rude, insolent or angry manner.

B. Whoever commits battery against a household member is guilty of a misdemeanor.

C. Upon conviction pursuant to this section, an offender shall be required to participate in and complete a domestic violence offender treatment or intervention program approved by the children, youth and families department pursuant to rules promulgated by the department that define the criteria for such programs.

D. Notwithstanding any provision of law to the contrary, if a sentence imposed pursuant to this section is suspended or deferred in whole or in part, the period of probation may extend beyond three hundred sixty-four days but may not exceed two years. If an offender violates a condition of probation, the court may impose any sentence that the court could originally have imposed and credit shall not be given for time served by the offender on probation; provided that the total period of incarceration shall not exceed three hundred sixty-four days and the combined period of incarceration and probation shall not exceed two years.

**History: Laws 1995, ch. 221, § 6; 2001, ch. 144, § 1; 2007, ch. 221, § 1; 2008, ch. 16, § 2.**

**The 2008 amendment,** effective July 1, 2008, provided for participation in intervention programs in Subsection C.

**The 2007 amendment,** effective July 1, 2007, added Subsections C and D.

**The 2001 amendment,** effective July 1, 2001, in Subsection B, increased the penalty for the offense of battery against a household member from a petty misdemeanor to a misdemeanor.

**Unlawfulness is an essential element of battery against a household member.** — Whether a defendant's touch or application of force was unlawful is an essential element of battery against a household member, so if there is some evidence that excused or justified the defendant's conduct, which is to say if the essential element of unlawfulness was contested, the court has a duty to instruct the jury on the state's burden to prove unlawfulness beyond a reasonable doubt. *State v. Smith*, 2021-NMSC-025, *aff'g* A-1-CA-34765, mem. op. (Dec. 16, 2019) (nonprecedential).

**Defendant was entitled to an instruction on unlawfulness.** — Where defendant was convicted of battery against a household member, based on evidence that defendant pushed his girlfriend to the ground after she pushed him away from the door to prevent him from entering their apartment and that defendant backed his car into his girlfriend, making contact with her arm, when she did not move away while defendant was trying to exit the parking lot, and where, at trial, defendant argued that his use of force was justified as a reasonable response to his girlfriend's initial use of force and that his conduct was justified or excused because his girlfriend committed the crime of deprivation of property of a household member, the trial court erred in denying defendant's requested instruction on unlawfulness, because, as an essential element of the crime of battery against a household member, if there was some evidence that excused or justified defendant's conduct, which is to say if the essential element of unlawfulness was contested, the court had a duty to instruct the jury on the state's burden to prove unlawfulness beyond a reasonable doubt. *State v. Smith*, 2021-NMSC-025, *aff'g* A-1-CA-34765, mem. op. (Dec. 16, 2019) (nonprecedential).

**ANNOTATIONS**

**Battery against one's own child** is not encompassed in the offense of battery against a household member. *State v. Stein*, 1999-NMCA-065, 127 N.M. 362, 981 P.2d 295.

**Sufficient evidence of battery against a household member.** — Where defendant was charged with criminal sexual penetration of a minor and battery against a household member, and where the state relied on testimony elicited from the victim that defendant kicked and pushed her and that defendant is her uncle, there was sufficient evidence to prove beyond a reasonable doubt that defendant intentionally touched or applied force to the victim in a rude, insolent or angry manner and that the victim was a household member. *State v. Garcia*, 2019-NMCA-056, cert. denied.

**Adult children.** — A plain reading of this section supports a conclusion that the definition of a "household member" includes adult children of the accused. *State v. Montoya*, 2005-NMCA-005, 136 N.M. 764, 104 P.3d 540, cert. quashed, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

**Right to de novo appeal.** — Where defendant was convicted in metropolitan court of battery against a household member in violation of 30-3-4 NMSA 1978, because the state did not prosecute the battery under this section, state could not contend that defendant was convicted of a crime involving domestic violence and he was entitled to a de novo appeal in district court rather than just an on-record review of the proceeding. *State v. Trujillo*, 1999-NMCA-003, 126 N.M. 603, 973 P.2d 855.

**Convictions for robbery and battery against a household member did not violate double jeopardy.** — Where defendant, who was a former employee of a restaurant, had an intimate romantic relationship with the victim who was the assistant manager of the restaurant; under the guise of returning the victim's cell phone, defendant approached the victim outside the restaurant, grabbed two money bags containing receipts of the restaurant that the victim intended to deposit; and when defendant grabbed the money bags, defendant struck the victim in the face and fled the scene, defendant's conviction for robbery and battery against a household member did not violate double jeopardy. *State v. Gutierrez*, 2012-NMCA-095, 286 P.3d 608, cert. denied, 2012-NMCERT-008.



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**State statute does not preempt municipal ordinance.** — The state statute providing a full misdemeanor penalty for certain acts of domestic violence does not preclude prosecution of an offense under a municipal ordinance that only provides a petty misdemeanor penalty. 2008 Op. Att'y Gen. No. 08-06.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — "Cohabitation" for purposes of domestic violence statutes, 71 A.L.R.5th 285.

## 30-3-16. Aggravated battery against a household member.

A. Aggravated battery against a household member consists of the unlawful touching or application of force to the person of a household member with intent to injure that person or another.

B. Whoever commits aggravated battery against a household member is guilty of a misdemeanor if the aggravated battery against a household member is committed by inflicting an injury to that person that is not likely to cause death or great bodily harm, but that does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body.

C. Whoever commits aggravated battery against a household member is guilty of a third degree felony if the aggravated battery against a household member is committed:

(1) by inflicting great bodily harm;

(2) with a deadly weapon;

(3) by strangulation or suffocation; or

(4) in any manner whereby great bodily harm or death can be inflicted.

D. Upon conviction pursuant to Subsection B of this section, an offender shall be required to participate in and complete a domestic violence offender treatment or intervention program approved by the children, youth and families department pursuant to rules promulgated by the department that define the criteria for such programs.

E. Notwithstanding any provision of law to the contrary, if a sentence imposed pursuant to the provisions of Subsection B of this section is suspended or deferred in whole or in part, the period of probation may extend beyond three hundred sixty-four days but may not exceed two years. If an offender violates a condition of probation, the court may impose any sentence that the court could originally have imposed and credit shall not be given for time served by the offender on probation; provided that the total period of incarceration shall not exceed three hundred sixty-four days and the combined period of incarceration and probation shall not exceed two years.

**History: Laws 1995, ch. 221, § 7; 2007, ch. 221, § 2; 2008, ch. 16, § 3; 2018, ch. 30, § 2.**

**The 2018 amendment,** effective July 1, 2018, provided that aggravated battery against a household member may be committed by strangulation or suffocation; in Subsection B, after "household member", added "is guilty of a misdemeanor if the aggravated battery against a household member is committed", and after "organ of the body", deleted "is guilty of a misdemeanor"; and in Subsection C, after "household member", added "is guilty of a third degree felony if the aggravated battery against a household member is committed", added the paragraph designations "(1)" and "(2)", in Paragraph C(1), after "harm", deleted "or doing so", in Paragraph C(2), after "weapon", deleted "or doing so", added a new paragraph C(3) and the new paragraph designation "(4)", and in Paragraph C(4), after "can be inflicted", deleted "is guilty of a third degree felony".

**The 2008 amendment,** effective July 1, 2008, provided for participation in intervention programs in Subsection D.

**The 2007 amendment,** effective July 1, 2007, added Subsections D and E.

ANNOTATIONS

**Intent to injure victim required.** — Defendant's conviction for aggravated battery on a household member was reversed where there was no direct testimony supporting the trial court's finding that he acted with the specific intent to harm the victim and there was not sufficient circumstantial evidence to support a finding of intent. *State v. Wynn*, 2001-NMCA-020, 130 N.M. 381, 24 P.3d 816.

**Application of force.** — Defendant's act of striking a window with sufficient force to propel the glass inward and against the victim constituted the application of force to the victim within the meaning of section. *State v. Wynn*, 2001-NMCA-020, 130 N.M. 381, 24 P.3d 816.

## 30-3-17. Multiple convictions of battery or aggravated battery.

A. Whoever commits three offenses of battery against a household member as provided in Section 30-3-15 NMSA 1978 or aggravated battery against a household member as provided in Subsection B of Section 30-3-16 NMSA 1978, or any combination thereof, when the household member is a spouse, a former spouse, a co-parent of a child or a person with whom the offender has had a continuing personal relationship is guilty of a fourth degree felony.



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B. Whoever commits four or more offenses of battery against a household member as provided in Section 30-3-15 NMSA 1978 or aggravated battery against a household member as provided in Subsection B of Section 30-3-16 NMSA 1978, or any combination thereof, when the household member is a spouse, a former spouse, a co-parent of a child or a person with whom the offender has had a continuing personal relationship is guilty of a third degree felony.

C. For the purpose of determining the number of offenses committed, each offense must have been committed after conviction for the preceding offense.

**History: Laws 2008, ch. 16, § 4.**

**Effective dates.** — Laws 2008, ch. 16, § 6 made this section effective July 1, 2008.

**Applicability.** — Laws 2008, ch. 16, § 5 provided that the provisions of Laws 2008, ch. 16, § 4 apply to convictions obtained on or after July 1, 2008.

ANNOTATIONS

**The Habitual Offender Act is applicable to convictions of felony battery against a household member.** — Where defendant pleaded guilty to battery against a household member after battering the mother of his child, and where this was defendant's third conviction of battery against a household member, and where the district court enhanced defendant's conviction to a fourth degree felony under § 30-3-17(A) NMSA 1978, and where defendant had previously been convicted of a separate felony, the district court enhanced defendant's sentence by one year under the Habitual Offender Act, § 31-18-17 NMSA 1978, the district court did not err in applying the Habitual Offender Act, because the plain language of § 30-3-17(A) NMSA 1978 and § 31-18-17 NMSA 1978 does not preclude their simultaneous application. *State v. Barela*, 2021-NMSC-001, *aff'g* 2019-NMCA-005, 458 P.3d 501.

**Habitual offender enhancement not prohibited.** — Where defendant, a three-time domestic violence offender, pleaded no contest to, and was convicted of, felony battery against a household member, the district court did not err in enhancing defendant's sentence by one year, pursuant to 31-18-17(A) NMSA 1978, based on a prior conviction for false imprisonment, because contrary to defendant's argument, the felony battery against a household member statute is not self-enhancing, and based on the plain language of the statutes at issue, the one-year habitual offender enhancement of defendant's fourth degree felony battery on a household member sentence was proper as a matter of law. *State v. Barela*, 2019-NMCA-005, cert. granted.

## 30-3-18. Criminal damage to property of household member; deprivation of property of household member.

A. Criminal damage to the property of a household member consists of intentionally damaging real, personal, community or jointly owned property of a household member with the intent to intimidate, threaten or harass that household member.

B. Whoever commits criminal damage to the property of a household member is guilty of a misdemeanor, except that when the damage to the household member's interest in the property amounts to more than one thousand dollars ($1,000), the offender is guilty of a fourth degree felony.

C. Deprivation of the property of a household member consists of intentionally depriving a household member of the use of separate, community or jointly owned personal property of the household member with the intent to intimidate or threaten that household member.

D. Whoever commits deprivation of the property of a household member is guilty of a misdemeanor.

**History: 1978 Comp., § 30-3-18, as enacted by Laws 2009, ch. 255, § 2.**

**Effective dates.** — Laws 2009, ch. 255 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

## 30-3-19. Threatening a judge or an immediate family member of a judge; penalty.

A. No person shall threaten a judge or the immediate family member of a judge with the intent to:

(1) place the judge or the immediate family member of a judge in fear of great bodily harm to the judge or to an immediate family member of the judge;

(2) prevent or interrupt the ability to carry out the judge's job duties; or



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(3) retaliate against a judge on account of the performance of the judge's official duties during the judge's term of service.

B. A person who violates the provisions of this section is guilty of a fourth degree felony.

C. As used in this section:

(1) "immediate family member" means a spouse, child, sibling, parent, grandparent or grandchild, and "immediate family member" includes a stepparent, a stepchild, a stepsibling and an adoptive relationship;

(2) "judge" means a current or former justice, judge, magistrate, domestic violence special commissioner or hearing officer; and

(3) "retaliate" means intentionally threatening bodily injury to or damage to the property of a judge or a family member of a judge with the intent to retaliate against the judge for the judge's exercise of the judge's judicial duties and causing the judge or the family member to reasonably believe that the judge's or the family member's person or property is in danger.

**History: Laws 2022, ch. 56, § 47.**

**Effective dates.** — Laws 2022, ch. 56, § 47 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

## 30-3-20. Malicious sharing of personal information of a judge or an immediate family member of a judge; penalty.

A. No person shall share the personal information of a judge or an immediate family member of a judge with the intent to:

(1) cause harm to the judge or an immediate family member of a judge;

(2) place the judge or an immediate family member of a judge in fear of great bodily harm to the judge or to an immediate family member of the judge; or

(3) prevent or interrupt the ability to carry out the judge's job duties.

B. A person who violates the provisions of this section is guilty of a misdemeanor.

C. As used in this section:

(1) "immediate family member" means a spouse, child, sibling, parent, grandparent or grandchild, and "immediate family member" includes a stepparent, a stepchild, a stepsibling and an adoptive relationship;

(2) "judge" means a current or former justice, judge, magistrate, domestic violence special commissioner or hearing officer; and

(3) "personal information" means a person's personal physical address, personal phone number or physical location.

**History: Laws 2022, ch. 56, § 48.**

**Effective dates.** — Laws 2022, ch. 56, § 48 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

# ARTICLE 3A

# Harassment and Stalking

Sec.
30-3A-1. Short title.
30-3A-2. Harassment; penalties.
30-3A-3. Stalking; penalties.
30-3A-3.1. Aggravated stalking; penalties.
30-3A-4. Exceptions.

## 30-3A-1. Short title.

Chapter 30, Article 3A NMSA 1978 may be cited as the "Harassment and Stalking Act".

**History: 1978 Comp., § 30-3A-1, enacted by Laws 1997, ch. 10, § 1; 2009, ch. 21, § 1.**

**Repeals and reenactments.** — Laws 1997, ch. 10, § 7, repealed 30-3A-1 NMSA 1978, as enacted by Laws 1993,



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ch. 86, § 1, and Laws 1997, ch. 10, § 1, enacted a new section, effective July 1, 1997.

**The 2009 amendment,** effective July 1, 2009, changed the reference to the act to Chapter 30, Article 3A, NMSA 1978.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction and application of stalking statutes, 29 A.L.R.5th 487.

## 30-3A-2. Harassment; penalties.

A. Harassment consists of knowingly pursuing a pattern of conduct that is intended to annoy, seriously alarm or terrorize another person and that serves no lawful purpose. The conduct must be such that it would cause a reasonable person to suffer substantial emotional distress.

B. Whoever commits harassment is guilty of a misdemeanor.

**History: 1978 Comp., § 30-3A-2, enacted by Laws 1997, ch. 10, § 2.**

**Repeals and reenactments.** — Laws 1997, ch. 10, § 7, repealed 30-3A-2 NMSA 1978, as enacted by Laws 1993, ch. 86, § 2, and Laws 1997, ch. 10, § 2, enacted a new section, effective July 1, 1997.

**ANNOTATIONS**

**Constitutionality.** — This section, as applied to defendant who repeatedly trespassed on victim's property, looked in her windows, and followed her both on and off her property, was not unconstitutionally vague; a person of ordinary intelligence would have known that such behavior was unlawful and would inflict substantial emotional distress upon the victim. *State v. Duran*, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352, *overruled on other grounds*, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Double jeopardy.** — When the defendant had been convicted of contempt, a misdemeanor, for violating a domestic violence protective order and sentenced to jail time, double jeopardy did not bar prosecution of the defendant for the offenses of stalking and harassment stemming from the same conduct that gave rise to the contempt adjudication. *State v. Gonzales*, 1997-NMCA-039, 123 N.M. 337, 940 P.2d 185, cert. denied, 123 N.M. 229, 938 P.2d 204.

Where the state relies on identical acts of an accused involving the same course of conduct to prove both the offenses of harassment and of stalking, double jeopardy provisions preclude multiple punishment, and the offense of harassment is subsumed into the offense of misdemeanor stalking. *State v. Duran*, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352, *overruled on other grounds*, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Construction and application of § 2A6.1 of United States Sentencing Guidelines (USSG § 2A6.1), pertaining to sentence to be imposed for making threatening communications, 148 A.L.R. Fed. 501.

## 30-3A-3. Stalking; penalties.

A. Stalking consists of knowingly pursuing a pattern of conduct, without lawful authority, directed at a specific individual when the person intends that the pattern of conduct would place the individual in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint of the individual or another individual.

B. As used in this section:

(1) "lawful authority" means within the scope of lawful employment or constitutionally protected activity; and

(2) "pattern of conduct" means two or more acts, on more than one occasion, in which the alleged stalker by any action, method, device or means, directly, indirectly or through third parties, follows, monitors, surveils, threatens or communicates to or about a person.

C. Whoever commits stalking is guilty of a misdemeanor. Upon a second or subsequent conviction, the offender is guilty of a fourth degree felony.

D. In addition to any punishment provided pursuant to the provisions of this section, the court shall order a person convicted of stalking to participate in and complete a program of professional counseling at the person's own expense or a domestic violence offender treatment or intervention program.

**History: 1978 Comp., § 30-3A-3, enacted by Laws 1997, ch. 10, § 3; 2009, ch. 21, § 2.**

**Repeals and reenactments.** — Laws 1997, ch. 10, § 7, repealed 30-3A-3 NMSA 1978, as amended by Laws 1995, ch. 23, § 1, and Laws 1997, ch. 10, § 3, enacted a new section, effective July 1, 1997.

**The 2009 amendment,** effective July 1, 2009, deleted former Subsections A and B and inserted new Subsections A and B; and in Subsection D, added the domestic violence offender treatment or intervention program.



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ANNOTATIONS

**Evidence sufficient.** — Evidence that defendant repeatedly trespassed onto victim's property and that defendant was the party who looked into victim's windows and followed her was sufficient to support convictions for stalking, harassment and criminal trespass. *State v. Duran*, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352, *overruled on other grounds*, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Double jeopardy.** — When the defendant had been convicted of contempt, a misdemeanor, for violating a domestic violence protective order and sentenced to jail time, double jeopardy did not bar prosecution of the defendant for the offenses of stalking and harassment stemming from the same conduct that gave rise to the contempt adjudication. *State v. Gonzales*, 1997-NMCA-039, 123 N.M. 337, 940 P.2d 185, cert. denied, 123 N.M. 229, 938 P.2d 204.

Where the state relies on identical acts of an accused involving the same course of conduct to prove both the offenses of harassment and of stalking, double jeopardy provisions preclude multiple punishment, and the offense of harassment is subsumed into the offense of misdemeanor stalking. *State v. Duran*, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352, *overruled on other grounds*, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

## 30-3A-3.1. Aggravated stalking; penalties.

A. Aggravated stalking consists of stalking perpetrated by a person:

(1) who knowingly violates a permanent or temporary order of protection issued by a court, except that mutual violations of such orders may constitute a defense to aggravated stalking;

(2) in violation of a court order setting conditions of release and bond;

(3) when the person is in possession of a deadly weapon; or

(4) when the victim is less than sixteen years of age.

B. Whoever commits aggravated stalking is guilty of a fourth degree felony. Upon a second or subsequent conviction, the offender is guilty of a third degree felony.

C. In addition to any punishment provided pursuant to the provisions of this section, the court shall order a person convicted of aggravated stalking to participate in and complete a program of professional counseling at his own expense.

**History: Laws 1997, ch. 10, § 4.**

**Effective dates.** — Laws 1997, ch. 10, § 8 made the Harassment and Stalking Act effective July 1, 1997.

ANNOTATIONS

**Proof of intent.** — Although aggravated stalking need not be construed as requiring, like aggravated assault, some use of a weapon, it is reasonable to construe the aggravated stalking statute as requiring some intent to use a weapon not specifically named or specifically described in 30-1-12B NMSA 1978 as a weapon. *State v. Anderson*, 2001-NMCA-027, 130 N.M. 295, 24 P.3d 327.

**Jury instruction.** — Under an aggravated stalking charge, when the object or instrument in question is an unlisted one that falls within the catchall language of 30-1-12B NMSA 1978, the jury must be instructed (1) that the defendant must have possessed the object or instrument with the intent to use it as a weapon, and (2) the object or instrument is one that, if so used, could inflict dangerous wounds. *State v. Anderson*, 2001-NMCA-027, 130 N.M. 295, 24 P.3d 327.

**The aggravated stalking statute is not unconstitutionally vague.** *State v. Smile*, 2009-NMCA-064, 146 N.M. 525, 212 P.3d 413, cert. quashed, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

**The aggravated stalking statute requires only one act in furtherance of a pattern of stalking.** *State v. Smile*, 2009-NMCA-064, 146 N.M. 525, 212 P.3d 413, cert. quashed, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

**Sufficient evidence.** — Where the victim of the defendant's stalking attempted to end the relationship between the defendant and the victim; the defendant threatened to kill the victim and to damage the victim's car, left threatening letters in the victim's mailbox and made threatening phone calls to the victim's father; the victim obtained a temporary restraining order against the defendant; before the TRO was served, the defendant appeared at the victim's apartment with Ninja-style knives, told police officers that the defendant was at the apartment to put the fear of God into the victim; when the TRO was served on the defendant, the defendant stated that a piece of paper would not stop the defendant from inflicting pain and fear on the victim; and the victim found a copy of the TRO in the door of the apartment with a threatening message written by the defendant, the evidence was sufficient to support the defendant's conviction of aggravated stalking. *State v. Smile*, 2009-NMCA-064, 146 N.M. 525, 212 P.3d 413, cert. quashed, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

## 30-3A-4. Exceptions.

The provisions of the [Harassment and] Stalking Act do not apply to:

A. picketing or public demonstrations that are lawful or that arise out of a bona fide labor dispute; or

B. a peace officer in the performance of his duties.



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**History: 1978 Comp., § 30-3A-4, enacted by Laws 1997, ch. 10, § 5.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not a part of the law.

**Repeals and reenactments.** — Laws 1997, ch. 10, § 7, repealed 30-3A-4 NMSA 1978, as enacted by Laws 1993, ch. 86, § 4, and Laws 1997, ch. 10, § 5, enacted a new section, effective July 1, 1997.

# ARTICLE 4

# Kidnapping

Sec.
30-4-1. Kidnapping.
30-4-2. Criminal use of ransom.
30-4-3. False imprisonment.
30-4-4. Custodial interference; penalties.

## 30-4-1. Kidnapping.

A. Kidnapping is the unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception, with intent:

(1) that the victim be held for ransom;

(2) that the victim be held as a hostage or shield and confined against his will;

(3) that the victim be held to service against the victim's will; or

(4) to inflict death, physical injury or a sexual offense on the victim.

B. Whoever commits kidnapping is guilty of a first degree felony, except that he is guilty of a second degree felony when he voluntarily frees the victim in a safe place and does not inflict physical injury or a sexual offense upon the victim.

**History: 1953 Comp., § 40A-4-1, enacted by Laws 1963, ch. 303, § 4-1; 1973, ch. 109, § 1; 1995, ch. 84, § 1; 2003 (1st S.S.), ch. 1, § 2.**

**Cross references.** — For essential elements of kidnapping jury instruction, *see* UJI 14-403 NMRA.

**The 2003 (1st S.S.) amendment,** effective February 3, 2004, substituted "physical injury or a sexual offense" for "great bodily harm" near the end of Subsection B.

**The 1995 amendment,** effective July 1, 1995, substituted "kidnapping" for "kidnaping" in the heading and throughout the section; in Subsection A, substituted "restraining, transporting or confining" for "restraining or confining", substituted "by force, intimidation or deception" for "by force or deception", deleted "that the victim" following "intent"; in Paragraphs A(1) and A(3) inserted "that the victim"; in Paragraph A(2), inserted "that the victim be held" and "or shield and"; added Paragraph A(4); and in Subsection B, substituted the language beginning with "he voluntarily" and ending with "harm upon the victim" for "the victim is freed without having had great bodily harm inflicted upon him by his captor".

### ANNOTATIONS

I. GENERAL CONSIDERATION.
II. ELEMENTS OF KIDNAPPING.
III. EVIDENCE AND PROOF.
IV. DOUBLE JEOPARDY.
V. JURY INSTRUCTIONS.

### I. GENERAL CONSIDERATION.

**Not void for vagueness.** — The 2003 amendment to Subsection B of 30-4-1 NMSA 1978, which replaced the phrase "great bodily harm" with the phrase "physical injury" did not did nor render 30-4-1 NMSA 1978 unconstitutionally vague. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-001.

**Constitutionality, vagueness.** — Defendant's contention that the words "held to service against the victim's will" had no general meaning which the public could comprehend and thus rendered the statute unconstitutionally vague was without merit. *State v. Aguirre*, 1972-NMSC-081, 84 N.M. 376, 503 P.2d 1154.

The language of Subsection B, regarding how a first degree crime is reduced to a second degree crime, is not unconstitutionally vague because it can be understood by, and gives reasonable notice to, persons of ordinary intelligence exercising common sense. *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

**If multiple victims, kidnapping offense committed against each one.** — Where the criminal information charges that each of a number of victims was held as hostage, the defendant is put on notice that the state charges that one offense of kidnapping was committed by holding any one of the victims as a hostage, and the defendant should be prepared to defend the charge in connection with each of the victims. *State v. Davis*, 1979-NMCA-015, 92 N.M. 563, 591 P.2d 1160.

**Standing to challenge validity.** — Defendant, who by standing mute in fact entered a plea of not guilty and was convicted on trial of a second degree felony for kidnapping, had no standing to attack the validity of the kidnapping statute (as it read prior to the 1973 amendment) on grounds that leaving to the jury the decision as to whether the crime should be a capital or second degree felony constituted a denial of equal protection. *State v. Sharpe*, 1970-NMCA-078, 81 N.M. 637, 471 P.2d 671.

**Construction.** — Subsection A(1) of this section should read "Kidnapping is the unlawful taking, . . . with the intent that the victim be held for ransom and confined against his will," and Subsection A(2) should read "Kidnapping is the unlawful taking, . . . with the intent that the victim be held as a hostage and confined against his will." *State v. Clark*, 1969-NMSC-078, 80 N.M. 340, 455 P.2d 844 (decided under prior law).

**Person asked to do or forbear act cannot be same as victim** in a prosecution for kidnapping. *State v. Davis*, 1979-NMCA-015, 92 N.M. 563, 591 P.2d 1160.

**Each of two hostages may also be third person.** — If it is charged that X and Y were held as hostages, this



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does not prohibit a conviction of kidnapping on the basis that X was hostage for the performance of some act by Y, and vice versa. *State v. Davis*, 1979-NMCA-015, 92 N.M. 563, 591 P.2d 1160.

**Jury instructions.** — Where defendant entered the victim's house; defendant pulled a gun, put the gun to the victim's head, and told the victim that defendant planned to rape the victim; defendant threatened to kill the victim's child if the victim did not comply; defendant raped the victim; a jury convicted defendant of kidnapping in the first degree and second degree criminal sexual penetration; the district court gave the jury UJI 14-403 NMRA, the kidnapping jury instruction, but did not give the jury UJI 14-6018, the special verdict form asking the jury to find whether defendant committed a sexual offense against the victim; and the district court modified defendant's conviction for first degree kidnapping to second degree kidnapping because the jury did not find, pursuant to the special verdict form, that defendant committed a sexual offense against the victim, the district court erred in modifying defendant's conviction for first degree kidnapping because the jury independently found that defendant had committed a sexual offense against the victim. *State v. Dominguez*, 2014-NMCA-064, cert. denied, 2014-NMCERT-005.

## II. ELEMENTS OF KIDNAPPING.

**"Force".** — "Force" cannot be construed to mean merely violent or deadly force, as it could not have been the legislative intention to so limit the statute, for many kidnappings are accomplished by the use of only minimal force, as, for example, where a child is abducted. *State v. Clark*, 1969-NMSC-078, 80 N.M. 340, 455 P.2d 844.

**"Deception"** necessarily implies that the victim is unaware that she is being kidnaped. *State v. Garcia*, 1983-NMCA-069, 100 N.M. 120, 666 P.2d 1267, cert. denied, 100 N.M. 192, 668 P.2d 308.

**"Hostage".** — Term "hostage," when used with reference to a person and in the context in which it is used in New Mexico's kidnapping statute, implies the unlawful taking, restraining or confining of a person with the intent that the person, or victim, be held as security for the performance, or forbearance, of some act by a third person. *State v. Crump*, 1971-NMSC-051, 82 N.M. 487, 484 P.2d 329; *State v. Davis*, 1979-NMCA-015, 92 N.M. 563, 591 P.2d 1160.

**"Held to service".** — The purpose of being so compelled or induced - "for the purpose of performing some act" - probably could be better stated; for example, using Webster's: "for the purpose of assisting or benefiting someone or something." Such an explanation serves to distinguish kidnapping from false imprisonment, which is a lesser offense included within kidnapping. *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

The third objective mentioned in the statute, holding for service, should be construed to effectuate the same overall scheme as the first two objectives - holding for ransom and as a hostage - namely, to accomplish some goal that the perpetrator may view as beneficial to himself or herself. *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

Once the defendant restrained the victim by force or coercion for service against her will, the crime of kidnapping occurred; the key to the restraint element in kidnapping is the point at which the victim's physical association with the defendant was no longer voluntary. *State v. Pisio*, 1994-NMCA-152, 119 N.M. 252, 889 P.2d 860, cert. denied, 119 N.M. 20, 888 P.2d 466.

A person is entitled to withdraw his or her consent or express a lack of consent to an act of criminal sexual penetration at any point prior to the act itself, but force or coercion exerted prior to the act itself will support a conviction for kidnapping or false imprisonment. *State v. Pisio*, 1994-NMCA-152, 119 N.M. 252, 889 P.2d 860, cert. denied, 119 N.M. 20, 888 P.2d 466.

Taking the victim by force and deception in order to convince him to end his relationship with another person constituted "holding for service" within this section. *State v. Kersey*, 1995-NMSC-054, 120 N.M. 517, 903 P.2d 828.

**Incidental restraint in homicide not sufficient.** — The mere incidental restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping. Unlike cases involving criminal sexual penetration or robbery, no "service" is performed by the victim of a shooting with intent to kill because the victim does not confer any independent assistance or benefit to the perpetrator of the crime. *State v. Baca*, 1995-NMSC-045, 120 N.M. 383, 902 P.2d 65.

**Incidental restraint in criminal sexual penetration of a minor not sufficient.** — The legislature did not intend to punish related incidental movement and restraints occurring prior to and during sexual assaults as the separate crime of kidnapping; to determine whether a restraint or movement is incidental to another crime, the court looks to whether the restraint or movement increases the culpability of the defendant over and above his culpability for the other crime, whether the movements of the victim substantially increased the risk of harm over and above that necessarily present in the accompanying crime, or whether the restraint served to decrease the defendant's risk of detection or the difficulty of the commission of the crime. *State v. Tapia*, 2015-NMCA-048, cert. denied, 2015-NMCERT-004.

Where four-year-old victim testified that defendant lay on top of her on the bed and sexually assaulted her, there was no evidence of restraint on her movement; defendant's incidental restraint did not increase his culpability beyond that already inherent to any sexual assault, and the child victims' testimony did not indicate that the restraint was any longer or greater than that necessary to commit the sexual assault, the restraint did not increase the victim's risk of harm or the severity of the assault beyond that inherent to the underlying crime, and the restraint did not serve to decrease defendant's risk of detection or the difficulty of the commission of the crime; the restraint, therefore, was incidental to the sexual assault perpetrated on the child victim and did not establish conduct that the legislature intended to support a kidnapping conviction. *State v. Tapia*, 2015-NMCA-048, cert. denied, 2015-NMCERT-004.

Where eight-year-old victim testified that when she and defendant were in her mom's room, defendant made her take her clothes off, and the two got into bed where defendant sexually assaulted her, any incidental restraint in making the child remove her clothing is not the type of separate conduct that the legislature intended to punish as kidnapping; the conduct did not increase defendant's culpability beyond that inherent to the assault, the restraint was not longer or greater than necessary to complete the assault, the restraint did not increase the risk of harm to the child or the severity of the assault, and the restraint used to compel the removal of the child's clothes is inherent to the sexual assault and was not done to make the commission of the crime easier or less detectable; any restraint that was utilized to compel the child to remove her clothing was incidental to the sexual assault. *State v. Tapia*, 2015-NMCA-048, cert. denied, 2015-NMCERT-004.

Where eight-year-old victim testified that defendant "made her go" or "took her into another room", the movement was from one room to another in the family residence where they were both already located; the movement did not subject the child to a substantial increase in risk of harm above and beyond that inherent in a sexual assault; the brief movements from one room to another, in furtherance of the sexual assault, were incidental to



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the crimes and cannot support a separate kidnapping conviction. *State v. Tapia*, 2015-NMCA-048, cert. denied, 2015-NMCERT-004.

**Kidnapping was not incidental to battery.** — Where defendant drove the victim to a deserted area, pulled the victim out of the vehicle, pulled the victim's hair, kicked the victim, threw the victim into bushes, and beat the victim; defendant held the victim by the arm and drove to a second location where defendant again beat the victim; when the victim attempted to run away, defendant put the victim in the vehicle and drove to a third location and again beat the victim and forced the victim to have intercourse with defendant; and defendant was convicted of kidnapping in the first degree and battery, defendant's convictions did not violate double jeopardy because defendant's conduct was not factually unitary or legally unitary because the jury could have determined that the victim suffered physical injuries when defendant dragged the victim from the vehicle, threw the victim into the bushes, pulled the victim's hair, or otherwise restrained the victim, all actions distinct from the hitting and kicking on which the battery charge was based. *State v. Sotelo*, 2013-NMCA-028, 296 P.3d 1232, cert. denied, 2013-NMCERT-001.

**Incidental restraint in aggravated battery not sufficient.** — The Legislature did not intend to punish as kidnapping restraints that are merely incidental to another crime. *State v. Trujillo*, 2012-NMCA-112, 289 P.3d 238, cert. granted, 2012-NMCERT-011.

Where defendant and another assailant broke into the home of the victim armed with metal bars or bats; defendant began striking victim with a metal bar; the victim fought back and was able to gain the upper hand; while victim was on top of defendant hitting defendant, defendant restrained the victim and called for the other assailant to help; the other assailant began striking victim, allowing defendant to get free and continue striking the victim; and the episode lasted two to four minutes, the restraint of the victim was as a matter of law insufficient to support a conviction for kidnapping because the restraint was no longer or greater than that necessary to achieve a battery and the brief restraint did not subject the victim to substantially greater risk of harm. *State v. Trujillo*, 2012-NMCA-112, 289 P.3d 238, cert. granted, 2012-NMCERT-011.

**Prolonged period of restraint not incidental to aggravated assault.** — Where defendants told the victims that they could not leave the apartment until missing drugs were found, prevented the victims from opening the door to the apartment as they tried to leave, held a knife to the throat of one victim and beat another victim to unconsciousness, and prevented the victims from leaving the apartment for approximately two hours, such a prolonged period of restraint was not incidental to or inherent in the aggravated assault. *State v. Herrera*, 2015-NMCA-116, cert. denied, 2015-NMCERT-010.

**Restraint not incidental to child endangerment.** — Where defendant was charged with child endangerment and kidnapping, evidence that defendant committed a home invasion and pointed a gun at the fifteen-year-old victim was the basis for the child endangerment charge, and evidence that defendant then ordered the victim to lock the door and forced the victim, at gunpoint, to assist in a futile room-to-room search for an individual not present in the home was the factual basis for the kidnapping charge. The restraint in which the victim was held to service to open each door in the home to allow defendant to search each empty room was not incidental to endangering the victim by pointing the gun at him in the first instance. *State v. Ramirez*, 2016-NMCA-072, cert. denied.

**Intent required.** — There must be an intent to confine against the victim's will when he is taken, restrained or confined with intent that he be held for ransom, or as a hostage, but it is not necessary that he be confined against his will when the purpose of the taking, restraining or confining is that the victim be held to service against his will. *State v. Clark*, 1969-NMSC-078, 80 N.M. 340, 455 P.2d 844.

**Determination of intent for jury.** — Under the pertinent definition of kidnapping, it is the intent of the defendant which controls, and the determination as to whether this intent was present is for the trier of the facts when this is an issue in the case. *State v. Aguirre*, 1972-NMSC-081, 84 N.M. 376, 503 P.2d 1154.

**Reversal of conviction where evidence of intent lacking.** — Where there was neither direct evidence nor proof of acts, occurrences or circumstances which could serve as support for an inference of intent to hold victim for ransom or as a hostage, or to service against her will, the finding of guilt could not stand. *State v. Clark*, 1969-NMSC-078, 80 N.M. 340, 455 P.2d 844.

**Proof of victim's state of mind is not essential** to prove kidnapping by deception; rather, the offense may be proved by circumstantial evidence. *State v. Garcia*, 1983-NMCA-069, 100 N.M. 120, 666 P.2d 1267, cert. denied, 100 N.M. 192, 668 P.2d 308 (1983).

**Conviction sufficient if kidnapper rapes victim during course of abduction.** — A conviction for kidnapping with the intent to hold for services is sufficient if the kidnapper rapes the victim during the course of the abduction. It is immaterial whether or not the intent to rape existed at the beginning of the act. *State v. Hutchinson*, 1983-NMSC-029, 99 N.M. 616, 661 P.2d 1315.

**Distinction between kidnapping and false imprisonment.** — The distinction between false imprisonment and kidnapping by holding to service is whether the defendant intended to hold the victim to service against the victim's will. *State v. Armijo*, 1977-NMCA-070, 90 N.M. 614, 566 P.2d 1152.

Merely to confine or restrain against a person's will without the requisite intention is not kidnapping, but is false imprisonment under Section 30-4-3 NMSA 1978, when done with knowledge of an absence of authority. *State v. Clark*, 1969-NMSC-078, 80 N.M. 340, 455 P.2d 844.

**Distinction between kidnapping and second degree criminal sexual penetration.** — A kidnapping was factually distinct from attempted criminal sexual penetration where the force used was not the kind "necessarily involved in every sexual penetration without consent." *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

### III. EVIDENCE AND PROOF.

**Admission of evidence.** — It was not error for trial court to admit into evidence gun and other items found on person of individual who participated with defendant in an attempted robbery, out of which grew the crime of kidnapping with which defendant was charged. *State v. Samora*, 1971-NMCA-149, 83 N.M. 222, 490 P.2d 480.

**Sufficient evidence of deception.** — Evidence that defendant entered the back seat of a car, with victims in front, under the false promise that defendant needed a ride and that defendant actually intended to murder the victims was sufficient evidence to support the element of deception. *State v. Sanchez*, 2000-NMSC-021, 129 N.M. 284, 6 P.3d 486.

**Sufficient evidence of kidnapping by deception.** — Where the victim, a fifteen year old boy, testified that he was led to believe that defendant was going to give him a ride home, but defendant instead took the victim to defendant's apartment where defendant provided the victim with drugs and alcohol, performed oral sex on the victim



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and asked the victim for anal sex, and where the victim testified that he felt forced to enter the apartment and believed he was threatened, there was sufficient evidence to support defendant's kidnapping conviction. *State v. Simmons*, 2018-NMCA-015, cert. denied.

**Sufficient evidence of kidnapping by intimidation.** — Where defendant was convicted of kidnapping, and where defendant claimed that the state failed to present sufficient evidence of kidnapping because there was no proof that he restrained the victim with the intent to inflict a sexual offense because the primary evidence of kidnapping occurred after the sexual offense, evidence that, prior to the sexual offense, defendant threatened the victim with a knife, ordered her to take off her pajamas, allowed her to travel from the bedroom to the restroom only, followed her to the restroom and masturbated while she used the restroom, and ultimately ordered her to return to the bedroom where the sexual assault occurred, was sufficient for a jury to reasonably conclude that defendant restricted or confined the victim using intimidation when he threatened her life using a knife, and the jury could then infer from defendant's actions that he restrained her while intending to inflict a sexual offense on her. *State v. Sena*, 2018-NMCA-037, *rev'd in part by* 2020-NMSC-011.

**Post-1995 version of the kidnapping statute.** — A defendant can be found guilty of kidnapping for taking someone against his or her will to hold that person, inter alia, "to service" *or* to inflict death, physical injury or a sexual offense on that person. *State v. Telles*, 2019-NMCA-039, cert. denied.

**Sufficient evidence of kidnapping.** — At defendant's trial for murder, kidnapping and tampering with evidence, where the state provided evidence establishing that defendant beat the victim with a bat and then moved the victim's body to a back room and then rolled the body in a carpet, there was sufficient evidence to prove, beyond a reasonable doubt, that defendant intended to inflict death or physical injury on the victim by moving him to the back room and rolling him up in the carpet. *State v. Telles*, 2019-NMCA-039, cert. denied.

Where defendant was convicted of criminal sexual penetration in the commission of a felony and first-degree kidnapping, the jury could have reasonably inferred that defendant took or transported the victim by deception based on the victim's testimony that he got into defendant's truck because defendant said that he would take the victim home, that defendant confined the victim by force based on the victim's testimony that when he tried to escape from defendant's truck, the door was locked, that defendant intended to hold the victim against his will to inflict a sexual offense against him based on the victim's testimony that defendant took him to a remote location, pulled down his pants, and then penetrated his anus, that defendant transported the victim to a remote location and confined him there for the purpose of inflicting a sexual offense on him based on defendant's statement upon completion of the sexual act, "Now I can take you home," that defendant's act against the victim was unlawful because the jury could have inferred that it was done without the victim's consent and for the purpose of gratifying defendant's sexual desire or to intrude upon the victim's bodily safety or integrity. There was sufficient evidence to support defendant's convictions. *State v. Samora*, 2016-NMSC-031.

**Sufficient evidence of restraint and confinement.** — Where defendant was charged with kidnapping and criminal sexual penetration of a minor, and where the evidence established that the child victim encountered defendant in an outdoor shed and, upon seeing him, tried to retreat through the shed's open door, but before she could do so, defendant stopped her retreat by grabbing her by the arm, suggesting that they "make babies" and shutting the door to the shed before throwing her to the floor and sexually assaulting her, there was sufficient evidence of restraint and confinement, independent from the restraint used during the sexual assault, to support defendant's kidnapping conviction. Defendant's actions constituted a completed kidnapping upon preventing the victim's escape, regardless of the sexual assault that followed. *State v. Garcia*, 2019-NMCA-056, cert. denied.

**Evidence sufficient.** — Where defendant entered the victim's house; defendant pulled a gun, put the gun to the victim's head, and told the victim that defendant planned to rape the victim; defendant threatened to kill the victim's child if the victim did not comply; and defendant raped the victim, there was sufficient evidence of force and intimidation, independent of the force used during the criminal sexual penetration, to support defendant's kidnapping conviction. *State v. Dominguez*, 2014-NMCA-064, cert. denied, 2014-NMCERT-005.

Where defendant's spouse had a series of affairs with the victim; defendant entered the estranged spouse's apartment, confronted the victim with a gun, bound the victim with duct tape, and after defendant and the victim had a conversation, defendant cut the duct tape from the victim and drove the victim to defendant's motel where defendant killed the victim; defendant was armed with a knife and two guns when defendant and the victim left the apartment; and the jury could infer that the victim did not willingly accompany defendant to the motel from evidence that defendant had defendant's hands in defendant's pockets when defendant and the victim entered the motel, the victim left the victim's watch and wallet at the apartment, and defendant was armed with the same guns when defendant forced the spouse to accompany defendant to the motel, and the spouse was afraid defendant would shoot the spouse, there was sufficient evidence to support defendant's conviction of first degree kidnapping. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-001.

Evidence that defendant bound and gagged a girl and her mother, raped the mother and stated that the girl and her mother were to take defendant out of state, to Oklahoma, was sufficient to show the kidnapping of the girl with the intent to hold her to service against her will. *State v. Kendall*, 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *rev'd in part on other grounds*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

Evidence that the defendant called the victim's mother and demanded $50,000 and that the defendant was having financial difficulties was sufficient to support a finding that the victim was taken with intent to hold him for ransom even though the defendant testified that the call was merely to divert suspicion. *State v. Kersey*, 1995-NMSC-054, 120 N.M. 517, 903 P.2d 828.

Even though there was evidence that defendant's association with the victim began as a consensual encounter in which he proposed to give the victim a ride, the defendant's statements, physical evidence, and the testimony of the victim's mother gave rise to a reasonable inference that the association became involuntary. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Evidence was sufficient to convict defendant of first degree kidnapping where it was shown that he enticed the victim to enter his car by deception, transported him by deception and intimidation with the intent to inflict a sexual offense, and that he did not voluntarily free the victim. *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

Evidence was sufficient to show that kidnapping was complete before the act of attempted criminal sexual penetration or the act of murder began, as the jury could have found that defendant kidnapped the victim by deception when he initially offered her a ride home with another intent in mind, that she was restrained by deception when he changed the



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intended destination of the ride, or when the victim made the final walk from the car to her death. *State v. Jacobs*, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127, *overruled on other grounds by State v. Martinez*, 2021-NMSC-002.

**Sufficient evidence of confinement or transportation by deception.** — Where defendant was charged with human trafficking of a minor and kidnapping, and where the evidence at trial showed that defendant instructed an associate to invite the victim, a seventeen-year-old girl, into a vehicle to smoke marijuana and drink alcohol while the victim was waiting for a bus at the bus station, that defendant and his nephew jumped into the vehicle and drove away from the bus station, and that defendant instructed the associate to take away the victim's identification so she would not want to leave, and where the victim testified that she was never left alone, was afraid to run away, and was placed with "clients" to perform sex acts, a reasonable jury could find that defendant confined or transported the victim by deception and intended to hold her against her will for the purpose of making her work for defendant. *State v. Carson*, 2020-NMCA-015, cert. denied.

**Evidence that defendant used his truck to block the victim from leaving defendant's property,** that defendant told the other defendants involved in the beating of the victim by telephone to "hurry up" because defendant did not know how long he could hold the victim, that defendant was angry and immediately became involved in the beating of the victim when the other defendants arrived, permitted the jury to conclude that the defendant held the victim so that the victim could be physically beaten. *State v. Huber*, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096, cert. denied, 2006-NMCERT-007, 140 N.M. 279, 142 P.3d 360.

**Insufficient evidence of kidnapping where conduct was incidental to killing.** — In defendant's trial for murder and kidnapping, there was insufficient evidence to support defendant's conviction for kidnapping where the evidence showed that the victim was assaulted in a parking lot, dragged to the edge of the lot behind a trash can where the victim was struck again at least once and where she was later found. In this case, any restraint occurred during the commission of one continuous attack that ended in murder, and the legislature did not intend to punish as kidnapping conduct that is merely incidental to another crime. *State v. Thomas*, 2016-NMSC-024.

**Evidence insufficient.** — Defendant's conviction for kidnapping was not supported under several alternative theories presented by the state. *State v. Rojo*, 1999-NMSC-001, 126 N.M. 438, 971 P.2d 829.

## IV. DOUBLE JEOPARDY.

**Kidnapping and battery.** — Where defendant drove the victim to a deserted area, pulled the victim out of the vehicle, pulled the victim's hair, kicked the victim, threw the victim into bushes, and beat the victim; defendant held the victim by the arm and drove to a second location where defendant again beat the victim; when the victim attempted to run away, defendant put the victim in the vehicle and drove to a third location and again beat the victim and forced the victim to have intercourse with defendant; and defendant was convicted of kidnapping in the first degree and battery, defendant's convictions did not violate double jeopardy because defendant's conduct was not factually unitary or legally unitary because the jury could have determined that the victim suffered physical injuries when defendant dragged the victim from the vehicle, threw the victim into the bushes, pulled the victim's hair, or otherwise restrained the victim, all actions distinct from the hitting and kicking on which the battery charge was based. *State v. Sotelo*, 2013-NMCA-028, 296 P.3d 1232, cert. denied, 2013-NMCERT-001.

**Convictions of voluntary manslaughter and kidnapping did not violate double jeopardy.** — Where defendant shot the victim in the chest in defendant's vehicle, drove the unconscious victim in the vehicle to an isolated area, and shot the victim twice in the head while the victim was still alive; and defendant used two different types of force when defendant shot the victim in the chest and when defendant kept the unconscious victim in the vehicle, defendant's convictions of voluntary manslaughter for shooting the victim in the chest and kidnapping for keeping the unconscious victim in defendant's vehicle and transporting the victim to the isolated area were not based on unitary conduct and did not violate defendant's right to be free from double jeopardy. *State v. Urioste*, 2011-NMCA-121, 267 P.3d 820, cert. granted, 2011-NMCERT-012.

**Sentences for kidnapping and felony murder not double jeopardy.** — Sentences for both kidnapping and felony murder did not violate double jeopardy since the kidnapping was sufficiently separated in time and space from the murder to establish two distinct crimes. *State v. Kersey*, 1995-NMSC-054, 120 N.M. 517, 903 P.2d 828.

Where the conduct underlying defendant's convictions for aggravated kidnapping and first degree felony murder was not unitary, the district court did not violate double jeopardy by convicting and sentencing defendant for both first degree felony murder and aggravated kidnapping. *State v. Foster*, 1999-NMSC-007, 126 N.M. 646, 974 P.2d 140.

**No merger with assault conviction.** — Merger of kidnapping and assault with intent to commit criminal sexual penetration convictions was not required by double jeopardy considerations where there was evidence apart from the defendant's subsequent sexual assault from which the jury could infer that the defendant restrained the victim with the intent of holding her for services and where, under the facts, the assault with intent to commit criminal sexual penetration occurred after the victim had been restrained and held for services. *State v. Williams*, 1986-NMCA-122, 105 N.M. 214, 730 P.2d 1196, cert. denied, 105 N.M. 111, 729 P.2d 1365.

**Convictions for kidnapping and aggravated assault did not violate double jeopardy.** — Where defendants told the victims that they could not leave the apartment until missing drugs were found, prevented the victims from opening the door to the apartment as they tried to leave, held a knife to the throat of one victim and beat another victim to unconsciousness, and prevented the victims from leaving the apartment for approximately two hours, the jury could reasonably have concluded that the victims were confined in the apartment by force or intimidation when defendants told the victims that they could not leave and closed the door when the victims tried to leave, and that this conduct was independent of and distinct from one defendant's wielding of the knife. If the conduct is not unitary, there is no double jeopardy violation. *State v. Herrera*, 2015-NMCA-116, cert. denied, 2015-NMCERT-010.

**Charges of kidnapping and second degree criminal sexual penetration do not merge** since the elements of the offense of second degree criminal sexual penetration do not involve all of the elements of kidnapping. *State v. Singleton*, 1984-NMCA-110, 102 N.M. 66, 691 P.2d 67.

**Consecutive sentences.** — Consecutive sentences for kidnapping and criminal sexual penetration did not violate the double jeopardy prohibition against multiple punishments for the same offense, where the evidence supported an inference that defendant intended to commit criminal sexual penetration from the moment of the abduction. *State v. McGuire*, 1990-NMSC-067, 110 N.M. 304, 795 P.2d 996.

**Predicate and compound offenses.** — The fact that a kidnapping charge was used to raise a charge of criminal sexual penetration to a second degree felony does not pose a double jeopardy problem. Convictions normally



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are allowed for both predicate and compound offenses, and criminal sexual penetration statutes and kidnapping statutes protect different social norms. *State v. McGuire*, 1990-NMSC-067, 110 N.M. 304, 795 P.2d 996.

**Merger of criminal sexual penetration and kidnapping based on same act.** — Defendant's convictions for second degree criminal sexual penetration (commission of a felony) under Section 30-9-11D NMSA 1978 and kidnapping, stemming from the same act of sexual intercourse, potentially violated double jeopardy rights and were required to be set aside. *State v. Crain*, 1997-NMCA-101, 124 N.M. 84, 946 P.2d 1095.

**Kidnapping and false imprisonment.** — Where over a three week period, at least two circumstances of kidnapping, as well as that of false imprisonment were separated by several days and intervening events that included consensual sex, drinking and daily activities, and terminations of the intent to restrain, defendant's convictions for kidnapping and false imprisonment did not violate the double jeopardy clause. *State v. Dombos*, 2008-NMCA-035, 143 N.M. 668, 180 P.3d 675, cert. denied, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 674.

**Kidnapping and murder.** — Where defendant first restrained the victim for the purpose of sexually assaulting the victim and made efforts to do so and defendant deliberately intended to make sure the victim was never going to leave the room where the victim was restrained after the sexual assault, defendant's convictions for first degree kidnapping and first degree murder did not violate the double jeopardy clause. *State v. Saiz*, 2008-NMSC-048, 144 N.M. 663, 191 P.3d 521, abrogated on other grounds in *State v. Belanger*, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783.

**Double jeopardy.** — Because the crimes of kidnapping and attempted criminal sexual penetration contain elements not contained in the Order Prohibiting Domestic Violence (OPDV) obtained by victim against defendant, defendant's double jeopardy rights were not violated by his conviction for those crimes following his conviction for contempt for violating the OPDV. *State v. Powers*, 1998-NMCA-133, 126 N.M. 114, 967 P.2d 454, cert. quashed, 127 N.M. 392, 981 P.2d 1210 (1999).

**Kidnapping and attempted tampering with evidence.** — Where defendant was convicted of both kidnapping and attempted tampering with evidence, and where the evidence at trial established that defendant beat the victim with a baseball bat, moved the body into a back room and then rolled the body in a carpet, defendant's double jeopardy rights were not violated, because each statute requires proof of a fact, or facts, that the other does not, tampering with evidence focusing on a defendant's intent to hide evidence to avoid prosecution, and kidnapping focusing instead on a defendant's intent in unlawfully taking, restraining transporting or confining a person, and the statutes were intended to address distinct social harms, tampering with evidence designed to punish individuals who attempt to interfere with the administration of justice by hiding or changing evidence that could be used in a criminal prosecution and the kidnapping statute designed to prevent individuals from harming others or depriving others of their freedom with the intent to force them to do something against their will. *State v. Telles*, 2019-NMCA-039, cert. denied.

**Lesser included offense.** — Where defendant drove the victim to a deserted area, pulled the victim out of the vehicle, pulled the victim's hair, kicked the victim, threw the victim into bushes, and beat the victim; defendant held the victim by the arm and drove to a second location where defendant again beat the victim; when the victim attempted to run away, defendant put the victim in the vehicle and drove to a third location where defendant again beat the victim; and defendant was charged with kidnapping in the first degree; defendant was not entitled to a jury instruction on the lesser included offense of false imprisonment because the only rational view of the evidence was that defendant intended to injure the victim as they drove between locations and false imprisonment was not the greatest offense committed. *State v. Sotelo*, 2013-NMCA-028, 296 P.3d 1232, cert. denied, 2013-NMCERT-001.

False imprisonment is a lesser offense necessarily included in kidnapping by holding to service. *State v. Armijo*, 1977-NMCA-070, , 90 N.M. 614, 566 P.2d 1152.

**No merger with murder charge.** — The homicide was sufficient evidence for the jury to find aggravated sodomy and first degree kidnapping, and there was no merger with the charge of murder of which defendant was acquitted. *State v. Melton*, 1977-NMSC-014, 90 N.M. 188, 561 P.2d 461.

**Consecutive sentences for kidnapping and criminal sexual penetration.** — Consecutive sentences for the compound crime of criminal sexual penetration during commission of kidnapping and the predicate felony of kidnapping with intent to hold for service is, in general, permissible because the two crimes address different social norms. *State v. Tsethlikai*, 1989-NMCA-107, 109 N.M. 371, 785 P.2d 282, cert. denied, 109 N.M. 262, 784 P.2d 1005 (1990).

**No unitary act.** — Where the defendant took control of the car at gunpoint and then drove the victims to a remote location before raping them, the crime of kidnapping was complete before the act of criminal sexual penetration began; because the two crimes did not constitute a "unitary act", imposition of consecutive sentences was not double jeopardy. *State v. Andazola*, 2003-NMCA-146, 134 N.M. 710, 82 P.3d 77.

## V. JURY INSTRUCTIONS.

**Hostage defined.** — Refusal to give a requested instruction defining "hostage" is no error, because "hostage" is not a technical term; the jurors can properly apply the common meaning of "hostage" and the application of the common meaning did not prejudice the defendant. *State v. Carnes*, 1981-NMCA-126, 97 N.M. 76, 636 P.2d 895.

**Multiple kidnappings.** — Where defendant was charged with kidnapping; identical jury instructions were given for each count alleged to have occurred on different dates; there was evidence to support separate incidents; and the court told the jury that to convict defendant on both counts, the jury had to be convinced, beyond a reasonable doubt, that two different incidences had occurred, the instructions were not deficient because they did not set out findings to support the separate convictions and did not lead to a violation of the due process clause. *State v. Dombos*, 2008-NMCA-035, 143 N.M. 668., 180 P.3d 675, cert. denied, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 674.

**Omission of the incidental restraint limitation in the kidnapping instruction was not error.** — Where defendant was tried before a jury on charges of criminal sexual penetration in the first degree, kidnapping in the first degree, armed robbery, aggravated burglary and criminal sexual contact, and where defendant claimed that it was fundamental error not to include the incidental restraint limitation to kidnapping in the essential elements instruction on kidnapping, the jury was properly instructed because a finding on whether the restraint of the victim resulting in the kidnapping was slight, inconsequential, or merely incidental to the commission of another crime was not required in this case where any restraint incidental to the sexual assaults was separate and distinct from the restraint that defendant used to complete the kidnapping. *State v. Sena*, 2020-NMSC-011, *rev'g in part* 2018-NMCA-037, 419 P.3d 1240.

**Failure to instruct on incidental restraint resulted in fundamental error.** — Where defendant was



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convicted of criminal sexual penetration, kidnapping, armed robbery, aggravated burglary, and criminal sexual contact, and where defendant claimed that the district court's kidnapping instruction was erroneous because it omitted an essential element of the crime when it failed to instruct the jury that any restraint of the victim must have been more than incidental, the erroneous instruction resulted in fundamental error, because kidnapping statutes do not apply to unlawful confinements or movements incidental to the commission of other felonies and the omission of incidental restraint from the jury instructions could have resulted in the jury convicting defendant based upon a deficient understanding of the legal meaning of restraint as an essential element of kidnapping. *State v. Sena*, 2018-NMCA-037, *rev'd in part by* 2020-NMSC-011.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M.L. Rev. 247 (1974).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 1 Am. Jur. 2d Abduction and Kidnapping § 1 et seq.

Fraud or false pretenses, kidnapping by, 95 A.L.R.2d 450.

What is "harm" within provisions of statutes increasing penalty for kidnapping where victim suffers harm, 11 A.L.R.3d 1053.

Seizure of prison officials by inmates as kidnapping, 59 A.L.R.3d 1306.

False imprisonment as included offense within charge of kidnapping, 68 A.L.R.3d 828.

Necessity and sufficiency of showing, in kidnapping prosecution, that detention was with intent to "secretly" confine victim, 98 A.L.R.3d 733.

Loco parentis, taking of child by person in, 20 A.L.R.4th 823.

Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child, 49 A.L.R.4th 7.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Coercion, compulsion, or duress as defense to charge of kidnapping, 69 A.L.R.4th 1005.

Validity, construction and application of "hold to service" provision of kidnapping statute, 28 A.L.R.5th 754.

Seizure or detention for purpose of committing rape, robbery, or other offense as constituting separate crime of kidnapping, 39 A.L.R.5th 283.

51 C.J.S. Kidnapping § 1.

## 30-4-2. Criminal use of ransom.

Criminal use of ransom consists of knowingly receiving, possessing, concealing or disposing of any portion of money or other property which has at any time been delivered for the ransom of a kidnaped person.

Whoever commits criminal use of ransom is guilty of a third degree felony.

**History: 1953 Comp., § 40A-4-2, enacted by Laws 1963, ch. 303, § 4-2.**

## 30-4-3. False imprisonment.

False imprisonment consists of intentionally confining or restraining another person without his consent and with knowledge that he has no lawful authority to do so.

Whoever commits false imprisonment is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-4-3, enacted by Laws 1963, ch. 303, § 4-3.**

ANNOTATIONS

**Motive is not necessary element** of crime of false imprisonment. *State v. Tijerina*, 1972-NMCA-169, 84 N.M. 432, 504 P.2d 642, *aff'd*, 1973-NMSC-105, 86 N.M. 31, 519 P.2d 127, cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

**False imprisonment does not require physical restraint** of the victim; it may also arise out of words, acts, gestures, or similar means. *State v. Corneau*, 1989-NMCA-040, 109 N.M. 81, 781 P.2d 1159, cert. denied, 108 N.M. 668, 777 P.2d 907.

**Kidnapping and false imprisonment.** — Where over a three week period, at least two circumstances of kidnapping, as well as that of false imprisonment were separated by several days and intervening events that included consensual sex, drinking and daily activities, and terminations of the intent to restrain, defendant's convictions for kidnapping and false imprisonment did not violate the double jeopardy clause. *State v. Dombos*, 2008-NMCA-035, 143 N.M. 668, 180 P.3d 675, cert. denied, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 674.

**Lesser included offense of kidnapping.** — False imprisonment is a lesser offense necessarily included in kidnapping by holding to service. The distinction between these two offenses is whether the defendant intended to hold the victim to service against the victim's will. *State v. Armijo*, 1977-NMCA-070, 90 N.M. 614, 566 P.2d 1152.

**Absence of intent.** — Merely to confine or restrain against a person's will without the requisite intention is not kidnapping, but is false imprisonment under this section, when done with knowledge of an absence of authority. *State v. Clark*, 1969-NMSC-078, 80 N.M. 340, 455 P.2d 844.

**Held without consent.** — A person is entitled to withdraw his or her consent or express a lack of consent to an act of criminal sexual penetration at any point prior to the act itself, but force or coercion exerted prior to the act itself will support a conviction for kidnapping or false imprisonment. *State v. Pisio*, 1994-NMCA-152, 119 N.M. 252, 889 P.2d 860, cert. denied, 119 N.M. 20, 888 P.2d 466.

**False imprisonment did not merge with criminal sexual penetration.** — There was sufficient evidence



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to support separate charges for false imprisonment and criminal sexual penetration where the victim testified that defendant would not let her out of the bedroom for a period of time after the criminal sexual penetration occurred. *State v. Traeger*, 2000-NMCA-015, 128 N.M. 668, 997 P.2d 142, cert. denied, 128 N.M. 689, 997 P.2d 821, *aff'd in part, rev'd in part on other grounds*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

Defendant's convictions of false imprisonment and criminal sexual penetration in the second degree, which arose out of the same conduct, violated the double jeopardy clause. *State v. Armendariz*, 2006-NMCA-152, 140 N.M. 712, 148 P.3d 798, cert. quashed, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 674.

Defendant's convictions for false imprisonment and criminal sexual penetration without the use of a deadly weapon, which arose out of the same conduct, did not violate the double jeopardy clause. *State v. Fielder*, 2005-NMCA-108, 138 N.M. 244, 118 P.3d 752, cert. quashed, 2006-NMCERT-004, 139 N.M. 429, 134 P.3d 120.

**"No lawful authority".** — Knowledge of lack of authority to restrain a minor spouse could reasonably be inferred from the circumstances as defendant had no lawful authority to engage in domestic violence and he displayed continuing abusive behavior; there was nothing about defendant's actions that permitted an inference that he was acting pursuant to a valid, recognized, and lawful marital authority to act for his spouse in her best interests. *State v. Barrera*, 2002-NMCA-098, 132 N.M. 707, 54 P.3d 548, cert. denied, 132 N.M. 674, 54 P.3d 78.

**False imprisonment does not merge with battery.** — Since battery required a touching or application of force and false imprisonment does not, and the elements for proving the two offenses differ, the two offenses do not merge. *State v. Muise*, 1985-NMCA-090, 103 N.M. 382, 707 P.2d 1192, cert. denied, 103 N.M. 287, 705 P.2d 1138, *overruled on other grounds*, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Consecutive sentences for armed robbery and false imprisonment were proper;** since the elements of the two crimes are dissimilar and the evidence required to establish each crime is independent, it was clear the crimes did not merge even when considered in light of the facts. *State v. Moore*, 1989-NMCA-073, 109 N.M. 119, 782 P.2d 91, cert. denied, 109 N.M. 54, 781 P.2d 782.

**Armed robbery and false imprisonment separate offenses.** — Because the statutory definitions of armed robbery and false imprisonment make it clear that the legislature intended to protect different individual interests and, therefore, create separately punishable offenses for violations of those interests, and since the record separated the conduct of the defendant which comprised armed robbery and the conduct which comprised false imprisonment and showed how the conduct for each conviction involved completely separate and distinct actions on the part of the defendant, conviction on both counts was proper. *State v. Ibarra*, 1993-NMCA-040, 116 N.M. 486, 864 P.2d 302, cert. quashed, 117 N.M. 744, 877 P.2d 44 (1994), and cert. denied, 513 U.S. 1157, 115 S. Ct. 1116, 130 L. Ed. 2d 1080 (1995).

**Merger of conviction for aggravated assault into offense of false imprisonment.** — Even though defendant's acts of threatening each of multiple victims with a deadly weapon constituted the means by which his victims were restrained or confined against their will so as to cause the assault to merge into the crime of false imprisonment, the trial court did not err in refusing to merge defendant's convictions of aggravated assault into the offenses of false imprisonment, because there was evidence of multiple acts of aggravated assault committed against each victim. *State v. Bachicha*, 1991-NMCA-014, 111 N.M. 601, 808 P.2d 51, cert. denied, 111 N.M. 529, 807 P.2d 227.

**Merger of assault and false imprisonment.** — The charge of assault by a prisoner should not be merged for sentencing purposes with the charge of false imprisonment where the facts supporting the two charges are not identical. Merger is also inappropriate in such a case because the statute prohibiting assault and the statute prohibiting false imprisonment advance two distinct social norms. *State v. Gibson*, 1992-NMCA-017, 113 N.M. 547, 828 P.2d 980, cert. denied, 113 N.M. 524, 828 P.2d 957.

**Double jeopardy not found.** — Convictions for accessory to assault with intent to commit a violent felony, accessory to aggravated battery with great bodily harm, and accessory to false imprisonment did not violate the constitutional prohibition against double jeopardy. *State v. Carrasco*, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

**Crime of violence.** — This crime is a crime of violence for purposes of sentencing a defendant as a career offender under federal law. *United States v. Zamora*, 222 F.3d 756 (10th Cir.), cert. denied, 531 U.S. 1043, 121 S. Ct. 641, 148 L. Ed. 2d 547 (2000).

**Sufficient evidence.** — Where defendant pinned the victim, who was defendant's spouse, down in the master bedroom to keep the victim from leaving the house, did not allow the victim to walk freely through the house, rigged a door so the victim could not leave the house, and removed the phones so the victim could not call the police; defendant choked the victim until the victim passed out, and defendant's actions were done with physical force, the evidence was sufficient to support defendant's conviction for false imprisonment. *State v. McGee*, 2002-NMCA-090, 132 N.M. 537, 51 P.3d 1191, cert. denied, 132 N.M. 551, 52 P.3d 411.

**Evidence sufficient to support conviction.** — The evidence was sufficient to support a conviction for false imprisonment where it was shown that the defendant, acting in concert with another, forced a school bus to stop, disabled the bus, and forced the driver, through fear of violence, to remain confined in the bus until police and rescue arrived. *State v. Muise*, 1985-NMCA-090, 103 N.M. 382, 707 P.2d 1192, cert. denied, 103 N.M. 287, 705 P.2d 1138 (1985), *overruled on other grounds*, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Evidence sufficiency.** — A defendant's acts of specifically pointing a rifle at each of several victims on two or more separate instances, accompanied by verbal threats, constituted evidence from which the jury could properly determine that defendant committed the separate offenses of aggravated assault and false imprisonment against each victim. Moreover, the jury could find that defendant falsely imprisoned his victims at the beginning of the episode and thereafter committed additional independent aggravated assaults for which he could be separately punished. *State v. Bachicha*, 1991-NMCA-014, 111 N.M. 601, 808 P.2d 51, cert. denied, 111 N.M. 529, 807 P.2d 227.

Evidence was sufficient to convict defendant of false imprisonment where it showed that she was armed; she decided, along with two others, to snatch a stranger off the street; the victim was forced into the back of a two-door car from which he could not get out except through the driver door or the passenger side door; and, as they drove, defendant pressed her foot on the gas pedal to maintain the car's speed while the driver turned around to beat the victim. *State v. Smith*, 2001-NMSC-004, 130 N.M. 117, 19 P.3d 254.

Evidence introduced to show how the defendant and his cohorts carefully orchestrated a prison escape was sufficient for the jury to find that the defendant planned, anticipated, and intended the assault and false imprisonment of a peace officer during the escape. The defendant need not have known the peace officer's name, but only that the victim would be a peace officer. *State v. Gibson*, 1992-NMCA-017, 113 N.M. 547, 828 P.2d 980, cert. denied, 113 N.M. 524, 828 P.2d 957.



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Evidence that intruders threw the house residents, husband and wife, into a closet, sufficed for a conviction of false imprisonment. *State v. Ibarra*, 1993-NMCA-040, 116 N.M. 486, 864 P.2d 302, cert. quashed, 117 N.M. 744, 877 P.2d 44 (1994) and cert. denied, 513 U.S. 1157, 115 S. Ct. 1116, 130 L. Ed. 2d 1080 (1995).

Evidence was sufficient to support defendant's conviction for false imprisonment, where the victim testified that defendant put a screwdriver up to her side and told her that if she tried to leave, he "would put that screwdriver through" her. *State v. Singleton*, 2001-NMCA-054, 130 N.M. 583, 28 P.3d 1124, cert. denied, 130 N.M. 558, 28 P.3d 1099.

Evidence was sufficient to support defendant's conviction of false imprisonment, given that the victims were bound hand and foot. *State v. Reyes*, 2002-NMSC-024, 132 N.M. 576, 52 P.3d 948.

**Verdict not ambiguous.** — Handwritten addition to typewriter guilty verdict form which reiterated the guilty verdict but also spoke of defendant's motive in committing crime of false imprisonment did not render the verdict ambiguous and the court committed no error in accepting it. *State v. Tijerina*, 1972-NMCA-169, 84 N.M. 432, 504 P.2d 642, *aff'd*, 1973-NMSC-105, 86 N.M. 31, 519 P.2d 127, and cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

**No collateral estoppel.** — State did not violate guarantee against double jeopardy in prosecuting defendant for assault with intent to commit a violent felony and false imprisonment, after an acquittal on charges of assault on a jail and false imprisonment and kidnapping of another individual arising out of the same incident, since when the jury in the first trial acquitted defendant they did not necessarily conclude that he was not present at the jail that day and thus did not commit any crimes, but simply that he was not guilty of the crimes alleged. *State v. Tijerina*, 1973-NMSC-105, 86 N.M. 31, 519 P.2d 127, *aff'g*, 1972-NMCA-169, 84 N.M. 432, 504 P.2d 642, and cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 32 Am. Jur. 2d False Imprisonment §§ 157, 160.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 A.L.R.3d 826.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for false arrest or imprisonment, 93 A.L.R.3d 1109.

Liability for negligently causing arrest or prosecution of another, 99 A.L.R.3d 1113.

Civil liability for "deprogramming" member of religious sect, 11 A.L.R.4th 228.

Penalties for common-law criminal offense of false imprisonment, 67 A.L.R.4th 1103.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence, 81 A.L.R.4th 1031.

Free exercise of religion clause of First Amendment as defense to tort liability, 93 A.L.R. Fed. 754.

35 C.J.S. False Imprisonment § 71.

## 30-4-4. Custodial interference; penalties.

A. As used in this section:

(1) "child" means an individual who has not reached his eighteenth birthday;

(2) "custody determination" means a judgment or order of a court of competent jurisdiction providing for the custody of a child, including visitation rights;

(3) "person" means any individual or legal entity, whether incorporated or unincorporated, including the United States, the state of New Mexico or any subdivision thereof;

(4) "physical custody" means actual possession and control of a child; and

(5) "right to custody" means the right to physical custody or visitation of a child arising from:

(a) a parent-child relationship between the child and a natural or adoptive parent absent a custody determination; or

(b) a custody determination.

B. Custodial interference consists of any person, having a right to custody of a child, maliciously taking, detaining, concealing or enticing away or failing to return that child without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody. Whoever commits custodial interference is guilty of a fourth degree felony.

C. Unlawful interference with custody consists of any person, not having a right to custody, maliciously taking, detaining, concealing or enticing away or failing to return any child with the intent to detain or conceal permanently or for a protracted time that child from any person having a right to custody of that child. Whoever commits unlawful interference with custody is guilty of a fourth degree felony.

D. Violation of Subsection B or C of this section is unlawful and is a fourth degree felony.

E. A peace officer investigating a report of a violation of this section may take a child into protective custody if it reasonably appears to the officer that any person will flee with the child in violation of Subsection B or C of this section. The child shall be placed with the person whose right to custody of the child is being enforced, if available and appropriate, and, if not, in any of the community-based shelter care facilities as provided for in Section 32-1-25.1 NMSA 1978 [repealed].



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F. Upon recovery of a child a hearing by the civil court currently having jurisdiction or the court to which the custody proceeding is assigned, shall be expeditiously held to determine continued custody.

G. A felony charge brought under this section may be dismissed if the person voluntarily returns the child within fourteen days after taking, detaining or failing to return the child in violation of this section.

H. The offenses enumerated in this section are continuous in nature and continue for so long as the child is concealed or detained.

I. Any defendant convicted of violating the provisions of this section may be assessed the following expenses and costs by the court, with payments to be assigned to the respective person or agency:

(1) any expenses and costs reasonably incurred by the person having a right to custody of the child in seeking return of that child; and

(2) any expenses and costs reasonably incurred for the care of the child while in the custody of the human services department.

J. Violation of the provisions of this section is punishable in New Mexico, whether the intent to commit the offense is formed within or outside the state, if the child was present in New Mexico at the time of the taking.

**History: 1978 Comp., § 30-4-4, enacted by Laws 1989, ch. 206, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Section 32-1-25.1 NMSA 1978, was repealed by Laws 1993, ch. 77, § 234, effective July 1, 1993. For present comparable provisions, *see* 32A-4-8 NMSA 1978.

**Repeals and reenactments.** — Laws 1989, ch. 206, § 1 repealed former 30-4-4 NMSA 1978, as enacted by Laws 1977, ch. 58, § 1, relating to custodial interference, and enacted a new section, effective April 4, 1989.

**Cross references.** — For provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act, *see* 40-10A-101 to 40-10A-403 NMSA 1978.

**Severability.** — Laws 1989, ch. 206, § 2 provides for the severability of the act if any part or application thereof is held invalid.

## ANNOTATIONS

**Sufficient evidence to support custodial interference.** — Where custody of the defendant's child was transferred to the children, youth and families department; the child was placed in a foster home; the child left the foster home and returned to the defendant's home; the defendant allowed the child to stay with the defendant in the defendant's home and never informed either the police or the children, youth and families department that the child was doing so, the evidence was sufficient to support the defendant's conviction of custodial interference. *State v. Romero*, 2009-NMCA-012, 145 N.M. 594, 203 P.3d 125, cert. quashed, 2009-NMCERT-002, 145 N.M. 704, 204 P.3d 29.

**Section not unconstitutionally vague.** — The terms "without good cause," "protracted time," "maliciously," "detaining," and "deprive permanently" as used in this section are of such well recognized meaning that individuals are placed on notice of the conduct sought to be proscribed and, therefore, the section is not unconstitutionally vague. *State v. Luckie*, 1995-NMCA-075, 120 N.M. 274, 901 P.2d 205, cert. denied, 120 N.M. 184, 899 P.2d 1138.

**Jurisdiction.** — The child must be present in New Mexico when criminal acts of custodial interference are committed for New Mexico to have criminal jurisdiction. *State v. Sung*, 2000-NMCA-031, 128 N.M. 786, 999 P.2d 430.

**Proper venue for the trial of the offense of custodial interference.** — In the event elements of a crime were committed in different counties, the trial may be had in any county in which a material element of the crime was committed. Interfering with or depriving a custodial parent of their right to custody is an essential element of the crime of custodial interference as are the methods for accomplishing the interference or deprivation. Because deprivation is an element, where the person was deprived of the right of custody establishes a proper venue for the trial of the offense of custodial interference. *State v. Lefthand*, 2015-NMCA-117, cert. denied, 2015-NMCERT-011.

Where defendant violated an order of custody, issued by a Taos county district court, by depriving the father of the child of his right to custody, the father's right to custody exists with him in his county of residence, the county in which he was given custody, and the county in which he was deprived of the custody of his son. Under the custodial interference statute, a person may be charged in the place where the harm sought to be prevented by the statute results, and therefore venue may lie in Taos county district court. *State v. Lefthand*, 2015-NMCA-117, cert. denied, 2015-NMCERT-011.

**Elements of custodial interference.** — To be guilty of custodial interference for taking the children for two weeks, the defendant had to have engaged in either interference by "taking" or "failing to return" the children without good cause. *State v. Munoz*, 2006-NMSC-005, 139 N.M. 106, 129 P.3d 142.

**Protracted period of time.** — Trial court's refusal to give defendant's requested jury instruction defining "protracted period of time" was not erroneous because the meaning of the phrase is readily understandable and the defendant argued in closing arguments that two weeks was not long enough. *State v. Munoz*, 2006-NMSC-005, 139 N.M. 106, 129 P.3d 142.

**Good cause.** — The term "good cause" encompasses the concepts of subjective "good faith" and objective reasonableness of the defendant and therefore a defendant must have an honest belief that his actions are necessary to protect a child from harm and that honest belief must be reasonable. *State v. Munoz*, 2006-NMSC-005, 139 N.M. 106, 129 P.3d 142.

**Defense waived by no contest plea.** — Although defendant's challenge to the jurisdiction of a Missouri court in entering a modification to an earlier divorce decree is a defense to the charges of custodial interference, defendant waived the defense when he entered a no contest plea. *State v. Hunter*, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, *rev'd*, 2006-NMSC-043, 140 N.M. 406, 143 P.3d 168.

**Legal right to custody not absolute.** — Parents' natural and legal right to custody of their children is



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prima facie and not an absolute right. *State v. Sanders*, 1981-NMCA-053, 96 N.M. 138, 628 P.2d 1134.

**Parent's natural right to custody** includes the right to remove the child from this jurisdiction in the absence of any legal modification of that right, but that right may be lost through court order. *State v. Whiting*, 1983-NMCA-123, 100 N.M. 447, 671 P.2d 1158.

**Parental right to custody curtailed by custody order.** — Because of the custody order under Sections 40-4-7B(4) and 40-4-9.1 NMSA 1978, defendant's otherwise natural and usual right to remove her children from the court's jurisdiction is curtailed to the extent that she could not do so without the court's consent. *State v. Whiting*, 1983-NMCA-123, 100 N.M. 447, 671 P.2d 1158.

**Right continues until terminated by appropriate authority.** — A parent has a legal right to the custody of his child unless that right had been terminated, however temporarily, by appropriate authority. *State v. Sanders*, 1981-NMCA-053, 96 N.M. 138, 628 P.2d 1134.

**Double jeopardy violation.** — Where, although there were three children involved, the alleged violation relates to only one custody order for all the children, the court violated double jeopardy requirements in convicting defendant on three counts of custodial interference, and sentencing defendant consecutively on each count. *State v. Hunter*, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, *rev'd*, 2006-NMSC-043, 140 N.M. 406, 143 P.3d 168.

**Written judgment required.** — A parent's legal right to custody of a child does not end until entry of, and the giving of, notice of a judgment in compliance with Rule 62(a), N.M.R. Child. Ct. (*see* Rule 10-352 NMRA), requiring a signed written judgment and disposition. *State v. Sanders*, 1981-NMCA-053, 96 N.M. 138, 628 P.2d 1134.

**Law reviews.** — For annual survey of New Mexico law relating to domestic relations, see 12 N.M.L. Rev. 325 (1982).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Kidnapping or related offense by taking or removing of child by or under authority of parent or one in loco parentis, 20 A.L.R.4th 823.

Liability of legal or natural parent, or one who aids or abets, for damages resulting from abduction of own child, 49 A.L.R.4th 7.

# ARTICLE 5

# Abortion

Sec.
30-5-1. Repealed.
30-5-2. Repealed.
30-5-3. Repealed.

## 30-5-1. Repealed.

**Repeals.** — Laws 2021, ch. 2, § 1 repealed 30-5-1 NMSA 1978, as enacted by Laws 1969, ch. 67, § 1, relating to definitions, effective June 18, 2021. For provisions of former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

## 30-5-2. Repealed.

**Repeals.** — Laws 2021, ch. 2, § 1 repealed 30-5-2 NMSA 1978, as enacted by Laws 1969, ch. 67, § 2, relating to persons and institutions exempt, effective June 18, 2021. For provisions of former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

## 30-5-3. Repealed.

**Repeals.** — Laws 2021, ch. 2, § 1 repealed 30-5-3 NMSA 1978, as enacted by Laws 1969, ch. 67, § 3, relating to criminal abortion, effective June 18, 2021. For provisions of former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 5A

# Partial-Birth Abortion Ban

Sec.
30-5A-1. Short title.
30-5A-2. Definitions.
30-5A-3. Prohibition of partial-birth abortions.
30-5A-4. Civil remedies.
30-5A-5. Criminal penalty; exception.

## 30-5A-1. Short title.

This act [30-5A-1 through 30-5A-5 NMSA 1978] may be cited as the "Partial-Birth Abortion Ban Act".



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**History: Laws 2000, ch. 55, § 1.**

**Cross references.** — For family planning, *see* 24-8-1 NMSA 1978.

For sterilization, *see* 24-9A-1 NMSA 1978

For maternal, fetal and infant experimentation, *see* 9A-24-1 NMSA 1978.

**Effective dates.** — Laws 2000, ch. 55 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on May 17, 2000, 90 days after adjournment of the legislature.

## ANNOTATIONS

**Section partially unconstitutional (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978).** — Portions of this section which define those "justified medical terminations" not proscribed by Section 30-5-3 NMSA 1978 (repealed) as only those where physician used acceptable medical procedures in accredited hospitals after approval by special hospital board, and either where continuation of pregnancy would result in death or grave injury to mother, where child was likely to have grave physical or mental defects or where pregnancy resulted from rape or incest, held unconstitutional by virtue of 1973 holdings in Doe v. Bolton (410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201) and Roe v. Wade (410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147). *State v. Strance*, 1973-NMCA-024, 84 N.M. 670, 506 P.2d 1217.

**This section does not define murder, homicide or feticide (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978),** but is concerned with the special circumstances required for abortion to be a criminal offense. *State v. Willis*, 1982-NMCA-151, 98 N.M. 771, 652 P.2d 1222 (specially concurring opinion).

**Meaning of "abortion" (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978).** — The word "abortion" was commonly employed in law to designate the means used to procure miscarriage. *State v. Grissom*, 1930-NMSC-109, 35 N.M. 323, 298 P. 666.

**Meaning of "justified medical termination" (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978).** — When limited definition of "justified medical termination" necessitated by court's reading of Roe v. Wade (410 U.S. 113) and Doe v. Bolton (410 U.S. 179) into Section 30-5-1 NMSA 1978 (repealed) is applied to this section what emerges is a criminal statute penalizing the act of performing abortions on the unconsenting, or performing an abortion on a woman under the age of 18 years without the consent of both the woman and her then living parent or guardian, or the performance of an abortion by a person who is not a physician licensed by the state. *State v. Strance*, 1973-NMCA-024, 84 N.M. 670, 506 P.2d 1217.

**Proof of pregnancy (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978).** — Although there was no direct, positive proof that on the day of the first attempted abortion the fetus was living, there was ample evidence for the jury to reasonably arrive at such a conclusion where the physician who had originally examined the woman on whom the abortion was performed testified as to the tests he had made on her and expressed the opinion that she was about two months pregnant. *State v. Gutierrez*, 1965-NMSC-143, 75 N.M. 580, 408 P.2d 503.

**Condition presumed to continue (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978).** — Although there was proof which might be construed to the effect that it was impossible to tell whether on the day of the original abortion attempt the fetus was alive or dead, the rule in this jurisdiction is that a condition once shown to exist will be presumed to continue until the contrary is established by evidence, direct or presumptive. *State v. Gutierrez*, 1965-NMSC-143, 75 N.M. 580, 408 P.2d 503.

**Evidence of other abortions (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978).** — The gist of offense under Laws 1919, ch. 4, § 1 (former 40-3-1, 1953 Comp.), was intent to murder a quick child by performing an abortion upon mother; in a prosecution under that section, proof of other abortions where the child had not quickened was not relevant and should be excluded. *State v. Bassett*, 1921-NMSC-016, 26 N.M. 476, 194 P. 867.

**Instruments and drugs (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978).** — Instruments and drugs were sufficiently connected with the accused and with the operation to make them admissible on his trial for abortion. *State v. Grissom*, 1930-NMSC-109, 35 N.M. 323, 298 P. 666.

**Exhibition of instruments (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978).** — In a prosecution for an attempted abortion, exhibition of dilator in cross-examination of accused was not error. *State v. Lewis*, 1932-NMSC-033, 36 N.M. 218, 12 P.2d 849.

**Erroneous instructions on corroboration (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978).** — In prosecution for abortion, defendant could be convicted by uncorroborated testimony of an accomplice, but where court gave instruction requiring corroboration, there must be some other evidence in the record tending to show that defendant took part in the commission of the crime. *State v. Gutierrez*, 1965-NMSC-143, 75 N.M. 580, 408 P.2d 503.

**Enforceability of section (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978).** — Under current law, Section 30-5-2 NMSA 1978 (repealed) is entirely enforceable, and this section and Section 30-5-1 NMSA 1978 (repealed) are enforceable only to the extent that they criminalize and punish the act of performing an abortion on an unconsenting woman, or the performance of an abortion by a person who is not a physician licensed by the state of New Mexico. 1990 Op. Att'y Gen. No. 90-19.

**Parental consent provision (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978).** — New Mexico's parental consent provision may become enforceable either through legislative enactment of amendments to existing law or, under certain circumstances, through modification of current federal abortion jurisprudence. 1990 Op. Att'y Gen. No. 90-19.

**Consent of husband not required (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978).** — Consent of the husband of a woman over the age of 18 is not required when she requests a justified medical termination of her pregnancy. 1970 Op. Att'y Gen. No. 70-91.

**Married woman under eighteen (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978).** — A woman under eighteen, but lawfully married, can request a justified medical termination of her pregnancy without the consent of her parent or guardian, or of her husband. 1970 Op. Att'y Gen. No. 70-91.

**Divorced or separated woman (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978).** — A married woman who subsequently is divorced or separated, regardless of age, is an emancipated person who is entitled to determine herself, without the consent of any other person, whether she will request medical termination of her pregnancy hereunder. 1970 Op. Att'y Gen. No. 70-91.



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**Law reviews.** — For article, "New Mexico's 1969 Criminal Abortion Law," see 10 Nat. Resources J. 591 (1970).

For article, "Rape Law: The Need for Reform," see 5 N.M.L. Rev. 279 (1975).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For comment, "Perspectives on the Abortion Decision," see 9 N.M.L. Rev. 175 (1978-79).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Constitutional right of prisoners to abortion services and facilities - federal cases, 90 A.L.R. Fed. 683.

Validity, construction, and application of statutes requiring parental notification of or consent to minor's abortion, 77 A.L.R.5th 1.

Validity of state statutes and regulations limiting or restricting public funding for abortions sought by indigent women, 20 A.L.R.4th 1166.

Medical malpractice in performance of legal abortion, 69 A.L.R.4th 875.

Parent's child support liability as affected by other parent's fraudulent misrepresentation regarding sterility or use of birth control, or refusal to abort pregnancy, 2 A.L.R.5th 337.

1 Am. Jur. 2d Abortion and Birth Control § 1 et seq.

Criminal responsibility of one other than subject or actual perpetrator of abortion, 4 A.L.R. 351.

Revocation of physician's or surgeon's license for performing abortion, 82 A.L.R. 1184.

Admissibility in prosecution for abortion of evidence of other abortions or attempted abortions by accused on same woman, 15 A.L.R.2d 1080.

Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts, 16 A.L.R.2d 949.

Pregnancy as element of abortion, 46 A.L.R.2d 1393.

1 C.J.S. Abortion and Birth Control; Family Planning §§ 10 to 12.

## 30-5A-2. Definitions.

As used in the Partial-Birth Abortion Ban Act [30-5A-1through 30-5A-5 NMSA 1978]:

A. "abortion" means the intentional termination of the pregnancy of a female by a person who knows the female is pregnant;

B. "fetus" means the biological offspring of human parents;

C. "partial-birth abortion" means a procedure in which any person, including a physician or other health care professional, intentionally extracts an independently viable fetus from the uterus into the vagina and mechanically extracts the cranial contents of the fetus in order to induce death; and

D. "physician" means a person licensed to practice in the state as a licensed physician pursuant to the Medical Practice Act [Chapter 61, Article 6 NMSA 1978] or an osteopathic physician licensed pursuant to Chapter 61, Article 10 NMSA 1978.

**History: Laws 2000, ch. 55, § 2.**

**Effective dates.** — Laws 2000, ch. 55 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on May 17, 2000, 90 days after adjournment of the legislature.

## 30-5A-3. Prohibition of partial-birth abortions.

No person shall perform a partial-birth abortion except a physician who has determined that in his opinion the partial-birth abortion is necessary to save the life of a pregnant female or prevent great bodily harm to a pregnant female:

A. because her life is endangered or she is at risk of great bodily harm due to a physical disorder, illness or injury, including a condition caused by or arising from the pregnancy; and

B. no other medical procedure would suffice for the purpose of saving her life or preventing great bodily harm to her.

**History: Laws 2000, ch. 55, § 3.**

**Cross references.** — For family planning, *see* 24-8-1 NMSA 1978.

For sterilization, *see* 24-9-1 NMSA 1978

For maternal, fetal and infant experimentation, *see* 24-9A-1 NMSA 1978.

**Effective dates.** — Laws 2000, ch. 55 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on May 17, 2000, 90 days after adjournment of the legislature.

**Severability.** — Laws 2000, ch. 55, § 6 provides that, if any part or application of § 3 of the Partial-Birth Abortion Act is held invalid, the remainder of the act or its application to other situations or persons shall be likewise invalid. Section 3 of that act is not severable.

## 30-5A-4. Civil remedies.

A. Except as provided in Subsection B of this section, the following persons may bring a civil action to obtain relief pursuant to this section against a person who has violated the provisions of Section 3 [30-5A-3 NMSA 1978] of the Partial-Birth Abortion Ban Act:



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(1) the person on whom a partial-birth abortion was performed;

(2) the biological father of the fetus that was the subject of the partial-birth abortion; and

(3) the parents of the person on whom the partial-birth abortion was performed if that person had not reached the age of majority at the time of the abortion.

B. The persons named as having a right of action in Subsection A of this section are barred from bringing a civil action pursuant to this section if:

(1) the pregnancy of the person on whom the partial-birth abortion was performed resulted from criminal conduct of the person seeking to bring the action; or

(2) the partial-birth abortion was consented to by the person seeking to bring the action.

C. A person authorized to bring a civil action pursuant to this section may recover compensatory damages for loss caused by violation of Section 3 of the Partial-Birth Abortion Ban Act.

**History: Laws 2000, ch. 55, § 4.**

**Effective dates.** — Laws 2000, ch. 55 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on May 17, 2000, 90 days after adjournment of the legislature.

## 30-5A-5. Criminal penalty; exception.

A. Except as provided in Subsections B, C, D and E of this section, a person who violates Section 3 [30-5A-3 NMSA 1978] of the Partial-Birth Abortion Ban Act is guilty of a fourth degree felony and shall be sentenced pursuant to Section 31-18-15 NMSA 1978.

B. The provisions of the Partial-Birth Abortion Ban Act shall apply only to the exact procedure specified in that act.

C. The provisions of the Partial-Birth Abortion Ban Act are not intended to criminalize any other method of terminating a woman's pregnancy.

D. The provisions of the Partial-Birth Abortion Ban Act are not intended to subject a woman, upon whom the procedure specified in that act is performed, to criminal culpability as an accomplice, aider, abettor, solicitor or conspirator.

E. The provisions of the Partial-Birth Abortion Ban Act are not intended to subject any person to criminal culpability pursuant to laws governing attempt, solicitation or conspiracy to commit a crime.

**History: Laws 2000, ch. 55, § 5.**

**Effective dates.** — Laws 2000, ch. 55 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on May 17, 2000, 90 days after adjournment of the legislature.

**Severability.** — Laws 2000, ch. 55, § 6 provides that, except for § 3 of the Partial-Birth Abortion Ban Act, if any part or application of that act is held invalid, the remainder of its application to other situations or persons shall not be affected.

# ARTICLE 6

# Crimes Against Children and Dependents

Sec.
30-6-1. Abandonment or abuse of a child.
30-6-2. Abandonment of dependent.
30-6-3. Contributing to delinquency of minor.
30-6-4. Obstruction of reporting or investigation of child abuse or neglect.

## 30-6-1. Abandonment or abuse of a child.

A. As used in this section:

(1) "child" means a person who is less than eighteen years of age;

(2) "neglect" means that a child is without proper parental care and control of subsistence, education, medical or other care or control necessary for the child's well-being because of the faults or habits of the child's parents, guardian or custodian or their neglect or refusal, when able to do so, to provide them; and



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(3) "negligently" refers to criminal negligence and means that a person knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child.

B. Abandonment of a child consists of the parent, guardian or custodian of a child intentionally leaving or abandoning the child under circumstances whereby the child may or does suffer neglect. A person who commits abandonment of a child is guilty of a misdemeanor, unless the abandonment results in the child's death or great bodily harm, in which case the person is guilty of a second degree felony.

C. A parent, guardian or custodian who leaves an infant less than ninety days old in compliance with the Safe Haven for Infants Act [Chapter 24, Article 22 NMSA 1978] shall not be prosecuted for abandonment of a child.

D. Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be:

(1) placed in a situation that may endanger the child's life or health;

(2) tortured, cruelly confined or cruelly punished; or

(3) exposed to the inclemency of the weather.

E. A person who commits abuse of a child that does not result in the child's death or great bodily harm is, for a first offense, guilty of a third degree felony and for second and subsequent offenses is guilty of a second degree felony. If the abuse results in great bodily harm to the child, the person is guilty of a first degree felony.

F. A person who commits negligent abuse of a child that results in the death of the child is guilty of a first degree felony.

G. A person who commits intentional abuse of a child twelve to eighteen years of age that results in the death of the child is guilty of a first degree felony.

H. A person who commits intentional abuse of a child less than twelve years of age that results in the death of the child is guilty of a first degree felony resulting in the death of a child.

I. Evidence that demonstrates that a child has been knowingly, intentionally or negligently allowed to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance shall be deemed prima facie evidence of abuse of the child.

J. Evidence that demonstrates that a child has been knowingly and intentionally exposed to the use of methamphetamine shall be deemed prima facie evidence of abuse of the child.

K. A person who leaves an infant less than ninety days old at a hospital may be prosecuted for abuse of the infant for actions of the person occurring before the infant was left at the hospital.

**History: 1953 Comp., § 40A-6-1, enacted by Laws 1973, ch. 360, § 10; 1977, ch. 131, § 1; 1978, ch. 103, § 1; 1984, ch. 77, § 1; 1984, ch. 92, § 5; 1989, ch. 351, § 1; 1997, ch. 163, § 1; 2001, ch. 31, § 9; 2001, ch. 132, § 9; 2004, ch. 10, § 1; 2004, ch. 11, § 1; 2005, ch. 59, § 1; 2009, ch. 259, § 1.**

**Cross reference.** — For jury instructions to be given in abandonment and abuse or neglect of a child, *see* UJI 14-606 to 14-607 NMRA.

**The 2009 amendment,** effective June 19, 2009, added Subsection J.

**The 2005 amendment,** effective June 17, 2005, added Subsections F, G, and H to define negligent abuse of a child that results in death and the intentional abuse of a child twelve to eighteen years that results in death as first degree felonies and the intentional abuse of a child less that twelve years that results in death as a first degree felony resulting in the death of a child.

**The 2004 amendment,** effective July 1, 2004, added a new Subsection F; designated the last paragraph of Subsection D as a new Subsection E; and redesignated former Subsection F as Subsection G.

## ANNOTATIONS

**Meaning of "negligently".** — The criminal negligence articulated in 30-6-1(A)(3) NMSA 1978 means "reckless disregard" and what has been called "criminally negligent child abuse" should be labeled "reckless child abuse" without any reference to negligence. The jury should be instructed with this terminology alone. *State v. Consaul*, 2014-NMSC-030, *overruling in part State v. Schoonmaker*, 2008-NMSC-010, 143 N.M. 373, 176 P.3d 1105.

**Sufficient evidence.** — Where defendant drove a pickup toward a group of children who were trick-or-treating on Halloween; the chaperone pushed the children out of the way but was struck and killed; the group was visible to motorists; and defendant altered defendant's course and drove toward the group and increased defendant's speed, defendant's conviction of intentional child abuse by endangerment was supported by substantial evidence. *State v. Melendrez*, 2014-NMCA-062, cert. denied, 2014-NMCERT-006.

**Sufficient evidence of child abuse.** — Where defendant was charged with criminal sexual penetration of a minor and child abuse, and where the state relied on testimony elicited from the victim that defendant grabbed her forcefully by the arm, threw her onto the ground, and pushed and kicked her when she stood up, that she was fourteen years old and that these events occurred in New Mexico two years earlier, there was sufficient evidence to prove beyond a reasonable doubt that defendant intentionally or with reckless disregard and without justification caused the



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victim to be placed in a situation which endangered her life or health. *State v. Garcia*, 2019-NMCA-056, cert. denied.

**Circumstantial evidence.** — A properly instructed jury may be justified in returning a guilty verdict based primarily on evidence that the defendant had the best opportunity to inflict the injury. *State v. Sheldon*, 1990-NMCA-039, 110 N.M. 28, 791 P.2d 479, cert. denied, 110 N.M. 44, 791 P.2d 798, and cert. denied, 498 U.S. 969, 111 S. Ct. 435 (1990).

**Evidence insufficient.** — Mere proximity to a dangerous situation is insufficient to support a conviction for child abuse by endangerment. *State v. Trujillo*, 2002-NMCA-100, 132 N.M. 649, 53 P.3d 909, cert. denied, 132 N.M. 674, 54 P.3d 78.

**Attempt.** — There is such a crime as attempt to commit child abuse when the theory of the case is intentional child abuse. *State v. Herrera*, 2001-NMCA-073, 131 N.M. 22, 33 P.3d 22, cert. denied, 131 N.M. 64, 33 P.3d 284.

**Criminal negligence.** — The mens rea element of negligence in the child abuse statute requires a showing of criminal negligence instead of ordinary civil negligence. To satisfy the element of negligence in Section 30-6-1 NMSA 1978 requires proof that the defendant knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child. *Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358.

**Failure to instruct** on the legal definition of "reckless disregard" as the applicable standard or criminal negligence was fundamental error. *State v. Mascarenas*, 2000-NMSC-017, 129 N.M. 230, 4 P.3d 1221.

**No specific intent to disregard one's obligations is involved in the concept of conscious disregard.** — The critical inquiry is whether defendants' acts or omissions, irrespective of whether they were knowingly committed, caused or permitted a child to be placed in a situation that may endanger the child's life or health or to be exposed to the inclemency of the weather, and a defendant acts recklessly within the meaning of § 30-6-1(D) NMSA 1978, when he or she disregards a substantial and justifiable risk of serious harm to the safety or health of a child. No specific intent to disregard one's obligations is involved in the concept of conscious disregard; the only intent involved is purposely engaging in conduct which implies a conscious disregard of one's obligations. *State v. Taylor*, 2021-NMCA-033, cert. granted.

**Sufficient evidence to support convictions for reckless child abuse.** — Where defendants, owners of a daycare, were each convicted of one count of reckless child abuse resulting in great bodily harm and one count of reckless child abuse resulting in death after failing to remove two one-year-old children under their supervision from a hot SUV following a trip to a park, resulting in the death of one child and life-threatening injuries to the other child, and where defendants argued that there was insufficient evidence to support their convictions for reckless child abuse because the state failed to show that the defendants acted with a reckless disregard for the safety of the victims, that they did not know they left the victims unattended in the SUV, and therefore, they did not knowingly act or fail to act, there was sufficient evidence to support defendants' convictions because defendants knew the victims were originally in the SUV, defendants created the risk by failing to take the victims out of the SUV, and defendants disregarded that risk by leaving them there. Moreover, defendants' conduct while caring for the victims on the day in question, failing to follow CYFD policies on which they had been trained and failing to follow their own internal accountability procedures, demonstrated a conscious disregard for the safety of the victims. *State v. Taylor*, 2021-NMCA-033, cert. granted.

**District court did not err in denying separate instruction on the definition of "reckless disregard."** — Where defendants, owners of a daycare, were each convicted of one count of reckless child abuse resulting in great bodily harm and one count of reckless child abuse resulting in death after failing to remove two one-year-old children under their supervision from a hot SUV following a trip to a park, resulting in the death of one child and life-threatening injuries to the other child, and where, at trial, defendants requested, in addition to the elements instruction, that the district court instruct the jury on the definition of reckless disregard as set forth in UJI 14-133 NMRA, the district court did not err in denying defendants' proposed jury instruction because the elements instruction, UJI 14-622 NMRA, already defined the mens rea necessary to convict defendants for reckless child abuse. *State v. Taylor*, 2021-NMCA-033, cert. granted.

**District court did not err in denying separate instruction on the definition of "accidental conduct."** — Where defendants, owners of a daycare, were each convicted of one count of reckless child abuse resulting in great bodily harm and one count of reckless child abuse resulting in death after failing to remove two one-year-old children under their supervision from a hot SUV following a trip to a park, resulting in the death of one child and life-threatening injuries to the other child, and where, at trial, defendants requested, in addition to the elements instruction, that the district court instruct the jury on the definition of "accidental conduct," claiming that the death of one child and the great bodily harm of the other child that occurred while in the care of defendants was accidental, the district court did not err in denying defendants' proposed instruction because the elements instructions tracked the language of the uniform jury instructions for reckless child abuse, UJI 14-615 NMRA and UJI 14-622 NMRA, and therefore accurately conveyed the law to the jury, making the proposed "accidental conduct" instruction unnecessary. *State v. Taylor*, 2021-NMCA-033, cert. granted.

**Penalty.** — The 2005 amendments to this section and their history show that the legislature intended the phrase "first degree felony resulting in the death of a child" to designate an entirely different level of noncapital offense — one that results in life in prison which is unusual, if not unprecedented, for an offense other than first degree murder. The result is a new level of offense and a new prison sentence that is at least 66% longer than the 18-year sentence for any other first degree felony. *Garcia v. State*, 2010-NMSC-023, 148 N.M. 414, 237 P.3d 716.

**Double jeopardy.** — Vehicular homicide is a lesser offense than child abuse resulting in death. *State v. Santillanes*, 2001-NMSC-018, 130 N.M. 464, 27 P.3d 456.

The child abuse statute is neither preempted by the reckless driving statute, specifically, nor by the Motor Vehicle Code, generally. *State v. Guilez*, 2000-NMSC-020, 129 N.M. 240, 4 P.3d 1231.

**Child abuse of fetus.** — Infliction of injuries to a fetus, which resulted in the death of a child, is insufficient to support a charge of child abuse resulting in death under Section 30-6-1 NMSA 1978. *State v. Mondragon*, 2008-NMCA-157, 145 N.M. 574, 203 P.3d 105.

**Any person construed.** — The statute for negligent child abuse resulting in death is not restricted to persons having a special relationship with the child, such as parent or guardian. It applied to defendant who was 18 years of age and who shot the victim, who was 14 years of age, and defendant's friend. *State v. Reed*, 2005-NMSC-031, 138 N.M. 365, 120 P.3d 447.

There is no reason to believe that the legislature intended that the protection of this section be limited only to the children of abusive parents. The defendant who drove a car whose occupants threw beer bottles and rammed a truck in which a child was riding may be guilty of child abuse. *State v. Lujan*, 1985-NMCA-111, 103 N.M. 667, 712 P.2d 13, cert. denied, 103 N.M. 740, 713 P.2d 556 (1986).



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**"Leaving" and "abandoning" defined.** — The New Mexico legislature intended "leaving" in 30-6-1(B) NMSA to create an independent theory of criminal culpability distinct from "abandoning". The definition of "leave" that is consistent with the intent of the legislation is to take leave of or withdraw oneself from, whether temporarily or permanently, and the definition of "abandon" that is consistent with the intent of the legislation is to forsake or desert in spite of an allegiance, duty, or responsibility, or withdraw one's protection, support, or help from. Section 30-6-1(B) NMSA 1978 criminalizes either intentionally leaving, even temporarily, or intentionally abandoning a child, but only under circumstances where doing so exposes the child to a risk of harm. *State v. Stephenson*, 2017-NMSC-002, *aff'g* 2015-NMCA-038.

**Insufficient evidence to support abandonment of a child.** — Where defendant was convicted of abandonment of a child resulting in great bodily harm, the evidence presented at trial that defendant locked her two-year-old child in his bedroom to go to sleep for the night, but that defendant remained in the apartment, and where the child was found the following morning pinned between the dresser and the crossbar of his toddler bed, was insufficient to prove that defendant intentionally left her child at a time and under circumstances when the child's well-being was at risk of harm. *State v. Stephenson*, 2017-NMSC-002, *aff'g* 2015-NMCA-038.

**Abandonment construed.** — To be convicted of criminal child abandonment, evidence of abandonment must demonstrate that a parent, guardian or custodian left the child without an intent to return. *State v. Stephenson*, 2015-NMCA-038, cert granted, 2015-NMCERT-001.

**Insufficient evidence of criminal child abandonment.** — Where parent locked a child in his bedroom and then ignored the child's cries from another room, and where there was no evidence that the parent intended to leave the child in his bedroom without an intent to return, there was insufficient evidence to support a conviction for criminal child abandonment. *State v. Stephenson*, 2015-NMCA-038, cert granted, 2015-NMCERT-001.

**Ordinary negligence not punishable.** — A conviction for child abuse by endangerment cannot be based on a mere possibility, however remote, that harm may result from a defendant's acts. The legislature intended to punish conduct that created a reasonable probability or possibility that a child will be endangered. The child abuse statute contains no indication that the legislature intended felony punishment to attach to ordinary negligent conduct. *State v. Massengill*, 2003-NMCA-024, 133 N.M. 263, 62 P.3d 354, cert. denied, 133 N.M. 126, 61 P.3d 835.

**Susceptibility of child.** — Although a child's susceptibility to harm is a factor a jury might consider when determining whether a defendant has committed child abuse, this factor alone is insufficient for a reviewing court to rule as a matter of law that defendant did not cause the child to be in a situation that might endanger his health. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the circumstances as a whole satisfied the essential elements of the crime of child abuse beyond a reasonable doubt. *State v. Jensen*, 2006-NMSC-045, 140 N.M. 416, 143 P.3d 178.

**Abuse of a child encompasses abuse by endangerment that results in emotional injury.** — The crime of child abuse by endangerment may be based on evidence of a truly significant risk of serious harm to a child's emotional health, just as when a child's physical health is endangered. *State v. Galindo*, 2018-NMSC-021.

Where defendant was convicted of child abuse not resulting in death or great bodily harm to his thirteen-year-old daughter (child), and where the state presented evidence that on the night defendant's infant daughter died, the child found defendant kneeling on the floor, holding the baby's "purple, bluish" body and calling the child to come and help him revive the baby, that defendant persisted in his frantic attempts to revive the baby, which included putting the baby's naked body in the kitchen sink and rubbing ice on her, performing CPR on her "very hard", biting her, splashing water on her in the shower and rubbing perfume on her body, and that defendant refused to let the child go get help from relatives who lived nearby, and where the child testified that the she felt shocked and scared, and that the baby's death made her feel "dead inside", defendant's conduct was sufficient to show that defendant exposed the child to a truly significant risk of serious emotional harm, because in light of the other evidence that defendant sexually assaulted and violently abused the baby, resulting in her death, defendant's conduct drew the child into the aftermath of defendant's crimes against the baby. The jury reasonably could have found that defendant endangered the child's emotional health by compelling her to witness and participate in the further abuse of the baby's lifeless body, as defendant tried to undo the effects of what he had already done to the baby. *State v. Galindo*, 2018-NMSC-021.

**Insufficient evidence of recklessly permitting child abuse.** — Where defendant was convicted of child abuse not resulting in death or great bodily harm to his thirteen-year-old daughter (child) based on three alternative theories of abuse, including intentionally causing the child to be placed in a situation that endangered her life or health, recklessly causing the child to be placed in a situation that endangered her life or health, and recklessly permitting the child to be placed in a situation that endangered her life or health, defendant's conviction for recklessly permitting the child to be placed in a situation that endangered her life or health was not supported by sufficient evidence, because there was no evidence that anyone other than defendant inflicted the abuse against the child, and "permitting" child abuse refers to the passive act of failing to prevent someone else, a third person, from inflicting the abuse. *State v. Galindo*, 2018-NMSC-021.

**Sufficient evidence of child abuse resulting in death.** — Where defendant was convicted of child abuse resulting in the death of his infant daughter, and where the state presented evidence that the baby died from blunt force trauma to her head, that the baby also suffered injuries to her groin area, and that the baby showed no signs of choking, and where defendant claimed that there was insufficient evidence that he acted intentionally and without justification because the evidence showed not that he meant to harm the baby, but that he was attempting to shock her into consciousness after he found her not breathing, the jury was free to reject defendant's version of events especially where there were inconsistencies between defendant's explanation of the baby's injuries and the medical evidence; the jury could have reasonably concluded that defendant acted intentionally and without justification. *State v. Galindo*, 2018-NMSC-021.

**Sufficient evidence of intentional child abuse.** — Where defendant admitted to police that she often lost her temper when her eight-month-old baby cried, admitted that she had bitten her baby, that she had shaken her baby, that she had hit the baby in the head, that she had thrown the baby on the bed causing the baby to hit her head against the wall, and that she had thrown the baby on the floor, and where the forensic pathologist testified that, based on the evidence of multiple bruises on the baby's face and head and evidence of bleeding around the baby's brain and inside the baby's eyes, the baby died from a fatal traumatic brain injury, defendant's conviction for intentional child abuse resulting in the death of a child was supported by substantial evidence. *State v. Cabezuela*, 2015-NMSC-016.

**Elements of intentional child abuse.** — Intentional child abuse under Section 30-6-1 NMSA 1978 occurs



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only when a defendant causes the abuse. It does not include the failure to act to prevent another from abusing the child. UJI 14-602 NMRA for intentionally causing child abuse is a misstatement of the relevant law when it includes the phrase "failure to act". *State v. Cabezuela*, 2011-NMSC-041, 150 N.M. 654, 265 P.3d 705.

Where the state only charged defendant with intentional child abuse resulting in death and the court instructed the jury that the state had to prove beyond a reasonable doubt that defendant's "actions or failure to act resulted in the death" of the child, the jury was improperly instructed as to the elements of intentional child abuse resulting in death, because the instruction included both intentional and negligent theories of child abuse. *State v. Cabezuela*, 2011-NMSC-041, 150 N.M. 654, 265 P.3d 705.

**Elements of intentional child abuse resulting in the death of a child under the age of twelve.** — Where the state charged defendant with intentional child abuse resulting in death of a child who was eight months old and the jury instruction required the jury to find that the child was under the age of eighteen, but did not require the jury to find that the child was under the age of twelve, the jury was improperly instructed as to the elements of intentional child abuse resulting in the death of a child under the age of twelve. *State v. Cabezuela*, 2011-NMSC-041, 150 N.M. 654, 265 P.3d 705.

**Elements instruction on intentional child abuse resulting in death did not result in fundamental error.** — Where defendant was convicted of intentional child abuse resulting in the death of a child less than twelve years of age, defendant's contention that the jury instructions improperly defined the intent element for the crime of intentional child abuse by endangerment was without merit, because the instructions given at defendant's trial required the jury to find that defendant acted intentionally when he caused the child to be placed in a situation that endangered her life or safety or caused the child to be tortured, cruelly confined, or cruelly punished. The elements instruction for intentional child abuse by endangerment was not incomplete or otherwise inconsistent with the law, nor was the jury instruction confusing or misleading under the circumstances of the case. *State v. Lucero*, 2017-NMSC-008.

**Proof required for conviction of child abuse by endangerment.** — A discernible risk of danger to a particular child or particular children is required to support a conviction of child abuse by endangerment and for a defendant to be criminally liable for child abuse by endangerment, the defendant must be aware of a particular danger to the identifiable child or children when engaging in the conduct that creates the risk of harm. *State v. Gonzales*, 2011-NMCA-081, 150 N.M. 494, 263 P.3d 271, cert. granted, 2011-NMCERT-008, 268 P.3d 513.

**Evidence of DWI was insufficient to support conviction of child abuse by endangerment.** — Where defendant, who was severely drunk, collided with a vehicle in which two children were riding in the back seat, killing one child and injuring the other child, and the state failed to prove that defendant was aware of the danger to the particular children who were the victims of defendant's drunk driving, the evidence was insufficient to convict defendant of negligent or intentional child abuse by endangerment. *State v. Gonzales*, 2011-NMCA-081, 150 N.M. 494, 263 P.3d 271, cert. granted, 2011-NMCERT-008, 268 P.3d 513.

**A moving DWI is a sufficient factual basis for a child abuse by endangerment conviction.** — The mere fact that a defendant was driving a vehicle in which a child was a passenger while defendant was intoxicated, standing alone, is sufficient as a matter of law to support a conviction of for child abuse by endangerment. *State v. Orquiz*, 2012-NMCA-080, 284 P.3d 418, cert. quashed, 2013-NMCERT-003.

Where defendant with driving a vehicle with defendant's nine-year-old child in the vehicle; defendant drove through an intersection without stopping at a stop sign and crashed into a ditch across the intersecting roadway; the child suffered minor injuries; defendant claimed the defendant could not stop the vehicle because the brakes failed; and defendant was convicted of driving while intoxicated, defendant's moving DWI alone was a sufficient factual basis for defendant's child abuse by endangerment conviction even if the DWI did not otherwise separately evince indicial of unsafe driving. *State v. Orquiz*, 2012-NMCA-080, 284 P.3d 418, cert. quashed, 2013-NMCERT-003.

**Evidence sufficient to support conviction for child endangerment.** — Where defendant claimed, in his trial on child endangerment, that the state failed to prove that defendant knew the victim was a child, evidence that defendant, during a home invasion, asked the fifteen-year-old victim, "Are your parents home?", was sufficient evidence for the jury to infer defendant's awareness that the person he would later hold at gunpoint was a child. *State v. Ramirez*, 2016-NMCA-072, cert. denied.

**Sufficient evidence of child abuse.** — Where, in defendant's trial for first-degree murder and child abuse, the jury heard evidence that defendant fired a gun at the victim nine times at point-blank range, that the victim was seated in the front passenger seat of his vehicle, and that the victim's three children were sitting in the back seats of the vehicle in immediate proximity to their father, and where the jury heard evidence that although the victim was shot nine times, only five of the bullets were found inside his body, that several of the bullets defendant fired traveled through the victim and continued onward, one of which traveled through the driver's-side window in the second row of seats of the vehicle and one of which was recovered from the inside roof of the vehicle, there was sufficient evidence to support the jury's determination that defendant placed the three children in a situation that endangered their lives and that defendant showed a reckless disregard for their safety and health. *State v. Ramirez*, 2018-NMSC-003.

**Corpus delicti rule.** — A defendant's extrajudicial statements may be used to establish the corpus delicti when the prosecution is able to demonstrate the trustworthiness of the confession and introduce some independent evidence of a criminal act. *State v. Wilson*, 2011-NMSC-001, 149 N.M. 273, 248 P.3d 315.

**Proof of corpus delicti.** — Where defendant was charged with first degree abuse of a child resulting in death; the child died without any physical signs of trauma; defendant confessed to suffocating the child with a blanket; the evidence confirmed the statements made by defendant in the confession; the evidence also showed that the child was in normal respiratory and cardiovascular health on the day prior to the child's death, the child had not been breathing before the child was taken to an emergency room even though there was no underlying medical condition that would kill the child, defendant made false statements to police and medical personnel about the child's medical record suggesting that defendant portrayed the child as chronically sick to cover up a crime, and the cause of death was consistent with a blockage to the mouth and nose, the corpus delicti of the crime was established because the evidence corroborated the trustworthiness of defendant's confession and independently showed that the child died from a criminal act. *State v. Wilson*, 2011-NMSC-001, 149 N.M. 273, 248 P.3d 315.

**Separate instructions on intentional and negligent child abuse were warranted.** — Where defendant, who was responsible for watching the child and who was frustrated and irritated by the child's crying, bundled the child in a blanket tighter than usual and put the child face down on a pillow in the crib; the child became ill, was



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taken to a hospital and died from an injury to the brain caused by lack of oxygen to the brain; defendant was indicted for both negligent and intentional child abuse resulting in great bodily harm; at the beginning of the trial, the state's theory was that defendant placed the child in a dangerous situation by swaddling the child tightly and leaving the child unattended; and during the trial, the state introduced the theory that defendant intentionally suffocated the child, defendant was entitled to separate jury instructions for negligent and intentional child abuse because the state's theories of how the harm to the child occurred were different and inconsistent. *State v. Consaul*, 2014-NMSC-030.

**When separate instructions are required to prove reckless or intentional child abuse.** — Jury instructions are to be read and considered as a whole and when so considered they are proper if they fairly and accurately state the applicable law; where a defendant is charged with both reckless and intentional child abuse resulting in the death of a child under twelve years of age, separate instructions for reckless and intentional child abuse are not necessary as long as the verdict forms make it clear which crime defendant was convicted of because the punishments are different for each crime. *State v. Montoya*, 2015-NMSC-010.

Where defendant was charged with both intentional and reckless child abuse, it was not reversible error where the elements of both intentional and reckless child abuse were contained in one instruction, when the instruction provided the definitions of reckless acts and intentional acts, and the special forms provided to the jury made it clear which crime defendant was convicted of: intentional child abuse resulting in the death of a child under twelve years of age. *State v. Montoya*, 2015-NMSC-010.

**Reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under twelve.** — The statutory elements of reckless child abuse resulting in the death of a child under twelve are a subset of the statutory elements of intentional child abuse resulting in the death of a child under twelve; the only distinction between the two crimes is the mens rea required, either intentional or reckless; one can commit child abuse recklessly without acting intentionally, but one cannot intentionally commit child abuse without consciously disregarding a substantial and unjustifiable risk. *State v. Montoya*, 2015-NMSC-010.

Where defendant was charged with both intentional and reckless child abuse, it was appropriate for the trial court to use a step-down instruction, instructing the jury that if they determined that defendant was guilty of child abuse resulting in death, they had to then determine whether defendant committed the crime intentionally or with reckless disregard, if the jury found that defendant committed the crime intentionally, then they were to complete the special verdict form and go no further, if they had reasonable doubt as to whether the crime was committed intentionally, they had to decide whether the crime was committed with reckless disregard, and if the jury could not find that the crime was committed intentionally or with reckless disregard, they were to find defendant not guilty of child abuse resulting in death. *State v. Montoya*, 2015-NMSC-010.

**Lesser-included offense of intentional child abuse resulting in the death of a child under twelve.** — Because reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under twelve, when a defendant is charged with intentional child abuse resulting in the death of a child under twelve, the defendant will be on notice to defend against both intentional and reckless child abuse resulting in the death of a child under twelve when the abuse results from the same conduct or course of conduct. *State v. Montoya*, 2015-NMSC-010.

Where defendant was charged with both intentional and reckless child abuse, it was appropriate for the trial court to use a step-down instruction providing the process by which the jury should consider each charge when both charges were based on the same course of conduct. *State v. Montoya*, 2015-NMSC-010.

**Sufficient evidence of intentional child abuse.** — Where the state presented evidence that the seventeen-month-old child was in good health prior to being left alone with defendant, the child's injuries could not have been accidental, and that defendant admitted hitting the child, there was sufficient evidence from which the jury could have found beyond a reasonable doubt that defendant committed intentional child abuse resulting in the death of a child under the age of twelve. *State v. Montoya*, 2015-NMSC-010.

**Instruction on lesser included offense not warranted.** — Where defendant was charged with child abuse resulting in the death of a child under twelve years of age; the state presented expert evidence that the child's death was caused by blunt force injuries to the child's head due to vigorous shaking of the child; and defendant requested an instruction on the lesser included offense of child abuse not resulting in death on the basis of defendant's admission that when defendant pulled the child's pants too hard, the child fell back on the child's head, the trial court did not abuse its discretion in refusing the lesser included instruction, because the incident to which defendant admitted did not rise to the level of criminally punishable conduct and there was insufficient evidence to support a conviction of child abuse not resulting in death. *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

**Substantial evidence.** — Where defendant left the defendant's child, who was two years of age, with defendant's friend while defendant went to work; the friend later asked defendant to return home and told defendant that the friend had picked the child up by the child's ears and had thrown the child into a bathtub; defendant saw physical symptoms, which suggested that the friend had caused serious injury to the child; defendant had previously witnessed the friend abuse the child; defendant stayed home with the child the next day, but returned to work on the third day leaving the child in the friend's care; the friend later asked defendant to return home; when defendant returned home, defendant found that the child was dead; and the evidence showed that the injury that resulted in the child's death occurred on the third day, there was sufficient evidence to support defendant's conviction of negligently permitting child abuse resulting in death. *State v. Vasquez*, 2010-NMCA-041, 148 N.M. 202, 232 P.3d 438, cert. denied, 2010-NMCERT-004, 148 N.M. 572, 240 P.3d 659.

**Sufficient evidence of child endangerment.** — Where defendant was driving with defendant's six-year-old child in the car; defendant smelled of alcohol and defendant's eyes were bloodshot and watery; defendant admitted to drinking at least five beers and some tequila prior to driving; and defendant admitted that defendant probably had too much alcohol to drive, the circumstantial evidence constituted substantial evidence that defendant acted with reckless disregard for the safety of defendant's child. *State v. Chavez*, 2009-NMCA-089, 146 N.M. 729, 214 P.3d 794, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

**Sufficient evidence of intentional child abuse.** — Where defendant did not dispute that the child died due to a blunt force injury to the head and that the cause of death was homicide; in two police interviews, defendant admitted harming the child on the day and night of the incident; and in a third police interview, defendant stated



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that defendant's friend harmed the child, there was sufficient evidence from which the jury could have found beyond a reasonable doubt that defendant intentionally abused the child and a retrial was not barred by double jeopardy. *State v. Cabezuela*, 2011-NMSC-041, 150 N.M. 654, 265 P.3d 705.

Where the defendant's three-year-old son was found by police officers naked with linear wounds on the child's back and stomach; the child was staying with the defendant at the time; the officers testified that the defendant was hostile and uncooperative; there were fifteen marks on the child's body extending from the child's lower to upper back; some of the marks wrapped around the child's abdomen; the defendant claimed that a dog caused the marks on the child's body; a doctor testified that the marks were consistent with child abuse, that the marks appeared to have been caused by the child being hit with a thin, flexible object, and that the marks were not consistent with dog scratches; and the officers retrieved various cords from the home that were consistent with the child's injuries, the evidence was sufficient to convict the defendant of intentional child abuse. *State v. Davis*, 2009-NMCA-067, 146 N.M. 550, 212 P.3d 438.

**Sufficient evidence.** — Circumstantial evidence that the child was in defendant's sole care for 56 minutes preceding defendant's discovering of the child's injuries; the child's injuries may have been inflicted minutes before the child began to display symptoms of the injury; once the child suffered the injuries, the child would have quickly become very sick; the child's injuries were acute, meaning that the injuries may have been inflicted seconds before they were discovered; and the child's skull fracture looked as if it had been inflicted a very short time prior to the child's death, there was sufficient evidence to support the finding that defendant caused the child's death. *State v. Jojola*, 2005-NMCA, 119; 138 N.M. 459, 122 P.3d 43, cert. quashed, 2006-NMCERT-010, 140 N.M. 674, 146 P.3d 809.

**Sufficient evidence of intentional child abuse by torture.** — Where a child victim testified that defendant, the child's foster father, used a stun gun on him more than twenty-four times, where pictures admitted at trial showed injuries to the child and where there was corroborating testimony from the child's sister and the investigating detective, a rational jury could have found defendant guilty beyond a reasonable doubt as the child's principal abuser on twenty-four counts of child abuse by torture, and where the child testified that defendant purchased the stun gun and gave it to his son, that the child was stunned by defendant's son approximately fifteen times, was stunned by defendant's other son approximately three times, that defendant was present during the assaults by one of the sons and would laugh in response, and where there was corroborating testimony from the child's sister, a rational jury could have found defendant guilty beyond a reasonable doubt as an accessory to child abuse inflicted by another. *State v. Vargas*, 2016-NMCA-038.

**Instruction based on the statutory presumption of child abuse by endangerment.** — Where the defendant was convicted of negligently permitting child abuse by endangerment after the defendant was arrested in a house where chemicals and equipment involved with methamphetamine production were found, and where the trial court, in addition to an instruction on the essential elements of child abuse by endangerment, instructed the jury, based on the presumption created by Section 30-6-1 NMSA 1978, that "Evidence that demonstrates that a child has been knowingly, intentionally or negligently allowed to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance may be deemed evidence of abuse of the child", the instruction was erroneous, because a reasonable juror could have concluded that he or she was not required to find the essential element of endangerment beyond a reasonable doubt. *State v. Trossman*, 2009-NMSC-034, 146 N.M. 462, 212 P.3d 350.

**A conviction of child abuse by endangerment** requires proof of the actual presence of a child when the dangerous situation occurred and the mere fact that a child normally resided in a home that contains chemicals and equipment used or intended for use in the manufacturing of a controlled substance is insufficient to support a conviction of child abuse by endangerment. *State v. Trossman*, 2009-NMSC-034, 146 N.M. 462, 212 P.3d 350.

**Evidence insufficient.** — Where the defendant was convicted of negligently permitting child abuse by endangerment after the defendant was arrested in a house where chemicals and equipment involved with methamphetamine production were found; there was evidence that the child resided in the house with the defendant; the child was not present in the house on the date the defendant was arrested; no methamphetamine was found in the house; and there was no evidence of specific dates when the child had been present in the house, of when the items that could be used to produce methamphetamine had been taken into the house, that any of the dangerous, legal, household chemicals in the house were stored in a manner that could endanger a child, of when or how often methamphetamine production had occurred in the house, or that the house was contaminated, the evidence was insufficient to support the defendant's conviction of child abuse by endangerment. *State v. Trossman*, 2009-NMSC-034, 146 N.M. 462, 212 P.3d 350.

**Endangerment by medical neglect.** — In the context of medical neglect, causing medical neglect and permitting medical neglect define identical criminal acts. *State v. Nichols*, 2016-NMSC-001, *rev'g* 2014-NMCA-040, 321 P.3d 937.

Where defendant, whose six-month-old baby died from a loss of blood associated with blunt abdominal trauma and a lacerated liver, was charged with both causing endangerment by medical neglect and permitting endangerment by medical neglect, and where the jury found defendant not guilty of causing medical neglect but guilty of permitting medical neglect, both of which imply passive involvement, the conflicting verdicts preclude any determination of which culpable act was the actual basis for the jury's conviction of defendant. Defendant's conviction for negligently permitting medical neglect of his son was reversed. *State v. Nichols*, 2016-NMSC-001, *rev'g* 2014-NMCA-040, 321 P.3d 937.

**Endangerment by "medical neglect" defined.** — "Medical neglect" is defined as the failure to provide medical, dental, or psychiatric care that is necessary to prevent or to treat serious physical or emotional injury or illness. *State v. Garcia*, 2021-NMSC-019.

**Insufficient evidence of causation in a case alleging intentional child abuse by endangerment through medical neglect.** — Where defendant was found guilty of intentional child abuse resulting in the death of a child under the age of twelve by endangerment through medical neglect, and where the state introduced evidence that the child, while under the care of defendant, suffered blunt force trauma and other injuries to his head that resulted in a lack of oxygen and blood to the brain, and that defendant, in order to avoid blame for the child's injuries, did not call 911 and instead took the child to the child's mother, but where the state's medical experts could not testify to a reasonable degree of medical certainty that the child would have lived with earlier medical intervention, there was insufficient evidence to prove beyond a reasonable doubt that defendant's failure to call 911 resulted in the child's death. Proof of causation in a criminal medical neglect case requires that the medical neglect be



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a factual, but-for cause of the child's death. *State v. Garcia*, 2021-NMSC-019.

**Insufficient evidence of conspiracy to commit child abuse.** — Where defendant was found guilty of conspiracy to commit intentional child abuse resulting in the death of a child under the age of twelve by endangerment through medical neglect, and where the state introduced evidence that the child, while under the care of defendant and defendant's wife, suffered blunt force trauma and other injuries to his head that resulted in a lack of oxygen and blood to the brain, and sought to prove that either defendant or his wife stood by while the baby was brutally beaten to death and did nothing or both defendant and his wife beat the child to death, there was insufficient evidence to support the conviction because no evidence was presented from which a jury could infer that defendant and his wife formed a mutually implied agreement to commit child abuse against the child. *State v. Garcia*, 2021-NMSC-019

**Insufficient evidence of reckless child abuse based on medical expert testimony.** — Where defendant, who was responsible for watching the child and who was frustrated and irritated by the child's crying, bundled the child in a blanket tighter than usual and put the child face down on a pillow in the crib; the child became ill, was taken to a hospital, and died from an injury to the brain caused by lack of oxygen to the brain; the state's theory was that defendant placed the child in a dangerous situation by swaddling the child tightly and leaving the child unattended; expert medical testimony provided the only evidence that the child may have been suffocated and that the child had not been injured by other, noncriminal causes; and the state's medical experts testified almost unanimously that the mere act of swaddling the child and placing the child face down on a pillow would not have caused the severe brain injuries they observed in the child, the state failed to prove causation and the charge of criminal recklessness completely failed for lack of substantial evidence. *State v. Consaul*, 2014-NMSC-030.

**Use of medical testimony alone to support a criminal conviction.** — Medical testimony to support causation in a criminal proceeding, as a matter of evidentiary foundation, should describe in detail the methodology utilized first to "rule-in" possible causes and then to "rule-out" all but one. Based on that process of elimination, described in detail to the jury, a doctor then should be able to offer an opinion on causation to a reasonable degree of medical probability which satisfies a minimum standard for admissibility. In a criminal trial, to meet a standard of proof beyond a reasonable doubt, prosecutors point to additional, non-opinion evidence, so that when considered cumulatively all the evidence is sufficient to support a verdict beyond a reasonable doubt. If, however, the prosecution is relying solely on medical opinion, it must go beyond the mere probable causation required for admissibility. The medical testimony should establish why the expert opinions are sufficient in themselves to establish guilt beyond a reasonable doubt. *State v. Consaul*, 2014-NMSC-030.

**Insufficient evidence of intentional child abuse based on medical testimony as to a "likely" cause.** — Where defendant, who was responsible for watching the child and who was frustrated and irritated by the child's crying, bundled the child in a blanket tighter than usual and put the child face down on a pillow in the crib; the child became ill, was taken to a hospital and died from an injury to the brain caused by lack of oxygen to the brain; the state's theory was that defendant intentionally suffocated the child; the expert medical testimony provided the only evidence that the child may have been suffocated and that the child had not been injured by other, noncriminal causes; and the state's medical experts testified that they suspected child abuse, that they could not rule out child abuse, and that they could not think of other explanations for the child's injuries, that child abuse was a likely cause, and that the child was likely suffocated, the evidence was insufficient to establish beyond a reasonable doubt that defendant intentionally suffocated the child. *State v. Consaul*, 2014-NMSC-030.

**Mens rea for intentional child abuse by endangerment.** — Where defendant was charged with intentional child abuse by endangerment, and where the state presented evidence at trial that defendant drove poorly while intoxicated, with her child strapped in a car seat, the evidence was insufficient to support the jury's verdict that defendant committed intentional child abuse by endangerment, because the mens rea for intentional child abuse by endangerment requires a conscious object to endanger a child, and no evidence was presented that it was defendant's conscious objective to endanger her child. *State v. Granillo*, 2016-NMCA-094, cert. denied.

**Insufficient evidence of child abuse based on DWI.** — Where police officers found defendant in the driver's seat of a van that was parked on a roadside; the van was not running; the keys were not in the ignition; both defendant and the passenger in the van were intoxicated and incapable of driving; the passenger's children were in the back seat; and the state did not rely on a theory of past driving, but on the theory that defendant might drive the van while impaired and place the children in a situation which endangered their lives and health, the evidence was insufficient to support defendant's conviction of child abuse. *State v. Cotton*, 2011-NMCA-096, 150 N.M. 585, 263 P.3d 925, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

**Evidence of endangerment based on filthy living conditions.** — When filthy living conditions provide the exclusive basis for charging the defendant with child endangerment, the state has the burden to identify the specific dangers posed by the living environment and to present evidence to support a finding that there is a substantial and foreseeable risk that such filthy living conditions endangered the child. *State v. Chavez*, 2009-NMSC-035, 146 N.M. 434, 211 P.3d 891, *rev'g* 2008-NMCA-126, 145 N.M. 11, 193 P.3d 558.

**Insufficient evidence of endangerment based on filthy living conditions.** — Where there was dirty laundry, dirty dishes, dirty diapers and mouse droppings throughout the defendant's house; the house contained dangerous features, such as a damaged ceiling, broken glass in the yard, nail-ridden debris from a collapsed shed, a gap in the floor boards on the front porch and household chemicals within reach of the children; open and broken dresser drawers were easily accessible to the children who could get inside and get stuck; closets were open and had piles of items inside that could fall on and injure a child; the shower and toilet were covered in mold; a razor was accessible to the children; rodent droppings were present throughout the house, including in cabinets where dishes and food were stored and on the dishes; no hot water from the tap was available, because the propane that fueled the water heater was empty and disconnected; the electric stove was available to heat water for washing, cooking and bathing; there was no evidence of drugs or alcohol in the house; the children were physically healthy and well-nourished; and there was no evidence connecting these conditions to a substantial and foreseeable risk of harm to the children, the evidence was insufficient to support a finding that the defendant's conduct created a substantial and foreseeable risk of harm to the children. *State v. Chavez*, 2009-NMSC-035, 146 N.M. 434, 211 P.3d 891, *rev'g* 2008-NMCA-126, 145 N.M. 11, 193 P.3d 558.

**Insufficient evidence of endangerment.** — Where defendant's neighbor found defendant's three-year-old child wandering around outside their apartment building at 2:00 a.m.; the child was crying and cold and wearing



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only a dirty diaper; the apartment was in a high-crime area and there was a busy parking lot, alley and street nearby; the door to defendant's apartment was ajar when the neighbor returned the child to the apartment; the neighbor found defendant asleep in the apartment; defendant was intoxicated; and the state produced no evidence that the child had been in a direct line of harm or exposed to anything more than a possibility of danger or that defendant's intoxication contributed to the child's wandering outside the apartment, the evidence was insufficient to support defendant's conviction for negligent child abuse by endangerment because the state failed to prove that the risk to the child was foreseeable and probable. *State v. Garcia*, 2014-NMCA-006, cert. granted, 2013-NMCERT-012.

Where defendant took the child to a tattoo parlor and signed a written consent to allow the child to have the child's tongue pierced without the knowledge, authorization or permission of the child's parent; the piercing was successful, but the child sustained serious injuries as a result of an accidental fall in the tattoo parlor; the child received penicillin during the course of treatment and it was discovered that the child was allergic to the drug; defendant lacked knowledge about tongue piercing and about the child's allergy to penicillin; defendant did not perform the piercing; and the owner of the tattoo parlor had sufficient knowledge and experience to perform the tongue piercing, the evidence was insufficient to support defendant's conviction of child abuse by endangerment because the evidence did not show that defendant's conduct created a substantial and foreseeable risk of serious harm to the child. *State v. Webb*, 2013-NMCA-027, 296 P.3d 1247, cert. denied, 2013-NMCERT-002.

Where the defendant placed the defendant's five-month-old child to sleep in a dresser drawer filled with blankets and padding because the child's bassinet had broken; the child died in the drawer; the autopsy listed the cause of death as inconclusive; and there was an absence of evidence in the record to indicate that the sleeping conditions presented anything more than a mere possibility of harm, the evidence failed to establish that the defendant created a substantial and foreseeable risk that the child would suffer a serious injury. *State v. Chavez*, 2009-NMSC-035, 146 N.M. 434, 211 P.3d 891, *rev'g* 2008-NMCA-126, 145 N.M. 11, 193 P.3d 558.

**Insufficient evidence of endangerment based on DWI.** — Where defendant was seated in the driver's seat of a vehicle with defendant's spouse in the middle, and defendant's four-year-old child on the passenger side of the vehicle; the vehicle was not running; defendant was holding the keys; open alcohol containers were on the floor and in the cup holders; defendant was intoxicated; defendant informed police officer that defendant was going to a local store; and defendant was convicted of DWI by actual physical control, there was insufficient evidence to support a conviction for felony child abuse by endangerment. *State v. Etsitty*, 2012-NMCA-012, 270 P.3d 1277, cert. denied, 2011-NMCERT-012.

**Sufficient evidence of child abuse.** — Where defendant fired two gunshots into a house in which a child, aged three weeks, was situated at the time of the shooting; the bullets found in the house matched those fired from defendant's handgun; and before the shooting, a witness told defendant that there was a newborn baby in the house, there was sufficient evidence to support defendant's conviction of negligent abuse of the child. *State v. Arrendondo*, 2012-NMSC-013, 278 P.3d 517.

**Sufficient evidence of child abuse by endangerment.** — Where five-year-old triplets and a 15-year-old child lived with defendant and defendant's spouse in a small house; the home was littered with cat urine and feces, trash, rotten food, dirty dishes and piles of dirty clothes; two loaded firearms with spare ammunition and magazines were in an open box on the floor in the master bedroom; the children played with toy guns, including a toy gun that was a Glock replica indistinguishable from a real gun; when police officers enter the home, defendant had glass pipes for smoking methamphetamine on defendant's person; defendant admitted that defendant and defendant's spouse had been using methamphetamine for three days and had not slept; and defendant admitted that defendant smoked methamphetamine when the children were home and left drug paraphernalia, including syringes, strewn about the master bedroom and the backyard, there was sufficient evidence to support defendant's conviction of negligent child abuse by endangerment. *State v. Schaaf*, 2013-NMCA-082.

Where the defendant lived in a trailer with his three small children and the mother of the children; the trailer had no gas utility and no alternative heating source or hot water; the trailer was infested with mice; the ceiling appeared ready to collapse; one window was missing, another was broken and glass shards were on the ground; the bathroom and shower were moldy; razors and chemicals were left where the children could access them; there was a trash pit at ground level outside the trailer that had flies and a pungent odor; open cans of solvent and cleaning fluid were on the porch; there were car parts, spray cans, matches and other objects that could be dangerous to children about the yard; the ramp leading to the trailer had a gap wide enough to injure a child; and the defendant sometimes left the children unattended in this environment, the defendant's conviction of child abuse by endangerment was supported by substantial evidence. *State v. Chavez*, 2008-NMCA-126, 145 N.M. 11, 193 P.3d 558, *rev'd*, 2009-NMSC-035, 146 N.M. 434, 211 P.3d 891.

**Sufficient evidence of child abuse resulting in death.** — Where the defendant put her child, who was sick with bronchitis, in a low youth-bed without rails on his back with a bottle and covered him with a blanket and placed an electric space heater on the floor within nine inches from the bed and left the child unattended all night and where the child rolled off the bed and was burned to death by the space heater, the evidence was sufficient to convict the defendant of negligent child abuse resulting in death. *State v. Chavez*, 2007-NMCA-162, 143 N.M. 126, 173 P.3d 48, cert. denied, 2007-NMCERT-011, 143 N.M. 155, 173 P.3d 762.

**"Endangered".** — Although the jury was not instructed on the definition of "endangered", when a common term is used, the jury may properly apply the common meaning of the term. *State v. Jensen*, 2005-NMCA-140, 138 N.M. 647, 124 P.3d 1186, *rev'd*, 2006-NMSC-045, 140 N.M. 416, 143 P.3d 178.

**Evidence insufficient.** — Where the state's case was nothing more than that the child abuse by endangerment statute criminalizes the filthy conditions of a noncontrolling caretaker's home continually made available to a 15-year old boy, and absent evidence showing the particular susceptibility to endangerment of a child who has reached 15 years of age, the evidence was not sufficient for a rational jury to conclude, from common experience beyond a reasonable doubt, that the situation was sufficiently precarious such that the child was on a reasonably sure path to harm's way with unfortunate health consequences reasonably likely to result. *State v. Jensen*, 2005-NMCA-140, 138 N.M. 647, 124 P.3d 1186, *rev'd*, 2006-NMSC-045, 140 N.M. 416, 143 P.3d 178.

**Evidence insufficient to convict of child abuse.** — In low-speed vehicle chase, where evidence showed that defendant was speeding, but then slowed to posted speed limit; that defendant lawfully went through intersections after he failed to stop for the police; that defendant failed to use a turn signal on one turn; that defendant slowed, but did not come to a complete stop at one stop



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sign; that defendant's automobile was drifting back and forth within its lane of travel; that there was no evidence that three children in the vehicle were unrestrained; that there was no evidence of the surrounding circumstances, such as the extent of defendant's abrupt swerve, traffic congestion or volume; and that defendant was acquitted of DWI, the evidence was insufficient to justify a finding that defendant showed a reckless disregard for the children in the automobile or exposed them to a substantial risk to their safety, to sustain a conviction of felony child abuse. *State v. Clemonts*, 2006-NMCA-031, 139 N.M. 147, 130 P.3d 208, cert. denied, 2006-NMCERT-003, 139 N.M. 352, 132 P.3d 1038.

**Reckless disregard.** — For negligent child abuse, one need only have reckless disregard to the consequences in the face of substantial and foreseeable danger. *State v. Schoonmaker*, 2005-NMCA-012, 136 N.M. 749, 105 P.3d 302, *rev'd on other grounds*, 2008-NMSC-010, 143 N.M. 373, 176 P.3d 1105.

**Evidence sufficient to convict of negligent abuse.** — Where the evidence established that prior to 3:20 p.m. on July 24, 2000, deceased child was a normal and healthy baby, and two hours later, after being in defendant's sole custody and care, he was not, and medical witnesses testified that deceased child suffered substantial, serious injuries that were consistent with shaken baby syndrome and that those injuries would manifest shortly after being violently shaken, and although defendant offered several innocent explanations, the consensus of the medical witnesses was that his explanations were medically unacceptable, and he also admitted shaking the child on two occasions, evidence is sufficient for the jury to convict defendant of criminally negligent child abuse. *State v. Schoonmaker*, 2005-NMCA-012, 136 N.M. 749, 105 P.3d 302, *rev'd on other grounds*, 2008-NMSC-010, 143 N.M. 373, 176 P.3d 1105.

**Endangerment.** — Because Subsection D(1) of this section proscribes conduct that may endanger the health, as well as the life, of a child, it was unnecessary for the state to show that an amount of marijuana accessible to the children could have been fatal. *State v. Graham*, 2005-NMSC-004, 137 N.M. 197, 109 P.3d 285.

It was within the jurors' experience to decide whether the amount of accessible marijuana in the apartment endangered the health of a three-year-old child and a one-year-old child who lived in the apartment. *State v. Graham*, 2005-NMSC-004, 137 N.M. 197, 109 P.3d 285.

**Double jeopardy not violated.** — Defendant's acquittal of intentional child abuse and subsequent prosecution for negligent child abuse did not violate the federal constitutional guarantee against double jeopardy. *State v. Schoonmaker*, 2005-NMCA-012, 136 N.M. 749, 105 P.3d 302, *rev'd on other grounds*, 2008-NMSC-010, 143 N.M. 373, 176 P.3d 1105.

**Double jeopardy violated.** — Defendant's convictions for second degree murder and child abuse resulting in death, for the death of defendant's child that resulted from the same conduct, violated the double jeopardy clause. *State v. Mann*, 2000-NMCA-088, 129 N.M. 600, 11 P.3d 564, *aff'd*, 2002-NMSC-001, 131 N.M. 459, 39 P.3d 124.

**Single continuous act.** — Where defendant drove while intoxicated with three children who were not restrained, defendant committed one continuous act and defendant was subject to only one charge and one punishment for child abuse. *State v. Castaneda*, 2001-NMCA-052, 130 N.M. 679, 30 P.3d 368, cert. denied, 130 N.M. 558, 28 P.3d 1099.

**Viable fetus not a child.** — Legislature did not intend for a viable fetus to be included within the statutory definition of a child for the purposes of the child abuse statute. State cannot prosecute a mother for child abuse when the mother uses cocaine during her pregnancy. *State v. Martinez*, 2006-NMCA-068, 139 N.M. 741, 137 P.3d 1195, cert. quashed, 2007-NMCERT-005, 141 N.M. 762, 161 P.3d 259.

**Section does not impose a mandatory minimum sentence for purposes of federal sentencing.** — Where defendant pleaded guilty in federal court to one count of second-degree child abuse, and where the district court imposed a forty-two month sentence, which both parties concede was based on a calculation error which resulted in a sentence longer than the court intended to impose, but where the government argued that the error was harmless because defendant was subject to a six-year minimum sentence under this section, the error was not harmless, because although a second-degree felony carries a basic sentence of nine years imprisonment, § 31-20-3 NMSA 1978, and a trial court may reduce a basic sentence upon a finding by the judge of any mitigating circumstances surrounding the offense or concerning the offender, § 31-18-15.1 NMSA 1978, but in no case shall the reduction in sentence exceed one-third of the basic sentence, a New Mexico trial court has discretion to vary the penalty for a crime by suspending part or all of the sentence. Thus, under the New Mexico sentencing scheme, defendant would not be required to serve a minimum of six years and may not be required to serve any period of incarceration or even to receive any sentence at all. *United States v. Jones*, 921 F.3d 932 (10th Cir. 2019).

**Law reviews.** — For note, "Criminal Law: Applying the General/Specific Statute Rule in New Mexico — State v. Santillanes," see 32 N.M.L. Rev. 313 (2002).

For note, "Criminal Law: The Child Abuse Statute Now Requires Criminal Negligence — Santillanes v. State," see 24 N.M.L. Rev. 477 (1994).

## 30-6-2. Abandonment of dependent.

Abandonment of dependent consists of a person having the ability and means to provide for his spouse or minor child's support and abandoning or failing to provide for the support of such dependent.

Whoever commits abandonment of dependent is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-6-2, enacted by Laws 1963, ch. 303, § 6-2; 1969, ch. 182, § 4; 1973, ch. 241, § 1; 1995, ch. 123, § 1.**

**Cross references.** — For enforcement of duty of support owed to spouse or minor children by the human services department, *see* 27-2-28 to 27-2-31 NMSA 1978.

For mutual obligation of support between husband and wife, *see* 40-2-1 NMSA 1978.

For Uniform Interstate Family Support Act, *see* Chapter 40, Article 6A NMSA 1978.

**The 1995 amendment,** effective July 1, 1995, in the first sentence, substituted "or" for "and" following "his spouse" and deleted "and thereby leaving such spouse or



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minor child dependent upon public support" following "of such dependent".

ANNOTATIONS

**Section not void for vagueness.** — This section conveys a definite warning of proscribed conduct; it is not unconstitutionally vague and does not violate due process. *State v. Villalpando*, 1974-NMCA-020, 86 N.M. 193, 521 P.2d 1034, cert. denied, 86 N.M. 189, 521 P.2d 1030.

**No unequal classification.** — Since the crime proscribed in this section is defined in terms of a defendant's actions, the contention of unequal classification of defendants allegedly (based on the actions of the victims in seeking or not seeking public support) has no factual basis. *State v. Villalpando*, 1974-NMCA-020, 86 N.M. 193, 521 P.2d 1034, cert. denied, 86 N.M. 189, 521 P.2d 1030.

**No affirmative action required of dependents.** — This statute contains no requirement that official action be taken to obtain public welfare benefits from the health and social services department (now the human services department) and hence the equal protection claim based on the concept that public welfare benefits must be sought by those abandoned in order to support a prosecution hereunder is without merit. *State v. Villalpando*, 1974-NMCA-020, 86 N.M. 193, 521 P.2d 1034, cert. denied, 86 N.M. 189, 521 P.2d 1030.

This statute is not written in terms of becoming dependent, but rather, refers to acts of a defendant which leave the victim dependent on public support. *State v. Villalpando*, 1974-NMCA-020, 86 N.M. 193, 521 P.2d 1034, cert. denied, 86 N.M. 189, 521 P.2d 1030.

**Both legitimate and illegitimate children are entitled to support** from their mothers and fathers. *Stringer v. Dudoich*, 1978-NMSC-071, 92 N.M. 98, 583 P.2d 462.

**Partial correction of social evil acceptable.** — Fact that this section fails to cover all abandonments and failures to support, by focusing only on those persons whose actions leave their dependents dependent on public support, does not violate the requirement of equal protection because the partial correction of the social evil in question has a rational relation to the object of the legislation. *State v. Villalpando*, 1974-NMCA-020, 86 N.M. 193, 521 P.2d 1034, cert. denied, 86 N.M. 189, 521 P.2d 1030.

**Standing to question constitutionality.** — Since defendant was charged only with abandoning his minor children, that offense applying equally to both men and women, his rights were not affected by statutory distinction formerly making it an offense for a man to abandon his wife, but not for a wife to abandon her husband, and accordingly his claims of unconstitutionality based on sex discrimination did not present an issue for decision. *State v. Villalpando*, 1974-NMCA-020, 86 N.M. 193, 521 P.2d 1034, cert. denied, 86 N.M. 189, 521 P.2d 1030.

**Social evil.** — Abandonment of or failure to support minor children is a social evil. *State v. Villalpando*, 1974-NMCA-020, 86 N.M. 193, 521 P.2d 1034, cert. denied, 86 N.M. 189, 521 P.2d 1030.

**Evidence sufficient.** — Where the record was replete with evidence that defendant abandoned his minor children without sufficient means of support, it amply supported conviction of abandonment under former 40-2-4, 1953 Comp., and obviated consideration of whether evidence must show that children were destitute when defendant left them. *State v. Seaton*, 1965-NMSC-123, 75 N.M. 511, 407 P.2d 354.

**Law reviews.** — For comment, "Artificial Insemination in New Mexico," see 10 Nat. Resources J. 353 (1970).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For comment, "Voluntary Sterilization in New Mexico: Who Must Consent?" see 7 N.M.L. Rev. 121 (1976-77).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 23 Am. Jur. 2d Desertion and Nonsupport §§ 1 to 23, 51 to 64.

Criminal responsibility of husband for abandonment or nonsupport of wife who refuses to live with him, 3 A.L.R. 107, 8 A.L.R. 1314.

Adultery of wife as affecting criminal charge of abandonment against husband, 17 A.L.R. 999.

Illegitimate child as within statute relating to duty to support child, 30 A.L.R. 1075.

Extent or character of support contemplated by statute making nonsupport of wife offense, 36 A.L.R. 866.

Power to make abandonment, desertion or nonsupport of wife or family criminal offense, 48 A.L.R. 1193.

Criminal liability of father for desertion of or failure to support child as affected by decree of divorce or separation, 73 A.L.R.2d 960.

41 C.J.S. Husband and Wife §§ 242 to 246; 67A C.J.S. Parent and Child § 165 to 167.

## 30-6-3. Contributing to delinquency of minor.

Contributing to the delinquency of a minor consists of any person committing any act or omitting the performance of any duty, which act or omission causes or tends to cause or encourage the delinquency of any person under the age of eighteen years.

Whoever commits contributing to the delinquency of a minor is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-6-3, enacted by Laws 1963, ch. 303, § 6-3; 1990, ch. 19, § 1.**

**The 1990 amendment,** effective July 1, 1990, substituted "the delinquency of a minor" for "delinquency of minor" in two places.

ANNOTATIONS

**Statute does not violate freedom of expression.** — The contributing to the delinquency of a minor statute does not violate the first amendment or Article II, Section 17 of the New Mexico Constitution. *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, cert. granted, 2012-NMCERT-012.

**Statute is not unconstitutionally overbroad.** — The contributing to the delinquency of a minor statute is not unconstitutionally overbroad under the first amendment. *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, cert. granted, 2012-NMCERT-012.

**Statute is not unconstitutionally vague.** — The contributing to the delinquency of a minor statute is not unconstitutionally vague in violation of due process. *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, cert. granted, 2012-NMCERT-012.

**Defendant's constitutional rights were not violated.** — Where defendant was convicted of contributing to the delinquency of a minor when defendant wrote



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a sexually explicit letter to the victim, defendant's conviction did not violate defendant's first amendment or New Mexico constitution freedom of expression rights because the conviction was premised on the effect of encouraging or tending to cause or encourage the victim's delinquency, not on the content of the letter, and Section 30-6-3 NMSA 1978 is content neutral, furthers an important and substantial governmental interest unrelated to suppression of free speech, is limited to circumstances that do not substantially burden more speech that necessary to further the interest of protecting children from delinquency, is not unconstitutionally overbroad under the first amendment, and is not void for vagueness in violation of defendant's due process rights. *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, cert. granted, 2012-NMCERT-012.

**General/specific rule did not apply.** — Where defendant, who was convicted of contributing to the delinquency of a minor when defendant wrote a sexually explicit letter to the victim, claimed that under the general/specific rule, the state was required to charge defendant under the sexually oriented materials statute, Section 30-37-2 NMSA 1978, rather than under Section 30-6-3 NMSA 1978; the general/specific rule states that if one statute deals with a subject in general and comprehensive terms and another statute addresses part of the same subject matter in a more specific manner, the latter controls; the contributing to the delinquency of a minor statute requires that the material encourage delinquency; and the sexually oriented materials statute only requires the knowing delivery of harmful materials to a minor, the general/specific rule did not apply because the statutory elements of the statutes were not the same and defendant's conviction did not violate the general/specific rule. *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, cert. granted, 2012-NMCERT-012.

**Double jeopardy.** — Where defendant served varieties of alcohol over a considerable period of time at his own home to invited minors, and personally interacted with the minors, intending and encouraging different minors to drink to intoxication he could be found guilty of multiple counts of contributing to the delinquency of a minor. *State v. Stone*, 2008-NMCA-062, 144 N.M. 78, 183 P.3d 963, cert. denied, 2008-NMCERT-003, 143 N.M. 682, 180 P.3d 1181.

**Jurisdiction.** — Insofar as the juvenile law formerly purported to confer "exclusive original jurisdiction" on juvenile courts over persons contributing to the delinquency of juveniles it was invalid since the constitution vests sole and exclusive jurisdiction for the trial of all felony cases in the district courts. *State v. McKinley*, 1949-NMSC-010, 53 N.M. 106, 202 P.2d 964.

**Contributing minor triable in district court.** — A minor, properly transferred from children's court to district court, may be tried and convicted of contributing to the delinquency of a minor under this section. *State v. Pitts*, 1986-NMSC-011, 103 N.M. 778, 714 P.2d 582.

**Infants have generally been favored class for special protection** in New Mexico; therefore, the legislature intended to make the commission of the act of contributing to the delinquency of a minor a crime without regard to intent. *State v. Gunter*, 1974-NMCA-132, 87 N.M. 71, 529 P.2d 297, cert. denied, 87 N.M. 48, 529 P.2d 274, and cert. denied, 421 U.S. 951, 95 S. Ct. 1686, 44 L. Ed. 2d 106 (1975).

**Acts of commission or omission.** — Any act of commission or omission causing or tending to cause juvenile delinquency as specifically defined came within the act. *State v. McKinley*, 1949-NMSC-010, 53 N.M. 106, 202 P.2d 964.

**Evidence that act causes delinquency.** — In order to prove the offense of contributing to the delinquency of a minor, the state does not need to prove that the defendant's acts had any particular effect on the victim; it is enough that his acts encourage the child to engage in delinquent behavior. *State v. Lucero*, 1994-NMCA-129, 118 N.M. 696, 884 P.2d 1175, cert. denied, 118 N.M. 731, 885 P.2d 1325.

**Defendant need not actually cause delinquency.** — The jury can convict if the defendant's act actually caused or encouraged the particular minor to commit a delinquent act or if the act only tends to cause or encourage delinquency generally. The "tends to cause or encourage" language refers to an objective view of the defendant's conduct. There is no requirement that the defendant actually cause delinquency. *State v. Trevino*, 1993-NMSC-067, 116 N.M. 528, 865 P.2d 1172.

**Tending to cause, encourage delinquency.** — Defendant's acts or omissions must have caused or tended to cause or encourage the delinquency of the juvenile. *State v. Grove*, 1971-NMCA-086, 82 N.M. 679, 486 P.2d 615.

**Sufficient evidence of contributing to the delinquency of a minor.** — Where defendant was charged with criminal sexual penetration of a minor and contributing to the delinquency of a minor, and where the state relied on testimony elicited from the victim that defendant pinned her to the floor, with her arms above her head and her legs under his, while defendant's son sat on the victim's chest and sexually assaulted her by putting his penis in her mouth, and that defendant's son was approximately fourteen years old, there was sufficient evidence to prove beyond a reasonable doubt that defendant caused or encouraged his son to engage in fellatio with the victim, and that doing so caused or encouraged the delinquency of defendant's son. *State v. Garcia*, 2019-NMCA-056, cert. denied.

**Tending to cause violation of law, or immorality.** — Defendant's acts must have tended to cause or encourage the prosecuting witness to violate the law of the state or to conduct himself in a manner injurious to his morals. *State v. Leyba*, 1969-NMCA-030, 80 N.M. 190, 453 P.2d 211, cert. denied, 80 N.M. 198, 453 P.2d 219.

**Causing disobedience of lawful command.** — In order to convict defendant of contributing to the delinquency of a minor for causing or encouraging the minor to refuse to obey the reasonable and lawful command or direction of the minor's parent, the state must prove that defendant knew or by the exercise of reasonable care should have known of such command or direction. *State v. Romero*, 2000-NMCA-029, 128 N.M. 806, 999 P.2d 1038.

**Habituality of juveniles' conduct not prerequisite to conviction of defendant.** — Defendant's contention that for his acts to be criminal hereunder they must tend to encourage "habitual" conduct on the part of the minor was unfounded, as the end result of defendant's acts, that is, whether they result in habitual conduct on the part of the juvenile, is not a prerequisite to the charge of contributing to the delinquency of a minor. *State v. Leyba*, 1969-NMCA-030, 80 N.M. 190, 453 P.2d 211, cert. denied, 80 N.M. 198, 453 P.2d 219.

**Multiple victims.** — Where defendant perpetrated distinct and separate acts with respect to each of seven juveniles, submission of separate elements instructions to the jury relating to each of the juveniles did not violate defendant's right against double jeopardy and his conviction on seven separate counts of contributing to the delinquency of a minor was justified along with his sentence to seven sentences. *State v. Barr*, 1999-NMCA-081, 127 N.M. 504, 984 P.2d 185.

**Criminal sexual contact of minor is separate offense.** — The legislature intended for the crimes of criminal sexual contact of a minor and contributing to the delinquency of a minor to be separate crimes, punishable separately even when unitary conduct violates both statutes. Therefore, convictions under both statutes do not violate double jeopardy principles. *State v. Trevino*, 1993-NMSC-067, 116 N.M. 528, 865 P.2d 1172.

**Indecent exposure is separate offense.** — An element of indecent exposure is that the defendant's acts



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take place in "public view"; there is no such element in contributing to delinquency of a minor, and the trial court's refusal to give the instruction as a lesser included offense was proper. *State v. Henderson*, 1993-NMSC-068, 116 N.M. 537, 865 P.2d 1181, *overruled in part on other grounds*, *State v. Meadors*, 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731; *State v. Hernandez*, 1999-NMCA-105, 127 N.M. 769, 987 P.2d 1156.

**Criminal sexual penetration is separate offense.** — Criminal sexual penetration of a minor requires proof of sexual penetration and contributing to delinquency of a minor requires proof that the defendant's act or omission contributed to the delinquency of a minor, and neither of those facts is required to prove the other. The legislature intended separate punishments for criminal sexual penetration of a minor and contributing to delinquency of a minor when the same conduct violates both statutes. *State v. Walker*, 1993-NMSC-069, 116 N.M. 546, 865 P.2d 1190.

**Sexually explicit letter.** — Where defendant, who was the biological parent of the victim, lived with the victim, the victim's mother, and the victim's sibling; on the day the offense occurred, defendant was alone in the house; the victim subsequently found a five page handwritten letter in the victim's underwear drawer that contained a story entitled "I Just a Fantasy Story"; the letter describing various sexual acts between the writer and the reader; the victim recognized the handwriting in the letter as defendant's handwriting; a handwriting analyst testified that the handwriting was defendant's handwriting; the content of the letter provided clues that defendant was the author; and the police found an envelope in the victim's parents' bedroom with the writing "I Just a fantasy" on it, the evidence was sufficient to support defendant's conviction of contributing to the delinquency of a minor. *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, cert. granted, 2012-NMCERT-012.

**Sufficiency of information.** — Information charging defendant with contributing to delinquency of minor did not fail to charge an offense even though it did not name the victim or allege particular acts. *State v. Roessler*, 1954-NMSC-017, 58 N.M. 102, 266 P.2d 351.

**Evidence sufficient.** — Where defendant, who was the spiritual leader of a religious group that lived together, was convicted of two counts of contributing to the delinquency of a minor based on an unclothed experience with two teenage children who were members of defendant's religious community; defendant claimed that the experiences were purely spiritual healing experiences; the teenage children each visited defendant alone and lay in bed naked with defendant; one child testified that defendant kissed the child on the breast; and the other child testified that while the child was unclothed and in bed next to the unclothed defendant, defendant put defendant's chest below the child's breast, defendant embraced the child by putting defendant's arm on the child's back as they lay on their sides, and defendant laid defendant's head and hand on the child's heart, there was sufficient evidence to support defendant's convictions of contributing to the delinquency of a minor. *State v. Bent*, 2013-NMCA-108, cert. denied, 2013-NMCERT-012.

Where defendant took the child to a tattoo parlor and signed a written consent to allow the child to have the child's tongue pierced without the knowledge, authorization or permission of the child's parent, there was sufficient evidence to support defendant's conviction of contributing to the delinquency of a minor because defendant's actions caused or encouraged the child to deceive the child's parent by obtaining the piercing without permission. *State v. Webb*, 2013-NMCA-027, 296 P.3d 1247, cert. denied, 2013-NMCERT-002.

Evidence that a 17 year old boy bought two cans of beer at defendant's place and drank one of them, that the girl from whom he purchased the beer took the money into the bedroom where defendant was in bed and handed it to her or placed it on the bed beside her, and that officer found four boys in defendant's living room with empty and open cans of beer in front of them, was sufficient to warrant a conviction hereunder. *State v. Ferguson*, 1967-NMSC-032, 77 N.M. 441, 423 P.2d 872.

Evidence was sufficient for conviction where it showed that defendant accompanied the victim and two other minors to a store to buy alcohol, that when they arrived at the store, defendant purchased alcohol, and that, once the group arrived back at the house where a party was underway, the victim carried the alcohol into the house and drank some of it. *State v. Perea*, 2001-NMCA-002, 130 N.M. 46, 16 P.3d 1105, *aff'd in part and vacated in part on other grounds*, *State v. Perea*, 2001-NMSC-026, 130 N.M. 732, 31 P.3d 1006.

Defendant's acts in indecently touching the private parts of a minor and talking indecently to him tended to cause or encourage his victim to violate former 40A-9-8, 1953 Comp., prohibiting indecent exposure, and also tended to cause or encourage him to conduct himself in a manner injurious to his morals. *State v. Leyba*, 1969-NMCA-030, 80 N.M. 190, 453 P.2d 211, cert. denied, 80 N.M. 198, 453 P.2d 219.

Evidence that defendant showed a men's magazine to a minor and told him to unbutton his pants was sufficient for the jury to find defendant guilty of contributing to the delinquency of a minor, even without evidence that defendant engaged in fellatio or had criminal sexual contact with the minor. *State v. Corbin*, 1991-NMCA-021, 111 N.M. 707, 809 P.2d 57, cert. denied, 111 N.M. 720, 809 P.2d 634.

**Sufficient evidence of contributing to the delinquency of a minor.** — Where defendant was charged with contributing to the delinquency of a minor (CDM), evidence that defendant had driven to Wal-Mart with the minor child and the two had discussed the child shoplifting with him, that defendant looked out to see if anyone was coming while the child shoplifted, and where a Wal-Mart asset protection associate testified that defendant and the child appeared to be working together and that she believed that defendant was assisting the child in picking out merchandise to steal, was sufficient to support defendant's conviction for CDM. *State v. Lozoya*, 2017-NMCA-052, cert. denied.

**Sufficient evidence to support conviction of contributing to the delinquency of a minor.** — Where defendant was convicted of human trafficking, promoting prostitution, accepting earnings from a prostitute, contributing to the delinquency of a minor, and conspiracy, defendant's conviction for contributing to the delinquency of a minor was supported by substantial evidence where the evidence presented at trial established that defendant instructed his co-conspirator to create an advertisement for the victim, a seventeen-year old girl, on a website commonly used to advertise prostitution services, explained to the victim that she would use the ad in order to exchange sex for money, and informed the victim when and where to meet people who responded to the ad. *State v. Jackson*, 2018-NMCA-066, cert. denied.

**Contributing to the delinquency of a minor does not require proof that the offender knew the age of the child.** — Where defendant was charged with contributing to the delinquency of a minor (CDM) for assisting a minor child in stealing bottles of alcohol from Wal-Mart, defendant's argument that failure to provide a knowledge-of-age element to the jury instruction constituted error was without merit, because CDM does not require proof that the offending adult know the age of the child to whose delinquency the adult contributed. *State v. Lozoya*, 2017-NMCA-052, cert. denied.

**Evidence insufficient.** — If from the evidence, it could be inferred that defendant was present when juvenile



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engaged in his admitted activities with marijuana, nevertheless there was no evidence that defendant had anything to do with these activities nor any evidence that defendant approved of them. In the absence of such evidence an inference that defendant was present when juvenile engaged in his marijuana activities was insufficient to sustain defendant's conviction for contributing to the delinquency of the juvenile. *State v. Grove*, 1971-NMCA-086, 82 N.M. 679, 486 P.2d 615.

**Jury instruction proper.** — Where time limitation was not an essential element of the offense of contributing to the delinquency of a minor and criminal sexual contact of a minor, no error was committed by the court's failure to instruct the jury on time limitations in connection with the charges at issue. *State v. Cawley*, 1990-NMSC-088, 110 N.M. 705, 799 P.2d 574.

**Trial court was not without jurisdiction to impose sentence** against defendant following his conviction some seven years earlier of contributing to delinquency of a minor child, at which time the court had deferred sentence until the "further order of the court." *State v. Sorrows*, 1957-NMSC-091, 63 N.M. 277, 317 P.2d 324.

**Sentencing discretion not abused.** — Where defendant pled guilty to contributing to delinquency of a minor, two counts of attempted rape being thereafter dismissed, it could not be said as a matter of law that the trial court abused its discretion by not adopting report of psychiatrist recommending probation or in not requesting diagnosis and recommendation from the department of corrections (now the criminal justice department) pursuant to Section 31-20-3 NMSA 1978. *State v. Hogan*, 1972-NMCA-037, 83 N.M. 608, 495 P.2d 388.

**Availability of psychiatric help in penitentiary.** — Where defendant convicted of contributing to delinquency of a minor asked court of appeals to take judicial notice that no psychiatric or psychological help was available for him at the penitentiary, but cited neither source nor reference for such a proposition and court found none in its search, assertion was not a matter for judicial notice. *State v. Hogan*, 1972-NMCA-037, 83 N.M. 608, 495 P.2d 388.

**Conviction allowed to stand.** — Since appellate court could only speculate as to why the jury acquitted defendant of assault, that acquittal, even though irreconcilable with conviction for contributing to delinquency of a minor by indecently touching his private parts, did not require the conviction to be set aside as a matter of law. *State v. Leyba*, 1969-NMCA-030, 80 N.M. 190, 453 P.2d 211, cert. denied, 80 N.M. 198, 453 P.2d 219.

**Law reviews.** — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 128 et seq.

Acts in connection with marriage of infant below marriageable age as contributing to delinquency, 68 A.L.R.2d 745.

Applicability of statute against contributing to the delinquency of children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 A.L.R.2d 874.

Criminal liability for contributing to delinquency of minor by sexually immoral acts as affected by fact that minor was married at time of acts charged, 84 A.L.R.2d 1254.

Criminal liability for contributing to delinquency of minor as affected by the fact that minor has not become a delinquent, 18 A.L.R.3d 824.

Mens rea or guilty intent as necessary element of offense of contributing to delinquency or dependency of minor, 31 A.L.R.3d 848.

Drugs: giving, selling or prescribing, dangerous drugs as contributing to the delinquency of a minor, 36 A.L.R.3d 1292.

43 C.J.S. Infants § 95.

## 30-6-4. Obstruction of reporting or investigation of child abuse or neglect.

Obstruction of reporting or investigation of child abuse or neglect consists of:

A. knowingly inhibiting, preventing, obstructing or intimidating another from reporting, pursuant to Section 32A-4-3 NMSA 1978, child abuse or neglect, including child sexual abuse; or

B. knowingly obstructing, delaying, interfering with or denying access to a law enforcement officer or child protective services social worker in the investigation of a report of child abuse or sexual abuse.

Whoever commits obstruction of reporting or investigation of child abuse or neglect is guilty of a misdemeanor.

**History: Laws 1989, ch. 287, § 1; 2014, ch. 10, § 1.**

**The 2014 amendment,** effective May 21, 2014, corrected an outdated reference in the NMSA 1978; and in Subsection A, after "Section", changed "32-1-15" to "32A-4-3".

# ARTICLE 6A

# Sexual Exploitation of Children

Sec.
30-6A-1. Short title.
30-6A-2. Definitions.
30-6A-3. Sexual exploitation of children.
30-6A-4. Sexual exploitation of children by prostitution.

## 30-6A-1. Short title.

Chapter 30, Article 6A NMSA 1978 may be cited as the "Sexual Exploitation of Children Act".



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**History: Laws 1984, ch. 92, § 1; 2015, ch. 13, § 1.**

**The 2015 amendment,** effective July 1, 2015, changed the statutory reference of the Sexual Exploitation of Children Act from "Sections 1 through 4 of this act" to "Chapter 30, Article 6A NMSA 1978".

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity and construction of 18 USCS §§ 371 and 2252(a) penalizing mailing or receiving, or conspiring to mail or receive, child pornography, 86 A.L.R. Fed. 359.

## 30-6A-2. Definitions.

As used in the Sexual Exploitation of Children Act:

A. "prohibited sexual act" means:

(1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex;

(2) bestiality;

(3) masturbation;

(4) sadomasochistic abuse for the purpose of sexual stimulation; or

(5) lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation;

B. "visual or print medium" means:

(1) any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer or electronically generated imagery; or

(2) any book, magazine or other form of publication or photographic reproduction containing or incorporating any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer generated or electronically generated imagery;

C. "performed publicly" means performed in a place that is open to or used by the public;

D. "manufacture" means the production, processing, copying by any means, printing, packaging or repackaging of any visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age; and

E. "obscene" means any material, when the content if taken as a whole:

(1) appeals to a prurient interest in sex, as determined by the average person applying contemporary community standards;

(2) portrays a prohibited sexual act in a patently offensive way; and

(3) lacks serious literary, artistic, political or scientific value.

**History: Laws 1984, ch. 92, § 2; 1993, ch. 116, § 1; 2001, ch. 2, § 1.**

**The 2001 amendment,** effective July 1, 2001, added Subsection E.

**The 1993 amendment,** effective June 18, 1993, in Subsection A(5), substituted "lewd and sexually explicit exhibition with a focus on" for "lewd exhibition of"; in Subsection B(1), substituted "computer diskette, videotape, videodisc or any computer or electronically generated imagery" for "videotape or videodisk"; in Subsection B(2), substituted "computer diskette, videotape, videodisc or any computer generated or electronically generated imagery" for "videotape or videodisk"; and in Subsection D, deleted "for pecuniary profit" following "repackaging" and substituted "eighteen" for "sixteen".

**ANNOTATIONS**

**Manufacture of prohibited images.** — The copying of digital pornographic images to a portable storage device creates a new digital copy of the prohibited image sufficient to constitute manufacturing. *State v. Smith*, 2009-NMCA-028, 145 N.M. 757, 204 P.3d 1267, cert. quashed, 2009-NMCERT-012, 147 N.M. 601, 227 P.3d 91.

**"Lewdness" – factors considered.** – Factors used to help determine whether a photograph involving a child is lewd include consideration of whether: (1) the focus is on the genital or pubic area; (2) the setting is sexually suggestive; (3) the child is depicted in an unnatural pose, or in inappropriate attire, considering the child's age; (4) the child is fully or partially clothed; (5) the depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) the depiction is designed to elicit a sexual response in the viewer. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668, *overruled in part*, *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105; *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

**"Sexually explicit exhibition".** – A "lewd and sexually explicit exhibition" means a visible display or readily discernable depiction of a child engaged in sexually provocative conduct; thus, to qualify, a photograph must be identifiable as hard-core child pornography, that is, it must display visible signs of sexual eroticism, rather than merely depict a naked child. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668, *overruled in part*, *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105; *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

**"Focus on the genitals or pubic area".** – Focus can be determined by photographic elements, such as design, composition, lighting, positioning, attire, and setting; in some instances the question of whether a photo



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focuses on the genitals or pubic area is apparent on the face of the photo and therefore can be dealt with as an undisputed fact – the photo either focuses on the area or it does not. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668, *overruled in part, State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105; *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

**"For the purpose of sexual stimulation".** – Under an objective standard, the central question is whether, based on the overall content of a photograph, a reasonable person could find the photograph was intended to elicit a sexual response; it is not a defendant's private reaction that transforms an innocent photo into a lewd exhibition, but rather the objectively ascertainable intended effect on the viewer. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Under an objective intent analysis, child pornography is not created and the Sexual Exploitation of Children Act is not violated simply because a person derives sexual enjoyment from otherwise innocent photographs; rather, the focus is on the harm to the child that flows from trespasses against the child's dignity when treated as a sexual object. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668, *overruled in part, State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105; *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

**"Patently offensive" – community tolerance standard adopted.** — Contemporary community standards should be judged by whether the average person or community would be tolerant of the materials in the possession of another, even though most members of the community might themselves be offended; community tolerance thus determines whether the material is patently offensive. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668, *overruled in part, State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105; *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

## 30-6A-3. Sexual exploitation of children.

A. It is unlawful for a person to intentionally possess any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age. A person who violates the provisions of this subsection is guilty of a fourth degree felony for sexual exploitation of children and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978. When a separate finding of fact made by a court or jury shows beyond a reasonable doubt that a child depicted in the visual or print medium is a child under the age of thirteen, the basic sentence shall be increased by one year, and the sentence imposed by this subsection shall be the first year served and shall not be suspended or deferred; provided that when the offender is a youthful offender, the sentence imposed by this subsection may be increased by one year.

B. The provisions of Subsection A of this section shall not apply to a depiction possessed by a child under the age of eighteen in which the depicted child is between the ages of fourteen and eighteen and the depicted child knowingly and voluntarily consented to the possession, and:

(1) the depicted child knowingly and voluntarily consented to the creation of the depiction; or

(2) the depicted child knowingly and voluntarily produced the depiction without coercion.

This subsection shall not prohibit prosecution nor create an immunity from prosecution for the possession of depictions that are the result of coercion.

C. It is unlawful for a person to intentionally distribute any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age. A person who violates the provisions of this subsection is guilty of a third degree felony for sexual exploitation of children and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

D. It is unlawful for a person to intentionally cause or permit a child under eighteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows, has reason to know or intends that the act may be recorded in any obscene visual or print medium or performed publicly. A person who violates the provisions of this subsection is guilty of a third degree felony for sexual exploitation of children and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978 unless the child is under the age of thirteen, in which event the person is guilty of a second degree felony for sexual exploitation of children and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.



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E. It is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age. A person who violates the provisions of this subsection is guilty of a second degree felony for sexual exploitation of children and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

F. It is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts a prohibited sexual act or simulation of such an act and if that person knows or has reason to know that a real child under eighteen years of age, who is not a participant, is depicted as a participant in that act. A person who violates the provisions of this subsection is guilty of a fourth degree felony.

G. It is unlawful for a person to intentionally distribute any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts a prohibited sexual act or simulation of such an act and if that person knows or has reason to know that a real child under eighteen years of age, who is not a participant, is depicted as a participant in that act. A person who violates the provisions of this subsection is guilty of a third degree felony.

H. The penalties provided for in this section shall be in addition to those set out in Section 30-9-11 NMSA 1978.

**History: Laws 1984, ch. 92, § 3; 1989, ch. 170, § 1; 1993, ch. 116, § 2; 2001, ch. 2, § 2; 2007, ch. 144, § 1; 2016, ch. 2, § 1.**

**Cross references.** — For the Sex Offender Registration and Notification Act, *see* Chapter 29, Article 11A NMSA 1978.

**The 2016 amendment,** effective February 25, 2016, increased the penalties for sexual exploitation of children offenses and exempted certain behavior from the offense of possession of prohibited material where the person possessing the material is a minor and the person depicted in the material is a minor between the ages of fourteen and eighteen and consented to the creation, production and possession of the material; in Subsection A, after "fourth degree felony", added the remainder of the subsection; added a new Subsection B and redesignated the succeeding subsections accordingly; in Subsection C, after "third degree felony", added the remainder of the subsection; in Subsection D, after "third degree felony", added "for sexual exploitation of children and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978", and after "second degree felony", added the remainder of the subsection; and in Subsection E, after "second degree felony", added the remainder of the subsection.

**The 2007 amendment,** effective July 1, 2007, added Subsections E and F and relettered former Subsection E as Subsection G.

**The 2001 amendment,** effective July 1, 2001, added Subsection A and renumbered the remaining subsections accordingly; in Subsection B, deleted "or posess with intent to distribute" following "intentionally distribute," and inserted "obscene" preceding "medium depicts"; throughout the section, inserted "obscene" preceding "visual or print medium"; and made stylistic changes.

**The 1993 amendment,** effective June 18, 1993, inserted "that person knows or has reason to know that" in the first sentence of Subsection A; and substituted "eighteen" for "sixteen" in the first sentence of Subsections A, B, and C.

**The 1989 amendment,** effective June 16, 1989, in Subsection A deleted "for pecuniary profit" following "possess with intent to distribute" in the first sentence, and substituted "third" for "fourth" in the second sentence; in Subsection B substituted "third" for "fourth" near the beginning of the second sentence and "second" for "third" near the end of that sentence; deleted former Subsection C, which read: "It is unlawful for any person to intentionally cause or permit a child under sixteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows or intends that the act be recorded in any visual or print medium made for the purpose of sale or other pecuniary profit. Any person who violates this subsection is guilty of a third degree felony, unless the child is under the age of thirteen, in which event the person is guilty of a second degree felony"; redesignated former Subsection D as present Subsection C, while substituting "second" for "third" in the second sentence therein; and added present Subsection D.

## ANNOTATIONS

**Vagueness.** — This section is not vague nor is the decision of Myers II, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105 an unforeseeable interpretation of the statute. *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

**Constitutional challenge to sexual exploitation of children statute.** — Where defendant was charged with two counts of manufacturing child pornography and one count of possession of child pornography, and where defendant claimed that, contrary to constitutional guarantees of equal protection and substantive due process, there is no rational basis for punishing him with second-degree manufacturing and fourth-degree possession for recording a sex act to which the minor participant legally consented, defendant's constitutional challenge was denied because defendant failed to address how this section treated differently groups that were similarly situated. *State v. Gwynne*, 2018-NMCA-033, cert. denied.

**Elements of the crime of sexual exploitation of children by manufacture.** — Although the plain language of this section does not provide any scienter requirement for the crime of sexual exploitation of children by manufacture, the crime of sexual exploitation of children by manufacture, like the crimes of sexual exploitation of children by possession and distribution, requires the state to prove scienter with respect to the content of the manufactured visual or print medium. The state must prove the defendant intentionally manufactured a visual or print medium, the medium depicts a prohibited sexual act or simulation of such an act, the defendant knew or had reason to know that the medium depicts a prohibited sexual act or simulation of such act, the defendant knew



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or had reason to know that one or more of the participants in that act is a child under eighteen years of age, and the depictions are obscene. *State v. Rael*, 2021-NMCA-040, cert. granted.

**Insufficient evidence to support defendant's conviction for possessing, distributing, and manufacturing sexual exploitation of children material.** — Where defendant was convicted of one count of sexual exploitation of children by possession, one count of sexual exploitation of children by distribution, and three counts of sexual exploitation of children by manufacture, there was insufficient evidence to support defendant's convictions where the state failed to prove beyond a reasonable doubt that defendant knew or had reason to know that the videos supporting his convictions contained sexual exploitation of children material. *State v. Rael*, 2021-NMCA-040, cert. granted.

**Sufficient evidence of manufacturing and possession of child pornography.** — Where defendant was charged with two counts of manufacturing child pornography and one count of possession of child pornography, there was sufficient evidence to support defendant's convictions for both manufacturing and possession of child pornography where the state presented evidence that defendant video-recorded himself and a sixteen-year-old girl engaging in sexual intercourse on two separate occasions and evidence that law enforcement seized from defendant's home a collection of child pornography separate and distinct from the videos of defendant and the minor. *State v. Gwynne*, 2018-NMCA-033, cert. denied.

**Lewdness standard.** — The state must apply both an objective standard for lewdness and a subjective standard for the statutory element of "for the purpose of sexual stimulation." No accused can be convicted under the Act merely for his own misguided subjective intent; the images must first satisfy the objective criteria for lewdness. *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

**Retroactive application of interpretation.** — The supreme court's opinion in *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105 was not an unforeseeable judicial enlargement of the Sexual Exploitation of Children Act such that defendant could not fairly have foreseen that defendant's conduct would be "lewd" within the meaning of the Act, the opinion applied retroactively to defendant's conduct, and the retroactive application of the opinion to defendant's conduct did not violate due process. *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13, *rev'g* 2010-NMCA-007, 147 N.M. 574, 226 P.3d 673.

**Retroactive application of statutory interpretation.** — Where, in 2004, defendant set up a video camera in a unisex bathroom adjacent to defendant's office for the purpose of recording females while they used the restroom; two of the females were minors at the time of recording; in 2004, the judicial interpretation of Subsection D of Section 30-6A-3 NMSA 1978 required the state to prove that the photographs were hard-core child pornography and applied an objective standard to determine whether defendant intended to manufacture the photographs for purposes of sexual stimulation; and in 2007, the New Mexico supreme court changed the statutory interpretation to require the state to prove that the photographs were child pornography, which the fact finder determines to be obscene, and applied a subjective standard to determine whether defendant manufactured the photographs for purposes of sexual stimulation, Subsection D of Section 30-6A-3 NMSA 1978, as interpreted by the New Mexico supreme court, was unconstitutionally vague as applied to defendant's conduct, because the New Mexico supreme court's interpretation of the statute was unforeseeable. *State v. Myers*, 2010-NMCA-007, 147 N.M. 574, 226 P.3d 673, cert. granted, 2010-NMCERT-001, *rev'd*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

**Manufacture of prohibited images.** — Where the defendant transferred pornographic images of children and infants from a computer to an external drive, the defendant manufactured the images. *State v. Smith*, 2009-NMCA-028, 145 N.M. 757, 204 P.3d 1267, cert. quashed, 2009-NMCERT-012, 147 N.M. 600, 227 P.3d 90.

**Lewd photographs.** — Where the defendant covertly videotaped minor female victims using the bathroom; the photographs depicted the victims unclothed from the waist down; the victim's pubic area was the focal point of the photographs; the victims appeared to be unaware that they were being photographed; and the photographs placed the viewer in the position of a voyeur, the photographs were lewd because they had a voyeuristic and deviant quality that rendered them sexual in nature. *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105, *rev'g in part State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554.

**Subjective standard adopted to determine intent.** — The court rejected the objective standard, which views challenged material from the perspective of an ordinary reasonable person, and adopted the subjective standard, which examines the criminal defendant's actual intent in distributing, possessing, or manufacturing images, as the proper standard by which to assess whether challenged material is manufactured for the purpose of sexual stimulation. In determining the defendant's intent, the trier of fact is not limited to the photographs but, rather, is permitted to consider extrinsic evidence of the defendant's intent, such as the circumstances under which the photographs were taken, the location where the photographs were found, and the presence or absence of other pornographic material. *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105, *rev'g in part State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554.

**Obscene photographs.** — Where the defendant covertly videotaped minor female victims using the bathroom and the photographs depicted the victims unclothed from the waist down; the photographs of the victims depicted a lewd and sexually explicit exhibition with a focus on the pubic area of the victims for the defendant's own sexual gratification, the photographs were obscene because they constituted child pornography. *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105, *rev'g in part State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554.

**Sufficient evidence of intentional possession of child pornography.** — Where defendant was charged with sexual exploitation of children, and at trial admitted that he searched for and intentionally downloaded numerous videos from the internet which contained child pornography, that he viewed the child pornography for "research purposes", and that he deleted videos of child pornography by moving them to his recycle bin on his computer, and where child pornography videos were found in defendant's recycle bin, there was sufficient evidence to permit a reasonable jury to conclude beyond a reasonable doubt that defendant intentionally possessed child pornography. *State v. Santos*, 2017-NMCA-075, cert. denied.

**Sufficient evidence of possession of child pornography.** — Where the state presented evidence that there were more than nine hundred downloads of suspected child pornography in a year to the IP address used by defendant's computer, most of which were determined to be images of child pornography, and where one investigator used peer-to-peer software to retrieve five images of child pornography from the shared folder of a single computer at the same IP address, and where officers executing a search of defendant's home discovered an external hard drive for defendant's computer on which investigators were able to retrieve fifty-two images of child pornography that had been



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deleted, a rational jury could reasonably infer that defendant had knowingly obtained, manipulated, stored, and shared the child pornography using his computer, and there was sufficient evidence for a rational jury to find beyond a reasonable doubt that defendant intentionally possessed child pornography. *State v. Adamo*, 2018-NMCA-013, cert. denied.

**Mens rea for intentional distribution of child pornography.** — General criminal intent, purposely doing an act which the law declares to be a crime, is sufficient to convict for intentional distribution of child pornography. *State v. Franco*, 2019-NMCA-057, cert. denied.

**Mens rea for intentional possession of child pornography and intentional manufacture of child pornography.** — General criminal intent, purposely doing an act which the law declares to be a crime, is the mens rea for intentional possession of child pornography and intentional manufacture of child pornography. *State v. Knight*, 2019-NMCA-060, cert. denied.

**Substantial evidence supported defendant's convictions for intentional distribution of child pornography.** — Where defendant was charged with eight counts of distribution of child pornography, and where, at trial, the state presented evidence that defendant downloaded a peer-to-peer, file-sharing network and acknowledged he was familiar with file-sharing networks, that for over five years defendant used such networks to access child pornography, that defendant used a network that required sharing in order to continue accessing files, that defendant kept files containing child pornography in his shared folder which were accessible to others on the network, and that defendant admitted that he was sharing, but denied that he was distributing child pornography, there was sufficient evidence to prove beyond a reasonable doubt that defendant committed distribution of child pornography with the requisite intent. *State v. Franco*, 2019-NMCA-057, cert. denied.

**Defendant's multiple convictions for distribution of child pornography violated double jeopardy.** — Where defendant was convicted of eight counts of distribution of child pornography based on evidence that defendant downloaded a peer-to-peer, file-sharing network and acknowledged he was familiar with file-sharing networks, that for over five years defendant used such networks to access child pornography, that defendant used a network that required sharing in order to continue accessing files, that defendant kept files containing child pornography in his shared folder, which were accessible to others on the network, defendant's multiple convictions for distribution of child pornography violated double jeopardy, because defendant's conduct in using the file-sharing network did not constitute separate acts of sufficient distinctness to warrant multiple units of prosecution for distribution of child pornography. *State v. Franco*, 2019-NMCA-057, cert. denied.

**Defendant's multiple convictions for intentional possession of child pornography violated double jeopardy.** — Where defendant was convicted of four counts of possession of child pornography, defendant could only be convicted of one count of possession of child pornography, because the unit of prosecution was ambiguous. *State v. Knight*, 2019-NMCA-060, cert. denied.

**Defendant's multiple convictions for manufacture of child pornography did not violate double jeopardy.** — Where defendant was convicted of ten counts of manufacture of child pornography, and where evidence showed that law enforcement officers found a computer in defendant's bedroom that contained ten separate videos containing child pornography, that the videos were contained on five different pieces of media; three videos on one DVD, one video on a second DVD, two videos on a third DVD, one video on a fourth DVD, and three videos on an external hard drive, double jeopardy did not require the counts to be merged, because each photograph the defendant copied of the child victims was a distinct violation of the statute. The unit of prosecution for the charges at issue is each copy of an electronic video file, no matter whether each file is copied individually or whether multiple files are copied in a batch. *State v. Knight*, 2019-NMCA-060, cert. denied.

**Substantial evidence supported defendant's convictions for intentional possession of child pornography.** — Where defendant was convicted of four counts of possession of child pornography, and where, at trial, the state presented evidence that when defendant's home was searched, law enforcement officers found a computer in his bedroom that contained four specific videos containing child pornography and that each of the file names identified contained the same child pornography search terms that defendant admitted to being familiar with, there was sufficient evidence to prove beyond a reasonable doubt that defendant committed possession of child pornography with the requisite intent. *State v. Knight*, 2019-NMCA-060, cert. denied.

**Substantial evidence supported defendant's convictions for intentional manufacture of child pornography.** — Where defendant was convicted of ten counts of manufacture of child pornography, and where, at trial, the state presented evidence that when defendant's home was searched, law enforcement officers found a computer in his bedroom that contained ten separate videos containing child pornography, that the videos were contained on five different pieces of media; three videos on one DVD, one video on a second DVD, two videos on a third DVD, one video on a fourth DVD, and three videos on an external hard drive, and that each of the videos identified contained the same child pornography search terms that defendant admitted to being familiar with, there was sufficient evidence to prove beyond a reasonable doubt that defendant committed manufacture of child pornography with the requisite intent. *State v. Knight*, 2019-NMCA-060, cert. denied.

**Jury instruction on possession of child pornography did not result in fundamental error.** — In defendant's trial for possession of child pornography, where the jury was instructed that it had to find that defendant had any obscene visual medium in his possession, was given an instruction on "possession" that conformed with UJI 14-130 NMRA, which requires the jury to find that defendant knew he had pornographic computer images, that he knew they were on his person or in his presence, and that he exercised control over them, and where the jury was instructed that it was required to find that defendant acted intentionally and that a person acts intentionally when he purposely does an act which the law declares to be a crime, there was no fundamental error in the jury instructions because the instructions fairly and correctly stated the applicable law and would not cause jury confusion or misdirection. *State v. Adamo*, 2018-NMCA-013, cert. denied.

**Scienter requirement in jury instructions.** — The scienter requirement in 30-6A-3(A) NMSA 1978, that a person "knows or has reason to know" that one or more of the participants depicted in the child pornography is under eighteen, is constitutionally sufficient, and therefore fundamental error did not occur because there was no basis to conclude that the jury was misled or confused by the instructions they received. *State v. Adamo*, 2018-NMCA-013, cert. denied.

**Failure to satisfy statutory elements.** — Where the defendant hid a video camera in a women's bathroom; the state relied on photographs taken from the videotape as demonstrative of what was on the videotapes; and the photographs showed the victims' pubic hair, the victims pulling up or pulling down their underwear, but did not show any external female genitalia, the photographs were



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not lewd, sexually explicit or inherently sexually suggestive and did not depict a prohibited sexual act and did not satisfy the statutory elements of the offense. *State v. Myers*, 2008-NMCA-047, 143 N.M. 710, 181 P.3d 702, *rev'd*, 2009-NMCA-016, 146 N.M. 128, 207 P.3d 1105.

**Unit of prosecution is not defined.** — The plain meaning of the language of Section 30-6A-3(A) NMSA 1978 as to the proper unit of prosecution is ambiguous and the history and purpose of the statute do not clarify the ambiguity. *State v. Olsson*, 2014-NMSC-012, *rev'g* 2008-NMCA-009, 143 N.M. 351,176 P.3d 340 and *State v. Ballard*, 2012-NMCA-043, 276 P.3d 976.

***Herron* factors are not applicable in possession cases.** — The factor analysis in *Herron v. State*, 1991-NMSC-012, 111 N.M. 357, 805 P.2d 624, to determine whether offenses are distinct is specifically tailored to a case where a defendant has direct contact with a victim and is not applicable in possession cases. The indicia of distinctness factors do not determine the unit of prosecution in possession of child pornography cases. *State v. Olsson*, 2014-NMSC-012, *rev'g* 2008-NMCA-009, 143 N.M. 351,176 P.3d 340 and *State v. Ballard*, 2012-NMCA-043, 276 P.3d 976.

**Rule of lenity applied.** — Where *Olsson* was charged with sixty counts of possession of child pornography based on photographs of minors found in three binders and three digital computer images; *Ballard* was charged with twenty-five counts of possession of child pornography based on twenty-five files that had been downloaded on five separate occasions and that consisted of eight files of video clips and seventeen files of still images; the statutory language of Section 30-6A-3(A) NMSA 1978 is ambiguous as to the unit of prosecution; and the factor analysis established in *Herron v. State*, 1991-NMSC-012, 111 N.M. 357, 805 P.2d 624, to determine whether offenses are distinct is not applicable in possession cases, the rule of lenity applied and *Olsson* and *Ballard* could each only be charged with one count of possession of child pornography. *State v. Olsson*, 2014-NMSC-012, *rev'g* 2008-NMCA-009, 143 N.M. 351,176 P.3d 340 and *State v. Ballard*, 2012-NMCA-043, 276 P.3d 976.

**Unit of prosecution.** — The unit of prosecution for Subsection D of Section 30-6A-3 NMSA 1978 is the production or copying of a single image of child pornography. *State v. Leeson*, 2011-NMCA-068, 149 N.M. 823, 255 P.3d 401, cert. denied, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

Where defendant's computer contained many pornographic images of children; the state charged defendant with twenty counts of sexual exploitation of children in violation of Subsection D of Section 30-6A-3 NMSA 1978; and defendant moved to have the twenty counts merged into one count on the ground that the multiple counts violated double jeopardy, each image of child pornography was a separate offense and double jeopardy did not require the counts to be merged. *State v. Leeson*, 2011-NMCA-068, 149 N.M. 823, 255 P.3d 401, cert. denied, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

Section 30-6A-3 NMSA 1978 does not clearly define the unit of prosecution for the sexual exploitation of children based on the possession of binders containing obscene photographs. *State v. Olsson*, 2008-NMCA-009, 143 N.M. 351, 176 P.3d 340, *rev'd*, 2014-NMSC-012.

**Unit of prosecution for possession of computer child pornography.** — The principal unit-of-prosecution focus in cases under Section 30-6A-3 NMSA 1978 is on the definition of "visual or print medium". Multiple images or victims depicted in the possessed medium cannot, under the definition of "visual or print medium" in Section 30-6A-2 NMSA 1978, be identified as the principal or sole distinguishing or distinctiveness factor in determining what constitutes "obscene visual or print medium" under Section 3-6A-3(A) NMSA 1978. *State v. Ballard*, 2012-NMCA-043, 276 P.3d 976, *rev'd*, *State v. Olsson*, 2014-NMSC-012.

Where defendant's computer contained twenty-five files, consisting of twenty-five separate images of child pornography that defendant had downloaded on five occasions, and defendant was convicted of twenty-five counts of sexual exploitation of children for possession of the illicit images, defendant was erroneously charged with and convicted on twenty-five counts because defendant's chargeable unlawful possession under Section 30-6A-3(B)(2) NMSA 1978 consisted of five separate and distinct downloads. *State v. Ballard*, 2012-NMCA-043, 276 P.3d 976, *rev'd*, *State v. Olsson*, 2014-NMSC-012.

**Unit of prosecution for distribution of computer child pornography.** — Where defendant possessed child pornography images in a shared file accessible on peer-to-peer software that third parties could download, defendant's acts did not have sufficient distinctness to justify multiple punishments, and defendant could only be charged with one count of distribution of child pornography, because his act of creating one distinct computer file containing multiple images of child pornography were not shown to be distinct with regard to any images placed in the shared file, no multiplicity of separate actions was alleged to have occurred, and no evidence was presented to establish that defendant personally sent any image to a third party. *State v. Sena*, 2016-NMCA-062, cert. granted.

**Corpus delicti of computer child pornography.** — Where defendant's computer hard drive contained twenty-five files consisting of twenty-five separate images of child pornography; the hard drive was not introduced into evidence; a copy of the hard drive burned on DVD discs was introduced into evidence; the state's expert, who did not create the DVDs, identified defendant's computer and hard drive from photographs the expert took and testified that the expert made a bit-for-bit copy of the hard drive, analyzed the copy and found child pornography on the hard drive; and the expert identified each file that was shown on the DVD and testified as to the name of the file when it was downloaded onto the hard drive, and that the images contained on the DVDs were the same images that the expert saw on the bit-for-bit copy of the hard drive, the trial court did not err in denying defendant's motion to dismiss for lack of corpus delicti. *State v. Ballard*, 2012-NMCA-043, 276 P.3d 976, *rev'd*, *State v. Olsson*, 2014-NMSC-012.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and application of statutes regulating sexual performance by child, 42 A.L.R.5th 291.

Admissibility of expert testimony as to criminal defendant's propensity toward sexual deviation, 42 A.L.R.4th 937.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

Validity, construction, and application of state statutes or ordinances regulating sexual performance by child, 42 A.L.R.5th 291.

Construction and application of United States Sentencing guideline § 2G2.1 et seq., pertaining to child pornography, 145 A.L.R. Fed. 481.

## 30-6A-4. Sexual exploitation of children by prostitution.

A. Any person knowingly receiving any pecuniary profit as a result of a child under the age of sixteen engaging in a prohibited sexual act with another is guilty of a second degree felony, unless the child is under the age of thirteen, in which event the person is guilty of a first degree felony.



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B. Any person knowingly hiring or offering to hire a child under the age of sixteen to engage in any prohibited sexual act is guilty of a second degree felony.

C. Any parent, legal guardian or person having custody or control of a child under sixteen years of age who knowingly permits that child to engage in or to assist any other person to engage in any prohibited sexual act or simulation of such an act for the purpose of producing any visual or print medium depicting such an act is guilty of a third degree felony.

**History: Laws 1984, ch. 92, § 4; 1989, ch. 170, § 2; 2015, ch. 13, § 2.**

**Cross references.** — For the Sex Offender Registration and Notification Act, *see* Chapter 29, Article 11A NMSA 1978.

For abandonment or abuse of child, *see* 30-6-1 NMSA 1978.

For enticement of child, *see* 30-9-1 NMSA 1978.

For criminal sexual contact of a minor, *see* 30-9-13 NMSA 1978.

For sentencing for noncapital felonies, *see* 31-18-15 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, amended the Sexual Exploitation of Children Act by revising the age limitation so that knowingly hiring or offering to hire a child under the age of sixteen to engage in any prohibited sexual act is a second degree felony; deleted former Subsection B, which made it a second degree felony to hire or offer to hire a child over the age of thirteen and under the age of sixteen to engage in any prohibited sexual act; and added new Subsection B making it a second degree felony to knowingly hire or offer to hire a child under the age of sixteen to engage in any prohibited sexual act.

**The 1989 amendment,** effective June 16, 1989, in Subsection A inserted "knowingly" near the beginning of the subsection, and substituted "second" for "third" near the middle of the subsection and "first" for "second" near the end of the subsection; substituted "second" for "third" near the end of Subsection B; and substituted "third" for "fourth" near the end of Subsection C.

# ARTICLE 7

# Weapons and Explosives

Sec.
30-7-1. "Carrying a deadly weapon".
30-7-2. Unlawful carrying of a deadly weapon.
30-7-2.1. Unlawful carrying of a deadly weapon on school premises.
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30-7-19. Possession of explosives.
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30-7-20. Facsimile or hoax bomb or explosive.
30-7-21. False report.
30-7-22. Interference with bomb or fire control.

## 30-7-1. "Carrying a deadly weapon".

"Carrying a deadly weapon" means being armed with a deadly weapon by having it on the person, or in close proximity thereto, so that the weapon is readily accessible for use.

**History: 1953 Comp., § 40A-7-1, enacted by Laws 1963, ch. 303, § 7-1.**

**Cross references.** — For definition of deadly weapon, *see* 30-1-12 NMSA 1978.

For possession of deadly weapon or explosive by prisoner, *see* 30-22-16 NMSA 1978.

### ANNOTATIONS

**Scope and factual determinations to be made by jury.** — "Carrying" does not a have a broader meaning in connection with the crime of carrying a weapon on school grounds than the general definition set forth in this section, and whether the defendant was carrying a weapon was a factual matter to be determined by the jury. *State v. Salazar*, 1997-NMCA-043, 123 N.M. 347, 940 P.2d 195.

**Loaded revolver** was a deadly weapon. *Territory v. Watson*, 1904-NMSC-030, 12 N.M. 419, 78 P. 504.

**Deadliness a jury question.** — Where instrument used in assault was not per se a deadly weapon under Laws 1887, ch. 30, whether it was so was ordinarily a question for jury to determine, considering its character and manner of use. *State v. Conwell*, 1932-NMSC-042, 36 N.M. 253, 13 P.2d 554.



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**Readily accessible.** — Evidence that a loaded gun was located in the trunk of the defendant's car where he could easily get at it was sufficient to show that it was readily accessible, and the evidence was thus sufficient to establish that the weapon was carried onto school premises in violation of 30-7-2.1 NMSA 1978. *State v. Salazar*, 1997-NMCA-043, 123 N.M. 347, 940 P.2d 195.

**Character of weapon used went only to aggravation of offense.** *Territory v. Armijo*, 1894-NMSC-011, 7 N.M. 571, 37 P. 1117; *Chacon v. Territory*, 1893-NMSC-024, 7 N.M. 241, 34 P. 448 ( decided under prior law).

**Omission in indictment to describe kind of knife was fatal,** as it was necessary to charge that the knife was one "with which dangerous cuts could be given, or with which dangerous thrusts can be inflicted." *Territory v. Armijo*, 1894-NMSC-011, 7 N.M. 571, 37 P. 1117 ( decided under prior law).

**Instructions.** — It is not error for the court in instructing the jury to define a deadly weapon in the terms of the statute. *State v. Dickens*, 1917-NMSC-041, 23 N.M. 26, 165 P. 850.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Weapons and Firearms §§ 7 to 19.

Firearm used as a bludgeon as a deadly weapon, 8 A.L.R. 1319.

Gun control laws, validity and construction of, 28 A.L.R.3d 845.

What constitutes "dangerous weapon" under statutes prohibiting the carrying of dangerous weapons in motor vehicle, 2 A.L.R.4th 1342.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

Validity of state gun control legislation under state constitutional provisions securing the right to bear arms, 86 A.L.R.4th 931.

94 C.J.S. Weapons §§ 3 to 23.

## 30-7-2. Unlawful carrying of a deadly weapon.

A. Unlawful carrying of a deadly weapon consists of carrying a concealed loaded firearm or any other type of deadly weapon anywhere, except in the following cases:

(1) in the person's residence or on real property belonging to him as owner, lessee, tenant or licensee;

(2) in a private automobile or other private means of conveyance, for lawful protection of the person's or another's person or property;

(3) by a peace officer in accordance with the policies of his law enforcement agency who is certified pursuant to the Law Enforcement Training Act [Chapter 29, Article 7 NMSA 1978];

(4) by a peace officer in accordance with the policies of his law enforcement agency who is employed on a temporary basis by that agency and who has successfully completed a course of firearms instruction prescribed by the New Mexico law enforcement academy or provided by a certified firearms instructor who is employed on a permanent basis by a law enforcement agency; or

(5) by a person in possession of a valid concealed handgun license issued to him by the department of public safety pursuant to the provisions of the Concealed Handgun Carry Act [Chapter 29, Article 19 NMSA 1978].

B. Nothing in this section shall be construed to prevent the carrying of any unloaded firearm.

C. Whoever commits unlawful carrying of a deadly weapon is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-7-2, enacted by Laws 1963, ch. 303, § 7-2; 1975, ch. 134, § 1; 1985, ch. 174, § 1; 2001, ch. 219, § 13.**

**Cross references.** — For right of people to bear nonconcealed arms, *see* N.M. Const., art. II, § 6.

For the department of public safety, *see* 9-19-4 NMSA 1978.

For right of sheriffs to carry concealed arms, *see* 4-41-10, 4-41-10.1 NMSA 1978.

For sentencing for misdemeanors, *see* 31-19-1 NMSA 1978.

**The 2001 amendment,** effective July 1, 2001, inserted Paragraph A(5).

**The 1985 amendment** substituted "in accordance with the policies of his law enforcement agency who is certified pursuant to the Law Enforcement Training Act; or" for "in the lawful discharge of his duties" in Subsection A(3) and added Subsection A(4).

### ANNOTATIONS

**Pocketknife.** — An ordinary pocketknife is not a per se deadly weapon, without regard to its actual or intended use. *State v. Nick R.*, 2009-NMSC-050, 147 N.M. 182, 218 P.3d 868.

**Intended use of weapon.** — Where the child worked in the child's father's furniture store; the father supplied all employees with pocketknives for opening boxes at work; one day at school, the child felt something in the child's pocket and pulled it out to look at it; and the object was a pocketknife the child had been using at work the day before when the child had been wearing the same pair of pants, the child was entitled to a jury determination of whether the child intended to carry the pocketknife as a deadly weapon. *State v. Nick R.*, 2009-NMSC-050, 147 N.M. 182, 218 P.3d 868.

**Constitutionality.** — This section does not violate equal protection on the basis that it impermissibly distinguishes between rich and poor, in that homeowners and vehicle owners may properly conceal weapons whereas poor people do not own a residence or vehicle in which to conceal a weapon. *State v. McDuffie*, 1987-NMCA-077, 106 N.M. 120, 739 P.2d 989.

**Legislative intent of Subsection A(2)** — The legislature, in enacting Subsection A(2) of this section, was aware



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of the inherent characteristics of firearms, but nevertheless concluded that lawfully carried firearms do not present an unreasonable risk of harm to persons in the vicinity of the firearm. *State v. Garcia*, 2004-NMCA-066, 135 N.M. 595, 92 P.3d 41, cert. granted, 135 N.M. 566, 92 P.3d 12, *rev'd on other grounds*, 2005-NMSC-017, 138 N.M. 1, 116 P.3d 72.

**When object "deadly weapon".** — Under this section, any object, even if manufactured for an innocent, nonviolent purpose, may be a deadly weapon, if it has a potential violent use and if, under the surrounding circumstances, the purpose of carrying the object was for use as a weapon. *State v. Blea*, 1983-NMCA-089, 100 N.M. 237, 668 P.2d 1114.

**Peace officers.** — None of the officers named in Laws 1891, ch. 63, § 3 (former 40-17-9, 1953 Comp.), providing when peace officers might carry weapons, had any more right to carry weapons than a private citizen, except when the same was done in the proper and necessary discharge of official duties. *Guyse v. Territory*, 1893-NMSC-022, 7 N.M. 228, 34 P. 295 (decided under prior law).

**Carrying arms while traveling.** — The word "travelers" in Laws 1887, ch. 30, § 9 (former 40-17-8, 1953 Comp.), providing that arms might be carried while traveling, did not include a ranch owner who made daily trips of less than ten miles to his ranch; nor could it have included one who had reached his objective before the homicide. *State v. Sedillo*, 1918-NMSC-105, 24 N.M. 549, 174 P. 985 (decided under prior law).

Fugitive from justice was not a "person traveling" under Laws 1887, ch. 30, § 9 (former 40-17-8, 1953 Comp.), and was therefore not permitted to carry arms. *State v. Starr*, 1917-NMSC-092, 24 N.M. 180, 173 P. 674, writ of error dismissed, 254 U.S. 611, 41 S. Ct. 61, 65 L. Ed. 437 (1920) (decided under prior law).

**Statute inapplicable to murder case.** — Statute pertaining to carrying weapon upon one's "landed estate" had no bearing in a murder case where accused pleaded self-defense, and testimony thereunder was properly excluded. *State v. Martinez*, 1929-NMSC-040, 34 N.M. 112, 278 P. 210.

**Exception added by Concealed Handgun Act.** — Under this section, the Concealed Handgun Carry Act does no more than add another exception to the general prohibition against carrying concealed weapons: carrying with a concealed handgun license. *State ex rel. New Mexico Voices for Children, Inc. v. Denko*, 2004-NMSC-011, 135 N.M. 439, 90 P.3d 458.

**Instruction properly refused in burglary case.** — Offense of unlawfully carrying a deadly weapon is neither a degree of burglary, nor the higher degree of aggravated burglary, and the trial court did not err in refusing to submit to the jury the offense of unlawfully carrying a deadly weapon as a lesser included offense. *State v. Andrada*, 1971-NMCA-033, 82 N.M. 543, 484 P.2d 763, cert. denied, 82 N.M. 534, 484 P.2d 754, and denial of post-conviction relief affirmed, 1971-NMCA-184, 83 N.M. 393, 492 P.2d 1010.

**Evidence of crime.** — Evidence tending to establish that defendant was armed with a loaded .38 caliber pistol concealed on his person was evidence tending to establish crime hereunder. *State v. Andrada*, 1971-NMCA-033, 82 N.M. 543, 484 P.2d 763, cert. denied, 82 N.M. 534, 484 P.2d 754, and denial of post-conviction relief affirmed, 1971-NMCA-184, 83 N.M. 393, 492 P.2d 1010.

**Probable cause to arrest.** — Sight of pistol in defendant's pocket gave arresting officer all the probable cause needed to make an arrest, regardless of whether the weapon later was found to be unloaded. *Ramirez v. Rodriguez*, 467 F.2d 822 (10th Cir. 1972), cert. denied, 410 U.S. 987, 93 S. Ct. 1518, 36 L. Ed. 2d 185 (1973).

There was probable cause to arrest the defendant for carrying a concealed weapon, where his belligerent behavior had led to a police officer's request to step out of his car and the officer was justified in performing a patdown search after seeing another weapon fall out of the vehicle when defendant opened the door. *United States v. Henning*, 906 F.2d 1392 (10th Cir. 1990), cert. denied, 498 U.S. 1069, 111 S. Ct. 789, 112 L. Ed. 2d 852 (1991).

**Reasonable grounds of belief.** — Where officer was told that man who assaulted deceased had gone into building where he subsequently found defendant wearing a coat which appeared to have bloodstains on the right sleeve, and he saw butt of a pistol protruding from defendant's pants pocket which had been concealed until the coat was opened, under the circumstances the officer had reasonable grounds to believe that defendant was unlawfully carrying a deadly weapon. *State v. Ramirez*, 1968-NMSC-148, 79 N.M. 475, 444 P.2d 986.

**Tort liability of parents.** — Absent knowledge on part of parent that child of 13 years was indiscreet or reckless in handling of firearms, mere keeping of a loaded gun on premises, and leaving the child there alone, did not make the parent liable for torts committed by the minor. *Lopez v. Chewiwie*, 1947-NMSC-061, 51 N.M. 421, 186 P.2d 512.

**No duty on "Saturday night special" manufacturers not to sell.** — In the area of firearm manufacture and sale, the New Mexico legislature, while imposing certain restrictions, has not seen fit to make such distribution per se unlawful and in the absence of any legislative action, or specific guidance from the New Mexico courts, the court held, in a case involving a "Saturday night special" used to kill plaintiff's husband, that it would not impose a "duty" upon manufacturers of firearms not to sell their products, merely because such products have the potential to be misused for purposes of criminal activity. *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771 (D.N.M. 1987), aff'd, 843 F.2d 406 (10th Cir. 1988).

**Demonstration of switchblade to jury held proper.** — Where a defendant was charged with unlawful possession of a switchblade, the trial court did not err in permitting a demonstration of how the knife worked. The issue for the jury in this case was how the knife could be opened. Therefore, the officer's demonstration was properly allowed over the objection made at trial. *State v. Riddall*, 1991-NMCA-033, 112 N.M. 78, 811 P.2d 576, cert. denied, 112 N.M. 21, 810 P.2d 1241.

**Sufficiency of evidence.** — Where a defendant was charged with carrying a concealed deadly weapon, the prosecution was not required to prove that the knife could actually be used to inflict great bodily harm; the prosecution needed to prove only that a butterfly knife was a switchblade. There was sufficient evidence that the knife carried by defendant was a switchblade as defined in 30-7-8 NMSA 1978. *State v. Riddall*, 1991-NMCA-033, 112 N.M. 78, 811 P.2d 576, cert. denied, 112 N.M. 21, 810 P.2d 1241.

**Applicability to school security force.** — Members of a security and patrol force composed of regular full-time employees of the Albuquerque public school system to guard school buildings and property could not be properly described as peace officers and must operate in compliance with the state statutes restricting possession and use of deadly weapons. 1969-70 Op. Att'y Gen. No. 70-87 (unofficial opinion issued to superintendent of Albuquerque public schools).

**Law reviews.** — For article, "The Right (?) to Keep and Bear Arms," see 27 N.M.L. Rev. 491 (1997).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Weapons and Firearms §§ 8 to 20.

Firearm used as bludgeon as a deadly weapon, 8 A.L.R. 1319.

Offense of carrying weapon on person as affected by place where defendant was at the time, 73 A.L.R. 839.

Forfeiture of property for unlawful use before trial of individual offender, 3 A.L.R.2d 738.

Offense of carrying concealed weapons as affected by manner of carrying or place of concealment, 43 A.L.R.2d 492.



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Scope and effect of exception in statute forbidding carrying of weapons, as to person on his own premises, 57 A.L.R.3d 938.

What constitutes "dangerous weapon" under statutes prohibiting the carrying of dangerous weapons in motor vehicle, 2 A.L.R.4th 1342.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

What constitutes a "bludgeon," "blackjack" or "billy" within meaning of criminal possession statute, 11 A.L.R.4th 1272.

Validity of state statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Propriety of imposing consecutive sentences upon convictions, under federal statutes, of unlawful receipt, transportation, or making and possession of same firearm, 55 A.L.R. Fed. 633.

What constitutes actual or constructive possession of unregistered or otherwise prohibited firearm in violation of 26 USCS § 5861, 133 A.L.R. Fed. 347.

94 C.J.S. Weapons §§ 3 to 23.

## 30-7-2.1. Unlawful carrying of a deadly weapon on school premises.

A. Unlawful carrying of a deadly weapon on school premises consists of carrying a deadly weapon on school premises except by:

(1) a peace officer;

(2) school security personnel;

(3) a student, instructor or other school-authorized personnel engaged in army, navy, marine corps or air force reserve officer training corps programs or state-authorized hunter safety training instruction;

(4) a person conducting or participating in a school-approved program, class or other activity involving the carrying of a deadly weapon; or

(5) a person older than nineteen years of age on school premises in a private automobile or other private means of conveyance, for lawful protection of the person's or another's person or property.

B. As used in this section, "school premises" means:

(1) the buildings and grounds, including playgrounds, playing fields and parking areas and any school bus of any public elementary, secondary, junior high or high school in or on which school or school-related activities are being operated under the supervision of a local school board; or

(2) any other public buildings or grounds, including playing fields and parking areas that are not public school property, in or on which public school-related and sanctioned activities are being performed.

C. Whoever commits unlawful carrying of a deadly weapon on school premises is guilty of a fourth degree felony.

**History: Laws 1987, ch. 232, § 1; 1989, ch. 285, § 1; 1994, ch. 17, § 1.**

**Cross references.** — For provision mandating adoption of student discipline policies pertaining to weapons in school, *see* 22-5-4.7 NMSA 1978.

**The 1994 amendment,** effective July 1, 1994, inserted "older than nineteen years of age" in Paragraph A(5); and, in Subsection B, divided the formerly undivided language into an introductory paragraph and Paragraph (1), added Paragraph (2) and, in Paragraph (1), deleted "on school grounds" following "bus" and added "or" at the end.

**The 1989 amendment,** effective June 16, 1989, substituted "fourth degree felony" for "misdemeanor" at the end of Subsection C.

ANNOTATIONS

**Scope and factual determinations to be made by jury.** — "Carrying" does not a have a broader meaning for purposes of this section than the general definition set forth in 30-7-1 NMSA 1978, and whether the defendant was carrying a weapon was a factual matter to be determined by the jury. *State v. Salazar*, 1997-NMCA-043, 123 N.M. 347, 940 P.2d 195.

**Readily accessible.** — Evidence that a loaded gun was located in the trunk of the defendant's car where he could easily get at it was sufficient to show that it was readily accessible, and the evidence was thus sufficient to establish that the weapon was carried onto school premises in violation of this section. *State v. Salazar*, 1997-NMCA-043, 123 N.M. 347, 940 P.2d 195.

## 30-7-2.2. Unlawful possession of a handgun by a person; exceptions; penalty.

A. Unlawful possession of a handgun by a person consists of a person knowingly having a handgun in the person's possession or knowingly transporting a handgun, except when the person is:



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(1) in attendance at a hunter's safety course or handgun safety course or participating in a lawful shooting activity;

(2) engaging in the use of a handgun for target shooting at an established range authorized by the governing body of the jurisdiction in which the range is located or in an area where the discharge of a handgun without legal justification is not prohibited by law;

(3) engaging in an organized competition involving the use of a handgun;

(4) participating in or practicing for a performance by an organization that has been granted exemption from federal income tax by the United States commissioner of internal revenue as an organization described in Section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended or renumbered;

(5) engaging in legal hunting or trapping activities;

(6) traveling, with an unloaded handgun in the person's possession, to or from an activity described in Paragraph (1), (2), (3), (4) or (5) of this subsection; or

(7) on real property under the control of the person's parent, grandparent or legal guardian and the person is being supervised by a parent, grandparent or legal guardian.

B. A person who commits unlawful possession of a handgun by a person is guilty of a misdemeanor.

C. As used in this section:

(1) "person" means an individual who is less than nineteen years old; and

(2) "handgun" means a loaded or unloaded pistol, revolver or firearm that will or is designed to or may readily be converted to expel a projectile by the action of an explosion and the barrel length of which, not including a revolving, detachable or magazine breech, does not exceed twelve inches.

**History: Laws 1994, ch. 22, § 2; 2022, ch. 56, § 25.**

**Cross references.** — For Section 501 of the federal Internal Revenue Code, *see* 26 U.S.C. § 501.

**The 2022 amendment,** effective May 18, 2022, clarified exceptions for unlawful possession of a handgun by a person; and in Subsection A, Paragraph A(1), after "handgun safety course", added "or participating in a lawful shooting activity", and in Paragraph A(5), added "engaging in".

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — What constitutes "constructive possession" of unregistered or otherwise prohibited weapon under state law, 88 A.L.R.5th 121.

What constitutes actual or constructive possession of unregistered or otherwise prohibited firearm in violation of 26 USCS § 5861, 133 A.L.R. Fed. 347.

## 30-7-2.3. Seizure and forfeiture of a handgun possessed or transported by a person in violation of unlawful possession of a handgun by a person.

A. A handgun is subject to seizure and forfeiture by a law enforcement agency when the handgun is possessed or transported by a person in violation of the offense of unlawful possession of a handgun by a person.

B. The provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of a handgun subject to forfeiture pursuant to Subsection A of this section.

**History: Laws 1994, ch. 22, § 3; 2002, ch. 4, § 12.**

**The 2002 amendment,** effective July 1, 2002, deleted former Subsections B through D, which contained standards and procedures for the forfeiture of handguns possessed or transported by persons in violation of the offense of unlawful possession of a handgun by a person; and added present Subsection B.

## 30-7-2.4. Unlawful carrying of a firearm on university premises; notice; penalty.

A. Unlawful carrying of a firearm on university premises consists of carrying a firearm on university premises except by:

(1) a peace officer;

(2) university security personnel;



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(3) a student, instructor or other university-authorized personnel who are engaged in army, navy, marine corps or air force reserve officer training corps programs or a state-authorized hunter safety training program;

(4) a person conducting or participating in a university-approved program, class or other activity involving the carrying of a firearm; or

(5) a person older than nineteen years of age on university premises in a private automobile or other private means of conveyance, for lawful protection of the person's or another's person or property.

B. A university shall conspicuously post notices on university premises that state that it is unlawful to carry a firearm on university premises.

C. As used in this section:

(1) "university" means a baccalaureate degree-granting post-secondary educational institution, a community college, a branch community college, a technical-vocational institute and an area vocational school; and

(2) "university premises" means:

(a) the buildings and grounds of a university, including playing fields and parking areas of a university, in or on which university or university-related activities are conducted; or

(b) any other public buildings or grounds, including playing fields and parking areas that are not university property, in or on which university-related and sanctioned activities are performed.

D. Whoever commits unlawful carrying of a firearm on university premises is guilty of a petty misdemeanor.

**History: Laws 2003, ch. 253, § 1.**

**Effective dates.** — Laws 2003, ch. 253, § 2 made the act effective on July 1, 2003.

## 30-7-3. Unlawful carrying of a firearm in licensed liquor establishments.

A. Unlawful carrying of a firearm in an establishment licensed to dispense alcoholic beverages consists of carrying a loaded or unloaded firearm on any premises licensed by the regulation and licensing department for the dispensing of alcoholic beverages except:

(1) by a law enforcement officer in the lawful discharge of the officer's duties;

(2) by a law enforcement officer who is certified pursuant to the Law Enforcement Training Act [Chapter 29, Article 7 NMSA 1978] acting in accordance with the policies of the officer's law enforcement agency;

(3) by the owner, lessee, tenant or operator of the licensed premises or the owner's, lessee's, tenant's or operator's agents, including privately employed security personnel during the performance of their duties;

(4) by a person carrying a concealed handgun who is in possession of a valid concealed handgun license for that gun pursuant to the Concealed Handgun Carry Act [Chapter 29, Article 19 NMSA 1978] on the premises of:

(a) a licensed establishment that does not sell alcoholic beverages for consumption on the premises; or

(b) a restaurant licensed to sell only beer and wine that derives no less than sixty percent of its annual gross receipts from the sale of food for consumption on the premises, unless the restaurant has a sign posted, in a conspicuous location at each public entrance, prohibiting the carrying of firearms, or the person is verbally instructed by the owner or manager that the carrying of a firearm is not permitted in the restaurant;

(5) by a person in that area of the licensed premises usually and primarily rented on a daily or short-term basis for sleeping or residential occupancy, including hotel or motel rooms;

(6) by a person on that area of a licensed premises primarily used for vehicular traffic or parking; or

(7) for the purpose of temporary display, provided that the firearm is:



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(a) made completely inoperative before it is carried onto the licensed premises and remains inoperative while it is on the licensed premises; and

(b) under the control of the licensee or an agent of the licensee while the firearm is on the licensed premises.

B. Whoever commits unlawful carrying of a firearm in an establishment licensed to dispense alcoholic beverages is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-7-2.1, enacted by Laws 1975, ch. 149, § 1; 1977, ch. 160, § 1; 1999, ch. 156, § 1; 2007, ch. 158, § 1; 2010, ch. 106, § 1.**

**The 2010 amendment,** effective July 1, 2010, in Subsection A(4), after "Concealed Handgun Carry Act", deleted "provided that the" and added "on the premises of;"; and added Subparagraph (b) of Paragraph (4) of Subsection A.

**The 2007 amendment**, effective July 1, 2007, added Paragraphs (2) and (4) of Subsection A.

**The 1999 amendment,** effective July 1, 1999, substituted "regulation and licensing department" for "department of alcoholic beverage control" in the introductory paragraph of Subsection A and added Subsection A(5).

ANNOTATIONS

**Purpose of statute is to protect innocent patrons** of businesses held out to the public as licensed liquor establishments. *State v. Soto*, 1980-NMSC-114, 95 N.M. 81, 619 P.2d 185.

**Purpose of statute.** — The purpose of the section is to protect innocent patrons of businesses which are licensed liquor establishments, and application during periods when liquor sales are prohibited by statute still serves the purpose of preventing or warding off the potential for harm from the mixture of alcohol and firearms. *State v. Lake*, 1996-NMCA-055, 121 N.M. 794, 918 P.2d 380, cert. denied, 121 N.M. 676, 916 P.2d 1343.

**State's prima facie case requires proof of licensing,** and is satisfied by the testimony of the owner of the bar and by a copy of the license. *State v. Soto*, 1980-NMSC-114, 95 N.M. 81, 619 P.2d 185.

**This section is constitutional,** as being within the police powers of the legislature, and is a valid regulation of a constitutional privilege. *State v. Dees*, 1983-NMCA-105, 100 N.M. 252, 669 P.2d 261.

**Constitutionality.** — This section is not overbroad or vague; it does not require proof that the defendant knew his act to be unlawful. Further the definition of licensed premises includes areas of the licensed premises besides those where the alcoholic beverages are displayed, and in the case at bar, the defendant knew his conduct violated the statute since the defendant had been repeatedly warned by store employees that bringing a firearm into the store was illegal. *State v. Lake*, 1996-NMCA-055, 121 N.M. 794, 918 P.2d 380, cert. denied, 121 N.M. 676, 916 P.2d 1343.

**Section applicable to any premises licensed for dispensing.** — This section does not refer to a particular type of license; it applies to any premises licensed for dispensing; it is not limited to a dispenser's license and it is to be read with 60-3-1 NMSA 1978 (now 60-3A-3 NMSA 1978). *State v. Montoya*, 1977-NMCA-134, 91 N.M. 262, 572 P.2d 1270.

**State of mind necessary for commission of the crime.** — The requisite mens rea element of this crime is that the possession be intentional; in other words, that the offender have actual knowledge of the possession. The jury needs only to find that the defendant acted intentionally and that he or she purposely did an act which the law declared to be a crime, whether or not the defendant knew the act to be unlawful. *State v. Powell*, 1993-NMCA-021, 115 N.M. 188, 848 P.2d 1115.

**General criminal intent.** — This section requires general criminal intent as to carrying of the firearm, but not as to the premises upon which the firearm is carried. *State v. Torres*, 2003-NMCA-101, 134 N.M. 194, 75 P.3d 410, cert. denied, 134 N.M. 179, 74 P.3d 1071.

**Evidence sufficient for conviction.** — To sustain the charge of unlawful carrying of a firearm in a licensed liquor establishment, the state was required to prove that defendant carried a loaded or unloaded firearm in an establishment licensed to dispense alcoholic beverages. Testimony that lounge displayed a license supports an inference that the license had not expired. Testimony that defendant carried a bag into the lounge which was later found to contain a handgun supports a reasonable inference is that it was the same one defendant carried in the lounge. *State v. Rivera*, 1993-NMCA-011, 115 N.M. 424, 853 P.2d 126, cert. denied, 115. N.M. 228, 849 P.2d 371.

**Mistake-of-fact defense.** — Because of the strict liability nature of the offense of unlawfully carrying a firearm into a licensed liquor establishment, the defendant was not entitled to raise a mistake-of-fact defense regarding the nature of the establishment. *State v. Torres*, 2003-NMCA-101, 134 N.M. 194, 75 P.3d 410, cert. denied, 134 N.M. 179, 74 P.3d 1071.

**Instructions.** — The listing of the persons excepted in Subsection A does not constitute an essential element of the offense and the failure to instruct on these exceptions is not jurisdictional and reversible error, especially when the defendant has not cited proof nor stated any facts to show that the exceptions apply to him. *State v. Roybal*, 1983-NMCA-085, 100 N.M. 155, 667 P.2d 462.

**Sale of firearms.** — The selling of firearms in a licensed liquor establishment would be unlawful pursuant to this section. 1977 Op. Att'y Gen. No. 77-23.

**Law reviews.** — For article, "The Right (?) to Keep and Bear Arms," see 27 N.M.L. Rev. 491 (1997).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Weapons and Firearms § 27.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

What constitutes actual or constructive possession of unregistered or otherwise prohibited firearm in violation of 26 USCS § 5861, 133 A.L.R. Fed. 347.

94 C.J.S. Weapons § 7.

## 30-7-4. Negligent use of a deadly weapon.

A. Negligent use of a deadly weapon consists of:

(1) discharging a firearm into any building or vehicle or so as to knowingly endanger a person or his property;

(2) carrying a firearm while under the influence of an intoxicant or narcotic;



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(3) endangering the safety of another by handling or using a firearm or other deadly weapon in a negligent manner; or

(4) discharging a firearm within one hundred fifty yards of a dwelling or building, not including abandoned or vacated buildings on public lands during hunting seasons, without the permission of the owner or lessees thereof.

B. The provisions of Paragraphs (1), (3) and (4) of Subsection A of this section shall not apply to a peace officer or other public employee who is required or authorized by law to carry or use a firearm in the course of his employment and who carries, handles, uses or discharges a firearm while lawfully engaged in carrying out the duties of his office or employment.

C. The exceptions from criminal liability provided for in Subsection B of this section shall not preclude or affect civil liability for the same conduct.

Whoever commits negligent use of a deadly weapon is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-7-3, enacted by Laws 1963, ch. 303, § 7-3; 1977, ch. 266, § 1; 1979, ch. 79, § 1; 1993, ch. 139, § 1.**

**Cross references.** — For authority of conservation officers to enforce these provisions under emergency circumstances, *see* 17-2-19 NMSA 1978.

**The 1993 amendment,** effective June 18, 1993, substituted "a dwelling or building, not including abandoned or vacated buildings on public lands during hunting seasons" for "an inhabited dwelling or building" in Subsection A(4) and inserted "of this section" in Subsection C.

ANNOTATIONS

**Subsection A(2) is not unconstitutionally vague.** A person of ordinary intelligence would understand what conduct is prohibited by the statute: having a firearm nearby, readily capable of being put into action or service, while under the influence of alcohol. The statute plainly does not require that the intoxicated person actually use or intend to use the firearm. *State v. Rivera*, 1993-NMCA-011, 115 N.M. 424, 853 P.2d 126, cert. denied, 115. N.M. 228, 849 P.2d 371.

**Constitutionality.** — Possession of firearms by intoxicated persons presents a clear danger to the public. The state constitution does not support a right to engage in this type of behavior. Therefore, the defendant's conviction for negligent use of a deadly weapon did not violate his right to bear arms under the state constitution, since there was evidence that he was intoxicated, he pointed the gun at another person, and he appeared to be loading the gun. *State v. Rivera*, 1993-NMCA-011, 115 N.M. 424, 853 P.2d 126, cert. denied, 115. N.M. 228, 849 P.2d 371.

**"Negligent" defined.** — "Negligent" means omitting to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. *State v. Grubbs*, 1973-NMCA-096, 85 N.M. 365, 512 P.2d 693, *overruled*, *Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358; *see State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209.

**Criminal negligence is not negligence referred to in Subsection C** (now Subsection A (3) of this section). *State v. Grubbs*, 1973-NMCA-096, 85 N.M. 365, 512 P.2d 693.

**Evidence of frame of mind.** — Evidence of conduct at and subsequent to commission of crime of unlawfully discharging a firearm in a settlement was competent to show frame of mind of defendant. *State v. Bustillos*, 1932-NMSC-004, 36 N.M. 30, 7 P.2d 296.

**Instruction required in homicide case.** — In homicide prosecution where one of defendant's theories was involuntary manslaughter, and record was replete with testimony that defendant was drunk while he rode around in automobile with deceased and witness holding and handling sawed-off shotgun, court's refusal to instruct the jury that negligent use of a weapon while under influence of an intoxicant was a petty misdemeanor left jury without a guide to determine whether this was a killing while in the commission of a misdemeanor, and was reversible error. *State v. Durham*, 1971-NMCA-168, 83 N.M. 350, 491 P.2d 1161.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Weapons and Firearms § 29.

Liability of private citizen or his employer for injury or damage to third person resulting from firing of shots at fleeing criminal, 29 A.L.R.4th 144.

Handgun manufacturer's or seller's liability for injuries caused to another by use of gun in committing crime, 44 A.L.R.4th 595.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

94 C.J.S. Weapons § 20.

## 30-7-5. Dangerous use of explosives.

Dangerous use of explosives consists of maliciously exploding, attempting to explode or placing any explosive with the intent to injure, intimidate or terrify another, or to damage another's property.

Whoever commits dangerous use of explosives is guilty of a third degree felony.

**History: 1953 Comp., § 40A-7-4, enacted by Laws 1963, ch. 303, § 7-4.**

ANNOTATIONS

**Lesser included offense.** — Under the facts of this case, the aggravated burglary offense could not be committed without also committing the crime of dangerous use of explosives; the explosives offense does not have an element not included in the burglary offense. The explosives offense was an offense included within the aggravated burglary offense. *State v. Jacobs*, 1985-NMCA-054, 102 N.M. 801, 701 P.2d 400.

**Merger with crime of arson.** — The crime of dangerous use of explosives merges into a conviction for arson. *State v. Rodriguez*, 1992-NMCA-035, 113 N.M. 767, 833 P.2d 244, cert. denied, 113 N.M. 636, 830 P.2d 553.



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**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Explosions and Explosives §§ 221 to 225. 35 C.J.S. Explosives §§ 12, 13.

## 30-7-6. Negligent use of explosives.

Negligent use of explosives consists of negligently exploding, attempting to explode or placing any explosive in such a manner as to result in injury to another or to property of another, or in the probability of such injury.

Whoever commits negligent use of explosives is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-7-5, enacted by Laws 1963, ch. 303, § 7-5.**

**Cross references.** — For excavation damage to pipelines and underground utility lines, *see* 62-14-1 NMSA 1978 et seq.

## 30-7-7. Unlawful sale, possession or transportation of explosives.

Unlawful sale, possession or transportation of explosives consists of:

A. knowingly selling or possessing any explosive or causing such explosive to be transported without having plainly marked in large letters in a conspicuous place on the box or package containing such explosive the name and explosive character thereof and the date of manufacture. For the purpose of this subsection, the term "explosive" is as defined in Section 2 of the Explosives Act [30-7-18 NMSA 1978], but shall not include:

(1) explosive materials in medicine and medicinal agents in the forms prescribed by the official United States pharmacopoeia or the national formulary;

(2) small arms ammunition and components thereof;

(3) commercially manufactured black powder in quantities not to exceed fifty pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches and friction primers intended to be used solely for sporting, recreational or cultural purposes as defined in Section 921(a)(16) [§ 921(a)(4)] of Title 18 of the United States Code, or in antique devices as exempted from the term "destructive device" in Section 921(a)(4) [§ 921(a)(16)] of Title 18 of the United States Code; or

(4) explosive materials transported in compliance with the regulations of the United States department of transportation and agencies thereof; or

B. knowingly transporting or taking any explosive upon or into any vehicle belonging to a common carrier transporting passengers. For the purpose of this subsection, the term "explosives" is as defined in Section 2 of the Explosives Act, but shall not include:

(1) explosive materials in medicines and medicinal agents in the forms prescribed by the official United States pharmacopoeia or the national formulary;

(2) small arms ammunition or components thereof; or

(3) explosive materials transported in compliance with the regulations of the United States department of transportation and agencies thereof.

Whoever commits unlawful sale, possession or transportation of explosives as set forth in Subsection A of this section is guilty of a petty misdemeanor.

Whoever commits unlawful transportation of explosives as set forth in Subsection B of this section is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-7-6, enacted by Laws 1963, ch. 303, § 7-6; 1981, ch. 246, § 7.**

**Cross references.** — For possession of deadly weapon or explosive by prisoner, *see* 30-22-16 NMSA 1978.

**Compiler's notes.** — The reference to 18 U.S.C. § 921(a)(16) in Subsection A(3) seems incorrect, as that section deals with antique devices. Section 921(a)(4) of 18 U.S.C. deals with devices used for sporting, recreational or cultural purposes.

The reference to 18 U.S.C. § 921(a)(4) in Subsection A(3) seems incorrect, as that section deals with the definition of "destructive devices." Section 921(a)(16) of 18 U.S.C. deals with antique devices.

**ANNOTATIONS**

**Applicability under former law.** — Under former 40-15-1 and 40-15-2, 1953 Comp., relating to marking of explosives and transporting same on passenger cars, no restrictions were pronounced which would be applicable to movement of explosives by individuals or agencies of the state government. 1957-58 Op. Att'y Gen. No. 57-42.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Explosions and Explosives §§ 228 to 233.

35 C.J.S. Explosives § 12.



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## 30-7-7.1. Unlawful sale of a firearm without a background check.

A. Unlawful sale of a firearm without a background check consists of the sale of a firearm without conducting a federal instant background check, subject to the following:

(1) if the buyer of a firearm is not a natural person, then each natural person who is authorized by the buyer to possess the firearm after the sale shall undergo a federal instant background check before taking possession of the firearm;

(2) a prospective firearm seller who does not hold a current and valid federal firearms license issued pursuant to 18 U.S.C. Section 923(a) shall arrange for a person who does hold that license to conduct the federal instant background check. A federal firearms licensee shall not unreasonably refuse to perform a background check pursuant to this paragraph; and

(3) a person who holds a current and valid federal firearms license issued pursuant to 18 U.S.C. Section 923(a) may charge a fee not to exceed thirty-five dollars ($35.00) for conducting a background check pursuant to this section.

B. The provisions of Subsection A of this section do not apply to the sale of a firearm:

(1) by or to a person who holds a current and valid federal firearms license issued pursuant to 18 U.S.C. Section 923(a);

(2) to a law enforcement agency;

(3) between two law enforcement officers authorized to carry a firearm and certified pursuant to federal law or the Law Enforcement Training Act; or

(4) between immediate family members.

C. As used in this section:

(1) "consideration" means anything of value exchanged between the parties to a sale;

(2) "federal instant background check" means a background check that meets the requirements of 18 U.S.C. Section 922(t) and that does not indicate that a sale to the person receiving the firearm would violate 18 U.S.C. Section 922(g) or 18 U.S.C. Section 922(n) or state law;

(3) "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosion; the frame or receiver of any such weapon; or any firearm muffler or firearm silencer; and includes any handgun, rifle or shotgun; but shall not include an antique firearm as defined in 18 U.S.C. Section 921(16), a powder-actuated tool or other device designed to be used for construction purposes, an emergency flare or a firearm in permanently inoperable condition;

(4) "immediate family member" means a spouse, parent, child, sibling, grandparent, grandchild, great-grandchild, niece, nephew, first cousin, aunt or uncle; and

(5) "sale" means the delivery or passing of ownership, possession or control of a firearm for a fee or other consideration, but does not include temporary possession or control of a firearm provided to a customer by the proprietor of a licensed business in the conduct of that business.

D. Each party to an unlawful sale in violation of this section may be separately charged for the same sale.

E. Each firearm sold contrary to the provisions of this section constitutes a separate offense under Subsection A of this section.

F. Two or more offenses may be charged in the same complaint, information or indictment and shall be punished as separate offenses.

G. Whoever violates the provisions of this section is guilty of a misdemeanor.

**History: Laws 2019, ch. 45, § 1.**

**Effective dates.** — Laws 2019, ch. 45, § 2 made Laws 2019, ch. 45, § 1 effective July 1, 2019.

## 30-7-8. Unlawful possession of switchblades.

Unlawful possession of switchblades consists of any person, either manufacturing, causing to be manufactured, possessing, displaying, offering, selling, lending, giving away or purchasing any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife, or any knife having a blade which opens or falls or is ejected into position by the force of gravity or by any outward or centrifugal thrust or movement.



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Whoever commits unlawful possession of switchblades is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-7-7, enacted by Laws 1963, ch. 303, § 7-7.**

ANNOTATIONS

**Constitutionality** — The terms of this section have specific meanings and can be defined unambiguously. Giving those words their ordinary meanings results in a reasonable and practical construction. Therefore, the statute is not void for vagueness. *State v. Riddall*, 1991-NMCA-033, 112 N.M. 78, 811 P.2d 576, cert. denied, 112 N.M. 21, 810 P.2d 1241.

**Constitutionality under the right to bear arms.** — The appropriate level of constitutional scrutiny in a right to bear arms challenge pursuant to N.M. Const., art. II, § 6, is intermediate scrutiny; to survive a challenge under intermediate scrutiny, the government must show that the statute is substantially related to an important government purpose. *State v. Murillo*, 2015-NMCA-046.

This section serves an important governmental purpose, to protect the public from the surprise use of a dangerous weapon utilized in large part for unlawful activity, and prohibiting the possession of switchblades is substantially related to this narrow, but important, purpose. *State v. Murillo*, 2015-NMCA-046.

**Constitutionality under substantive due process.** — Substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty; the appropriate level of scrutiny of a statute challenged under substantive due process grounds depends on the nature and importance of the individual interests asserted and the classifications created by the statute. *State v. Murillo*, 2015-NMCA-046.

Where defendant claimed that prohibiting the possession of switchblade knives violated his right to bear arms guaranteed under U.S. Const., amend. II, as applied to the states under the due process clause of U.S. Const., amend. XIV, the New Mexico court of appeals, applying intermediate scrutiny to this section, held that the statute is not repugnant to the right to bear arms under a federal standard and that defendant's federal substantive due process challenge fails. *State v. Murillo*, 2015-NMCA-046.

**"Butterfly knife" included within the term "switchblade".** — In determining whether a "butterfly knife" constitutes a switchblade, it is of no legal significance that a combination of gravity and centrifugal force is required. The phrase "any outward or centrifugal thrust or movement" suggests a legislative intent to include knives that require a combination of forces to operate. In this case, the words used and the intended purpose of the provision in which the words are contained indicate that the legislature intended to include a "butterfly knife" within the term "switchblade knife". *State v. Riddall*, 1991-NMCA-033, 112 N.M. 78, 811 P.2d 576, cert. denied, 112 N.M. 21, 810 P.2d 1241.

**Demonstration of switchblade to jury held proper.** — Where a defendant was charged with unlawful possession of a switchblade, the trial court did not err in permitting a demonstration of how the knife worked. The issue for the jury in this case was how the knife could be opened. Therefore, the officer's demonstration was properly allowed over the objection made at trial. *State v. Riddall*, 1991-NMCA-033, 112 N.M. 78, 811 P.2d 576, cert. denied, 112 N.M. 21, 810 P.2d 1241.

**Sufficiency of evidence.** — Where a defendant was charged with carrying a concealed deadly weapon, the prosecution was not required to prove that the knife could actually be used to inflict great bodily harm; the prosecution needed to prove only that a butterfly knife was a switchblade. Thus there was sufficient evidence that the knife carried by defendant was a switchblade as defined in 30-7-8 NMSA 1978. *State v. Riddall*, 1991-NMCA-033, 112 N.M. 78, 811 P.2d 576, cert. denied, 112 N.M. 21, 810 P.2d 1241.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity of state statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

## 30-7-9. Repealed.

**Repeals.** — Laws 2012, ch. 45, § 1 repealed 30-7-9 NMSA 1978, as enacted by Laws 1969, ch. 122, § 1, relating to firearms sales and purchases, effective July 1, 2012.

For provisions of former section, *see* the 2011 NMSA 1978 on *NMOneSource.com*.

## 30-7-10. Short title.

Sections 30-7-10 through 30-7-15 NMSA 1978 may be cited as the "Bus Passenger Safety Act".

**History: Laws 1979, ch. 376, § 1.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

## 30-7-11. Definitions.

As used in the Bus Passenger Safety Act [30-7-10 through 30-7-15 NMSA 1978]:

A. "bus transportation company" or "company" means any person, groups of persons or corporation providing for-hire transportation to passengers or cargo by bus upon the highways in New Mexico. The term also includes buses owned or operated by or for local public bodies, school districts, municipalities and by public corporations, boards and commissions; and



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B. "bus" means any passenger bus, coach or other motor vehicle having a seating capacity of not less than fifteen passengers operated by a bus transportation company when used for the purpose of carrying passengers or cargo for hire.

**History: Laws 1979, ch. 376, § 2.**

## 30-7-12. Prohibitions; penalties.

A. It is unlawful to seize or exercise control of a bus by force or violence or by threat of force or violence. Whoever violates the provisions of this subsection is guilty of a third degree felony.

B. It is unlawful to intimidate, threaten or assault any driver, attendant, guard or passenger of a bus with the intent of seizing or exercising control of a bus. Whoever violates the provisions of this subsection is guilty of a fourth degree felony.

**History: Laws 1979, ch. 376, § 3.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity and construction of statute or ordinance specifically criminalizing passenger misconduct on public transportation, 78 A.L.R.4th 1127.

## 30-7-13. Carrying weapons prohibited.

A. It is unlawful for any person without prior approval from the company to board or attempt to board a bus while in possession of a firearm or other deadly weapon upon his person or effects and readily accessible to him while on the bus. Any person who violates the provisions of this subsection is guilty of a misdemeanor.

B. Subsection A of this section does not apply to duly elected or appointed law enforcement officers or commercial security personnel in the lawful discharge of their duties.

**History: Laws 1979, ch. 376, § 4.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity and construction of statute or ordinance specifically criminalizing passenger misconduct on public transportation, 78 A.L.R.4th 1127.

What constitutes actual or constructive possession of unregistered or otherwise prohibited firearm in violation of 26 USCS § 5861, 133 A.L.R. Fed. 347.

## 30-7-14. Weapon detection.

A bus transportation company may employ any reasonable means, including mechanical, electronic or x-ray devices to detect concealed weapons, explosives or other hazardous material in baggage or upon the person of a passenger. The company may take possession of any concealed weapon, explosive or other hazardous material discovered and shall turn such items over to law enforcement officers.

**History: Laws 1979, ch. 376, § 5.**

## 30-7-15. Weapons; transporting.

Any person wishing to transport a firearm or other deadly weapon on a bus may do so only in accordance with regulations established by the company; provided that any firearm or deadly weapon must be transported in a compartment which is not accessible to passengers while the bus is moving.

**History: Laws 1979, ch. 376, § 6.**



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## 30-7-16. Firearms or destructive devices; receipt, transportation or possession by certain persons; penalty.

A. It is unlawful for the following persons to receive, transport or possess a firearm or destructive device in this state:

(1) a felon;

(2) a person subject to an order of protection pursuant to Section 40-13-5 or 40-13A-5 NMSA 1978; or

(3) a person convicted of any of the following crimes:

(a) battery against a household member pursuant to Section 30-3-15 NMSA 1978;

(b) criminal damage to property of a household member pursuant to Section 30-3-18 NMSA 1978;

(c) a first offense of stalking pursuant to Section 30-3A-3 NMSA 1978; or

(d) a crime listed in 18 U.S.C. 921.

B. A felon found in possession of a firearm shall be guilty of a third degree felony.

C. A serious violent felon that is found to be in possession of a firearm shall be guilty of a third degree felony, and notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a basic term of six years imprisonment.

D. Any person subject to an order of protection pursuant to Section 40-13-5 or 40-13A-5 NMSA 1978 or convicted of a crime listed in Paragraph (3) of Subsection A of this section who receives, transports or possesses a firearm or destructive device is guilty of a misdemeanor.

E. As used in this section:

(1) except as provided in Paragraph (2) of this subsection, "destructive device" means:

(a) any explosive, incendiary or poison gas: 1) bomb; 2) grenade; 3) rocket having a propellant charge of more than four ounces; 4) missile having an explosive or incendiary charge of more than one-fourth ounce; 5) mine; or 6) similar device;

(b) any type of weapon by whatever name known that will, or that may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell that is generally recognized as particularly suitable for sporting purposes; or

(c) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in this paragraph and from which a destructive device may be readily assembled;

(2) the term "destructive device" does not include any device that is neither designed nor redesigned for use as a weapon or any device, although originally designed for use as a weapon, that is redesigned for use as a signaling, pyrotechnic, line throwing, safety or similar device;

(3) "felon" means a person convicted of a felony offense by a court of the United States or of any state or political subdivision thereof and:

(a) less than ten years have passed since the person completed serving a sentence or period of probation for the felony conviction, whichever is later;

(b) the person has not been pardoned for the felony conviction by the proper authority; and

(c) the person has not received a deferred sentence;

(4) "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosion or the frame or receiver of any such weapon; and

(5) "serious violent felon" means a person convicted of an offense enumerated in Subparagraphs (a) through (n) of Paragraph (4) of Subsection L of Section 33-2-34 NMSA 1978; provided that:

(a) less than ten years have passed since the person completed serving a sentence or a period of probation for the felony conviction, whichever is later;

(b) the person has not been pardoned for the felony conviction by the proper authority; and

(c) the person has not received a deferred sentence and completed the total term of deferment as provided in Section 31-20-9 NMSA 1978.



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**History: Laws 1981, ch. 225, § 1; 1987, ch. 202, § 1; 2001, ch. 89, § 1; 2018, ch. 74, § 4; 2019, ch. 253, § 1; 2020, ch. 54, § 2; 2022, ch. 56, § 26.**

**The 2022 amendment,** effective May 18, 2022, clarified the penalty for receipt, transportation or possession of a firearm or destructive device by a serious violent felon; in Subsection B, after "third degree felony", deleted "and shall be sentenced in accordance with the provisions of the Criminal Sentencing Act"; added a new Subsection C and redesignated former Subsections C and D as Subsections D and E, respectively; and in Subsection E, added Paragraph E(5).

**The 2020 amendment,** effective July 1, 2020, provided that the penalty for a felon in possession of a firearm or destructive device is a third degree felony; and in Subsection B, after "shall be guilty of a", deleted "fourth" and added "third", and after "Criminal Sentencing Act", deleted "provided that the violation of and the sentence imposed pursuant to this subsection shall be increased to a violation of and the sentence for a third degree felony if the person has previously been convicted of a capital felony or a serious violent offense provided in Paragraph (4) of Subsection L of Section 33-2-34 NMSA 1978".

**The 2019 amendment,** effective July 1, 2019, expanded the categories of persons who cannot receive, transport or possess a firearm, and revised the definition of "firearm" as used in this section; in the section heading, after "possession by", deleted "a felon" and added "certain persons"; in Subsection A, in the introductory clause, after "unlawful for", deleted "a felon" and added "the following persons", and added Paragraphs A(1) through A(3); in Subsection B, after the subsection designation, deleted "Any person violating the provisions of this section" and added "A felon found in possession of a firearm", and after "provided in", deleted "Subparagraphs (a) through (n) of"; added new Subsection C and redesignated former Subsection C as Subsection D; and in Subsection D, in Paragraph D(4), after "such weapon", deleted "or any firearm muffler or firearm silencer. 'Firearm' includes any handgun, rifle or shotgun".

**The 2018 amendment,** effective July 1, 2018, increased the penalty for a felon in possession of a firearm or destructive device if the person has previously been convicted of a capital felony or a serious violent offense, and provided clarifying language; in Subsection B, after "Criminal Sentencing Act", added the remainder of the subsection; and in Subsection C, Paragraph C(1), added "except as provided in Paragraph (2) of this subsection", at the end of Subparagraph C(1)(b), deleted "and" and added "or", added a new paragraph designation "(2)" and redesignated former Paragraphs C(2) and C(3) as Paragraphs C(3) and C(4), respectively.

**The 2001 amendment,** effective July 1, 2001, added the Paragraph designation C(1)(c) and substituted "this paragraph" for "Paragraphs (1) and (2)" within that new paragraph; and rewrote the definition of "felon" in Paragraph C(2).

**The 1987 amendment,** effective June 19, 1987, inserted "or destructive devices" in the catchline and "or destructive device" in Subsection A; substituted "fourth degree felony" for "misdemeanor" in Subsection B; and, in Subsection C, added present Paragraph (1) and redesignated former Paragraphs (1) and (2) as present Paragraphs (2) and (3).

## ANNOTATIONS

**A conditional discharge is not a conviction.** — Where the district court had entered a conditional discharge order in a prior criminal proceeding against defendant; the order was entered without an adjudication of guilt and with a sentencing term; defendant's probation was subsequently revoked and defendant was placed back on probation; a year later, defendant's probation was again revoked and the district court ordered that defendant be incarcerated; and the district court did not revoke defendant's conditional discharge, the district court did not err by dismissing a later felon in possession charge against defendant on the ground that defendant's conditional discharge had not been revoked and could not serve as the predicate felony for the felon in possession charge. *State v. Harris*, 2013-NMCA-031, 297 P.3d 374.

**Bullets as destructive devices.** — Nothing in this section says that destructive devices as defined in the section are deadly weapons. It is unreasonable to construe this section to say that destructive devices are necessarily also deadly weapons as defined in Section 30-1-12B NMSA 1978. Even were .22 caliber cartridges to be considered destructive devices under Section 30-7-16, the bullets were not deadly weapons under Section 30-1-12B. *State v. Galaz*, 2003-NMCA-076, 133 N.M. 794, 70 P.3d 784, cert denied, 133 N.M. 771, 70 P.3d 761.

**Possession of firearms by felons.** — The fact that New Mexico law does not forbid possession of firearms by those convicted of felonies more than 10 years ago does not preclude the federal government from doing so. *United States v. Fuentes*, 119 Fed. Appx. 248 (2004).

**Admission of unavailable accomplice's tape recorded custodial police interview** was not harmless error because it provided only direct evidence that defendant held firearm, it contradicted state's otherwise circumstantial case, and defendant expressly denied ever holding firearm. *State v. Johnson*, 2004-NMSC-029, 136 N.M. 348, 98 P.3d 998, cert. denied, 543 U.S. 1177, 125 S. Ct. 1334, 161 L. Ed. 2d 162.

**No preemption by federal firearms act.** — Although federal law excludes antique firearms from the proscription of receipt of firearms by certain convicted felons while this section does not, this section is not preempted by the federal law. *State v. Haddenham*, 1990-NMCA-048, 110 N.M. 149, 793 P.2d 279, cert. denied, 110 N.M. 72, 792 P.2d 49, and cert. denied, 110 N.M. 183, 793 P.2d 865.

**Proof of all three aspects not required for conviction.** — Thus, the defendant could be convicted for the crime of felon transporting a firearm even though there was no evidence that he possessed or owned the firearm. This section prohibits receiving, transporting, or possessing any firearm; the use of the disjunctive "or" indicates that this section may be violated by any of the enumerated methods. *State v. Dunsmore*, 1995-NMCA-012, 119 N.M. 431, 891 P.2d 572.

**"Constructive" possession.** — Where state could not prove that defendant had actual possession of gun, the state can rely on a theory of "constructive" possession; that defendant knew the gun was present and exercised control over it. *State v. Garcia*, 2004-NMCA-066, 135 N.M. 595, 92 P.3d 41, *rev'd on other grounds*, 2005-NMSC-017, 138 N.M. 1, 116 P.3d 72.

**Evidence sufficient for conviction of possession.** — Documentary evidence of a prior felony conviction and defendant's numerous statements during the interrogation that he possessed several of the victim's firearms is sufficient evidence for the conviction of felon in possession of a firearm. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, *overruled on other grounds by State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

**Sufficient evidence of being a felon in possession of a firearm.** — Where defendant was charged with being a felon in possession of a firearm after taking a gun inside a Las Cruces club, there was sufficient evidence to support the conviction, because based on evidence presented at trial that defendant told the officer that he was armed with a gun, a witness told the officer over the phone that defendant had a gun, and police recovered a handgun inside the club, a reasonable jury could have found that defendant



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had knowledge and control, and thereby possession, of a gun. *State v. Jimenez*, 2017-NMCA-039, cert. denied.

**Sufficient evidence of unlawful transportation of a firearm.** — Where defendant was convicted of unlawful transportation of a firearm, and where defendant admitted that he was a felon at the time of the charged offense, and where the state presented evidence at trial that he was driving his accomplice around town and was aware that his accomplice had brought a gun into the car, there was sufficient evidence for a jury to find that defendant transported a firearm. *State v. Torres*, 2018-NMSC-013.

**Defense of duress** is available against the charge of felon in possession of a firearm only when no reasonable alternatives are available — a reasonable felon would resort to possession of a firearm only when committing the offense is the only reasonable alternative. *State v. Castrillo*, 1991-NMSC-096, 112 N.M. 766, 819 P.2d 1324.

District court properly refused to submit the defense of duress to the jury, where defendant, a convicted felon, could have contacted the police, or simply avoided his estranged wife after she smashed his car windshield, but instead he chose to arm himself by purchasing a handgun. *State v. Castrillo*, 1991-NMSC-096, 112 N.M. 766, 819 P.2d 1324.

**No exception for self-defense.** — This statute does not exclude from its operation felons who are defending themselves. *State v. Calvillo*, 1990-NMCA-046, 110 N.M. 114, 792 P.2d 1157, cert. denied, 110 N.M. 72, 792 P.2d 49 (1991).

**Construed with 31-18-17 NMSA 1978.** — Where defendants were convicted of the charge of felon in possession of a firearm contrary to 30-7-16 NMSA 1978, and the defendants were also sentenced as habitual offenders in accordance with 31-18-17 NMSA 1978, the trial court erred in sentencing the defendants as habitual offenders when the same prior felony convictions were relied upon to convict the defendants of the underlying offense of felon in possession of a firearm. *State v. Haddenham*, 1990-NMCA-048, 110 N.M. 149, 793 P.2d 279, cert. denied, 110 N.M. 72, 792 P.2d 49, and cert. denied, 110 N.M. 183, 793 P.2d 865.

**Use of prior felony.** — The state was not prevented from using distinct felonies obtained in the same judgment and sentence for the separate purposes of enhancement under the felon in possession statute and the general habitual offender statute. *State v. Calvillo*, 1990-NMCA-046, 112 N.M. 140, 812 P.2d 794, cert. denied, 112 N.M. 77, 811 P.2d 575 (1991).

In this case it did not matter that the state did not specify which of the two felonies it was relying on to prove the principal crime, whichever felony the jury relied on, there was an additional one available for sentence enhancement. If the jury relied on both, there is still no double jeopardy problem. *State v. Dunsmore*, 1995-NMCA-012, 119 N.M. 431, 891 P.2d 572.

Details of the prior crime are irrelevant to prove the required element of the crime of being a felon in possession, and admission into evidence of the defendant's prior conviction of a firearms offense was reversible error. *State v. Tave*, 1996-NMCA-056, 122 N.M. 29, 919 P.2d 1094.

**Multiple uses of prior convictions does not violate double jeopardy.** — Where defendant's prior felony convictions were used to establish defendant's status as a habitual offender for sentencing for attempted murder and to serve as the predicate felony for defendant's conviction of felon in possession of a firearm, the double jeopardy clause was not violated. *State v. Tafoya*, 2012-NMSC-030, 285 P.3d 604.

**Jury instruction.** — In a prosecution for being a felon in possession of a firearm, it was reversible error for the court to use UJI 14-1701 NMRA naming the predicate offense, *i.e.*, aggravated assault with a deadly weapon. *State v. Tave*, 1996-NMCA-056, 122 N.M. 29, 919 P.2d 1094.

**Unsubstantiated reference to drug dealer gun owner inappropriate.** — Repeated references to defendant as a known drug dealer when the state lacked sufficient evidence to convict defendant of possession or distribution of illegal drugs, and instead relied on unsubstantiated hearsay to convince the jury defendant was a "known drug dealer" so, ipso facto, the shotgun must belong to him is prohibited and should be excluded. *State v. Rael*, 1994-NMCA-043, 117 N.M. 539, 873 P.2d 285.

**Restoration of firearms privileges.** — Firearm privileges are automatically restored when a person successfully completes the period of a deferred sentence. 1988 Op. Att'y Gen. No. 88-03.

**Partial pardon by governor limiting right to use firearm.** — The governor has the power under the New Mexico Constitution to grant a partial pardon conferring the right to vote and hold public office while denying the right to possess a firearm. 1992 Op. Att'y Gen. No. 92-09.

**Law reviews.** — For note, "Evidence Law – Boundaries, Balancing, and Prior Felony Convictions: After United States v. Old Chief," see 28 N.M. L. Rev. 583 (1998).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 79 Am. Jur. 2d Weapons and Firearms § 24.

Propriety of using single prior felony conviction as basis for offense of possessing weapon by convicted felon and to enhance sentence, 37 A.L.R.4th 1168.

Sufficiency of evidence as to nature of firearm in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms, 37 A.L.R.4th 1179.

Sufficiency of evidence of possession in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons, 43 A.L.R.4th 788.

What amounts to "control" under state statute making it illegal for felon to have possession or control of firearm or other dangerous weapon, 66 A.L.R.4th 1240.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

What constitutes actual or constructive possession of unregistered or otherwise prohibited firearm in violation of 26 USCS § 5861, 133 A.L.R. Fed. 347.

94 C.J.S. Weapons § 2.

## 30-7-17. Short title.

Sections 1 through 6 [30-7-17 through 30-7-22 NMSA 1978] of this act may be cited as the "Explosives Act".

**History: Laws 1981, ch. 246, § 1.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Explosions and Explosives §§ 214 to 237.

35 C.J.S. Explosives § 12.



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## 30-7-18. Definitions.

As used in the Explosives Act [30-7-17 through 30-7-22 NMSA 1978]:

A. "explosive" means any chemical compound or mixture or device, the primary or common purpose of which is to explode and includes but is not limited to dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord and igniters; and

B. "explosive device" or "incendiary device" means:

(1) any explosive bomb, grenade, missile or similar device;

(2) any device or mechanism used or created to start a fire or explosion with or without a timing mechanism except cigarette lighters and matches; or

(3) any incendiary bomb or grenade, fire bomb or similar device or any device which includes a flammable liquid or compound and a wick or igniting agent composed of any material which is capable of igniting the flammable liquid or compound.

**History: Laws 1981, ch. 246, § 2; 1990, ch. 74, §1.**

**The 1990 amendment,** effective May 16, 1990, in Subsection B, substituted " 'explosive device' " for " 'explosive' " at the beginning, deleted "dynamite and all other forms of high explosives" at the beginning and "or" at the end of Paragraph (1), added "except cigarette lighters and matches" at the end of Paragraph (2), and made a minor stylistic change in Paragraph (3).

## 30-7-19. Possession of explosives.

A. Possession of explosives consists of knowingly possessing, manufacturing or transporting any explosive and either intending to use the explosive in the commission of any felony or knowing or reasonably believing that another intends to use the explosive to commit any felony.

B. Any person who commits possession of explosives is guilty of a fourth degree felony.

**History: Laws 1981, ch. 246, § 3; 1990, ch. 74, §2.**

**The 1990 amendment,** effective May 16, 1990, deleted "or explosive or incendiary device" following "explosives" in the catchline and in Subsections A and B and, in Subsection A, inserted "knowingly", deleted "or any explosive or incendiary device, including any combination of parts from which such device may be made" following "any explosive", deleted "or device or combination of parts thereof " following "the explosive" in two places, and made minor stylistic changes.

## 30-7-19.1. Possession of explosive device or incendiary device.

A. Possession of an explosive device or incendiary device consists of knowingly possessing, manufacturing or transporting any explosive device or incendiary device or complete combination of parts thereof necessary to make an explosive device or incendiary device. This subsection shall not apply to any fireworks as defined in Section 60-2C-2 NMSA 1978 or any lawfully acquired household, commercial, industrial or sporting device or compound included in the definition of explosive device or incendiary device in Section 30-7-18 NMSA 1978 that has legitimate and lawful commercial, industrial or sporting purposes or that is lawfully possessed under Section 30-7-7 NMSA 1978.

B. Any person who commits possession of an explosive device or incendiary device is guilty of a fourth degree felony.

**History: Laws 1990, ch. 74, § 3.**

ANNOTATIONS

**Dry ice bomb was not an explosive or an explosive device.** — Where defendant had two bottles of dry ice and two gallon jugs of water; defendant admitted that defendant was going to a desert area to detonate a dry ice bomb; and dry ice bombs result from the expansion of gases, rather than by fire or burning, a dry ice bomb is neither an "explosive" nor an "explosive device" and is not prohibited by Section 30-7-19.1 NMSA 1978. *State v. Alverson*, 2013-NMCA-091, cert. granted, 2013-NMCERT-008.

## 30-7-20. Facsimile or hoax bomb or explosive.

Any person who intentionally gives, mails, sends or causes to be sent any false or facsimile bomb or explosive to another person or places or causes to be placed at any location any false or facsimile



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bomb or explosive, with the intent that any other person thinks it is a real bomb or explosive, is guilty of a fourth degree felony.

**History: Laws 1981, ch. 246, § 4.**

## 30-7-21. False report.

A. False report consists of knowingly conveying or causing to be conveyed to any police agency or fire department a false report concerning a fire or explosion or the placement of any explosives or explosive or incendiary device or any other destructive substance and includes, but is not limited to, setting off a fire alarm.

B. Any person who commits false report which causes death or great bodily harm to another is guilty of a fourth degree felony, but if such death or great bodily harm is not caused, the person is guilty of a misdemeanor.

**History: Laws 1981, ch. 246, § 5.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity and construction of statutes or ordinances imposing civil or criminal penalties on alarm system users, installers, or servicers for false alarms, 17 A.L.R.5th 825.

## 30-7-22. Interference with bomb or fire control.

A. Interference with bomb or fire control consists of:

(1) intentionally interfering with the proper functioning of a fire alarm system;

(2) intentionally interfering with the lawful efforts of a fireman or police officer to control or extinguish a fire or to secure the safety of any object reasonably believed to be a bomb, explosive or incendiary device; or

(3) intentionally interfering with the lawful efforts of a fireman or police officer to preserve for investigation or investigate the scene of a fire or explosion to determine its cause.

B. Any person who commits interference with bomb or fire control is guilty of a misdemeanor.

**History: Laws 1981, ch. 246, § 6.**

**Severability.** — Laws 1981, ch. 246, § 9, provides for the severability of the act if any part or application thereof is held invalid.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity and construction of statutes or ordinances imposing civil or criminal penalties on alarm system users, installers, or servicers for false alarms, 17 A.L.R.5th 825.

# ARTICLE 8

# Nuisances

Sec.
30-8-1. Public nuisance.
30-8-2. Polluting water.
30-8-3. Refuse defined.
30-8-4. Littering.
30-8-5. Enforcement.
30-8-6. Posting; notice to public.
30-8-7. Public education.
30-8-8. Abatement of a public nuisance.
30-8-8.1. Abatement of house of prostitution.
30-8-9. Abandonment of dangerous containers.
30-8-10. Repealed.
30-8-11. Illegal prescribing of medicine.
30-8-12. Repealed.
30-8-13. Repealed.
30-8-14. Recompiled.

## 30-8-1. Public nuisance.

A public nuisance consists of knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either:



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A. injurious to public health, safety, morals or welfare; or

B. interferes with the exercise and enjoyment of public rights, including the right to use public property.

Whoever commits a public nuisance for which the act or penalty is not otherwise prescribed by law is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-8-1, enacted by Laws 1963, ch. 303, § 8-1.**

**Cross references.** — For polluting of water being public nuisance, *see* 30-8-2 NMSA 1978.

For provisions on abatement of public nuisance, *see* 30-8-8 NMSA 1978.

For conduct offensive to public well-being, *see* 30-8-12 NMSA 1978.

For house of prostitution being public nuisance, *see* 30-9-8 NMSA 1978.

For gambling and gambling houses being public nuisance, *see* 30-19-8 NMSA 1978.

For provision making forest fire burning without proper precaution a public nuisance, *see* 30-32-1 NMSA 1978.

## ANNOTATIONS

**Nuisance must affect group of people.** — A public nuisance must affect a considerable number of people or an entire community or neighborhood. *Environmental Improvement Div. v. Bloomfield Irrigation Dist.*, 1989-NMCA-049, 108 N.M. 691, 778 P.2d 438, cert. denied, 108 N.M. 681, 777 P.2d 1325.

This section applies to "anything affecting any number of citizens", which means a considerable number of people or an entire community or neighborhood. *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, 119 N.M. 150, 889 P.2d 185.

**Anticipatory nuisance.** — Anticipatory nuisance is a valid cause of action. *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, 119 N.M. 150, 889 P.2d 185.

**Acts of municipality under governmental authority.** — In the absence of a showing of fraud, collusion, or illegality, a city's constitutional and statutory authority to construct public highways and bridges constitutes a valid defense to a claim of nuisance per se. *City of Albuquerque v. State ex rel. Vill. of Los Ranchos de Albuquerque*, 1991-NMCA-015, 111 N.M. 608, 808 P.2d 58, cert. denied, 113 N.M. 524, 828 P.2d 957 (1992).

Acts which the law authorized to be done, if carried out and maintained in the manner authorized by law, where a public entity acts under its governmental authority, do not constitute public nuisances per se. *City of Albuquerque v. State ex rel. Vill. of Los Ranchos de Albuquerque*, 1991-NMCA-015, 111 N.M. 608, 808 P.2d 58, cert. denied, 113 N.M. 524, 828 P.2d 957 (1992).

Absent a showing that a project is, or will be, conducted or maintained in a manner contrary to law, a city is lawfully empowered to initiate and construct such project, and the project is not subject to abatement as a public nuisance per se, because the construction, operation, and maintenance of a highway or bridge in a lawful manner does not constitute a public nuisance. *City of Albuquerque v. State ex rel. Vill. of Los Ranchos de Albuquerque*, 1991-NMCA-015, 111 N.M. 608, 808 P.2d 58, cert. denied, 113 N.M. 524, 828 P.2d 957 (1992).

**Public works as public nuisance.** — Public works projects are fundamentally different from private construction projects. A public project carries with it the presumption that it is for the public good; proof that it will be a nuisance must be balanced against its benefit for the public as a whole. *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, 119 N.M. 150, 889 P.2d 185.

**Due authorization of public works.** — If the public works project is in existence and poses a present nuisance, due authorization is a qualified defense; courts may or may not decide that despite the defense the project is still a nuisance. However, if the project has yet to be constructed and is challenged as an anticipatory nuisance in fact, due authorization is an absolute defense; courts will summarily conclude that there is no basis for a finding of nuisance. *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, 119 N.M. 150, 889 P.2d 185.

**Contamination of underground water.** — Where a sewage treatment facility is operated by a city in a manner which results in the contamination of the underground water to such a degree that it is offensive or dangerous for human consumption or use, is injurious to public health, safety and welfare and interferes with the exercise and enjoyment of public rights, including the right to use public property, the city has created a public nuisance within the meaning of this section. Relief in the nature of a mandatory injunction requiring abatement of the nuisance by ordering the city to extend its waterlines to residences in and outside its limits free of hookup charges would not be a "donation" in violation of N.M. Const., art. IX, § 14. *State ex rel. N.M. Water Quality Control Comm'n v. City of Hobbs*, 1974-NMSC-064, 86 N.M. 444, 525 P.2d 371.

**Shooting range.** — Use of private property as a trap shooting range was not a "public right," and, thus, the actions of adjoining landowners in making complaints to the sheriff who shut down the range for an investigation did not support a claim under this section. *State ex rel. Smith v. Riley*, 1997-NMCA-063, 123 N.M. 453, 942 P.2d 721.

**Entrance to house.** — "Stoop" or concrete platform 14–1/2 inches off ground located outside back door of premises which was only means of entrance and exit was not a public nuisance as defined by statute, nor a private nuisance. *Jellison v. Gleason*, 1967-NMSC-033, 77 N.M. 445, 423 P.2d 876.

**Illegal sale of alcoholic beverages is not a statutory nuisance** per se nor is it a common law nuisance per se. *State v. Davis*, 1958-NMSC-130, 65 N.M. 128, 333 P.2d 613.

**Damages.** — Compensatory damages are not available for statutory public nuisance, as abatement of the nuisance is the prescribed remedy. *New Mexico v. General Elec. Co.*, 335 F. Supp. 2d 1185 (D.N.M. 2004).

**Launching rockets.** — Construction and launching of rockets without adequate supervision and without adequate safeguards being provided to protect the persons involved as well as other persons and property which could be harmed by such a dangerous mechanism would be a public nuisance under this section. 1961-62 Op. Att'y Gen. No. 61-134.

**Law reviews.** — For note, "The Availability of the Affirmative Defenses of Assumption of Risk and the 'Sale Defense' Against Common Law Public Nuisance Actions; United States v. Hooker Chemicals & Plastics Corp.," see Nat. Resources J. 941 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Nuisances §§ 35, 36, 403, 404.

Necessity of knowledge by owner of real estate of a nuisance maintained thereon by another to subject him to the operation of a statute providing for the abatement of



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nuisances or prescribing a pecuniary penalty therefor, 12 A.L.R. 431, 121 A.L.R. 642.

Computer as nuisance, 45 A.L.R.4th 1212.

Telephone calls as nuisance, 53 A.L.R.4th 1153.

Tree or limb falls onto adjoining private property: personal injury and property damage liability, 54 A.L.R.4th 530.

Legal aspects of speed bumps, 60 A.L.R.4th 1249.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 A.L.R.4th 603.

Sewage treatment plant as constituting nuisance, 92 A.L.R.5th 517.

Preemption, by provisions of Clean Air Act (42 USCS §§ 7401 et seq.), of federal common law of nuisance in area of air pollution, 61 A.L.R. Fed. 859.

66 C.J.S. Nuisances §§ 2, 159.

## 30-8-2. Polluting water.

Polluting water consists of knowingly and unlawfully introducing any object or substance into any body of public water causing it to be offensive or dangerous for human or animal consumption or use. Polluting water constitutes a public nuisance.

For the purpose of this section, "body of water" means any public river or its tributary, stream, lake, pond, reservoir, acequia, canal, ditch, spring, well or declared or known ground waters.

Whoever commits polluting water for which the act or penalty is not otherwise prescribed by law is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-8-2, enacted by Laws 1963, ch. 303, § 8-2; 1993, ch. 291, § 19.**

**Cross references.** — For Water Quality Act, relating to water pollution, *see* 74-6-1 NMSA 1978 et seq.

**The 1993 amendment,** effective June 18, 1993, inserted "for which the act or penalty is not otherwise prescribed by law" in the last paragraph and made a minor stylistic change.

**ANNOTATIONS**

**Scope of section.** — This section is a broad nuisance provision, but it does not contain specific mandatory requirements to create a specific duty to prevent water pollution. *Aragon v. United States*, 146 F.3d 819 (10th Cir. 1998).

**Law reviews.** — For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 61A Am. Jur. 2d Pollution Control §§ 134, 135.

Liability for injury to property occasioned by oil, water or the like, flowing from well, 19 A.L.R.2d 1025.

Measure and elements of damages for pollution of well or spring, 76 A.L.R.4th 629.

Liability insurance coverage for violations of antipollution laws, 87 A.L.R.4th 444.

93 C.J.S. Waters § 57.

## 30-8-3. Refuse defined.

Refuse means any article or substance:

A. which is commonly discarded as waste; or

B. which, if discarded on the ground, will create or contribute to an unsanitary, offensive or unsightly condition.

Refuse includes, but is not limited to, the following items or classes of items: waste food; waste paper and paper products; cans, bottles or other containers; junked household furnishings and equipment; junked parts or bodies of automobiles and other metallic junk or scrap; portions or carcasses of dead animals; and collections of ashes, dirt, yard trimmings or other rubbish.

**History: 1953 Comp., § 40A-8-3, enacted by Laws 1963, ch. 303, § 8-3.**

## 30-8-4. Littering.

A. Littering consists of discarding refuse:

(1) on public property in any manner other than by placing the refuse in a receptacle provided for the purpose by the responsible governmental authorities or otherwise in accordance with lawful direction; or

(2) on private property not owned or lawfully occupied or controlled by the person, except with the consent of its owner, lessee or occupant.

B. Whoever commits littering is guilty of a petty misdemeanor and, notwithstanding the provisions of Section 31-19-1 NMSA 1978, shall be punished by a fine of fifty dollars ($50.00). The use of uniform traffic citations is authorized for the enforcement of this section. The court may to the



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extent permitted by law, as a condition to suspension of any other penalty provided by law, require a person who commits littering to pick up and remove from any public place or any private property, with prior permission of the legal owner, any litter deposited thereon.

**History: 1953 Comp., § 40A-8-4, enacted by Laws 1963, ch. 303, § 8-4; 1975, ch. 199, § 1; 1977, ch. 79, § 1; 1981, ch. 256, § 1; 2018, ch. 74, § 5.**

**Cross references.** — For municipal refuse collection and disposal, *see* 3-48-1 NMSA 1978 et seq.

For provisions relating to uniform traffic citations, *see* 66-8-128 NMSA 1978 et seq.

**The 2018 amendment,** effective July 1, 2018, provided that the penalty for littering shall be a fine of fifty dollars, and removed language related to more severe penalties for littering; in Subsection B, after "petty misdemeanor", added "and, notwithstanding the provisions of Section 31-19-1 NMSA 1978, shall be punished by a fine of fifty dollars ($50.00)"; and deleted former Subsection C, which stated "Any jail sentence imposed pursuant to Subsection B of this section may be suspended, in the discretion of the magistrate or judge, upon conditions that the offender assist in litter clean-up in the jurisdiction for a period not to exceed the length of the suspended sentence."

## 30-8-5. Enforcement.

The state game commission may designate trained employees of the commission vested with police powers to enforce the provisions of Section 30-8-4 NMSA 1978. In addition, members of the state police, county sheriffs and their deputies, police officers and those employees of the state park and recreation commission [state parks division of the energy, minerals, and natural resources department] vested with police powers shall enforce the provisions of that section.

**History: 1953 Comp., § 40A-8-4.1, enacted by Laws 1975, ch. 199, § 2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1977, ch. 254, § 4, abolished the parks and recreation commission. Section 3 of that act established the natural resources department, consisting of several divisions, including the state park and recreation division, which was created by § 11 of the act. Laws 1987, ch. 234 repealed the provisions relating to the natural resources department and created the energy, minerals, and natural resources department, including the state parks division. *See* 9-5A-3 and 9-5A-6.1 NMSA 1978.

## 30-8-6. Posting; notice to public.

The state highway department [department of transportation] and the state park and recreation commission [state parks division of the natural resources department] shall post in areas under their control pertinent portions of Section 30-8-4 NMSA 1978 and pleas for the public to take their refuse with them and to dispose of it properly.

**History: 1953 Comp., § 40A-8-4.2, enacted by Laws 1975, ch. 199, § 3.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1977, ch. 254, § 4, abolished the parks and recreation commission. Section 3 of that act established the natural resources department, consisting of several divisions, including the state park and recreation division, which was created by § 11 of the act. Laws 1987, ch. 234 repealed the provisions relating to the natural resources department and created the energy, minerals, and natural resources department, including the state parks division. *See* 9-5A-3 and 9-5A-6.1 NMSA 1978.

## 30-8-7. Public education.

The state game commission, the state highway department [department of transportation], the state park and recreation commission [state parks division of the natural resources department] and the environmental improvement agency [department of environment] are encouraged to institute public education programs through the news media in order to inform the public of the litter problem in New Mexico and of individual efforts that can be made to assist in the abatement of the problem. In addition, these agencies are authorized to work with industry organizations in a joint antilitter [anti-litter] campaign so that additional effect may be given to the antilitter [anti-litter] effort in New Mexico.

**History: 1953 Comp., § 40A-8-4.3, enacted by Laws 1975, ch. 199, § 4.**

**Bracketed material.** — The bracketed was was inserted by the compiler and is not part of the law. Laws 1977, ch. 254, § 4, abolished the parks and recreation commission. Section 3 of that act established the natural resources department, consisting of several divisions, including the state park and recreation division,



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which was created by § 11 of the act. Laws 1987, ch. 234 repealed the provisions relating to the natural resources department and created the energy, minerals, and natural resources department, including the state parks division. *See* 9-5A-3 and 9-5A-6.1 NMSA 1978.

## 30-8-8. Abatement of a public nuisance.

A. Except as herein provided, an action for the abatement of a public nuisance shall be governed by the general rules of civil procedure.

B. A civil action to abate a public nuisance may be brought, by verified complaint in the name of the state without cost, by any public officer or private citizen, in the district court of the county where the public nuisance exists, against any person, corporation or association of persons who shall create, perform or maintain a public nuisance.

C. When judgment is against the defendant in an action to abate a public nuisance, he shall be adjudged to pay all court costs and a reasonable fee for the complainant's attorney, when the suit is not prosecuted exclusively by the attorney general or a district attorney.

**History: 1953 Comp., § 40A-8-5, enacted by Laws 1963, ch. 303, § 8-5.**

**Cross references.** — For control of contagious diseases and dangerous conditions by health authorities, *see* 24-1-15 to 24-1-19, 24-1-21 NMSA 1978.

For admissibility of evidence in proceedings hereunder, *see* 30-9-7 NMSA 1978.

For procedure in seeking injunction, *see* Rules 1-065 and 1-066 NMRA.

ANNOTATIONS

**Injunction authorized.** — Injunctive relief could be employed to protect the public health, morals, safety and welfare from irreparable injury by a public nuisance. *State ex rel. Marron v. Compere*, 1940-NMSC-041, 44 N.M. 414, 103 P.2d 273.

**Crime not enjoinable as such.** — Where a ground of equitable jurisdiction to enjoin otherwise exists, the claim to such relief is not to be denied merely because the act complained of constitutes a crime, but a crime may not in and of itself be made an independent ground for injunction; hence, trial court could not extend authority of its restraint against defendant from maintaining a certain premises for purposes of lewdness, assignation or prostitution throughout entire county, and its attempt to do so fell squarely within the interdiction that equity may not be employed to forestall the commission of a crime. *State v. Robertson*, 1957-NMSC-060, 63 N.M. 74, 313 P.2d 342.

**Motion picture.** — Injunction of motion picture as nuisance because of "lewdness" would be in the nature of censorship and prior restraint. *State ex rel. Murphy v. Morley*, 1957-NMSC-087, 63 N.M. 267, 317 P.2d 317.

**Bond as enforcement device.** — A trial judge has both the statute and the discretion inherent in his broad equitable powers to draw upon in providing means for the enforcement of order restraining defendant from using, occupying or maintaining a certain premises for purposes of lewdness, assignation or prostitution, by requiring a bond of defendant, so long as its effect is confined to the premises in question. *State v. Robertson*, 1957-NMSC-060, 63 N.M. 74, 313 P.2d 342.

**Civil action.** — Action brought under general equity powers for protection of public morals is a civil action. *State ex rel. Murphy v. Morley*, 1957-NMSC-087, 63 N.M. 267, 317 P.2d 317.

**Standing to sue for pollution abatement.** — Action brought by attorney general and certain private citizens for injunction to abate alleged public nuisance caused by emissions from coal-burning power plant should have been dismissed in trial court since environmental improvement agency (now environment department) had primary jurisdiction over pollution control and means were available to compel agency to perform its duties, should it fail to do so. *State ex rel. Norvell v. Arizona Pub. Serv. Co.*, 1973-NMSC-051, 85 N.M. 165, 510 P.2d 98.

**Sufficiency of complaint.** — Where the nuisance complained of is a nuisance per se, and denounced as such in the statute, it is sufficient for the complaint to allege its existence in the language of the statute. *State v. Robertson*, 1957-NMSC-060, 63 N.M. 74, 313 P.2d 342.

**Injunction power of court.** — Injunction under general equity powers of court to protect public morals could not be had where complaint was brought under statute providing for injunction and abatement of nuisance and forfeiture of premises on proof that "lewdness, assignation or prostitution" existed there. *State ex rel. Murphy v. Morley*, 1957-NMSC-087, 63 N.M. 267, 317 P.2d 317.

**Recovery of pecuniary damages is not provided** by this section. Thus, a private plaintiff's attempt to recover pecuniary damages for the pollution of his groundwater must fail. *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 857 F. Supp. 838 (D.N.M. 1994).

**Statute provides alternative means for abating noxious odors.** — Where air quality standards or regulations have not been established as to what constitutes "air pollution" and thus no violation of the Air Quality Control Act (Sections 74-2-1 to 74-2-17 NMSA 1978) or regulations and standards is apparent, the public nuisance law may provide an alternative means for the environmental improvement division (now environment department) to abate noxious odors. 1978 Op. Att'y Gen. No. 78-12.

**Law reviews.** — For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For note, "Gabaldon v. Sanchez: New Developments in the Law of Nuisance, Negligence and Trespass," see 9 N.M.L. Rev. 367 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Nuisances §§ 229 to 267.

Carwash as nuisance, 4 A.L.R.4th 1308.

When statute of limitations begins to run as to cause of action for nuisance based on air pollution, 19 A.L.R.4th 456.

Validity and application of statute authorizing forfeiture of use or closure of real property from which obscene materials have been disseminated or exhibited, 25 A.L.R.4th 395.

Business interruption, without physical damage, as actionable, 65 A.L.R.4th 1126.

What constitutes special injury that entitles private party to maintain action based on public nuisance - modern cases, 71 A.L.R.4th 13.



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Nuisance as entitling owner or occupant of real estate to recover damages for personal inconvenience, discomfort, annoyance, anguish, or sickness, distinct from, or in addition to, damages for depreciation in value of property or its use, 25 A.L.R.5th 568.

66 C.J.S. Nuisances §§ 102 to 110.

## 30-8-8.1. Abatement of house of prostitution.

A. When the public nuisance sought to be abated under the provisions of Section 30-8-8 NMSA 1978 is a house of prostitution, as defined in Section 30-9-8 NMSA 1978, in addition to injunctive relief, the remedies and presumptions provided in this section apply.

B. For the purposes of this section and Section 30-8-8 NMSA 1978, two or more convictions of any person or persons occurring at least one week apart within a period of one year for violation of either Section 30-9-2 or 30-9-3 NMSA 1978 arising out of conduct engaged in at the place described in an abatement action creates a presumption that the place is a house of prostitution. However, this presumption shall not arise unless the person against whom the abatement action is brought is shown to have had actual knowledge or to have received written notice from law enforcement officials of the convictions upon which the presumption is based. The knowledge must have been acquired or the notice given no more than thirty days after the date of the convictions. For the purpose of this section the "date of the convictions" is the date upon which a plea of guilty or nolo contendere or a judgment of guilty entered in the case charging the crime is final and unappealable.

C. If, in an abatement action brought under Section 30-8-8 NMSA 1978, a binding admission is made by the defendant or the court concludes that a house of prostitution exists at the location alleged, the court may, as part of its judgment:

(1) direct the removal from the house of prostitution all movable personal property used in conducting the house of prostitution and shall direct the sale of that property in the same manner as personal property is sold when seized under a writ of execution; and

(2) order the closing of the house of prostitution for a period of one year and prohibit any person entering it except under conditions specified in the order.

D. If a judgement entered under the provisions of Subsection C of this section includes the provisions of Paragraph (2) of that subsection, the court shall include in its judgment a provision for permitting the owner of the premises ordered closed to take possession of them if he files a bond with sureties to be approved by the court in an amount equal to the full value of the property conditioned upon his promise to abate the nuisance immediately and prevent the reoccurrence of the nuisance for one year thereafter.

**History: Laws 1989, ch. 114, § 1.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 24 Am. Jur. 2d Disorderly Houses §§ 40 to 48.

27 C.J.S. Disorderly Houses § 18.

## 30-8-9. Abandonment of dangerous containers.

Abandonment of dangerous containers consists of any person:

A. abandoning, discarding or keeping in any place accessible to children, any refrigerator, icebox, freezer, airtight container, cabinet or similar container, of a capacity of one and one-half cubic feet or more, which is no longer in use, without having the attached doors, hinges, lids or latches removed or without sealing the doors or other entrances so as to make it impossible for anyone to be imprisoned therein; or

B. who, being the owner, lessee or manager of any premises, knowingly permits any abandoned or discarded refrigerator, icebox, freezer, airtight container, cabinet or similar container of a capacity of one and one-half cubic feet or more, and which remains upon such premises in a condition whereby a child may be imprisoned therein.

Whoever commits abandonment of dangerous containers is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-8-6, enacted by Laws 1963, ch. 303, § 8-6.**



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## 30-8-10. Repealed.

**Repeals.** — Laws 2000, ch. 22, § 3 repealed 30-8-10 NMSA 1978, as enacted by Laws 1963, ch. 303, § 8-7, relating to placing injurious substances on highways, effective July 1, 2000. For provisions of the former section, *see* the 1999 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 66-7-364 NMSA 1978.

## 30-8-11. Illegal prescribing of medicine.

Illegal prescribing of medicine consists of any physician or other person, while under the influence of any alcoholic beverage or narcotic, prescribing or compounding for any other person, any poison, drug or medicine.

Whoever commits illegal prescribing of medicine while under the influence of any alcoholic beverage or narcotic is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-8-8, enacted by Laws 1963, ch. 303, § 8-8.**

## 30-8-12. Repealed.

**Repeals.** — Laws 2018, ch. 74, § 56 repealed 30-8-12 NMSA 1978, as enacted by Laws 1963, ch. 303, § 8-9, relating to conduct offensive to public well-being, effective July 1, 2018. For provisions of former section, *see* the 2017 NMSA 1978 on *NMOnesource.com*.

## 30-8-13. Repealed.

**Repeals.** — Laws 2018, ch. 74, § 56 repealed 30-8-13 NMSA 1978, as enacted by Laws 1963, ch. 303, § 8-10, relating to unlawfully permitting livestock upon public highways, effective July 1, 2018. For provisions of former section, *see* the 2017 NMSA 1978 on *NMOnesource.com*.

## 30-8-14. Recompiled.

**Recompilations.** — Laws 2019, ch. 155, § 2 recompiled and amended former 30-8-14 NMSA 1978 as 66-7-363.1 NMSA 1978 effective June 14, 2019.

# ARTICLE 9

# Sexual Offenses

Sec.
30-9-1. Enticement of child.
30-9-2. Prostitution.
30-9-3. Patronizing prostitutes.
30-9-4. Promoting prostitution.
30-9-4.1. Accepting earnings of a prostitute.
30-9-5. Order for medical examination and treatment.
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30-9-7. Evidence.
30-9-8. House of prostitution; public nuisance.
30-9-9. Remedy of lessor.
30-9-10. Definitions.
30-9-11. Criminal sexual penetration.
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30-9-14. Indecent exposure.
30-9-14.1. Indecent dancing.
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30-9-15. Corroboration.
30-9-16. Testimony; limitations; in camera hearing.
30-9-17. Videotaped depositions of alleged victims who are under sixteen years of age; procedure; use in lieu of direct testimony.
30-9-17.1. Victims; polygraph examinations; prohibited actions.
30-9-18. Alleged victims who are under thirteen years of age; psychological evaluation.
30-9-19. Sexual assault; law enforcement agency policies; submission of DNA samples by law enforcement and laboratories.
30-9-20. Voyeurism prohibited; penalties.
30-9-21. Sexual assault survivor's bill of rights.

## 30-9-1. Enticement of child.

Enticement of child consists of:



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A. enticing, persuading or attempting to persuade a child under the age of sixteen years to enter any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 of the Criminal Code; or

B. having possession of a child under the age of sixteen years in any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 of the Criminal Code.

Whoever commits enticement of child is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-9-10, enacted by Laws 1963, ch. 303, § 9-10.**

**Cross references.** — For sexual exploitation of children, *see* 30-6A-1 NMSA 1978 et seq.

For sexually oriented material harmful to minors, *see* 30-37-1 NMSA 1978 et seq.

**Compiler's notes.** — The words "Article 9 of the Criminal Code" refer to Article 9 of Laws 1963, ch. 303, the unrepealed portions of which are compiled herein as 30-9-1 to 30-9-4 and 30-9-5 to 30-9-9 NMSA 1978.

ANNOTATIONS

**Possession is control, not forcible abduction.** *State v. Perea*, 2008-NMCA-147, 145 N.M. 123, 194 P.3d 738, cert. denied, 2008-NMCERT-009, 145 N.M. 257, 196 P.3d 488.

**Possession of minor girl.** — Where the thirteen-year old minor victim voluntarily entered the defendants' car; the defendant and the victim drove around all day; the victim was frightened but did not feel that she could summon help; the defendant determined the route and the stops and controlled the course of events; the victim was not of legal driving age and could not take control of the car; and the defendant's purpose was to have sex with the victim, the defendant had "possession" of the victim. *State v. Perea*, 2008-NMCA-147, 145 N.M. 123, 194 P.3d 738, cert. denied, 2008-NMCERT-009, 145 N.M. 257, 196 P.3d 488.

A man who had a minor girl in his possession for evil purposes was guilty, whether she had been enticed away or carried off by him. *State v. Martin*, 1923-NMSC-036, 28 N.M. 489, 214 P. 575; *State v. Chenault*, 1915-NMSC-024, 20 N.M. 181, 147 P. 283; *State v. Chitwood*, 1923-NMSC-034, 28 N.M. 484, 214 P. 575.

**"Enticement" means** to incite or instigate, to allure, attract or lead astray; it indicates an intentional act. *State v. Garcia*, 1983-NMCA-069, 100 N.M. 120, 666 P.2d 1267, cert. denied, 100 N.M. 192, 668 P.2d 308.

**Not lesser included offense of criminal sexual penetration.** — The offense of enticement of a child is not a lesser included offense of criminal sexual penetration. *State v. Garcia*, 1983-NMCA-069, 100 N.M. 120, 666 P.2d 1267, cert. denied, 100 N.M. 192, 668 P.2d 308.

**Completion of offense in evil intent.** — The gravamen of charge that defendant had a female minor in his possession for evil purposes, to wit: sexual intercourse, was the evil purpose and intent of the possession, so that the offense was complete from the instant the accused formed the evil intent and purpose of sexual intercourse, regardless of whether it ever came about. *State v. Phipps*, 1943-NMSC-038, 47 N.M. 316, 142 P.2d 550 (decided under prior law).

**Charging offense.** — Where, in charging the offense, the words "for the purpose of unlawful sexual intercourse" were used, the quoted phrase did not describe an act of fornication only, since an act of sexual intercourse was lawful or unlawful according to the relation of the parties. *State v. Chenault*, 1915-NMSC-024, 20 N.M. 181, 147 P. 283.

**Conclusions of jury sustained.** — Where jury had opportunity to see the witnesses, heard their testimony and concluded that sexual intercourse had taken place, conviction would be sustained even though it necessitated the rejection of the truth of some of the state's testimony in the case. *State v. Phipps*, 1943-NMSC-038, 47 N.M. 316, 142 P.2d 550.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and application of statutes or ordinances regulating sexual performance by child, 42 A.L.R.5th 291.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Validity, construction, and application of state stat-utes or ordinances regulating sexual performance by child, 42 A.L.R.5th 291.

## 30-9-2. Prostitution.

Prostitution consists of knowingly engaging in or offering to engage in a sexual act for hire.

As used in this section "sexual act" means sexual intercourse, cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent and with any object of the genital or anal opening of another, whether or not there is any emission.

Whoever commits prostitution is guilty of a petty misdemeanor, unless such crime is a second or subsequent conviction, in which case such person is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-9-11, enacted by Laws 1963, ch. 303, § 9-11; 1981, ch. 233, § 1; 1989, ch. 132, § 1.**

**The 1989 amendment,** effective June 16, 1989, substituted "a sexual act" for "sexual penetration" in the first and second paragraphs, and inserted "masturbation of another" in the second paragraph.

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**Constitutionality.** — This section does not violate the equal protection clause of the fourteenth amendment of the United States constitution or the equal rights amendment of the New Mexico constitution. *State v. Sandoval*, 1982-NMCA-091, 98 N.M. 417, 649 P.2d 485.

**"Masturbation" construed.** — A jury instruction defining masturbation to include erotic stimulation of the genital organs by the alternative means of "sexual



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fantasies" extended the scope of criminal conduct prohibited by this section and constituted reversible error. *State v. Mayfield*, 1995-NMCA-077, 120 N.M. 198, 900 P.2d 358.

**Possession of woman for unlawful purposes.** — The having in possession of a woman for purposes of unlawful sexual intercourse was criminal. *State v. Chenault*, 1915-NMSC-024, 20 N.M. 181, 147 P. 283 (decided under prior law).

**Law reviews.** — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 63A Am. Jur. 2d Prostitution §§ 1 to 30.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.

Laws prohibiting or regulating "escort services," "outcall entertainment" or similar services used to carry on prostitution, 15 A.L.R.5th 900.

73 C.J.S. Prostitution and Related Offenses §§ 2 to 20.

## 30-9-3. Patronizing prostitutes.

Patronizing prostitutes consists of:

A. entering or remaining in a house of prostitution or any other place where prostitution is practiced, encouraged or allowed with intent to engage in a sexual act with a prostitute; or

B. knowingly hiring or offering to hire a prostitute, or one believed by the offeror to be a prostitute, to engage in a sexual act with the actor or another.

As used in this section, "a sexual act" means sexual intercourse, cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent and with any object of the genital or an anal opening of another whether or not there is any emission.

Whoever commits patronizing prostitutes is guilty of a petty misdemeanor, unless such crime is a second or subsequent conviction, in which case such person is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-9-12, enacted by Laws 1963, ch. 303, § 9-12; 1981, ch. 233, § 2; 1989, ch. 132, § 2.**

**The 1989 amendment,** effective June 16, 1989, substituted "a sexual act" for "sexual penetration" throughout the section, in Subsection B inserted "or one believed by the offeror to be a prostitute", inserted "masturbation of another" in the next-to-last undesignated paragraph, and substituted "an anal" for "oral" in the next-to-last undesignated paragraph.

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**Law reviews.** — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

## 30-9-4. Promoting prostitution.

Promoting prostitution consists of any person, acting other than as a prostitute or patron of a prostitute:

A. knowingly establishing, owning, maintaining or managing a house of prostitution or a place where prostitution is practiced, encouraged or allowed, or participating in the establishment, ownership, maintenance or management thereof;

B. knowingly entering into any lease or rental agreement for any premises which a person partially or wholly owns or controls, knowing that such premises are intended for use as a house of prostitution or as a place where prostitution is practiced, encouraged or allowed;

C. knowingly procuring a prostitute for a house of prostitution or for a place where prostitution is practiced, encouraged or allowed;

D. knowingly inducing another to become a prostitute;

E. knowingly soliciting a patron for a prostitute or for a house of prostitution or for any place where prostitution is practiced, encouraged or allowed;

F. knowingly procuring a prostitute for a patron and receiving compensation therefor;

G. knowingly procuring transportation for, paying for the transportation of or transporting a person within the state with the intention of promoting that person's engaging in prostitution;

H. knowingly procuring through promises, threats, duress or fraud any person to come into the state or causing a person to leave the state for the purpose of prostitution; or

I. under pretense of marriage, knowingly detaining a person or taking a person into the state or causing a person to leave the state for the purpose of prostitution.

Whoever commits promoting prostitution is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-9-13, enacted by Laws 1963, ch. 303, § 9-13; 1981, ch. 233, § 3.**

**Cross references.** — For sexual exploitation of children by prostitution, *see* 30-6A-4 NMSA 1978.



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ANNOTATIONS

**Suspension of sentence set aside.** — Substantial evidence that defendant permitted certain premises which were under her control to be used for purposes of prostitution, lewdness and assignation, supported judgment of trial court in setting aside order of suspension of one month jail sentence imposed for keeping a house of prostitution. *State v. Snyder*, 1923-NMSC-021, 28 N.M. 387, 212 P. 736.

**Sufficient evidence to support promoting prostitution conviction.** — Where defendant was convicted of human trafficking, promoting prostitution, accepting earnings from a prostitute, contributing to the delinquency of a minor, and conspiracy, defendant's conviction for promoting prostitution was supported by substantial evidence where the evidence presented at trial established that defendant created an advertisement for the victim on a website commonly used to advertise prostitution services, that defendant listed his phone number as the contact number in the advertisement, and that defendant took the victim to a gas station and dropped her off there intending for her to exchange sex for money. *State v. Jackson*, 2018-NMCA-066, cert. denied.

**Indictment sufficient.** — A count in which it was charged that defendant, on a certain day, at a certain place, did, unlawfully, set up and keep a house of prostitution in a certain town, within seven hundred feet of a certain theater, contrary to the form of the statute, sufficiently conformed with the statute (Laws 1901, ch. 84, § 1). *Territory v. McGrath*, 1911-NMSC-026, 16 N.M. 202, 114 P. 364 (decided under prior law).

It was unnecessary to set forth in the indictment the names of persons permitted to use the premises unlawfully. *State v. Alston*, 1923-NMSC-006, 28 N.M. 379, 212 P. 1031.

**Law reviews.** — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 24 Am. Jur. 2d Disorderly Houses §§ 14, 19; 63A Am. Jur. 2d Prostitution §§ 7 to 9, 15 to 23.

Criminal responsibility of woman who connives or consents to her own transportation for immoral purposes, 84 A.L.R. 376.

Separate acts of taking earnings of or support from prostitute as separate or continuing offenses of pimping, 3 A.L.R.4th 1195.

Entrapment defense, availability in state court of defense where one accused of pandering denies participation in offense, 5 A.L.R.4th 1128.

Entrapment defense in sex offense prosecution, 12 A.L.R.4th 413.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, 41 A.L.R.4th 675.

27 C.J.S. Disorderly Houses §§ 2 to 6; 73 C.J.S. Prostitution and Related Offenses §§ 4 to 13.

## 30-9-4.1. Accepting earnings of a prostitute.

Accepting the earnings of a prostitute consists of accepting, receiving, levying or appropriating money or anything of value, without consideration, from the proceeds of the earnings of a person engaged in prostitution with the knowledge that the person is engaged in prostitution and that the earnings are derived from engaging in prostitution, or knowingly owning or knowingly managing a house or other place where prostitution is practiced or allowed and living or deriving support or maintenance, in whole or in part, from the earnings or proceeds of a person engaged in prostitution at that house or place.

Whoever commits accepting the earnings of a prostitute is guilty of a fourth degree felony.

**History: Laws 1981, ch. 233, § 4.**

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**Sufficient evidence to support conviction.** — Where defendant was convicted of human trafficking, promoting prostitution, accepting earnings from a prostitute, contributing to the delinquency of a minor, and conspiracy, defendant's conviction for accepting earnings of a prostitute was supported by substantial evidence where trial testimony from the victim established that defendant knew that the victim was engaged in prostitution and that the victim gave defendant money she received as a result of various sexual transactions. *State v. Jackson*, 2018-NMCA-066, cert. denied.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 63A Am. Jur. 2d Prostitution §§ 24 to 26.

73 C.J.S. Prostitution §§ 17, 18.

## 30-9-5. Order for medical examination and treatment.

In addition to its general sentencing authority, the court may order any defendant convicted of prostitution or patronizing prostitutes to be examined for venereal disease and shall sentence any diseased defendant to submit to medical treatment until he is discharged from treatment as noninfectuous [noninfectious]. If the defendant is without funds to pay for medical treatment, it shall be provided by the state department of public health [department of health].

**History: 1953 Comp., § 40A-9-14, enacted by Laws 1963, ch. 303, § 9-14.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Section 12-1-2, 1953 Comp. (Laws 1937, ch. 39, § 2), creating the state department of health, was repealed by Laws 1968, ch. 37, § 7. Laws 1968, ch. 37, § 3, (former 12-1-28, 1953 Comp.), transferred all powers, duties, etc. of the department of public health to the health and social



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services department, which department was abolished by Laws 1977, ch. 253, § 5. Section 4 of the 1977 act established the health and environment department, consisting of several divisions. Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department, and enacted a new 9-7-4 NMSA 1978, creating the department of health.

## 30-9-6. Testimony of witnesses to prostitution and lewdness.

In any investigation, proceeding, preliminary hearing or trial before any court, magistrate or grand jury concerning a violation of or an attempt to commit any crime in violation of Sections 9-11, 9-12 and 9-13 [30-9-2, 30-9-3 and 30-9-4 NMSA 1978] of this article, no person shall be excused from giving testimony or producing documentary or other evidence material to such investigation, proceeding, preliminary hearing or trial on the ground that the testimony or evidence required of him is incriminating evidence; provided that, any person who is so subpoenaed and ordered to testify or produce evidence concerning such crimes shall be immune to prosecution or conviction for any violation of such crimes about which he may testify.

**History: 1953 Comp., § 40A-9-15, enacted by Laws 1963, ch. 303, § 9-15.**

**Cross references.** — For protection against self-incrimination, *see* N.M. Const., art. II, § 15.

## 30-9-7. Evidence.

In any proceeding under Article 9 [30-9-1 through 30-9-9 NMSA 1978] or action to abate a public nuisance under Article 8 [30-8-1 to 30-8-4, 30-8-8 to 30-8-13 NMSA 1978], testimony about the following circumstances is admissible in evidence:

A. the general reputation of the place;

B. the reputation of the persons who reside in or frequent the place;

C. the frequency, timing and length of visits by nonresidents; and

D. prior convictions of the defendant or persons who reside in or frequent the place under Sections 9-11, 9-12 and 9-13 [30-9-2, 30-9-3 and 30-9-4 NMSA 1978] of this article or Sections 40-34-1 through 40-34-5 New Mexico Statutes Annotated, 1953 Compilation, or of any other offense of like nature wherever committed.

**History: 1953 Comp., § 40A-9-16, enacted by Laws 1963, ch. 303, § 9-16.**

**Cross references.** — For general rule on admissibility of evidence of other crimes, *see* Paragraph B of Rule 11-404 NMRA.

**Compiler's notes.** — Sections 40-34-1 through 40-34-5, 1953 Comp., relating to prostitution, which are referred to in Subsection D, were repealed by Laws 1963, ch. 303, § 30-1.

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**Proof not restricted.** — Evidence by which an establishment might be proved a house of prostitution was not limited to a proof of facts mentioned in statute. *Territory v. McGrath*, 1911-NMSC-026, 16 N.M. 202, 114 P. 364.

**Admissibility of prior conviction.** — Proof of a prior conviction for keeping a house of prostitution should have been restricted to a conviction previously had under the provisions of current act (Laws 1921, ch. 69) and not of a prior act. *State v. Snyder*, 1923-NMSC-022, 28 N.M. 388, 212 P. 736 (decided under prior law).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 24 Am. Jur. 2d Disorderly Houses §§ 29 to 32; 63A Am. Jur. 2d Prostitution § 28.

Admissibility, in prosecution for sexual offense, of evidence of other similar offense, 77 A.L.R.2d 841, 2 A.L.R.4th 330.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome, 42 A.L.R.4th 879.

Admissibility of expert testimony as to criminal defendant's propensity toward sexual deviation, 42 A.L.R.4th 937.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape person other than prosecutrix - prior offenses, 86 A.L.R.5th 59.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other then prosecutrix - subsequent acts, 87 A.L.R.5th 181.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape, person other than prosecutrix - offenses unspecified as to time, 88 A.L.R.5th 429.

27 C.J.S. Disorderly Houses § 14 (1-5); 73 C.J.S. Prostitution and Related Offenses § 6.

## 30-9-8. House of prostitution; public nuisance.

As used in this section "house of prostitution" means a building, enclosure or place that is used for the purpose of prostitution as that crime is defined in Section 30-9-2 NMSA 1978. A house of prostitution is a public nuisance per se.



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**History: 1953 Comp., § 40A-9-17, enacted by Laws 1963, ch. 303, § 9-17; 1989, ch. 114, § 2.**

**Cross references.** — For abatement of public nuisance, *see* 30-8-8 NMSA 1978.

**The 1989 amendment,** effective March 28, 1989, added the first sentence.

**ANNOTATIONS**

**Criminal proceeding.** — Former statute providing for injunction and abatement of nuisance and forfeiture of premises on proof that lewdness, assignation or prostitution existed was criminal in nature and the complaint was an action in the nature of a criminal proceeding. *State ex rel. Murphy v. Morley*, 1957-NMSC-087, 63 N.M. 267, 317 P.2d 317.

**Crime not enjoinable as such.** — Where a ground of equitable jurisdiction to enjoin otherwise exists, the claim to such relief is not to be denied merely because the act complained of constitutes a crime, but a crime may not in and of itself be made an independent ground for injunction; hence, trial court could not extend authority of its restraint against defendant from maintaining a certain premises for purposes of lewdness, assignation or prostitution throughout entire county, and its attempt to do so fell squarely within the interdiction that equity may not be employed to forestall the commission of a crime. *State v. Robertson*, 1957-NMSC-060, 63 N.M. 74, 313 P.2d 342.

**Sufficiency of complaint.** — Where the nuisance complained of is a nuisance per se, and denounced as such in the statute, it is sufficient for the complaint to allege its existence in the language of the statute. *State v. Robertson*, 1957-NMSC-060, 63 N.M. 74, 313 P.2d 342.

**Bond as enforcement device.** — A trial judge has both the statute and the discretion inherent in his broad equitable powers to draw upon in providing means for the enforcement of order restraining defendant, from using, occupying or maintaining a certain premises for purposes of lewdness, assignation or prostitution, by requiring a bond of defendant, so long as its effect is confined to the premises in question. *State v. Robertson*, 1957-NMSC-060, 63 N.M. 74, 313 P.2d 342.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity of statutes or ordinances requiring sex-oriented businesses to obtain operating licenses, 8 A.L.R.4th 130.

## 30-9-9. Remedy of lessor.

If the lessee of property has been convicted of using it as a house of prostitution, or if the property has been adjudged to constitute a public nuisance for that reason, the lease by which the property is held is voidable by the lessor. The lessor shall have the same remedies for regaining possession as in the case of a tenant holding over his term.

**History: 1953 Comp., § 40A-9-18, enacted by Laws 1963, ch. 303, § 9-18.**

**Cross references.** — For provisions on forcible entry and unlawful detainer, *see* 35-10-1 NMSA 1978 et seq.

For Uniform Owner-Resident Relations Act, *see* 47-8-1 NMSA 1978.

**ANNOTATIONS**

**Recovery of rent barred.** — Where building was leased with intent that it be used as a house of prostitution, and the house was so used, the lessor could not recover rent. *McRae v. Cassan*, 1910-NMSC-038, 15 N.M. 496, 110 P. 574.

## 30-9-10. Definitions.

As used in Sections 30-9-10 through 30-9-16 NMSA 1978:

A. "force or coercion" means:

(1) the use of physical force or physical violence;

(2) the use of threats to use physical violence or physical force against the victim or another when the victim believes that there is a present ability to execute the threats;

(3) the use of threats, including threats of physical punishment, kidnapping, extortion or retaliation directed against the victim or another when the victim believes that there is an ability to execute the threats;

(4) the perpetration of criminal sexual penetration or criminal sexual contact when the perpetrator knows or has reason to know that the victim is unconscious, asleep or otherwise physically helpless or suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act; or

(5) the perpetration of criminal sexual penetration or criminal sexual contact by a psychotherapist on his patient, with or without the patient's consent, during the course of psychotherapy or within a period of one year following the termination of psychotherapy.

Physical or verbal resistance of the victim is not an element of force or coercion;

B. "great mental anguish" means psychological or emotional damage that requires psychiatric or psychological treatment or care, either on an inpatient or outpatient basis, and is characterized by extreme behavioral change or severe physical symptoms;

C. "patient" means a person who seeks or obtains psychotherapy;



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D. "personal injury" means bodily injury to a lesser degree than great bodily harm and includes, but is not limited to, disfigurement, mental anguish, chronic or recurrent pain, pregnancy or disease or injury to a sexual or reproductive organ;

E. "position of authority" means that position occupied by a parent, relative, household member, teacher, employer or other person who, by reason of that position, is able to exercise undue influence over a child;

F. "psychotherapist" means a person who is or purports to be a:

(1) licensed physician who practices psychotherapy;

(2) licensed psychologist;

(3) licensed social worker;

(4) licensed nurse;

(5) counselor;

(6) substance abuse counselor;

(7) psychiatric technician;

(8) mental health worker;

(9) marriage and family therapist;

(10) hypnotherapist; or

(11) minister, priest, rabbi or other similar functionary of a religious organization acting in his role as a pastoral counselor;

G. "psychotherapy" means professional treatment or assessment of a mental or an emotional illness, symptom or condition;

H. "school" means any public or private school, including the New Mexico military institute, the New Mexico school for the blind and visually impaired, the New Mexico school for the deaf, the New Mexico boys' school, the New Mexico youth diagnostic and development center, the Los Lunas medical center, the Fort Stanton hospital, the New Mexico behavioral health institute at Las Vegas and the Carrie Tingley crippled children's hospital, that offers a program of instruction designed to educate a person in a particular place, manner and subject area. "School" does not include a college or university; and

I. "spouse" means a legal husband or wife, unless the couple is living apart or either husband or wife has filed for separate maintenance or divorce.

**History: 1953 Comp., § 40A-9-20, enacted by Laws 1975, ch. 109, § 1; 1979, ch. 28, § 1; 1993, ch. 177, § 1; 2001, ch. 161, § 1; 2005, ch. 313, § 7.**

**The 2005 amendment,** effective June 17, 2005, changed the name of the New Mexico school for the visually handicapped to the New Mexico school for the blind and visually impaired and changed the name of the Las Vegas medical center to the New Mexico behavioral institute at Las Vegas in Subsection H.

**The 2001 amendment,** effective July 1, 2001, added Subsection H and redesignated former Subsection H as Subsection I.

**The 1993 amendment,** effective July 1, 1993, in Subsection A, substituted "contact" for "conduct" near the beginning of Paragraph (4), redesignated the former second sentence of Paragraph (4) as the second undesignated paragraph of the subsection, added Paragraph (5), making a related grammatical change, and made stylistic changes; and added present Subsections C, F, and G, making related subsection redesignations.

## ANNOTATIONS

**Force or coercion.** – Where defendant grabbed the victim's breasts, causing pain and discomfort and squeezed the victim's breasts so tightly that the victim was unable to breath, became dizzy, and was unable to escape from defendant's grip, there was sufficient evidence to support a finding that defendant used force to sexually assault the victim. *State v. Huff*, 1998-NMCA-075, 125 N.M. 254, 960 P.2d 342, cert. denied, 125 N.M. 146, 958 P.2d 104.

**Mental anguish.** – Expert testimony concerning the victim's mood swings from depression to anger, the victim's emotional inability to re-enroll in school, indications that the victim had started drinking more to block out what happened, and the victim's plan to move in order to avoid bad memories and embarrassment was sufficient evidence to establish the element of mental anguish. *State v. Barraza*, 1990-NMCA-026, 110 N.M. 45, 791 P.2d 799, cert. denied, 109 N.M. 704, 789 P.2d 1271.

**Sufficient evidence of great mental anguish.** — Where defendant was convicted of first-degree criminal sexual penetration (CSP), and where defendant claimed that the state failed to establish that the victim suffered great mental anguish as a result of the incident and that the evidence is therefore insufficient to support his conviction for first-degree CSP, evidence that the victim was over seventy years of age, that she moved to another state to live with her daughter because she felt unable to live alone, that she experienced constant flashbacks, and as a result had trouble concentrating and was unable to drive for a period of time, was sufficient to support a conclusion that the victim suffered great mental anguish as a result of the incident. *State v. Sena*, 2018-NMCA-037, *rev'd in part by* 2020-NMSC-011.

**Position of authority.** – Where defendant was considered by the victim as a father figure; defendant acted as a father figure in the presence of other people; defendant did chores at the request of the victim's parent; defendant was entrusted by the victim's parent to act as the victim's guardian at times; defendant assumed the role of employer by allowing the victim to earn money at defendant's place



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of business; and defendant was the trusted friend of the victim's parent which allowed defendant to be alone with the victim when the victim spent the night at defendant's house or went to the dump in defendant's truck, the evidence was sufficient to support a finding that defendant exercised a position of authority over the victim. *State v. Gipson*, 2009-NMCA-053, 146 N.M. 202, 207 P.3d 1179.

**"Position of authority" interpreted.** — In 30-9-10(E) NMSA 1978, the legislature has designated certain relationships with a child that represent a "position of authority," and the language "who, by reason of that position, is able to exercise undue influence over a child" does not pertain to each of the types of position of authority listed in the definition. Under the definition of "position of authority", a household member is presumed to be able to exercise undue influence over a child such that additional proof concerning a perpetrator's use or possession of such authority is not required. *State v. Erwin*, 2016-NMCA-032, cert. denied.

Where defendant, who was charged with criminal sexual contact of a child thirteen to eighteen years of age, did not dispute the evidence that he was a household member, but claimed that the state failed to prove that he used this position of authority to coerce the child to submit to sexual contact, the state was not required to prove that defendant, by reason of his position as a household member, was able to exercise undue influence over the child, because the legislature has designated certain relationships with a child, including a household member, that represent a position of authority for purposes of prosecution under 30-9-13 NMSA 1978. *State v. Erwin*, 2016-NMCA-032, cert. denied.

**Phrase "unless the couple is living apart"** is not void for vagueness when construed and applied in the ordinary sense to mean a suspension of the marital relationship. *State v. Brecheisen*, 1984-NMCA-011, 101 N.M. 38, 677 P.2d 1074, cert. denied, 101 N.M. 11, 677 P.2d 624.

**Evidence of living apart.** — Evidence supported finding that defendant and his wife were living apart at the time of an alleged attack by defendant upon his wife, where the wife testified that she felt she was living apart from defendant at the time of the attack, and there was evidence of the couple's physical separation and the defendant's securing other housing and paying one month's rent. *Brecheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

**Consensual sex between therapist and adult patient.** — A defendant's conduct did not constitute the crimes of second or third degree criminal sexual penetration because consensual sex between a therapist and his adult patient is not a crime. *State v. Leiding*, 1991-NMCA-043, 112 N.M. 143, 812 P.2d 797, cert. denied, 112 N.M. 77, 811 P.2d 575.

**Law reviews.** — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For article, New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption, see 22 N.M.L. Rev. 551 (1992).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Rape or similar offense based on intercourse with woman who is allegedly mentally deficient, 31 A.L.R.3d 1227.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient, 99 A.L.R.3d 854.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 A.L.R.4th 310.

Conviction of rape or related sexual offenses on basis of intercourse accomplished under the pretext of, or in the course of, medical treatment, 65 A.L.R.4th 1064.

## 30-9-11. Criminal sexual penetration.

A. Criminal sexual penetration is the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.

B. Criminal sexual penetration does not include medically indicated procedures.

C. Aggravated criminal sexual penetration consists of all criminal sexual penetration perpetrated on a child under thirteen years of age with an intent to kill or with a depraved mind regardless of human life. Whoever commits aggravated criminal sexual penetration is guilty of a first degree felony for aggravated criminal sexual penetration.

D. Criminal sexual penetration in the first degree consists of all criminal sexual penetration perpetrated:

(1) on a child under thirteen years of age; or

(2) by the use of force or coercion that results in great bodily harm or great mental anguish to the victim.

Whoever commits criminal sexual penetration in the first degree is guilty of a first degree felony.

E. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:

(1) by the use of force or coercion on a child thirteen to eighteen years of age;

(2) on an inmate confined in a correctional facility or jail when the perpetrator is in a position of authority over the inmate;

(3) by the use of force or coercion that results in personal injury to the victim;

(4) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons;

(5) in the commission of any other felony; or



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(6) when the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual penetration in the second degree is guilty of a second degree felony. Whoever commits criminal sexual penetration in the second degree when the victim is a child who is thirteen to eighteen years of age is guilty of a second degree felony for a sexual offense against a child and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a minimum term of imprisonment of three years, which shall not be suspended or deferred. The imposition of a minimum, mandatory term of imprisonment pursuant to the provisions of this subsection shall not be interpreted to preclude the imposition of sentencing enhancements pursuant to the provisions of the Criminal Sentencing Act [Chapter 31, Article 18 NMSA 1978].

F. Criminal sexual penetration in the third degree consists of all criminal sexual penetration perpetrated through the use of force or coercion not otherwise specified in this section.

Whoever commits criminal sexual penetration in the third degree is guilty of a third degree felony.

G. Criminal sexual penetration in the fourth degree consists of all criminal sexual penetration:

(1) not defined in Subsections D through F of this section perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child and not the spouse of that child; or

(2) perpetrated on a child thirteen to eighteen years of age when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is a student in a school.

Whoever commits criminal sexual penetration in the fourth degree is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-9-21, enacted by Laws 1975, ch. 109, § 2; 1987, ch. 203, § 1; 1991, ch. 26, § 1; 1993, ch. 177, § 2; 1995, ch. 159, § 1; 2001, ch. 161, § 2; 2003 (1st S.S.), ch. 1, § 3; 2007, ch. 69, § 1; 2009, ch. 56, § 1.**

**Cross references.** — For assault with intent to commit a violent felony, *see* 30-3-3 NMSA 1978.

For sexual exploitation of children, *see* 30-6A-3 NMSA 1978.

For provision that testimony of a victim hereunder need not be corroborated, *see* 30-9-15 NMSA 1978.

For limitations on testimony regarding victim's past sexual conduct, *see* 30-9-16 NMSA 1978.

For the Sex Offender Registration and Notification Act, *see* Chapter 29, Article 11A NMSA 1978.

For Uniform Jury Instructions, *see* UJI 14-941 to 14-963 NMRA.

**Compiler's notes.** — For Laws 2003, ch. 257 enactment concerning time limit for prosecution under this section, *see* 30-1-9.2 NMSA 1978 and notes thereto.

**The 2009 amendment,** effective July 1, 2009, in Subsection C, increased the age of the child victim from nine to thirteen years.

**The 2007 amendment,** effective July 1, 2007, added a new Subsection C to provide a penalty for aggravated criminal sexual penetration in the first degree; defined criminal sexual penetration in the second degree to consist of criminal sexual penetration by the use of force or coercion on a child thirteen to eighteen years of age; and eliminated the penalty for criminal sexual penetration in the third degree when the victim is thirteen to eighteen years of age.

**The 2003 (1st S.S.) amendment,** effective February 3, 2004, added the last two sentences of Subsection D and the last sentence of Subsection E.

**The 2001 amendment,** effective July 1, 2001, substituted "eighteen" for "sixteen" in Paragraph D(1); and in Subsection F, added the Paragraph (1) designation, inserted "the child" following "older than" in Paragraph (1), and added Paragraph (2).

**The 1995 amendment,** effective July 1, 1995, in Subsection D, added Paragraph (2) and redesignated the remaining paragraphs accordingly.

**The 1993 amendment,** effective July 1, 1993, designated the formerly undesignated provisions as Subsection A; added present Subsection B; redesignated former Subsections A through D as Subsections C through F; and substituted "Subsections C through E" for "Subsection A, B, or C" in the first paragraph of Subsection F.

**The 1991 amendment,** effective June 14, 1991, deleted "other than one's spouse" following "person" in the first paragraph and substituted "and not the spouse of that child" for "the child" at the end of the first sentence in Subsection D.

**The 1987 amendment,** effective June 19, 1987, added Subsection D.

**ANNOTATIONS**

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## I. GENERAL CONSIDERATION.

### A. IN GENERAL.

**Constitutionality.** — "Unlawful" is defined as "without excuse of justification" and the use of that term by the statute does not render the statute void for vagueness. *State v. Larson*, 1980-NMSC-106, 94 N.M. 795, 617 P.2d 1310.

**Identical counts and jury instructions.** — Where multiple counts of criminal sexual penetration of a minor in the indictment and the counts in the jury instructions were carbon-copy counts of each other and where the child's testimony distinguished facts for each count and the defendant admitted to having sexual intercourse with the child on several occasions, there was sufficient evidence from which a jury could find separate incidents of criminal sexual penetration and there was no violation of double jeopardy. *State v. Martinez*, 2007-NMCA-160, 143 N.M. 96, 173 P.3d 18, cert. denied, 2007-NMCERT-011.

**Double jeopardy.** — The crime of attempted CSP III is subsumed within assault with intent to commit CSP. Proof of an overt act done with the intent of forcing CSP required by attempted CSP III is satisfied by the same proof required for the attempted restraint by force in the assault (attempted battery) charge. *State v. Schackow*, 2006-NMCA-123, 140 N.M. 506, 143 P.3d 745, cert. denied, 2006-NMCERT-008, 140 N.M. 422, 143 P.3d 184.

**Multiple counts of criminal sexual penetration.** — Section 30-9-11 NMSA 1878 cannot be said as a matter of law to evince a legislative intent to punish separately each penetration occurring during a continuous attack absent proof that each act of penetration is in some sense distinct from the others. In determining whether an act is distinct our analysis is informed by the following factors culled from decisions of other jurisdictions that have considered the issue of multiple punishment in cases of rape: (1) temporal proximity of penetrations (the greater the interval between acts the greater the likelihood of separate offenses); (2) location of the victim during each penetration (movement or repositioning of the victim between penetrations tends to show separate offenses); (3) existence of an intervening event; (4) sequencing of penetrations (serial penetrations of different orifices, as opposed to repeated penetrations of the same orifice, tend to establish separate offenses); (5) defendant's intent as evidenced by his conduct and utterances; and (6) number of victims (although not relevant here, multiple victims will likely give rise to multiple offenses). *Herron v. State*, 1991-NMSC-012, 111 N.M. 357, 805 P.2d 624.

**The term "sexual intercourse"** includes penetration of the vulva even when the vaginal canal is not penetrated. *State v. Tafoya*, 2010-NMCA-010, 147 N.M. 602, 227 P.3d 92, cert. denied, 2009-NMCERT-012, 147 N.M. 600, 227 P.3d 90.

**Applicable statute of limitations.** — Where the state alleges that defendant committed criminal sexual penetration of a minor under the age of 13 between September and December of 1988 and in January of 1989, the applicable statute of limitations at the time defendant allegedly committed the crime is 15 years. *State v. Hill*, 2005-NMCA-143, 138 N.M. 693, 125 P.3d 1175, cert. denied, 2005-NMCERT-012, 138 N.M. 772, 126 P.3d 1136.

**Exclusion of defendant from courtroom.** — Defendant's exclusion from the courtroom while child testified created a substantial risk that the jury would assume that the trial court believed that the defendant had engaged in misconduct necessitating his absence from the courtroom. *State v. Rodriguez*, 1992-NMCA-088, 114 N.M. 265, 837 P.2d 459.

**Defendant absent from trial voluntarily.** — Factors articulated in *State v. Clements*, 1988-NMCA-094, 108 N.M. 13, 765 P.2d 1195, cert. denied, 107 N.M. 785, 765 P.2d 758, as to waiver of right to be present being occasioned by the voluntary absence of an accused, were to be applied only when the defendant was absent from trial voluntarily. *State v. Rodriguez*, 1992-NMCA-088, 114 N.M. 265, 837 P.2d 459.

**Trial of co-defendants.** — Whether separate trials are to be held for defendants jointly indicted for attempted forcible rape was a matter to be addressed to and resolved by the sound discretion of the trial court. *State v. Pope*, 1967-NMCA-010, 78 N.M. 282, 430 P.2d 779.

**Defense of mistake of fact.** — Twenty year-old defendant's conviction of fourth degree criminal sexual penetration was reversed, where the trial court did not consider his defense of mistake of fact, which was based on evidence that he had asked the fifteen year-old victim her age and was told by her and another person that she was seventeen. *Perez v. State*, 1990-NMSC-115, 111 N.M. 160, 803 P.2d 249.

**Prosecutor's remarks held prejudicial.** — The prosecutor made a legally incorrect statement of the law when he told the jury the crime for which the defendant was charged (criminal sexual penetration) was less serious than committing the crime with a weapon, thus invading the province of the court to give instructions on the law. Because the evidence of defendant's guilt was less than overwhelming, it is fair to assume that the prosecutor's remarks had some prejudicial impact, substantial enough to require a new trial at the trial court's discretion. *State v. Gonzales*, 1986-NMCA-050, 105 N.M. 238, 731 P.2d 381, cert. quashed, 105 N.M. 211, 730 P.2d 1193 (1987).

**Adoption of child conceived as result of rape.** — Man convicted of criminal sexual penetration of a child had no constitutional right under the due process clauses of the United States or New Mexico Constitutions to withhold consent to adoption of the child conceived and born as a result of that act. *Christian Child Placement Serv. of the N.M. Christian Children's Home v. Vestal*, 1998-NMCA-098, 125 N.M. 426, 962 P.2d 1261.

**Spouses living apart.** — The phrase "living apart" as the phrase is used in the definition of the term "spouse" in Section 30-9-10 NMSA 1978 suggests that Section 30-9-11 NMSA 1978 was designed to prohibit nonconsensual sexual activity among married persons during interruption of the relationship and there is no indication that the legislature intended either a durational requirement or the existence of measures to terminate the marriage to impose criminal liability on one spouse for the rape of another. *Brescheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

### B. CONSTITUTIONALITY.

**Speedy trial.** — The right to a speedy trial based on a 1989 original complaint, which was dismissed, did not run from 1989 to 2002 when charges were re-filed because defendant was not an "accused" and knew he was not an "accused" during the approximately 13-year interval when no criminal sexual penetration of a minor under the age of 13 charges were pending against him. Therefore, defendant's speedy trial right did not attach until 2002. *State v. Hill*, 2005-NMCA-143, 138 N.M. 693, 125 P.3d 1175, cert. denied, 2005-NMCERT-012, 138 N.M. 772, 126 P.3d 1136.

**Phrase "perpetrated by the use of force or coercion" not vague.** — Phrase "perpetrated by the use of force or coercion" in this section is not unconstitutionally vague since the crime is defined in terms of a result that defendant causes, and if a defendant causes such a result by the use of force or coercion, force or coercion was the method which caused the result, that is, the crime. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

**Distinctions between degrees on basis of harm constitutional.** — Determining the degree of a crime by



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the amount of the harm done to the victim does not make the statute unconstitutionally vague. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

**Section not void for vagueness.** — Criminal sexual penetration could be committed by the use of force or coercion without the victim suffering personal injury as a result thereof and the distinction between second and third degree criminal sexual penetration based on personal injury to the victim is not void for vagueness as a matter of law. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

This section is not unconstitutionally vague or overbroad, nor does the statute encourage arbitrary or discriminatory prosecution. *State v. Pierce*, 1990-NMSC-049, 110 N.M. 76, 792 P.2d 408.

**Former sodomy statute constitutional.** — Former 40A-9-6, 1953 Comp., which embraced and proscribed sodomitic conduct even on the part of consenting adults was constitutionally valid. *State v. Elliott*, 1976-NMSC-030, 89 N.M. 305, 551 P.2d 1352 (decided under prior law, statute repealed).

**And not violative of right of privacy.** — On attack by an inmate of penal institution against constitutionality of former sodomy statute on grounds that it violated right of privacy, nothing in the language of the act could reasonably be considered as violative of any constitutionally protected area, nor did the record disclose an unconstitutional application of the law in the particular instance. *Washington v. Rodriguez*, 1971-NMCA-021, 82 N.M. 428, 483 P.2d 309 (decided under prior law, statute repealed).

**Standing to challenge constitutionality.** — Defendant's claims that definitional distinctions which go to difference between first and second degree criminal sexual penetration are unconstitutionally vague would not be considered by the appeals court when defendant was convicted of second degree criminal sexual penetration. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

Since defendant did not claim nor argue that he was a member of the class discriminated against by the former sodomy statute or that his rights had been impaired by application of the statute to him, he lacked standing to challenge the constitutionality of the act. *State v. Armstrong*, 1973-NMCA-081, 85 N.M. 234, 511 P.2d 560, cert. denied, 85 N.M. 228, 511 P.2d 554, *overruled by State v. Elliott*, 1975-NMCA-087, 88 N.M. 187, 539 P.2d 207; *State v. Kasakoff*, 1972-NMCA-151, 84 N.M. 404, 503 P.2d 1182.

In prosecution for sodomy, where the state's evidence was that the act was committed by force and the defendant denied committing the act, defendant could not then argue that the incident was a consensual act between two adult persons and that the statute was unconstitutional as overbroad for prohibiting private consensual acts of adults. *State v. Kasakoff*, 1972-NMCA-151, 84 N.M. 404, 503 P.2d 1182.

**Spouses living apart.** — Where, at the time defendant broke into the house in which defendant's spouse lived and forcibly had sexual contact with the spouse, defendant and the spouse were living apart, defendant did not have standing to challenge Section 30-9-11 NMSA 1978 on the ground that the statute was unconstitutionally overbroad, because it infringed on privacy in marriage which is a protected right of association under the First Amendment. *Brescheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

**Section 30-9-11 NMSA 1978 is not unconstitutionally vague** even though the phrase "living apart" is not defined as that phrase is used in the definition of the term "spouse" in Section 30-9-10 NMSA 1978. *Brescheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

C. ELEMENTS OF OFFENSE.

**Criminal sexual penetration based on the commission of a felony.** — When criminal sexual penetration in the second degree is based on the commission of a felony, it must be a felony that is committed against the victim of, and that assists in the accomplishment of, sexual penetration by force or coercion or against a victim who, by age or other statutory factor, gave no lawful consent. Simply causing another person to engage in otherwise lawful sexual intercourse at the same time a felony is being committed does not constitute the crime of criminal sexual penetration during the commission of a felony. The jury should be instructed that the crime of criminal sexual penetration during the commission of a felony requires the commission of unlawful sexual activity with the victim of the felony. *State v. Stevens*, 2014-NMSC-011, *overruling in part State v. Maestas*, 2005-NMCA-062, 137 N.M. 477.

Where defendant directed the victim to perform oral sex on defendant's friend after the three injected methamphetamine together; defendant did not force the victim to perform oral sex; the victim complied with defendant's direction because the victim was high and did not care; defendant was charged with causing criminal sexual penetration during the commission of the felony of distribution of a controlled substance to a minor; and the jury was not instructed that the state was required to prove that the sexual penetration was unlawful and that the penetration was caused by the commission of a felony against the victim, the deficiency in the jury instructions did not result in fundamental error, because the sexual relation between the victim, who was thirteen years of age, and defendant's friend, who was as least ten years older, was unlawful and the fact that it was after the victim had been injected with methamphetamine that the victim acquiesced to defendant's direction to perform oral sex established the nexus of causation between the commission of the felony against the victim and the resulting unlawful sexual act committed on the victim. *State v. Stevens*, 2014-NMSC-011, *overruling in part State v. Maestas*, 2005-NMCA-062, 137 N.M. 477.

**Use of force.** — Where the defendant ensured the physical isolation of the location where the incident occurred; locked the doors of the car; unbuttoned and took off the thirteen-year old victim's pants; told the victim that she was ready for intercourse despite her disagreement; reclined the victim's car seat and then climbed on top of her, initiating sex by forcing the victim's legs open; and persisted in having intercourse with the victim after she told the defendant that it hurt and asked him to stop, the evidence was sufficient to support the defendant's conviction of sexual penetration through the use of force or coercion. *State v. Perea*, 2008-NMCA-147, 145 N.M. 123, 194 P.3d 738, cert. denied, 2008-NMCERT-009, 145 N.M. 257, 196 P.3d 488.

**Criminal sexual penetration is not continuing offense.** — Once the penetration is perpetrated, that criminal sexual penetration is a completed offense. *State v. Ramirez*, 1978-NMCA-102, 92 N.M. 206, 585 P.2d 651; *State v. Corneau*, 1989-NMCA-040, 109 N.M. 81, 781 P.2d 1159, cert. denied, 108 N.M. 668, 777 P.2d 907.

**Penetration not essential.** — Despite the heading "Criminal sexual penetration" for this section, the offense does not require penetration. *State v. Delgado*, 1991-NMCA-064, 112 N.M. 335, 815 P.2d 631, cert. denied, 112 N.M. 220, 813 P.2d 1018.

**Force or coercion not an element.** — Force or coercion is not an essential element of second degree criminal sexual penetration when defendant is in a position of authority over an inmate. *State v. Maestas*, 2005-NMCA-062, 137 N.M. 477, 112 P.3d 1134, *rev'd on other grounds*, 2007-NMSC-001, 140 N.M. 836, 149 P.3d 933.

**"Anguish" as personal injury.** — "Anguish" means "distress," and mental anguish is distress of the mind;



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if such results from the use of force or coercion it is personal injury under this statute. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

**Specific intent to rape** was not element of the crime. *State v. Ramirez*, 1972-NMCA-108, 84 N.M. 166, 500 P.2d 451, cert. denied, 84 N.M. 180, 500 P.2d 1303.

**Intent.** — The wording of this section was not meant to impose the additional requirement of showing specific intent. The intent which must be present to perform the act satisfies the "intentional causing" provision in this section. *State v. Keyonnie*, 1977-NMSC-097, 91 N.M. 146, 571 P.2d 413.

**Voluntary drunkenness no defense.** — Instruction that rape requires no specific intent and that voluntary drunkenness is neither excuse nor justification for crime of rape was correct. *State v. Ramirez*, 1972-NMCA-108, 84 N.M. 166, 500 P.2d 451, cert. denied, 84 N.M. 180, 500 P.2d 1303.

**Specific sexual intent not an element.** — The legislature did not intend to adopt a requirement of specific sexual intent as an element of this section. *State v. Pierce*, 1990-NMSC-049, 110 N.M. 76, 792 P.2d 408.

**Proof of intent.** — State was not required to prove motive or intent. *State v. Alva*, 1913-NMSC-056, 18 N.M. 143, 134 P. 209.

**"Perpetrated,"** in Subsection D, means accomplished, performed, committed. *State v. Ramirez*, 1978-NMCA-102, 92 N.M. 206, 585 P.2d 651.

**Penetration must be intentional.** — To prove criminal sexual penetration in the third degree, the state must establish that the penetration was intentional. *State v. Lucero*, 1994-NMCA-129, 118 N.M. 696, 884 P.2d 1175, cert. denied, 118 N.M. 731, 885 P.2d 1325.

**Child under age of 13.** — Causing a child under the age of 13 to engage in cunnilingus, even where there is no penetration, is sufficient to establish violation of this section. *State v. Orona*, 1982-NMSC-002, 97 N.M. 232, 638 P.2d 1077.

**Penetration and felony must be continuous transaction under Subsection D(4) (now E(5)).** — If a criminal sexual penetration occurs within the res gestae of a felony, Subsection D(4) (now E(5)) is applicable, and for the sexual penetration to come within the res gestae, the felony and the sexual penetration must be part of one continuous transaction and closely connected in point of time, place and causal connection. *State v. Martinez*, 1982-NMCA-053, 98 N.M. 27, 644 P.2d 541, cert. denied, 98 N.M. 336, 648 P.2d 794.

**Means of committing offense.** — Former law defining rape did not embrace several distinct offenses, but merely defined the various means by which the same offense might be committed. *Territory v. Edie*, 1892-NMSC-019, 6 N.M. 555, 30 P. 851, *aff'd on rehearing*, 1893-NMSC-016, 7 N.M. 183, 34 P. 46.

**Force or coercion.** — Unless there is force or coercion beyond that inherent in almost every criminal sexual penetration, the proper charge is third degree criminal sexual penetration. *State v. Pisio*, 1994-NMCA-152, 119 N.M. 252, 889 P.2d 860, cert. denied, 119 N.M. 20, 888 P.2d 466.

**Intercourse with underage girl.** — Rape could be perpetrated in any of the ways set out in the statutes and sexual intercourse with a girl with her consent constituted rape if she was less than 16 (now 13) years of age. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

**Submission to request of authority figure is coercion** if it is achieved through undue influence or affected by external forces. *State v. Gillette*, 1985-NMCA-037, 102 N.M. 695, 699 P.2d 626.

**Consensual sex between therapist and adult patient.** — A defendant's conduct did not constitute the crimes of second or third degree criminal sexual penetration because consensual sex between a therapist and his adult patient is not a crime. *State v. Leiding*, 1991-NMCA-043, 112 N.M. 143, 812 P.2d 797, cert. denied, 112 N.M. 77, 811 P.2d 575.

**Spouses living apart.** — Where defendant's spouse asked defendant to move out of their house several days before defendant broke into the house and forcibly had sexual contact with the spouse; the separation was to last a month to give the spouse time to decide whether to seek a divorce; defendant believed defendant had no choice but to move out; and defendant moved some of defendant's belongings out of the house and visited the spouse only to get work clothes and toiletries, there was a suspension of the marital relationship at the time defendant forcibly had sexual contact with the spouse. *Brescheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

**Guilt of each participant.** — A person engages in sexual intercourse, cunnilingus, fellatio, or anal intercourse if that person is one of the two persons required for the performance of the act. *State v. Delgado*, 1991-NMCA-064, 112 N.M. 335, 815 P.2d 631, cert. denied, 112 N.M. 220, 813 P.2d 1018.

**Statutory language genderless.** — The genderless language used in the statute makes clear that the defendant can be either male or female. *State v. Delgado*, 1991-NMCA-064, 112 N.M. 335, 815 P.2d 631, cert. denied, 112 N.M. 220, 813 P.2d 1018.

**Child not conceived "as a result of rape".** — Child conceived as a result of fourth degree criminal sexual penetration of a 16-year-old was not conceived "as a result of rape" authorizing dismissal of the father from adoption proceedings under Subsection C of 32A-5-19 NMSA 1978. *State ex rel. Children, Youth & Families Dep't v. Paul P.*, 1999-NMCA-077, 127 N.M. 492, 983 P.2d 1011.

**Defendant entitled to discovery** of information relevant to element of mental anguish which the state has to prove. *State v. Garcia*, 1980-NMCA-061, 94 N.M. 583, 613 P.2d 725, cert. denied, 94 N.M. 675, 615 P.2d 992.

**Defendant may require complaining witness to undergo psychological examination.** — When the mental condition of the victim is relevant because the state alleges the force or coercion resulted in mental anguish to the victim, defendant may require complaining witness to undergo a psychological examination, in order to adequately prepare his defense. *State v. Garcia*, 1980-NMCA-061, 94 N.M. 583, 613 P.2d 725, cert. denied, 94 N.M. 675, 615 P.2d 992.

### D. MULTIPLE CONVICTIONS OR PUNISHMENTS.

**Criminal sexual penetration and assault with intent to commit criminal sexual penetration on household member.** — Criminal sexual penetration and assault with intent to commit criminal sexual penetration on a household member are separate offenses. *State v. Jensen*, 2005-NMCA-113, 138 N.M. 254, 118 P.3d 762, cert. quashed, 2005-NMCERT-011, 138 N.M. 587, 124 P.3d 565.

**Third degree criminal sexual penetration becomes second degree criminal sexual penetration** when it is committed during the commission of any other felony. *Florez v. Williams*, 281 F.3d 1136 (10th Cir. 2002).

**Offense of enticement of child is not lesser included offense** of criminal sexual penetration. *State v. Garcia*, 1983-NMCA-069, 100 N.M. 120, 666 P.2d 1267, cert. denied, 100 N.M. 192, 668 P.2d 308.

**Aggravated sodomy and murder not merged.** — Homicide resulting from great bodily harm provided sufficient evidence for the jury to find aggravated sodomy and first degree kidnapping, and there was no merger with the charge of murder of which defendant was acquitted. *State v. Melton*, 1977-NMSC-014, 90 N.M. 188, 561 P.2d 461.

**Merger of attempted criminal sexual penetration and criminal sexual contact of minor from unitary**



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**conduct.** — Despite the state's contention that the conduct underlying the offenses charged against the defendant was not unitary, in that the defendant's action of lying on the victim constituted criminal sexual contact of a minor and his action of preparing to "hump" her constituted attempted criminal sexual penetration of a minor, the actions can only reasonably be deemed to constitute unitary conduct; the contact and attempted penetration all took place within the same short space of time, with no physical separation between the illegal acts. *State v. Mora*, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, cert. denied, 133 N.M. 727, 69 P.3d 237.

**Criminal sexual contact of minor is not lesser included offense of attempted criminal sexual penetration.** — For purposes of double jeopardy, the offenses of criminal sexual contact of a minor and attempted criminal sexual penetration of a minor cannot be characterized as lesser included and greater inclusive crimes because they each contain different elements and stand independently in relation to one another. *State v. Mora*, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, cert. denied, 133 N.M. 727, 69 P.3d 237.

**Charges of kidnapping and second degree criminal sexual penetration do not merge** since the elements of the offense of second degree criminal sexual penetration do not involve all of the elements of kidnapping. *State v. Singleton*, 1984-NMCA-110, 102 N.M. 66, 691 P.2d 67.

The fact that a kidnapping charge was used to raise a charge of criminal sexual penetration to a second degree felony does not pose a double jeopardy problem. Convictions normally are allowed for both predicate and compound offenses, and criminal sexual penetration statutes and kidnapping statutes protect different social norms. *State v. McGuire*, 1990-NMSC-067, 110 N.M. 304, 795 P.2d 996.

Under the facts of this case, the jury could have inferred from facts other than the rape itself that defendant intended to hold the victim against her will from the moment of the abduction. Since the conduct underlying the offenses is not the same, the double jeopardy clause does not prohibit multiple punishments in this case. *State v. Ramos*, 1993-NMCA-072, 115 N.M. 718, 858 P.2d 94, cert. denied, 115 N.M. 602, 856 P.2d 250.

**Merger of criminal sexual penetration and kidnapping based on same act.** — Defendant's convictions for second degree criminal sexual penetration (commission of a felony) and kidnapping (no great bodily harm) under Section 30-4-1 NMSA 1978, stemming from the same act of sexual intercourse, potentially violated double jeopardy rights and were required to be set aside. *State v. Crain*, 1997-NMCA-101, 124 N.M. 84, 946 P.2d 1095.

**Consecutive sentences for kidnapping and criminal sexual penetration.** — Consecutive sentences for the compound crime of criminal sexual penetration during commission of kidnapping and the predicate felony of kidnapping with intent to hold for service is, in general, permissible because the two crimes address different social norms. *State v. Tsethlikai*, 1989-NMCA-107, 109 N.M. 371, 785 P.2d 282, cert. denied, 109 N.M. 262, 784 P.2d 1005 (1990).

**Consective sentences.** — Consecutive sentences for kidnapping and criminal sexual penetration did not violate the double jeopardy prohibition against multiple punishments for the same offense, where the evidence supported an inference that defendant intended to commit criminal sexual penetration from the moment of the abduction. *State v. McGuire*, 1990-NMSC-067, 110 N.M. 304, 795 P.2d 996.

Where the defendant took control of the car at gunpoint and then drove the victims to a remote location before raping them, the crime of kidnapping was complete before the act of criminal sexual penetration began; because the two crimes did not constitute a "unitary act," imposition of consecutive sentences was not double jeopardy. *State v. Andazola*, 2003-NMCA-146, 134 N.M. 710, 82 P.3d 77.

**Force or coercion for kidnapping or false imprisonment.** — A person is entitled to withdraw his or her consent or express a lack of consent to an act of criminal sexual penetration at any point prior to the act itself, but force or coercion exerted prior to the act itself will support a conviction for kidnapping or false imprisonment. *State v. Pisio*, 1994-NMCA-152, 119 N.M. 252, 889 P.2d 860, cert. denied, 119 N.M. 20, 888 P.2d 466.

**False imprisonment and criminal sexual penetration II.** — Defendant's convictions of false imprisonment and criminal sexual penetration in the second degree which arose out of the same conduct violated the double jeopardy clause. *State v. Armendariz*, 2006-NMCA-152, 140 N.M. 712, 148 P.3d 798, cert. quashed, 2008-NMCERT-002, 143 N.M. 667, 180 P.3d 674.

**False imprisonment and criminal sexual penetration III.** — Defendant's convictions for false imprisonment and criminal sexual penetration without the use of a deadly weapon which arose out of the same conduct did not violate the double jeopardy clause. *State v. Fielder*, 2005-NMCA-108, 138 N.M. 244, 118 P.3d 752, cert. quashed, 2006-NMCERT-004, 139 N.M. 430, 134 P.3d 123.

**No merger of false imprisonment and criminal sexual penetration.** — There was sufficient evidence to support separate charges for false imprisonment and criminal sexual penetration where the victim testified that defendant would not let her out of the bedroom for a period of time after the penetration occurred. *State v. Traeger*, 2000-NMCA-015, 128 N.M. 668, 997 P.2d 142, *aff'd in part, rev'd in part on other grounds*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

**No merger of aggravated burglary and criminal sexual penetration.** — Since aggravated burglary (Section 30-16-4 NMSA 1978) and criminal sexual penetration in the third degree each require proof of facts which the other does not and since neither offense necessarily involves the other, there is no double jeopardy violation and no merger of the offenses despite the fact that the same evidence may go toward proving both. *State v. Young*, 1978-NMCA-040, 91 N.M. 647, 579 P.2d 179, cert. denied, 91 N.M. 751, 580 P.2d 972, and cert. denied, 439 U.S. 957, 99 S. Ct. 357, 58 L. Ed. 2d 348 (1978).

**No merger of offenses.** — Where there was evidence that the victim awoke and found the defendant on top of her and that the defendant told her not to move or make a noise or he would blow her head off, that was evidence of a battery. When the battery preceded sexual activity, there was evidence of an aggravated burglary apart from a sex offense, and the two offenses did not merge, nor was the "same transaction" test applied. *State v. Archunde*, 1978-NMCA-050, 91 N.M. 682, 579 P.2d 808.

Where defendant's acts constituting battery for purposes of aggravated burglary charges and acts constituting criminal sexual penetration (CSP) were separate and distinct, convictions and consecutive sentences for both CSP and aggravated burglary did not violate double jeopardy. *Lucero v. Kerby*, 133 F.3d 1299 (10th Cir.), cert. denied, 523 U.S. 1110, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

**Aggravated burglary and attempted criminal sexual penetration merged.** — Defendant's conduct consisting of his entry into a dwelling with intent to commit a felony and attempted criminal sexual penetration (CSP II) was unitary; thus, his convictions for both aggravated burglary and attempted CSP II violated double jeopardy. *Lucero v. Kerby*, 133 F.3d 1299 (10th Cir.), cert. denied, 523 U.S. 1110, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

**Contributing to delinquency is separate offense.** — Criminal sexual penetration of a minor requires proof of sexual penetration and contributing to delinquency of a



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minor requires proof that the defendant's act or omission contributed to the delinquency of a minor, and neither of those facts is required to prove the other. The legislature intended separate punishments for criminal sexual penetration of a minor and contributing to delinquency of a minor when the same conduct violates both statutes. *State v. Walker*, 1993-NMSC-069, 116 N.M. 546, 865 P.2d 1190.

**Felony-murder doctrine applied.** — Applying the strict-elements test, first degree criminal sexual penetration (CSP) is not a lesser included offense of second degree murder and, accordingly, first degree CSP could properly serve as a predicate for applying the felony-murder doctrine. *State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266.

**Sentence and prison discipline for same offense.** — Contention by inmates convicted of sodomy that sentence imposed by court amounted to double jeopardy because they had already been punished by prison officials for same offense was without merit. *Washington v. Rodriguez*, 1971-NMCA-021, 82 N.M. 428, 483 P.2d 309.

**Multiple sentences improper.** — Consecutive sentences of 45 to 50 years and 80 to 99 years imposed on defendant for convictions of assault with intent to commit rape and rape, respectively, were improper, since where charges arose out of the same transaction, were committed at the same time as part of a continuous act and were inspired by the same criminal intent which was an essential element of each offense, they were susceptible of only one punishment. *State v. Blackwell*, 1966-NMSC-088, 76 N.M. 445, 415 P.2d 563.

**Increasing sentence based on consideration of element of offense.** — Where defendant noted that physical injury is an element of the crime of second degree criminal sexual penetration under Subsection D(3) (now E(3)), and he contended that the trial court's consideration of the physical injury suffered by the victim in increasing the basic sentence pursuant to § 31-18-15.1 exposed him to double jeopardy, it was held that the court's consideration of circumstances surrounding an element of the offense did not expose defendant to double jeopardy. *State v. Bernal*, 1987-NMCA-075, 106 N.M. 117, 739 P.2d 986, cert. denied, 106 N.M. 81, 738 P.2d 1326.

**Aggravating factor improperly considered in sentencing.** — While the victim's blood relationship to defendant arguably was a circumstance surrounding the offense of criminal sexual penetration, it was error for the court to consider such relationship as an aggravating factor at sentencing on a criminal sexual penetration count after defendant had also been convicted of incest. *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223.

**Multiple penetrations.** — Penetrations of separate orifices with the same object constitute separate offenses. Therefore, the acts of anal intercourse, sexual intercourse, and at least one instance of fellatio constitute separate offenses. *State v. Wilson*, 1993-NMCA-074, 117 N.M. 11, 868 P.2d 656, cert. quashed, 119 N.M. 311, 889 P.2d 1233 (1995).

**Number of contacts.** — The number of contacts is not dispositive of the existence of a separate violation of this section. *State v. Pisio*, 1994-NMCA-152, 119 N.M. 252, 889 P.2d 860, cert. denied, 119 N.M. 20, 888 P.2d 466.

**Single criminal intent of several acts.** — Defendant's contention that "single criminal intent" doctrine should have been applied to four acts of sodomy which he was convicted of having performed on victim over period of one and one half to two hours was neither supported by sufficient evidence nor properly preserved for review. *State v. Elliott*, 1977-NMSC-002, 89 N.M. 756, 557 P.2d 1105.

**Multiple penetrations.** — This section cannot be said, as a matter of law, to evince a legislative intent to punish separately each penetration occurring during a continuous attack absent proof that each act of penetration is in some sense distinct from the others. *Herron v. State*, 1991-NMSC-012, 111 N.M. 357, 805 P.2d 624.

A case involving a single defendant tried on an indictment alleging multiple penetrations was remanded to the trial court with instructions to vacate 14 convictions and sentences for second degree criminal sexual penetration and to resentence accordingly, where the evidence supported, at most, five convictions and sentences. *Herron v. State*, 1991-NMSC-012, 111 N.M. 357, 805 P.2d 624.

**Defense must raise "single criminal intent"** doctrine at trial. *State v. Elliott*, 1977-NMSC-002, 89 N.M. 756, 557 P.2d 1105.

**Double jeopardy.** — Where the evidence established that defendant committed three separate and distinct battery offenses, double jeopardy did not preclude the first two batteries supporting a conviction for battery, even though the third battery satisfied elements of a charge of criminal sexual penetration. *Brecheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

There is no double jeopardy impediment to convicting and sentencing a defendant to consecutive terms for both incest and criminal sexual penetration arising out of the same act. *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223.

There was no double jeopardy bar to punishment for the offenses of assault with intent to commit rape and criminal sexual penetration, where the victim testified at trial that defendant bound her to a bed, struck her several times, and threatened her verbally for a period of time before commencing the sexual assault. *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223.

When the defendant received consecutive sentences upon his plea of guilty to second degree criminal sexual penetration, aggravated burglary, kidnapping, and aggravated battery, in order to support a double jeopardy challenge he had the burden to provide a sufficient record for the court to determine unitary conduct for purposes of the double jeopardy analysis. *State v. Sanchez*, 1996-NMCA-089, 122 N.M. 280, 923 P.2d 1165.

Because the crimes of kidnapping and attempted criminal sexual penetration contain elements not contained in the Order Prohibiting Domestic Violence (OPDV) obtained by victim against defendant, defendant's double jeopardy rights were not violated by his conviction for those crimes following his conviction for contempt for violating the OPDV. *State v. Powers*, 1998-NMCA-133, 126 N.M. 114, 967 P.2d 454, cert. quashed, 127 N.M. 392, 981 P.2d 1210 (1999).

Defendant's right to freedom from double jeopardy was not violated by punishment for attempted first degree murder, aggravated battery with a deadly weapon, and criminal sexual penetration. *State v. Traeger*, 2000-NMCA-015, 128 N.M. 668, 997 P.2d 142, *aff'd in part, rev'd in part on other grounds*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

Where an assault was with an intent to commit criminal sexual penetration, followed then by criminal sexual penetration, the fear, and the acts of penetration with resulting personal injury, are reasonably separable in terms of harm and social evil, and are sufficient to reflect a legislative intent to punish the conduct separately such that the defendant was not placed in double jeopardy. *State v. Jensen*, 2005-NMCA-113, 138 N.M. 254, 118 P.3d 762, cert. quashed, 2005-NMCERT-011, 138 N.M. 587, 124 P.3d 565.

## II. INDICTMENT AND INFORMATION.

**Information not unconstitutionally vague.** — Where information expressly stated age of minor rape victim, and that age was under 10 years, argument that the information was so vague and indefinite as to violate due process in that it stated an offense both under statute



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covering rape of female under or over 16 when resistance is overcome by force, and also under statute relating to rape of female child under 10, was without merit. *Gallegos v. Cox*, 358 F.2d 703 (10th Cir.), cert. denied, 385 U.S. 869, 87 S. Ct. 138, 17 L. Ed. 2d 97 (1966).

**Notice sufficient.** — The trial court did not deprive defendant of opportunity to be informed of charges against him by failing to require the state to specify precisely which of several acts of sodomy defendant was accused of having been accessory to, where the indictment and bill of particulars which were a part of the record identified the date, the approximate time and nature of the crimes alleged, the prosecutrix and the associates with whom defendant was alleged to have committed the crimes. *State v. Barnett*, 1973-NMCA-098, 85 N.M. 404, 512 P.2d 977.

**Lack of specificity not violative of double jeopardy.** — The trial court's refusal to require that the state specify which act of sodomy the defendant was accessory to did not subject him to double jeopardy, on the basis of the argument that if he were indicted or informed against as accessory to a particular act of sodomy based on the same incident he could not point to his present conviction as precluding his trial on any particular act of sodomy, where he had not been indicted or informed against for another crime growing out of the same set of facts. *State v. Barnett*, 1973-NMCA-098, 85 N.M. 404, 512 P.2d 977.

**Separate counts of incest and criminal sexual penetration.** — There was no error in charging defendant on separate counts of criminal sexual penetration and incest under a theory that he had sexual intercourse with a child under 13 years of age and a child between 13 and 16 years of age, and he knew each was his biological daughter. *State v. Hargrove*, 1989-NMSC-012, 108 N.M. 233, 771 P.2d 166.

**Language of statute sufficient.** — It was unnecessary to charge crime pursuant to the common law; an indictment in language of statute which in effect charged sexual intercourse with a female under the age of fourteen was sufficient, use of the word "ravish" being unnecessary. *State v. Alva*, 1913-NMSC-056, 18 N.M. 143, 134 P. 209.

**Use of words "carnally know and abuse"** in indictment was surplusage. *State v. Alva*, 1913-NMSC-056, 18 N.M. 143, 134 P. 209.

**Charge of rape adequate.** — An information "did, with force and arms in and upon the body of Agnes Vigil . . . unlawfully and feloniously make an assault, and did then and there wickedly and feloniously against her will . . . ravish and unlawfully know, contrary to the form of the statute . . . " was sufficient to charge rape and not merely an assault, notwithstanding the omission of any such words as "her the said Agnes Vigil" between the words "know" and "contrary." *State v. Alarid*, 1936-NMSC-047, 40 N.M. 450, 62 P.2d 817.

**Information failing to name statutory rape victim** not fatally defective. *State v. Roessler*, 1954-NMSC-017, 58 N.M. 102, 266 P.2d 351; *Ex parte Kelley*, 1953-NMSC-011, 57 N.M. 161, 256 P.2d 211.

**Assault with intent to rape.** — An indictment charging that defendant unlawfully, violently and forcibly assaulted prosecutrix with intent to ravish was sufficient charge of assault with intent to rape. *State v. Raulie*, 1930-NMSC-074, 35 N.M. 135, 290 P. 789.

**Allegation of defendant's virility unnecessary.** — It was unnecessary that indictment allege that defendant was over the age of fourteen or, being under that age, had the physical ability to commit the offense. *State v. Ancheta*, 1915-NMSC-003, 20 N.M. 19, 145 P. 1086.

**Information and bill construed together.** — In determining whether acts alleged constituted offense of sodomy, the information and the bill of particulars are to be read together as a single instrument. *State v. Putman*, 1967-NMCA-020, 78 N.M. 552, 434 P.2d 77.

**Overinclusive bill of particulars not binding.** — Although bill of particulars alleged two acts of sodomy, namely, requiring victim to take into her mouth the defendant's sexual organ and the placing of defendant's sexual organ in the victim's anus, the state was not bound by the statement in the bill of particulars to prove acts of both types of sodomy on the part of the defendant, and failure to instruct that the state must prove both types of sodomy before a conviction would be justified did not require reversal. *State v. Barnett*, 1973-NMCA-098, 85 N.M. 404, 512 P.2d 977.

**Variance between information and instructions.** — Jury instructions describing crime perpetrated by defendant as that of sexual intercourse with a female under sixteen years impaired no fundamental rights of defendant even though the crime was charged as "rape" in the information. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

## III. EVIDENCE.

### A. ADMISSIBILITY.

**Dismissal unwarranted.** — Where the state did not pursue the case of criminal sexual penetration of a minor under the age of 13 in 1989, because, at that time, it lacked the evidence to go forward with the case, but the young child victim who in 1989 was apparently too traumatized to testify voluntarily came forward at a later age to testify, and there is no evidence that the state intended the delay to work a tactical disadvantage on defendant or that the state knew or should have known that the delay would cause any specific tactical disadvantage to defendant and defendant does not assert that the state improperly obtained such a tactical advantage, dismissal is not warranted on this basis. *State v. Hill*, 2005-NMCA-143, 138 N.M. 693, 125 P.3d 1175, cert. denied, 2005-NMCERT-012, 138 N.M. 772, 126 P.3d 1136.

**Subsequent beating irrelevant to determination of degree of offense.** — Defendant's beating of the victim with a blunt instrument subsequent to intercourse was not considered in determining whether or not the offense of criminal sexual penetration was committed by force or coercion resulting in personal injury because this beating went to the aggravated battery conviction. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

**Out-of-court identification.** — Where victim testified that rapist was in her presence for approximately an hour and 40 minutes and at the police station she described him with some specificity, action of police officer in showing victim the driver's license photograph which victim knew came from wallet she had taken from rapist's pocket and asking "is this the man" was not so suggestive as to bar evidence of victim's out-of-court identification, nor was in-court identification inadmissibly tainted because of it. *State v. Baldonado*, 1971-NMCA-068, 82 N.M. 581, 484 P.2d 1291.

The out-of-court photographic identification procedure was not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification where the photographs viewed by the victim were all of male caucasians of about the same age and hirsuteness as defendant. *State v. Clark*, 1986-NMCA-058, 104 N.M. 434, 722 P.2d 685, cert. denied, 104 N.M. 378, 721 P.2d 1309.

**Identification by child.** — Testimony by witness that three-year old child said "this is the man" a half hour after attack upon her was properly admitted over objection that it was hearsay. *State v. Godwin*, 1947-NMSC-016, 51 N.M. 65, 178 P.2d 584.

Victim's identification was not tainted by the fact that the case agent and the child's grandmother hugged the child after she indicated that she was sure of her identification of the defendant as her assailant. *State v. Clark*,



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1986-NMCA-058, 104 N.M. 434, 722 P.2d 685, cert. denied, 104 N.M. 378, 721 P.2d 1309.

**Hypnotically enhanced testimony.** — Post-hypnotic recollections, revived by the hypnosis procedure, are only admissible in a trial where a proper foundation has also first established the expertise of the hypnotist and that the techniques employed were correctly performed, free from bias or suggestibility. *State v. Clark*, 1986-NMCA-058, 104 N.M. 434, 722 P.2d 685, cert. denied, 104 N.M. 378, 721 P.2d 1309.

If the trial court's determination that the identifications were not "post-hypnotic recollections revived by hypnosis" is supported by substantial evidence, then the requirements established by *State v. Beachum*, 1981-NMCA-137, 97 N.M. 682, 643 P.2d 246, were not triggered. *State v. Clark*, 1986-NMCA-058, 104 N.M. 434, 722 P.2d 685, cert. denied, 104 N.M. 378, 721 P.2d 1309.

Where no details of the incident were mentioned during the hypnotic sessions; no information was sought from the child, nor details suggested, but the only suggestion made was that the child should remember; and there was independent, objective verification of the facts presented by other witnesses, the child victim's in-court identification was not impermissibly tainted by the unproductive hypnotic session. *State v. Clark*, 1986-NMCA-058, 104 N.M. 434, 722 P.2d 685, cert. denied, 104 N.M. 378, 721 P.2d 1309.

**Testimony concerning post-traumatic stress disorder.** — Testimony concerning post-traumatic stress disorder is admissible for establishing whether the alleged victim exhibits symptoms that are consistent with rape or sexual abuse. *State v. Alberico*, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192, *rev'g* 1991-NMCA-112, 116 N.M. 178, 861 P.2d 219.

**Testimony concerning rape trauma syndrome.** — Record did not suggest that the danger of unfair prejudice so outweighed the probative value of a witness's testimony concerning rape trauma syndrome as to require reversal in the absence of an objection, where there was little likelihood that the jury viewed the testimony as a "diagnosis" that the victim had been raped. *State v. Barraza*, 1990-NMCA-026, 110 N.M. 45, 791 P.2d 799, cert. denied, 109 N.M. 704, 789 P.2d 1271.

Testimony concerning rape trauma syndrome is not admissible in a prosecution involving rape or sexual abuse. *State v. Alberico*, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192, *rev'g* 1991-NMCA-112, 116 N.M. 178, 861 P.2d 219.

**Foot tracks.** — Nonexpert evidence as to identity of accused, derived from a comparison of foot tracks with other tracks known to be those of accused, was admissible. *State v. Ancheta*, 1915-NMSC-003, 20 N.M. 19, 145 P. 1086.

**Confession admissible.** — Where defendant, believing that prosecutrix had told of his relations with her, put himself under the protection of a third person and admitted to such person that he had slept with the prosecutrix, the confession was purely voluntary and admissible. *State v. Whitener*, 1918-NMSC-111, 25 N.M. 20, 175 P. 870.

**Suppression of evidence of rape trauma syndrome.** — An order suppressing a psychologist's testimony relating to rape trauma syndrome was affirmed, where it could not be said that the trial court's order was clearly against the logic and effect of the facts and circumstances, and where there was no request to limit the evidence rather than exclude it altogether. *State v. Bowman*, 1986-NMCA-014, 104 N.M. 19, 715 P.2d 467.

**Ordinarily previous chastity of prosecuting witness** is immaterial in a statutory rape case. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

**Prior relations corroborative of statutory rape.** — Evidence tending to show more than one act of criminal intercourse between accused and prosecutrix was admissible to show the relation and familiarity of the parties, and was corroborative of prosecutrix' testimony concerning the particular act relied upon for a conviction of statutory rape. *State v. Whitener*, 1918-NMSC-111, 25 N.M. 20, 175 P. 870.

**Exclusion of evidence of prior rape and sexual conduct.** — In prosecution for second degree criminal sexual penetration where theory of defense was that of fabrication of the rape and consensual intercourse, trial court properly excluded evidence of prior rape of victim and victim's prior sexual conduct. *State v. Fish*, 1984-NMSC-056, 101 N.M. 329, 681 P.2d 1106.

**Previous intercourse admissible on issue of identity.** — Exception to the rule that previous chastity of victim is immaterial might be where her pregnancy is shown and testimony given that defendant was father of the child, as there the testimony of prior sexual acts might be pertinent on rebuttal as tending to show that another might have been the cause of such condition. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

**Previous intercourse not admissible on issue of penetration.** — Trial court did not err in refusing to permit cross-examination of prosecuting witness in prosecution for statutory rape concerning prior acts of intercourse with other men, since the sole reason advanced by defendant's counsel for admissibility was on the issue of penetration, an issue about which there was no genuine controversy. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

**Evidence of defendant's vasectomy was probative of whether defendant committed the sexual assault as the victim described.** — Where defendant was charged with criminal sexual penetration of an inmate, allegedly committed while defendant was employed as a corrections officer, and where, at trial, the district court admitted evidence regarding defendant's vasectomy over defendant's objection that the evidence was not relevant, the district court did not abuse its discretion in admitting the evidence because the serology report presented at trial identified the presence of semen, but no sperm on the victim's underwear, and additional evidence at trial established that a vasectomy is one reason why a semen sample might not contain sperm. Thus, evidence of defendant's vasectomy was probative of whether it was defendant's semen on the victim's underwear and whether he committed the sexual assault as the victim described. *State v. Arvizo*, 2021-NMCA-055, cert. denied.

**Defendant's occupation as police officer.** — Evidence of the defendant's status as a police officer was material and relevant to the issue of whether he committed criminal sexual penetration in the third degree using his status as a police officer to force the victim to engage in fellatio or perform other delinquent acts. *State v. Lucero*, 1994-NMCA-129, 118 N.M. 696, 884 P.2d 1175, cert. denied, 118 N.M. 731, 885 P.2d 1325.

B. INHERENT IMPROBABILITY.

**Rule of inherent improbability.** — Because of highly emotional and prejudicial elements present in cases of rape, supreme court has taken the position that over and above the substantial evidence rule applicable in appeals, it will review the evidence to determine whether or not it is so inherently improbable that, by conviction of the crime, a fundamental wrong has been done to defendant. *State v. Shouse*, 1953-NMSC-104, 57 N.M. 701, 262 P.2d 984.

Where defendant in prosecution for rape of a child contended that evidence was too vague and insufficient to establish guilt of defendant, appellate court would only weigh the evidence in the scales of inherent probability, and where there was substantial evidence tending to sustain the jury's verdict, its determination would be conclusive. *State v. Till*, 1967-NMSC-150, 78 N.M. 255, 430 P.2d 752, appeal dismissed and cert. denied, 390 U.S. 713, 88 S. Ct. 1426, 20 L. Ed. 2d 254 (1968).



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Where there was absolutely no evidence corroborating the prosecuting witness, and her evidence was outside the domain of reasonable probability, and accused denied the offense, a verdict of guilty was set aside and a new trial ordered. *Mares v. Territory*, 1901-NMSC-010, 10 N.M. 770, 65 P. 165.

In cases of common-law rape, where in the absence of such corroboration as outcries, torn and disarranged clothing, wounds or bruises, or if there is long delay in making complaint, the evidence is so inherently improbable as to be unsubstantial, unless there is other testimony which points unerringly to the defendant's guilt, an appellate court will not uphold a conviction. *State v. Boyd*, 1972-NMCA-120, 84 N.M. 290, 502 P.2d 315, cert. denied, 84 N.M. 271, 502 P.2d 296, and cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973) and *reh'g denied*, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

**Reversal since evidence improbable.** — District court should, and supreme court would, examine the evidence in a rape case with great care to determine whether testimony of prosecuting witness was inherently improbable; and if so, in absence of some evidence of some fact unequivocally and unerringly pointing to the defendant's guilt, a conviction would not be permitted to stand. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

**Directed verdict.** — Court was to instruct jury to find a verdict of not guilty on defendant's or its own motion when at the close of testimony in rape case insufficiently supported testimony of prosecuting witness was inherently improbable and a verdict based on it would constitute a miscarriage of justice. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

**Rape not inherently improbable.** — Testimony of examining physician that he found no evidence of trauma or injury to the vagina; that such lack of trauma is unusual in a rape case; that he found no other physical indication on the prosecutrix or her clothes that a rape had occurred; and that he found sperm in the vagina but that they were all immotile did not render the testimony of the prosecutrix inherently improbable. *State v. Boyd*, 1972-NMCA-120, 84 N.M. 290, 502 P.2d 315, cert. denied, 84 N.M. 271, 502 P.2d 296, and cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973), and *reh'g denied*, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

**Time element.** — Where the prosecutrix testified that she was raped twice by defendant and forced to commit an act of sodomy within a period of approximately 30 minutes, and in addition, there was some conversation between the prosecutrix and defendant during this time, it could not be said as a matter of law that the events described could not in fact have occurred during the period stated. *State v. Boyd*, 1972-NMCA-120, 84 N.M. 290, 502 P.2d 315, cert. denied, 84 N.M. 271, 502 P.2d 296, and cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973), and *reh'g denied*, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

**Initial denial of sodomy.** — Prosecutrix' denial that act of sodomy had occurred in first written statement to police and failure to mention it in second statement to police or to examining doctor did not render her testimony inherently improbable, where she explained that her denial and her failure to mention the act were the result of her embarrassment about it. *State v. Boyd*, 1972-NMCA-120, 84 N.M. 290, 502 P.2d 315, cert. denied, 84 N.M. 271, 502 P.2d 296, and cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973), and *reh'g denied*, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

**Unusual circumstances not inherently improbable.** — The uncorroborated testimony of a minor child competent to testify, unless there be something inherently improbable in it, is deemed substantial evidence and sufficient to uphold a conviction, and testimony which merely discloses unusual circumstances does not come within that category. *State v. Trujillo*, 1955-NMSC-094, 60 N.M. 277, 291 P.2d 315.

**Rule inapplicable to sodomy.** — The "inherently improbable" rule enunciated by the supreme court in *State v. Shouse*, 1953-NMSC-104, 57 N.M. 701, 262 P.2d 984, a rape case, is not applicable in cases of sodomy. *State v. Kasakoff*, 1972-NMCA-151, 84 N.M. 404, 503 P.2d 1182.

### C. CORROBORATION.

**Bald charge insufficient.** — In this jurisdiction, no corroboration of a prosecutrix by way of testimony of an independent character emanating from an outside source was required to sustain a conviction. But the bald charge of a woman against a man in that regard, unsupported and uncorroborated by facts and circumstances pointing to guilt of accused, was insufficient to meet requirement that verdict be supported by substantial evidence. *State v. Boyd*, 1972-NMCA-120, 84 N.M. 290, 502 P.2d 315, cert. denied, 84 N.M. 271, 502 P.2d 296, and cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973) and *reh'g denied*, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973); *State v. Armijo*, 1920-NMSC-011, 25 N.M. 666, 187 P. 553.

**Surrounding facts as corroboration.** — Testimony of prosecutrix required no corroboration except that surrounding facts and circumstances must have tended to establish truth of her testimony, but it need not have been evidence of an independent character, disconnected from her testimony. *State v. Ellison*, 1914-NMSC-076, 19 N.M. 428, 144 P. 10 (decided under prior law).

**Other witnesses not required.** — Corroboration of prosecutrix' testimony by other witnesses as to particular acts constituting offense of rape was not required and an instruction to that effect would correctly state the law. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

**Corroboration in victim's complaint to mother.** — In prosecution for rape, testimony of prosecuting witness was corroborated by proof of complaint made to her mother of the outrage committed upon her. *Territory v. Edie*, 1892-NMSC-019, 6 N.M. 555, 30 P. 851, *aff'd on reh'g*, 7 N.M. 183, 34 P. 46 (1893).

**Defendant's own actions corroborative.** — Defendant's actions both preceding and following rape, including rather severely injuring nose and lip of prosecutrix, making of threats on way home, and fleeing even before any report was made to the police pointed unerringly to his guilt, and constituted corroborating circumstances of the truth of prosecutrix' story. *State v. Ramirez*, 1962-NMSC-042, 70 N.M. 54, 369 P.2d 973.

**Corroboration rule in rape cases was not applicable to sodomy.** *State v. Boyd*, 1972-NMCA-120, 84 N.M. 290, 502 P.2d 315, cert. denied, 84 N.M. 271, 502 P.2d 296, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973), *reh'g denied*, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973) (decided under prior law).

**Corroboration rule not applicable to statutory rape.** — In prosecutions for statutory rape, where consent was immaterial and force was not used, corroboration was not essential to a conviction, and it had only to be determined that the testimony of the prosecuting witness was not inherently improbable. *State v. Trujillo*, 1955-NMSC-094, 60 N.M. 277, 291 P.2d 315.

Corroboration was not required in cases of statutory rape because the usual concomitant facts present in common-law rape, such as torn and disarranged clothing, wounds or bruises, outcries, etc., neither necessarily nor ordinarily appear. *State v. Trujillo*, 1955-NMSC-094, 60 N.M. 277, 291 P.2d 315.



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**Uncorroborated testimony of child.** — The uncorroborated testimony of a minor child competent to testify, unless there be something inherently improbable in it, is deemed substantial evidence and sufficient to uphold a conviction. *State v. Trujillo*, 1955-NMSC-094, 60 N.M. 277, 291 P.2d 315.

In statutory sex offenses against a young victim corroboration of the claim that the defendant is the guilty party is not necessary where the evidence of guilt is substantial. *State v. Montoya*, 1957-NMSC-015, 62 N.M. 173, 306 P.2d 1095.

Independent of statute, a man could be convicted of rape upon the uncorroborated evidence of a strumpet or a girl under the age of ten years. *State v. Ellison*, 1914-NMSC-076, 19 N.M. 428, 144 P. 10.

**Instruction properly refused.** — As no corroboration of prosecutrix was necessary to uphold conviction, a requested instruction on subject of corroboration, contrary to the rule, was properly refused. *State v. Whitener*, 1918-NMSC-111, 25 N.M. 20, 175 P. 870.

**Absence of corroboration.** — In rape prosecution, where prosecutrix was not corroborated, evidence was insufficient, for want of such corroboration, to sustain conviction. *State v. Clevenger*, 1921-NMSC-097, 27 N.M. 466, 202 P. 687.

In cases of common-law rape, in the absence of such corroboration as outcries, torn and disarranged clothing, wounds or bruises, or if there is long delay in making complaint, the evidence might be so inherently improbable as to be unsubstantial, and would not uphold a conviction. *State v. Shults*, 1938-NMSC-070, 43 N.M. 71, 85 P.2d 591.

## D. SUFFICIENCY.

**Jury's function.** — It is the jury's function in a rape case to judge the credibility of the witnesses and the weight to be given their testimony. *State v. White*, 1967-NMSC-016, 77 N.M. 488, 424 P.2d 402.

The jury was to determine how much incriminating circumstances were weakened by contrary characterizations, more or less plausible, or by other facts having an opposite tendency in the evidence. *State v. Godwin*, 1947-NMSC-016, 51 N.M. 65, 178 P.2d 584.

**Victim's age for jury.** — Whether prosecutrix was under the age of consent was a jury question. *State v. Whitener*, 1918-NMSC-111, 25 N.M. 20, 175 P. 870.

**Sufficient evidence of criminal sexual penetration of a minor under thirteen where there were inconsistencies as to the victim's age.** — Where, on direct and cross-examination, victim testified that defendant had not digitally penetrated her until after she turned thirteen years old, but on redirect examination, after having her recollection refreshed, testified that defendant had penetrated her when she was twelve years old, there was sufficient evidence to support the jury's finding that defendant committed criminal sexual penetration of a minor under thirteen. Although the victim's testimony on redirect contradicted her testimony on direct and cross-examination, it is the exclusive province of the jury to resolve factual inconsistencies in a witness's testimony. *State v. Little*, 2020-NMCA-040.

**Proof of penetration** alone was sufficient to establish the crime of statutory rape. *State v. Harbert*, 1915-NMSC-023, 20 N.M. 179, 147 P. 280.

**Penetration provable from circumstances.** — Proof of penetration was essential to conviction of having carnally known and abused a minor child, but it was not necessary that it be proved by direct evidence; it might be established by circumstantial evidence. *State v. Godwin*, 1947-NMSC-016, 51 N.M. 65, 178 P.2d 584.

**Opportunity and physical condition.** — Proof of carnal knowledge could be adequately shown by fact that opportunity for sexual intercourse existed and that physical condition of the child showed abuse. *State v. Godwin*, 1947-NMSC-016, 51 N.M. 65, 178 P.2d 584.

**A decedent constitutes a "person" for purposes of this section.** — Where defendant was convicted of first-degree murder and third-degree criminal sexual penetration (CSP), based on defendant's admission that he killed the victim and then had sexual intercourse with the victim after she died, but where defendant argued that the statute requires that the victim be alive at the time of penetration, defendant was properly convicted of CSP because the purpose of the CSP statute is to protect against forcible, nonconsensual sexual penetration of a person's body and the legislative intent underlying CSP is the protection of people from unlawful intrusions into enumerated areas of the body, and it would be contrary to the spirit of the statute to exclude victims who were unable to consent or resist solely because the perpetrator rendered the victim permanently unconscious by killing the victim. *State v. Martinez*, 2021-NMSC-012.

**The state sufficiently established the corpus delicti of CSP.** — Where defendant was convicted of first-degree murder and third-degree criminal sexual penetration (CSP), based on defendant's admission that he killed the victim and then had sexual intercourse with the victim after she died, and where defendant argued that the corpus delicti rule requires the state to produce some evidence that a crime has been committed in addition to extrajudicial confessions or admissions of the accused to support a conviction, the state sufficiently established the corpus delicti of CSP because a defendant's extrajudicial statements may be used to establish the corpus delicti when the prosecution is able to demonstrate the trustworthiness of the confessions and introduce some independent evidence of a criminal act, and in this case, the post-mortem condition and location of the victim's body was sufficient to corroborate the truthfulness of defendant's statements. *State v. Martinez*, 2021-NMSC-012.

**Evidence of penetration sufficient.** — Where child's parent discovered a bruise on the child's labia immediately after the child had been in defendant's care; a linear abrasion went deep into the child's vagina; two photographs of the bruise were admitted into evidence; the child told four people that defendant had pinched the child's "cha-cha" and illustrated the statement by pulling on the child's labia; and the bruise was consistent with being pinched, the evidence was sufficient to support defendant's conviction of criminal sexual penetration by penetration. *State v. Massengill*, 2003-NMCA-024, 133 N.M. 263, 62 P.3d 354, cert. denied, 133 N.M. 126, 61 P.3d 835.

Testimony of doctor who examined victim, a minor child under the age of 13, in the evening of the day of alleged act of sodomy, that there had been a penetration into boy's anus, along with child's testimony as to the assault and as to the pain experienced by him as a result thereof, was sufficient evidence of penetration for jury's consideration. *State v. Mase*, 1965-NMSC-134, 75 N.M. 542, 407 P.2d 874.

**Sufficient evidence to prove a pattern of conduct of criminal sexual penetration of a minor.** — Where defendant was charged with twelve counts of criminal sexual penetration of a minor, and where the two children testified to a pattern of conduct where defendant would put his penis and fingers in each child's vagina and anus before she went to school in the mornings, and where the children further testified that defendant did this more than six times, with one instance tied to the first day of school, but where no other evidence tied an incident to a certain time or place, the undifferentiated multiple acts against a victim within a period of time is evidence sufficient to support a conviction on one count per child for a pattern of conduct of criminal sexual penetration of a minor. *State v. Huerta-Castro*, 2017-NMCA-026.



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**Sufficient evidence of aiding and abetting.** — Evidence that defendant ordered the victims to perform fellatio on particular individuals and threatened the victims with grave bodily harm if they failed to do so and that defendant assisted in creating the atmosphere of intimidation which convinced the victims that the threats would be carried out, there was sufficient evidence to support defendant's conviction of accessory to criminal sexual penetration. *State v. Perez*, 2002-NMCA-040, 132 N.M. 84, 44 P.3d 530, cert. denied, 132 N.M. 83, 44 P.3d 529.

**Evidence sufficient to sustain conviction.** — Where defendant was convicted for criminal sexual penetration in the second degree which resulted in the pregnancy of the victim; the victim testified that defendant impregnated the victim when the victim was fourteen years old while the victim and the victim's family were living with defendant, that the victim felt compelled to have sex with defendant because defendant was an authority figure, that the sex was not consensual, and that defendant told the victim that if the victim reported the sexual intercourse, defendant would kill the victim and the victim's family; and a forensic DNA analyst testified that DNA samples from defendant, the victim, and the victim's child showed that defendant fathered the victim's child, there was sufficient evidence to support defendant's conviction. *State v. Fierro*, 2014-NMCA-004, cert. denied, 2013-NMCERT-012.

Where the child, who was six years old, testified that defendant put defendant's hand underneath the child's underwear, touched the child's vagina, and performed cunnilingus on the child; and the doctor who performed a SANE examination of the child testified that the child told the doctor that defendant had inserted defendant's fingers into the child's vagina; and the doctor's examination of the child revealed injuries to the child's vagina that were consistent with penetration by a finger or other object, the evidence was sufficient to support defendant's conviction of criminal sexual penetration of a minor. *State v. Skinner*, 2011-NMCA-070, 150 N.M. 26, 256 P.3d 969, cert. denied, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

The prosecutrix' testimony, which was not inherently improbable and which was corroborated by facts and circumstances, pointed unerringly to defendant and was sufficient evidence to sustain the conviction. *State v. Boyd*, 1972-NMCA-120, 84 N.M. 290, 502 P.2d 315, cert. denied, 84 N.M. 271, 502 P.2d 296, and cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973) and *reh'g denied*, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

Evidence consisting of the testimony of the victim's counselor and the victim herself was sufficient to support convictions of criminal sexual contact with a minor and criminal sexual penetration of a minor. *State v. Ortiz-Burciaga*, 1999-NMCA-146, 128 N.M. 382, 993 P.2d 96, cert. denied, 128 N.M. 149, 990 P.2d 823.

When evidence as a whole left no doubt as to fact of intercourse and penetration, it was sufficient, even though if certain questions addressed to complaining witness with their answers alone were considered, there might have been some doubt as to sufficiency of proof. *State v. Alva*, 1913-NMSC-056, 18 N.M. 143, 134 P. 209.

Appellate court found no ground to disturb verdict of guilty where after sifting from any recitation of facts made to support claim that 11 year old prosecutrix' testimony was inherently improbable, all facts and inferences which verdict resolves against defendant, there remains testimony of a substantial character sufficient to support the conviction. *State v. Trujillo*, 1955-NMSC-094, 60 N.M. 277, 291 P.2d 315.

An appellate court will not disturb the verdict of the jury if the victim's testimony was sufficiently credible for a conviction. *State v. Nichols*, 2006-NMCA-017, 139 N.M. 72, 128 P.3d 500.

Where defendant was convicted of numerous counts of criminal sexual penetration of a minor perpetrated on his eight-year-old daughter and four-year-old stepdaughter; the child victims' testimony that the nature of defendant's acts involved physical interaction that was skin to skin, that defendant rubbed or repetitiously slid his finger upon each child's unclothed genital openings, the requirement that penetration minimally occur to any extent was met, and where eight-year-old victim testified that defendant put his penis "where I go poop" and that it "actually went in", was sufficient evidence to support defendant's conviction for criminal sexual penetration of a minor, and where eight-year-old child victim's testimony established that defendant's repeated movements of his penis against her unclothed genitalia prior to emission penetrated the labia major to the slightest extent or beyond, met the penetrative element of criminal sexual penetration of a minor; there was sufficient evidence for a jury to conclude that defendant committed the acts of criminal sexual penetration. *State v. Tapia*, 2015-NMCA-048, cert. denied, 2015-NMCERT-004.

**Retrial was not barred where there was substantial evidence of defendant's guilt under the invalid jury instructions.** — Where defendant was charged with two counts of criminal sexual penetration of a minor in the second degree (CSPM-II) based on the state's theory that defendant used his position of authority to coerce the victim to submit to the sexual act, and where the district court instructed the jury using an inapplicable uniform jury instruction that omitted the essential element of "force or coercion", retrial was not barred where there was substantial evidence of defendant's guilt under the given instructions where the jury could reasonably have concluded that the victim had been coerced into lying still while defendant perpetrated fellatio, a symptom of the undue influence that defendant's position as the victim's father enabled him to exercise. *State v. Figueroa*, 2020-NMCA-007, cert. denied.

**Sufficient evidence of criminal sexual penetration of a minor for purposes of retrial.** — Where defendant was convicted of one count of criminal sexual penetration of a minor and twenty-one counts of criminal sexual contact of a minor, and where defendant's convictions were overturned based on the state's violation of defendant's constitutional right against self-incrimination, there was sufficient evidence to support each of defendant's convictions for purposes of retrial where, at trial, the state presented evidence from the child victim that defendant committed multiple instances of criminal sexual contact and at least one instance of criminal sexual penetration over a four-month period and defendant's admission that he had put the child's penis in his mouth at least once and had touched the child's penis between twenty and thirty times. *State v. Atencio*, 2021-NMCA-061, cert. granted.

**Sufficient evidence of great mental anguish.** — Where defendant was convicted of first-degree criminal sexual penetration (CSP), and where defendant claimed that the state failed to establish that the victim suffered great mental anguish as a result of the incident and that the evidence is therefore insufficient to support his conviction for first-degree CSP, evidence that the victim was over seventy years of age, that she moved to another state to live with her daughter because she felt unable to live alone, that she experienced constant flashbacks, and as a result had trouble concentrating and was unable to drive for a period of time, was sufficient to support a conclusion that the victim suffered great mental anguish as a result of the incident. *State v. Sena*, 2018-NMCA-037, *rev'd in part by* 2020-NMSC-011.

**Sufficient evidence of second-degree criminal sexual penetration perpetrated in the commission of a felony.** — Where defendant was convicted of criminal sexual penetration in the commission of a felony and first-degree kidnapping, the jury could have reasonably inferred that defendant took or transported the victim by



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deception based on the victim's testimony that he got into defendant's truck because defendant said that he would take the victim home, that defendant confined the victim by force based on the victim's testimony that when he tried to escape from defendant's truck, the door was locked, that defendant intended to hold the victim against his will to inflict a sexual offense against him based on the victim's testimony that defendant took him to a remote location, pulled down his pants, and then penetrated his anus, that defendant transported the victim to a remote location and confined him there for the purpose of inflicting a sexual offense on him based on defendant's statement upon completion of the sexual act, "Now I can take you home," that defendant's act against the victim was unlawful because the jury could have inferred that it was done without the victim's consent and for the purpose of gratifying defendant's sexual desire or to intrude upon the victim's bodily safety or integrity. There was sufficient evidence to support defendant's convictions. *State v. Samora*, 2016-NMSC-031.

**Sufficient evidence of criminal sexual penetration based on the commission of a felony.** — Where defendant offered a ride home to a fifteen year old boy, but instead took the boy back to defendant's apartment where defendant offered the boy beer and cocaine, which were consumed by the boy, and where defendant then proceeded to perform oral sex on the boy and prior to taking the boy home the defendant asked the boy for anal sex, which the boy complied with because he was afraid that if he did not he would be anally penetrated, and where, at trial, a forensic examiner testified that she identified saliva that contained defendant's DNA on the inside of the victim's boxer shorts, there was sufficient evidence to support defendant's convictions for distribution of a controlled substance to a minor, CSP II, and contributing to the delinquency of a minor. *State v. Simmons*, 2018-NMCA-015, cert. denied.

**Rape established.** — Where the evidence establishes that defendant had sexual intercourse with a female without her consent and by forcibly overcoming her resistance, this was rape, regardless of the age of the victim. *State v. Garcia*, 1967-NMSC-140, 78 N.M. 136, 429 P.2d 334.

**Conviction for rape not barred by facts also establishing statutory rape.** *State v. Garcia*, 1967-NMSC-140, 78 N.M. 136, 429 P.2d 334.

**Rape of child.** — In prosecution for rape of child, statement of 9 year old prosecutrix and testimony of examining doctor expressing opinion that child had undergone sexual intercourse as late as the day charged constituted substantial evidence and met test of inherent probability. *State v. Till*, 1967-NMSC-150, 78 N.M. 255, 430 P.2d 752, appeal dismissed and cert. denied, 390 U.S. 713, 88 S. Ct. 1426, 20 L. Ed. 2d 254 (1968).

When testimony of prosecuting witness, a child of between twelve and thirteen, was convincing, was not inherently improbable, was unshaken by cross-examination and was corroborated by the mother, and, up to a certain point, by defendant, it was sufficient to sustain a conviction of statutory rape. *State v. Keener*, 1938-NMSC-078, 43 N.M. 94, 85 P.2d 748.

**Spouses living apart.** — Evidence supported finding that defendant and his wife were living apart at the time of the attack, where the wife testified that she felt she was living apart from defendant at the time of the attack, and there was evidence of the couple's physical separation and the defendant's securing other housing and paying one month's rent. *Brecheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

**Attempted sodomy.** — Acts of defendant constituted an active effort to consummate crime of sodomy and were more than mere preparation, where in addition to his announced intention to "screw" 16 year old victim, defendant beat victim until he passed out and removed victim's clothes, during course of which events the fly on defendant's pants was open. *State v. Trejo*, 1972-NMCA-019, 83 N.M. 511, 494 P.2d 173.

## IV. DEFENSES.

### A. CONSENT.

**Consent is not a defense when victim is a statutorily defined child.** — The consent of a statutorily defined child is legally irrelevant to the unlawfulness element for both criminal sexual penetration charges. *State v. Moore*, 2011-NMCA-089, 150 N.M. 512, 263 P.3d 289, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Where the victim was fourteen years of age; defendant was forty-six years of age; the victim voluntarily agreed to have sex with defendant; and defendant was charged with criminal sexual penetration in the second degree and criminal sexual penetration in the fourth degree, the state did not improperly instruct the grand jury on the unlawfulness element for the charges when the state omitted language that the act must have been done "without consent" of the victim, because the consent of a statutorily defined child is legally irrelevant to the unlawfulness element of both charges. *State v. Moore*, 2011-NMCA-089, 150 N.M. 512, 263 P.3d 289, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

**Absence of consent not element of criminal sexual penetration.** — Although absence of consent was an element of the rape statute, which has now been repealed, absence of consent is not an element of the crime of criminal sexual penetration as defined by the legislature. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60; *State v. Gillette*, 1985-NMCA-037, 102 N.M. 695, 699 P.2d 626.

**Absence of consent not element of statutory rape.** — Under former law, where intercourse was with a girl under age of 16 the state need have proved only that defendant indulged in intercourse with her, regardless of question of her consent. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

**Absence of consent not required for rape.** — Under former law, where victim was over age of consent, it was necessary to prove intercourse against her will. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

**As was resistance.** — To constitute the crime of rape of one over the age of consent, there must be resistance, and it must be forcibly overcome; it was not sufficient that the carnal act was violently accomplished, or that it was without her consent. *Mares v. Territory*, 1901-NMSC-010, 10 N.M. 770, 65 P. 165 (decided under prior law).

**Amount of resistance required of victim depended upon the facts** of the particular case. Resistance may be overcome by fear induced by threats as by physical violence. *State v. White*, 1967-NMSC-016, 77 N.M. 488, 424 P.2d 402 (decided under prior law).

**Violent injury indicative of adequate resistance.** — Less than satisfactory evidence of resistance would not warrant reversal of rape conviction where the physical violence done to the prosecutrix and her resultant injuries therefrom tend to show that further resistance would have been of no avail and perhaps would have resulted in more serious injuries to her. *State v. Ramirez*, 1962-NMSC-042, 70 N.M. 54, 369 P.2d 973 (decided under prior law).

**Threats overcoming resistance.** — Fact that threats by which prosecutrix' resistance had been overcome were made by someone other than the defendant was immaterial. *State v. Barnett*, 1973-NMCA-098, 85 N.M. 404, 512 P.2d 977 (decided under prior law).

**Consent inconsistent with evidence.** — Evidence that prosecutrix' clothes were torn, that she suffered a scratch or cut on the side of her head which bled during the preliminary hearing, that immediately after the assault various witnesses noticed red welts or marks, on



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prosecutrix' throat and that her bedroom was in disarray, was inconsistent with sexual intercourse by consent. *State v. White*, 1967-NMSC-016, 77 N.M. 488, 424 P.2d 402.

**Consensual sex.** — Accused will not be convicted for engaging in purely consensual sex. *State v. Maestas*, 2005-NMCA-062, 137 N.M. 477, 112 P.3d 1134, *rev'd on other grounds*, 2007-NMSC-001, 140 N.M. 836, 149 P.3d 933.

B. IMPOTENCY.

**Assault with intent to rape.** — Impotency could be shown but was not a complete defense to charge of assault with intent to rape. *State v. Ballamah*, 1922-NMSC-057, 28 N.M. 212, 210 P. 391.

V. SODOMY.

**Force was not element of crime of sodomy under former law.** *Washington v. Rodriguez*, 1971-NMCA-021, 82 N.M. 428, 483 P.2d 309 (decided under prior law).

**Consent no defense.** — Under former law, consent of both parties to the act of sodomy did not constitute a defense to that crime. *Washington v. Rodriguez*, 1971-NMCA-021, 82 N.M. 428, 483 P.2d 309 (decided under prior law).

**Emission was not necessary element of crime of sodomy.** *State v. Massey*, 1954-NMSC-018, 58 N.M. 115, 266 P.2d 359 (decided under prior law).

**Each act distinct.** — Since under former 40A-9-6, 1953 Comp., "any penetration" could complete the crime of sodomy, on its face the statute clearly allowed prosecution for different kinds or acts of sodomy. *State v. Elliott*, 1977-NMSC-002, 89 N.M. 756, 557 P.2d 1105.

**Cunnilingus and fellatio.** — Under former 40A-9-6, 1953 Comp., sodomy included a taking into the mouth "the sexual organ of any other person"; the statute was not limited to the sexual organ of the male, "any other person" including both male and female. *State v. Putman*, 1967-NMCA-020, 78 N.M. 552, 434 P.2d 77 (decided under prior law).

Where former statute (Laws 1876, ch. 34, § 1) provided a penalty for crime of sodomy, but did not define the term, the common-law definition would apply; hence, sexual copulation per os or fellatio, was not included in the offense of sodomy. *Bennett v. Abram*, 1953-NMSC-013, 57 N.M. 28, 253 P.2d 316 (discharging petitioners in habeas corpus proceeding where they pleaded guilty to charge of sodomy without proper advice as to nature of the crime) (decided under prior law).

**Aiding and abetting shown.** — It was not necessary that the state prove that defendant aided and abetted a particular act of sodomy, as his presence at the scene and active participation in the criminal conduct being undertaken, in such a way as to encourage the commission of the charged offenses, was enough to constitute aiding and abetting. *State v. Barnett*, 1973-NMCA-098, 85 N.M. 404, 512 P.2d 977.

VI. INSTRUCTIONS.

**Use of wrong alternative in uniform instruction.** — Where defendant was charged with first degree criminal sexual penetration of a minor for vaginal penetration and first degree criminal sexual penetration of a minor for anal penetration; the court instructed the jury that the state had to prove beyond a reasonable doubt that defendant "caused the insertion to any extent, of a penis into the vagina and/or vulva" of the victim and that the state had to prove beyond a reasonable doubt that defendant "caused the insertion to any extent, of a penis into the anus" of the victim; and although the court erred in using the second alternative of the uniform instruction as the form of the instructions given to the jury, the instructions as given accurately reflected the statutory law and did not constitute reversible error. *State v. Tafoya*, 2010-NMCA-010, 147 N.M. 602, 227 P.3d 92, cert. denied, 2009-NMCERT-012, 147 N.M. 600, 227 P.3d 90.

**Essential elements of crime.** — A jury must be instructed on the essential elements of the crime charged, and failure so to do is fundamental error because the error is jurisdictional and thus not harmless. *State v. Kendall*, 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *rev'd in part*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464, (holding that under the circumstances an instruction that victim must not be defendant's spouse, was not necessary) (decided under prior law).

**Essential elements of second-degree criminal sexual penetration in the commission of a felony.** — If unlawfulness is at issue, then lack of consent is an essential element of criminal sexual penetration perpetrated in the commission of a felony. *State v. Samora*, 2016-NMSC-031.

In defendant's trial for second-degree criminal sexual penetration perpetrated in the commission of a felony (CSP-felony), where the jury instruction at issue reflected UJI 14-132 NMRA, except that it failed to include the bracketed phrase "without consent," which would have clarified that any sexual contact between the victim and defendant had to be non-consensual for the jury to determine that defendant's act was unlawful, it was fundamental error to omit the element of consent from the jury instructions that were relevant to CSP-felony, because unlawfulness was at issue and the jurors may have been confused or misdirected as to whether defendant could have still acted unlawfully if the victim had consented to sex. *State v. Samora*, 2016-NMSC-031.

**Criminal sexual penetration based on the commission of a felony.** — When criminal sexual penetration is based on the commission of a felony, it must be a felony that is committed against the victim of, and that assists in the accomplishment of, sexual penetration perpetrated by force or coercion or against a victim who, by age or other statutory factor, gave no lawful consent. *State v. Simmons*, 2018-NMCA-015, cert. denied.

**No fundamental error where instruction on CSP-II felony failed to instruct on causal link between the felony committed and the CSP.** — In defendant's trial for criminal sexual penetration (CSP II) based on the commission of a felony, where the jury was instructed that the state must prove defendant caused the victim to engage in fellatio and anal intercourse, and defendant committed the acts during the commission of kidnapping or distribution of a controlled substance to a minor or contributing to the delinquency of a minor, but was not instructed to find that the associated felony must be committed against the victim of and assist in the accomplishment of the CSP, the jury instruction was deficient but did not rise to the level of fundamental error, because a reasonable jury would not be confused by the instruction, and the connection between the associated felonies and the acts of CSP II was so apparent that the CSP II-felony convictions did not shock the judicial conscience. *State v. Simmons*, 2018-NMCA-015, cert. denied.

**Intent instruction for felony underlying second-degree CSP was proper.** — Where defendant was convicted of fourth-degree criminal sexual penetration of a minor and second-degree criminal sexual penetration of a minor, perpetrated during the commission of a felony, and where defendant claimed that the jury instruction on giving alcohol to a minor, the felony underlying his second-degree criminal sexual penetration conviction, was defective because it omitted the mens rea of the offense, whether he knew giving alcohol to a minor was unlawful, fundamental error did not occur with the given instruction, which set forth the proper mens rea for giving alcohol to a minor, whether defendant knew or had reason to



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know that the recipient of the alcohol was a minor. *State v. Muller*, 2022-NMCA-024, cert. denied.

**Fundamental error occurred where jury convicted defendant on an invalid legal theory.** — Where defendant was charged with two counts of criminal sexual penetration of a minor in the second degree (CSPM-II) based on the state's theory that defendant used his position of authority to coerce the victim to submit to the sexual act, and where the district court instructed the jury using an inapplicable uniform jury instruction that omitted the essential element of "force or coercion", fundamental error occurred because the given instructions would have confused or misled a reasonable juror and it was a miscarriage of justice to convict defendant of "position of authority" CSPM-II because that crime did not exist at the time the CSPM at issue was alleged to have occurred. *State v. Figueroa*, 2020-NMCA-007, cert. denied.

**Instruction in language of statute.** — An instruction which set forth the elements of the crime of second degree criminal sexual penetration in the language of the statute was sufficient, and there was no error in failing to instruct on absence of the victim's consent. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

**Reading of statute permissible.** — In prosecution for rape though there was no evidence tending to show that the prosecuting witness, through idiocy, imbecility or unsoundness of mind, either temporary or permanent, was incapable of giving consent, it was not error for the court, in its instructions, to read the entire section to the jury. *Territory v. Edie*, 1892-NMSC-019, 6 N.M. 555, 30 P. 851, *aff'd on reh'g*, 1893-NMSC-016, 7 N.M. 183, 34 P. 46.

**Instruction constituting constructive amendment of information.** — Jury instruction which allowed for conviction based on digital penetration occurring prior to the enactment of this section constituted a constructive amendment of the information which required reversal. *Hunter v. New Mexico*, 916 F.2d 595 (10th Cir. 1990), cert. denied, 500 U.S. 909, 111 S. Ct. 1693, 114 L. Ed. 2d 87 (1991).

**Instruction on personal injury.** — In a prosecution for criminal sexual penetration, where the trial court gave the statutory definition of personal injury appearing at 30-9-10C NMSA 1978, and also gave the statutory definition of great bodily harm at 30-1-12A NMSA 1978 in the instruction on first degree criminal sexual penetration, the lack of additional definition of personal injury was not error; if defendant desired that personal injury be further defined, he should have submitted a requested instruction to that effect, and since he did not do so, he could not complain of the lack of additional definition of the term. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

**Failure to give charge of offense in third degree.** — Failure to give defendant's tendered charge on criminal sexual penetration in the third degree was reversible error at his trial for false imprisonment and criminal sexual penetration in the second degree, where the jury could find from the evidence that the sexual intercourse occurred by coercion or force, but without the requisite elements of false imprisonment as an independent felony. *State v. Corneau*, 1989-NMCA-040, 109 N.M. 81, 781 P.2d 1159, cert. denied, 108 N.M. 668, 777 P.2d 907.

**Victim other than spouse.** — Where there was no evidence whatsoever that the victim raped, sodomized and killed was the spouse of the defendant, failure to instruct the jury that it must find that the victim was not defendant's wife in the rape conviction was not a jurisdictional error. *State v. Melton*, 1977-NMSC-014, 90 N.M. 188, 561 P.2d 461 (decided under prior law).

Reversal of defendant's conviction of criminal sexual penetration because of trial court's failure to instruct that jury must find that victim was other than defendant's spouse was improper under facts of the case, and defendant was properly convicted of criminal sexual penetration. *Kendall v. State*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464 (decided under prior law).

**Identical instructions on multiple counts.** — Where the jury was given identical instructions on two counts of attempted criminal sexual penetration that were alleged to have occurred over a three week period and the victim testified that defendant attempted to force the victim to perform fellatio four times on different evenings; and the victim described intervening events between the attempted acts of fellatio, defendant's acts were not unitary and the instructions did not violate the double jeopardy clause. *State v. Dombos*, 2008-NMCA-035, 143 N.M. 668, 180 P.3d 675, cert. denied, 2008-NMCERT-002, 143 N.M. 666, 180 P.3d 673.

**Instructions on aiding and abetting.** — Circumstantial evidence that defendant knew that throughout defendant's companion forced the victim to commit various sexual acts; that on several occasions during the night at the companion's request, defendant brought coffee and cigarettes to the companion in the bedroom; and that defendant had a knife in defendant's belt was sufficient to support an instruction that the jury could convict defendant if defendant aided and abetted the companion in the commission of criminal sexual penetration. *State v. Duncan*, 1990-NMCA-063, 113 N.M. 637, 830 P.2d 554, *aff'd*, 1991-NMSC-010, 111 N.M. 354, 805 P.2d 621.

**Lesser included offenses.** — In trial of Indian for rape under the federal Major Crimes Act (18 U.S.C. §§ 1153, 3242, conferring federal jurisdiction over certain enumerated major crimes committed by Indians on Indian reservations), it was reversible error for trial court to refuse to instruct on the non-enumerated offenses of attempted rape, simple assault and battery, all of which were lesser included offenses under New Mexico law. *Joe v. United States*, 510 F.2d 1038 (10th Cir. 1974).

**Lesser included offense instruction.** — Any variance between the victim's testimony at trial and her testimony before the grand jury was insufficient to require an instruction on a lesser included offense, where defendant's own testimony that he had no contact of any sort with the victim negated the possibility that such an instruction might have been warranted. *Chavez v. Kerby*, 848 F.2d 1101 (10th Cir. 1988).

**Lesser included offenses and alibi.** — Because the defendant offered the defense of an alibi, he was not entitled to a lesser included offense instruction on the ground that the jury might have rejected the part of the complainant's testimony regarding the use of a gun. *State v. Wilson*, 1993-NMCA-074, 117 N.M. 11, 868 P.2d 656, cert. quashed, 119 N.M. 311, 889 P.2d 1233 (1995).

**Charge on third degree not warranted.** — Where there was no evidence tending to establish that the criminal sexual penetration was committed by force or coercion without resultant personal injury, since the only evidence was that defendant used force which resulted in personal injury, beating the victim with his fists, twisting her breasts and pulling her hair immediately prior to sexual intercourse, there was no evidence supporting an instruction on third degree criminal sexual penetration. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

**Instruction on consent properly refused.** — Where a review of the record and a thorough examination of the prosecutrix' testimony does not ever raise a slight inference of consent on part of victim, it was not error for trial court to deny defendant's requested instruction on consent as a defense. *State v. Armstrong*, 1973-NMCA-081, 85 N.M. 234, 511 P.2d 560, cert. denied, 85 N.M. 228, 511 P.2d 554, *overruled on other grounds by State v. Elliott*, 1975-NMCA-087, 88 N.M. 187, 539 P.2d 207.



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**Requested instruction defining CSP of an inmate as an act committed without the inmate's consent properly denied.** — Where defendant was charged with criminal sexual penetration (CSP) of an inmate, allegedly committed while defendant was employed as a corrections officer, and where, at trial, defendant proposed a jury instruction defining CSP of an inmate as an act committed without the inmate's consent, and where the district court determined that the phrase "without consent" was not necessary in the jury instruction defining unlawfulness for CSP of an inmate because, as a matter of law, an inmate cannot consent to sexual intercourse with a corrections officer, the district court did not err in denying defendant's proposed jury instruction defining unlawfulness for CSP of an inmate in terms of an absence of consent, because as a matter of law, an inmate confined in a correctional facility or jail cannot consent to sexual intercourse with a perpetrator in a position of authority over the inmate. *State v. Arvizo*, 2021-NMCA-055, cert. denied.

**Defense of consent.** — Effective for cases filed after January 20, 2005, instructions have been approved for the defense of consent in criminal sexual penetration cases that are analogous to the defense of self-defense. *State v. Jensen*, 2005-NMCA-113, 138 N.M. 254, 118 P.3d 762, cert. quashed, 2005-NMCERT-011, 138 N.M. 587, 124 P.3d 565.

**Requested instruction on lesser offense properly refused when no supporting evidence.** — Where there is no view of the evidence adduced which would support the jury in finding the defendant guilty of third degree criminal sexual penetration which would not also require the jury to find him guilty of second degree criminal sexual penetration, a requested instruction on the lesser offense is properly refused. *State v. Romero*, 1980-NMCA-011, 94 N.M. 22, 606 P.2d 1116, *overruled on other grounds by State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

**Charge on probability unnecessary.** — It was not erroneous in rape case to refuse instructions calling for jury's consideration of reasonable probability of testimony of prosecuting witness where jury was instructed that they must find beyond a reasonable doubt that defendant committed the offense charged before they could return verdict of guilty. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

**Intoxication instruction.** — Evidence in prosecution for criminal sexual penetration was sufficient under New Mexico law to warrant an intoxication instruction. *Florez v. Williams*, 281 F.3d 1136 (10th Cir. 2002).

**Circumstantial evidence.** — There was no error in court's refusal to give the usual stock instruction relating to circumstantial evidence where the state did not rely upon circumstantial evidence to prove its case in prosecution for sodomy involving two juveniles. *State v. Frederick*, 1964-NMSC-045, 74 N.M. 42, 390 P.2d 281.

**Impotency.** — Where certain statements and testimony of defendant were only evidence of impotency, and no request for instruction on defense of impotency was tendered, it was not fundamental error on trial court's part to fail to instruct on its own motion on the defense, in view of confession and statements made by defendant admitting the act giving rise to the statutory rape prosecution. *State v. Johnson*, 1958-NMSC-046, 64 N.M. 83, 324 P.2d 781.

**Coercion not element in fourth degree criminal sexual penetration.** — Subsection D (now G) does not include an element of force or coercion, and there is no basis for construing it to require nonconsent by the child as an element of the crime. 1988 Op. Att'y Gen. No. 88-69.

**Law reviews.** — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For article, "Rape Law: The Need For Reform," see 5 N.M.L. Rev. 279 (1975).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

For article, New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption, see 22 N.M.L. Rev. 551 (1992).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

For note, "New Mexico Applies the Strict Elements Test to the Collateral Felony Doctrine - State v. Campos," see 28 N.M.L. Rev. 535 (1998).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 1 to 30; 70A Am. Jur. 2d Sodomy §§ 1 to 24.

Liability of parent or person in loco parentis for personal tort against minor child, 19 A.L.R.2d 423, 41 A.L.R.3d 904, 6 A.L.R.4th 1066.

Blood grouping tests, 46 A.L.R.2d 1000, 43 A.L.R.4th 579.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children and the like, 62 A.L.R.2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy, 62 A.L.R.2d 1083.

Assault with intent to commit unnatural sex act upon minor as affected by the latter's consent, 65 A.L.R.2d 748.

Applicability of rape statute concerning children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 A.L.R.2d 874.

Incest as included within charge of rape, 76 A.L.R.2d 484.

Rape by fraud or impersonation, 91 A.L.R.2d 591.

Mistake or lack of information as to victim's age as defense to statutory rape, 8 A.L.R.3d 1100.

Impotency as defense to charge of rape, attempt to commit rape or assault with intent to commit rape, 23 A.L.R.3d 1351.

Statutory rape of female who is or has been married, 32 A.L.R.3d 1030.

Recantation by prosecuting witness in sex crime as ground for new trial, 51 A.L.R.3d 907.

Consent as defense in prosecution for sodomy, 58 A.L.R.3d 636.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

Fact that rape victim's complaint or statement was made in response to question as affecting res gestae character, 80 A.L.R.3d 369.

Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape, 81 A.L.R.3d 1228.

Propriety of, or prejudicial effect of omitting or of giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge, 92 A.L.R.3d 866.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Constitutionality of rape laws limited to protection of females only, 99 A.L.R.3d 129.

Venue in rape cases where crime is committed partly in one place and partly in another, 100 A.L.R.3d 1174.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like, 3 A.L.R.4th 1009.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.



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Validity of statute making sodomy a criminal offense, 20 A.L.R.4th 1009.

Criminal responsibility of husband for rape, or assault to commit rape, on wife, 24 A.L.R.4th 105.

Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse, 25 A.L.R.4th 1213.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome, 42 A.L.R.4th 879.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 A.L.R.4th 310.

Sexual child abuser's civil liability to child's parent, 54 A.L.R.4th 93.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation - post-New York Times cases, 57 A.L.R.4th 404.

Intercourse accomplished under pretext of medical treatment as rape, 65 A.L.R.4th 1064.

Prosecution of female as principal for rape, 67 A.L.R.4th 1127.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids, 75 A.L.R.4th 897.

Fact that murder-rape victim was dead at time of penetration as affecting conviction for rape, 76 A.L.R.4th 1147.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

Statute protecting minors in a specified age range from rape or other sexual activity as applicable to defendant minor within protected age group, 18 A.L.R.5th 856.

Propriety of publishing identity of sexual assault victim, 40 A.L.R.5th 787.

Sufficiency of allegations or evidence of victim's mental injury or emotional distress to support charge of aggravated degree of rape, sodomy, or other sexual offense, 44 A.L.R.5th 651.

Mistake or lack of information as to victim's age as defense to statutory rape, 46 A.L.R.5th 499.

Defense of mistake of fact as to victim's consent in rape prosecution, 102 A.L.R.5th 447.

75 C.J.S. Rape §§ 1 to 35; 81 C.J.S. Sodomy §§ 1 to 8.

## 30-9-12. Criminal sexual contact.

A. Criminal sexual contact is the unlawful and intentional touching of or application of force, without consent, to the unclothed intimate parts of another who has reached his eighteenth birthday, or intentionally causing another who has reached his eighteenth birthday to touch one's intimate parts.

B. Criminal sexual contact does not include touching by a psychotherapist on his patient that is:

(1) inadvertent;

(2) casual social contact not intended to be sexual in nature; or

(3) generally recognized by mental health professionals as being a legitimate element of psychotherapy.

C. Criminal sexual contact in the fourth degree consists of all criminal sexual contact perpetrated:

(1) by the use of force or coercion that results in personal injury to the victim;

(2) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons; or

(3) when the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual contact in the fourth degree is guilty of a fourth degree felony.

D. Criminal sexual contact is a misdemeanor when perpetrated with the use of force or coercion.

E. For the purposes of this section, "intimate parts" means the primary genital area, groin, buttocks, anus or breast.

**History: 1953 Comp., § 40A-9-22, enacted by Laws 1975, ch. 109, § 3; 1981, ch. 8, § 1; 1991, ch. 26, § 2; 1993, ch. 177, § 3.**

**Cross references.** — For provision that testimony of victim hereunder need not be corroborated, *see* 30-9-15 NMSA 1978.

For limitations on testimony regarding victim's past sexual conduct, *see* 30-9-16 NMSA 1978.

For the Sex Offender Registration and Notification Act, *see* 29-11A-1 NMSA 1978.

**The 1993 amendment,** effective July 1, 1993, deleted the former second sentence of Subsection A, which defined "intimate parts"; added present Subsections B and E, redesignating the succeeding subsections accordingly; and made stylistic changes in Subsections A, C, and E.

**The 1991 amendment,** effective June 14, 1991, designated the formerly undesignated first paragraph as present Subsection A and redesignated former Subsections A and B as present Subsections B and C and, in present Subsection A, substituted "unlawful and intentional" for "intentionally" and deleted "and someone other than one's spouse" following "birthday" in two places in the first sentence and made a minor stylistic change in the second sentence.



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**Legislative intent.** — The legislative intent in defining "intimate parts" with a listing of five separate protected areas was to protect the victim from intrusions to each enumerated part; separate punishments are sustainable where evidence shows distinctly separate touchings of different parts. *State v. Williams*, 1986-NMCA-122, 105 N.M. 214, 730 P.2d 1196, cert. denied, 105 N.M. 111, 729 P.2d 1365.

Statutory enumeration of different aggravating factors, or alternative methods of committing fourth degree criminal sexual contact, does not evince a legislative intent to authorize multiple punishments for the same act; where alternative methods of committing criminal sexual contact are submitted to the jury, the accused may be found guilty of only one offense. *State v. Williams*, 1986-NMCA-122, 105 N.M. 214, 730 P.2d 1196, cert. denied, 105 N.M. 111, 729 P.2d 1365.

**Section compared with 30-9-11 NMSA 1978.** — This section is a general statute prohibiting a touching of intimate parts, whereas 30-9-11 NMSA 1978 is a specific statute which prohibits a touching of the penis with the lips or tongue. Section 30-9-11 NMSA rather than this section was the applicable statute in a prosecution for fellatio because the specific statute prevails over the general statute. *State v. Gabaldon*, 1978-NMCA-077, 92 N.M. 93, 582 P.2d 1306.

**Instruction on lesser included offense not warranted by the facts.** — Where defendant was charged with aggravated sexual abuse; defendant broke into the victim's house; defendant, who was not wearing pants and who had a knife in defendant's hand, climbed on top of the victim, and ordered the victim to remove the victim's underwear; the victim felt defendant's erection; and the victim was told to tell the victim's friend who had entered the room that the victim was alright; during that time, defendant was continually using the knife to cut the victim's throat, defendant was not entitled to a jury instruction on the lesser included offense of sexual contact by use of a deadly weapon resulting in personal injury. *United States v. Dennison*, 937 F.2d 559 (10th Cir. 1991).

**Evidence of "force".** — The evidence was sufficient to establish the element of force necessary to sustain convictions for felony criminal sexual contact where the victim testified that the defendant, in the first incident, grabbed and squeezed her breasts causing her pain and discomfort and, in the second incident, squeezed her breasts so tightly that she was unable to breathe, became dizzy, and was unable to extricate herself from his grip. *State v. Huff*, 1998-NMCA-075, 125 N.M. 254, 960 P.2d 342, cert. denied, 125 N.M. 146, 958 P.2d 104.

**"Groin" defined.** — Not having defined "groin" in this section as it read prior to 1993 amendment, and nothing to the contrary appearing, the legislature is presumed to use the common meaning of "groin," which is the fold or depression marking the line between the lower part of the abdomen and the thigh; also, the region of this line. *State v. Doe*, 1979-NMCA-021, 93 N.M. 206, 598 P.2d 1166.

**Evidence sufficient to sustain conviction.** — A touching of the upper, inner thigh is a touching in the region of the line between the lower part of the abdomen and the thigh; the touching is a touching of the groin and, therefore, sufficient evidence to sustain a conviction of criminal sexual contact. *State v. Doe*, 1979-NMCA-021, 93 N.M. 206, 598 P.2d 1166.

**Law reviews.** — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 6 Am. Jur. 2d Assault and Battery §§ 24 to 30, 41, 42, 55, 67, 106, 119, 156, 229.

Indecent proposal to woman as assault, 12 A.L.R.2d 971.

Sexual nature of physical contact as aggravating offense of assault and battery, 63 A.L.R.3d 225.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like, 3 A.L.R.4th 1009.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

## 30-9-13. Criminal sexual contact of a minor.

A. Criminal sexual contact of a minor is the unlawful and intentional touching of or applying force to the intimate parts of a minor or the unlawful and intentional causing of a minor to touch one's intimate parts. For the purposes of this section, "intimate parts" means the primary genital area, groin, buttocks, anus or breast.

B. Criminal sexual contact of a minor in the second degree consists of all criminal sexual contact of the unclothed intimate parts of a minor perpetrated:

(1) on a child under thirteen years of age; or

(2) on a child thirteen to eighteen years of age when:

(a) the perpetrator is in a position of authority over the child and uses that authority to coerce the child to submit;

(b) the perpetrator uses force or coercion that results in personal injury to the child;

(c) the perpetrator uses force or coercion and is aided or abetted by one or more persons; or

(d) the perpetrator is armed with a deadly weapon.



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Whoever commits criminal sexual contact of a minor in the second degree is guilty of a second degree felony for a sexual offense against a child and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a minimum term of imprisonment of three years, which shall not be suspended or deferred. The imposition of a minimum, mandatory term of imprisonment pursuant to the provisions of this subsection shall not be interpreted to preclude the imposition of sentencing enhancements pursuant to the provisions of Sections 31-18-17, 31-18-25 and 31-18-26 NMSA 1978.

C. Criminal sexual contact of a minor in the third degree consists of all criminal sexual contact of a minor perpetrated:

(1) on a child under thirteen years of age; or

(2) on a child thirteen to eighteen years of age when:

(a) the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit;

(b) the perpetrator uses force or coercion which results in personal injury to the child;

(c) the perpetrator uses force or coercion and is aided or abetted by one or more persons; or

(d) the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual contact of a minor in the third degree is guilty of a third degree felony for a sexual offense against a child.

D. Criminal sexual contact of a minor in the fourth degree consists of all criminal sexual contact:

(1) not defined in Subsection C of this section, of a child thirteen to eighteen years of age perpetrated with force or coercion; or

(2) of a minor perpetrated on a child thirteen to eighteen years of age when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is a student in a school.

Whoever commits criminal sexual contact in the fourth degree is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-9-23, enacted by Laws 1975, ch. 109, § 4; 1987, ch. 203, § 2; 1991, ch. 26, § 3; 2001, ch. 161, § 3; 2003 (1st S.S.), ch. 1, § 4.**

**Cross references.** — For sexual exploitation of children, *see* 30-6A-3 NMSA 1978.

For provision that testimony of victim hereunder need not be corroborated, *see* 30-9-15 NMSA 1978.

For limitations on testimony regarding victim's past sexual conduct, *see* 30-9-16 NMSA 1978.

For the Sex Offender Registration and Notification Act, *see* Chapter 29, Article 11A NMSA 1978.

**The 2003 (1st S.S.) amendment,** effective February 3, 2004, designated the formerly undesignated introductory language as Subsection A, inserted present Subsection B, redesignated former Subsections A and B as present Subsections C and D, added "for a sexual offense against a child" at the end of Subsection C, and substituted "C" for "A" in Paragraph (1) of Subsection D.

**The 2001 amendment,** effective July 1, 2001, inserted "of a minor" in the last paragraph in Subsection A; and in Subsection B inserted the Paragraph (1) designation and added Paragraph (2).

**The 1991 amendment,** effective June 14, 1991, rewrote the first sentence which read "Criminal sexual contact of a minor is unlawfully and intentionally touching or applying force to the intimate parts of a minor other than one's spouse, or unlawfully and intentionally causing a minor other than one's spouse, to touch one's intimate parts"; in Paragraph (2) of Subsection A, substituted "the perpetrator uses" for "by the use of" at the beginning of subparagraphs (b) and (c) and made related stylistic changes; and made a stylistic change in the second sentence of the section.

**The 1987 amendment,** effective June 19, 1987, inserted "not defined in Subsection A of this section" in the first paragraph of Subsection B.

**ANNOTATIONS**

**Second degree criminal sexual contact of a minor.** — Second degree criminal sexual contact of a minor as defined in Subsection B of Section 30-9-13 NMSA 1978 is limited to instances in which a defendant touches or applies force to the unclothed intimate parts of a minor. *State v. Trujillo*, 2012-NMCA-092, 287 P.3d 344, cert. denied, 2012-NMCERT-008.

**Sufficient evidence of third degree criminal sexual contact of a minor.** — Where defendant caused the ten-year-old victim to touch defendant's unclothed penis while in bed; the trial court instructed the jury using the language of the uniform jury instruction in effect at the time for third degree criminal sexual contact of a minor; and defendant was found guilty of and was sentenced for second degree criminal sexual contact of a minor, defendant's conduct was a third degree felony under Subsection C, not a third degree felony under Subsection B. *State v. Trujillo*, 2012-NMCA-092, 287 P.3d 344, cert. denied, 2012-NMCERT-008.

**Sufficient evidence.** — Where defendant, who was the spiritual leader of a religious group that lived together, was convicted of criminal sexual contact of a minor based on an unclothed experience with a teenage child who was a member of defendant's religious community; defendant claimed that the experience was a purely spiritual healing experience; the teenage child visited defendant alone and lay in bed naked with defendant; and the child



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testified that defendant kissed the child on the breast, there was sufficient evidence to support defendant's conviction of criminal sexual contact of a minor. *State v. Bent*, 2013-NMCA-108, cert. denied, 2013-NMCERT-012.

Where defendant was charged with two counts of criminal sexual contact of a minor that occurred between January 1, 2009 and February 12, 2009; most of the evidence related to an incident that occurred on February 11, 2009; the victim testified that defendant had touched the victim inappropriately prior to February 11, 2009; defendant testified on cross-examination that inappropriate things had been going on between defendant and the victim about for about a week; and a police officer testified that defendant admitted touching the victim inappropriately twice within the last week; there was sufficient evidence for the jury to conclude that defendant inappropriately touched the victim on February 11, 2009 and on another occasion between January 1, 2009 and February 12, 2009. *State v. Garcia*, 2013-NMCA-064, 302 P.3d 111, cert. denied, 2013-NMCERT-004.

Where the evidence showed that the defendant and the victim went to the trash dump two to three times per month during the period from October 2001 through May 2005; that the defendant sexually molested the victim on each trip when the defendant and the victim were alone; and that although the defendant's step-daughter accompanied the defendant and the victim to the trash dump on some occasions, there was no evidence that the step-daughter accompanied the defendant and the victim to the trash dump during the period from October 2001 through March 2002, the evidence was sufficient to support the state's charges of one count of criminal sexual contact of a minor for each month between October 2001 and March 2002. *State v. Gipson*, 2009-NMCA-053, 146 N.M. 202, 207 P.3d 1179.

Where the victim testified that defendant touched the victim's vulva and patted the victim's buttocks; the touching left the victim upset and sad; when confronted with accusations of improper sexual contact by one parent, defendant apologized, and when confronted by the victim's other parent defendant said that defendant had been forgiven, sufficient evidence supported defendant's convictions for criminal sexual contact with a minor. *State v. Kerby*, 2005-NMCA-016, 138 N.M. 232, 118 P.3d 740, *aff'd*, 2007-NMSC-014, 141 N.M. 413, 156 P.3d 704.

Where defendant was convicted of numerous counts of criminal sexual contact of a minor perpetrated on his eight-year-old daughter and four-year-old stepdaughter; the four-year-old victims' testimony that defendant twice forced her to place her hand on defendant's penis, which was corroborated by the eight-year-old child victim, the evidence was sufficient to support convictions for criminal sexual contact of a minor. *State v. Tapia*, 2015-NMCA-048, cert. denied, 2015-NMCERT-004 and cert. denied, 2015-NMCERT-004.

**Sufficient evidence of attempt to commit second-degree criminal sexual contact of a minor.** — Where defendant was charged with attempt to commit second-degree criminal sexual contact of a minor, and where the child victim testified at trial that defendant entered the room where she was sleeping, lifted the blanket off her, pulled down her pajama pants and underwear, pulled down his own pants, and rubbed her arm while masturbating, then walked to the other side of the bed, laid down next to her, and continued masturbating while rubbing her upper ribs over her clothing, and further testified that she was afraid that defendant was going to touch her private parts, there was substantial evidence to support defendant's conviction for attempted criminal sexual contact of a minor. *State v. Notah*, 2022-NMCA-005, cert. denied.

**The district court did not err in denying defendant's proposed jury instruction for attempt to commit third-degree CSCM as a lesser included offense.** — Where defendant was charged with attempt to commit second-degree criminal sexual contact of a minor (CSCM), and where the child victim testified at trial that defendant entered the room where she was sleeping, lifted the blanket off her, pulled down her pajama pants and underwear, pulled down his own pants, and rubbed her arm while masturbating, then walked to the other side of the bed, laid down next to her, and continued masturbating while rubbing her upper ribs over her clothing, and further testified that she was afraid that defendant was going to touch her private parts, and where defendant requested a jury instruction for a lesser included offense of attempt to commit third-degree CSCM, claiming that the evidence tended to better prove an intent to touch the child's breast area, which remained clothed, thus supporting a third-degree rather than a second-degree charge, the district court did not err in denying defendant's proposed jury instruction, because the elements of the crime differ in such a way that each may be committed without necessarily committing the other. Third-degree CSCM is not a lesser included offense of second-degree CSCM, because the element distinguishing between the two degrees of CSCM under thirteen years of age is whether the child victim's intimate part was clothed or unclothed, and in this case there was no reasonable view of the evidence that would support a jury finding that defendant partially undressed the child in an attempt to touch a clothed intimate part of her body but not an unclothed intimate part. *State v. Notah*, 2022-NMCA-005, cert. denied.

**Position of authority.** — Where the defendant and the victim were neighbors; the victim's mother worked with the defendant and the families were good friends; the families did things together; the defendant fixed things at the victim's house and took the trash to the trash dump as requested by the victim's mother; the victim thought of the defendant as a father figure; the victim spent the night at the defendant's house on a regular basis; the victim's mother entrusted the defendant with the victim's care; the defendant allowed the victim to earn money at the defendant's place of business, the jury could reasonably conclude that the defendant was in a position of authority over the victim. *State v. Gipson*, 2009-NMCA-053, 146 N.M. 202, 207 P.3d 1179.

Where the minor victims believed that the defendant, who was a massage therapist, was a professional healthcare provider; the victims had never had a massage; the defendant told the victims that a breast and buttock massage was part of a normal body massage, the defendant was in a position of authority over the victims. *State v. Haskins*, 2008-NMCA-086, 144 N.M. 287, 186 P.3d 916, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

**"Position of authority" interpreted.** — In 30-9-10(E) NMSA 1978, the legislature has designated certain relationships with a child that represent a "position of authority," and the language "who, by reason of that position, is able to exercise undue influence over a child" does not pertain to each of the types of position of authority listed in the definition. Under the definition of "position of authority", a household member is presumed to be able to exercise undue influence over a child such that additional proof concerning a perpetrator's use or possession of such authority is not required. *State v. Erwin*, 2016-NMCA-032, cert. denied.

Where defendant, who was charged with criminal sexual contact of a child thirteen to eighteen years of age, did not dispute the evidence that he was a household member, but claimed that the state failed to prove that he used this position of authority to coerce the child to submit to sexual contact, the state was not required to prove that defendant, by reason of his position as a household member, was able to exercise undue influence over the child, because the legislature has designated certain relationships with a child, including a household member,



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that represent a position of authority for purposes of prosecution under 30-9-13 NMSA 1978. *State v. Erwin*, 2016-NMCA-032, cert. denied.

**Trustworthiness doctrine.** — The mere fact that defendant made multiple confessions or that he was suffering from Huntington's Disease when he made the confessions that he had inappropriately touched his daughter, who was two year old, and had made her touch him was not sufficient to establish the trustworthiness of his statements which the state relied upon to establish the corpus delicti of criminal sexual contact of a minor. *State v. Weisser*, 2007-NMCA-015, 141 N.M. 93, 150 P.3d 1043.

The mere fact that defendant's daughter, who was two years old, exhibited two of sixteen behaviors that could be corroborative of sexual abuse was not sufficient to establish the trustworthiness of the defendant's statements that he had inappropriately touched his daughter and had made her touch him which the state relied upon to establish the corpus delicti of criminal sexual contact of a minor. *State v. Weisser*, 2007-NMCA-015, 141 N.M. 93, 150 P.3d 1043.

**Denial of severance motion.** — Where the trial court denied defendant's motion to sever the counts in the indictment relating to each of two female victims, with the result that the jury heard and was allowed to consider the evidence pertaining to both victims, and the evidence relating to each victim would not have been cross-admissible in separate trials to show defendant's plan to commit the offenses of criminal sexual contact of a minor in the third degree by a person in a position of authority and aggravated indecent exposure, the trial court abused its discretion when it denied defendant's severance motion for two trials. *State v. Gallegos*, 2005-NMCA-142, 138 N.M. 673, 125 P.3d 652, cert. granted, 2005-NMCERT-012, 138 N.M. 772, 126 P.3d 1137, *aff'd in part, rev'd in part*, 2007-NMSC-007, 141 N.M. 185, 152 P.3d 828.

**Deportation as consequence of guilty plea.** — The district court was not constitutionally required to advise defendant that his guilty plea to criminal sexual contact of a minor almost certainly would result in his deportation. *State v. Paredez*, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799.

**Guilty plea entered knowingly and voluntarily.** — In prosecution for criminal sexual contact of a minor in the third degree, where defendant understood the charges, understood the penalties, understood his constitutional rights and that he was waiving them, understood the factual basis on which the charges were brought, agreed with the facts, and fully intended to enter a plea of guilty, and at no time did defendant say anything that would indicate that he was reluctant to plead guilty, that he had been unduly rushed into agreeing to enter a plea, or that he was entering the plea based on fear or concern that, even though he was innocent, his attorney was not prepared for trial and he would likely be convicted although innocent, plea was entered knowingly and voluntarily. *State v. Moore*, 2004-NMCA-035, 135 N.M. 210, 86 P.3d 635.

**Not vague or overbroad.** — The statutory crime of criminal sexual contact of a minor is not unconstitutionally vague. *State v. Benny E.*, 1990-NMCA-052, 110 N.M. 237, 794 P.2d 380.

This section is not unconstitutionally vague or overbroad, nor does the statute encourage arbitrary or discriminatory prosecution. *State v. Pierce*, 1990-NMSC-049, 110 N.M. 76, 792 P.2d 408; *State v. Scott*, 1991-NMCA-081, 113 N.M. 525, 828 P.2d 958, cert. quashed, *sub nom. Gibson v. State*, 113 N.M. 524, 828 P.2d 957 (1992).

**Double jeopardy.** — Where defendant massaged the child's nude body, touching the child's breasts, buttocks, and vagina, was one continuous course of conduct, and there was no lapse in time between the times defendant touched the child's different body parts and no intervening events, there was one continuous course of conduct that was not capable of being split into three charges merely because defendant touched three different body parts and defendant's conviction for three counts of criminal sexual contact of a minor violated the Double Jeopardy Clause. *State v. Ervin*, 2008-NMCA-016, 143 N.M. 493, 177 P.3d 1067, cert. denied, 2008-NMCERT-001, 143 N.M. 398, 176 P.3d 1130.

Where defendant attempted to move child's hand toward his groin area twice within a few minutes, one of his two convictions for attempted third degree criminal sexual contact of a minor violated double jeopardy. *State v. Segura*, 2002-NMCA-044, 132 N.M. 114, 45 P.3d 54, cert. denied, 132 N.M. 193, 46 P.3d 100.

**Specific intent not element.** — The legislature did not intend to adopt a requirement of specific sexual intent as an element of this section. *State v. Pierce*, 1990-NMSC-049, 110 N.M. 76, 792 P.2d 408.

**Unlawfulness as element.** — By defining criminal sexual contact of a minor as "unlawfully and intentionally" touching a child's intimate parts, the legislature properly intended that the state must establish the unlawfulness of the touching as a distinct element of the offense. *State v. Osborne*, 1991-NMSC-032, 111 N.M. 654, 808 P.2d 624.

**Lack of consent is not an element of criminal sexual contact of a minor.** — Where defendant was convicted of one count of criminal sexual contact of a minor for forcibly touching the breast of a sixteen-year-old female victim, and where the evidence at trial established that defendant, a thirty-three year old man, who appeared intoxicated, entered a candy shop where the victim was working alone, that defendant lingered and made lewd comments of a sexual nature to the victim, that defendant repeatedly asked the victim to give him a hug, that when the victim instead extended her hand across the counter in an attempt to shake the defendant's hand, defendant took her hand and forcibly pulled her into a hug, and that as defendant released the victim from the hug, he brushed his hand over her chest and squeezed her breast, and where defendant claimed that fundamental error occurred because of the failure to instruct the jury on lack of consent, claiming that surveillance video footage of his encounter with the victim was evidence of the victim's consent to his actions, fundamental error did not occur, because lack of consent is not an element of criminal sexual contact of a minor. Consent of a child between the ages of thirteen and sixteen to engage in sexual contact is irrelevant where force occurred. *State v. Begaye*, 2022-NMCA-012, cert. denied.

**Contributing to delinquency of a minor is separate offense.** — The legislature intended for the crimes of criminal sexual contact of a minor and contributing to the delinquency of a minor to be separate crimes, punishable separately even when unitary conduct violates both statutes. Therefore, convictions under both statutes do not violate double jeopardy principles. *State v. Trevino*, 1993-NMSC-067, 116 N.M. 528, 865 P.2d 1172.

**Merger of attempted criminal sexual penetration and criminal sexual contact of minor from unitary conduct.** — Despite the state's contention that the conduct underlying the offenses charged against the defendant was not unitary, in that the defendant's action of lying on the victim constituted criminal sexual contact of a minor and his action of preparing to "hump" her constituted attempted criminal sexual penetration of a minor, the actions can only reasonably be deemed to constitute unitary conduct; the contact and attempted penetration all took place within the same short space of time, with no physical separation between the illegal acts. *State v. Mora*, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, cert. denied, 133 N.M. 727, 69 P.3d 237.

**Criminal sexual contact of minor is not lesser included offense of attempted criminal sexual**



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**penetration.** — For purposes of double jeopardy, the offenses of criminal sexual contact of a minor and attempted criminal sexual penetration of a minor cannot be characterized as lesser included and greater inclusive crimes because they each contain different elements and stand independently in relation to one another. *State v. Mora*, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, cert. denied, 133 N.M. 727, 69 P.3d 237.

**Sufficiency of notice of crime charged.** — Where a child was charged with unlawfully and intentionally touching or applying force to the intimate parts of his sister, and the charging document contained not only a time frame, but the name of the alleged victim, the child was given adequate notice to enable him to prepare a defense and to assure that any conviction or acquittal would be res judicata against a subsequent prosecution for the same offense. *State v. Benny E.*, 1990-NMCA-052, 110 N.M. 237, 794 P.2d 380.

**Statements part of res gestae.** — In prosecution for sexual assault upon four year old female child, statements made by victim within 45 minutes after awaking, crying and scared, upon being discovered in bed with defendant, could be seen as contemporaneous with shocked condition and as spontaneous utterances, and were properly admitted under the res gestae exception to the hearsay rule. *State v. Apodaca*, 1969-NMCA-038, 80 N.M. 244, 453 P.2d 764.

**Similar prior acts.** — Admission into evidence of prior sexual acts between defendant and prosecuting witness similar to those charged in conviction for indecent handling and touching of girl under age of 16 was not an abuse of trial court's discretion as a matter of law. *State v. Minns*, 1969-NMCA-035, 80 N.M. 269, 454 P.2d 355, cert. denied, 80 N.M. 234, 453 P.2d 597.

In a prosecution for criminal sexual contact with a minor, the admission of evidence of prior "bad" acts, including uncharged sexual battery dating back to the victim's early childhood, was not error. The evidence corroborated the victim's testimony and placed the charged acts in context. The evidence of defendant's treatment of the victim was relevant to the issue of credibility and not merely offered to show defendant's character and propensity to commit the crime. *State v. Landers*, 1992-NMCA-131, 115 N.M. 514, 853 P.2d 1270, *overruled on other grounds by State v. Kerby*, 2005-NMCA-106, 138 N.M. 232, 118 P.3d 740.

**Physical evidence is not required** to support a conviction under this section. *State v. Landers*, 1992-NMCA-131, 115 N.M. 514, 853 P.2d 1270, cert. quashed, 115 N.M. 535, 854 P.2d 362, *overruled on other grounds by State v. Kerby*, 2005-NMCA-106, 138 N.M. 232, 118 P.3d 740.

**Circumstantial evidence was sufficient** to allow a jury to find accused guilty under this section beyond a reasonable doubt. *Mora v. Williams*, 111 Fed. Appx. 537 (10th Cir. 2004).

**Child's testimony sufficient.** — The uncorroborated testimony of a minor child competent to testify, unless there be something inherently improbable in it, is deemed substantial evidence and sufficient to uphold a conviction. *State v. Trujillo*, 1955-NMSC-094, 60 N.M. 277, 291 P.2d 315.

**Corroboration was not essential to conviction** in a prosecution for indecent handling and touching of a minor under 18 years of age. *State v. Trujillo*, 1955-NMSC-094, 60 N.M. 277, 291 P.2d 315.

**Use of a position of authority to coerce sexual contact** may be proven inferentially and although the position of employer in and of itself does not necessarily establish the use of that position as coercion, where there exists sufficient connection between the employment and the sexual contact, the jury can appropriately infer that the employer used coercion. *State v. Trevino*, 1991-NMCA-085, 113 N.M. 804, 833 P.2d 1170, *aff'd sub nom. State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

**Coercion by a person in a position of authority is not negated where victim resists the defendant's attempts to force sexual contact.** — Where defendant was found guilty of two counts of criminal sexual contact of a minor by a person in a position of authority, where the evidence at trial established that defendant grabbed his thirteen-year-old niece's clothed buttocks while she walked past him, and later placed his hand directly on the "outer lip" of her genital area while she was sleeping, and where defendant argued that the child was not coerced to submit to sexual contact because she immediately resisted his attempts to force sexual contact, there was sufficient evidence for a jury to infer defendant was in a position of authority over the child and used that authority to coerce the child to submit to sexual contact because of the nature of the relationship between defendant and the child and the child's testimony that she felt pressure not to interfere with the family dynamics given the close relationship between her family and her uncle's family. Though a child's resistance may have some relevance to the element of coercion, the primary focus of the analysis should be on the perpetrator's actions, not the victim's. *State v. Arvizo*, 2018-NMSC-026, *rev'g* No. 33,697, mem. op. (N.M. Ct. App. June 28, 2016) (non-precedential).

**Instruction on position of authority.** — The defendant's requested jury instruction that "[t]he fact the defendant was in a position of authority does not alone establish that he used that authority to coerce sexual contact" was not a correct statement of the law because coercion for the purposes of this section occurs when a defendant occupies a position which enables that person to exercise undue influence over the victim and that influence is the means of compelling submission to the contact. *State v. Gardner*, 2003-NMCA-107, 134 N.M. 294, 76 P.3d 47, cert. denied, 134 N.M. 179, 74 P.3d 1071.

**Defendant's motivation irrelevant.** — A defendant who unlawfully and intentionally touches an intimate part of a minor's body is guilty of criminal sexual contact of a minor, regardless of whether the defendant was motivated by a desire to obtain sexual gratification or by some other desire. *State v. Gardner*, 2003-NMCA-107, 134 N.M. 294, 76 P.3d 47, cert. denied, 134 N.M. 179, 74 P.3d 1071.

**Implicit waiver of right to confrontation.** — Where defendant at trial did not file a response to the state's motion for a videotaped deposition, nor did he object at the time of the taking of the deposition or at the time that the district court admitted the deposition tape as evidence, but, to the contrary, defendant relied on both the deposition tape and the interview tape in his opening and closing arguments, defendant's actions indicate that he implicitly waived his right to face-to-face confrontation by conduct. *State v. Herrera*, 2004-NMCA-015, 135 N.M. 79, 84 P.3d 696, cert. denied, 2004-NMCERT-001, 135 N.M. 160, 85 P.3d 802.

On appeal from a prosecution for criminal sexual contact of a minor, where defendant argued that the district court was constitutionally required to make specific findings justifying its substitution of videotaped testimony for face-to-face confrontation, even though defendant never objected to the substitution, defendant waived his Confrontation Clause claim by failing to raise the confrontation issue at trial and there is no fundamental error. *State v. Herrera*, 2004-NMCA-015, 135 N.M. 79, 84 P.3d 696, cert. denied, 2004-NMCERT-001, 135 N.M. 160, 85 P.3d 802.

**Instruction on time limitation properly refused.** — Where time limitation was not an essential element of the offenses of contributing to the delinquency of a



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minor and criminal sexual contact of a minor, no error was committed by the court's failure to instruct the jury on time limitations in connection with the charges at issue. *State v. Cawley*, 1990-NMSC-088, 110 N.M. 705, 799 P.2d 574.

**Instruction on intoxication improperly refused.** — Where trial court by instruction fixed specific intent as an essential ingredient of offense charged, sexual assault of female under the age of 16, refusal to instruct on defense of intoxication was reversible error. *State v. Rayos*, 1967-NMSC-008, 77 N.M. 204, 420 P.2d 314.

**No instruction on touchings' lawfulness absent evidence.** — Although the defendant contended that all touching of the victim was colorably lawful, there was no evidence from which the jury could infer that the particular touchings that the state sought to prove were lawful. The only way to view the defendant's evidence was that he did not touch the victim whatsoever in the manner the state alleged and that all of his other touchings were lawful. Because the defendant did not allege that the particular touchings forming the basis for the charges were lawful, the issue of the lawfulness of those touchings was not at issue, and the trial court's failure to give a lawfulness instuction was not fundamental error. *State v. Landers*, 1992-NMCA-131, 115 N.M. 514, 853 P.2d 1270, cert. quashed, 115 N.M. 535, 854 P.2d 362, *overruled on other grounds by State v. Kerby*, 2005-NMCA-106, 138 N.M. 232, 118 P.3d 740.

**Attempt.** — Reversal of defendant's convictions under this section was required because the attempt aspect of the charge needed to be connected with the underlying crime in a manner that made it clear to the jury that the initiatory crime of attempt applied to all elements of the underlying crime. *State v. Segura*, 2002-NMCA-044, 132 N.M. 114, 45 P.3d 54, cert. denied, 132 N.M. 193, 46 P.3d 100.

**Sufficient evidence of criminal sexual contact.** — Where defendant was charged with criminal sexual contact of a minor and where the minor child, at trial, testified that defendant unzipped her pajamas and positioned his hand in the her underwear and touched the skin underneath her underwear in a rubbing motion, a jury could reasonably believe that defendant touched or applied force to the child's unclothed groin area, and thus there was sufficient evidence of criminal sexual contact of a minor. *State v. Pitner*, 2016-NMCA-102, cert. denied.

**Evidence sufficient to support conviction.** — Father's conviction on two counts of criminal sexual contact of a minor was supported by substantial evidence, including the testimony of the child and a therapist who interviewed the child. *State v. Newman*, 1989-NMCA-086, 109 N.M. 263, 784 P.2d 1006, cert. denied, 109 N.M. 262, 784 P.2d 1005.

Evidence consisting of the testimony of the victim's counselor and the victim herself was sufficient to support convictions of criminal sexual contact with a minor and criminal sexual penetration of a minor. *State v. Ortiz-Burciaga*, 1999-NMCA-146, 128 N.M. 382, 993 P.2d 96, cert. denied, 128 N.M. 149, 990 P.2d 823.

Evidence was sufficient to demonstrate that defendant coerced a 16-year old boy to submit to sexual contact by using his position as employer, where defendant, who had hired the boy to help repair appliances, closed the doors and windows when the boy indicated a desire to leave after defendant made sexual advances. *State v. Corbin*, 1991-NMCA-021, 111 N.M. 707, 809 P.2d 57, cert. denied, 111 N.M. 720, 809 P.2d 634.

Jury could infer coercion resulted from the employment relationship. First, the sexual contact took place on a job site owned by defendant, who had sole supervisory control not only over the premises but also over the victim. Second, defendant assigned victim to a small ticket booth where all of the incidents of sexual contact took place. *State v. Trevino*, 1991-NMCA-085, 113 N.M. 804, 833 P.2d 1170, *aff'd sub nom. State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

Where four students testified that the defendant, an assistant principal, had on various occasions while at school touched their breasts and/or buttocks, the testimony was sufficient for a reasonable mind to conclude that the unlawful contact was at least in part a result of the defendant's position of authority. *State v. Gardner*, 2003-NMCA-107, 134 N.M. 294, 76 P.3d 47, cert. denied, 134 N.M. 179, 74 P.3d 1071.

**Sufficient evidence of criminal sexual contact of a minor for purposes of retrial.** — Where defendant was convicted of one count of criminal sexual penetration of a minor and twenty-one counts of criminal sexual contact of a minor, and where defendant's convictions were overturned based on the state's violation of defendant's constitutional right against self-incrimination, there was sufficient evidence to support each of defendant's convictions for purposes of retrial where, at trial, the state presented evidence from the child victim that defendant committed multiple instances of criminal sexual contact and at least one instance of criminal sexual penetration over a four-month period and defendant's admission that he had put the child's penis in his mouth at least once and had touched the child's penis between twenty and thirty times. *State v. Atencio*, 2021-NMCA-061, cert. granted.

**Disjunctive in instruction not error.** — It was not error for the district court to instruct the jury that in order to convict defendant of criminal sexual contact of a minor under the age of 13, it must conclude that defendant touched or applied force either to the vagina or breast of the victim, as the essential element of the crime is touching an intimate part of the child. *State v. Nichols*, 2006-NMCA-017, 139 N.M. 72, 128 P.3d 500.

**Special probation condition did not terminate parental rights.** — Where defendant pleaded guilty to eight counts of criminal sexual contact of a minor in the fourth degree, the charges stemming from a series of incidents that occurred over the course of several months between defendant and one of his adopted daughters, and after the sentencing hearing, the district court imposed nine conditions of probation, with one condition prohibiting defendant from having direct or indirect contact with all children under the age of 18, including the victim of his crimes, absent a court order, the special condition did not amount to a "de facto" termination of parental rights, necessitating jurisdiction within the children's court. *State v. Garcia*, 2005-NMCA-065, 137 N.M. 597, 113 P.3d 867.

**Law reviews.** — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense, 88 A.L.R.3d 8.

Modern status of admissibility, in statutory rape prosecution, of complainant's prior sexual acts or general reputation for unchastity, 90 A.L.R.3d 1286.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like, 3 A.L.R.4th 1009.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.



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Sexual child abuser's civil liability to child's parent, 54 A.L.R.4th 93.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

6A C.J.S. Assault and Battery § 123.

## 30-9-14. Indecent exposure.

A. Indecent exposure consists of a person knowingly and intentionally exposing his primary genital area to public view.

B. As used in this section, "primary genital area" means the mons pubis, penis, testicles, mons veneris, vulva or vagina.

C. Whoever commits indecent exposure is guilty of a misdemeanor.

D. In addition to any punishment provided pursuant to the provisions of this section, the court shall order a person convicted for committing indecent exposure to participate in and complete a program of professional counseling at his own expense.

**History: 1953 Comp., § 40A-9-24, enacted by Laws 1975, ch. 109, § 5; 1996, ch. 84, § 1.**

**Cross references.** — For provision that testimony of victim hereunder need not be corroborated, *see* 30-9-15 NMSA 1978.

For limitations on testimony regarding victim's past sexual conduct, *see* 30-9-16 NMSA 1978.

**The 1996 amendment,** effective July 1, 1996, rewrote and designated the existing language as Subsections A through C, and added Subsection D.

ANNOTATIONS

**Vehicle on public street as "public view".** — The cab of a pickup truck parked on a public street in daylight hours is open to the public view and the actions of a defendant in calling an 11 year-old girl to a window on the pretext of asking directions consequently fall within the meaning of indecent exposure under this section. *State v. Artrip*, 1991-NMCA-035, 112 N.M. 87, 811 P.2d 585, cert. denied, 112 N.M. 21, 810 P.2d 1241.

**No exposure to "public view".** — The defendant, who deliberately displayed his genital area before a minor child in the household wherein he was living, did not indecently expose himself to "public view" as proscribed by this section. *State v. Romero*, 1985-NMCA-096, 103 N.M. 532, 710 P.2d 99, cert. denied, 103 N.M. 525, 710 P.2d 92.

**Prosecutrix' prior sexual conduct.** — In prosecution for indecent exposure before female child under 18, where questions asked of prosecutrix on cross-examination relating to specific prior acts of sexual misconduct were allowed by the trial court on theory that they were an attack upon her credibility, the permitting or limiting of extent of such questioning was well within discretion of the court. *State v. McKinzie*, 1963-NMSC-060, 72 N.M. 23, 380 P.2d 177.

**Contributing to delinquency of a minor is separate offense.** — An element of indecent exposure is that the defendant's acts take place in "public view;" there is no such element in contributing to delinquency of a minor, and the trial court's refusal to give the instruction as a lesser included offense was proper. *State v. Henderson*, 1993-NMSC-068, 116 N.M. 537, 865 P.2d 1181, *overruled in part on other grounds by State v. Meadors*, 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731.

**Prior offenses.** — In prosecution for indecent exposure before female child under age of 18, question to defendant's wife regarding a prior second degree rape charge filed against her husband, posed after she testified that his sexual morality had never been called into question, related only to the character of defendant, which he himself had placed in issue by taking the stand, and claimed prejudice was unavailing to him. *State v. McKinzie*, 1963-NMSC-060, 72 N.M. 23, 380 P.2d 177.

**Cross-examination prejudicial.** — It was an abuse of discretion for trial court to permit the cross-examination of defendant in prosecution for indecent demonstration or exposure in presence of female under 16, to be conducted to the extent and in the manner disclosed by the record, where for purpose of attacking defendant's credibility the prosecutor asked about specified lewd acts with his young daughter, describing the acts, unnecessarily repeating his questions, framing his interrogations as assertions and challenging defendant's denials, with result that defendant was denied a fair trial. *State v. Hargrove*, 1970-NMCA-006, 81 N.M. 145, 464 P.2d 564.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 50 Am. Jur. 2d Lewdness, Indecency and Obscenity §§ 2, 17.

Criminal offense predicated upon indecent exposure, 93 A.L.R. 996, 94 A.L.R.2d 1353.

Topless or bottomless dancing or similar conduct as offense, 49 A.L.R.3d 1084.

What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place, 96 A.L.R.3d 692.

Indecent exposure: what is "person", 63 A.L.R.4th 1040.

Regulation of exposure of female, but not male breasts, 67 A.L.R.5th 431.

Constitutionality of state statutes banning distribution of sexual devices, 94 A.L.R.5th 497.

What constitutes "public place" within meaning of state statute or local ordinance prohibiting indecency or commission of sexual act in public place, 95 A.L.R.5th 229.

## 30-9-14.1. Indecent dancing.

Indecent dancing consists of a person knowingly and intentionally exposing his intimate parts to public view while dancing or performing in a licensed liquor establishment. "Intimate parts" means the mons pubis, penis, testicles, mons veneris, vulva, female breast or vagina. As used in this section, "female breast" means the areola, and "exposing" does not include any act in which the intimate part is covered by any nontransparent material.



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Whoever commits indecent dancing is guilty of a petty misdemeanor.

A liquor licensee, his transferee or their lessee or agent who allows indecent dancing on the licensed premises is guilty of a petty misdemeanor and his license may be suspended or revoked pursuant to the provisions of the Liquor Control Act [60-3A-1 NMSA 1978].

**History: Laws 1979, ch. 403, § 1; 1981, ch. 41, § 1.**

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**Constitutionality.** — The state's regulatory power under the twenty-first amendment outweighs any first amendment interest in nude dancing and therefore this section is constitutional insofar as it applies to the prohibition of indecent dancing in licensed liquor establishments. *Nall v. Baca*, 1980-NMSC-138, 95 N.M. 783, 626 P.2d 1280.

**Law reviews.** — For note, "Constitutional Law - Regulating Nude Dancing in Liquor Establishments - The Preferred Position of the Twenty-First Amendment - Nall v. Baca," see 12 N.M.L. Rev. 611 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Topless or bottomless dancing or similar conduct as offense, 49 A.L.R.3d 1084.

What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place, 96 A.L.R.3d 692.

## 30-9-14.2. Indecent waitering.

Indecent waitering consists of a person knowingly and intentionally exposing his intimate parts to public view while serving beverage or food in a licensed liquor establishment. "Intimate parts" means the mons pubis, penis, testicles, mons veneris, vulva, female breast or vagina. As used in this section, "female breast" means the areola and "exposing" does not include any act in which the intimate part is covered by any nontransparent material.

Whoever commits indecent waitering is guilty of a petty misdemeanor.

A liquor licensee or his lessee or agent who allows indecent waitering on the licensed premises is guilty of a petty misdemeanor and his license may be suspended or revoked pursuant to the provisions of the Liquor Control Act [60-3A-1 NMSA 1978].

**History: Laws 1979, ch. 403, § 2; 1981, ch. 41, § 2.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place, 96 A.L.R.3d 692.

67 C.J.S. Obscenity § 5.

## 30-9-14.3. Aggravated indecent exposure.

A. Aggravated indecent exposure consists of a person knowingly and intentionally exposing his primary genital area to public view in a lewd and lascivious manner, with the intent to threaten or intimidate another person, while committing one or more of the following acts or criminal offenses:

(1) exposure to a child less than eighteen years of age;

(2) assault, as provided in Section 30-3-1 NMSA 1978;

(3) aggravated assault, as provided in Section 30-3-2 NMSA 1978;

(4) assault with intent to commit a violent felony, as provided in Section 30-3-3 NMSA 1978;

(5) battery, as provided in Section 30-3-4 NMSA 1978;

(6) aggravated battery, as provided in Section 30-3-5 NMSA 1978;

(7) criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978; or

(8) abuse of a child, as provided in Section 30-6-1 NMSA 1978.

B. As used in this section, "primary genital area" means the mons pubis, penis, testicles, mons veneris, vulva or vagina.

C. Whoever commits aggravated indecent exposure is guilty of a fourth degree felony.

D. In addition to any punishment provided pursuant to the provisions of this section, the court shall order a person convicted for committing aggravated indecent exposure to participate in and complete a program of professional counseling at his own expense.

**History: Laws 1996, ch. 84, § 2.**

**Effective dates.** — Laws 1996, ch. 84, § 3 makes the act effective on July 1, 1996.



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**Am. Jur. 2d, A.L.R. and C.J.S. references.**— Constitutionality of state statutes banning distribution of sexual devices, 94 A.L.R.5th 497.

What constitutes "public place" within meaning of state statute or local ordinance prohibiting indecency or commission of sexual act in public place, 95 A.L.R.5th 229.

## 30-9-15. Corroboration.

The testimony of a victim need not be corroborated in prosecutions under Sections 2 through 5 [30-9-11 through 30-9-14 NMSA 1978] of this act and such testimony shall be entitled to the same weight as the testimony of victims of other crimes under the Criminal Code.

**History: 1953 Comp., § 40A-9-25, enacted by Laws 1975, ch. 109, § 6.**

**Compiler's notes.** — For case law requiring corroboration prior to enactment of this section, *see* notes under 30-9-11 NMSA 1978.

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**Weight of evidence.** — In prosecutions for criminal sexual penetration, the testimony of the victim need not be corroborated and lack of corroboration has no bearing on weight to be given to the testimony. *State v. Nichols*, 2006-NMCA-017, 139 N.M. 72, 128 P.3d 500; *State v. Hunter*, 1984-NMSC-017, 101 N.M. 5, 677 P.2d 618, cert. denied, 469 U.S. 838, 105 S. Ct. 137, 83 L. Ed. 2d 77 (1984).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 65 Am. Jur. 2d Rape §§ 94 to 99; 70A Am. Jur. 2d Sodomy §§ 70 to 76.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense, 31 A.L.R.4th 120.

75 C.J.S. Rape § 78.

## 30-9-16. Testimony; limitations; in camera hearing.

A. As a matter of substantive right, in prosecutions pursuant to the provisions of Sections 30-9-11 through 30-9-15 NMSA 1978, evidence of the victim's past sexual conduct, opinion evidence of the victim's past sexual conduct or of reputation for past sexual conduct, shall not be admitted unless, and only to the extent that the court finds that, the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

B. As a matter of substantive right, in prosecutions pursuant to the provisions of Sections 30-9-11 through 30-9-15 NMSA 1978, evidence of a patient's psychological history, emotional condition or diagnosis obtained by an accused psychotherapist during the course of psychotherapy shall not be admitted unless, and only to the extent that, the court finds that the evidence is material and relevant to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

C. If the evidence referred to in Subsection A or B of this section is proposed to be offered, the defendant shall file a written motion prior to trial. The court shall hear the pretrial motion prior to trial at an in camera hearing to determine whether the evidence is admissible pursuant to the provisions of Subsection A or B of this section. If new information, which the defendant proposes to offer pursuant to the provisions of Subsection A or B of this section, is discovered prior to or during the trial, the judge shall order an in camera hearing to determine whether the proposed evidence is admissible. If the proposed evidence is deemed admissible, the court shall issue a written order stating what evidence may be introduced by the defendant and stating the specific questions to be permitted.

**History: 1953 Comp., § 40A-9-26, enacted by Laws 1975, ch. 109, § 7; 1993, ch. 177, § 4.**

**The 1993 amendment,** effective July 1, 1993, substituted "30-9-11 through 30-9-15 NMSA 1978" for "2 through 6 of this act" near the beginning of Subsection A; added present Subsection B, redesignating former Subsection B as present Subsection C; in Subsection C, inserted "referred to in Subsection A or B of this section" in the first sentence, inserted "or B" in the second and third sentences, and deleted "under Subsection A of this section" from the end of the third sentence; and made stylistic changes throughout Subsections A and C.

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**Victim's past allegations against a third party.** — Where the trial court excluded evidence of the victim's past allegations against a third party which related to the victim's reputation for past sexual conduct, the victim made the allegations against the third party in the past; the circumstances of the prior incident in no way resembled the allegations that led to the charges against the defendant; the defendant did not show that the circumstances of the prior allegations were clearly relevant to any material issue in the defendant's case other than propensity; and the defendant did not show how the prior



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allegations related to the defendant's defense, the trial court properly excluded the evidence. *State v. Casillas*, 2009-NMCA-034, 145 N.M. 783, 205 P.3d 830, cert. denied, 2009-NMCERT-003, 146 N.M. 603, 213 P.3d 507.

**Accused's right of confrontation denied.** — Where the defendant's sole defense in his rape trial was that the child victim consented to sexual intercourse with him and then fabricated an allegation of rape because her parents, who were opposed to premarital sex because of their deeply religious convictions, had previously punished the victim for engaging in consensual sex with someone else, the defendant was denied his constitutional right of confrontation when the trial court prohibited the defendant from cross-examining the victim and her parents about the prior sexual encounter and the punishment the victim had received from her parents as a result of that encounter and the error was not harmless beyond a reasonable doubt. *State v. Stephen F.*, 2008-NMSC-037, 144 N.M. 360, 188 P.3d 84, *aff'g*, 2007-NMCA-025, 141 N.M. 199, 152 P.3d 842.

**Prior sexual abuse of a child.** — To rebut the natural assumption that a young victim of sexual abuse is sexually naive and could only have learned about it because the victim was victimized by the defendant, the defendant may introduce the fact that the victim had been previously sexually abused to show an alternative source of sexual knowledge. *State v. Payton*, 2007-NMCA-110, 142 N.M. 385, 165 P.3d 1161, cert. denied, 2007-NMCERT-008, 142 N.M. 434, 166 P.3d 1088.

**In order to present evidence of victim's alleged prostitution,** defendant had to establish that the evidence was material and that its prejudicial effect did not outweigh its probative value. *State v. Maestas*, 2005-NMCA-062, 137 N.M. 477, 112 P.3d 1134, *rev'd on other grounds*, 2007-NMSC-001, 140 N.M. 836, 149 P.3d 933.

**Section is not unconstitutional on its face.** *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972.

The fact that this section attempts to regulate practice and procedure in district courts in regard to a victim's past sexual conduct does not mean that the legislation is unconstitutional in that it violates the provisions for separation of governmental power. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972.

**This section was intended to encourage reporting of rapes** by minimizing intrusive inquiry into the personal affairs of the victim. *State v. Romero*, 1980-NMCA-011, 94 N.M. 22, 606 P.2d 1116, *overruled on other grounds by State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

**Section protects victim against unwarranted invasions of her privacy.** — In addition to its effect in insulating the jury from prejudicial material, this section serves to protect the victim of the crime against unwarranted invasions of her privacy. *State v. Romero*, 1980-NMCA-011, 94 N.M. 22, 606 P.2d 1116, *overruled on other grounds by State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

**Purpose of statute.** — The statute is designed to minimize intrusive inquiry into a rape complainant's private life. *State v. Ramos*, 1993-NMCA-072, 115 N.M. 718, 858 P.2d 94, cert. denied, 115 N.M. 602, 856 P.2d 250.

**Section not in conflict with rules.** — The procedures in this section do not conflict, but rather are consistent, with Rule 36, N.M.R. Crim. P. (now Rule 5-603 NMRA), regarding pretrial hearings. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972.

The balancing approach to be applied in admitting evidence concerning past sexual conduct under this section does not conflict, but rather is consistent, with Rule 403, N.M.R. Evid. (now Rule 11-403 NMRA). *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972.

Once a showing sufficient to raise an issue as to relevancy of past sexual conduct is made, the balancing test of this section and of Rule 403, N.M.R. Evid. (now Rule 11-403 NMRA) is to be applied in determining admissibility. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972.

There is no conflict between this section and Rule 405, N.M.R. Evid. (now Rule 11-405 NMRA), regarding methods of proving character, because the balancing approach of Rule 403, N.M.R. Evid. (now Rule 11-403 NMRA) is also applicable to evidence admissible under Rule 405, N.M.R. Evid. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972.

**Section is not limited to sex by consent;** rather, its unlimited wording applies to all forms of past sexual conduct, so that a prior rape is past sexual conduct within the meaning of this section. *State v. Montoya*, 1978-NMCA-052, 91 N.M. 752, 580 P.2d 973, cert. denied, 91 N.M. 751, 580 P.2d 972.

**Section does not protect against waiver of privilege not to disclose medical records.** — In a prosecution for criminal sexual penetration, this section did not apply to give the victim the right to release her medical and psychotherapy records to the police and state's attorneys and then invoke an absolute privilege against *in camera* inspection by the court or subsequent disclosure to other parties. *State v. Gonzales*, 1996-NMCA-026, 121 N.M. 421, 912 P.2d 297.

**Discretion of trial court.** — In prosecution for indecent exposure before female child under 18, where questions asked of prosecutrix on cross-examination relating to specific acts of sexual misconduct were allowed by the court on theory that they were an attack upon her credibility, the permitting or limiting of extent of such questioning was well within discretion of the trial court. *State v. McKinzie*, 1963-NMSC-060, 72 N.M. 23, 380 P.2d 177.

**Limited psychiatric examination of victim permissible.** — Insofar as a psychiatric examination probes the past sexual behavior of the victim, it is within the terms of this section. *State v. Romero*, 1980-NMCA-011, 94 N.M. 22, 606 P.2d 1116, *overruled on other grounds by State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

**Prior accusations of sexual misconduct.** — In a prosecution for sexual misconduct, the trial court did not err in denying the defendant's request to call the victim's stepfather and the defendant's wife to testify that the victim had previously falsely accused the stepfather of sexual misconduct. *State v. Scott*, 1991-NMCA-081, 113 N.M. 525, 828 P.2d 958, cert. quashed, *sub nom. Gibson v. State*, 113 N.M. 524, 828 P.2d 957 (1992).

**Victim's past sexual conduct not admissible.** — Even though evidence of a victim's prior sexual conduct may be admissible to show bias, motive to fabricate or for other purposes consistent with the constitutional right of confrontation, the trial court did not err in rejecting such evidence where defendant failed to show that it was material and relevant, and that its probative value equaled or outweighed its inflammatory nature. *State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

**Victim's past sexual conduct** in itself indicates nothing concerning consent in particular case. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972; *see State v. Romero*, 1980-NMCA-011, 94 N.M. 22, 606 P.2d 1116, *overruled on other grounds by, State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

**Victim's virginity relevant if consent at issue.** — Evidence of a victim's virginity is relevant in cases



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involving alleged forcible criminal sexual penetration where the consent of the victim is at issue. *State v. Singleton*, 1984-NMCA-110, 102 N.M. 66, 691 P.2d 67.

**Previous chastity immaterial.** — Ordinarily the previous chastity of prosecuting witness is immaterial in a statutory rape case. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

**Probative value of evidence of victim's past sexual activity** must be weighed against its prejudicial effect, and its prejudicial effect is great. *State v. Romero*, 1980-NMCA-011, 94 N.M. 22, 606 P.2d 1116, *overruled on other grounds by State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

**Confrontation of witness.** — The discretion of the trial court to exclude evidence of sexual conduct must be weighed against a criminal defendant's constitutional right to confront witnesses. *Manlove v. Sullivan*, 1989-NMSC-029, 108 N.M. 471, 775 P.2d 237.

**Victim's past sexual history.** — Evidence of a minor's past sexual history was properly excluded since that evidence was not relevant to the charge of contributing to the delinquency of a minor. *State v. Lucero*, 1994-NMCA-129, 118 N.M. 696, 884 P.2d 1175, cert. denied, 118 N.M. 731, 885 P.2d 1325.

**Past conduct negativing defendant's paternity.** — Exception to the rule that previous chastity of victim is immaterial might be where her pregnancy is shown and testimony given that defendant was father of the child, as there the testimony of prior sexual acts might be pertinent on rebuttal as tending to show that another might have been the cause of such condition. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

**Issue of penetration.** — Trial court did not err in refusing to permit cross-examination of prosecuting witness in prosecution for statutory rape concerning prior acts of intercourse with other men, where sole reason advanced by defendant's counsel for admissibility was on the issue of penetration, an issue about which there was no genuine controversy. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

**De novo review** is the proper standard of review for analyzing cases implicating both the rape shield rule and the Confrontation Clause. *State v. Montoya*, 2014-NMSC-032, *rev'g* 2013-NMCA-076, 306 P.3d 470.

**Analysis of cases implicating both the rape shield rule and the Confrontation Clause.** — When a defendant makes a claim that the rape shield law bars evidence implicating the defendant's confrontation rights, the district court must first identify a theory of relevance implicating the defendant's constitutional right to confrontation and then weigh whether evidence elicited under that theory would be more prejudicial than probative. *State v. Montoya*, 2014-NMSC-032, *rev'g* 2013-NMCA-076, 306 P.3d 470.

**Application of rape shield rule violated Confrontation Clause.** — Where defendant and the victim, who had a sexual relationship for two years, began arguing about a telephone call that defendant had received; during the argument, defendant indicated to the victim that defendant wanted sex; defendant and the victim went into defendant's bedroom where defendant got on top of the victim and tried to remove the victim's clothes; the victim told the defendant "no" several times and pushed and kicked defendant until defendant stopped making sexual advances; defendant was indicted for kidnapping with intent to commit a sexual offense; the district court refused to allow defendant on cross-examination to ask the victim whether the victim and defendant had a long-standing sexual relationship and whether they had a history of engaging in sex after an argument as "make-up sex" to resolve disputes for the purpose of showing that defendant never intended to sexually assault the victim but was pursuing consensual "make-up sex" as defendant and the victim had done after arguments in the past; the victim was the sole material witness against defendant and the only witness who could provide testimony necessary for defendant's theory of the case; and the evidence was relevant to defendant's defense and would not have had a prejudicial impact on the victim, the district court's ruling violated defendant's confrontation right because it denied defendant an opportunity to present a full and fair defense. *State v. Montoya*, 2014-NMSC-032, *rev'g* 2013-NMCA-076, 306 P.3d 470.

**Standard of review for cases involving the rape shield rule and the Confrontation Clause.** — There are three steps and three standards of review that relate to the application of the rape shield rule. First, the court reviews de novo whether a defendant has presented a theory of admissibility that implicates the defendant's confrontation rights. If the defendant has, the court undertakes a de novo balancing of the state's interest in excluding the evidence against the defendant's constitutional rights to determine if the district court acted within the wide scope of its discretion to limit cross-examination. If the Confrontation Clause is not implicated or if there has been no Confrontation Clause violation, the court examines whether the district court has abused its discretion in its application of the rule itself. *State v. Montoya*, 2013-NMCA-076, *rev'd* by 2014-NMSC-032.

**Application of the rape shield rule did not implicate the Confrontation Clause.** — Where defendant and the victim had been arguing; defendant wanted to have sex with the victim, but the victim refused; defendant got on top of the victim and attempted to remove the victim's clothing; the victim pushed and kicked defendant until defendant stopped; defendant did not force the victim to have sex; defendant was charged with kidnapping and attempt to commit criminal sexual penetration; to show that defendant did not have specific intent to commit the crimes, defendant sought to introduce evidence of the sexual history of the victim and defendant to show that the defendant's intent and the victim's belief was that defendant was trying to have sex to "make-up" just as they had done in the past; the district court precluded defendant from inquiring into the party's sexual history; at trial, the victim testified that defendant and the victim had been friends for two years, the victim believed that defendant would not penetrate the victim unless the victim consented, and the victim perceived defendant's actions as an attempt to obtain the victim's consent to have sex; defendant claimed that defendant's confrontation rights had been violated because defendant was unable to challenge an opposing version of the facts, the district court's exclusion of the evidence did not implicate or violate the Confrontation Clause, because defendant sought not to confront the victim, but to use the victim's testimony as evidence unrelated to the truth or accuracy of the victim's testimony and the district court did not abuse its discretion in excluding of evidence of the history of victim's and defendant's sexual relationship. *State v. Montoya*, 2013-NMCA-076, *rev'd* by 2014-NMSC-032.

**Prior acts with defendant.** — Admission into evidence of prior sexual acts between defendant and prosecuting witness similar to those charged in prosecution for indecent handling and touching of girl under age of 16 was not an abuse of trial court's discretion as matter of law. *State v. Minns*, 1969-NMCA-035, 80 N.M. 269, 454 P.2d 355, cert. denied, 80 N.M. 234, 453 P.2d 597.

Trial court did not err in allowing a child-victim to testify about his sexual conduct with defendant while in California and before moving to New Mexico, where the California episodes were relevant to the episodes in New Mexico. *State v. Gillette*, 1985-NMCA-037, 102 N.M. 695, 699 P.2d 626.



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**Evidence of past sexual encounter of victim and third party.** — Trial court acted within its discretion in suppressing evidence of a past sexual encounter of the victim and a third party during which the victim allegedly affixed the ropes found on the bed to restrain the third party in the course of consensual sexual activity, where such evidence was irrelevant to defendant's culpability for the crimes charged, advanced no legitimate defense, excuse, or justification for the crimes charged, and were likely to inject false issues and confuse the jury. *State v. Swafford*, 1989-NMCA-069, 109 N.M. 132, 782 P.2d 385, cert. denied, 109 N.M. 54, 781 P.2d 782.

**Testimony offered for fabrication defense.** — Testimony that the prosecutrix made up stories of rape and abduction in the past that resembled the facts alleged in the case, that prosecutrix had once recanted such a story, and that prosecutrix was the sort of person who would willingly see an innocent person put in jail, was not evidence of sexual conduct precluded by the Rape Shield Law but rather went to the prosecutrix's proclivity for truthfulness and was relevant both to impeach the prosecutrix's credibility and as direct evidence in the petitioner's fabrication defense. The testimony was closely enough related to sexual conduct to be barred by this section, but the court's discretion to exclude such evidence must be weighed against a defendant's constitutional right to confront witnesses. *Manlove v. Tansy*, 981 F.2d 473 (10th Cir. 1992).

**Law reviews.** — For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

For note, "Striking the Right Balance in New Mexico's Rape Shield Law - State v. Johnson," see 28 N.M.L. Rev. 611 (1998).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 50 Am. Jur. 2d Lewdness, Indecency and Obscenity § 34 et seq.; 65 Am. Jur. 2d Rape §§ 82 to 87; 70A Am. Jur. 2d Sodomy §§ 54 to 57.

Evidence of complaint by victim of rape who is not a witness, 157 A.L.R. 1359.

Validity and construction of constitution on statute authorizing exclusion of public in sex offense cases, 39 A.L.R.3d 852.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Admissibility of evidence of character or reputation of party in civil action for sexual assault on issues other than impeachment, 100 A.L.R.3d 569.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences, 1 A.L.R.4th 283.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons, 71 A.L.R.4th 448.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 A.L.R.4th 469.

Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense, 81 A.L.R.4th 1076.

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts, 83 A.L.R.4th 685.

75 C.J.S. Rape §§ 63; 81 C.J.S. Sodomy § 10.

## 30-9-17. Videotaped depositions of alleged victims who are under sixteen years of age; procedure; use in lieu of direct testimony.

A. In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, upon motion of the district attorney and after notice to the opposing counsel, the district court may, for a good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years. The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys. Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition in the same manner as permitted at trial under the provisions of Rule 611 of the New Mexico Rules of Evidence [Rule 11-611 NMRA]. Any videotaped deposition taken under the provisions of this act [this section] shall be viewed and heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim.

B. For the purposes of this section, "videotaped deposition" means the visual recording on a magnetic tape, together with the associated sound, of a witness testifying under oath in the course of a judicial proceeding, upon oral examination and where an opportunity is given for cross-examination in the presence of the defendant and intended to be played back upon the trial of the action in court.

C. The supreme court may adopt rules of procedure and evidence to govern and implement the provisions of this act.

D. The cost of such videotaping shall be paid by the state.

E. Videotapes which are a part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the victim.

**History: 1953 Comp., § 40A-9-27, enacted by Laws 1978, ch. 98, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.



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ANNOTATIONS

**Implicit waiver of right to confrontation.** — Where defendant at trial did not file a response to the state's motion for a videotaped deposition, nor did he object at the time of the taking of the deposition or at the time that the district court admitted the deposition tape as evidence, but, to the contrary, defendant relied on both the deposition tape and the interview tape in his opening and closing arguments, defendant's actions indicate that he implicitly waived his right to face-to-face confrontation by conduct. *State v. Herrera*, 2004-NMCA-015, 135 N.M. 79, 84 P.3d 696, cert. denied, 2004-NMCERT-001, 135 N.M. 160, 85 P.3d 802.

**Defendant absent from trial voluntarily.** Factors articulated in *State v. Clements*, 1988-NMCA-094, 108 N.M. 13, 765 P.2d 1195, cert. denied, 107 N.M. 785, 765 P.2d 758, as to waiver of right to be present being occasioned by the voluntary absence of an accused, were to be applied only when the defendant was absent from trial voluntarily. *State v. Rodriguez*, 1992-NMCA-088, 114 N.M. 265, 837 P.2d 459.

**Record insufficient to justify denial of right to confront victim.** — Where a child was charged with criminal sexual contact with his sister, and, at trial, the victim testified in chambers with only counsel and the judge present and the accused observed the victim testify on a video monitor located in another room, the procedure was invalid without particularized findings of special harm to the particular child witness which are supported by substantial evidence, because the accused child's right of confrontation requires that he be permitted to confront each of the witnesses against him, including the child victim. *State v. Benny E.*, 1990-NMCA-052, 110 N.M. 237, 794 P.2d 380.

**Right of confrontation not denied.** — In a prosecution for criminal sexual contact with a minor, use of the victim's videotaped deposition did not deny the defendant the right of confrontation: the defendant was not deprived of his right to fairly and fully cross-examine the child during the deposition, and the jury, which heard the child's testimony and viewed the child, via videotape, while she testified, had an adequate opportunity to observe the child's demeanor. *State v. Vigil*, 1985-NMCA-103, 103 N.M. 583, 711 P.2d 28.

Videotaping depositions of victims of sex crimes, while defendant was required to remain in a control room instead of the room in which the testimony was given, was consistent with this section and Rule 5-504 NMRA, and no violation of defendant's right to confrontation occurred. *State v. Tafoya*, 1988-NMCA-082, 108 N.M. 1, 765 P.2d 1183, cert. denied, 107 N.M. 785, 765 P.2d 758, cert. denied, 489 U.S. 1097, 109 S. Ct. 1572, 103 L. Ed. 2d 938 (1989).

In a prosecution for sexual abuse, trial judge did not abuse his discretion in allowing the children to testify by way of depositions that were videotaped outside the presence of the defendant and then shown to the jury, as he made the requisite findings that the individualized harm which would otherwise result in the child victims outweighed the defendant's right to a face-to-face confrontation with his accusers. *State v. Fairweather*, 1993-NMSC-065, 116 N.M. 456, 863 P.2d 1077.

**Showing of traumatic effect.** — Showing a traumatic effect upon the child is sufficient to render the child unavailable to testify. *Vigil v. Tansy*, 917 F.2d 1277 (10th Cir. 1990), cert. denied, 498 U.S. 1100, 111 S. Ct. 995, 112 L. Ed. 2d 1078 (1991).

**Deposition need not be taken to charging paper on which defendant ultimately tried.** — There is nothing in Rule 5-504 NMRA requiring a deposition to be taken pursuant to the charging paper upon which defendant is ultimately tried. A deposition may be taken pursuant to a complaint and then introduced at a trial on an indictment or information. *State v. Larson*, 1988-NMCA-019, 107 N.M. 85, 752 P.2d 1101, cert. denied, 107 N.M. 74, 752 P.2d 789.

**Second deposition admitted into evidence.** — While it appears that the procedure outlined in this section and Rule 5-504 NMRA contemplates only one deposition, at which defense counsel should be on notice that this is his chance to confront the victim, although defendant never alerted the trial court why, following a deposition, a new video deposition was necessary, and he never specifically informed the appellate court, with references to the record, why a new video deposition was necessary, it could not be said that the trial court erred in allowing defendant to take a second deposition and then allowing both the first and second videotaped depositions into evidence. *State v. Larson*, 1988-NMCA-019, 107 N.M. 85, 752 P.2d 1101, cert. denied, 107 N.M. 74, 752 P.2d 789.

**Mistrial declared where tape inaudible at trial.** — Where videotape of testimony of 11-year-old victim of alleged criminal sexual penetration was inaudible at trial and child was unavailable to testify in person because of illness and possible emotional harm, there existed a manifest necessity for declaring a mistrial so that double jeopardy did not bar defendant's retrial. *State v. Messier*, 1984-NMCA-085, 101 N.M. 582, 686 P.2d 272.

**Consideration of whether evidence subject to public inspection.** — Any determination of whether items of evidence are properly subject to public inspection and copying must necessarily consider the likelihood of injury to parties not involved in the particular case at bar. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

**Waiver of required state showing.** — In a prosecution for criminal sexual penetration of a minor, since in order to gain a continuance the defendant had agreed to allow the admission of videotaped depositions at trial, he could not complain on appeal that the state failed to make the requisite showing for admissibility of the depositions. *State v. Trujillo*, 1995-NMCA-008, 119 N.M. 772, 895 P.2d 672, cert. quashed, 120 N.M. 394, 902 P.2d 76.

On appeal from a prosecution for criminal sexual contact of a minor, where defendant argued that the district court was constitutionally required to make specific findings justifying its substitution of videotaped testimony for face-to face confrontation, even though defendant never objected to the substitution, defendant waived his confrontation clause claim by failing to raise the confrontation issue at trial and there is no fundamental error. *State v. Herrera*, 2004-NMCA-015, 135 N.M. 79, 84 P.3d 696, cert. denied, 2004-NMCERT-001, 135 N.M. 160, 85 P.3d 802.

**Law reviews.** — For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

For article, "The Interpretation of the Confrontation Clause: Desire to Promote Perceived Societal Benefits and Denial of the Resulting Difficulties Produces Dichotomy in the Law," see 26 N.M. L. Rev. 353 (1996).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Closed-circuit television witness examination, 61 A.L.R.4th 1155.

## 30-9-17.1. Victims; polygraph examinations; prohibited actions.

A law enforcement officer, prosecuting attorney or other government official shall not ask or require an adult, youth or child victim of a sexual offense provided in Sections 30-9-11 through 30-9-13 NMSA 1978 to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation, charging or prosecution of the offense. The victim's refusal



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to submit to a polygraph examination or other truth-telling device shall not prevent the investigation, charging or prosecution of the offense.

**History: Laws 2008, ch. 10, § 1.**

**Effective dates.** — Laws 2008, ch. 10, § 2 made this section effective July 1, 2008.

## 30-9-18. Alleged victims who are under thirteen years of age; psychological evaluation.

In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, if the alleged victim is under thirteen years of age, the court may hold an evidentiary hearing to determine whether to order a psychological evaluation of the alleged victim on the issue of competency as a witness. If the court determines that the issue of competency is in sufficient doubt that the court requires expert assistance, then the court may order a psychological evaluation of the alleged victim, provided however, that if a psychological evaluation is ordered it shall be conducted by only one psychologist or psychiatrist selected by the court who may be utilized by either or both parties; further provided that if the alleged victim has been evaluated on the issue of competency during the course of investigation by a psychologist or psychiatrist selected in whole or in part by law enforcement officials, the psychological evaluation, if any, shall be conducted by a psychologist or psychiatrist selected by the court upon the recommendation of the defense.

**History: Laws 1987, ch. 118, § 1.**

**ANNOTATIONS**

**Victim's past allegations against a third party.** — Where the trial court excluded evidence of the victim's past allegations against a third party which related to the victim's reputation for past sexual conduct, the victim made the allegations against the third party in the past; the circumstances of the prior incident in no way resembled the allegations that led to the charges against the defendant; the defendant did not show that the circumstances of the prior allegations were clearly relevant to any material issue in the defendant's case other than propensity; and the defendant did not show how the prior allegations related to the defendant's defense, the trial court properly excluded the evidence. *State v. Casillas*, 2009-NMCA-034, 145 N.M. 783, 205 P.3d 830, cert. denied, 2009-NMCERT-003, 146 N.M. 603, 213 P.3d 507.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Witnesses: child competency statutes, 60 A.L.R.4th 369.

## 30-9-19. Sexual assault; law enforcement agency policies; submission of DNA samples by law enforcement and laboratories.

A. By October 1, 2017, every law enforcement agency shall develop and implement a policy that:

(1) prescribes how the agency handles a sample of biological material collected pursuant to a medical examination of a sexual assault victim who reported the sexual assault to law enforcement that is received by the agency;

(2) provides how the agency prioritizes a sample for DNA testing by the agency's servicing laboratory; and

(3) requires the agency to send a sample of biological material collected pursuant to a medical examination of a sexual assault victim who reported the sexual assault to law enforcement to that agency's servicing laboratory for DNA testing as soon as practicable after receiving the sample and, in all cases, within thirty days of the agency's receipt of the sample.

B. Records derived from DNA testing that qualify for insertion into CODIS shall be submitted by the servicing laboratory to the administrative center.

C. By November 1 of each year, a law enforcement agency's servicing laboratory shall report to the legislature if, at the end of the immediately preceding fiscal year, the laboratory had in its possession three hundred or more untested samples of biological material collected pursuant to medical examinations of sexual assault victims.

D. As used in this section:

(1) "administrative center" means the law enforcement agency or unit that administers and operates the DNA identification system pursuant to the provisions of the DNA Identification Act;



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(2) "biological material" means material that is derived from a human body and includes bodily fluids, hair and skin cells;

(3) "CODIS" means the federal bureau of investigation's "combined DNA index system", a national DNA index system for storage and exchange of DNA records submitted by forensic DNA laboratories;

(4) "DNA" means deoxyribonucleic acid;

(5) "DNA testing" means a forensic DNA analysis that includes restriction fragment length polymorphism, polymerase chain reaction or other valid methods of DNA typing performed to obtain identification characteristics of samples; and

(6) "sample" means a sample of biological material sufficient for DNA testing.

**History: Laws 2006, ch. 104, § 10; 2017, ch. 99, § 1.**

**Cross references.** — For the collection of samples of certain sex offenders, *see* 29-16-6 NMSA 1978.

For the Sex Offender Registration and Notification Act, *see* Chapter 29, Article 11A NMSA 1978.

**Severability.** — Laws 2006, ch. 104, § 11, effective January 1, 2007, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

**The 2017 amendment,** effective June 16, 2017, required law enforcement agencies to develop and implement policies related to handling and testing of sexual assault examination kits, and required law enforcement agencies' servicing laboratories to report to the legislature on an annual basis the number of untested samples of biological material collected pursuant to medical examinations of sexual assault victims; in the catchline, added "law enforcement agency policies"; in Subsection A, deleted "Samples from" and added the remainder of the introductory clause and Paragraphs A(1) and A(2), and added paragraph designation "(3)" preceding the remaining language of the first sentence from former Subsection A, in Paragraph A(3), added "requires the agency to send a sample of", after the first occurrence of "sexual assault victim", deleted "shall be submitted by the investigating law enforcement agency" and added "who reported the sexual assault to law enforcement", and after "DNA testing", added "as soon as practicable after receiving the sample and, in all cases, within thirty days of the agency's receipt of the sample"; added subsection designation "B." preceding the remaining language of the second sentence from former Subsection A; added new Subsection C and redesignated former Subsection B as Subsection D; and in Subsection D, Paragraph D(3), after "investigation's", added "'combined DNA index system', a".

## 30-9-20. Voyeurism prohibited; penalties.

A. Voyeurism consists of intentionally using the unaided eye to view or intentionally using an instrumentality to view, photograph, videotape, film, webcast or record the intimate areas of another person without the knowledge and consent of that person:

(1) while the person is in the interior of a bedroom, bathroom, changing room, fitting room, dressing room or tanning booth or the interior of any other area in which the person has a reasonable expectation of privacy; or

(2) under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.

B. Whoever commits voyeurism is guilty of a misdemeanor, except if the victim is less than eighteen years of age, the offender is guilty of a fourth degree felony.

C. As used in this section:

(1) "intimate areas" means the primary genital area, groin, buttocks, anus or breasts or the undergarments that cover those areas; and

(2) "instrumentality" means a periscope, telescope, binoculars, camcorder, computer, motion picture camera, digital camera, telephone camera, photographic camera or electronic device of any type.

**History: Laws 2007, ch. 238, § 1.**

**Effective dates.** — Laws 2007, ch. 238, § 2 made this section effective on July 1, 2007.

## 30-9-21. Sexual assault survivor's bill of rights.

A. A health care provider who examines and collects a sexual assault examination kit from a survivor of sexual assault shall:

(1) obtain contact information for the survivor;

(2) provide the survivor with:



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(a) a consent form by which the survivor may authorize the release of the kit to the relevant law enforcement agency and information about how the survivor may authorize the release of the kit to the agency at a later date;

(b) a copy of the provider's kit release policy;

(c) provide the survivor with contact and descriptive information regarding free and low-cost human immunodeficiency virus and sexually transmitted disease testing, prevention and treatment services including options and services provided by the department of health; and

(d) provide the survivor contact and descriptive information regarding the department of public safety statewide sexual assault examination kit tracking system;

(3) if the survivor consents, notify the relevant law enforcement agency of the sexual assault and collection of the kit;

(4) upon the survivor's request, notify the survivor when the kit is released to a law enforcement agency; and

(5) provide the survivor's contact information to the law enforcement agency when the survivor's kit is transferred to that agency.

B. No costs incurred by a health care provider for the collection of a sexual assault examination kit shall be charged directly or indirectly to the survivor of the sexual assault.

C. A law enforcement agency or crime laboratory that receives a sexual assault examination kit shall:

(1) confirm the sexual assault survivor's contact information and request that the survivor inform the agency of any changes to that information;

(2) inform the survivor of the survivor's right to have the kit tested within one hundred eighty days and have the right to the following information from the agency:

(a) whether the survivor's kit has been tested and the date on which test results are expected, which information shall be provided to the survivor; and

(b) whether the agency was able to develop a DNA profile using the samples of biological material in the kit;

(3) inform the survivor of the survivor's right to the following information from the agency:

(a) information regarding the statewide sexual assault examination kit tracking system;

(b) upon completion of the law enforcement investigation, whether a DNA profile was developed using the samples of biological material in the kit; and

(c) upon completion of the law enforcement investigation, whether a DNA profile match was identified through comparison of the DNA profile;

(4) in a case in which the alleged sexual assault offender has not been identified, notify the survivor in writing at least one hundred eighty days before destruction of a kit, if the law enforcement agency intends to destroy the survivor's kit, and provide information on how the survivor may appeal the agency's decision to destroy the kit; and

(5) with the consent of the survivor, enter designated information from the sexual assault examination kit into the department of public safety statewide sexual assault examination kit tracking system within fourteen days of obtaining consent.

D. A crime laboratory shall complete the processing of a sexual assault examination kit within one hundred eighty days of receipt of the kit.

E. Before commencing an interview of a sexual assault survivor, a law enforcement officer or prosecutor shall inform the survivor of the following:

(1) the survivor's rights pursuant to this section and other relevant law by providing the survivor with a document to be developed by the department of public safety, which document shall be signed by the survivor to confirm receipt;

(2) the survivor's right to consult with a counselor or advocate who specializes in sexual assault services or a support person designated by the survivor during any interview by a law enforcement officer, prosecutor or defense attorney, and the counselor shall be summoned by the interviewer before the commencement of the interview, unless no counselor or advocate who specializes in sexual assault services or a support person designated by the survivor can be summoned in a reasonably timely manner;

(3) the survivor's right to have a support person of the survivor's choosing present during an interview by a law enforcement officer, prosecutor or defense attorney; and



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(4) for interviews by a law enforcement officer, the survivor's right to request a different officer if the survivor believes the officer to be unsupportive or inadequately trained.

F. A law enforcement officer or prosecutor shall not, for any reason, discourage a sexual assault survivor from undergoing an examination or allowing the collection of a sexual assault examination kit.

G. In a civil or criminal case relating to a sexual assault, a sexual assault survivor has the right to:

(1) be reasonably protected from the defendant and persons acting on behalf of the defendant;

(2) not be required to submit to a polygraph examination as a prerequisite to filing an accusatory pleading or participating in any part of the criminal justice system;

(3) be heard through a survivor impact statement at any proceeding relevant to the sexual assault; and

(4) provide a sentencing recommendation to the official conducting a pre-sentence investigation.

H. A sexual assault survivor retains the right to have an advocate present during all stages of any medical examination, interview, investigation or other interaction with representatives from the legal or criminal justice systems within New Mexico. Treatment of the survivor shall not be affected or altered in any way as a result of the survivor's decision to exercise the survivor's right to have an advocate present as provided in this section.

I. A law enforcement agency may require a sexual assault survivor's requests for information pursuant to Subsection C of this section to be made in writing, and the agency shall communicate its responses to those requests in writing.

J. For the purpose of notifications and other communications provided for in this section, a sexual assault survivor may designate another person to receive notifications and information on the survivor's behalf and the survivor shall provide the designee's contact information to a medical provider or law enforcement agency required to communicate with the survivor pursuant to this section.

K. In the case of a sexual assault survivor who is deceased, the following persons shall have the right to receive notifications and information required to be communicated to a survivor pursuant to this section:

(1) a person who was the deceased sexual assault survivor's spouse at the time of the survivor's death; or

(2) the deceased sexual assault survivor's parent or sibling or child who is eighteen years of age or older.

L. A prosecutor shall not prosecute a sexual assault survivor for a criminal offense that is not a felony, including underage consumption of alcohol, drug use or prostitution, if the evidence of the commission of the offense is obtained through the examination of and collection of a sexual assault examination kit from the survivor or is obtained through the investigation of the sexual assault.

M. For the purposes of this section:

(1) "health care provider" means a sexual assault examination nurse or another health care provider authorized to examine and collect samples of biological material from a survivor of sexual assault following the assault; and

(2) "sexual assault examination kit" means samples of biological material derived from a human body, including bodily fluid, hair and skin cells, collected during a medical examination of a survivor following a sexual assault.

**History: Laws 2019, ch. 102, § 1.**

**Effective dates.** — Laws 2019, ch. 102, § 2 made Laws 2019, ch. 102, § 1 effective July 1, 2019.

# ARTICLE 10

# Marital and Familial Offenses

Sec.
30-10-1. Bigamy.
30-10-2. Repealed.
30-10-3. Incest.



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## 30-10-1. Bigamy.

Bigamy consists of knowingly entering into a marriage by or with a person who has previously contracted one or more marriages which have not been dissolved by death, divorce or annulment. Both parties may be principals.

Whoever commits bigamy is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-10-1, enacted by Laws 1963, ch. 303, § 10-1.**

### ANNOTATIONS

**Elements.** — Knowledge is an element of the crime of bigamy. Evidence of defendant's legal knowledge is admissible to rebut a defense that defendant did not know he was not divorced when he remarried. *State v. Ashley*, 1997-NMSC-049, 124 N.M. 1, 946 P.2d 205.

**Cohabitation without marriage contrary to public policy.** — Prior to its repeal, 30-10-2 NMSA 1978 declared cohabitation a criminal offense. *In re Estate of Bivians*, 1982-NMCA-132, 98 N.M. 722, 652 P.2d 744, cert. quashed, 98 N.M. 762, 652 P.2d 1213 (decided under prior law).

**Meaning clear.** — The meaning of "bigamy" as used in Code 1915, § 1775 was universally understood, and no language could have been employed which would have made clearer the intention of the legislature. *State v. Lindsey*, 1921-NMSC-004, 26 N.M. 526, 194 P. 877 (decided under prior law).

**Indictment.** — It was not necessary to allege knowledge or intention in an indictment for bigamy. *State v. Lindsey*, 1921-NMSC-004, 26 N.M. 526, 194 P. 877 (decided under prior law).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 10 Am. Jur. 2d Bigamy §§ 1 to 5.

Common-law marriage, prosecution based on, 70 A.L.R. 1036.

Validation of marriage by death of former spouse, 95 A.L.R. 1292.

Mistake as to validity or effect of divorce as defense to, 56 A.L.R.2d 915.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution - modern state cases, 74 A.L.R.4th 223.

10 C.J.S. Bigamy § 2 et seq.

## 30-10-2. Repealed.

**Repeals.** — Laws 2001, ch. 32, § 1 repealed 30-10-2 NMSA 1978, as enacted by Laws 1963, ch. 303, § 10-2, relating to unlawful cohabitation and the penalties subscribed thereto, effective June 15, 2001. For provisions of former section, *see* the 2000 NMSA 1978 on *NMOneSource.com*.

## 30-10-3. Incest.

Incest consists of knowingly intermarrying or having sexual intercourse with persons within the following degrees of consanguinity: parents and children including grandparents and grandchildren of every degree, brothers and sisters of the half as well as of the whole blood, uncles and nieces, aunts and nephews.

Whoever commits incest is guilty of a third degree felony.

**History: 1953 Comp., § 40A-10-3, enacted by Laws 1963, ch. 303, § 10-3.**

### ANNOTATIONS

**Purpose of section.** — This section is directed toward prohibiting sexual intercourse between specific relations within the blood line. *State v. Hargrove*, 1989-NMSC-012, 108 N.M. 233, 771 P.2d 166.

**Term "consanguinity"** admits of only one plain meaning. It is the relationship by descent from the same stock or common ancestor, related by blood. *State v. Hargrove*, 1989-NMSC-012, 108 N.M. 233, 771 P.2d 166.

**Elements of offense.** — The purpose of Laws 1917, ch. 50, § 1 (former 40-7-3, 1953 Comp.) was to prevent sexual intercourse between close relatives, and the free act of the one being tried, with knowledge of the relationship, was all that was required, it being immaterial that the same testimony would have sustained a conviction for rape. *State v. Hittson*, 1953-NMSC-018, 57 N.M. 100, 254 P.2d 1063.

The free act of the one being tried, who has knowledge of the relationship, is required to convict one of incest. *State v. Hargrove*, 1989-NMSC-012, 108 N.M. 233, 771 P.2d 166.

Failure to instruct the jury that it had to find beyond a reasonable doubt that defendant had knowledge of the prohibited blood relationship was reversible error, where defendant's testimony that he believed he did not father his "adopted daughter" demonstrated that he did not concede that at the time they had intercourse he knew she was his biological daughter. *State v. Hargrove*, 1989-NMSC-012, 108 N.M. 233, 771 P.2d 166.

**Uncle/niece marriages.** — New Mexico's public policy against incest did not preclude the district court from awarding a mother primary physical custody of her children, after taking into account her plans to marry her uncle, where that choice was in the best interests of the children, and mother and uncle intended to reside in California. *Leszinske v. Poole*, 1990-NMCA-088, 110 N.M. 663, 798 P.2d 1049, cert. denied, 110 N.M. 533, 797 P.2d 983.

**Separate counts of incest and criminal sexual penetration.** — There was no error in charging defendant on separate counts of criminal sexual penetration and incest under a theory that he had sexual intercourse with a child under 13 years of age and a child between 13 and 16 years of age, and he knew each was his biological daughter. *State v. Hargrove*, 1989-NMSC-012, 108 N.M. 233, 771 P.2d 166.

**Polygraph test results.** — In prosecution for incest, it was reversible error for trial court to admit into evidence



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the results of a polygraph test over objection of the defendant, despite the fact that defendant had signed a waiver agreeing to be bound by the results of the test. *State v. Trimble*, 1961-NMSC-076, 68 N.M. 406, 362 P.2d 788.

**Double jeopardy.** — There is no double jeopardy impediment to convicting and sentencing a defendant to consecutive terms for both incest and criminal sexual penetration arising out of the same act. *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223.

**Law reviews.** — For article, "The Perils of Intestate Succession in New Mexico and Related Will Problems," see 7 Nat. Resources J. 555 (1967).

For article, "New Mexico's 1969 Criminal Abortion Law," see 10 Nat. Resources J. 591 (1970).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 41 Am. Jur. 2d Incest § 1 et seq.

Adoption, relationship created by, as within statute regarding incest, 151 A.L.R. 1146.

Consent as element of incest, 36 A.L.R.2d 1299.

Prosecutrix in incest case as accomplice or victim, 74 A.L.R.2d 705.

Incest as included within charge of rape, 76 A.L.R.2d 484.

Admissibility, in incest prosecution, of evidence of alleged victim's prior sexual acts with persons other than accused, 97 A.L.R.3d 967.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution - modern state cases, 74 A.L.R.4th 223.

Sexual intercourse between persons related by half blood as incest, 34 A.L.R.5th 723.

42 C.J.S. Incest §§ 2 to 6.

# ARTICLE 11

# Crimes Against Reputation

Sec.
30-11-1. Libel.

## 30-11-1. Libel.

Libel consists of making, writing, publishing, selling or circulating without good motives and justifiable ends, any false and malicious statement affecting the reputation, business or occupation of another, or which exposes another to hatred, contempt, ridicule, degradation or disgrace.

Whoever commits libel is guilty of a misdemeanor.

The word "malicious," as used in this article, signifies an act done with evil or mischievous design and it is not necessary to prove any special facts showing ill-feeling on the part of the person who is concerned in making, printing, publishing or circulating a libelous statement against the person injured thereby.

A. A person is the maker of a libel who originally contrived and either executed it himself by writing, printing, engraving or painting, or dictated, caused or procured it to be done by others.

B. A person is the publisher of a libel who either of his own will or by the persuasion or dictation, or at the solicitation or employment for hire of another, executes the same in any of the modes pointed out as constituting a libel; but if anyone by force or threats is compelled to execute such libel he is guilty of no crime.

C. A person is guilty of circulating a libel who, knowing its contents, either sells, distributes or gives, or who, with malicious design, reads or exhibits it to others.

D. The written, printed or published statement to come within the definition of libel must falsely convey the idea either:

(1) that the person to whom it refers has been guilty of some penal offenses;

(2) that he has been guilty of some act or omission which, though not a penal offense, is disgraceful to him as a member of society, and the natural consequence of which is to bring him into contempt among honorable persons;

(3) that he has some moral vice or physical defect or disease which renders him unfit for intercourse with respectable society, and as such should cause him to be generally avoided;

(4) that he is notoriously of bad or infamous character; or

(5) that any person in office or a candidate therefor is dishonest and therefore unworthy of such office, or that while in office he has been guilty of some malfeasance rendering him unworthy of the place.

E. It shall be sufficient to constitute the crime of libel if the natural consequence of the publication of the same is to injure the person defamed although no actual injury to his reputation need be proven.



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F. No statement made in the course of a legislative or judicial proceeding, whether true or false, although made with intent to injure and for malicious purposes, comes within the definition of libel.

**History: 1953 Comp., § 40A-11-1, enacted by Laws 1963, ch. 303, § 11-1.**

**Cross references.** — For constitutional provision guaranteeing freedom of speech and of the press, and making truth a defense in criminal prosecutions for libel, *see* N.M. Const., art. II, § 17.

For provision allowing a special motion to dismiss an unwarranted or specious lawsuit against a person for conduct or speech in a public setting, *see* 38-2-9.1 and 38-2-9.2 NMSA 1978.

For the Uniform Single Publication Act, *see* 41-7-1 NMSA 1978 et seq.

For defamation by radio and television, *see* 41-7-6 NMSA 1978.

### ANNOTATIONS

**Definition of libel.** — The statutory definition of libel governed where there was a statute on the subject, and it was immaterial whether the words alleged to be libelous were libelous per se. *State v. Elder*, 1914-NMSC-074, 19 N.M. 393, 143 P. 482.

**Statement involving matter of public concern.** — This statute is unconstitutional insofar as it applies to a public statement involving a matter of public concern. Such statements can be subject to criminal penalty only if made with actual malice. *State v. Powell*, 1992-NMCA-086, 114 N.M. 395, 839 P.2d 139.

**Charges libelous.** — Charging a person in a newspaper with being "an unprincipled son," a "moral coward," "an imbecile" and "one who has about as much regard for the truth as an infidel has for the Bible," was libelous. *State v. Elder*, 1914-NMSC-074, 19 N.M. 393, 143 P. 482 (decided under prior law).

**Article not privileged.** — Where an alleged libelous article did not refer to the several branches of government, but to a particular assessor, it was not privileged under Laws 1889, ch. 11, § 17 (former 40-27-13, 1953 Comp.) making publications as to the government or its branches privileged. *State v. Ogden*, 1915-NMSC-074, 20 N.M. 636, 151 P. 758 (decided under prior law).

**Indictment sufficient.** — An indictment which charged that the alleged defamatory matter was false was sufficient on demurrer, negative averments not being necessary. The indictment need not allege that if true the matters were not published with good motives or justifiable ends. *State v. Elder*, 1914-NMSC-074, 19 N.M. 393, 143 P. 482.

**Law reviews.** — For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

For note, "The Defenses of Fair Comment and Qualified Privilege," see 11 N.M.L. Rev. 243 (1981).

For note, "Libel Law - New Mexico Adopts an Ordinary Negligence Standard for Defamation of a Private Figure: Marchiondo v. Brown," see 13 N.M.L. Rev. 715 (1983).

For note, "Criminal Libel Statute Held Unconstitutional as Applied to Public Statements Involving Public Concerns: *State v. Powell*," see 24 N.M.L. Rev. 495 (1994).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 50 Am. Jur. 2d Libel and Slander § 520 et seq.

Character of libel or slander for which criminal prosecution will lie, 19 A.L.R. 1470.

Words as criminal offense other than libel or slander, 48 A.L.R. 83.

Liability of partners or partnership for libel, 88 A.L.R.2d 474.

Liability of telegraph or telephone company for transmitting or permitting transmission of libelous or slanderous messages, 91 A.L.R.3d 1015.

Actionability of false newspaper report that plaintiff has been arrested, 93 A.L.R.3d 625.

Libel by newspaper headlines, 95 A.L.R.3d 660.

Liability of commercial printer for defamatory statement contained in matter printed for another, 16 A.L.R.4th 1372.

Libel and slander: attorneys' statements, to parties other than alleged defamed party or its agents, in course of extrajudicial investigation or preparation relating to pending or anticipated civil litigation as privileged, 23 A.L.R.4th 932.

Defamation: loss of employer's qualified privilege to publish employee's work record or qualification, 24 A.L.R.4th 144.

Criticism or disparagement of attorney's character, competence, or conduct as defamation, 46 A.L.R.4th 326.

Libel or slander: defamation by gestures or acts, 46 A.L.R.4th 403.

Validity of criminal defamation statutes, 68 A.L.R.4th 1014.

In personam jurisdiction, in libel and slander action, over nonresident who mailed allegedly defamatory letter from outside state, 83 A.L.R.4th 1006.

Who is "public figure" for purposes of defamation action, 19 A.L.R.5th 1.

Libel and slander: charging one with breach or nonperformance of contract, 45 A.L.R.5th 739.

Defamation: publication of letter to editor in newspaper as actionable, 54 A.L.R.5th 443.

53 C.J.S. Libel and Slander; Injurious Falsehood §§ 7 to 9.

# ARTICLE 12

# Abuse of Privacy

Sec.
30-12-1. Interference with communications; exception.
30-12-2. Grounds for order of interception.
30-12-3. Form of application.
30-12-4. Entry of order; determination.
30-12-5. Contents of order.
30-12-6. Order; extension; requirements.
30-12-7. Method of recording communication; custody.
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30-12-9. Disclosure; when and by whom allowed.
30-12-10. Interception of privileged or unauthorized communications.
30-12-11. Right of privacy; damages.
30-12-12. Disturbing a marked burial ground.
30-12-13. Defacing tombs.
30-12-14. Unlawful burial.



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## 30-12-1. Interference with communications; exception.

Interference with communications consists of knowingly and without lawful authority:

A. displacing, removing, injuring or destroying any radio station, television tower, antenna or cable, telegraph or telephone line, wire, cable, pole or conduit belonging to another, or the material or property appurtenant thereto;

B. cutting, breaking, tapping or making any connection with any telegraph or telephone line, wire, cable or instrument belonging to or in the lawful possession or control of another, without the consent of such person owning, possessing or controlling such property;

C. reading, interrupting, taking or copying any message, communication or report intended for another by telegraph or telephone without the consent of a sender or intended recipient thereof;

D. preventing, obstructing or delaying the sending, transmitting, conveying or delivering in this state of any message, communication or report by or through telegraph or telephone; or

E. using any apparatus to do or cause to be done any of the acts hereinbefore mentioned or to aid, agree with, comply or conspire with any person to do or permit or cause to be done any of the acts hereinbefore mentioned.

Whoever commits interference with communications is guilty of a misdemeanor, unless such interference with communications is done:

(1) under a court order as provided in Sections 30-12-2 through 30-12-11 NMSA 1978; or

(2) by an operator of a switchboard or an officer, employee or agent of any communication common carrier in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his services or to the protection of rights or property of the carrier of such communication; or

(3) by a person acting under color of law in the investigation of a crime, where such person is a party to the communication, or one of the parties to the communication has given prior consent to such interception, monitoring or recording of such communication.

**History: 1953 Comp., § 40A-12-1, enacted by Laws 1963, ch. 303, § 12-1; 1973, ch. 369, § 1; 1979, ch. 191, § 1.**

### ANNOTATIONS

**Section 30-12-1 NMSA 1978 is not violated when telephone calls placed from a jail are recorded** after the caller has been given notice that the recording will occur. *State v. Johnson*, 2010-NMSC-016, 148 N.M. 50, 229 P.3d 523.

**Recordings of telephone calls from jail.** — Where defendant made telephone calls from jail requesting that defendant's friends be present at defendant's trial ostensibly to influence the testimony of the state's witnesses; and when a call was placed at the jail, a digital message informed both parties to the call that the call may be recorded and monitored, the trial court properly admitted the recordings into evidence. *State v. Johnson*, 2010-NMSC-016, 148 N.M. 50, 229 P.3d 523.

**Speaking in code.** — In the absence of evidence that the defendant had actual notice that his telephone calls made in the booking area of the jail might be monitored, the defendant's talking in code is not sufficient to establish his implied consent to monitor the calls. Tape recordings of the defendant's telephone calls made in jail should have been suppressed. *State v. Templeton*, 2007-NMCA-108, 142 N.M. 369, 165 P.3d 1145.

**Right of media access to judicial records.** — The right of media access to judicial records serves the important function of ensuring the integrity of judicial proceedings and the law enforcement process. This right of access and inspection, however, may be limited by special circumstances and the exercise of sound discretion of the trial court. The right of inspection by the media does not extend beyond that available to the public generally. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

**Materials not subject to disclosure unless used as evidence.** — Except those matters actually introduced into evidence or utilized in open court, materials intercepted pursuant to this article are not subject to disclosure. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

**Legislature did not intend to expose every person with telephone extension to criminal liability** who allowed someone else to listen to his conversation. *Robison v. Katz*, 1980-NMCA-045, 94 N.M. 314, 610 P.2d 201, cert. denied, 94 N.M. 675, 615 P.2d 992.

**Transmittal of face-to-face conversation.** — Subsection C of this section pertains to telephone conversations or telegraph messages, and was not applicable to a face-to-face conversation transmitted to a listener by a device concealed on one of the participants in the conversation. *State v. Hogervorst*, 1977-NMCA-057, 90 N.M. 580, 566 P.2d 828, cert. denied, 90 N.M. 636, 567 P.2d 485.

**Voluntary conversation invites risk of recording and transmission.** — One who voluntarily enters into a conversation with another takes the risk that the other person on the line may memorize, record or even transmit the conversation. *State v. Arnold*, 1979-NMCA-087, 94 N.M. 385, 610 P.2d 1214, *rev'd on other grounds*, 1980-NMSC-030, 94 N.M. 381, 610 P.2d 1210.

**Civil action permitted whether or not conviction achieved.** — Section 30-12-11 NMSA 1978 provides a civil cause of action against any person who intercepts, discloses or uses, or procures any other person to intercept, disclose or use, such communications, without lawful authority to do so, regardless of whether that person has been convicted under this section. *Templin v. Mountain Bell Tel. Co.*, 1982-NMCA-024, 97 N.M. 699, 643 P.2d 263, cert. quashed, 98 N.M. 51, 644 P.2d 1040.

**Monitoring telephone calls made from jail.** — Proof of consent to the interception of electronic communications may be shown by circumstantial evidence;



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thus, the defendant consented to interception of his phone calls from jail since he was aware of a written notice that calls were monitored and recorded. *State v. Coyazo*, 1997-NMCA-029, 123 N.M. 200, 936 P.2d 882, cert. denied, 123 N.M. 168, 936 P.2d 337.

**Antecedent justification.** — The United States Supreme Court has held that there must be antecedent justification to a court, governed by precise procedures and guidelines, before wiretapping is employed. 1970-71 Op. Att'y Gen. No. 71-37.

**Law reviews.** — For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 74 Am. Jur. 2d Telecommunications §§ 36, 207, 211, 213, 214, 217.

Permissible surveillance, under state communications interception statute, by person other than state or local law enforcement officer or one acting in concert with officer, 24 A.L.R.4th 1208.

Permissible warrantless surveillance, under state communications interception statute, by state or local law enforcement officer or one acting in concert with officer, 27 A.L.R.4th 449.

Eavesdropping on extension telephone as invasion of privacy, 49 A.L.R.4th 430.

Intrusion by news-gathering entity as invasion of right of privacy, 69 A.L.R.4th 1059.

"Caller ID" system, allowing telephone call recipient to ascertain number of telephone from which call originated, as violation of right to privacy, wiretapping statute, or similar protections, 9 A.L.R.5th 553.

Applicability, in civil action, of provisions of Omnibus Crime Control and Safe Streets Act of 1968, prohibiting interception of communications (18 USCS § 2511 (1)), to interception by spouse, or spouse's agent, of conversations of other spouse, 139 A.L.R. Fed. 517.

Construction and application of provision of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. § 2520) authorizing civil cause of action by person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of Act, 164 A.L.R. Fed. 139.

86 C.J.S. Telegraphs, Telephones, Radio and Television §§ 120, 122.

## 30-12-2. Grounds for order of interception.

An ex parte order for wiretapping, eavesdropping or the interception of any wire or oral communication may be issued by any judge of a district court upon application of the attorney general or a district attorney, stating that there is probable cause to believe that:

A. evidence may be obtained of the commission of:

(1) the crime of murder, kidnapping, extortion, robbery, trafficking or distribution of controlled substances or bribery of a witness;

(2) the crime of burglary, aggravated burglary, criminal sexual penetration, arson, mayhem, receiving stolen property or commercial gambling, if punishable by imprisonment for more than one year; or

(3) an organized criminal conspiracy to commit any of the aforementioned crimes; or

B. the communication, conversation or discussion is itself an element of any of the above specified crimes.

**History: 1953 Comp., § 40A-12-1.1, enacted by Laws 1973, ch. 369, § 2; 1979, ch. 191, § 2.**

ANNOTATIONS

**Law reviews.** — For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Permissible surveillance, under state communications interception statute, by person other than state or local law enforcement officer or one acting in concert with officer, 24 A.L.R.4th 1208.

## 30-12-3. Form of application.

Each application for wiretapping, eavesdropping or the interception of any wire or oral communication shall be made in writing upon oath or affirmation to a judge of a district court and shall state the applicant's authority to make such application. Each application shall include:

A. the identity of the investigative or law enforcement officer making the application and the officer authorizing the application;

B. a complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including:

(1) details as to the particular offense that has been, is being or is about to be committed;

(2) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;

(3) a particular description of the type of communication sought to be intercepted; and

(4) the identity of the person, if known, committing the offense and whose communications are to be intercepted;



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C. a complete statement as to whether other investigative procedures have been tried and failed, or reasonably appear unlikely to succeed if tried, or appear to be too dangerous;

D. a statement of the period of time for which the interception is required to be maintained; if the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of the facts establishing probable cause to believe that additional communications of the same type will occur thereafter shall be required;

E. a complete statement of the facts concerning all previous applications known to the individuals authorizing and making the application, which were made to any judge for authorization to intercept or for approval of interceptions of wire or oral communications involving any of the same persons, facilities or places specified in the application and the action taken by the judge on each such application; and

F. where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

**History: 1953 Comp., § 40A-12-1.2, enacted by Laws 1973, ch. 369, § 3.**

**ANNOTATIONS**

**Requirement for oath or affirmation.** — A notary public is not required to administer the formalities of an oath embodied in Section 14-13-1 NMSA 1978 or an affirmation under Section 14-13-2 NMSA 1978 in order for a sworn statement to be deemed as given under oath or affirmation in accordance with this section. *State v. Knight*, 2000-NMCA-016, 128 N.M. 591, 995 P.2d 1033, cert. denied, 128 N.M. 689, 997 P.2d 821, *overruled on other grounds by State v. Williamson*, 2009-NMSC-039, 146 N.M. 488, 212 P.3d 376.

When Paragraph E of Rule 5-211 NMRA is read together with this section, it is clear that the latter only requires that an application be "in writing upon oath or affirmation" and directed to a district court judge. The affiant need not make the oath or affirmation in front of a judge. *State v. Knight*, 2000-NMCA-016, 128 N.M. 591, 995 P.2d 1033, cert. denied, 128 N.M. 689, 997 P.2d 821, *overruled on other grounds by State v. Williamson*, 2009-NMSC-039, 146 N.M. 488, 212 P.3d 376.

## 30-12-4. Entry of order; determination.

Upon application, the judge may enter an ex parte order, as requested or as modified, authorizing or approving wiretapping, eavesdropping or the interception of wire or oral communications within the district in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that:

A. there is probable cause for belief that a person is committing, has committed or is about to commit a particular offense enumerated in 30-12-2 NMSA 1978;

B. there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

C. normal investigative procedures have been tried and failed, or reasonably appear unlikely to succeed if tried, or appear to be too dangerous; and

D. there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted is being used or is about to be used in connection with the commission of such offense, or is leased to, listed in the name of or commonly used by the person alleged to be involved in the commission of the offense.

**History: 1953 Comp., § 40A-12-1.3, enacted by Laws 1973, ch. 369, § 4.**

**ANNOTATIONS**

**Requirement for probable cause.** — An affidavit was deficient with respect to an unnamed informant because, although it established the informant's reliability by stating that he had provided information in the past that led to a determination of probable cause for a search warrant and to arrests and prosecution of narcotics felons, the informant's basis of knowledge was lacking. *State v. Knight*, 2000-NMCA-016, 128 N.M. 591, 995 P.2d 1033, cert. denied, 128 N.M. 689, 997 P.2d 821, overruled on other grounds by *State v. Williamson*, 2009-NMSC-039, 146 N.M. 488, 212 P.3d 376.

An affidavit met the basis of the knowledge requirement because it related in detail the informant's meetings and conversations with the subject, and clearly described the underlying circumstances upon which the informant's information was based. *State v. Knight*, 2000-NMCA-016, 128 N.M. 591, 995 P.2d 1033, cert. denied, 128 N.M. 689, 997 P.2d 821, *overruled on other grounds by State v. Williamson*, 2009-NMSC-039, 146 N.M. 488, 212 P.3d 376.



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**Am. Jur. 2d, A.L.R. and C.J.S. references.** — When do facts shown as probable cause for wiretap authorization under 18 USCS § 2518(3) become "stale," 68 A.L.R. Fed. 953.

## 30-12-5. Contents of order.

A. Each order authorizing or approving wiretapping, eavesdropping or interception of wire or oral communications shall specify:

(1) the identity, if known, of the person whose communications are to be intercepted;

(2) the nature and location of the communication facilities as to which, or the place where, authority to intercept is granted;

(3) a particular description of the type of communication sought to be intercepted and a statement of the particular offense to which it relates;

(4) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(5) the period of time during which such interception is authorized, including a statement as to whether the interception automatically terminates when the described communication has been first obtained.

B. An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

**History: 1953 Comp., § 40A-12-1.4, enacted by Laws 1973, ch. 369, § 5.**

## 30-12-6. Order; extension; requirements.

No order entered under this act [30-12-1 through 30-12-11 NMSA 1978] may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension, made in accordance with Section 30-12-3 NMSA 1978, and if the court makes the findings required by Section 30-12-4 NMSA 1978. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purpose for which it was granted, and in no event longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception under this act and shall terminate upon attainment of the authorized objective, or in any event within thirty days. Whenever an order authorizing interception is entered pursuant to this act, the order may require reports to be made to the judge who issued the order, showing what progress has been made toward achievement of the authorized objective and the need for continued interception. The reports shall be made at such times as the judge may require.

**History: 1953 Comp., § 40A-12-1.5, enacted by Laws 1973, ch. 369, § 6.**

**ANNOTATIONS**

**Interception of nonrelevant conversations.** — This section does not forbid interception of all nonrelevant conversations, but, like the federal statute, mandates the government to conduct the surveillance so as to minimize the interception of such conversations. Factors to be considered in determining whether the government acted reasonably in a given case may include, but are not limited to, the complexity of the criminal operation, whether the callers are using ambiguous or coded language, whether the applicable telephone is public or residential, the length of time of the wiretap and of the telephone calls, and the extent of judicial supervision. *State v. Manes*, 1991-NMCA-025, 112 N.M. 161, 812 P.2d 1309, cert. denied, 112 N.M. 77, 811 P.2d 575, and cert. denied, 502 U.S. 942, 112 S. Ct. 381, 116 L. Ed. 2d 332 (1991).

The defendant argued that the police, who wiretapped his phone, failed to properly minimize the interception of unauthorized communications, those involving his wife, mother, and children. To prevail, he had to show a pattern of interception of innocent conversations which



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developed over the period of the wiretap; it was insufficient if he merely identified particular calls which he contended should not have been intercepted. *State v. Manes*, 1991-NMCA-025, 112 N.M. 161, 812 P.2d 1309, cert. denied, 112 N.M. 77, 811 P.2d 575, and cert. denied, 502 U.S. 942, 112 S. Ct. 381, 116 L. Ed. 2d 332 (1991).

**Law reviews.** — For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

## 30-12-7. Method of recording communication; custody.

A. The contents of any wire or oral communication intercepted by any means authorized by this act [30-12-1 through 30-12-11 NMSA 1978] shall, if possible, be recorded on tape, wire or other comparable device. The recording shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon expiration of the period of the order or extension thereof, such recording shall be made available to the judge issuing the order and sealed under his directions. Custody of the recording shall be wherever the judge orders. A recording shall not be destroyed except upon the order of the judge, and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of this act. The presence of the seal, or a satisfactory explanation for the absence thereof, shall be prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived under this act.

B. Applications made and orders granted under this act shall be sealed by the judge and custody of them shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction, and shall not be destroyed except on order of the judge to whom presented, and in any event shall be kept for ten years.

C. Any violation of the provisions of this section may be punished as a contempt of court.

D. Within a reasonable time, but not later than ninety days after the filing of an application for an order of approval which is denied, or after the termination of the period of an order or extensions thereof, the judge to whom the application was presented shall cause to be served on the persons named in the order or the applications and on such other parties to intercepted communications as the judge may determine is in the interest of justice, notice of:

(1) the fact of the entry of the order or application;

(2) the date of the entry and the period of authorized, approved or disapproved interception or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted. The judge, upon the filing of a motion, may, in his discretion, make available to any such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge the serving of the matter required by this subsection may be postponed.

**History: 1953 Comp., § 40A-12-1.6, enacted by Laws 1973, ch. 369, § 7.**

**Cross references.** — For contempt of court, *see* 34-1-2 to 34-1-5 NMSA 1978.

ANNOTATIONS

**Right of press to evidentiary materials arises when materials become public.** — The right of the press to copies of evidentiary materials does not arise until the materials become part of the public record or are played in open court. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

**Procedure upon pretrial motion for disclosure of wiretap records.** — A pretrial motion for disclosure of federal and state wiretap records, which claimed that a telephone call had been subject to surveillance, triggered the government's duty to affirm or deny the existence of such evidence, but since the government's denial was adequate and no evidence of an illegal surveillance beyond the unsupported allegations in the motion was presented, it was unnecessary to conduct a further hearing on the motion. *United States v. Alvillar*, 575 F.2d 1316 (10th Cir. 1978).

## 30-12-8. Use of contents as evidence; disclosure; motion to suppress.

A. The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in a state court unless each party, not less than ten days before the trial, hearing or proceeding has been furnished with a copy of the court order and accompanying application, under which



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interception was authorized or approved. This ten-day period may be waived by the court if it finds that it was not possible to furnish the party with such information ten days before the trial, hearing or proceeding, and that the party will not be prejudiced by the delay in receiving such information.

B. Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of the state or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication on the grounds that:

(1) the communication was unlawfully intercepted;

(2) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(3) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing or proceeding unless there has been no opportunity to make such motion, or the person has not been aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall not be received as evidence. In addition to any other right of appeal, the state shall have the right to appeal from an order granting a motion to suppress made under this subsection, or to appeal the denial of an application for an order of approval, if the person making or authorizing the application shall certify to the judge granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order is entered and shall be diligently prosecuted.

**History: 1953 Comp., § 40A-12-1.7, enacted by Laws 1973, ch. 369, § 8.**

**Cross references.** — For motion to suppress, *see* Rule 5-212 NMRA.

ANNOTATIONS

**Applicability.** — Provisions of this section regulating admissibility of evidence authorized by court order were not applicable, even where there was no court order, to situation where overheard communication was a face-to-face conversation transmitted to a listener by concealed device. *State v. Hogervorst*, 1977-NMCA-057, 90 N.M. 580, 566 P.2d 828, cert. denied, 90 N.M. 636, 567 P.2d 485.

**Purpose of disclosure requirement.** — The purpose of the timely disclosure provision is to afford an aggrieved party an opportunity to file a pretrial motion to suppress. *State v. Anderson*, 1989-NMCA-096, 110 N.M. 382, 796 P.2d 603, cert. denied, 109 N.M. 232, 784 P.2d 419.

**Distinction between Subsections A and B.** — Subsection A precludes the use of the evidence at a particular hearing or trial, unless the defendant has had an opportunity to review the appropriate documents and to move to suppress the evidence. Subsection B precludes the use of such evidence at any proceeding involving the defendant. *State v. Anderson*, 1989-NMCA-096, 110 N.M. 382, 796 P.2d 603, cert. denied, 109 N.M. 232, 784 P.2d 419.

**State delaying in providing information.** — In determining whether the right to a speedy trial was violated by pre-indictment delay, where the preliminary hearing was continued because the state did not provide the defendant with wiretap information at least ten days prior to the hearing, as required by this section, this delay was weighed against the state. *State v. Manes*, 1991-NMCA-025, 112 N.M. 161, 812 P.2d 1309, cert. denied, 112 N.M. 77, 811 P.2d 575, and cert. denied, 502 U.S. 942, 112 S. Ct. 381, 116 L. Ed. 2d 332 (1991).

**Remedy for Subsection A violation.** — The proper course of action for a court faced with a claim of violation of Subsection A is to decide whether the purposes of the statute have been or can be fulfilled so that the evidence can be used in the particular proceeding at issue, or whether the evidence should be excluded, but only from that proceeding. *State v. Anderson*, 1989-NMCA-096, 110 N.M. 382, 796 P.2d 603, cert. denied, 109 N.M. 232, 784 P.2d 419.

**Right of press to evidentiary materials arises when materials become public.** — The right of the press to copies of evidentiary materials does not arise until the materials become part of the public record or are played in open court. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

**Determination of whether evidence subject to public inspection.** — Any determination of whether items of evidence are properly subject to public inspection and copying must necessarily consider the likelihood of injury to parties not involved in the particular case at bar. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

**Law reviews.** — For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

## 30-12-9. Disclosure; when and by whom allowed.

A. Any investigative or law enforcement officer who, by any means authorized by this act [30-12-1 through 30-12-11 NMSA 1978], has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may:

(1) disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure; or



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(2) use such contents to the extent such use is appropriate in the official performance of his official duties.

B. Any person who has received, by any means authorized by this act, any information concerning a wire or oral communication, or evidence derived therefrom, intercepted in accordance with the provisions of this act, may disclose the contents of that communication or such derivative evidence while giving testimony in any criminal proceeding in any court of this state or in any grand jury proceeding.

**History: 1953 Comp., § 40A-12-1.8, enacted by Laws 1973, ch. 369, § 9.**

ANNOTATIONS

**Right of press to copies of evidentiary material arises where materials become public.** — The right of the press to copies of evidentiary materials does not arise until the materials become part of the public record or are played in open court. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

## 30-12-10. Interception of privileged or unauthorized communications.

A. No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this act [30-12-1 through 30-12-11 NMSA 1978] shall lose its privileged character.

B. When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized in this act, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof and evidence derived therefrom may be disclosed or used as provided in Subsection A of Section 30-12-9 NMSA 1978. Such contents and evidence derived therefrom may be used under Subsection B of Section 30-12-9 NMSA 1978 when authorized or approved by a judge of competent jurisdiction, when such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this act. Such application shall be made as soon as practicable.

**History: 1953 Comp., § 40A-12-1.9, enacted by Laws 1973, ch. 369, § 10.**

ANNOTATIONS

**Determination of whether evidence subject to public inspection.** — Any determination of whether items of evidence are properly subject to public inspection and copying must necessarily consider the likelihood of injury to parties not involved in the particular case at bar. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Propriety of governmental eavesdropping on communications between accused and his attorney, 44 A.L.R.4th 841.

## 30-12-11. Right of privacy; damages.

A. Any person whose wire or oral communication is intercepted, disclosed or used in violation of this act [30-12-1 through 30-12-11 NMSA 1978] shall:

(1) have a civil cause of action against any person who intercepts, discloses or uses, or procures any other person to intercept, disclose or use such communications; and

(2) be entitled to recover from any such person actual damages, but not less than liquidated damages computed at the rate of one hundred dollars ($100) for each day of violation or one thousand dollars ($1,000), whichever is higher; punitive damages; and a reasonable attorney's fee and other litigation costs reasonably incurred.

B. A good faith reliance on a court order or on the provisions of this act shall constitute a complete defense to any civil or criminal action.

C. Any communications common carrier which in good faith acts in reliance upon a court order or in compliance with any of the provisions of this act shall not be liable for any civil or criminal action.

**History: 1953 Comp., § 40A-12-1.10, enacted by Laws 1973, ch. 369, § 11.**

**Severability clauses.** — Laws 1973, ch. 369, § 12, provided for the severability of the act if any part or application thereof is held invalid.



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ANNOTATIONS

**"Any person who intercepts" construed.** — The meaning of "any person who intercepts" includes persons who have participated in the steps necessary to effectuate an unauthorized interception of communications which results in the violation of an individual's privacy. *Templin v. Mountain Bell Tel. Co.*, 1982-NMCA-024, 97 N.M. 699, 643 P.2d 263, cert. quashed, 98 N.M. 51, 644 P.2d 1040.

**Civil action permitted whether or not conviction achieved.** — The civil cause of action provided for in this section may be pursued regardless of whether the defendant has been convicted under 30-12-1 NMSA 1978. *Templin v. Mountain Bell Tel. Co.*, 1982-NMCA-024, 97 N.M. 699, 643 P.2d 263, cert. quashed, 98 N.M. 51, 644 P.2d 1040.

**Corporations as well as individuals may be liable in damages** if they participate in setting up unauthorized interceptions of a customer's telephone communications. *Templin v. Mountain Bell Tel. Co.*, 1982-NMCA-024, 97 N.M. 699, 643 P.2d 263, cert. quashed, 98 N.M. 51, 644 P.2d 1040.

**Duty of telephone company.** — A telephone company has a duty to obtain the valid consent of a customer before placing an extension of the customer's phone in another person's residence. *Templin v. Mountain Bell Tel. Co.*, 1982-NMCA-024, 97 N.M. 699, 643 P.2d 263, cert. quashed, 98 N.M. 51, 644 P.2d 1040.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 62A Am. Jur. 2d Privacy §§ 54, 254.

Limitation of actions: invasion of right of privacy, 33 A.L.R.4th 479.

Construction and application of state statutes authorizing civil cause of action by person whose wire or oral communication is intercepted, disclosed, or used in violation of statutes, 33 A.L.R.4th 506.

Eavesdropping on extension telephone as invasion of privacy, 49 A.L.R.4th 430.

Plaintiff's rights to punitive or multiple damages when cause of action renders both available, 2 A.L.R.5th 449.

Application to extension telephones of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510 et seq.), pertaining to interception of wire communications, 58 A.L.R. Fed. 594.

## 30-12-12. Disturbing a marked burial ground.

Disturbing a marked burial ground consists of knowingly and willfully disturbing or removing the remains, or any part of them, or any funerary object, material object or associated artifact of any person interred in any church, churchyard, cemetery or marked burial ground or knowingly and willfully procuring or employing any other person to disturb or remove the remains, or any part of them, or any funerary object, material object or artifact associated with any person interred in any church, churchyard, cemetery or marked burial ground, other than pursuant to an order of the district court, the provisions of Section 24-14-23 NMSA 1978 or as otherwise specifically permitted by law. As used in this section "marked burial ground" means any interment visibly marked according to traditional or customary practice.

Whoever commits disturbing a marked burial ground is guilty of a fourth degree felony and shall be punished by a fine not to exceed five thousand dollars ($5,000) or by imprisonment for a definite term of eighteen months or both.

**History: 1953 Comp., § 40A-12-2, enacted by Laws 1963, ch. 303, § 12-2; 1989, ch. 267, § 3.**

**Cross references.** — For permit for disinterment and reinterment, *see* 24-14-23 NMSA 1978.

**The 1989 amendment,** effective June 16, 1989, substituted "a marked burial ground" for "the remains of a dead person" in the catchline; in the first paragraph, substituted the present first sentence for "Disturbing the remains of a dead person consists of knowingly disturbing or removing the remains, or any part thereof, of any person permanently interred in any church, churchyard or cemetery, other than pursuant to an order of the district court", and added the second sentence; and substituted the present language of the second paragraph for "Whoever commits disturbing the remains of a dead person is guilty of a misdemeanor."

ANNOTATIONS

**No private right of action.** — There is no private right of action to enforce this section. *Eisert v. Archdiocese of Santa Fe*, 2009-NMCA-042, 146 N.M. 179, 207 P.3d 1156, cert. denied, 2009-NMCERT-004, 146 N.M. 641, 213 P.3d 791.

**This section is in pari materia with § 58-17-3** and should be construed with reference to the definition of "cemetery" supplied by Section 58-17-3 NMSA 1978. 1987 Op. Att'y Gen. No. 87-31.

**Property held not to be cemetery.** — Private property discovered to contain human remains presumed to be soldiers killed in the battle of Glorieta on March 28, 1862, is not a cemetery within the meaning of this section so as to require the museum division of the office of cultural affairs to petition the district court prior to excavating the site and disinterring the remains pursuant to the Cultural Properties Act, Sections 18-6-1 to 18-6-7 NMSA 1978. 1987 Op. Att'y Gen. No. 87-31.

**Necessary party to disinterment actions.** — Since when a district court orders disinterment a legal interest of the health department (now the department of health) will of necessity be directly affected, the department is a necessary or indispensable party in disinterment actions brought in the district courts of this state. 1966 Op. Att'y Gen. No. 66-116.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 22A Am. Jur. 2d Dead Bodies § 107.

Dead bodies: liability for improper manner of reinterment, 53 A.L.R.4th 394.

Liability for desecration of graves and tombstones, 77 A.L.R.4th 108.

25A C.J.S. Dead Bodies § 10.



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## 30-12-13. Defacing tombs.

Defacing tombs consists of either:

A. intentionally defacing, breaking, destroying or removing any tomb, monument or gravestone erected to any deceased person or any memento, memorial or marker upon any place of burial of any human being or any ornamental plant, tree or shrub appertaining to the place of burial of any human being; or

B. intentionally marking, defacing, injuring, destroying or removing any fence, post, rail or wall of any cemetery or graveyard or erected within any cemetery or graveyard or any marker, memorial or funerary object upon any place of burial of any human being.

Whoever commits defacing a tomb is guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars ($1,000) or by imprisonment for a definite term less than one year or both.

**History: 1953 Comp., § 40A-12-3, enacted by Laws 1963, ch. 303, § 12-3; 1989, ch. 267, § 4.**

**The 1989 amendment,** effective June 16, 1989, substituted "memorial or marker upon any place of burial of any human being" for "any memorial" in Subsection A, added all of the language of Subsection B beginning with "or any marker", and substituted all of the language of the undesignated last paragraph beginning with "misdemeanor" for "petty misdemeanor".

ANNOTATIONS

**Multiple counts.** — Damage to ten gravestones during a single criminal episode, with a single intent, constitutes only ten violations of the statute. Each gravestone represents distinct interests protected by the statute. Injury to each gravestone causes injury to the memory of a different person and is likely to cause emotional distress to a different collection of living persons. That circumstance is a strong indicator that destruction to each gravestone is a distinct offense. *State v. Morro*, 1999-NMCA-118, 127 N.M. 763, 987 P.2d 420.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 14 Am. Jur. 2d Cemeteries § 44.

Liability for desecration of graves and tombstones, 77 A.L.R.4th 108.

14 C.J.S. Cemeteries §§ 34, 35.

## 30-12-14. Unlawful burial.

Unlawful burial consists of the using of any land or lands as a burial place of interment within fifty yards from either side of the bank or border of any stream, river or any body of water, by a person or persons, society of persons, order, corporation or corporations.

Whoever commits unlawful burial is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-12-4, enacted by Laws 1963, ch. 303, § 12-4.**

**Cross references.** — For burial of unclaimed dead, *see* 24-12-1 to 24-12-3 NMSA 1978.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 22A Am. Jur. 2d Dead Bodies § 46.

Liability of cemetery in connection with conducting or supervising burial services, 42 A.L.R.4th 1059.

25A C.J.S. Dead Bodies § 10.

# ARTICLE 13

# Violation of Civil Rights

Sec.

30-13-1. Disturbing lawful assembly.
30-13-2. Denial of service by a utility.
30-13-3. Blacklisting.
30-13-4. Unlawful payment of wages in script.
30-13-5. Unlawful coercion of employees.

## 30-13-1. Disturbing lawful assembly.

Disturbing lawful assembly consists of:

A. disturbing any religious society or any member thereof when assembled or collected together in public worship; or

B. disturbing any meeting of the people assembled for any legal object.

Whoever commits disturbing lawful assembly is guilty of a petty misdemeanor.



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**History: 1953 Comp., § 40A-13-1, enacted by Laws 1963, ch. 303, § 13-1.**

ANNOTATIONS

**Due process.** — The language of Subsection B of this section conveys a sufficiently definite warning of the conduct proscribed and is therefore not void for vagueness. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

**Intent of legislature.** — Contention that legislature did not intend this section to apply to conduct formerly covered by 40-12-7, 1953 Comp., was incorrect. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

**Meaning of "disturbing".** — Since the statutory word "disturbing" is not defined, its ordinary meaning was properly applied by the trial court in instruction that term "disturb" meant "to throw into disorder or confusion, to interrupt." *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

**Meaning of "meeting".** — Subsection B of this section forbids the disturbance of any meeting of the people assembled for any legal object, that is, any gathering for business, social or other purposes if the object of the gathering is legal. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

**Basketball game spectators as "meeting".** — The people assembled to view a basketball game constituted a "meeting" within meaning of this section. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

**Basketball game players as "meeting".** — Players in basketball game were a meeting of people assembled for a lawful object. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

**Evidence sufficient.** — Evidence that basketball game was delayed 35 to 40 minutes by necessity of removing debris and liquids from playing surface was substantial evidence that meeting of the players and meeting of the spectators to view the game were interrupted. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

Evidence that the defendants threw objects when others also threw them, and also evidence from which community of intent could be reasonably inferred, was sufficient for the issue of aiding and abetting those who threw far enough so that objects landed on the playing surface of the courts to be submitted to the jury. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

**Aiding and abetting.** — Although charged with disturbing meeting under this section, defendants could be convicted of aiding and abetting that disturbance. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 24 Am. Jur. 2d Disturbing Meetings §§ 1 to 11.

Conduct amounting to offense of disturbing religious meeting, 12 A.L.R. 650.

Prohibition or limitation on display of signs by employees as unfair labor practices, 86 A.L.R. Fed. 321.

27 C.J.S. Disturbance of Public Meetings § 1.

## 30-13-2. Denial of service by a utility.

Denial of service by a utility consists of any utility refusing to furnish service to another in the area served by such utility. Utility as used in this section is defined as any person furnishing to the public: water, power, telephone or gas. Provided such utility may lawfully refuse its services if:

A. the person to be served has not tendered an amount of money required for the expense of construction, if construction is necessary for furnishing the utilities; or

B. the person has not tendered the amount of money due for the use of such utilities.

Whoever commits denial of services [service] by a utility is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-13-2, enacted by Laws 1963, ch. 303, § 13-2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

ANNOTATIONS

**Disputed claim.** — A public service corporation could not cut off a supply of water or electricity to enforce payment of a disputed claim. *Miller v. Roswell Gas & Elec. Co.*, 1917-NMSC-034, 22 N.M. 594, 166 P. 1177 (decided under prior law).

**Section assumes that customer has right to demand service.** — If a customer's installation has not passed or would not pass electrical inspection, he has no right to demand service of utility. 1969 Op. Att'y Gen. No. 69-81.

**Duty to refuse service.** — A utility has a positive duty to refuse service to a customer whose wiring is known by the utility to be in a dangerous or defective condition. 1969 Op. Att'y Gen. No. 69-81.

**Defense to prosecution.** — Compliance with rules of the public service commission permitting a public utility to discontinue service immediately in the event of a condition determined by the utility to be hazardous would be a defense to a criminal action upon a refusal to render electric service, but the burden would be upon the utility to produce some evidence that the condition was actually hazardous and to prove the existence of the rule itself. 1969 Op. Att'y Gen. No. 69-81.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 74 Am. Jur. 2d Telecommunications §§ 61, 62; 78 Am. Jur. 2d Waterworks and Water Companies § 15, 47 to 49.

Discontinuance: right of public utility to discontinue line or branch on ground that it is unprofitable, 10 A.L.R.2d 1121.

29 C.J.S. Electricity § 25; 38A C.J.S. Gas § 46 et seq.; 86 C.J.S. Telegraphs, Telephones, Radio and Television §§ 65, 68, 69; 94 C.J.S. Waters §§ 278 to 280.

## 30-13-3. Blacklisting.

Blacklisting consists of an employer or his agent preventing or attempting to prevent a former employee from obtaining other employment.

Whoever commits blacklisting is guilty of a misdemeanor.



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Upon request, an employer may give an accurate report or honest opinion of the qualifications and the performance of a former employee. An employer is defined as any person employing labor or the agent of such person.

**History: 1953 Comp., § 40A-13-3, enacted by Laws 1963, ch. 303, § 13-3.**

**Cross references.** — For criminal libel, *see* 30-11-1 NMSA 1978.

For constitutional provision guaranteeing freedom of speech and of the press, and making truth a defense in criminal prosecutions for libel, *see* N.M. Const., art. II, § 17.

ANNOTATIONS

**Union affiliation.** — Workers could not be dismissed from employment because of their labor union affiliations. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271 (1941).

**Law reviews.** — For comment, "Public Accommodations in New Mexico: The Right to Refuse Service for Reasons Other Than Race or Religion," see 10 Nat. Resources J. 635 (1970).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 48 Am. Jur. 2d Labor and Labor Relations § 669.

Blacklist, libel or slander, 66 A.L.R. 1499.

Publication of libel by blacklist for purpose of statute of limitation, 42 A.L.R.3d 807.

Validity, construction, and operation of state blacklisting statutes, 95 A.L.R.5th 1.

Federal pre-emption of whistleblower's state-law action for wrongful retaliation, 99 A.L.R. Fed. 775.

Who has "participated" in investigation proceeding or hearing and is thereby protected from retaliation under § 704(a) of Title VII of Civil Rights Act of 1964 (42 USCA § 2000e-3(a)), 149 A.L.R. Fed. 431.

51 C.J.S. Labor Relations § 8; 30 C.J.S. Employer-Employee § 58.

## 30-13-4. Unlawful payment of wages in script.

Unlawful payment of wages in script consists of any person selling, giving or delivering, or in any manner issuing, directly or indirectly, to any person employed by him, and in payment for wages due, any script, draft, order or other evidence of indebtedness payable or redeemable otherwise than in lawful money of the United States.

Whoever commits unlawful payment of wages in script is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-13-4, enacted by Laws 1963, ch. 303, § 13-4.**

**Cross references.** — For payment of wages, *see* 50-4-1 NMSA 1978 et seq.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 48A Am. Jur. 2d Labor and Labor Relations § 4196 et seq.

51B C.J.S. Labor Relations § 1179.

## 30-13-5. Unlawful coercion of employees.

Unlawful coercion of employees consists of any person employing labor, or any agent of such employer, compelling or coercing, directly or indirectly, any employee to buy goods or trade with any particular store, business or person.

Whoever commits unlawful coercion of employees is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-13-5, enacted by Laws 1963, ch. 303, § 13-5.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 51 C.J.S. Labor Relations § 9; 51B C.J.S. Labor Relations § 1009.

# ARTICLE 14

# Trespass

Sec.
30-14-1. Criminal trespass.
30-14-1.1. Types of trespass; injury to realty; civil damages.
30-14-2. Consent required for key duplication [of educational institutions].
30-14-3. Penalty.
30-14-4. Wrongful use of public property; permit; penalties.
30-14-5. Repealed.
30-14-6. No trespassing notice; sign contents; posting; requirement; prescribing a penalty for wrongful posting of public lands.
30-14-7. Repealed.
30-14-8. Breaking and entering.



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## 30-14-1. Criminal trespass.

A. Criminal trespass consists of knowingly entering or remaining upon posted private property without possessing written permission from the owner or person in control of the land. The provisions of this subsection do not apply if:

(1) the owner or person in control of the land has entered into an agreement with the department of game and fish granting access to the land to the general public for the purpose of taking any game animals, birds or fish by hunting or fishing; or

(2) a person is in possession of a landowner license given to him by the owner or person in control of the land that grants access to that particular private land for the purpose of taking any game animals, birds or fish by hunting or fishing.

B. Criminal trespass also consists of knowingly entering or remaining upon the unposted lands of another knowing that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof. Notice of no consent to enter shall be deemed sufficient notice to the public and evidence to the courts, by the posting of the property at all vehicular access entry ways.

C. Criminal trespass also consists of knowingly entering or remaining upon lands owned, operated or controlled by the state or any of its political subdivisions knowing that consent to enter or remain is denied or withdrawn by the custodian thereof.

D. Any person who enters upon the lands of another without prior permission and injures, damages or destroys any part of the realty or its improvements, including buildings, structures, trees, shrubs or other natural features, is guilty of a misdemeanor, and he shall be liable to the owner, lessee or person in lawful possession for civil damages in an amount equal to double the value of the damage to the property injured or destroyed.

E. Whoever commits criminal trespass is guilty of a misdemeanor. Additionally, any person who violates the provisions of Subsection A, B or C of this section, when in connection with hunting, fishing or trapping activity, shall have his hunting or fishing license revoked by the state game commission for a period of not less than three years, pursuant to the provisions of Section 17-3-34 NMSA 1978.

F. Whoever knowingly removes, tampers with or destroys any "no trespass" sign is guilty of a petty misdemeanor; except when the damage to the sign amounts to more than one thousand dollars ($1,000), he or she is guilty of a misdemeanor and shall be subject to imprisonment in the county jail for a definite term less than one year or a fine not more than one thousand dollars ($1,000) or to both such imprisonment and fine in the discretion of the judge.

G. This section, as amended, shall be published in all issues of "Big Game Hunt Proclamation" as published by the department of game and fish.

**History: 1953 Comp., § 40A-14-1, enacted by Laws 1963, ch. 303, § 14-1; 1975, ch. 52, § 1; 1979, ch. 186, § 1; 1981, ch. 34, § 1; 1983, ch. 27, § 2; 1991, ch. 58, § 1; 1995, ch. 164, § 1.**

**Cross references.** — For authority of conservation officers to enforce these provisions under emergency circumstances, *see* 17-2-19 NMSA 1978.

For trespass on state lands, *see* 19-6-3 NMSA 1978 et seq.

For criminal damage to property, *see* 30-15-1 NMSA 1978.

For detention or arrest of trespassers upon restricted areas, *see* 30-21-3 NMSA 1978.

For removal or destruction of plants near highway, *see* 76-8-1 NMSA 1978 et seq.

For livestock trespass, *see* 77-14-3 NMSA 1978 et seq.

**The 1995 amendment,** effective June 1, 1995, added the second sentence in Subsection B and added Subsections F and G.

**The 1991 amendment,** effective July 1, 1991, added Subsection A; redesignated the subsequent subsections accordingly; in Subsection B inserted "also" and "unposted"; in Subsection D added the language beginning with "and he shall be liable"; and added the second sentence in Subsection E.

**The 1983 amendment** deleted "petty" preceding "misdemeanor" in Subsections C and D.

### ANNOTATIONS

**Crime defined.** — Trespassing, both at common law and by statute, is the entry onto another's property without permission of the owner. *State v. Tower*, 2002-NMCA-109, 133 N.M. 32, 59 P.3d 1264.

**Unauthorized entry.** — Where an unauthorized entry merely consists of climbing over a fence, businesses and other open property are protected under the criminal trespass statute. *State v. Foulenfont*, 1995-NMCA-028, 119 N.M. 788, 895 P.2d 1329.

**Elements of offense.** — For a conviction, Section 30-14-1D NMSA 1978 requires that the defendant both "entered" property "without permission" and "damaged" an improvement on the property. *State v. Contreras*, 2007-NMCA-119, 142 N.M. 518, 167 P.3d 966.

**Instruction on lesser included offense.** — When criminal trespass is factually based solely on unlawful entry, not on unlawfully remaining without consent, then criminal trespass is necessarily included within the offense of aggravated burglary of a dwelling house and a defendant is entitled to an instruction on the lesser included



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offense. *State v. Romero*, 1998-NMCA-057, 125 N.M. 161, 958 P.2d 119,

**Knowledge requirement.** — While criminal trespass can, under some circumstances, require knowledge that the trespasser does not have permission to be on the land, New Mexico law also defines other trespass-type offenses that require knowledge only of the trespasser's actions, not of their illegality. *Tanberg v. Shlotis*, 401 F.3d 1151 (10th Cir. 2005).

**Private land not properly posted.** — If private land is not properly posted under the statutory requirements, then a person can only commit criminal trespass by entering or remaining upon the property knowing that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof. *State v. Merhege*, 2017-NMSC-016, *rev'g* 2016-NMCA-059, 376 P.3d 867.

**Proof of knowledge element of criminal trespass.** — Where defendant was charged with criminal trespass for running through the front yard of a private residence that was enclosed by a three foot high wall and for attempting to jump over an adjoining fence into the back yard of the residence while fleeing from a police officer at 3:40 a.m., there was sufficient circumstantial evidence for the jury to find that defendant knew that he did not have consent to enter the property based on the wall surrounding the property's front yard, the purpose of defendant's entry, and the time of his entry on the property. *State v. Merhege*, 2017-NMSC-016, *rev'g* 2016-NMCA-059, 376 P.3d 867.

**Knowledge of lack of consent to enter land required.** — In defendant's trial for criminal trespass, there was insufficient evidence to support defendant's conviction where the private land did not have a "no trespassing" sign, and the landowner did not place defendant on notice that he was not permitted on his property by denying or withdrawing consent to enter his land. *State v. Merhege*, 2016-NMCA-059, cert. granted.

**This section requires general criminal intent.** *State v. McCormack*, 1984-NMCA-042, 101 N.M. 349, 682 P.2d 742.

**When one commits burglary** of dwelling house one commits criminal trespass based on that entry. *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160.

**Unlawfully entering lands of another.** — The only "act" involved in criminal trespass, as a lesser offense included within burglary of a dwelling house, is entry upon the lands of another, which requires a "malicious intent." *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160 (decided under prior law).

**Unlawful entry is entry not authorized by law,** without excuse or justification. *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160.

**"Lands," in Subsection B,** includes buildings and fixtures and is synonymous with real property. *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160.

**Subsection B applies to federal government land.** — Where land is owned and operated by the federal government as a proprietor, the state has sovereignty over the land, provided it does not interfere with the use of the federal government, and Subsection A applies. *State v. McCormack*, 1984-NMSC-006, 100 N.M. 657, 674 P.2d 1117.

**Damage to property not required to show malicious intent.** — While damage to property would be evidence of malicious intent, such is not required inasmuch as malicious intent may be established by evidence of an intent to vex or annoy or do a wrongful act. *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160 (decided under prior law).

**Trespass in watermelon patch.** — Trespass of group of boys on land occupied by another and stealing of watermelons thereon, with minor injury to fence, did not constitute a violation of former 40-47-12, 1953 Comp., relating to unlawful injury of fence and crops, a felony, but rather, of former 40-47-5, 1953 Comp., relating to trespassing on improved land with intent to cut, take, etc., trees or crops growing there, a misdemeanor. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

**Injuring house.** — An opening of four inches was sufficient to complete the offense of injuring house for purpose of entering and molesting occupant under Laws 1875-1876, ch. 9, § 2, former 40-47-19, 1953 Comp. *Territory v. Gallegos*, 1913-NMSC-002, 17 N.M. 409, 130 P. 245 (decided under prior law).

**Civil liability to injured trespasser.** — As a matter of law the use of a gun by owner while stopping trespass or theft of watermelons by group of boys was not permissible, and when owner fired gun he became liable to injured boy. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152 (decided under prior law).

**Application to journalist not abridgement of rights.** — Application of this section to a journalist who crossed a barricade at a federal government nuclear waste disposal plant did not abridge the first amendment right to peaceably assemble or the right of the press to gather and report news. *State v. McCormack*, 1984-NMCA-042, 101 N.M. 349, 682 P.2d 742.

**Criminal trespass not a lesser included offense of breaking and entering.** — Trial court did not err in refusing to give lesser included-offense instructions on criminal trespass and breaking and entering. *State v. Andrade*, 1998-NMCA-031, 124 N.M. 690, 954 P.2d 755, cert. denied, 124 N.M. 589, 953 P.2d 1087.

**Evidence sufficient.** — Evidence that defendant repeatedly trespassed onto victim's property and that defendant was the party who looked into victim's windows and followed her was sufficient to support convictions for stalking, harassment and criminal trespass. *State v. Duran*, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352, *overruled on other grounds by State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Access to public waters.** — A private landowner cannot prevent persons from fishing in a public stream that flows across the landowner's property, provided the public stream is accessible without trespass across privately owned adjacent lands. 2014 Op. Att'y Gen. 14-04.

**Law reviews.** — For annual survey of New Mexico criminal law, see 16 N.M.L. Rev. 9 (1986).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 75 Am. Jur. 2d Trespass §§ 162, 163, 167, 181, 182, 185.

Right to enter land to remove timber cut before revocation of license, 26 A.L.R.2d 1194.

Students: participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly or similar offense, 32 A.L.R.3d 551.

Liability of private citizen, calling on police for assistance after disturbance or trespass, for false arrest by officer, 98 A.L.R.3d 542.

Trespass: state prosecution for unauthorized entry or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 A.L.R.4th 773.

Entry on private lands in pursuit of wounded game as criminal trespass, 41 A.L.R.4th 805.

87 C.J.S. Trespass §§ 144 to 147.

## 30-14-1.1. Types of trespass; injury to realty; civil damages.

A. Any person who enters and remains on the lands of another after having been requested to leave is guilty of a misdemeanor.



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B. Any person who enters upon the lands of another when such lands are posted against trespass at every roadway or apparent way of access is guilty of a misdemeanor.

C. Any person who drives a vehicle upon the lands of another except through a roadway or other apparent way of access, when such lands are fenced in any manner, is guilty of a misdemeanor.

D. In the event any person enters upon the lands of another without prior permission and injures, damages or destroys any part of the realty or its improvements, including buildings, structures, trees, shrubs or other natural features, he shall be liable to the owner, lessee or person in lawful possession for damages in an amount equal to double the amount of the appraised value of the damage of the property injured or destroyed.

**History: Laws 1979, ch. 186, § 2; 1983, ch. 27, § 3.**

**The 1983 amendment** deleted "petty" preceding "misdemeanor" in Subsections A to C.

ANNOTATIONS

**Surface lessee of land had no standing to sue for trespass and unjust enrichment.** — Where plaintiff leased land for purposes of ranching and defendants pumped salt water from beyond the boundaries of the land into a disposal well on the land without the knowledge or consent of plaintiff, plaintiff did not have standing to sue defendants for trespass or unjust enrichment. *McNeill v. Rice Eng. & Operating, Inc.*, 2010-NMSC-015, 148 N.M. 16, 229 P.3d 489.

**Owner of land had no standing to sue for trespass for use of land prior to owner's acquisition of the land.** — Where defendants pumped salt water from beyond the boundaries of plaintiff's land into a disposal well on plaintiff's land without the knowledge or consent of plaintiff or plaintiff's predecessor in interest, plaintiff did not have standing to sue defendants for trespass for acts that occurred prior to the time plaintiff owned the land. *McNeill v. Rice Eng. & Operating, Inc.*, 2010-NMSC-015, 148 N.M. 16, 229 P.3d 489.

**Subsection D does not apply** to trespass by substances beneath the surface of the land. *Hartman v. Texaco, Inc.*, 1997-NMCA-032, 123 N.M. 220, 937 P.2d 979.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Trespass: state prosecution for unauthorized entry or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 A.L.R.4th 773.

Entry on private lands in pursuit of wounded game as criminal trespass, 41 A.L.R.4th 805.

Tree or limb falls onto adjoining private property: personal injury and property damage liability, 54 A.L.R.4th 530.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 A.L.R.4th 603.

Business interruption, without physical damage, as actionable, 65 A.L.R.4th 1126.

## 30-14-2. Consent required for key duplication [of educational institutions].

No person shall knowingly make or cause to be made any key or duplicate key for any building, laboratory, facility, room, dormitory, hall or any other structure, or part thereof, owned or leased by the state, any political subdivision, or by the board of regents or other governing body of any college or university, which is supported wholly or in part by the state, without the prior written consent of the state, political subdivision, board of regents or other governing body.

**History: 1953 Comp., § 40A-14-3, enacted by Laws 1965, ch. 115, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 30-14-3. Penalty.

Any person who violates Section 1 [30-14-2 NMSA 1978] of this act is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-14-4, enacted by Laws 1965, ch. 115, § 2.**

## 30-14-4. Wrongful use of public property; permit; penalties.

A. Wrongful use of public property consists of:

(1) knowingly entering any public property without permission of the lawful custodian or his representative when the public property is not open to the public;

(2) remaining in or occupying any public property after having been requested to leave by the lawful custodian, or his representative, who has determined that the public property is being



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used or occupied contrary to its intended or customary use or that the public property may be damaged or destroyed by the use; or

(3) depriving the general public of the intended or customary use of public property without a permit.

B. Permits to occupy or use public property may be obtained from the lawful custodian or his representative upon written application which:

(1) describes the public property to be occupied or used; and

(2) states the period of time during which the public property will be occupied or used. The applicant shall pay in advance a reasonable fee or charge for the use of the public property. The fee or charge shall be prescribed by the lawful custodian or his representative.

C. The lawful custodian or his representative may issue the permit if he believes that the use or occupation of the public property will not unreasonably interfere with the intended or customary use of the public property by the general public and that the use will not damage or destroy the public property.

D. Any person occupying or using public property under the authority of a permit shall submit to a search for firearms or other weapons and surrender any firearms or other weapons to any peace officer, who has jurisdiction, upon request.

E. As used in this section, "public property" means any public building, facility, structure or enclosure used for a public purpose or as a place of public gathering, owned or under the control of the state or one of its political subdivisions or a religious, charitable, educational or recreational association.

F. Any person who commits wrongful use of public property is guilty of a petty misdemeanor.

G. Any person who commits wrongful use of public property after having been requested to leave by the lawful custodian or his representative or any peace officer, who has jurisdiction, is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-14-5, enacted by Laws 1969, ch. 61, § 1.**

ANNOTATIONS

**Unconstitutional delegation of power.** — Paragraph A(2) of this section, proscribing the act of remaining in or occupying any public property after having been requested to leave by the lawful custodian or his representative upon determination that the public property is being used or occupied contrary to its intended or customary use, is without sufficiently definite standards to be enforceable, and is thus an unconstitutional delegation of legislative power. *State v. Jaramillo*, 1972-NMCA-071, 83 N.M. 800, 498 P.2d 687.

**Serious doubts on constitutionality.** — Because of the many constitutional infirmities in this section, there are serious doubts as to whether it is a valid law. 1969 Op. Att'y Gen. No. 69-21.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Students: participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly or similar offense, 32 A.L.R.3d 551.

"Choice of evils," necessity, duress, or similar defense to state or local criminal charges based on acts of public protest, 3 A.L.R.5th 521.

## 30-14-5. Repealed.

**Repeals.** — Laws 1979, ch. 186, § 4, repealed 30-14-5 NMSA 1978, as enacted by Laws 1969, ch. 195, § 1, relating to the short title of the Property Posting Act.

## 30-14-6. No trespassing notice; sign contents; posting; requirement; prescribing a penalty for wrongful posting of public lands.

A. The owner, lessee or person lawfully in possession of real property in New Mexico, except property owned by the state or federal government, desiring to prevent trespass or entry onto the real property shall post notices parallel to and along the exterior boundaries of the property to be posted, at each roadway or other way of access in conspicuous places, and if the property is not fenced, such notices shall be posted every five hundred feet along the exterior boundaries of such land.

B. The notices posted shall prohibit all persons from trespassing or entering upon the property, without permission of the owner, lessee, person in lawful possession or his agent. The notices shall:



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(1) be printed legibly in English;

(2) be at least one hundred forty-four square inches in size;

(3) contain the name and address of the person under whose authority the property is posted or the name and address of the person who is authorized to grant permission to enter the property;

(4) be placed at each roadway or apparent way of access onto the property, in addition to the posting of the boundaries; and

(5) where applicable, state any specific prohibition that the posting is directed against, such as "no trespassing," "no hunting," "no fishing," "no digging" or any other specific prohibition.

C. Any person who posts public lands contrary to state or federal law or regualtion [regulation] is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-14-7, enacted by Laws 1969, ch. 195, § 2; 1979, ch. 186, § 3.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

ANNOTATIONS

**Failure to post notices not a valid defense to liability for trespass at common law.** — Where plaintiffs filed a complaint against defendants seeking injunctive relief and damages arising from claims for common law trespass based on allegations that defendants performed certain earthwork on plaintiffs' land, the district court did not err in denying defendants' jury instruction modeled on the text of the criminal trespass statute, 30-14-16 NMSA 1978, which imposed a duty on landowners to post notices on the boundaries of their property in order to subject individuals to trespass liability for any entries thereon, because this section cannot be fairly read to change the common law of trespass, which does not require posting of property in order for an unauthorized entry to constitute a trespass. *Holcomb v. Rodriguez*, 2016-NMCA-075, cert. denied.

## 30-14-7. Repealed.

**Repeals.** — Laws 1979, ch. 186, § 4, repealed 30-14-7 NMSA 1978, as enacted by Laws 1969, ch. 195, § 3, relating to penalties for trespassing and double damages for injury to realty. For present penalty and damages provisions, *see* 30-14-1.1 NMSA 1978.

## 30-14-8. Breaking and entering.

A. Breaking and entering consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, where entry is obtained by fraud or deception, or by the breaking or dismantling of any part of the vehicle, watercraft, aircraft, dwelling or other structure, or by the breaking or dismantling of any device used to secure the vehicle, watercraft, aircraft, dwelling or other structure.

B. Whoever commits breaking and entering is guilty of a fourth degree felony.

**History: Laws 1981, ch. 34, § 2.**

ANNOTATIONS

**Sufficient evidence.** — Where defendant attempted to force entry into an apartment through the front door; the occupants of the apartment struggled to hold the door closed; and defendant pushed the occupants back into the apartment about a foot and stepped into the apartment, there was sufficient evidence to support defendant's conviction of breaking and entering. *State v. Sorrelhorse*, 2011-NMCA-095, 150 N.M. 536, 263 P.3d 313, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

**Sufficient evidence of "unauthorized entry".** — An "entry", for purposes of the breaking and entering statute, occurs whenever there is an invasion into an enclosed, private, prohibited space. To determine the boundaries of enclosures, the proper question is whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusions. *State v. Holt*, 2016-NMSC-011, *aff'g* 2015-NMCA-073, 352 P.3d 702.

Where the evidence established that defendant placed his fingers behind a window screen affixed to a residential dwelling and beyond the boundary created by the window screen, defendant's actions constituted an intrusion into an enclosed, private, prohibited space and constituted an "entry" for the purposes of New Mexico's breaking and entering statute. There was sufficient evidence to support defendant's conviction for breaking and entering. *State v. Holt*, 2016-NMSC-011, *aff'g* 2015-NMCA-073, 352 P.3d 702.

**Sufficient evidence of breaking and entering.** — Where defendant was charged with first-degree murder in the shooting death of two victims, tampering with evidence and breaking and entering, there was sufficient evidence to support his conviction for breaking and entering where the state presented a witness who testified that she saw defendant break a car window and rummage around inside the car, and where defendant acknowledged breaking into a vehicle, but claimed he entered the vehicle to retrieve his own property from the vehicle. It is immaterial that defendant was breaking in to retrieve his own property, because New Mexico's breaking and entering statute requires no intent to commit a crime upon entering, only the breaking and entering need be shown. *State v. Carrillo*, 2017-NMSC-023.

**Sufficient evidence to support breaking and entering conviction.** — Where defendant was charged with arson, breaking and entering and violating an order



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of protection, and where the state presented evidence that defendant had broken into the victim's house through her window on prior occasions, similar to the way the arsonist did on the night of the fire, that defendant's blood was found on a pair of pliers and pruning shears found near the victim's broken window on the night of the fire, tools which the victim did not recognize or notice when she had her window secured earlier that morning, and that defendant had a motive to burn the victim's house down, jealousy following a breakup, there was sufficient evidence for a rational juror to find that defendant broke into the victim's house and set it on fire. *State v. Pamphille*, 2021-NMCA-002, cert. denied.

**Intrusion into the space between a window screen and window is sufficient to warrant a finding of an unauthorized entry for the purposes of the breaking and entering statute.** — Where defendant attempted to force entry into a home through a window by removing the window screen from its track, and while holding the screen, defendant's fingers penetrated the area between the window and the screen, there was sufficient evidence to support defendant's conviction of breaking and entering because the window screen was part of the enclosure around the home, and a reasonable person would expect the window screen to afford some protection from unauthorized intrusions. *State v. Holt*, 2015-NMCA-073, cert. granted, 2015-NMCERT-006.

**Criminal damage to property was a lesser included offense of breaking and entering.** — Where defendant attempted to force entry into an apartment through the front door; the occupants of the apartment struggled to hold the door closed; defendant pushed the occupants back into the apartment about a foot and stepped into the apartment; while one occupant of the apartment attempted to call 911, defendant walked away; and when the other occupant opened the door to see which way defendant had gone, defendant returned and began kicking the door, defendant's initial act of trying to force open the door of the apartment and then returning minutes later to kick the door was unitary conduct and defendant's conviction of criminal damage to property, which was a lesser included offense of defendant's conviction of breaking and entering, violated defendant's right to be free from double jeopardy. *State v. Sorrelhorse*, 2011-NMCA-095, 150 N.M. 536, 263 P.3d 313, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

**Not lesser included offense of aggravated burglary.** — Breaking and entering is not a lesser included offense of aggravated burglary because each offense requires an element not included in the other and, by convicting defendant of breaking and entering when he only had notice of an aggravated burglary, the trial court violated his right to notice of the charges against him. *State v. Hernandez*, 1999-NMCA-105, 127 N.M. 769, 987 P.2d 1156, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Criminal trespass not a lesser included offense of breaking and entering.** — Trial court did not err in refusing to give lesser included-offense instructions on criminal trespass and breaking and entering. *State v. Andrade*, 1998-NMCA-031, 124 N.M. 690, 954 P.2d 755, cert. denied, 124 N.M. 589, 953 P.2d 1087.

**Mistake of fact instruction.** — Where defendant was charged with breaking and entering a motel room and the evidence showed that defendant checked into the motel and was assigned room 125, subsequently defendant, who was very intoxicated, was discovered in room 121, in the bathroom, the key card for room 125 was on the ground outside near room 121, and the key card did not have a room number on it, defendant was entitled to an instruction on the defense of mistake of fact. *State v. Contreras*, 2007-NMSC-119, 142 N.M. 518, 167 P.3d 966.

**Instructions.** — Even though Subsection A of this section uses the phrase "unauthorized entry," while UJI 14-1410 uses the phrase "without permission," this variation from the strict language of the statute does not, by itself, make the instruction improper. *State v. Rubio*, 1999-NMCA-018, 126 N.M. 579, 973 P.2d 256.

Trial court's failure to instruct the jury on an "unauthorized entry" rather than an "entry without permission" was not reversible error where the evidence overwhelmingly supported the conclusion that defendant did not have blanket authority to enter the apartment, or that whatever authority he may have had was freely revocable by the renter. *State v. Rubio*, 1999-NMCA-018, 126 N.M. 579, 973 P.2d 256.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Burglary, breaking, or entering of motor vehicle, 72 A.L.R.4th 710.

# ARTICLE 15

# Property Damage

Sec.
30-15-1. Criminal damage to property.
30-15-1.1. Unauthorized graffiti on personal or real property.
30-15-2. Rocks, protected plants or trees within four hundred yards of highway.
30-15-3. Damaging insured property.
30-15-4. Desecration of a church.
30-15-5. Damaging caves or caverns unlawful.
30-15-6. Penalty.
30-15-7. Desecration of roadside memorials; penalty.
30-15-8. Criminal damage to property by theft or attempted theft of regulated material; penalty.

## 30-15-1. Criminal damage to property.

Criminal damage to property consists of intentionally damaging any real or personal property of another without the consent of the owner of the property.

Whoever commits criminal damage to property is guilty of a petty misdemeanor, except that when the damage to the property amounts to more than one thousand dollars ($1,000) he is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-15-1, enacted by Laws 1963, ch. 303, § 15-1.**

**Cross references.** — For destruction of newspapers kept by county clerk, *see* 4-40-10 NMSA 1978.



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For authority of conservation officers to enforce these provisions under emergency circumstances, *see* 17-2-19 NMSA 1978.

For polluting of water, *see* 30-8-2 NMSA 1978.

For destruction of cemetery property, *see* 30-12-13 NMSA 1978.

For criminal trespass, *see* 30-14-1 NMSA 1978.

For liability of parents for destruction of property by child, *see* 32A-2-27 NMSA 1978.

For flooding of highway, *see* 67-7-4 NMSA 1978.

For interference with or changing of water measuring devices, *see* 72-5-20 NMSA 1978.

For injury and interference with waterworks, *see* 72-8-1 and 72-8-3 NMSA 1978.

For interference with community ditches, *see* 73-2-64 NMSA 1978.

For injuring of survey marks, *see* 73-17-5 NMSA 1978.

For injuring of fence, *see* 77-16-10 NMSA 1978.

## ANNOTATIONS

**The replacement cost of irreparable items is an appropriate measure of the value of the items.** *State v. Cobrera* 2013-NMSC-012, 300 P.3d 729.

**The purchase price of an item was sufficient evidence of replacement cost.** — Where defendant damaged household goods of defendant's estranged spouse; and the state's evidence showed that the purchase price of the irreparably damaged items was greater than $1,000, there was sufficient evidence from which the jury could conclude that the replacement cost of the items was greater than $1,000. *State v. Cobrera* 2013-NMSC-012, 300 P.3d 729.

**Determining damage amount for felony criminal damage to property.** — The damage amount for felony criminal damage to property is the cost of repair or replacement cost, whichever is less. The state bears the burden of proving the replacement cost of the damaged property. *State v. Fernandez*, 2015-NMCA-091.

Where defendant kicked victim's twelve-year-old pickup truck, causing a large dent in the door of victim's vehicle and then struck victim's truck with defendant's own vehicle, and the state presented evidence at trial that the cost of repair of victim's truck was between $1,500 and $1,600, but failed to offer evidence regarding replacement cost, there was insufficient evidence to convict defendant of felony criminal damage to property, because the state was required to submit evidence as to replacement cost so that the jury could reasonably determine whether it exceeded the cost of repair. *State v. Fernandez*, 2015-NMCA-091.

**Criminal damage to property was a lesser included offense of breaking and entering.** — Where defendant attempted to force entry into an apartment through the front door; the occupants of the apartment struggled to hold the door closed; defendant pushed the occupants back into the apartment about a foot and stepped into the apartment; while one occupant of the apartment attempted to call 911, defendant walked away; and when the other occupant opened the door to see which way defendant had gone, defendant returned and began kicking the door, defendant's initial act of trying to force open the door of the apartment and then returning minutes later to kick the door was unitary conduct and defendant's conviction of criminal damage to property, which was a lesser included offense of defendant's conviction of breaking and entering, violated defendant's right to be free from double jeopardy. *State v. Sorrelhorse*, 2011-NMCA-095, 150 N.M. 536, 263 P.3d 313, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

**Cost of repair.** — The cost of repair alone is sufficient to support a conviction for criminal damage to property. *State v. Barreras*, 2007-NMCA-067, 141 N.M. 653, 159 P.3d 1138.

**Lesser included offenses.** — Entrustment and conversion are not elements of criminal damage to property. *State v. Archie*, 1997-NMCA-058, 123 N.M. 503, 943 P.2d 537.

**Defendant charged under this section and vehicle tampering statute.** — Where defendant caused damage in excess of $1000 to a vehicle, the general/specific rule did not apply to prevent a charge of criminal damage to property under this section, on the basis that defendant could only be charged under Section 66-3-506 NMSA 1978 (now Section 30-16D-5 NMSA 1978), prohibiting injuring or tampering with a vehicle. *State v. Arellano*, 1997-NMCA-074, 123 N.M. 589, 943 P.2d 1042, cert. quashed, 124 N.M. 589, 953 P.2d 1087 (1998).

**Community property of defendant.** — This section does not criminalize damage to community property one owns; such property is not "property of another" for purposes of this section. *State v. Powels*, 2003-NMCA-090, 134 N.M. 118, 73 P.3d 256.

**Equitable owner of property.** — The equitable owner of property under a real estate contract cannot be criminally charged with damaging that property. *State v. Earp*, 2014-NMCA-059.

Where defendant purchased a home pursuant to a real estate contract; when defendant failed to pay the balance due on the contract, the seller terminated the contract; prior to vacating the property, defendant removed a number of appliances and fixtures from the house and left the house in a state of disrepair; and defendant was charged with criminal damage to property, 30-15-1 NMSA 1978 did not apply to property in which defendant had an equitable ownership interest. *State v. Earp*, 2014-NMCA-059.

**Defense of habitation.** — Question whether force used by a person in defense of habitation exceeded what was reasonably necessary was for the jury to resolve upon appropriate instructions by the trial judge. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

The defense of habitation alone, without a statute making it a felony to unlawfully and maliciously injure a house, gave householder the right to meet force with force, and "an attack upon a dwelling, and especially in the night, the law regards as equivalent to an assault on a man's person, for a man's house is his castle." *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

When one's home was attacked in the middle of a dark night by persons riding in an automobile, the householder, being unable to determine what weapons the assailants had, was not obliged to retreat but might pursue his adversaries until he found himself out of danger. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

**Resistance to commission of felony.** — While no law countenanced wanton slaying, the protection and security of life being the most vital interest of society, the law of defense of habitation and the resistance to the commission of a felony thereon gave householder right to kill aggressor, if such killing was necessary or apparently necessary to prevent or repel the felonious aggression. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

**Tort liability for injury to trespasser.** — As a matter of law the use of a gun by owner while stopping trespass or theft of watermelons by group of boys was not permissible, and when owner fired gun he became liable to injured boy. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

**Sufficiency of evidence.** — Evidence was sufficient to support an inference that damages were at least $1,000. *State v. Haar*, 1990-NMCA-076, 110 N.M. 517, 797 P.2d 306, cert. denied, 110 N.M. 330, 795 P.2d 1022.

**Sufficient evidence.** — Where the evidence showed that defendant bashed out the windows of a truck with a baseball bat, threw rocks at the truck and through the windows of the truck, kicked the truck, tore the face plate off of the stereo in the truck in an attempt to take the stereo, which damaged the entire stereo system, destroyed the rearview mirror in truck, and irreparably damaged the ignition column of the truck, the evidence



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was sufficient to support defendant's conviction of criminal damage to property. *State v. Dickert*, 2012-NMCA-004, 268 P.3d 515, cert. denied, 2011-NMCERT-012.

**Insufficient evidence of intent to damage the property of another.** — Where defendant was convicted of criminal damage to property based on DNA evidence found in a burglarized house, there was insufficient evidence to permit a rational jury to find the essential facts to establish each element of the crime of criminal damage to property beyond a reasonable doubt, because although there was evidence that defendant had entered the property without authorization, the state, without presenting any evidence linking defendant to the property damage, failed to establish, either directly or by circumstantial evidence, that defendant intentionally damaged the property of another. *State v. Ledbetter*, 2020-NMCA-046.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 52 Am. Jur. 2d Malicious Mischief §§ 1 to 11.

Liability for injury to property occasioned by oil, water or the like flowing from well, 19 A.L.R.2d 1025.

Liability for damage to automobile left in parking lot or garage, 13 A.L.R.4th 442.

54 C.J.S. Malicious or Criminal Mischief or Damage to Property §§ 1 to 11.

## 30-15-1.1. Unauthorized graffiti on personal or real property.

A. Graffiti consists of intentionally and maliciously defacing any real or personal property of another with graffiti or other inscribed material inscribed with ink, paint, spray paint, crayon, charcoal or the use of any object without the consent or reasonable ground to believe there is consent of the owner of the property.

B. Whoever commits graffiti to real or personal property when the damage to the property is one thousand dollars ($1,000) or less is guilty of a petty misdemeanor and shall be required to perform a mandatory one hundred hours of community service within a continuous six-month period immediately following his conviction and shall be required to make restitution to the property owner for the cost of damages and restoration.

C. Whoever commits graffiti to real or personal property when the damage to the property is greater than one thousand dollars ($1,000) is guilty of a fourth degree felony and shall be required to perform a mandatory one hundred sixty hours of community service within a continuous eight-month period immediately following his conviction and shall be required to provide restitution to the property owner for the cost of damages and restoration as a condition of probation or following any term of incarceration as a condition of parole.

D. When a single occurrence of graffiti is committed by more than one individual, the court may apportion the amount of restitution owed by each offender in accordance with each offender's degree of culpability.

**History: Laws 1990, ch. 36, § 1; 1995, ch. 204, § 1.**

**The 1995 amendment,** effective July 1, 1995, subdivided and rewrote former Subsection B into Subsections B and C and added Subsection D.

ANNOTATIONS

**Law reviews.**— For article, "Co-opting the Journalist's Privilege: Of Sources and Spray Paint," see 23 N.M. L. Rev. 435 (1993).

## 30-15-2. [Rocks, protected plants or trees within four hundred yards of highway.]

It is a petty misdemeanor to deface, without the written consent of the landowner, any rock, any plant defined in Section 76-8-1 NMSA 1978, or any dead or living tree within four hundred yards of any public highway.

**History: 1953 Comp., § 40A-15-1.1, enacted by Laws 1971, ch. 3, § 1.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — What is considered property "involved" in money laundering offense, and thus subject to civil or criminal forfeiture, for purposes of Money Laundering Control Act (18 USCS § 981(a)(1)(A) and 982(a)(1)), 135 A.L.R. Fed. 367.

## 30-15-3. Damaging insured property.

Damaging insured property consists of intentionally damaging property which is insured with intent to defraud the insurance company into paying himself or another for such damage.

Whoever commits damaging insured property is guilty of a fourth degree felony.



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**History: 1953 Comp., § 40A-15-2, enacted by Laws 1963, ch. 303, § 15-2.**

ANNOTATIONS

**Evidence of insurance.** — Evidence that balance of fee for carrying out scheme to apparently burglarize and vandalize and then burn business was to be paid when insurance company paid for the supposed theft and vandalism, that undercover officer hired to carry out the scheme was told to be sure the burglar alarm was on or the company would refuse coverage and that conspirators stated the business was insured, was substantial evidence that the property to be damaged was insured and that the purpose of the conspiracy was to damage insured property. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

**Arson section not exclusive.** — In conspiracy to damage business property by fire after making it appear to have been first burglarized and vandalized, where the conspiracy to burglarize and vandalize was directed to acts not covered by 30-17-5 NMSA 1978, the arson statute, that section did not act as a special provision prohibiting the prosecution of defendant under this section for the aspect of the conspiracy directed toward burglary and vandalism. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

**Single penalty for conspiracy to damage.** — Where defendant was charged with one count of conspiracy to commit felony arson, and one count under this section, since scheme to damage business property by fire after making it appear to have been first burglarized and vandalized involved only one conspiracy, only one penalty could be imposed. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — What constitutes "vandalism" or "malicious mischief" within meaning of insurance policy specifically extending coverage to losses from such causes, 56 A.L.R.5th 407.

## 30-15-4. Desecration of a church.

Desecration of a church consists of willfully, maliciously and intentionally defacing a church or any portion thereof.

Whoever commits desecration of a church is guilty of a misdemeanor, except that when the damage to the church amounts to more than one thousand dollars ($1,000) he is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-15-3, enacted by Laws 1963, ch. 303, § 15-3; 1965, ch. 173, § 1.**

ANNOTATIONS

**Meaning of "church".** — The sense in which "church" is used in this section is expressive of a place where persons regularly assemble for worship and is not limited to the Christian religion. *State v. Vogenthaler*, 1976-NMCA-030, 89 N.M. 150, 548 P.2d 112.

**Contents not included.** — Absent any legislative intent to the contrary, "church or any portion thereof" does not include the movable contents of the building. *State v. Vogenthaler*, 1976-NMCA-030, 89 N.M. 150, 548 P.2d 112.

**No violation of establishment clause.** — This section does not advance religion contrary to the First and Fourteenth Amendments of the United States Constitution. *State v. Vogenthaler*, 1976-NMCA-030, 89 N.M. 150, 548 P.2d 112.

**Equal protection not violated.** — The differences in the elements of this section and 30-15-1 NMSA 1978 provide a rational basis for the difference in penalties imposed for damage amounting to less than $1,000, in that violation of 30-15-1 NMSA 1978 requires only intentional damage, while this section involves willful, malicious and intentional defacement; therefore, this section does not violate equal protection. *State v. Vogenthaler*, 1976-NMCA-030, 89 N.M. 150, 548 P.2d 112.

**Rational basis.** — A rational basis for treating criminal damage to a church differently than criminal damage to other property is the role of religion in society as a whole. *State v. Vogenthaler*, 1976-NMCA-030, 89 N.M. 150, 548 P.2d 112.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity and construction of statute or ordinance prohibiting desecration of church, 90 A.L.R.3d 1119.

What is considered property "involved in" money laundering offense, and thus subject to civil or criminal forfeiture, for purposes of Money Laundering Control Act (18 USCS § 981(a)(1)(A) and 982(a)(1)), 135 A.L.R. Fed. 367.

## 30-15-5. Damaging caves or caverns unlawful.

It shall be unlawful for any person, without prior permission of the federal, state or private land owner, to willfully or knowingly break, break off, crack, carve upon, write or otherwise mark upon, or in any manner destroy, mutilate, injure, deface, remove, displace, mar or harm any natural material found in any cave or cavern, such as stalactites, stalagmites, helictites, anthodites, gypsum flowers or needles, flowstone, draperies, columns, tufa dams, clay or mud formations or concretions, or other similar crystalline mineral formations or otherwise; to kill, harm or in any manner or degree disturb any plant or animal life found therein; to otherwise disturb or alter the natural conditions of such cave or cavern through the disposal therein of any solid or liquid materials such as refuse, food, containers or fuel of any nature, whether or not malice is intended; to disturb, excavate, remove, displace, mar or harm any archaeological artifacts found within a cave or cavern including petroglyphs, projectile points, human remains, rock or wood carvings or otherwise, pottery, basketry or any handwoven articles of any nature, or any pieces, fragments or parts of any of the such articles;



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or to break, force, tamper with, remove or otherwise disturb a lock, gate, door or other structure or obstruction designed to prevent entrance to a cave or cavern, without the permission of the owner thereof, whether or not entrance is gained. For purposes of this section, "cave" means any natural geologically formed void or cavity beneath the surface of the earth, not including any mine, tunnel, aqueduct or other manmade excavation, which is large enough to permit a person to enter.

**History: Laws 1981, ch. 236, § 1.**

## 30-15-6. Penalty.

Anyone violating the provisions of Section 1 [30-15-5 NMSA 1978] of this act shall be guilty of a misdemeanor.

**History: Laws 1981, ch. 236, § 2.**

## 30-15-7. Desecration of roadside memorials; penalty.

A. A person shall not knowingly or willfully deface or destroy, in whole or in part, a descanso, also known as a memorial, placed alongside a public road right of way to memorialize the death of one or more persons.

B. A person who violates the provisions of Subsection A of this section is:

(1) for a first offense, guilty of a petty misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978; and

(2) for a second and subsequent offense, guilty of a misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

C. The provisions of this section shall not apply to law enforcement officials or other employees of the state or a political subdivision of the state who in the course of the lawful discharge of their duties move or remove a descanso that obstructs or damages any public road in this state or to an owner of private property upon which a descanso is located.

**History: Laws 2007, ch. 35, § 1 and Laws 2007, ch. 242, § 1.**

**Effective dates.** — Laws 2007, ch. 242 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

**Compiler's notes.** — Laws 2007, ch. 35, § 1 and Laws 2007, ch. 242, § 1 enacted identical sections. This section is set out as enacted by Laws 2007, ch. 242, § 1. *See* 12-1-8 NMSA 1978.

## 30-15-8. Criminal damage to property by theft or attempted theft of regulated material; penalty.

A. Criminal damage to property by theft or attempted theft of regulated material consists of the unlawful taking or attempted taking of any regulated material from another that results in any damage to real or personal property. Whoever commits criminal damage to property by theft or attempted theft of regulated material resulting in property damage or property loss, based on the fair market value of that damage or loss, in an amount of:

(1) less than one thousand dollars ($1,000) is guilty of a petty misdemeanor;

(2) one thousand dollars ($1,000) or more but less than two thousand five hundred dollars ($2,500) is guilty of a misdemeanor; or

(3) two thousand five hundred dollars ($2,500) or more is guilty of a fourth degree felony.

B. For the purposes of this section:

(1) "aluminum material" means wire or coil products made from aluminum, an aluminum alloy or an aluminum byproduct;

(2) "copper or brass material" means:

(a) insulated or noninsulated copper wire, hardware or cable of the type used by a public utility, commercial mobile radio service carrier or common carrier that consists of at least twenty-five percent copper; or



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(b) a copper or brass item of a type commonly used in construction or by a public utility, commercial mobile radio service carrier or common carrier;

(3) "regulated material" means:

(a) aluminum material;

(b) copper or brass material;

(c) steel material;

(d) a utility access cover;

(e) a water meter cover;

(f) a road or bridge guard rail;

(g) a highway or street sign;

(h) a traffic directional or control sign or signal; or

(i) a catalytic converter that is not part of an entire motor vehicle; and

(4) "steel material" means infrastructure-grade or construction products made from an alloy of iron, chromium, nickel or manganese.

C. Nothing in this section shall be construed to preclude a claim made pursuant to any other section of law.

**History: Laws 2022, ch. 56, § 50.**

**Effective dates.** — Laws 2022, ch. 56, § 50 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

# ARTICLE 16

# Larceny


Sec.
30-16-1. Larceny.
30-16-2. Robbery.
30-16-3. Burglary.
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30-16-20. Shoplifting.
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Sec.
30-16-27. Possession of a credit card stolen, lost, mislaid or delivered by mistake.
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30-16-29. Fraudulent taking, receiving or transferring credit cards.
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30-16-33. Fraudulent use of a credit card.
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30-16-35. Possession of incomplete credit cards or machinery, plates or other contrivance.
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30-16-37. Obtaining fraudulently acquired transportation ticket at a discount.
30-16-38. Applicability of other laws.
30-16-39. Fraudulent acts to obtain or retain possession of rented or leased vehicle or other personal property; penalty.
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30-16-41. Repealed.
30-16-42. Repealed.
30-16-43. Repealed.
30-16-44. Repealed.
30-16-45. Repealed.
30-16-46. Legislative finding.
30-16-47. Documentation required.
30-16-48. Penalty; further investigation.


## 30-16-1. Larceny.

A. Larceny consists of the stealing of anything of value that belongs to another.



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B. Whoever commits larceny when the value of the property stolen is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits larceny when the value of the property stolen is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits larceny when the value of the property stolen is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits larceny when the value of the property stolen is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. Whoever commits larceny when the value of the property stolen is over twenty thousand dollars ($20,000) is guilty of a second degree felony.

G. Whoever commits larceny when the property of value stolen is livestock is guilty of a third degree felony regardless of its value.

H. Whoever commits larceny when the property of value stolen is a firearm is guilty of a fourth degree felony when its value is less than two thousand five hundred dollars ($2,500).

**History: 1953 Comp., § 40A-16-1, enacted by Laws 1963, ch. 303, § 16-1; 1969, ch. 171, § 1; 1979, ch. 118, § 1; 1987, ch. 121, § 1; 2006, ch. 29, § 2.**

**Cross references.** — For sheriff's duty to search for stolen livestock, *see* 29-1-2 NMSA 1978.

For description of cattle in indictment, *see* 31-7-1 NMSA 1978.

For provision making disposal of livestock levied upon grand larceny, *see* 39-6-3 NMSA 1978.

For provision on recovery of lost or stolen property from junk dealers, *see* 57-7-4 NMSA 1978.

For possession of livestock by person accused of theft without bill of sale being prima facie evidence of illegal possession, *see* 77-9-21 NMSA 1978.

For livestock board inspector's duty to search for stolen livestock, *see* 77-9-33 NMSA 1978.

For failure of person killing cattle or sheep to show hide to inspector as evidence of larceny or receipt of stolen livestock, *see* 77-17-14 NMSA 1978.

**The 2006 amendment,** effective July 1, 2006, increased the value of property in Subsection B from $100 or less to $250 or less; increased the value of property in Subsection C from more than $100 but less than $250 to more than $250 but less than $500; and increased the value of property in Subsection D from more than $250 to more than $500.

**The 1987 amendment,** effective June 19, 1987, added the third paragraph, substituted "two hundred fifty dollars ($250)" for "one hundred dollars ($100)" in the fourth paragraph, and substituted "is over" for "exceeds" and "more than" for "over" in the fifth paragraph.

## ANNOTATIONS

I. GENERAL CONSIDERATION.
II. MULTIPLE PROSECUTIONS OR PUNISHMENTS.
III. ELEMENTS OF OFFENSE.
IV. INDICTMENT AND INFORMATION.
V. EVIDENCE.
A. IN GENERAL.
B. LARCENY OF LIVESTOCK.
C. VALUE.
D. SUFFICIENCY.
VI. INSTRUCTIONS.

### I. GENERAL CONSIDERATION.

**Larceny of livestock category constitutional.** — The portion of larceny statute, which made it a felony to steal livestock regardless of its value, applied to all persons who steal livestock in the state of New Mexico, and did not constitute special legislation contrary to N.M. Const., art. IV, § 24, nor did it deny defendant equal protection under the law. *State v. Pacheco*, 1969-NMCA-127, 81 N.M. 97, 463 P.2d 521 (decided under prior law).

**Punishment under former law.** — The punishment of the crime of stealing mules by not less than 30 lashes on the bare back was not "cruel and inhuman" under the United States constitution. *Garcia v. Territory*, 1869-NMSC-001, 1 N.M. 415 (decided under prior law).

**Restitution does not wipe out crime of larceny** and does not deprive state of the right to prosecute for the crime. *State v. Odom*, 1974-NMCA-118, 86 N.M. 761, 527 P.2d 802.

**Legislature to define crimes.** — It cannot be gainsaid that the hide of neat cattle is a part of the animal and its removal from the carcass without permission of the owner and subsequent appropriation thereof constitutes theft; under former law the legislature said it shall constitute the crime of larceny, and it is no part of the duty of the courts to inquire into the wisdom, the policy or the justness of an act of the legislature. *State v. Thompson*, 1953-NMSC-072, 57 N.M. 459, 260 P.2d 370 (decided under prior law).

**Owner's consent to taking.** — In order for an owner to consent to a theft, more than a passive assent to the taking is required. *State v. Ontiveros*, 1990-NMCA-112, 111 N.M. 90, 801 P.2d 672, cert. denied, 111 N.M. 77, 801 P.2d 659.

A person does not consent to his property being taken by purposely leaving it exposed, or failing to resist the taking, even though he may know that another intends to come and steal it. *State v. Ontiveros*, 1990-NMCA-112, 111 N.M. 90, 801 P.2d 672, cert. denied, 111 N.M. 77, 801 P.2d 659.

Pretended cooperation of an agent of an owner in effecting the theft from the owner is not consent. *State v. Ontiveros*, 1990-NMCA-112, 111 N.M. 90, 801 P.2d 672, cert. denied, 111 N.M. 77, 801 P.2d 659.

An owner's nonconsent to larceny may be established by the facts and circumstances in evidence. *State v. Ontiveros*, 1990-NMCA-112, 111 N.M. 90, 801 P.2d 672, cert. denied, 111 N.M. 77, 801 P.2d 659.

**Authorized sentence unassailable.** — Where defendant, who pleaded guilty to larceny of property worth over $2500, a third degree felony, was sentenced to the term authorized by law for a third degree felony his assertion that codefendants were sentenced for a fourth degree felony on the basis of "the same identical act" and that the state had reduced the charge against one codefendant to a fourth degree felony provided no basis for post-conviction relief. *State v. Follis*, 1970-NMCA-083, 81 N.M. 690, 472 P.2d 655.

**Ownership conclusively determined.** — A defendant in a larceny case was, after conviction, barred from



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litigating the question of ownership of the stolen property with owner thereof as charged in the indictment. *Supulver v. Gilchrist & Dawson, Inc.*, 1922-NMSC-060, 28 N.M. 339, 211 P. 595.

**Evidence held sufficient to sustain larceny conviction.** *State v. Davis*, 1982-NMCA-057, 97 N.M. 745, 643 P.2d 614.

**Tort liability to thief.** — The rules of law governing the liability of appellee for shooting and wounding appellant while stopping a trespass or the theft of watermelons are the same whether the proceedings be civil or criminal. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

## II. MULTIPLE PROSECUTIONS OR PUNISHMENTS.

**Larceny of firearm punishable as separate offense.** — Under the structure of this section, where the property stolen includes both generic property and a firearm, larceny of the firearm is punishable as a separate offense. *State v. Alvarez-Lopez*, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699.

**Single larceny doctrine.** — The single larceny doctrine, also known as the single criminal intent doctrine, is a canon of construction used when the legislature's intent regarding multiple punishments is ambiguous. When several articles of property are stolen by the defendant from the same owner at the same time and at the same place, only one larceny is committed. *State v. Torres*, 2021-NMCA-045, cert. granted.

**Single larceny doctrine applied to interpret the unit of prosecution for larceny of livestock.** — In consolidated appeals, where defendants, in separate and unrelated incidents of cattle rustling, were each charged with multiple counts of larceny of livestock based on one count per head of cattle stolen, and where the district court dismissed multiple counts against each defendant, concluding that § 30-16-1(G) NMSA 1978, defined the unit of prosecution as a single offense regardless of the number of animals taken, reasoning that the term "livestock" is used by our legislature to refer to animals in the aggregate, and that the term "livestock" is plural and, accordingly, it is the aggregate of the parts such that a single offense exists irrespective of whether one or ten animals were taken, the district court did not err in dismissing multiple counts of larceny or in concluding that the unit of prosecution for larceny of livestock is a single offense regardless of the number of animals taken, because applying the single larceny doctrine, it clarifies that a taking of multiple head of cattle at the same time and place, or a series of takings from a single owner with a single criminal intent, constitutes but one larceny. *State v. Torres*, 2021-NMCA-045, cert. granted.

**Larceny of several articles.** — Under the "single larceny doctrine," as a matter of judicial policy, a taking of two or more articles of property from the same owner at the same time and place should be prosecuted as only one larceny, even though separate convictions would not be barred by double jeopardy. *State v. Boeglin*, 1977-NMCA-004, 90 N.M. 93, 559 P.2d 1220.

Nothing in the statutory language indicates that the legislature intended to create a separate offense for each taking of property belonging to different persons during a continuous episode. *State v. Brown*, 1992-NMCA-028, 113 N.M. 631, 830 P.2d 183, cert. denied, 113 N.M. 636, 830 P.2d 553.

**Charge of larceny is necessarily included in charge of robbery.** *State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36.

**Grand larceny and armed robbery merged.** — Where the act of grand larceny was necessary to, or incidental to, the crime of armed robbery which the defendant committed, the offense of grand larceny was merged with the graver offense of armed robbery, and hence although the defendant was properly convicted of both armed robbery and grand larceny, he cannot be doubly punished for both of those crimes. *State v. Quintana*, 1961-NMSC-108, 69 N.M. 51, 364 P.2d 120; *State v. Montano*, 1961-NMSC-174, 69 N.M. 332, 367 P.2d 95.

**No merger of larceny and burglary.** — There is no merger when an accused is charged with both burglary and larceny though the charges stem from one transaction or event. *State v. Deats*, 1971-NMCA-089, 82 N.M. 711, 487 P.2d 139.

**Elements of larceny and burglary differ.** — Since stealing is a necessary element of larceny but is not a necessary element of burglary, larceny is not necessarily involved in a burglary; hence, these two crimes do not merge, and defendant could be convicted of and sentenced for both crimes. *State v. McAfee*, 1967-NMSC-139, 78 N.M. 108, 428 P.2d 647.

Larceny is not a lesser included offense of burglary, since each crime includes an element not contained in the other. Burglary requires entry into a dwelling, whereas larceny does not, and larceny requires an actual taking, whereas burglary does not. *Yparrea v. Dorsey*, 64 F.3d 577 (10th Cir. 1995).

**Assault and larceny separate offenses.** — Assault with a deadly weapon, even though committed in connection with a larceny is a separate criminal act, as distinguished from a necessary ingredient of the crime of larceny, and, accordingly, there may be a conviction and punishment for both. *State v. Martinez*, 1967-NMSC-103, 77 N.M. 745, 427 P.2d 260.

**Unlawful taking of motor vehicle not included offense.** — Violation of 64-9-4A, 1953 Comp. (now repealed), by unlawful taking of a motor vehicle, is not necessarily included in offense of larceny, since the criminal intent requisite for the crime of larceny is the intent to deprive the owner of his property permanently, while a violation of 64-9-4A, 1953 Comp. (now repealed), does not require this intent. *State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36 (decided under prior law, statute repealed).

**Receipt of stolen goods by thief himself.** — A thief who holds on to stolen property cannot be guilty of receiving the stolen property because he cannot receive it from himself, nor can he violate the statute by retaining the stolen property because larceny is a continuing offense; the thief's disposition of the property, however, is action separate from the larceny, and it is neither absurd nor unreasonable to hold that the thief violates 30-16-11 NMSA 1978 when he disposes of the property that he stole. *State v. Tapia*, 1976-NMCA-042, 89 N.M. 221, 549 P.2d 636, cert. denied, 89 N.M. 206, 549 P.2d 284.

**Asportation of stolen property.** — Larceny was a continuing offense, and if property was stolen in one county and taken by the thief into another, he was guilty of a new caption and asportation in the latter county. *State v. McKinley*, 1924-NMSC-052, 30 N.M. 54, 227 P. 757; *State v. Meeks*, 25 N.M. 231, 180 P. 295.

**Transporting stolen livestock and larceny of livestock.** — Defendant's conviction for transporting stolen livestock, when considered with his conviction for larceny of livestock, violated his constitutional right to be free of double jeopardy. *State v. Clark*, 2000-NMCA-052, 129 N.M. 194, 3 P.3d 689, cert. denied, 129 N.M. 207, 4 P.3d 35.

**Double jeopardy.** — Because defendant's case was a single prosecution case, under which the single larceny doctrine was implicated, defendant's double jeopardy rights were violated by defendant's two punishments for violations of two clauses of this section. *State v. Alvarez-Lopez*, 2003-NMCA-039, 133 N.M. 404, 62 P.3d 1286, *rev'd*, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699, cert. denied, 543 U.S. 1177, 125 S. Ct. 1334, 161 L. Ed. 2d 162 (2005).

Municipal court conviction of larceny is not the same offense for purposes of double jeopardy as a district court



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conviction of theft of a credit card. *State v. Rodriguez*, 2005-NMSC-019, 138 N.M. 21, 116 P.3d 92.

**Theft of credit card.** — Larceny is a lesser included offense of theft of a credit card. *State v. Rodriguez*, 2005-NMSC-019, 138 N.M. 21, 116 P.3d 92.

III. ELEMENTS OF OFFENSE.

**Corpus delicti.** — The corpus delicti of larceny is constituted of two elements: that the property was lost by the owner, and that it was lost by a felonious taking. *State v. Paris*, 1966-NMSC-039, 76 N.M. 291, 414 P.2d 512; *State v. Buchanan*, 1966-NMSC-045, 76 N.M. 141, 412 P.2d 565.

**Ownership of another.** — In cases of larceny and embezzlement, ownership of the property stolen or embezzled must be established in some person or entity capable of owning property. *State v. Parsons*, 1917-NMSC-084, 23 N.M. 520, 169 P. 475.

**Ownership issues.** — Every larceny included a trespass to possession, which could not exist unless the property was in possession of person from whom it was charged to have been stolen. *State v. Curry*, 1927-NMSC-015, 32 N.M. 219, 252 P. 994.

**Particular ownership not essential.** — Neither an allegation or proof of ownership in a particular person is an essential element of the offense of larceny, it being sufficient that the proof disclosed that property stolen belonged to one other than defendant. *State v. Ford*, 1969-NMCA-092, 80 N.M. 649, 459 P.2d 353.

**Violence not an element.** — Larceny, although an essential element of the offense of robbery, is distinguished primarily on the basis of the violence which precedes or accompanies the taking; robbery is a compound or aggravated larceny, composed of the crime of larceny from the person with the aggravation of force, actual or constructive, used in the taking. *State v. Wingate*, 1975-NMCA-035, 87 N.M. 397, 534 P.2d 776.

**"Steal" connotes intent.** — Under the statute using the term "steal," when that term is used in the instruction, it carries with it a meaning that the taking must have been with a felonious intent. *State v. Paris*, 1966-NMSC-039, 76 N.M. 291, 414 P.2d 512.

**Specific intent to permanently deprive requisite.** — One of the essential elements of larceny is that of intent on the part of defendant to permanently deprive the owners of their property; hence, a taking of property by defendant with the intent of using it temporarily and then returning it would not constitute larceny. *State v. Parker*, 1969-NMCA-056, 80 N.M. 551, 458 P.2d 803, cert. denied, 80 N.M. 607, 458 P.2d 859.

**As distinguished from wrongful taking of car.** — Larceny includes the concept of criminal intent, and in addition, the intention to permanently deprive the owner of possession of his property, such intention to permanently deprive is not an essential element of 64-9-4A, 1953 Comp., prohibiting intentional taking of a motor vehicle without consent of the owner. *State v. Austin*, 1969-NMCA-095, 80 N.M. 748, 461 P.2d 230 (decided under prior law, statute repealed).

**Embezzlement.** — A legislative intent to include the element of intent to permanently deprive the owner of his property in crime of embezzlement cannot be ascertained by comparing the embezzlement statute 30-16-8 NMSA 1978 with this section, because larceny is defined in terms of stealing and comparable language is not used in the embezzlement statute. *State v. Moss*, 1971-NMCA-117, 83 N.M. 42, 487 P.2d 1347.

**Value of livestock immaterial.** — Under former law, in prosecution for depriving owner of possession of certain sheep, value of the animals was not material, it did not need to be alleged and if alleged, did not need to be proved. *State v. Anaya*, 1922-NMSC-059, 28 N.M. 283, 210 P. 567; *see also State v. Jaramillo*, 1919-NMSC-013, 25 N.M. 228, 180 P. 286; *State v. Lucero*, 1913-NMSC-011, 17 N.M. 484, 131 P. 491 (prosecutions for larceny of cattle).

**Theft from employer.** — Since the physical control exercised by an employee over property entrusted to him by his employer is merely custody and not possession, an employee takes the property from his employer's possession, and thereby commits a trespass, when he converts it; he is accordingly guilty of larceny, without regard to whether he entertained such intent at the time he acquired custody, or not. *State v. Robertson*, 1977-NMCA-044, 90 N.M. 382, 563 P.2d 1175, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Aiding and abetting.** — To be an aider and abettor in the crime of larceny one must share the criminal intent of the principal; there must be a community of purpose in the unlawful undertaking. *State v. Duran*, 1974-NMCA-088, 86 N.M. 594, 526 P.2d 188, cert. denied, 86 N.M. 593, 526 P.2d 187.

**Effect of intoxication on intent.** — Voluntary intoxication alone is not a defense to a charge of larceny, but if a defendant claims he was so intoxicated as to be unable to form the necessary intent, the question of intent is a matter for the jury. *State v. Lucero*, 1962-NMSC-077, 70 N.M. 268, 372 P.2d 837.

**Restitution no bar to conviction.** — Fact that defendant turned himself in to owner and worked to make restitution for theft, that owner told defendant he would have larceny charges against him dismissed and that this was not done, if true, provided no legal basis for withdrawal of guilty plea. *State v. Odom*, 1974-NMCA-118, 86 N.M. 761, 527 P.2d 802.

IV. INDICTMENT AND INFORMATION.

**Allegation of ownership.** — In indictment charging embezzlement it is essential to aver the felonious conversion of the property of another; unless the rule is modified by statute, the allegation must be as accurate as in an indictment for larceny, and in case of an association, facts must be averred to show that the association could own property in its name. *State v. Parsons*, 1917-NMSC-084, 23 N.M. 520, 169 P. 475 (decided under prior law).

**Laying ownership in representative.** — Where owner of stolen mule was dead, indictment charging larceny was to lay the ownership in his representative and not in his estate. *Territory v. Valles*, 1909-NMSC-026, 15 N.M. 228, 103 P. 984.

**Deprivation of owner's possession understood.** — Where indictment charged that defendant "then and there, unlawfully and feloniously did take, steal and knowingly drive away, etc." the animal in question, it was not necessary to further allege that the owner was thereby deprived of the immediate possession of the animal. *State v. Roberts*, 1914-NMSC-004, 18 N.M. 480, 138 P. 208.

**Describing stolen animal in indictment as a "cow" was sufficient.** *Wilburn v. Territory*, 1900-NMSC-028, 10 N.M. 402, 62 P. 968.

**Word "feloniously" unnecessary.** — It was not necessary to use word "feloniously" in information charging larceny from house or other building, under Laws 1869-1870, ch. 26, §§ 1, 2 (former 40-45-6, 40-45-7, 1953 Comp.), to support sentence of three to five years. *State v. Jones*, 1930-NMSC-007, 34 N.M. 499, 285 P. 501.

**Allegation of knowledge.** — The third crime defined by 79, 1897 C.L. (former 40-4-17, 1953 Comp.), of knowingly killing or otherwise depriving the owners of animals of their immediate possession, was a purely statutory one; use of word "knowingly" made knowledge an element of the crime, and an indictment failing to allege it in words of statute or words of similar import failed to state the offense. *Territory v. Cortez*, 1909-NMSC-010, 15 N.M. 92, 103 P. 264 (decided under prior law).

**Allegation that defendant "committed crime of larceny" would be sufficient** where the crime



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constituted both statutory grand larceny and common-law larceny. *State v. Shroyer*, 1945-NMSC-014, 49 N.M. 196, 160 P.2d 444 (decided under prior law).

**Information adequate.** — Information charging grand larceny, particularized by referring to section relating to grand larceny, was sufficient where crime was covered by that section. *State v. Lucero*, 1962-NMSC-077, 70 N.M. 268, 372 P.2d 837.

**Particulars specified.** — Where amendment of information which charged defendant with larceny of sheep apprised him of particulars he might have asked for in a bill of particulars, he suffered no injustice. *State v. Shroyer*, 1945-NMSC-014, 49 N.M. 196, 160 P.2d 444.

**Defendant entitled to more definite specification.** — Where charge simply alleged that defendant did steal and carry away certain articles of personal property of a stated value and being the property of a named individual, and there was not a single word to indicate the nature or character of the property, the charge was too vague and indefinite upon which to deprive defendant of his liberty when he had sought a more definite specification of what constituted the personal property which he was charged with stealing. *State v. Campos*, 1968-NMSC-177, 79 N.M. 611, 447 P.2d 20.

**Selection of charges.** — Where defendant was alleged to have stolen $400 in quarters from a change machine by using a rigged bill, he is potentially subject to being charged with both larceny and the misdemeanor offense of cheating a machine or device, and the preemption rationale of the general-specific rule did not preclude prosecution under either or both of the statutes. *State v. Davis*, 2000-NMCA-105, 129 N.M. 773, 14 P.3d 38, cert. denied, 130 N.M. 17, 16 P.3d 442.

**Charging in alternative.** — An indictment under Laws 1884, ch. 47, § 15 (former 40-4-17, 1953 Comp.), relating to larceny, embezzlement or killing of animals, could charge that accused committed the crime in each of the specified ways, so long as they were not repugnant. *State v. McKinley*, 1924-NMSC-052, 30 N.M. 54, 227 P. 757.

Some single offenses were of a nature to be committed by many means, and a count was not necessarily double which charged several of the means, if they were not repugnant. *Territory v. Harrington*, 1912-NMSC-006, 17 N.M. 62, 121 P. 613; *see also Territory v. Eaton*, 1905-NMSC-011, 13 N.M. 79, 79 P. 713.

**Additional details surplusage.** — Information charging defendant with stealing a washing machine belonging to a certain company, from the company warehouse, of the value of $300, which used the term "grand larceny" and referred to the statutory section defining grand larceny, sufficiently charged defendant of the crime of grand larceny, and not larceny from a warehouse, as defendant contended; the additional averment that the machine was stolen from the company's warehouse was surplusage, its effect, if any, being merely to place an additional burden on the state in proving the case. *State v. Johnson*, 1955-NMSC-070, 60 N.M. 57, 287 P.2d 247.

**Variance not jurisdictional.** — In conviction for burglary and larceny, variance between indictment and proof regarding name and address of victim was not jurisdictional and was cured by jury's guilty verdict. *State v. Jaramillo*, 1973-NMCA-029, 85 N.M. 19, 508 P.2d 1316, cert. denied, 85 N.M. 5, 508 P.2d 1302, and cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973).

**"Criminal complaint" insufficient to confer jurisdiction.** — Order revoking a suspended sentence given defendant on a plea of guilty to charges of burglary and grand larceny contained in a "criminal complaint" filed by sheriff must be reversed, as the defendant's sentence was imposed without jurisdiction in the court, due to lack of a proper charge against him. *State v. Chacon*, 1957-NMSC-030, 62 N.M. 291, 309 P.2d 230.

**Designation of crime in bond.** — A recognizance which described the alleged offense against the principal as "having sold and thereby deprived the owner thereof of a horse, the same being the crime of larceny" sufficiently designated the crime to bind the sureties on the bond or recognizance. *Territory v. Minter*, 1907-NMSC-002, 14 N.M. 6, 88 P. 1130.

## V. EVIDENCE.

### A. IN GENERAL.

**Proof of venue.** — Venue, like any other fact in a case, could be proven by circumstantial evidence. *State v. Lott*, 1936-NMSC-024, 40 N.M. 147, 56 P.2d 1029; *State v. Mares*, 1921-NMSC-048, 27 N.M. 212, 199 P. 111.

**Inference of intent to steal.** — An intent to steal was an element to be inferred by the jury from the facts and circumstances established upon the trial. Such an inference might be drawn from facts showing that property was taken in one county and driven through several others and kept for 10 or 12 days before it was found and retaken by its owner. *State v. McKinley*, 1924-NMSC-052, 30 N.M. 54, 227 P. 757.

**Exhibit relevant to intent.** — Fifty foot cotton rope with pipe T's on one end taken from defendant's car, which was identified as device capable of being used in larceny of signal wire, was relevant and material to preparation and intent of defendant, even though there was no evidence that in fact the exhibit was so used. *State v. Hardison*, 1970-NMCA-043, 81 N.M. 430, 467 P.2d 1002.

**Extra-judicial statements inadmissible.** — In prosecution for larceny of scrap metal, defendant's out-of-court statements to witness that codefendant had bought some junk and that he (defendant) was going to haul the junk were properly disallowed as self-serving, and were not admissible as part of res gestae since proffered testimony of witness did not show that they were contemporaneous with a shocked condition or were spontaneous. *State v. Hunt*, 1972-NMCA-055, 83 N.M. 753, 497 P.2d 755, cert. denied, 83 N.M. 740, 497 P.2d 742.

### B. LARCENY OF LIVESTOCK.

**Circumstantial evidence.** — In prosecution for larceny of cattle, the corpus delicti could be proved by circumstantial evidence. *State v. Ortega*, 1932-NMSC-003, 36 N.M. 57, 7 P.2d 943.

Direct evidence of nonconsent of the owner to the killing of an animal was not required as a matter of law, and such nonconsent could be shown by circumstantial evidence. *State v. Parry*, 1920-NMSC-096, 26 N.M. 469, 194 P. 864.

**Establishing animal's identity.** — It was equally as competent to establish the identity of a stolen animal by a brand as by its color or by any distinguishing mark. *Territory v. Valles*, 1909-NMSC-026, 15 N.M. 228, 103 P. 984.

**Proof of ownership.** — Where indictment alleged that animal unlawfully killed was the property of copartners, it was necessary to prove the ownership as laid out in the indictment beyond a reasonable doubt. *Territory v. Sais*, 1909-NMSC-021, 15 N.M. 171, 103 P. 980.

**When brand required as evidence.** — Only when the evidence of ownership of animals depended upon a brand was it necessary to introduce a certified copy of the recorded brand in evidence. *State v. Meeks*, 1919-NMSC-015, 25 N.M. 231, 180 P. 295.

**Brand not conclusive.** — In prosecution for larceny of a steer, the brand was but prima facie evidence of ownership, and did not prevent prosecution from introducing other evidence of true ownership of animal at time of offense. *Chavez v. Territory*, 1892-NMSC-014, 6 N.M. 455, 30 P. 903.

**Brand not conclusive proof of ownership.** — Proof that calf bore defendant's brand in prosecution for stealing and branding the animal did not constitute prima facie evidence that defendants owned the animal, under



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statute providing that registration in brand book under seal of the cattle sanitary board (now New Mexico livestock board) constituted prima facie proof that person owning the recorded brand was owner of animal branded with such brand. *State v. Reed*, 1951-NMSC-021, 55 N.M. 231, 230 P.2d 966), cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

**Disposal of meat as part of res gestae.** — In prosecution for larceny of cattle, evidence as to hogs eating beef at ranch of a defendant was properly admitted as part of res gestae. *Territory v. Leslie*, 1910-NMSC-002, 15 N.M. 240, 106 P. 378.

**Prima facie case.** — In prosecution for larceny of cattle, proof of ownership in alleged owner, that the cattle were stolen, that shortly thereafter they were found near the ranch of defendant, bearing his brand, freshly put on, and that he then claimed to own them, was sufficient prima facie proof of an unlawful taking and asportation, and made a prima facie case of larceny, although other cattle of the owner grazed in the same locality where the stolen cattle were found. *State v. Liston*, 1921-NMSC-104, 27 N.M. 500, 202 P. 696.

In prosecution for larceny of mule, testimony tending to establish identity of mule, ownership by named person as administrator, and possession of mule by defendant was enough to make out a prima facie case of guilt. *Territory v. Valles*, 1909-NMSC-026, 15 N.M. 228, 103 P. 984.

**Offense established.** — Evidence of discovery of two calves belonging to others in weaning pen of ranch on which the defendant was foreman, along with other circumstances, afforded adequate support for larceny conviction. *State v. Compton*, 1953-NMSC-036, 57 N.M. 227, 257 P.2d 915.

**Conviction justified.** — Possession of hide, ears and hoofs of heifer stolen from ranch, and their concealment, together with other circumstances, justified conviction for the theft. *State v. Lott*, 1936-NMSC-024, 40 N.M. 147, 56 P.2d 1029.

C. VALUE.

**Testimony of owner admissible.** — An owner's testimony regarding the value of an item stolen is admissible and sufficient to withstand a motion for a directed verdict based on lack of evidence of value. *State v. Romero*, 1975-NMCA-017, 87 N.M. 279, 532 P.2d 208.

**Store owner's calculations.** — Testimony of store owner in the form of direct evidence of items taken and their value, based upon his own knowledge and a calculation of the value of the items stolen by determining how many items were in the bins before the theft and how many were left, was substantial evidence as to the value of the goods stolen. *State v. Landlee*, 1973-NMCA-143, 85 N.M. 726, 516 P.2d 697.

**Cost of television set.** — Evidence that stolen television set was purchased new in March or April prior to the December it was stolen, that the purchase price was $750 and that it was "working all right" before it was stolen, was substantial evidence of value, and further, as defendant elicited this information on cross-examination, he was not in a position to complain about it. *State v. Phillips*, 1971-NMCA-114, 83 N.M. 5, 487 P.2d 915.

**Value of checks.** — Defendant was not entitled to an instruction on fourth degree larceny as a lesser included offense of third degree larceny on the grounds that the $3,200 in checks he stole were neither endorsed nor stamped and therefore worthless. The value of a check, in the absence of proof to show a lesser value, is measured by what the owner of the check could expect to receive for the check at the time of the theft, i.e. the check's face value. *Gallegos v. State*, 1992-NMSC-014, 113 N.M. 339, 825 P.2d 1249.

**Market value.** — Testimony of expert witnesses that a fair market value of stolen scrap metal was in excess of $100 constituted substantial evidence to support conviction of defendants for larceny of property worth over $100. *State v. Hunt*, 1972-NMCA-055, 83 N.M. 753, 497 P.2d 755, cert. denied, 83 N.M. 740, 497 P.2d 742.

**Cost or replacement value distinguished.** — In prosecution for larceny of a plow, where jury was instructed to determine market value thereof, jury was not warranted in considering its cost or replacement value. *State v. Gallegos*, 1957-NMSC-052, 63 N.M. 57, 312 P.2d 1067.

**Evidence sufficient.** — Testimony that part of the item stolen, if it was considered as scrap, was worth $30, that its replacement cost was $110 and that its market value was $170 to $180 was sufficient for a conviction under this statute for larceny of an item in excess of $100 but less than $2500. *State v. Landlee*, 1973-NMCA-112, 85 N.M. 449, 513 P.2d 186.

D. SUFFICIENCY.

**Identification adequate.** — Where victim and witness of robbery perpetrated by two masked men described, on the night of the robbery, the robber and the clothes he was wearing, and at trial identified clothes found in defendant's apartment and defendant himself on basis of his posture, size and stoop, there was sufficient evidence to establish that defendant was one of the men involved in the robbery. *State v. Quintana*, 1961-NMSC-108, 69 N.M. 51, 364 P.2d 120; *see also State v. Montano*, 1961-NMSC-174, 69 N.M. 332, 367 P.2d 95.

**Exclusion of every reasonable hypothesis save guilt.** — Circumstantial evidence of defendant's aiding or abetting larceny was substantial and did not fail to exclude every reasonable hypothesis other than defendant's guilt, where he changed positions in car containing stolen property and helped reload a television set which fell off the roof of the vehicle, which actions excluded the defense hypothesis that defendant was asleep and knew nothing about the larceny. *State v. Phillips*, 1971-NMCA-114, 83 N.M. 5, 487 P.2d 915.

In prosecution for larceny of signal wire, tracks from car belonging to codefendant and along line of cut wire, which were shown to match those made by defendant's boots, along with unexplained flight from the scene and removal of some cut wire about 100 feet in the direction of the car excluded every reasonable hypothesis other than guilt. *State v. Hardison*, 1970-NMCA-043, 81 N.M. 430, 467 P.2d 1002.

**"Exclusive" possession.** — If the unexplained possession of stolen property found in defendant's apartment was within his "exclusive" possession, that circumstance coupled with other culpatory and incriminating circumstances is sufficient to sustain conviction of larceny. *State v. Flores*, 1966-NMSC-059, 76 N.M. 134, 412 P.2d 560.

The "exclusive" possession which creates an inference of guilt does not mean that the possession must be separate from all others provided there is other evidence to connect the defendant with the offense. *State v. Flores*, 1966-NMSC-059, 76 N.M. 134, 412 P.2d 560.

**Proof of ownership.** — In prosecuting larceny, the state need not prove ownership in a particular person; proof that the property belonged to someone other than the defendant is sufficient. *State v. Brown*, 1992-NMCA-028, 113 N.M. 631, 830 P.2d 183, cert. denied, 113 N.M. 636, 830 P.2d 553.

**Sale of property.** — While something more than possession alone must be shown to establish corpus delicti of larceny, where ring owned by woman was relinquished by her to jailer when she was confined in jail in which defendant was a trustee and defendant had the ring in his possession afterwards and sold it to another, the corpus delicti of larceny was established by circumstantial evidence. *State v. Buchanan*, 1966-NMSC-045, 76 N.M. 141, 412 P.2d 565.



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Evidence that defendant employee took property belonging to corporate owner from the business where it had been repaired, sold the property to a third person and retained the proceeds of the sale, and that defendant had no authority either to obtain possession of the property or to sell it, was evidence of an unlawful taking with the requisite intent. *State v. Robertson*, 1977-NMCA-044, 90 N.M. 382, 563 P.2d 1175, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Taking money from lounge constituted larceny** even where the person defendant took the money from was employed at the lounge, had custody of the money, and consented to the taking of the money, since the money belonged to the owner, not the employee and even if the employee had turned the money over to the defendant willingly, she had no authority to do so. *State v. Rhea*, 1974-NMCA-030, 86 N.M. 291, 523 P.2d 26, cert. denied, 86 N.M. 281, 523 P.2d 16.

**Sufficient evidence to support conviction,** despite failure to preserve fingerprints or trace ownership of weapon. *State v. Peterson*, 1985-NMCA-109, 103 N.M. 638, 711 P.2d 915, cert. denied, 475 U.S. 1052, 106 S. Ct. 1279, 89 L. Ed. 2d 586 (1986).

**Sufficient evidence to support retrial for larceny.** — When reviewing whether sufficient evidence exists to support retrial, an appellate court includes in its review any erroneously admitted evidence, and if all the evidence, including the wrongfully admitted evidence, is sufficient, then retrial following appeal is not barred. *State v. Winters*, 2015-NMCA-050, cert. denied, 2015-NMCERT-004.

Following reversal of defendant's conviction for larceny over $2,500, the court of appeals held that the evidence that defendant's truck was found at the scene with the stolen property in the bed of the truck, combined with the erroneously admitted arresting officer's opinion that shoe prints found at the scene matched shoe prints found at defendant's residence, was sufficient to permit the jury to reasonably infer that defendant was at the scene and committed the theft; defendant is subject to retrial on remand. *State v. Winters*, 2015-NMCA-050, cert. denied, 2015-NMCERT-004.

**Evidence insufficient.** — Evidence that smooth soled tracks were found between area where wire was being larcenously cut and car belonging to one defendant, and that woman within the car was wearing smooth soled moccasins, where no attempt to match moccasins to tracks was made, was insufficient to exclude every reasonable hypothesis other than her guilt. *State v. Hardison*, 1970-NMCA-043, 81 N.M. 430, 467 P.2d 1002.

Where proof relied upon to establish defendant's guilt of breaking and entering and larceny was purely circumstantial and not incompatible with innocence on any rational theory, or incapable of explanation on any reasonable hypothesis, it was error for the court not to have directed a verdict of acquittal at the close of the state's case. *State v. Campos*, 1968-NMSC-177, 79 N.M. 611, 447 P.2d 20.

**Insufficient evidence that value of stolen property over $2,500.** *State v. Seward*, 1986-NMCA-062, 104 N.M. 548, 724 P.2d 756, cert. denied, 104 N.M. 522, 724 P.2d 231.

**Insufficient evidence of intent to permanently deprive owner of stolen items.** — Where defendant was convicted of larceny based on DNA evidence found in a burglarized house, there was insufficient evidence to permit a rational jury to find the essential facts to establish each element of the crime of larceny beyond a reasonable doubt, because although there was evidence that defendant had entered the property without authorization, the state, without presenting any evidence linking defendant to the stolen items, failed to establish, either directly or by circumstantial evidence, that defendant took or carried away the stolen items with the specific intent to permanently deprive the owner of those items. *State v. Ledbetter*, 2020-NMCA-046.

## VI. INSTRUCTIONS.

**Intent.** — Where on appeal it was contended an error occurred for the district court to give a general intent instruction without instructing the jury that it did not apply to a specific intent crime, because the instruction substantially followed the applicable law, there was no fundamental error. *State v. Gee*, 2004-NMCA-042, 135 N.M. 408, 89 P.3d 80, cert. denied, 2004-NMCERT-003, 135 N.M. 321, 88 P.3d 261.

**Error in time period charged harmless.** — Where crime of grand larceny was charged as having been committed on February 15, 1953, the information charging theft of a washing machine over the value of $20.00 was filed January 4, 1954, and meanwhile the statute defining the crime was amended on June 12, 1953, by substituting $50.00 in lieu of $20.00, fact that the court's instructions permitted jury to find that the offense had occurred on February 18, 1953, or at any time within the three years next preceding the date the information was filed was harmless, as the evidence conclusively showed that the offense had occurred prior to the effective date of the amendment, and moreover, the error was waived. *State v. Johnson*, 1955-NMSC-070, 60 N.M. 57, 287 P.2d 247.

**Incorrect identification of victim not fundamental error.** — Instructions to which defendant in prosecution for burglary and larceny made no objection, incorrectly setting forth the name and address of the victim, did not constitute fundamental error. *State v. Jaramillo*, 1973-NMCA-029, 85 N.M. 19, 508 P.2d 1316, cert. denied, 85 N.M. 5, 508 P.2d 1302, and cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973).

**Charge on circumstantial evidence proper.** — Instruction on circumstantial evidence concerning the stealing and unlawful branding of a bull calf was not erroneous because of inclusion of statement "that before you would be authorized to find a verdict of guilty against the defendant where the evidence is circumstantial, the facts and circumstances shown in the evidence must be incompatible upon any reasonable hypothesis with the innocence of the defendant and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the defendant." *State v. Reed*, 1951-NMSC-021, 55 N.M. 231, 230 P.2d 966, cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

**Cumulative instruction.** — The court was not required to give instruction on circumstantial evidence which was cumulative. *State v. Reed*, 1951-NMSC-021, 55 N.M. 231, 230 P.2d 966, cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

**Instruction on larceny by employee incorrect.** — Defendant's requested instruction which told the jury that if the defendant was an employee of the corporate owner and as such had the right to have the possession of the equipment in question, then even though he sold said equipment without authority, he was not guilty of larceny, was an incorrect statement of the law because it failed to recognize that defendant's physical control of the equipment was no more than custody on behalf of an employer who retained possession. *State v. Robertson*, 1977-NMCA-044, 90 N.M. 382, 563 P.2d 1175, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Larceny as included offense.** — Because robbery is an aggravated larceny, so that larceny is necessarily included within the offense of robbery, defendant had the right to have instructions on larceny submitted to the jury, since there was evidence from several defense witnesses which tended to establish that offense. *State v. Wingate*, 1975-NMCA-035, 87 N.M. 397, 534 P.2d 776.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).



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For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico Criminal Law, see 20 N.M.L. Rev. 265 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 50 Am. Jur. 2d Larceny § 1 et seq.

Should ownership of property be laid in the husband or the wife in an indictment for larceny, 2 A.L.R. 352.

Intent to convert property to one's own use or to the use of third person as element of larceny, 12 A.L.R. 804.

"Asportation" which will support charge of larceny, 19 A.L.R. 724, 144 A.L.R. 1383.

Appropriation of property after obtaining possession by fraud as larceny, 26 A.L.R. 381.

Assisting in transportation or disposal of property known to have been stolen as rendering one guilty of larceny, 29 A.L.R. 1031.

Individual criminal responsibility of officer or employee for larceny, through corporate act, of property of third person, 33 A.L.R. 787.

Larceny or embezzlement by one spouse of other's property, 55 A.L.R. 558.

"Larceny" within fidelity bond, 56 A.L.R. 967.

Sufficiency of verdict on conviction, which fails to state value of property, 79 A.L.R. 1180.

Dog as subject of larceny, 92 A.L.R. 212.

Larceny of gas, 113 A.L.R. 1282.

Distinction between larceny and embezzlement, 146 A.L.R. 532.

Gambling or lottery paraphernalia as subject of larceny, 51 A.L.R.2d 1396.

Relative rights, as between purchaser of chattel from one who previously bought it with stolen money, and victim of the theft, 62 A.L.R.2d 537.

Law as to cats, 73 A.L.R.2d 1032, 8 A.L.R.4th 1287, 55 A.L.R.4th 1080, 68 A.L.R.4th 823.

Carcass: stealing carcass as within statute making it larceny to steal cattle or livestock, 78 A.L.R.2d 1100.

Taking, and pledging or pawning, another's property as larceny, 82 A.L.R.2d 863.

Stolen money or property as subject of larceny, 89 A.L.R.2d 1435.

Entrapment or consent, 10 A.L.R.3d 1121.

Cotenant taking cotenancy property, 17 A.L.R.3d 1394.

Single or separate larceny predicated upon stealing property from different owners at same time, 37 A.L.R.3d 1407.

Rented vehicles: criminal liability in connection with rental of motor vehicles, 38 A.L.R.3d 949.

Purse snatching as robbery or theft, 42 A.L.R.3d 1381.

Price tags: changing of price tags by patron of self-service store as criminal offense, 60 A.L.R.3d 1293.

Gambling: retaking of money lost at gambling as robbery or larceny, 71 A.L.R.3d 1156.

What constitutes larceny "from a person," 74 A.L.R.3d 271.

Criminal liability for wrongfully obtaining unemployment benefits, 80 A.L.R.3d 1280.

Instruction allowing presumption or inference of guilt from possession of recently stolen property as violation of defendant's privilege against self-incrimination, 88 A.L.R.3d 1178.

Applicability of best evidence rule to proof of ownership of allegedly stolen personal property in prosecution for theft, 94 A.L.R.3d 824.

Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime, 1 A.L.R.4th 481.

Criminal liability under state laws in connection with application for, or receipt of, public welfare payments, 22 A.L.R.4th 534.

Bank officer's or employee's misapplication of funds as state criminal offense, 34 A.L.R.4th 547.

Criminal liability for theft of, interference with, or unauthorized use of computer programs, files, or systems, 51 A.L.R.4th 971.

Cat as subject of larceny, 55 A.L.R.4th 1080.

Consideration of sales tax in determining value of stolen property or amount of theft, 63 A.L.R.5th 417.

What constitutes violation of 15 USCS § 714m(c), proscribing larceny or conversion of property owned by or pledged to commodity credit corporation, 109 A.L.R. Fed. 871.

52A C.J.S. Larceny §§ 1 to 29.

## 30-16-2. Robbery.

Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence.

Whoever commits robbery is guilty of a third degree felony.

Whoever commits robbery while armed with a deadly weapon is, for the first offense, guilty of a second degree felony and, for second and subsequent offenses, is guilty of a first degree felony.

**History: 1953 Comp., § 40A-16-2, enacted by Laws 1963, ch. 303, § 16-2; 1973, ch. 178, § 1.**

**Cross references.** — For definition of deadly weapon, *see* 30-1-12 NMSA 1978.

For aggravated assault, *see* 30-3-2 NMSA 1978.

For assault with intent to commit a violent felony, *see* 30-3-3 NMSA 1978.

**ANNOTATIONS**

I. GENERAL CONSIDERATION.
II. MULTIPLE PROSECUTIONS OR PUNISHMENTS.
III. ELEMENTS OF OFFENSE.
IV. INDICTMENT AND INFORMATION.
V. EVIDENCE.
A. IN GENERAL.
B. SUFFICIENCY.
VI. INSTRUCTIONS.
VII. SUBSEQUENT ARMED ROBBERY OFFENSES.

I. GENERAL CONSIDERATION.

**Specification of "anything of value".** — Because the use of the phrase "anything of value" in Section 30-16-2 NMSA 1978 to describe the stolen property does not specify what type of property theft will be punished, the state's legal theory of the crime supplies the "anything of value" element of robbery in cases where that crime is charged. *State v. Gutierrez*, 2011-NMSC-024, 150 N.M. 232, 258 P.3d 1024.

**Specification of "anything of value" resulted in double jeopardy.** — Where the child was charged with armed robbery for taking both an automobile and the keys to the automobile in violation of Section 30-16-2 NMSA 1978 and for the unlawful taking of a motor vehicle in violation of Section 30-16D-1 NMSA 1978, the child's conduct underlying both crimes was unitary; and both convictions required the same proof of the theft of the automobile, the unlawful taking of a motor vehicle conviction



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was subsumed by the robbery conviction and the child's conviction for both resulted in double jeopardy. *State v. Gutierrez*, 2011-NMSC-024, 150 N.M. 232, 258 P.3d 1024.

**Crime of violence.** — The district court properly included defendant's state robbery conviction as a violent felony under 18 U.S.C. § 924, the Armed Career Criminal Act. *United States v. Lujan*, 9 F.3d 890 (10th Cir. 1993).

**Increased penalty provision strictly construed.** — A more severe punishment on conviction for a second offense is deemed highly penal and therefore must be strictly construed. *State v. Garcia*, 1978-NMSC-039, 91 N.M. 664, 579 P.2d 790.

**Enhanced sentence not double jeopardy.** — Validly increasing a defendant's sentence after conviction according to the provisions of the enhancement statute does not amount to double jeopardy. *State v. Stout*, 1981-NMSC-045, 96 N.M. 29, 627 P.2d 871.

**Sentencing statutes not conflicting.** — Former Section 31-18-4 NMSA 1978 does not conflict with this section in providing that the first year of the statutory sentence for a felony, other than a capital felony, in commission of which a firearm was used, shall not be suspended; the two statutes are in harmony, each expressing a separate legislative intent. *State v. Wilkins*, 1975-NMCA-069, 88 N.M. 116, 537 P.2d 1012, cert. denied, 88 N.M. 319, 540 P.2d 249 (decided under prior law, statute repealed).

Even though this section provides an increased penalty for second or subsequent armed robberies, it does not conflict with the Habitual Offender Statute, 31-18-5 NMSA 1978 (now repealed), which applies only to a current felony "not otherwise punishable by death or life imprisonment," since second or subsequent armed robberies are punishable by life imprisonment. *State v. Roland*, 1977-NMCA-043, 90 N.M. 520, 565 P.2d 1037, cert. denied, 90 N.M. 637, 567 P.2d 486 (decided under prior law, statute repealed).

Habitual Offender Statute, 31-18-5 NMSA 1978 (now repealed), does not apply to second or subsequent armed robberies. *State v. Roland*, 1977-NMCA-043, 90 N.M. 520, 565 P.2d 1037, cert. denied, 90 N.M. 637, 567 P.2d 486 (decided under prior law, statute repealed).

**Intent of provision.** — The fact that the defendant was convicted in one criminal proceeding of two armed robberies charged under separate counts of one indictment was not sufficient to invoke the increased penalty provision of this section, which is intended to serve as a warning to first offenders and to provide increased punishment for those who persist in violations of the law after having been formally convicted. *State v. Garcia*, 1978-NMSC-039, 91 N.M. 664, 579 P.2d 790.

**When enhanced penalty proper.** — Any armed robbery offense committed subsequent to a conviction for armed robbery is a first degree felony calling for the enhanced penalty contemplated by this section. *State v. Garcia*, 1978-NMSC-039, 91 N.M. 664, 579 P.2d 790.

**Pretrial notice of enhanced sentence not required.** — The state is not required to give a defendant notice before trial on the substantive offense that enhancement may be sought after conviction. By filing a pleading seeking to enhance the defendant's sentence after conviction, the state complies with due process requirements. *State v. Stout*, 1981-NMSC-045, 96 N.M. 29, 627 P.2d 871.

## II. MULTIPLE PROSECUTIONS OR PUNISHMENTS.

**Single intent not applicable to robbery.** — Robbery is not merely a property crime, but a crime against a person and the robbery statute is designed to protect citizens from violence and to punish the use of violence. The legislature intended to allow separate charges for each individual against whom violence or the threat of violence is separately used. The unit of prosecution for robbery is not based on the defendant's intent. *State v. Bernal*, 2006-NMSC-050, 140 N.M. 644, 146 P.3d 289.

**Separate and discrete acts.** — Where defendant had the intent to steal only one victim's property, but used separate and discrete acts of force and threats of force against two victims in an attempt to obtain that property, multiple attempted robbery charges do not violate double jeopardy. *State v. Bernal*, 2006-NMSC-050, 140 N.M. 644, 146 P.3d 289.

**Single or multiple thefts.** — Where property is stolen from the same owner and from the same place by a series of acts, if each taking is the result of a separate, independent impulse, each is a separate crime; but if the successive takings are all pursuant to a single, sustained criminal impulse and in execution of a general fraudulent scheme, they together constitute a single larceny, regardless of the time which may elapse between each act. *State v. Allen*, 1955-NMSC-015, 59 N.M. 139, 280 P.2d 298.

**Question for jury.** — Whether acts of defendant and companions in stealing victim's vodka and later returning, whipping victim and stealing money, constituted two offenses or only one was a question of fact for the jury under instructions to disregard testimony of more than one taking if they found the takings constituted separate offenses. *State v. Allen*, 1955-NMSC-015, 59 N.M. 139, 280 P.2d 298.

**Two convictions for one conspiracy unconstitutional.** — Because the defendant robbed two different victims but only one conspiracy to commit the robberies existed, it was violation of double jeopardy to convict the defendant for two conspiracies, as he was punished twice for the same offense. *State v. Jackson*, 1993-NMCA-092, 116 N.M. 130, 860 P.2d 772, cert. denied, 115 N.M. 795, 858 P.2d 1274.

**Charge of larceny is necessarily included in charge of robbery.** *State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36.

**Legislative intent for separate punishments.** — As each offense includes one statutory element not included in the other, the presumption is that the legislature intended to punish separately the two offenses of aggravated assault and armed robbery. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

**Attempted robbery and conspiracy to commit robbery.** — Convictions for attempted robbery and conspiracy to commit robbery did not violate the constitutional prohibition against double jeopardy. *State v. Carrasco*, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

**Unitary conduct in commission of murder and robbery.** — Since the defendant's conduct in stabbing and robbing a cabdriver was unitary, the elements of armed robbery were subsumed by the elements of felony murder in the course of an armed robbery and conviction and sentencing of the defendant for both felony murder and the underlying felony of armed robbery violated double jeopardy. *State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228.

**Double jeopardy.** — *State v. Maes*, 1983-NMCA-073, 100 N.M. 78, 665 P.2d 1169 is no longer considered to be controlling authority, because the analysis contained therein predates, and has been replaced by, the two-pronged analysis of *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223 for determining whether a defendant's right to be free from double jeopardy is violated by his convictions. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

Convictions for felony murder and robbery, because they arise out of unitary conduct, violate the defendant's right to be free from double jeopardy. *State v. Duffy*, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807.

Where armed robbery provided the underlying felony for defendant's first degree murder conviction, the elements of the former crime were subsumed within the elements of the murder offense and, therefore, reversal of



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defendant's conviction and sentence for armed robbery was required. *State v. Foster*, 1999-NMSC-007, 126 N.M. 646, 974 P.2d 140.

Plaintiff who was convicted in a justice of the peace court (now replaced by magistrate courts) of petty misdemeanor of receiving stolen property, and was later convicted in the district court of the second degree felony of armed robbery, was not placed in double jeopardy, and the state was not barred or estopped from prosecuting and convicting him for the armed robbery. *State v. Gleason*, 1969-NMCA-054, 80 N.M. 382, 456 P.2d 215.

The defendant's acts of taking truck keys and using them to drive the truck away supported separate convictions for armed robbery and unlawful taking of a vehicle, and his double jeopardy right to be free from multiple punishment was not violated by his sentence for unlawful taking. *State v. McGruder*, 1997-NMSC-023, 123 N.M. 302, 940 P.2d 150.

**Grand larceny and armed robbery merged.** — Where the act of grand larceny was necessary to, or incidental to, the crime of armed robbery which the defendant committed, the offense of grand larceny was merged with the graver offense of armed robbery, and hence although the defendant was properly convicted of both armed robbery and grand larceny, he could not be doubly punished for both of those crimes. *State v. Quintana*, 1961-NMSC-108, 69 N.M. 51, 364 P.2d 120; *State v. Montano*, 1961-NMSC-174, 69 N.M. 332, 367 P.2d 95.

**Offense of receiving stolen property cannot be included within armed robbery.** *State v. Mares*, 1968-NMCA-042, 79 N.M. 327, 442 P.2d 817.

**No bar to subsequent prosecution.** — The facts necessary to sustain a conviction of receiving stolen property could not possibly sustain a conviction of armed robbery, which is essential to make a prior conviction a bar to a subsequent prosecution and conviction for a greater offense. *State v. Mares*, 1968-NMCA-042, 79 N.M. 327, 442 P.2d 817.

The fact that defendant pleaded guilty, or at least indicated his guilt and was thereupon convicted of receiving stolen property, which property later turned out to be a portion of the property taken by him in the armed robbery, in no way clothed him with immunity from being charged, tried and convicted of the far more serious offense of which he was guilty. *State v. Mares*, 1968-NMCA-042, 79 N.M. 327, 442 P.2d 817.

**No bar to dual punishments.** — The offenses of receiving stolen property and armed robbery fail to fall within the prohibition against punishment for more than one offense because the criminal intent essential to the felony of armed robbery is not an essential element of the petty misdemeanor of receiving stolen property. *State v. Mares*, 1968-NMCA-042, 79 N.M. 327, 442 P.2d 817.

**Merger with aggravated battery.** — Aggravated battery merges with a robbery offense when the defendant's intent to take a victim's purse includes an intent to injure the victim. *State v. Gammil*, 1989-NMCA-005, 108 N.M. 208, 769 P.2d 1299, *overruled in part on other grounds*, *State v. Fuentes*, 1994-NMCA-158, 119 N.M. 104, 888 P.2d 986, cert. denied, 119 N.M. 168, 889 P.2d 203 (1995).

**Offense of aggravated battery did not merge with armed robbery.** *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Separate punishment for armed robbery and aggravated battery is consistent with legislative intent and does not constitute double jeopardy. *State v. Fuentes*, 1994-NMCA-158, 119 N.M. 104, 888 P.2d 986, cert. denied, 119 N.M. 168, 889 P.2d 203 (1995).

**Aggravated battery does not constitute lesser included offense.** — The concept of lesser included offenses is not involved in a prosecution for armed robbery and aggravated battery because either offense can be committed without committing the other offense. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Elements of aggravated battery and armed robbery differ.** — Since taking the victim's purse was a fact required to be proved under the armed robbery charge, but not under the aggravated battery charge, and application of force was a fact required to be proved under the aggravated battery charge, while threatened use of force would be acceptable proof under the armed robbery charge, the elements of the two crimes were not the same. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Sentences for robbery and aggravated burglary proper.** — Since theft is a necessary element of robbery but it is not necessarily involved in aggravated burglary, which requires only the element of intent to commit felony or theft, while an unauthorized entry is an element of aggravated burglary but not of robbery, the crimes did not involve the same elements, and therefore, defendant could be sentenced for each of these crimes. *State v. Ranne*, 1969-NMCA-029, 80 N.M. 188, 453 P.2d 209.

**Consecutive sentences for armed robbery and false imprisonment were proper;** since the elements of the two crimes are dissimilar and the evidence required to establish each crime is independent, it was clear the crimes did not merge even when considered in light of the facts. *State v. Moore*, 1989-NMCA-073, 109 N.M. 119, 782 P.2d 91, cert. denied, 109 N.M. 54, 781 P.2d 782; *State v. Ibarra*, 1993-NMCA-040, 116 N.M. 486, 864 P.2d 302, cert. quashed, 117 N.M. 744, 877 P.2d 44 (1994), and cert. denied, 513 U.S. 1157, 115 S. Ct. 1116, 130 L. Ed. 2d 1080 (1995).

**Robbery of money and unlawful taking of vehicle not merged.** — Unlawful taking of a vehicle in violation of 64-9-4A, 1953 Comp., was not a necessary ingredient of offense of robbery of money by use or threatened use of force and violence; hence, defendant committed two separate and distinct criminal offenses, and the fact that they were committed on the same day, or even that one succeeded the other as part of one episode of criminal activity, did not cause them to merge. *State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36 (decided under prior law, statute repealed).

**Convictions for robbery and battery against a household member did not violate double jeopardy.** — Where defendant, who was a former employee of a restaurant, had an intimate romantic relationship with the victim who was the assistant manager of the restaurant; under the guise of returning the victim's cell phone, defendant approached the victim outside the restaurant, grabbed two money bags containing receipts of the restaurant that the victim intended to deposit; and when defendant grabbed the money bags, defendant struck the victim in the face and fled the scene, defendant's conviction for robbery and battery against a household member did not violate double jeopardy. *State v. Gutierrez*, 2012-NMCA-095, 286 P.3d 608, cert. denied, 2012-NMCERT-008.

## III. ELEMENTS OF OFFENSE.

**Criminal intent.** — Theft is an element of the crime of robbery and it includes the concept of criminal intent. *State v. Nelson*, 1971-NMCA-152, 83 N.M. 269, 490 P.2d 1242, cert. denied, 83 N.M. 259, 490 P.2d 1232.

**Aggravated assault and armed robbery distinguished.**— Aggravated assault contains an element that armed robbery does not: striking at a victim instead of just threatening him. Armed robbery contains an element that aggravated assault does not: taking victim's property with the intent to permanently deprive victim of the property. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

**Intent to steal.** — A specific criminal intent, the intent to steal, is an essential element of the crime of robbery,



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and the use or threatened use of force or violence does not eliminate such an intent as an element of that crime. *State v. Puga*, 1973-NMCA-079, 85 N.M. 204, 510 P.2d 1075.

**Element of "carrying away" may be satisfied without actual possession.** — The instant that a cashier, under coercion from the defendant, removes money from a cash register, the element of "carrying away" the money is satisfied, even though the defendant is apprehended prior to his actually taking possession of the money. *State v. Williams*, 1982-NMSC-041, 97 N.M. 634, 642 P.2d 1093, cert. denied, 459 U.S. 845, 103 S. Ct. 101, 74 L. Ed. 2d 91 (1982).

**Larceny plus force.** — The presence of violence, actual or constructive, is an essential ingredient of robbery, but not of larceny, so that robbery is a compound or aggravated larceny, composed of the crime of larceny from the person with the aggravation of force, actual or constructive, used in the taking. *State v. Wingate*, 1975-NMCA-035, 87 N.M. 397, 534 P.2d 776.

**Use or threatened use of force is essential element** of robbery under this section. *State v. Martinez*, 1973-NMCA-120, 85 N.M. 468, 513 P.2d 402.

**Armed robbery.** — Armed robbery may involve the use of force or the threat of force. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

**Force or intimidation is gist of offense** under this section. *State v. Sanchez*, 1967-NMCA-009, 78 N.M. 284, 430 P.2d 781.

**Amount or degree of force is not determinative factor** in establishing the use of force in robbery. *State v. Martinez*, 1973-NMCA-120, 85 N.M. 468, 513 P.2d 402; *State v. Segura*, 1970-NMCA-066, 81 N.M. 673, 472 P.2d 387, cert. denied, 81 N.M. 669, 472 P.2d 383.

**Compulsion the issue.** — Where force is charged under this section, the issue is not how much force was used, but whether the force was sufficient to compel the victim to part with his property. *State v. Sanchez*, 1967-NMCA-009, 78 N.M. 284, 430 P.2d 781.

**Force or intimidation is gist of offense.** — Under this section the force or fear must be the moving cause inducing the victim to part unwillingly with his property. *State v. Sanchez*, 1967-NMCA-009, 78 N.M. 284, 430 P.2d 781.

**Amount or degree of force is not determinative factor.** — The use or threatened use of force or violence is not, in and by itself, sufficient to sustain a conviction for robbery; it must be the lever by which the thing of value is separated from the person or immediate control of another. *State v. Baca*, 1971-NMCA-142, 83 N.M. 184, 489 P.2d 1182; *see also State v. Martinez*, 1973-NMCA-120, 85 N.M. 468, 513 P.2d 402.

**Implicit threat.** — Neither statutory language nor case law limit the term "threat" to explicit, verbal threats of force. *State v. Hernandez*, 2003-NMCA-131, 134 N.M. 510, 79 P.3d 1118, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

**Force used for mere escape not sufficient.** — Under the facts of the present case, the victim's money was removed and separated from his person by stealth, and the defendant's use of a weapon only after the money was separated from the victim was merely an action to hold victim at bay as he escaped from the motel. The use of force to retain property or to facilitate escape does not satisfy the force element necessary for the crime of robbery. Thus, there was insufficient evidence to support the defendant's conviction for armed robbery. *State v. Lewis*, 1993-NMCA-165, 116 N.M. 849, 867 P.2d 1231.

**Intimidating reasonable man.** — Under this section where fear or intimidation is charged, it is necessary to show that the circumstances were such as to cause a reasonable man to apprehend danger and that he could be reasonably expected to give up his property in order to protect himself. *State v. Sanchez*, 1967-NMCA-009, 78 N.M. 284, 430 P.2d 781.

**Assault and putting in fear.** — It was not necessary that the assault be "with force and violence," if it was done by "assault and putting in fear." *Territory v. Abeita*, 1873-NMSC-001, 1 N.M. 545 (decided under prior law).

**Armed robbery is not offense distinct from robbery;** the offense is robbery whether or not armed, and whether or not one is an accessory; "armed robbery" is a way to commit "robbery" and, if done in that way, the penalty is greater but the basic offense remains robbery. *State v. Roque*, 1977-NMCA-094, 91 N.M. 7, 569 P.2d 417, cert. denied, 91 N.M. 4, 569 P.2d 414.

**Robbery of a deceased person.** — Where defendant, with the assistance of others, robbed and then killed the victim, left the scene only to return several hours later to empty the victim's pocket of cash and pour gasoline throughout the residence and on the victim's body and set the residence on fire, defendant was properly convicted under the robbery statute for the second robbery, because the principle of law that one cannot be guilty of robbery if the victim is a deceased person does not apply where a robbery and homicide are a part of the same transaction and are so interwoven with each other as to be inseparable, and it is reasonable to conclude that defendant's second robbery and the subsequent arson were directly connected with the original robbery and killing, and therefore the second robbery can rationally be linked to the murder that enabled the robbery. *State v. Montoya*, 2017-NMCA-033, cert. denied.

**Degree of force a jury issue.** — The question of whether or not the snatching of the purse from the victim was accompanied by sufficient force to constitute robbery is a factual determination, within the province of the jury's discretion. *State v. Clokey*, 1976-NMSC-035, 89 N.M. 453, 553 P.2d 1260.

**Gun as deadly weapon.** — There was no room for argument that gun with which defendant was armed when he committed assault and robbery was not a dangerous weapon, whether loaded or unloaded. *State v. Montano*, 1961-NMSC-174, 69 N.M. 332, 367 P.2d 95.

**BB gun as a deadly weapon.** — Although a BB gun is not a deadly weapon as a matter of law, where the state was prepared to show that defendant pointed what looked to the victim to be a handgun at the victim's stomach area and demanded money, a jury could reasonably conclude that the gun and the manner of use indicated that it was a weapon that could inflict a dangerous wound. *State v. Fernandez*, 2007-NMCA-091, 142 N.M. 231, 164 P.3d 112.

**Ownership.** — The crime of robbery requires that the property taken be in the immediate control of another; however, the property need not be owned by the person from whom it was taken. *State v. Kenny*, 1991-NMCA-094, 112 N.M. 642, 818 P.2d 420, cert. denied, 112 N.M. 499, 816 P.2d 1121.

## IV. INDICTMENT AND INFORMATION.

**Reference to statute sufficient.** — Indictment charging defendant with "robbery while armed with a deadly weapon contrary to 40A-16-2, 1953 Comp. [Section 30-16-2 NMSA 1978]" was not deficient for failure to include phrase "by use or threatened use of violence" since such phrase was contained in the definition of, and was included in the word, robbery, and since an indictment was sufficient if it identified the crime charged by reference to the statute establishing the offense. *State v. Walsh*, 1969-NMCA-123, 81 N.M. 65, 463 P.2d 41.

**Alternative charges.** — Charge of both robbery and armed robbery in indictment was not duplicitous because all that was charged was that the one robbery was committed in two ways, namely, robbery without specification of the means and robbery by firearm, and such was



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not duplicity, but alternative pleading. *State v. Roque*, 1977-NMCA-094, 91 N.M. 7, 569 P.2d 417, cert. denied, 91 N.M. 4, 569 P.2d 414.

**Bill of particulars.** — Defendant's motion for bill of particulars should have been granted, furnishing name and type of store where the robbery allegedly occurred, whether a safe, vault or other depository was involved and the name of the person or persons allegedly intimidated or threatened, and failure to grant motion was reversible error. *State v. Graves*, 1963-NMSC-183, 73 N.M. 79, 385 P.2d 635 (decided under prior law).

## V. EVIDENCE.

### A. IN GENERAL.

**Admission of unavailable accomplice's tape recorded custodial police interview** was not harmless error because it provided key evidence directly inculpating defendant convicted of felony murder, and remaining circumstantial evidence against him, although strong, was disputed. *State v. Johnson*, 2004-NMSC-029, 136 N.M. 348, 98 P.3d 998, cert. denied, 543 U.S. 1177, 125 S. Ct. 1334, 161 L. Ed. 2d 162 (2005).

**Statement by defendant.** — Testimony that defendant said, "I was going to do something but I was too scared," while hearsay, was admitted without objection and, therefore, was competent in robbery prosecution. *State v. Baca*, 1971-NMCA-142, 83 N.M. 184, 489 P.2d 1182.

**Defendant's pecuniary condition.** — In prosecution for robbery while armed with dangerous weapon under Laws 1921, ch. 20, § 1 evidence of accused's pecuniary condition, on the question of motive, was properly excluded. *State v. Tapia*, 1937-NMSC-077, 41 N.M. 616, 72 P.2d 1087.

**Other crime.** — In prosecution for aggravated burglary, armed robbery and rape it was proper to go into details of another rape some five blocks away about an hour later, in order to establish both characteristic conduct and possession of knife and flashlight involved in first crime. *State v. Lopez*, 1969-NMCA-057, 80 N.M. 599, 458 P.2d 851, cert. denied, 80 N.M. 607, 458 P.2d 859, and cert. denied, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

**Other offenses.** — In armed robbery prosecution, reference in defendant's statement to two other offenses committed in a continuous sequence immediately preceding robbery, in light of alibi defense and identity issue was properly not deleted. *State v. Stout*, 1971-NMCA-028, 82 N.M. 455, 483 P.2d 510.

**Polygraph test results.** — Where armed robbery was committed in daylight in victim's home and took about 20 minutes, throughout which time victim was in presence of the perpetrator, and victim identified defendant as that person, admission into evidence of polygraph test results as per stipulation of the defense, without objection at trial, was not a denial of a fair trial or due process. *State v. Chavez*, 1969-NMCA-109, 80 N.M. 786, 461 P.2d 919 (decided under prior law).

**Exhibits admissible.** — There was no abuse of discretion on part of trial judge in admitting into evidence moneybags and contents stolen by robbers, along with jacket the same color as one worn by one robber and pistol which would match general description of robbery weapon, which items were found in car driven by defendant which he and companion abandoned, and checks stolen at same time, which were on person of companion. *State v. Beachum*, 1970-NMCA-119, 82 N.M. 204, 477 P.2d 1019.

**Weight of evidence.** — Defense argument that items of stolen property were not shown to have been in possession of defendants went to the weight to be accorded this evidence and not its admissibility, where evidence indicated that defendants had possession of the property in cafe and attempted to destroy or conceal it. *State v. Santillanes*, 1970-NMCA-003, 81 N.M. 185, 464 P.2d 915.

**Absence of alibi witness.** — Where defendant in trial for armed robbery proceeded to trial without objection, knowing that alibi witness was not present, without applying for writ of attachment or other process to secure her presence, and during hearing upon motion for new trial, trial court heard witness' testimony and concluded it was not probable that a different result would have been reached had her testimony been produced at trial, it could not be said that court abused its discretion in refusing to grant a new trial. *State v. Milton*, 1969-NMCA-099, 80 N.M. 727, 460 P.2d 257.

### B. SUFFICIENCY.

**Circumstantial evidence.** — Circumstantial evidence may suffice to establish the corpus delicti, and it may also suffice as proof of the identity of the perpetrator of a crime. *State v. Santillanes*, 1970-NMCA-003, 81 N.M. 185, 464 P.2d 915.

**Corpus delicti plus identity of robber.** — Proof sufficient to sustain a conviction of the crime of robbery involves proof of two distinct propositions, namely, the theft of something of value from the person of another or from the immediate control of another by use or threatened use of force or violence, and that such theft was done by the person or persons charged; in other words, proof of the corpus delicti and the identity of the accused. *State v. Santillanes*, 1970-NMCA-003, 81 N.M. 185, 464 P.2d 915.

**Corpus delicti proven.** — Corpus delicti in prosecution for armed robbery was sufficiently proven by testimony of complaining witness that he was the victim of a robbery by some person armed with a dangerous weapon. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

**Threatened use of force.** – Where a defendant points a note at the teller's cash drawer, keeps his other hand hidden from view, states that the teller should give him everything, and directs the teller not to use the alarm, a reasonable fact finder could conclude that this combination of actions threatened force and caused the teller to hand over the contents of the cash drawer *State v. Hernandez*, 2003-NMCA-131, 134 N.M. 510, 79 P.3d 1118, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

**Identification adequate.** — Where victim and witness of robbery perpetrated by two masked men described, on the night of the robbery, the robber and the clothes he was wearing, and at trial identified clothes found in defendant's apartment and defendant himself on basis of his posture, size and stoop, there was sufficient evidence to establish that defendant was one of the men involved in the robbery. *State v. Quintana*, 1961-NMSC-108, 69 N.M. 51, 364 P.2d 120; *see also State v. Montano*, 1961-NMSC-174, 69 N.M. 332, 367 P.2d 95.

**Victim identification.** — Where the victim positively identified the defendant, this testimony, alone, was held sufficient to sustain the conviction. *State v. Hunt*, 1972-NMCA-026, 83 N.M. 546, 494 P.2d 624.

**Exact role of defendant immaterial.** — Although evidence as to which of the robbers took the change was sparse and conflicting, this did not matter. The jury was instructed on aiding and abetting and the evidence was substantial that defendant was at least an aider and abettor of the robbery of the change. *State v. Urban*, 1974-NMCA-046, 86 N.M. 351, 524 P.2d 523.

**Mere presence insufficient.** — If proof disclosed only presence of defendant at scene of robbery it would not support a conviction. *State v. Santillanes*, 1970-NMCA-003, 81 N.M. 185, 464 P.2d 915.

Where state did not contend that defendant and his companions entered service station with any thought or intention of committing a crime, and acts relating to alleged robbery commenced after defendant had been shot and placed in his car, defendant could only have committed robbery as accessory or as aider and abettor and only if the record showed that defendant shared the criminal



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intent and purpose of the principals, mere presence without some outward manifestation of approval being insufficient. *State v. Salazar*, 1967-NMSC-187, 78 N.M. 329, 431 P.2d 62.

**Defendant's participation not shown.** — Evidence was insufficient to support verdict against individual who remained in back seat of car while two companions got out and beat and robbed person who had been given a ride, where there was no showing of a community of purpose to accomplish the crime, or any acts, words, signs or motions that would evince a design to encourage, incite or approve of the crime. *State v. Lucero*, 1957-NMSC-062, 63 N.M. 80, 313 P.2d 1052.

**Driver of getaway car.** — Testimony that complaining witness was beaten and robbed by two individuals with whom he had been riding, while driver of the car kept the motor running, saw what occurred and drove the getaway car was sufficient to find driver guilty as a principal. *State v. Lucero*, 1957-NMSC-062, 63 N.M. 80, 313 P.2d 1052.

**Mere presence insufficient.** — Verdict of attempted armed robbery was supported by substantial evidence where defendant was driver of car stationed outside liquor store and lounge awaiting commission of armed robbery by others, one of whom had pulled gun on manager and told him to lie down behind counter when robbery was abandoned after witness walked into store and started screaming. *State v. Paul*, 1972-NMCA-043, 83 N.M. 619, 495 P.2d 797.

**Firing at police.** — Shooting by defendant at police who were pursuing car in which he and robber were passengers which was fleeing scene of crime was evidence that defendant approved the robbery and shared the robber's criminal intent, and was sufficient to sustain armed robbery conviction. *State v. O'Dell*, 1973-NMCA-124, 85 N.M. 536, 514 P.2d 55.

**Exclusive possession of stolen property.** — Articles stolen from store by robbers which were found a short time later in front seat of car driven by defendant constituted evidence which would support conclusion that defendant was in exclusive possession of the property, despite fact that another person accompanied defendant in the car. *State v. Beachum*, 1970-NMCA-119, 82 N.M. 204, 477 P.2d 1019.

**Possession insufficient absent other facts.** — Although recently stolen property found in exclusive possession of defendant will not alone support a verdict of guilt, circumstances of flight, apprehension only minutes after robbery a short distance from scene of crime, and finding of clothing in car driven by defendant fitting description of eye witnesses, constituted sufficient circumstance of guilt in addition to possession of property stolen to support verdict. *State v. Beachum*, 1970-NMCA-119, 82 N.M. 204, 477 P.2d 1019.

**Seizure of weapon during commission of robbery.** — When defendant acquires a weapon during the commission of a robbery and then uses the weapon to harm or threaten the victim, or to acquire additional possessions from the victim, he is guilty of armed robbery. *State v. Hamilton*, 2000-NMCA-063, 129 N.M. 321, 6 P.3d 1043, cert. denied, 129 N.M. 249, 4 P.3d 1240.

The determination of whether a defendant who seizes a weapon during the commission of a robbery is armed "while" committing the robbery is highly fact sensitive. When the defendant acquires the weapon and how he uses it after its acquisition are paramount. *State v. Hamilton*, 2000-NMCA-063, 129 N.M. 321, 6 P.3d 1043, cert. denied, 129 N.M. 249, 4 P.3d 1240.

**Codefendant's use of weapon.** — Where several defendants were prosecuted for robbery, all tried as principals, proof that one was armed with dangerous weapon was sufficient to satisfy allegation of the information that all were so armed, and allegation that dangerous weapon was held in hands of one defendant was surplusage. *State v. Kimbell*, 1930-NMSC-075, 35 N.M. 101, 290 P. 792.

**Deadly character of weapon not established.** — In prosecution for robbery while armed with a deadly weapon, where defendant was convicted as an accessory, evidence that other man raised a tire tool, the size, length or weight of which was not described, over service station attendant's head "like a threat," without more, was insufficient for a determination that tire tool was capable of producing death or great bodily harm or a weapon with which dangerous wounds could be inflicted. *State v. Gonzales*, 1973-NMCA-153, 85 N.M. 780, 517 P.2d 1306.

**Surprise not equivalent to force.** — The defendant's motion for a directed verdict, questioning the sufficiency of the evidence for a conviction of armed robbery, should have been sustained, where witness only testified that he had been taken by surprise and not that by force or fear he had been induced to part with anything of value. *State v. Baca*, 1971-NMCA-142, 83 N.M. 184, 489 P.2d 1182.

**Jostling victim.** — Evidence of jostling or causing the victim to fall as property is taken is a sufficient showing to establish the use of force. *State v. Martinez*, 1973-NMCA-120, 85 N.M. 468, 513 P.2d 402.

**Evidence sufficient.** — Where the victim identified defendant in court and testified that defendant was in a white car that drove up alongside the victim, that defendant grabbed the victim's purse, and that the purse and its contents had value and a police officer testified that the victim's driver's license, which was in the purse, was found during an inventory search of a vehicle in which defendant was a passenger, there was sufficient evidence to support defendant's conviction for robbery. *State v. Verdugo*, 2007-NMCA-095, 142 N.M. 267, 164 P.3d 966, cert. quashed, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124.

Where defendant approached an employee of a hotel in the hotel laundry room, struck the employee in the face with a closed fist, beat the employee over the head with a hard plastic tube, took the keys to the hotel office, and took money from the hotel cash drawer, there was sufficient evidence that defendant formed the intent to commit robbery before or during the time defendant committed the battery on the employee. *State v. Lopez*, 2011-NMCA-071, 150 N.M. 34, 256 P.3d 977, cert. denied, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

Circumstantial evidence, sufficient to sustain the defendant's conviction for robbery, included evidence placing defendant and his distinctly colored car at the service station on the afternoon before the robbery, evidence that the robber departed the scene in this car after the robbery, the description of the robber given by a witness and defendant's own statement against his interest. *State v. Milton*, 1974-NMCA-094, 86 N.M. 639, 526 P.2d 436.

Where defendant had told witnesses before and after the murder that he was going to rob/had robbed someone and no money was found on murdered victim but there was evidence that victim had money, there was sufficient evidence introduced for jury to find that defendant committed armed robbery. *State v. Montoya*, 1984-NMSC-073, 101 N.M. 424, 684 P.2d 510.

Evidence was sufficient to support defendant's conviction as an accessory to armed robbery, where his confession, found to be voluntary, was corroborated by other evidence at trial. *Church v. Sullivan*, 942 F.2d 1501 (10th Cir. 1991).

Evidence that defendants intruded into husband and wife's home, beat and kicked the husband, and dragged both of them into a closet prior to absconding with money and jewelry, sufficed for a conviction for robbery. *State v. Ibarra*, 1993-NMCA-040, 116 N.M. 486, 864 P.2d 302, cert. quashed, 117 N.M. 744, 877 P.2d 44 (1994), and cert. denied, 513 U.S. 1157, 115 S. Ct. 1116, 130 L. Ed. 2d 1080 (1995).

Where there was evidence that defendant or accomplice or both assaulted victim and split the money taken from the victim, this is sufficient evidence for the conviction of robbery, as principal or as an accessory. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, *overruled on*



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*other grounds by State v. Rudy B.*, 2010-NMSC-045, 149 N.M. 22, 243 P.3d 726.

**Credibility and weight of evidence for jury.** — Where although the evidence concerning armed robbery was conflicting it substantially supported the verdict, the credibility of the witnesses and the weight to be given their testimony was for the jury to determine. *State v. Valles*, 1972-NMCA-027, 83 N.M. 541, 494 P.2d 619.

**Jury to determine facts.** — Whether defendant had gun in her hand as testified to by robbery victim was for the jury to resolve. *State v. Encee*, 1968-NMCA-012, 79 N.M. 23, 439 P.2d 240.

## VI. INSTRUCTIONS.

**Scope of appellate review regarding jury charge.** — Comparing the elements of aggravated assault, a compound offense that has three alternate ways of being charged, with armed robbery, another offense for which the statute contains alternatives, the appellate court looks only to the statutes as charged to the jury and disregards the inapplicable statutory elements. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

**Instructions substantially following language of statute was sufficient.** *State v. Lopez*, 1969-NMCA-057, 80 N.M. 599, 458 P.2d 851, cert. denied, 80 N.M. 607, 458 P.2d 859, and cert. denied, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

**More clarity possible.** — Court of appeals held that while an instruction in robbery prosecution on the requisite intent to steal would have been a clearer statement as to that element, an instruction in the language of the statute was legally sufficient. *State v. Puga*, 1973-NMCA-079, 85 N.M. 204, 510 P.2d 1075.

**Use or threat of violence.** — Since "use or threatened use of force or violence" is an essential element of this crime, a failure to instruct on this essential element is reversible error. *State v. Walsh*, 1969-NMCA-123, 81 N.M. 65, 463 P.2d 41.

**Putting victim in fear.** — Instruction requiring acquittal if jury believed that defendant did not with force and violence take the property would have been erroneous since jury might have been satisfied that there was an "assault and putting in fear," which with other essential ingredients of the offense was all that was requisite for a conviction. *Territory v. Abeita*, 1873-NMSC-001, 1 N.M. 545 (decided under prior law).

**Intent adequately covered.** — Defendant's argument that since he was charged with being accessory to an attempted armed robbery and where there was no evidence of a demand for money or goods, he was entitled to a specific intent instruction within the general intent instruction was without merit where a separate instruction on attempt was given as well as an instruction on armed robbery setting out requirement of specific intent. *State v. Paul*, 1972-NMCA-043, 83 N.M. 619, 495 P.2d 797.

**Train hold-up.** — The phrase "holding up," when used in instructions in relation to an attack upon a train, meant the forcible detention of a train with intent to commit a robbery or some other felony. *Territory v. McGinnis*, 1900-NMSC-019, 10 N.M. 269, 61 P. 208, *overruled on other grounds by State v. Deltenre*, 1966-NMSC-187, 77 N.M. 497, 424 P.2d 782 (decided under prior law).

**Fruits of crime.** — Since a determination by jury that defendant had in his possession the fruits of the crime does not justify a finding of guilt unless there is evidence of other circumstances connecting the defendant with the offense, the jury should also be instructed as to the requirement of proof by the state of other circumstances by which the defendant is linked to the crime charged. *State v. Graves*, 1963-NMSC-183, 73 N.M. 79, 385 P.2d 635.

**Possession of unidentified money.** — The court in its instructions in robbery case, must explain to the jury the rules of law with respect to possession of unidentified money, so that the jury will have a guide in making its determination of what weight, if any, is to be given to this type of evidence; the jury must be satisfied beyond a reasonable doubt that the defendant had in his possession the actual fruits of the crime, or a part thereof. *State v. Graves*, 1963-NMSC-183, 73 N.M. 79, 385 P.2d 635.

**Entrapment.** — Where there was no evidence that informer who drove getaway car either persuaded or induced defendant to commit armed robbery, defendant was not entitled to instruction on entrapment. *State v. Sweat*, 1972-NMCA-092, 84 N.M. 122, 500 P.2d 207.

**Instruction on larceny required.** — Because robbery is an aggravated larceny, larceny is necessarily included within the offense of robbery, so that defendant had the right to have instructions on the lesser included offenses of larceny submitted to the jury, since there was evidence from several defense witnesses which tended to establish larceny. *State v. Wingate*, 1975-NMCA-035, 87 N.M. 397, 534 P.2d 776.

An instruction on larceny should have been given since there was evidence that the defendant's shoving of the victim was part of his drunkenness, and that the purse was taken without force sufficient to constitute robbery. *State v. Curley*, 1997-NMCA-038, 123 N.M. 295, 939 P.2d 1103.

**Charge on lesser offense not supported.** — Where testimony of victim did not give rise to any other conclusion than that defendant committed the robbery while armed, defendant was not entitled to have the jury instructed on the lesser offenses because there was no evidence to establish them. *State v. Sweat*, 84 N.M. 122, 500 P.2d 207.

**Directing verdict.** — In a prosecution for unarmed robbery, a motion for a directed verdict is to be determined by viewing the evidence in the light most favorable to the state. *State v. Sanchez*, 1967-NMCA-009, 78 N.M. 284, 430 P.2d 781.

**Self-defense instruction refused since defendant entered store with weapon, prepared to rob.** — Where a murder defendant entered a store with a weapon, prepared to commit armed robbery if the circumstances permitted it, such facts can only reasonably point to the commission of a felony in a situation which is, of itself, "inherently or foreseeably dangerous to human life," and a self-defense instruction is properly refused. *State v. Chavez*, 1983-NMSC-037, 99 N.M. 609, 661 P.2d 887.

**Voluntary intoxication.** – Where the defendant presented no evidence that he was intoxicated to any degree, let alone to the point that it affected his ability to form the necessary mental state for robbery, a specific-intent crime, he was not entitled to an instruction on voluntary intoxication; mere evidence that the defendant consumed an intoxicant is not enough to warrant an intoxication instruction. *State v. Hernandez*, 2003-NMCA-131, 134 N.M. 510, 79 P.3d 1118, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

## VII. SUBSEQUENT ARMED ROBBERY OFFENSES.

**Subsequent armed robbery offenses.** — Proof of prior armed robbery convictions should be presented to the judge and established by a preponderance of the evidence. *State v. Villegas*, 2009-NMCA-023, 145 N.M. 592, 203 P.3d 123, cert. denied, 2009-NMCERT-001, 145 N.M. 655, 203 P.3d 870.

**Prior armed robbery not also used with habitual offender statute.** — A prior armed robbery conviction may not be used for ehancement under both this section and the habitual offender provision; accordingly, in the case of a defendant who has one prior burglary, one prior armed robbery, and one current armed robbery, the sentence for the current offense, discounting any reduction for mitigating circumstances, should be that for a second



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armed robbery plus a one-year enhancement for the prior burglary under the habitual offender statute. *State v. Keith*, 1985-NMCA-012, 102 N.M. 462, 697 P.2d 145, cert. denied, 102 N.M. 492, 697 P.2d 492.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

For note, "Search and Seizure - Automobile Inventory Search Exception to the Fourth Amendment Expanded by State v. Williams," see 13 N.M.L. Rev. 689 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 67 Am. Jur. 2d Robbery §§ 1 to 9.

Taking property from the person by stealth as robbery, 8 A.L.R. 359.

What constitutes attempt to commit robbery, 55 A.L.R. 714.

Other robberies, admissibility of evidence of, 42 A.L.R.2d 854.

Gambling or lottery paraphernalia as subject of robbery, 51 A.L.R.2d 1396.

Stolen money or property as subject of robbery, 89 A.L.R.2d 1435.

Purse snatching as robbery or theft, 42 A.L.R.3d 1381.

Robbery by means of toy or simulated gun or pistol, 81 A.L.R.3d 1006.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 A.L.R.3d 1309.

Use of force or intimidation in retaining property or in attempting to escape, rather than in taking property, as element of robbery, 93 A.L.R.3d 643.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 A.L.R.3d 287.

Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime, 1 A.L.R.4th 481.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 7 A.L.R.4th 607.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

"Intimidation" as element of bank robbery under 18 USCS § 2113(a), 63 A.L.R. Fed. 430, 163 A.L.R. Fed. 225.

77 C.J.S. Robbery § 1 et seq.

## 30-16-3. Burglary.

Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein.

A. Any person who, without authorization, enters a dwelling house with intent to commit any felony or theft therein is guilty of a third degree felony.

B. Any person who, without authorization, enters any vehicle, watercraft, aircraft or other structure, movable or immovable, with intent to commit any felony or theft therein is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-16-3, enacted by Laws 1963, ch. 303, § 16-3; 1971, ch. 58, § 1.**

**Cross references.** — For assault with intent to commit burglary, *see* 30-3-3 NMSA 1978.

For instruction on the essential elements of burglary, *see* UJI 14-1630 NMRA.

For instruction on aiding or abetting as accessory to crime other than attempt and felony murder, *see* UJI 14-2822 NMRA.

ANNOTATIONS

I. GENERAL CONSIDERATION.
II. MULTIPLE PROSECUTIONS.
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A. IN GENERAL.
B. ADMISSIBILITY.
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VI. INSTRUCTIONS.

I. GENERAL CONSIDERATION.

**Rule of *ejusdem generis*.** — Courts should use the *ejusdem generis* rule, which is codified in Section 12-2A-20 NMSA 1978, when interpreting the outer limits of the prohibited space that is protected by the burglary statute. *State v. Office of the Public Defender*, 2012-NMSC-029, 285 P.3d 622.

**Rule of lenity.** — When deciding whether or not a burglary charge is appropriate, courts and district attorneys must consider whether or not this is the type of entry Section 30-16-3 NMSA 1978 was intended to deter. Any doubts about the construction of Section 30-16-3 NMSA 1978 must be resolved in favor of lenity. *State v. Office of the Public Defender*, 2012-NMSC-029, 285 P.3d 622.

**New rule, narrowing the scope of what conduct is prosecuted under the burglary statute, should be applied retroactively.** — Where defendant was charged and convicted of felony burglary in 2010, and where, in 2015, defendant was again charged and convicted of numerous offenses, and where the state sought to enhance defendant's 2015 sentence pursuant to the Habitual Offender Act, § 31-18-17 NMSA 1978, relying on defendant's 2010 felony conviction, and where defendant claimed that his 2010 burglary conviction should not be used to enhance his 2015 sentence, based on the New Mexico supreme court's decision in *State v. Office of Public Defender ex rel. Muqqddin*, 2012-NMSC-029, which held for the first time that the act of penetrating a vehicle's gas tank and removing gas therefrom did not constitute burglary under § 30-16-3 NMSA 1978, the district court erred in determining defendant to be a habitual offender as alleged



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by the state and enhancing defendant's sentence in the 2015 case, because *Muqqddin* announced a new rule that altered the range of conduct or the class of persons that the law punishes, and should therefore be applied retroactively. *State v. Wood*, 2022-NMCA-009.

**Purpose to protect possessory rights.** — The statutory offense of burglary is one against the security of property, and its purpose is to protect possessory rights. *State v. Sanchez*, 1987-NMCA-035, 105 N.M. 619, 735 P.2d 536, cert. denied, 105 N.M. 618, 735 P.2d 536.

**Legislative consolidation intended.** — A comparison of this section and the statutes concerning burglary and unlawful entry that existed prior to 1963 (40-9-1, 40-9-6, 40-9-7, 40-9-10, 1953 Comp.) indicates that the new section is a consolidation of the old statutes and does not evidence an intention of the legislature to exclude from the crime of burglary unauthorized entries to structures other than dwellings. It is clear that he legislature intended the term "other structure" to be construed in its literal sense and that it not be limited by the specific language preceding it. It is proper for the court to consider prior and subsequent statutes in pari materia to determine legislative intent. *State v. Gonzales*, 1967-NMSC-168, 78 N.M. 218, 430 P.2d 376.

**Common law expanded.** — Section 40-9-6, 1953 Comp., defines the offense of burglary so as to expand the common-law definition of that offense to include the breaking and entering of offices, shops and warehouses. *Martinez v. United States*, 295 F.2d 426 (10th Cir. 1961) (decided under prior law).

**Crime of violence.** — The offense defined under this section of breaking and entering a dwelling house or other building with intent to commit a felony therein was a crime of violence for purposes of former 15 U.S.C. § 902(e) relating to the transporting of a firearm in interstate commerce after conviction of a crime of violence. *Martinez v. United States*, 295 F.2d 426 (10th Cir. 1961) (decided under prior law).

The district court properly included defendant's state burglary conviction as a violent felony under 18 U.S.C. § 924, the Armed Career Criminal Act. *United States v. Lujan*, 9 F.3d 890 (10th Cir. 1993).

**Prosecution of Indians limited.** — Where a federal statute limiting the definition and punishment of burglary by an Indian within Indian country to the laws of the several states in force at the time of its enactment, and there was no law of New Mexico in effect at that time defining a crime of burglary as it was charged in the information, defendant's motion to dismiss the information was sustained. *United States v. Gomez*, 250 F. Supp. 535 (D.N.M. 1966).

II. MULTIPLE PROSECUTIONS.

**Several burglaries.** — The burglary of several businesses in one building at approximately the same time constitutes not one offense, but several, and a defendant may be prosecuted for all such offenses. *State v. Ortega*, 1974-NMCA-060, 86 N.M. 350, 524 P.2d 522.

**When one commits burglary of dwelling house one commits criminal trespass** based on that entry. *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160, superseded by statute, *State v. McCormack*, 1984-NMCA-042, 101 N.M. 349, 682 P.2d 742.

**Two crimes shown.** — Evidence that a conspiracy to commit burglary was entered on the evening of November 16th, that the conspirators unsuccessfully attempted to carry out the conspiracy at 10:30 p.m. of that day, and that the burglary was performed between 9:00 and 9:30 a.m. of November 17th, showed two distinct crimes, and there was no factual basis for the contention that they were either the same or so similar that multiple convictions were prohibited. *State v. Watkins*, 1975-NMCA-126, 88 N.M. 561, 543 P.2d 1189, cert. denied, 89 N.M. 6, 546 P.2d 71.

**Larceny not lesser included offense.** — Larceny is not a lesser included offense of burglary, since each crime includes an element not contained in the other. Burglary requires entry into a dwelling, whereas larceny does not, and larceny requires an actual taking, whereas burglary does not. *Yparrea v. Dorsey*, 64 F.3d 577 (10th Cir. 1995).

**Larceny and burglary not merged.** — Prosecution for burglary and larceny arising out of the same event does not constitute double jeopardy since there is no merger when an accused is charged with both burglary and larceny though the charges stem from one transaction or event. *State v. Deats*, 1971-NMCA-089, 82 N.M. 711, 487 P.2d 139.

Since stealing is a necessary element of larceny but is not a necessary element of burglary, larceny is not necessarily involved in a burglary, and the two crimes do not merge, hence, defendant could be convicted of and sentenced for both crimes. *State v. McAfee*, 1967-NMSC-139, 78 N.M. 108, 428 P.2d 647.

**Possession of burglary tools** is not necessarily involved in burglary. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927.

**Burglary and possession of burglary tools does not merge.** — The crime of possession of burglary tools does not merge with the crime of burglary, and hence defendant's sentence for each of these crimes did not constitute double punishment. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927.

As the "overt act" required in the general attempt statute 30-28-1 NMSA 1978 did not necessarily involve possession of burglary tools, the crime of attempt to commit a felony of burglary did not merge with the crime of possession of burglary tools, and hence, defendant's sentence for each of these crimes did not constitute double punishment. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927.

**Convictions for burglary and receiving improper.** — The state cannot convict a person under one indictment or information of receiving stolen property, and then subsequently convict him under another indictment or information of burglary, if the burglary conviction is dependent upon a theft by him of the same property, and he is shown to have been the person who actually took and asported the property during the burglarious entry. *State v. Gleason*, 1969-NMCA-054, 80 N.M. 382, 456 P.2d 215.

**"Disposal" shown.** — Where the record supported the conclusion that the defendant "disposed of " property which he may have also stolen, as the theft and disposal were different acts, the principle that one who is a thief cannot be convicted of "receiving" the property he stole because the theft and receipt are the same act was inapplicable. *State v. Mitchell*, 1974-NMCA-057, 86 N.M. 343, 524 P.2d 206.

**Entry of a vehicle.** — The use of a nail to penetrate a vehicle's gas tank constitutes an entry under Section 30-16-3 NMSA 1978. *State v. Muqqddin*, 2010-NMCA-069, 148 N.M. 845, 242 P.3d 412, cert. granted, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

Where, without the permission of the owner of a van to enter the van, defendant used a nail to penetrate the gas tank to drain gas from the tank, defendant was guilty of burglary. *State v. Muqqddin*, 2010-NMCA-069, 148 N.M. 845, 242 P.3d 412, cert. granted, 2010-NMCERT-008, 148 N.M. 943, 242 P.3d 1289.

**Entry into a retail store.** — As a general rule, the court will presume that retail stores are open to the public during business hours and, therefore, an individual who enters a retail store with the intent to shoplift is not guilty of burglary. *State v. Baca*, 2014-NMCA-087, cert. granted, 2014-NMCERT-008.



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Where a group of people, including defendant, entered Costco; no person in the group was a member of Costco, but one person showed the Costco greeter a membership card that belonged to another person; one person in the group placed items in a bag that other persons in the group pointed out; at the checkout line, the group purchased only water and ice cream; Costco was a membership warehouse; one had to be a member or a guest of a member to enter the store; and "member only" signs were posted outside Costco as notice to the public that only members could enter, defendant's entry into Costco, even assuming that defendant was aware that the person presenting the membership card was a non-member, was not sufficient as a matter of law to establish an unauthorized entry and the crime of burglary. *State v. Baca*, 2014-NMCA-087, cert. granted, 2014-NMCERT-008.

III. ELEMENTS OF OFFENSE.

**Entry into separate residence of spouse.** — Section 40-3-3 NMSA 1978 does not provide immunity from prosecution for burglary of a spouse's separate residence. *State v. Parvilus*, 2014-NMSC-028, *rev'g* 2013-NMCA-025, 297 P.3d 1228.

Where, because of domestic problems, defendant rented a separate apartment for defendant's spouse; the parties agreed that the apartment was the spouse's separate residence, that defendant would not have a key to the apartment, and that defendant did not have the spouse's permission to enter the apartment; and several months later, defendant entered the spouse's apartment through a window, 40-3-3 NMSA 1978 did not preclude defendant's conviction for burglary of the spouse's separate dwelling. *State v. Parvilus*, 2014-NMSC-028, *rev'g* 2013-NMCA-025, 297 P.3d 1228.

**The plain language of Section 40-3-3 NMSA 1978** renders inter-spousal burglary an impossibility, because the New Mexico burglary statutes protect the possessory right to exclude and Section 40-3-3 NMSA 1978 dictates that spouses have no such right to exclude the other spouse. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-001.

**Entry into residence of estranged spouse.** — Where defendant entered defendant's estranged spouse's apartment without permission, kidnapped the victim, and killed the victim, Section 40-3-3 NMSA 1978 prohibited defendant's spouse from excluding defendant from the spouse's apartment and defendant's entry into the apartment, even with felonious purpose, did not constitute burglary as a matter of law. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-001.

**Parts of protected spaces.** — An entry into a part of the enumerated structures in Section 30-16-3 NMSA 1978 is not equal to an entry of that structure itself. *State v. Office of the Public Defender*, 2012-NMSC-029, 285 P.3d 622.

**Protected spaces must be enclosed.** — The right to exclude others is the possessory interest with which burglary is primarily concerned. For an area to be considered prohibited space under Section 30-16-3 NMSA 1978, it must have some sort of enclosure. *State v. Office of the Public Defender*, 2012-NMSC-029, 285 P.3d 622.

**A vehicle's gas tank and wheel wells are not protected spaces.** — A vehicle's gas tank and wheel wells do not constitute a protected space under Section 30-16-3 NMSA 1978 and cannot be burglarized under the statute. *State v. Office of the Public Defender*, 2012-NMSC-029, 285 P.3d 622.

**A vehicle's gas tank is not a protected space.** — Where defendant used a piece of metal to puncture a gas tank and took the gas, the defendants did not commit burglary. *State v. Office of the Public Defender*, 2012-NMSC-029, 285 P.3d 622, *rev'g* 2010-NMCA-069, 148 N.M. 845, 242 P.3d 412.

**The use of a nail to penetrate a vehicle's gas tank constitutes an entry under Section 30-16-3 NMSA 1978.** *State v. Muqqddin*, 2010-NMCA-069, 148 N.M. 845, 242 P.3d 412, cert. granted, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

**Entry of a vehicle.** — Where, without the permission of the owner of a van to enter the van, defendant used a nail to penetrate the gas tank to drain gas from the tank, defendant was guilty of burglary. *State v. Muqqddin*, 2010-NMCA-069, 148 N.M. 845, 242 P.3d 412, cert. granted, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

**A vehicle's wheel wells are not a protected space.** — Where defendant removed the two rear wheels of a vehicle and the lug nuts of the front wheels, the defendants did not commit burglary. *State v. Office of the Public Defender*, 2012-NMSC-029, 285 P.3d 622.

**Structure.** — Where the defendant took items from a covered area that was open on three sides but directly attached to the wall of a store; the area was covered by a metal roof that was supported by metal posts; the area was used to store merchandise and equipment; a door from the main building led from the store to the covered area; and a chain-link fence topped with barbed wire abutted the open yard that surrounded the covered area, the covered area constituted a structure. *State v. Gonzales*, 2008-NMCA-146, 145 N.M. 110, 194 P.3d 725, cert. denied, 2008-NMCERT-009, 145 N.M. 257, 196 P.3d 488.

**Burglary is offense against security of building,** and when that security is breached by the penetration of an instrument into the building there has been an entry within the meaning of this statute. *State v. Tixier*, 1976-NMCA-054, 89 N.M. 297, 551 P.2d 987.

**Entry.** — Although New Mexico no longer defines burglary in terms of a "breaking," the offense of burglary remains an offense against the security of the property which is entered. *State v. Ortiz*, 1978-NMCA-074, 92 N.M. 166, 584 P.2d 1306, cert. denied, 92 N.M. 79, 582 P.2d 1292.

In establishing a burglary, any penetration, however slight, of the interior space is sufficient to constitute entry. *State v. Reynolds*, 1990-NMCA-122, 111 N.M. 263, 804 P.2d 1082, cert. denied, 111 N.M. 164, 803 P.2d 253 (1991).

**Unlawful entry of building in nighttime constitutes "burglary,"** the punishment being dependent upon the degree of the offense. *Miller v. Cox*, 1960-NMSC-108, 67 N.M. 414, 356 P.2d 231 (decided under prior law).

**Breaking not required.** — The requirement of a "breaking" is no longer included in New Mexico's statutory definition of burglary, which is not concerned with distinctions between evidence of breaking as opposed to evidence of entering. *State v. Tixier*, 1976-NMCA-054, 89 N.M. 297, 551 P.2d 987.

**Entry plus intent.** — The crime of burglary is complete when the defendant makes an unauthorized entry with intent to commit any felony or theft. *State v. Madrid*, 1972-NMSC-016, 83 N.M. 603, 495 P.2d 383; *State v. Gutierrez*, 1971-NMCA-058, 82 N.M. 578, 484 P.2d 1288, cert. denied, 82 N.M. 562, 484 P.2d 1272.

The crime of burglary is complete when there is an unauthorized entry with the intent to commit a felony or theft in the vehicle or structure entered. *State v. Wilkerson*, 1972-NMCA-067, 83 N.M. 770, 497 P.2d 981; *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927; *State v. Ford*, 1970-NMCA-061, 81 N.M. 556, 469 P.2d 535.

In order to prove the crime of burglary, it is required to prove unlawful entry of a structure with the necessary intent. *State v. Hinojos*, 1967-NMCA-003, 78 N.M. 32, 427 P.2d 683.

The mere entry of an occupied dwelling house in the nighttime with intent to commit larceny is burglary. *State v. Ocanas*, 1956-NMSC-106, 61 N.M. 484, 303 P.2d 390.



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**Unauthorized entry required.** — A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time, open to the public or the actor is licensed or privileged to enter. *State v. Sanchez*, 1987-NMCA-035, 105 N.M. 619, 735 P.2d 536, cert. denied, 105 N.M. 618, 735 P.2d 536.

**Entry into locked office adjacent to public motel lobby constituted unauthorized entry.** — Where defendant's accomplice entered a secured clerk's office, separate from the public motel lobby, by climbing over a chest-high counter top, broke the lock on a cash drawer and removed $250, the accomplice's conduct constituted an unauthorized entry under the burglary statute, because the clerk's office was designed to remain separate from the public lobby area, and the enclosure's physical characteristics were such that a reasonable person would expect some protection from unauthorized intrusions. *State v. Mestas*, 2016-NMCA-047.

**Burden on state to prove unauthorized entry.** — It is not necessary that every person who could consent to entry testifies that consent was given as the burden on the state is to prove unauthorized entry beyond a reasonable doubt. *State v. Mireles*, 1971-NMCA-027, 82 N.M. 453, 483 P.2d 508.

**Types of unauthorized entry.** — A trespassory entry would be an unauthorized entry, as would an entry without consent or on the basis of an unauthorized consent. *State v. Ortiz*, 1978-NMCA-074, 92 N.M. 166, 584 P.2d 1306, cert. denied, 92 N.M. 79, 582 P.2d 1292.

**Unauthorized entry.** — Entry by fraud, deceit or pretense, whether characterized as trespassory, without consent or without authorized consent, is an unauthorized entry, similar to the constructive "breaking" at common law. *State v. Ortiz*, 1978-NMCA-074, 92 N.M. 166, 584 P.2d 1306, cert. denied, 92 N.M. 79, 582 P.2d 1292.

**Burglary statute intended to punish harmful entry.** — The burglary statute has a greater purpose than merely protecting property, but it is also the invasion of privacy and the victim's feeling of being personally violated that is the harm caused by the modern burglar and the evil that our society is attempting to deter through the burglary statute; first and foremost, it is the harmful entry that is being punished under this section. State v. Archuleta, 2015-NMCA-037, *overruling State v. Tower*, 2002-NMCA-109, 133 N.M. 32, 59 P.3d 1264, and cert. granted, 2015-NMCERT-001.

Where defendant violated an order of no trespass by entering an otherwise open public shopping area with the intent to commit a theft, his conduct did not implicate the feeling of violation and vulnerability generally associated with the crime of burglary and did not constitute the type of harmful entry required for a violation of the burglary statute. *State v. Archuleta*, 2015-NMCA-037, *overruling State v. Tower*, 2002-NMCA-109, 133 N.M. 32, 59 P.3d 1264, and cert. granted, 2015-NMCERT-001.

**Effect of trespass notice.** — A defendant, previously given trespass notice by a store that any subsequent entry would be considered criminal trespass, who later enters the store for the purpose of shoplifting, may be charged and convicted for burglary, as the entry was unauthorized. *State v. Tower*, 2002-NMCA-109, 133 N.M. 32, 59 P.3d 1264, cert. denied, 133 N.M. 30, 59 P.3d 1262.

**Burglary of vehicle separate offense from taking or tampering.** — The offense of burglary of a motor vehicle requires an unauthorized entry. Unauthorized entry is not an element of either unlawful taking of a vehicle, Section 66-3-504 NMSA 1978 (now Section 30-16D-1 NMSA 1978) , or tampering with a vehicle, Section 66-3-506 NMSA 1978 (now Section 30-16D-5 NMSA 1978) . This difference in the elements of the offenses is sufficient ground to reject the defendant's contention that the statutes are the same and that he should not be charged with the more general burglary charge. *State v. Hernandez*, 1993-NMCA-132, 116 N.M. 562, 865 P.2d 1206, cert. denied, 116 N.M. 801, 867 P.2d 1183.

**Penetration by instrument.** — Evidence of a break-in by use of an instrument which penetrates into the building is evidence of entry into the building, and the sufficiency of this evidence is not destroyed by a failure to prove that the instrument was used to steal something from the building or to commit another felony. *State v. Tixier*, 1976-NMCA-054, 89 N.M. 297, 551 P.2d 987.

**Unoccupied structure still "dwelling house".** — A structure, even if unoccupied for a year, does not lose its character as a "dwelling house" for purposes of Subsection A, unless there is evidence that the last tenant has abandoned the structure with no intention of returning. *State v. Ervin*, 1981-NMCA-068, 96 N.M. 366, 630 P.2d 765.

**Attached garage with no opening to house was part of dwelling house** within the meaning of this section because the garage was a part of the habitation, directly contiguous to and a functioning part of the residence. *State v. Lara*, 1978-NMCA-112, 92 N.M. 274, 587 P.2d 52, cert. denied, 92 N.M. 260, 586 P.2d 1089.

**"Other structure" construed literally.** — Under this section the legislature intended the term "other structure" to be construed in its literal sense and that it not be limited by the specific language preceding it. *State v. Gonzales*, 1967-NMSC-168, 78 N.M. 218, 430 P.2d 376.

**Food store included.** — Under this section ejusdem generis is resorted to merely as an aid in determining legislative intent and does not foreclose the inclusion of a food store within the term "other structure." *State v. Gonzales*, 1967-NMSC-168, 78 N.M. 218, 430 P.2d 376.

**Entry into soft drink vending machine.** — The term "structure" as set forth in this section does not include the unauthorized entry into a soft drink vending machine located outside a building or other structure with intent to commit a felony or theft within. *State v. Bybee*, 1989-NMCA-071, 109 N.M. 44, 781 P.2d 316.

**Entering open store.** — A person who enters a store open to the public with intent to shoplift or commit larceny is not guilty of burglary. *State v. Rogers*, 1972-NMCA-053, 83 N.M. 676, 496 P.2d 169.

**Entry into inner door.** — Where there is lawful entry into a building, an unauthorized entry into an inner door of any unit with the necessary intent may be prosecuted for burglary. *State v. Ortega*, 1974-NMCA-060, 86 N.M. 350, 524 P.2d 522.

**Reaching into bed of pickup truck** with the intent to commit a felony may constitute a burglary within the meaning of this section. *State v. Rodriguez*, 1984-NMCA-034, 101 N.M. 192, 679 P.2d 1290, cert. denied, 101 N.M. 189, 679 P.2d 1287.

**Post office box deemed "structure".** — A post office box was a "structure" within the meaning of this section. The separately secured area that constituted the structure was the area consisting of the mail sorting room and the post office boxes, the backs of which opened into the sorting room. *State v. Gregory*, 1993-NMCA-146, 117 N.M. 104, 869 P.2d 292, cert. denied, 117 N.M. 215, 870 P.2d 753 (1994).

**Fence does not constitute "structure"** within the meaning of this section. *State v. Foulenfont*, 1995-NMCA-028, 119 N.M. 788, 895 P.2d 1329, cert. quashed, 120 N.M. 498, 903 P.2d 240.

**Identity of place.** — The identity of the place burglarized was an essential element of crime denounced by Laws 1853-1854, p. 100, §§ 11 (40-9-6, 1953 Comp., relating to breaking and entering into places other than dwellings). *State v. Salazar*, 1938-NMSC-021, 42 N.M. 308, 77 P.2d 633 (decided under prior law).

**Intent to commit felony under burglary statute includes general criminal intent.** — When one intends to commit a felony or theft under the burglary statute, one



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also has the general criminal intent of purposely doing an act even though he may not know the act is unlawful. *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160.

**Specific intent to commit felony or theft is essential element** of the state's case to be proved beyond a reasonable doubt, the gravamen of the offense of burglary being the intent with which the structure is entered. *State v. Elliott*, 1975-NMCA-087, 88 N.M. 187, 539 P.2d 207, *rev'd on other grounds*, 1976-NMSC-030, 89 N.M. 305, 551 P.2d 1352; *State v. Ortega*, 1968-NMCA-092, 79 N.M. 707, 448 P.2d 813.

**Intent to steal vehicle sufficient.** — An intent to steal the car is an intent to commit a theft "therein." Theft of the car itself may be an offense committed within the vehicle. If one intends to commit in a car acts that accomplish the crime, then one intends to commit the crime in the car. Theft of a car can be accomplished from within the vehicle. *State v. Hernandez*, 1993-NMCA-132, 116 N.M. 562, 865 P.2d 1206, cert. denied, 116 N.M. 801, 867 P.2d 1183.

**Intent measured at time of entry.** — A specific intent to commit a felony must exist and may be measured at the time of the claimed unauthorized entry into the home of the prosecutrix. *State v. Elliott*, 1975-NMCA-087, 88 N.M. 187, 539 P.2d 207, *rev'd on other grounds*, 1976-NMSC-030, 89 N.M. 305, 551 P.2d 1352.

**Entry without intent not burglary.** — Absent any proof that entry had been made with an intent to commit a felony, the act of prying a lock did not constitute burglary. *State v. Grubaugh*, 1950-NMSC-044, 54 N.M. 272, 221 P.2d 1055.

**Intoxication may be shown to negate existence of required intent** in a prosecution for burglary, and where defendant claims absence of intent due to intoxication, the issue of intent is for the jury. *State v. Gonzales*, 1971-NMCA-007, 82 N.M. 388, 482 P.2d 252, cert. denied, 82 N.M. 377, 482 P.2d 241.

**Voluntary intoxication as defense.** — Voluntary intoxication is not a defense to a charge of larceny unless defendant was so intoxicated as to be unable to form the necessary intent. *State v. Lucero*, 1962-NMSC-077, 70 N.M. 268, 372 P.2d 837.

Burglary requires that entry be with the specific intent to commit a felony or theft; intoxication may be shown to negate this specific intent. *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160.

**Burglary does not depend upon actions after the entry,** the crime being complete when there is an unauthorized entry with the intent to commit a felony or theft. *State v. Tixier*, 1976-NMCA-054, 89 N.M. 297, 551 P.2d 987.

**Stealing is not necessary element of burglary.** *State v. Ford*, 1970-NMCA-061, 81 N.M. 556, 469 P.2d 535.

**Proof of theft unnecessary.** — When entry is accomplished with intent to steal it is not a required element of proof to show that any property was actually taken. *State v. Ortega*, 1968-NMCA-092, 79 N.M. 707, 448 P.2d 813.

To prove burglary, the state was not required to prove either that defendant stole something or ownership of any articles stolen. *State v. Gutierrez*, 1971-NMCA-058, 82 N.M. 578, 484 P.2d 1288, cert. denied, 82 N.M. 562, 484 P.2d 1272.

**Possession of stolen property immaterial.** — Proof that property was actually taken is not necessary nor is proof of possession of a stolen item. *State v. Wilkerson*, 1972-NMCA-067, 83 N.M. 770, 497 P.2d 981.

To prove burglary, the state was not required to prove defendant's possession of stolen articles. *State v. Ford*, 1970-NMCA-061, 81 N.M. 556, 469 P.2d 535.

**Proof of burglary.** — The state is not required to prove dominion, control or possession. Evidence of dominion, control or possession of the stolen property is admissible on the questions of entry and intent. *State v. Hinojos*, 1967-NMCA-003, 78 N.M. 32, 427 P.2d 683.

**Possession of tools immaterial.** — Although burglary tools are admissible in evidence in a prosecution for burglary, it is not necessary to have burglary tools in one's possession to violate this section. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927.

## IV. INDICTMENT AND INFORMATION.

### A. IN GENERAL.

**Accessory prosecuted as principal.** — Although defendant never entered burglarized building, he was an aider and abettor or he was an accessory as defined in 30-1-13 NMSA 1978 and could therefore be prosecuted as a principal. *State v. Riley*, 1970-NMCA-015, 82 N.M. 298, 480 P.2d 693.

**Allegation of ownership unnecessary.** — An allegation or proof of ownership of a building or structure, the subject of a burglary charge, is unnecessary. *State v. Flores*, 1971-NMCA-036, 82 N.M. 480, 483 P.2d 1320.

**Ownership for identification.** — This section clearly does not require that ownership of the building or structure entered be alleged, nor is such allegation necessary to charge the offense. Accordingly, except as a means of identification, an allegation or proof of ownership of a building or structure the subject of a burglary charge is unnecessary. *State v. Ford*, 1969-NMCA-092, 80 N.M. 649, 459 P.2d 353.

**Model and license of burglarized vehicle.** — Where the essential elements of the crime of burglary of an automobile were established, the model and license of the vehicle were surplusage in the indictment which did not need to be proved, and failure to do so did not constitute reversible error. *State v. Newman*, 1971-NMCA-137, 83 N.M. 165, 489 P.2d 673.

**Value of property.** — Under 40-9-6, 1953 Comp., prescribing penalties for breaking and entering into places other than dwelling with intent to commit murder, rape, robbery, larceny or any felony, term "larceny" was not limited to "grand larceny" under 40-45-2, 1953 Comp., and since stealing property of any value was a felony, a value over $50.00 did not have to be specified in the information nor proved in a charge of attempt. *State v. Serrano*, 1964-NMSC-161, 74 N.M. 412, 394 P.2d 262 (decided under former law).

**Charge sufficient.** — Charge that defendant "burglarized" an outhouse belonging to a named individual in the nighttime was sufficient to invoke the jurisdiction of the court in that it charged a public offense. *State v. Mares*, 1956-NMSC-031, 61 N.M. 46, 294 P.2d 284 (decided under former law).

### B. VARIANCE.

**Material variance between places charged and proved.** — Where proof identified burglarized shop as that of Joe Howard, and indictment charged burglary of "the Harvey Cleaners," and there was no showing of identity, there was a material variance. *State v. Salazar*, 1938-NMSC-021, 42 N.M. 308, 77 P.2d 633 (decided under former law).

**Variance not jurisdictional.** — Variance between indictment and proof regarding name and address of party and place burglarized was not jurisdictional because it can be cured by verdict of the jury. *State v. Jaramillo*, 1973-NMCA-029, 85 N.M. 19, 508 P.2d 1316, cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973) (decided under former law).

**Nature of building.** — An indictment was not defective for calling a building where goods were sold a "shop," though witnesses at the trial called it a "store." *State v. Padilla*, 1914-NMSC-012, 18 N.M. 573, 139 P. 143 (decided under former law).



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**Raising variance.** — Variance between charge and proof regarding nature of building burglarized could not be raised for the first time by motion in arrest of judgment or motion for a new trial. *State v. Mares*, 1956-NMSC-031, 61 N.M. 46, 294 P.2d 284 (decided under former law).

V. EVIDENCE.

A. IN GENERAL.

**Ordinarily, burglary must be proved by circumstantial evidence** sufficient to submit the issue to the jury, since such an offense can rarely be proved by witnesses who saw and recognized a defendant in the act of making an unauthorized entry with intent to commit a theft. *State v. Johnson*, 1972-NMCA-082, 84 N.M. 29, 498 P.2d 1372.

**Exclusion of every reasonable hypothesis save guilt.** — To support a conviction testimony must do more than raise a strong suspicion of guilt as the evidence and reasonable inferences that flow therefrom must exclude every reasonable hypothesis other than the guilt of the defendant. *State v. Heim*, 1971-NMCA-159, 83 N.M. 260, 490 P.2d 1233.

**Circumstantial evidence.** — Where circumstances alone are relied upon by the prosecution, the circumstances must be such as to apply exclusively to defendant, and such as are reconcilable with no other hypothesis than defendant's guilt. *State v. Montano*, 1972-NMCA-021, 83 N.M. 523, 494 P.2d 185.

**Specific intent to commit theft** may be proven by inference from established facts and circumstances. *State v. Ortega*, 1968-NMCA-092, 79 N.M. 707, 448 P.2d 813.

**Breaking and entering justifies inference.** — In the absence of inconsistent circumstances, proof of unlawful breaking and entry into a building which contains personal property that could be the subject of larceny gives rise to an inference that will sustain a conviction of burglary, grounded in human experience, which justifies the assumption that the unlawful entry was not purposeless, and, in the absence of other proof, indicates theft as the most likely purpose. *State v. Ortega*, 1968-NMCA-092, 79 N.M. 707, 448 P.2d 813.

**Presence plus inferences.** — Although presence alone is insufficient to sustain a conviction for burglary when the facts and reasonable inferences therefrom show much more than mere presence, there is substantial evidence to support the conviction. *State v. Sedillo*, 1971-NMCA-003, 82 N.M. 287, 480 P.2d 401.

**Unauthorized presence in vehicle.** — A jury might reasonably infer from a defendant's unauthorized presence in a vehicle that he had the necessary intent to commit a felony or theft therein. *State v. Wilkerson*, 1972-NMCA-067, 83 N.M. 770, 497 P.2d 981.

**Possession of stolen property not enough.** — Recently stolen property found in the possession of a defendant will not alone support a conclusion of guilt of the offense of burglary unless there is evidence of other circumstances connecting the defendant with the crime charged. *State v. Heim*, 1971-NMCA-159, 83 N.M. 260, 490 P.2d 1233.

**Facts pointing unerringly to guilt.** — Where the facts and circumstances do not unerringly point to defendant's guilt of burglary and do not establish inferentially or otherwise that defendant's entry was unauthorized, the judgment and sentence must be reversed. *State v. Slade*, 1967-NMCA-027, 78 N.M. 581, 434 P.2d 700.

**Establishing aiding and abetting.** — Aiding and abetting a burglary is established by evidence of a community of purpose or a shared criminal intent in the unlawful undertaking, such that by any of the means of communicating thought defendant incited, encouraged or instigated commission of the offense or made it known that commission of an offense already undertaken had aider's support or approval. *State v. Gonzales*, 1971-NMCA-007, 82 N.M. 388, 482 P.2d 252, cert. denied, 82 N.M. 377, 482 P.2d 241.

B. ADMISSIBILITY.

**Character evidence.** — Honesty and truthfulness are pertinent character traits that are admissible under Rule 11-404(A)(1) in a prosecution for solicitation to commit burglary. *State v. Martinez*, 2008-NMSC-060, 145 N.M. 220, 195 P.3d 1232.

**Evidence of dominion, control or possession** of stolen property is admissible on the questions of entry and intent. *State v. Hinojos*, 1967-NMCA-003, 78 N.M. 32, 427 P.2d 683.

Evidence of dominion, control or possession of stolen property is admissible on the question of intent. *State v. Montano*, 1972-NMCA-021, 83 N.M. 523, 494 P.2d 185.

**Discovery of weapons relevant.** — Where defendant was convicted of burglary as accessory, argument that testimony concerning weapons found in defendant's car after his arrest was irrelevant to issues raised by indictment was without merit. *State v. Gunzelman*, 1973-NMCA-121, 85 N.M. 535, 514 P.2d 54, *overruled on other grounds by State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

**Proving unauthorized entry.** — New Mexico does not restrict the method of proving unauthorized entry and it may be proved by circumstantial evidence. *State v. Mireles*, 1971-NMCA-027, 82 N.M. 453, 483 P.2d 508.

**Substantial evidence of intent to commit burglary.** — Where defendant was discovered lying underneath a van; next to defendant was a plastic container positioned under the van to catch fuel dripping from the gas tank of the van; defendant admitted that defendant had used a nail to create a hole in the tank so that gas could escape; and the owner of the van had not abandoned the van and had not given defendant permission to enter or remove gas from the van, there was substantial evidence to support the finding that defendant possessed the intent necessary to commit burglary. *State v. Muqqddin*, 2010-NMCA-069, 148 N.M. 845, 242 P.3d 412, cert. granted, 2010-NMCERT-008, 148 N.M. 943, 242 P.3d 1289.

C. SUFFICIENCY.

**Substantial evidence of intent to commit burglary.** — Where defendant was discovered lying underneath a van; next to defendant was a plastic container positioned under the van to catch fuel dripping from the gas tank of the van; defendant admitted that defendant had used a nail to create a hole in the tank so that gas could escape; and the owner of the van had not abandoned the van and had not given defendant permission to enter or remove gas from the van, there was substantial evidence to support the finding that defendant possessed the intent necessary to commit burglary. *State v. Muqqddin*, 2010-NMCA-069, 148 N.M. 845, 242 P.3d 412, cert. granted, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

**Inference of intent permissible.** — Defendant's motion for a directed verdict was properly denied because the jury could have properly inferred that defendant was the person who burglarized the building, and that the jacket and knife found in the vent, therefore belonged to defendant. *State v. Barragan*, 2001-NMCA-086, 131 N.M. 281, 34 P.3d 1157.

**Inference of intent to commit felony.** — Evidence that a store's burglary alarm system was triggered, that police officers responded within a minute after being called, that there was a four-by-eight-inch hole in a garage door near the opening mechanism, that defendant was found hiding in tires outside the building near the



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door, that the piece of door which had been removed in making the hole was found in the same area and that the store had been closed at 5:30 p.m., while the alarm went off shortly after 10:00 p.m. permitted an inference that defendant intended to commit a felony or theft inside the store. *State v. Tixier*, 1976-NMCA-054, 89 N.M. 297, 551 P.2d 987.

**Inference of criminal intent.** — Victim's house was broken into; defendant helped carry stolen items away over four foot fence in back of house; he was recognized by the victim's neighbor while carrying some of the stolen items; some stolen items were concealed; and defendant fled when discovered, although subsequently returned to the vicinity of the victim's house. These facts were evidence sufficient to sustain an inference of criminal intent. *State v. Peden*, 1973-NMCA-095, 85 N.M. 363, 512 P.2d 691.

**Inference of intent.** — Where defendant's companion completed crime of burglary by an unauthorized entry with the necessary intent, and defendant knew this fact, was present and participated, his intent could be inferred from his acts. *State v. Riley*, 1970-NMCA-015, 82 N.M. 298, 480 P.2d 693.

Where defendant was caught in a public schoolhouse on a Sunday afternoon by two police officers and upon being searched for weapons several items taken from desk or storage cabinet in principal's office were discovered, the evidence substantially supported a reasonable inference of defendant's intent to commit a theft in the schoolhouse which he had entered without authorization. *State v. Lujan*, 1970-NMCA-087, 82 N.M. 95, 476 P.2d 65.

In prosecution for burglary, larceny and unlawful taking of a vehicle, evidence of the time factors, distances, observations of defendants, locations and possession of stolen goods pointed unerringly to defendants and excluded every reasonable hypothesis other than guilt. *State v. Sanchez*, 1971-NMCA-065, 82 N.M. 585, 484 P.2d 1295.

**Breaking of window indicative of intent.** — Jury, after they found that defendant shattered the grocery store window, validly inferred that window was broken in an attempt to enter and unlawfully take property from inside the store, and that he acted with criminal intent. *State v. Serrano*, 1964-NMSC-161, 74 N.M. 412, 394 P.2d 262.

**Intent absent.** — Testimony by the prosecutrix that she engaged in sexual intercourse with defendant, along with his acquittal on rape charge, suggests that jury found that the sexual intercourse took place with consent of the prosecutrix and that defendant did not enter her home with intent to commit rape, and thus the evidence was insufficient to sustain a conviction for burglary. *State v. Elliott*, 1975-NMCA-087, 88 N.M. 187, 539 P.2d 207, *rev'd on other grounds*, 1976-NMSC-030, 89 N.M. 305, 551 P.2d 1352.

**Insufficient evidence of intent to commit a theft or criminal damage to property.** — Where defendant was convicted of residential burglary based on DNA evidence found in the burglarized house, there was insufficient evidence to permit a rational jury to find the essential facts to establish each element of the crime of residential burglary beyond a reasonable doubt, because although there was evidence that defendant had entered the property without authorization, the state, without presenting any evidence linking defendant to the stolen items or the property damage, failed to establish, either directly or by circumstantial evidence, that defendant entered the dwelling with the intent to commit a theft or criminal damage to property when inside. *State v. Ledbetter*, 2020-NMCA-046.

**Proof beyond reasonable doubt.** — Where unlawful entry and a description of items stolen were proven beyond a reasonable doubt, this was sufficient to sustain the conviction under this statute. *State v. Baca*, 1974-NMCA-022, 86 N.M. 144, 520 P.2d 872.

**Guilt as only reasonable hypothesis.** — Defendant's flight when officers arrived indicated consciousness of guilt, and together with fact that he came to store with intent of breaking in and gave a false name when arrested, absent an explanation of his reasons or motive, permitted an inference of guilt, excluding every other reasonable hypothesis. *State v. Gonzales*, 1971-NMCA-007, 82 N.M. 388, 482 P.2d 252, cert. denied, 82 N.M. 377, 482 P.2d 241.

**Hypothesis in defense.** — Defendant's hypothesis that actual burglar had been frightened away by appearance of defendant since there was no evidence introduced concerning fingerprints, defendant was not wearing gloves and officers found nothing on defendant classified as burglar tools, was not reasonable in the light of the jury verdict which necessarily determined that defendant was inside burglarized apartment, and in light of undisputed evidence of a torn screen, open door and "mess" inside the apartment. *State v. Madrid*, 1972-NMSC-016, 83 N.M. 603, 495 P.2d 383.

**Unauthorized entry established.** — Circumstantial evidence may be used to establish an unauthorized entry, and evidence showing that defendant and companions went to liquor store with intent to break in, taking a sledgehammer, that windows were broken, that the men fled the scene and that bottles of liquor were missing, pointed unerringly to an unauthorized entry. *State v. Gonzales*, 1971-NMCA-007, 82 N.M. 388, 482 P.2d 252, cert. denied, 82 N.M. 377, 482 P.2d 241.

**Slight penetration sufficient.** — Evidence that an unidentified instrument penetrated one-half inch inside a building was sufficient evidence of entry to sustain a burglary conviction, since any penetration, however slight, of the interior space is sufficient. *State v. Tixier*, 1976-NMCA-054, 89 N.M. 297, 551 P.2d 987.

**Evidence supporting conviction.** — Evidence that a fingerprint lifted from a coke machine which had been broken into during a burglary was the same as that on defendant's fingerprint card, on the basis of a ten point comparison taken from defendant under controlled circumstances, and that although gas station operator testified that his son had access to key to machine he also stated that to his knowledge his son never opened it, was sufficient to support conviction. *State v. Douglas*, 1974-NMCA-087, 86 N.M. 665, 526 P.2d 807, cert. denied, 86 N.M. 656, 526 P.2d 798.

**Sufficient evidence.** — Where store manager testified that he had checked the building just before he left the previous evening and that it was securely locked, that a window found broken shortly after defendant's apprehension had not been broken the evening before and that no one, including the defendant, was authorized to enter the store after closing time, and evidence showed that defendant, seen near the store in the early morning when all the businesses were closed, ran when a police officer attempted to stop him for questioning, dropped two bags which contained merchandise from the store, evidence was sufficient, albeit circumstantial, for the jury to infer that defendant committed burglary. *State v. Lauderdale*, 1973-NMCA-035, 85 N.M. 157, 509 P.2d 1352, cert. denied, 85 N.M. 144, 509 P.2d 1339.

Evidence, including positive identification of defendant and testimony as to his presence in cab of burglarized pick-up, along with business papers kept in truck which were found on the ground near the pick-up and in the alley near which the defendant was apprehended, sustained burglary conviction. *State v. Wilkerson*, 1972-NMCA-067, 83 N.M. 770, 497 P.2d 981.

Where evidence was clear that the residence had been entered with an intent to commit theft as various items of personal property had been stolen and homeowner



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testified that to gain entrance the window would have had to be forced open, presence of defendant's prints on inside portion of the window was sufficient to point to defendant as the one who entered the house and stole the property. *State v. Mireles*, 1971-NMCA-027, 82 N.M. 453, 483 P.2d 508.

Evidence is sufficient to support a defendant's burglary conviction where the defendant, a security guard and associate member of a club, makes an unauthorized entry into the club after closing hours by breaking the club's door, then breaking into a bar cabinet and slot machine. *State v. Carter*, 1979-NMCA-117, 93 N.M. 500, 601 P.2d 733, cert. denied, 93 N.M. 683, 604 P.2d 821.

Where defendant admitted that he and accomplice "ransacked" the victim's residence and removed at least two pistols and three long firearms, this is sufficient evidence for the conviction of burglary. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, *overruled on other grounds by State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

**"Dwelling house" construed.** — To determine whether a structure constitutes a dwelling house, the court considers the evidence presented regarding the physical characteristics of the structure to determine whether it is a type of structure customarily used for living quarters and in which possessory and privacy interests of habitation should be protected, and examines whether the structure was actually used for living quarters, whether its purpose was for habitation, and whether its use as living quarters was sufficient to warrant protection of the heightened privacy and possessory interests of habitation. *State v. Shelby*, 2021-NMCA-064, cert. denied.

**Sufficient evidence of burglary of a "dwelling house".** — Where defendant was convicted of burglary of a dwelling, larceny over $2,500, and criminal damage to property over $1,000, and where defendant claimed that his conviction for burglary of a dwelling was not supported by sufficient evidence because the interior of the house at issue was under construction, it lacked electricity and running water, and the evidence did not show that the owner "customarily used" the house "as living quarters" under the definition of "dwelling house," as set out in UJI 14-1631 NMRA, the evidence sufficiently established that the structure entered was a dwelling house within the meaning and purpose of the burglary statute and UJI 14-1631, because the state presented evidence that the structure was a house with an enclosed, finished exterior, the house was used for habitation in a regular, yet intermittent, way, and the apparent purpose of the house was for habitation. *State v. Shelby*, 2021-NMCA-064, cert. denied.

**Sufficient evidence of burglary of a vehicle.** — Where surveillance video evidence showed a dark-colored pickup truck enter a motel parking lot in the early morning hours and showed a person identified by the arresting officer as defendant forcibly entering and removing items from two vehicles, and where, during a custodial interview, defendant made statements to the effect that he did not remember what he took and did not know the whereabouts of the items taken from the vehicles, and where the arresting officer testified that he observed defendant forcibly enter two other vehicles at a different motel, there was sufficient evidence to support defendant's convictions on four counts of burglary of a vehicle. *State v. Sweat*, 2017-NMCA-069, cert. denied.

**Sufficient evidence of conspiracy to commit burglary.** — Where defendant, a former employee of a motel, asked the motel desk clerk to attend to an internet problem in the motel by implying that he was a motel guest, which he was not, and where defendant remained in the lobby while his co-conspirator climbed over the desk clerk's counter, broke the lock on a cash drawer and removed cash, and where defendant immediately followed the co-conspirator out of the motel lobby after the co-conspirator took the cash, there was sufficient evidence for a rational trier of fact to infer that defendant, as a former employee of the motel, knew the location of the cash drawer, that asking the desk clerk to reset the wireless router would require the clerk to be away from the office for a sufficient amount of time to create an opportunity to steal the cash and escape without notice, and that defendant and his accomplice agreed and intended to commit the crime of burglary. *State v. Mestas*, 2016-NMCA-047.

**Circumstantial evidence sufficient.** — Facts regarding the defendants' actions and the surrounding circumstances provided sufficient evidence from which a jury could infer that defendants intended to break into a building and commit a theft therein. *State v. Jennings*, 1984-NMCA-051, 102 N.M. 89, 691 P.2d 882, cert. quashed, 102 N.M. 88, 691 P.2d 881.

**Unexplained possession with other circumstances.** — While unexplained possession of goods belonging to another does not raise presumption that a larceny has been committed and that the possessor is a thief, additional evidence being necessary to establish the corpus delicti, nevertheless additional evidence, consisting of the fact that a robbery had been committed, the early hour of the morning, the lack of identification, the giving of a false name and defendant's statement that he was on his way home which was in the southwest quadrant of the city when he was walking north, was sufficient to sustain a conviction for burglary. *State v. Rivera*, 1973-NMCA-145, 85 N.M. 723, 516 P.2d 694.

**Sufficiency of evidence.** — Evidence that defendant possessed recently stolen property which he acquired by theft, together with evidence of defendant's presence at the scene near the time of the crime with a person who knew the precise location of the property, permitted the inference that defendant stole the guns during an unauthorized entry of owner's residence, and was sufficient to sustain his conviction for burglary. *State v. Jordan*, 1975-NMCA-102, 88 N.M. 230, 539 P.2d 620.

Evidence, though partly circumstantial, supported conviction for burglary, where soda pop of kind and amount stolen was found in possession of defendant near the place where pop had been stolen, defendant had prevailed upon acquaintances to take him to the vicinity of the storage shed for the purpose of getting some pop, when being investigated defendant admitted the theft, and a footprint similar to defendant's was found in the burglarized shed. *State v. Waits*, 1966-NMSC-162, 76 N.M. 630, 417 P.2d 439.

**Aiding and abetting shown.** — Although defendant's witness testified that defendant was unaware that witness was removing stereo tape deck from automobile, where evidence showed that defendant and witness looked into another car before witness broke into the burglarized car and that defendant leaned on the door of the burglarized car and was "looking both ways as if observing for something," this evidence was sufficient to sustain defendant's conviction as an aider and abettor under this section. *State v. Sandoval*, 1972-NMCA-038, 83 N.M. 599, 495 P.2d 379.

**Evidence insufficient.** — Although similarity between footprints, and tire prints, along with defendant's locations, actions and statements, created a suspicion that he committed the offense charged, it could not be said that there were not other reasonable hypotheses which permitted a finding of his innocence and hence circumstantial evidence solely relied upon by state, failed to meet the standard required. *State v. Seal*, 1965-NMSC-154, 75 N.M. 608, 409 P.2d 128; *State v. Waits*, 1966-NMSC-162, 76 N.M. 630, 417 P.2d 439; *State v. Sharp*, 1967-NMSC-169, 78 N.M. 220, 430 P.2d 378; *State v. Williamson*, 1968-NMSC-033, 78 N.M. 751, 438 P.2d 161, cert. denied, 393 U.S. 891, 89 S. Ct. 212, 21 L. Ed. 2d 170 (1968); *Nance v. State*, 1969-NMCA-018, 80 N.M. 123, 452 P.2d 192.

Where at best the state showed that defendant had constructive possession of certain stolen jewelry by virtue of



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occupying along with another individual the same room in which it was found, but there was no evidence showing or tending to show that he had knowledge, control or voice in the power of disposal of the jewelry, evidence was insufficient to permit issue of defendant's guilt on burglary charge to go to the jury. *State v. Romero*, 1960-NMSC-047, 67 N.M. 82, 352 P.2d 781.

**Raising insufficiency of evidence.** — On appeal from denial of post-conviction relief, petitioner's contentions that he should not have been charged with and convicted of aggravated burglary, that the state failed to prove criminal intent and that he was intoxicated at the time of the offense and could not have had the requisite intent, not having been raised on direct appeal, did not provide a basis for post-conviction relief. *Andrada v. State*, 1971-NMCA-184, 83 N.M. 393, 492 P.2d 1010.

Where in a prosecution for burglary the question of sufficiency of the evidence was not presented to the trial court, defendant could not demand a review of the evidence as a matter of right, but in case at hand appellate court would examine the record to determine if fundamental error was committed. *State v. Sedillo*, 1969-NMCA-107, 81 N.M. 47, 462 P.2d 632, cert. denied, 81 N.M. 40, 462 P.2d 625.

## VI. INSTRUCTIONS.

**Instruction on specific intent required.** — Since the crime of burglary is a crime requiring a specific mens rea, an instruction on specific intent or specific mens rea is required. *State v. Gunzelman*, 1973-NMSC-055, 85 N.M. 295, 512 P.2d 55, *overruled on other grounds by State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

**Failure to give instruction** concerning criminal intent is jurisdictional and may be raised for the first time on appeal. *State v. Gunzelman*, 1973-NMSC-055, 85 N.M. 295, 512 P.2d 55, *overruled on other grounds by State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

**Language of statute adequate.** — Since this section defines the element of intent constituting the crime of burglary, an instruction which follows the language of the statute adequately instructs the jury on the specific criminal intent required. *State v. Gunzelman*, 1973-NMSC-055, 85 N.M. 295, 512 P.2d 55, *overruled on other grounds by State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

**Sufficiency of instruction.** — Instruction that any person who, without authorization, enters a dwelling house with intent to commit any felony or theft therein is guilty of burglary of a dwelling house was sufficient on the element of criminal intent. *State v. Baca*, 1973-NMCA-054, 85 N.M. 55, 508 P.2d 1352.

**Additional instruction on general criminal intent was unnecessary** in prosecution for burglary as a person is presumed to intend the logical consequences of his actions. *State v. Gunzelman*, 1973-NMSC-055, 85 N.M. 295, 512 P.2d 55, *overruled on other grounds by State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

**Intoxication instruction properly refused.** — Requested instruction telling jury to acquit defendant if he "did not have the intent to commit the unlawful act of burglary as a result of intoxication" was properly refused because of its wording, which would have required jury to accept, as a fact, the matter of intoxication which was for the jury to decide. *State v. Gonzales*, 1971-NMCA-007, 82 N.M. 388, 482 P.2d 252, cert. denied, 82 N.M. 377, 482 P.2d 241.

**Presumption of innocence adequately covered.** — In prosecution for burglary, where instructions were given on the presumption of innocence and the burden of proof, court's refusal to instruct that there was no presumption that defendant was an accessory and that he did not have the burden of proving that he was not an accessory was not error. *State v. Gunzelman*, 1973-NMCA-121, 85 N.M. 535, 514 P.2d 54, *overruled on other grounds by State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

**Submission of lesser offense unnecessary.** — Offense of unlawfully carrying a deadly weapon is neither a degree of burglary, nor the higher degree of aggravated burglary, and not being an included offense, trial court did not err in refusing to submit to the jury the offense of unlawfully carrying a deadly weapon as a lesser included offense. *State v. Andrada*, 1971-NMCA-033, 82 N.M. 543, 484 P.2d 763, cert. denied, 82 N.M. 534, 484 P.2d 754.

**Instruction on accomplice's testimony.** — In trial for burglary, instruction that an accused may be convicted upon the testimony of an accomplice, even though it is uncorroborated, was proper. *State v. Baca*, 1973-NMCA-054, 85 N.M. 55, 508 P.2d 1352.

**Instruction misstating victim's name and address.** — Error in instruction misstating name and address of burglary victim, to which defendant did not object, was not preserved for review and did not constitute fundamental error. *State v. Jaramillo*, 1973-NMCA-029, 85 N.M. 19, 508 P.2d 1316, cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973).

**Failure to request instruction.** — Counsel's failure to request an instruction to the effect that intoxication would relieve the defendant of criminal responsibility if he were unable to form the criminal intent required for the commission of the crime of burglary may have been no more than bad strategy on the part of counsel, so that it could not be said, as a matter of law, that representation was so inadequate as to deprive him of his constitutional right to effective assistance of counsel. *State v. Samora*, 1971-NMCA-001, 82 N.M. 252, 479 P.2d 532.

**Attorney general opinions.** — The phrase "or any other felony," in former 40-9-6, 1953 Comp., dealing with crime of breaking and entering into places other than dwellings, was indicative that this section of the statute only applied to a breaking and entering with intent to commit a felony. 1955-56 Op. Att'y Gen. No. 6115.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 13 Am. Jur. 2d Burglary §§ 1 to 14.

Opening closed but unlocked door as breaking which will sustain charge of burglary or breaking and entering, 23 A.L.R. 112.

Burglary without breaking, 23 A.L.R. 288.

Outbuilding or the like as part of "dwelling house," 43 A.L.R.2d 831.

Gambling or lottery paraphernalia as subject of burglary, 51 A.L.R.2d 1396.

Night, sufficiency of showing that burglary was committed at, 82 A.L.R.2d 643.

Entry through partly opened door or window as burglary, 70 A.L.R.3d 881.

Maintainability of burglary charge, where entry into building is made with consent, 58 A.L.R.4th 335.

What is "building" or "house" within burglary or breaking and entering statute, 68 A.L.R.4th 425.

Burglary, breaking, or entering of motor vehicle, 72 A.L.R.4th 710.

Minor's entry into home of parent as sufficient to sustain burglary charge, 17 A.L.R.5th 111.

Use of fraud or trick as "constructive breaking" for purpose of burglary or breaking and entering offense. 17 A.L.R.5th 125.

12A C.J.S. Burglary §§ 1 to 38.



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## 30-16-4. Aggravated burglary.

Aggravated burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with intent to commit any felony or theft therein and the person either:

A. is armed with a deadly weapon;

B. after entering, arms himself with a deadly weapon;

C. commits a battery upon any person while in such place, or in entering or leaving such place.

Whoever commits aggravated burglary is guilty of a second degree felony.

**History: 1953 Comp., § 40A-16-4, enacted by Laws 1963, ch. 303, § 16-4.**

**Cross references.** — For definition of deadly weapon, *see* 30-1-12 NMSA 1978.

For battery, *see* 30-3-4 NMSA 1978.

For instruction as to essential elements of aggravated burglary, *see* UJI 14-1632 NMRA.

ANNOTATIONS

**The unit of prosecution for aggravated burglary is an unlawful entry with intent to commit a felony.** — When there is only one unauthorized entry, there can only be one aggravated burglary, even if defendant commits multiple aggravating acts. *State v. Swick*, 2012-NMSC-018, 279 P.3d 747, *rev'g* 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462 and *overruling State v. Armendariz*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

**Convictions of aggravated burglary while committing a battery and aggravated burglary with a deadly weapon violated double jeopardy.** — Where defendant, who was armed with a knife and who intended to steal a vehicle from the victims, entered the victims' home, stabbed one victim, and beat and stabbed the other victim; and defendant was convicted of aggravated burglary while committing a battery and aggravated burglary with a deadly weapon, defendant's convictions violated the prohibition against double jeopardy. *State v. Swick*, 2012-NMSC-018, 279 P.3d 747, *rev'g* 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462 and *overruling State v. Armendariz*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

**Double jeopardy.** — Where the force used to complete aggravated burglary constituted the same force used to restrain a victim to accomplish CSP II there were insufficient indicia of distinctness differentiating the acts and a conviction on both is impermissible on double jeopardy grounds. *State v. Armendariz*, 2006-NMCA-152, 140 N.M. 712, 148 P.3d 198, cert. quashed, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 674.

**Lesser included offense.** — Under the facts of this case, the aggravated burglary offense could not be committed without also committing the crime of dangerous use of explosives; the explosives offense does not have an element not included in the burglary offense. The explosives offense was an offense included within the aggravated burglary offense. *State v. Jacobs*, 1985-NMCA-054, 102 N.M. 801, 701 P.2d 400.

**Instruction on lesser included offense.** — When criminal trespass is factually based solely on unlawful entry, not on unlawfully remaining without consent, then criminal trespass is necessarily included within the offense of aggravated burglary of a dwelling house and a defendant is entitled to an instruction on the lesser included offense. *State v. Romero*, 1998-NMCA-057, 125 N.M. 161, 958 P.2d 119

**Double jeopardy.** — Section 30-16-4 NMSA 1978 is designed to address the heightened threat associated with possession of deadly weapons and to deter their possession in the course of burglaries even if no use is intended. By contrast, Subsection C of Section 30-16-4 NMSA 1978 is designed to address actual physical injury to persons during a burglary. Because these factors reinforce the presumption of distinct, punishable offenses, a defendant's convictions pursuant to these two separate statutory subsections do not offend double jeopardy principles. *State v. Swick*, 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462.

**Legislative intent to deter firearm possession during crime.** — The adoption of several statutes, one classifying aggravated burglary as a second degree felony, and the other specifying that simple burglary is a fourth-degree felony, evinces a clear legislative intention to deter the commission of burglaries and the possession of firearms during such crimes. *State v. Luna*, 1982-NMCA-150, 99 N.M. 76, 653 P.2d 1222, cert. denied, 99 N.M. 148, 655 P.2d 160.

**Crucial factor in crime of aggravated burglary** is whether the defendant has the intent to commit a felony on entering the dwelling, not whether the felony was actually committed, as the intent does not have to be consummated. *State v. Castro*, 1979-NMCA-023, 92 N.M. 585, 592 P.2d 185, cert. denied, 92 N.M. 621, 593 P.2d 62.

**Meaning of "deadly weapon".** — Deadly weapons shall be construed to mean any kind or class of pistol or gun, whether loaded or unloaded. *State v. Montano*, 1961-NMSC-174, 69 N.M. 332, 367 P.2d 95.

**Theft is not a necessary element of aggravated burglary,** which requires only the element of intent to commit any felony or theft. *State v. Ranne*, 1969-NMCA-029, 80 N.M. 188, 453 P.2d 209.

**Elements of robbery and aggravated burglary are not the same,** and therefore, defendant could be sentenced for each of these crimes. *State v. Ranne*, 1969-NMCA-029, 80 N.M. 188, 453 P.2d 209.

**Breaking and entering not lesser included offense.** — Breaking and entering is not a lesser included offense of aggravated burglary because each offense requires an element not included in the other and, by convicting defendant of breaking and entering when he only had notice of an aggravated burglary, the trial court violated his right to notice of the charges against him. *State v. Hernandez*, 1999-NMCA-105, 127 N.M. 769, 987 P.2d 1156, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Larceny of a firearm distinguished.** — Aggravated burglary and larceny of a firearm are different crimes, with different elements: larceny of a firearm requires proof that the firearm was stolen but does not require proof of an unlawful entry. *State v. Tisthammer*, 1998-NMCA-115, 126 N.M. 52, 966 P.2d 760, cert. denied, 126 N.M. 107, 967 P.2d 447.

**Aggravated burglary and sex offense separate crimes.** — Since aggravated burglary and criminal sexual penetration in the third degree (30-9-11 NMSA 1978) each require proof of facts which the other does not and since neither offense necessarily involves the other, there would be no double jeopardy violation and no merger of the offenses despite the fact that the same evidence may go toward proving both. *State v. Young*, 1978-NMCA-040, 91 N.M. 647, 579 P.2d 179, cert. denied, 91 N.M. 751, 580 P.2d 972, and cert. denied, 439 U.S. 957, 99 S. Ct. 357, 58 L. Ed. 2d 348 (1978).



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Where the victim awoke and found the defendant on top of her and the defendant told her not to move or make a noise or he would blow her head off, that was evidence of a battery. When the battery preceded sexual activity, there was evidence of an aggravated burglary apart from a sex offense, and the two offenses did not merge, nor was the "same transaction" test applied. *State v. Archunde*, 1978-NMCA-050, 91 N.M. 682, 579 P.2d 808.

Where defendant's acts constituting battery for purposes of aggravated burglary charges and acts constituting criminal sexual penetration (CSP) were separate and distinct, convictions and consecutive sentences for both CSP and aggravated burglary did not violate double jeopardy. *Lucero v. Kerby*, 133 F.3d 1299 (10th Cir.), cert. denied, 523 U.S. 1110, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

**Aggravated burglary and attempted criminal sexual penetration merged.** — Defendant's conduct consisting of his entry into a dwelling with intent to commit a felony and attempted criminal sexual penetration (CSP II) was unitary, thus his convictions for both aggravated burglary and attempted CSP II violated double jeopardy. *Lucero v. Kerby*, 133 F.3d 1299 (10th Cir.), cert. denied, 523 U.S. 1110, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

**Aggravated burglary and first degree murder not unitary.** — First degree murder and aggravated burglary were not unitary acts, and imposition of sentences for both offenses did not violate double jeopardy. *State v. Livernois*, 1997-NMSC-019, 123 N.M. 128, 934 P.2d 1057.

**Indictment adequate.** — Indictment employing the name given the offense by statute and specifically referring to the section and subsection of the statute which created the offense sufficiently charged crime of aggravated burglary, despite failure to allege an entry with intent to commit a felony or theft. *State v. Turner*, 1970-NMCA-024, 81 N.M. 450, 468 P.2d 421, cert. denied, 81 N.M. 506, 469 P.2d 151 (decided under prior law).

**Unauthorized entry.** — An allegation or proof of ownership of a building or structure, the subject of a burglary charge, is unnecessary. *State v. Flores*, 1971-NMCA-036, 82 N.M. 480, 483 P.2d 1320.

**Entry into separate residence of spouse.** — Section 40-3-3 NMSA 1978 does not provide immunity from prosecution for burglary of a spouse's separate residence. *State v. Parvilus*, 2014-NMSC-028, *rev'g* 2013-NMCA-025, 297 P.3d 1228.

Where, because of domestic problems, defendant rented a separate apartment for defendant's spouse; the parties agreed that the apartment was the spouse's separate residence, that defendant would not have a key to the apartment, and that defendant did not have the spouse's permission to enter the apartment; and several months later, defendant entered the spouse's apartment through a window, 40-3-3 NMSA 1978 did not preclude defendant's conviction for burglary of the spouse's separate dwelling. *State v. Parvilus*, 2014-NMSC-028, *rev'g* 2013-NMCA-025, 297 P.3d 1228.

**The plain language of Section 40-3-3 NMSA 1978** renders inter-spousal burglary an impossibility because the New Mexico burglary statutes protect the possessory right to exclude and Section 40-3-3 NMSA 1978 dictates that spouses have no such right to exclude the other spouse. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-001.

**Entry into residence of estranged spouse.** — Where defendant entered defendant's estranged spouse's apartment without permission, kidnapped the victim, and killed the victim, Section 40-3-3 NMSA 1978 prohibited defendant's spouse from excluding defendant from the spouse's apartment and defendant's entry into the apartment, even with felonious purpose, did not constitute aggravated burglary as a matter of law. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-001.

**Battery while unarmed not lesser crime.** — The legislature made no distinction in severity of punishment between a defendant who commits a burglary while armed with a deadly weapon as opposed to an unarmed defendant who causes a victim physical harm by committing a battery. *State v. Romero*, 1994-NMCA-150, 119 N.M. 195, 889 P.2d 230, cert. denied, 119 N.M. 20, 888 P.2d 466.

**Intent to steal vehicle sufficient.** — Breaking into a car with the intent to steal the car qualifies as an intent to commit a theft "therein." *State v. Griffin*, 1993-NMSC-071, 116 N.M. 689, 866 P.2d 1156.

**"Armed" defined.** — "Armed" includes a stolen deadly weapon which is easily accessible and readily available for use during the commission of the burglary whether or not it is actually on the person of the accused. *State v. Padilla*, 1996-NMCA-072, 122 N.M. 92, 920 P.2d 1046, cert. denied, 122 N.M. 1, 919 P.2d 409.

**Corroboration of use of gun.** — In prosecution for aggravated burglary and aggravated battery testimony by victim that he was struck by defendant with a gun on and about his face was corroborated by fact that he recognized the gun in question, by defendant's testimony that he threw the gun away after leaving the scene and by photographs of victim showing facial cuts and abrasions; furthermore, corroboration was not required. *State v. Tafoya*, 1969-NMCA-073, 80 N.M. 494, 458 P.2d 98.

**Possession of unloaded firearm sufficient.** — Subsection B (Section 30–16–4 NMSA 1978) is violated by a person who in the commission of a burglary becomes armed with an unloaded firearm. Whether a defendant is in actual possession of a firearm within the contemplation of Subsection B (Section 30-16-4 NMSA 1978) or possesses the requisite intent to commit a felony may, however, present a factual issue to be determined by the trier of fact. *State v. Luna*, 1982-NMCA-150, 99 N.M. 76, 653 P.2d 1222, cert. denied, 99 N.M. 148, 655 P.2d 160.

**"Leaving such place".** — The legislature intended the word "leaving" in Subsection C (Section 30–16–4 NMSA 1978) to be given the ordinary meaning of "departing or going away from" and not "losing exterior contact with"; thus, when the burglarized area is an area of restricted access in an otherwise public building, a person will be deemed to be leaving the area so long as that person is still in the public portion of the building. *State v. Romero*, 1994-NMCA-150, 119 N.M. 195, 889 P.2d 230, cert. denied, 119 N.M. 20, 888 P.2d 466.

**Collateral offenses admissible.** — Testimony of victim and corroborating witness as to an assault on the same night and in same vicinity as the crimes of aggravated burglary and aggravated battery for which defendant was on trial, offered upon issue of identity, was admissible as an exception to rule prohibiting evidence of collateral offenses. *State v. Turner*, 1970-NMCA-024, 81 N.M. 450, 468 P.2d 421, cert. denied, 81 N.M. 506, 469 P.2d 151.

In prosecution for aggravated burglary, armed robbery and rape, testimony of victim raped an hour after initial crime about five blocks away was admissible in order to establish characteristic conduct and defendant's possession of knife and flashlight which figured in first crime. *State v. Lopez*, 1969-NMCA-057, 80 N.M. 599, 458 P.2d 851, cert. denied, 80 N.M. 607, 458 P.2d 859, and cert. denied, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

**Conflicting evidence for jury.** — Although based on certain deception tests (polygraph, sodium amytol and hypnosis) the experts considered defendant truthful in his denial, the testimony of the complaining witness presented on issue of fact for the jury, and defendant was not entitled to a directed verdict on charges of aggravated battery and aggravated burglary. *State v. Turner*, 1970-NMCA-024, 81 N.M. 450, 468 P.2d 421, cert. denied, 81 N.M. 506, 469 P.2d 151.

**Intent established.** — Where defendant made an unauthorized entry into an apartment, armed with a knife,



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and began to kiss and fondle the female occupant who was asleep, the evidence was sufficient to establish that defendant's intent upon entry was to commit an aggravated assault, and therefore he was guilty of aggravated burglary. *State v. Mata*, 1974-NMCA-067, 86 N.M. 548, 525 P.2d 908, cert. denied, 86 N.M. 528, 525 P.2d 888.

**Instructions which substantially follow language of the statute** are sufficient. *State v. Lopez*, 1969-NMCA-057, 80 N.M. 599, 458 P.2d 851, cert. denied, 80 N.M. 607, 458 P.2d 859, and cert. denied, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

**Charge of lesser offense not warranted.** — Offense of unlawfully carrying a deadly weapon is neither a degree of burglary, nor the higher degree of aggravated burglary, and not being an included offense, trial court did not err in refusing to submit to the jury the offense of unlawfully carrying a deadly weapon as a lesser included offense. *State v. Andrada*, 1971-NMCA-033, 82 N.M. 543, 484 P.2d 763, cert. denied, 82 N.M. 534, 484 P.2d 754.

**Breaking-and-entering, lesser included offense instruction rejected since no evidence to support.** — Where defendant was charged with aggravated burglary, his tendered instruction on lesser included offense of breaking and entering was properly rejected because there was no evidence to support the commission of the lesser offense. *State v. Smith*, 1986-NMCA-089, 104 N.M. 729, 726 P.2d 883, cert. denied, 104 N.M. 702, 726 P.2d 856.

**Insanity defense.** — Trial court committed reversible error in refusing to instruct on defense of insanity, where expert medical testimony regarding defendant's heroin addiction injected reasonable doubt as to his mental illness at the time of the burglary. *State v. Flores*, 1971-NMCA-036, 82 N.M. 480, 483 P.2d 1320.

**Juror present for police investigation.** — Conviction for entering a dwelling with intent to commit a felony while armed with a deadly weapon should be reversed, where after verdict fact came to light that following commission of the crime and on the same day one juror was present in the dwelling in question with the complaining witness while two police officers who testified at trial sought latent fingerprints, on basis of which defendant was convicted. *Mares v. State*, 1971-NMSC-106, 83 N.M. 225, 490 P.2d 667.

**Sufficient evidence based on testimony of an accomplice.** — Where defendant was convicted of aggravated burglary based on the testimony of an accomplice, defendant's argument, that such testimony when uncorroborated by physical evidence is insufficient as a matter of law, was without merit, because the uncorroborated testimony of an accomplice is sufficient in law to support a verdict for aggravated burglary. *State v. Montoya*, 2016-NMCA-098, cert. denied.

**Sufficient evidence to support conviction,** despite failure to preserve fingerprints or trace ownership of weapon. *State v. Peterson*, 1985-NMCA-109, 103 N.M. 638, 711 P.2d 915, cert. denied, 475 U.S. 1052, 106 S. Ct. 1279, 89 L. Ed. 2d 586 (1986).

Evidence, consisting of co-conspirator's testimony as to defendant's involvement in burglaries, was sufficient to support a conviction under this section; it is the province of the jury to determine a witness's credibility, and an appellate court will not substitute its judgment for that of the jury. *State v. Tisthammer*, 1998-NMCA-115, 126 N.M. 52, 966 P.2d 760, cert. denied, 126 N.M. 107, 967 P.2d 447.

There was sufficient evidence to uphold defendant's aggravated burglary conviction because (1) defendant's use of a tire iron to break into a house fell under the definition that defendant was "armed" with a weapon, pursuant to 30-1-12B NMSA 1978 and (the tire iron) was easily accessible and readily available for use, and (2) the use of a tire iron to break a window constituted "entry" under this section. *State v. Alvarez-Lopez*, 2003-NMCA-039, 133 N.M. 404, 62 P.3d 1286, *rev'd on other grounds*, *State v. Alvarez-Lopez*, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 13 Am. Jur. 2d Burglary § 27.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

What is "building" or "house" within burglary or breaking and entering statute, 68 A.L.R.4th 425.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

12A C.J.S. Burglary §§ 6, 7.

## 30-16-5. Possession of burglary tools.

Possession of burglary tools consists of having in the person's possession a device or instrumentality designed or commonly used for the commission of burglary and under circumstances evincing an intent to use the same in the commission of burglary.

Whoever commits possession of burglary tools is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-16-5, enacted by Laws 1963, ch. 303, § 16-5.**

ANNOTATIONS

**This section is not void for vagueness,** since it gives fair warning that possession of the type of instrument described in the statute, and under the circumstances described in the statute, is a crime. *State v. Najera*, 1976-NMCA-088, 89 N.M. 522, 554 P.2d 983.

**Vagueness.** — Since criminal intent is construed to be necessary element of crime of possession of burglary tools, act is not void for indefiniteness and uncertainty under constitution. *State v. Lawson*, 1955-NMSC-069, 59 N.M. 482, 286 P.2d 1076.

**No unlawful delegation of power.** — Since criminal intent is construed to be necessary element of crime of possession of burglary tools, act does not constitute an unlawful delegation of legislative power to the judiciary to prescribe in each case a different offense. *State v. Lawson*, 1955-NMSC-069, 59 N.M. 482, 286 P.2d 1076.

**No merger with attempted burglary.** — The crime of attempt to commit felony of burglary did not merge with the crime of possession of burglary tools, and hence, defendant's sentence for each of these crimes did not constitute double punishment. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927.

**Possession of burglary tools.** — Possession of burglary tools is not necessarily involved in burglary. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927.

**What conduct prohibited.** — This section gives notice that one is exposed to criminal sanctions if one: (1) possesses an instrumentality or device, (2) the instrumentality or device is designed or commonly used to commit burglary, and (3) the instrumentality or device



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is possessed under circumstances evincing an intent to use the instrumentality or device in committing burglary. *State v. Najera*, 1976-NMCA-088, 89 N.M. 522, 554 P.2d 983.

**Possession of a burglary tool is alone insufficient to satisfy the statutory element of intent to commit burglary.** — Where defendant was charged with possession of burglary tools, and where, at trial, the arresting officer testified that defendant was found in possession of "jiggle" or "bump" keys, which the officer testified are filed down car keys which may be used as universal keys to start vehicles and which are designed for or commonly used in the commission of a burglary, there was insufficient evidence to support defendant's conviction for possession of burglary tools, because although defendant was found to be carrying a tool that has no legitimate purpose and is designed for burglary, proof of possession of a tool designed exclusively for use as a burglary tool is alone insufficient to satisfy the statutory element of intent to use that tool in the commission of a burglary. *State v. Montoya*, 2021-NMCA-006, cert. denied.

**Whether items commonly used for burglary is jury question.** — The issue of whether items are commonly used for burglary is a factual one to be decided by the jury upon any competent evidence tending to show the nature and purpose of the tools. *State v. Jennings*, 1984-NMCA-051, 102 N.M. 89, 691 P.2d 882, cert. quashed, 102 N.M. 88, 691 P.2d 881.

**Criminal intent requisite.** — Criminal intent is an element of crime of possession of burglary tools, and the phrase "under circumstances evincing an intent" is merely a directive that criminal intent may be shown by evidence of circumstances. *State v. Lawson*, 1955-NMSC-069, 59 N.M. 482, 286 P.2d 1076.

**Nature of possession.** — This section does not require possession of burglary tools on the person of the defendant. *State v. Garcia*, 1969-NMCA-039, 80 N.M. 247, 453 P.2d 767.

**Indictment sufficient.** — Indictment charging offense by reference to the section or subsection creating the offense was sufficient, and trial court properly treated allegation as to possession on defendant's person as surplusage. *State v. Garcia*, 1969-NMCA-039, 80 N.M. 247, 453 P.2d 767.

**Evidence sufficient.** — The evidence, which showed that defendant pried open an office door and committed a larceny, was sufficient to support a finding that defendant intended to use a pry device to make an unauthorized entry of a structure with the intent to commit a felony therein. *State v. Barragan*, 2001-NMCA-086, 131 N.M. 281, 34 P.3d 1157.

**Evidence of possession.** — Evidence that burglary tools were taken by police from possession of defendants, weapons being found in the truck occupied by them on night of the burglary, substantially supported finding that defendants were in possession of the tools. *State v. Garcia*, 1969-NMCA-039, 80 N.M. 247, 453 P.2d 767.

**Insufficient evidence of possession of burglary tools.** — Where defendant was convicted of possession of burglary tools, and where the state presented evidence that a police officer witnessed defendant driving a vehicle that had been reported stolen and that the officer observed a screwdriver in the center console, there was insufficient evidence to support defendant's conviction, because there was no evidence that defendant had the screwdriver before he entered the vehicle or that he had any intent to use the screwdriver to obtain unauthorized entry to the vehicle. *State v. Ford*, 2019-NMCA-073.

**Insufficient evidence to support defendant's conviction for possession of burglary tools.** — Where defendant was convicted of non-residential burglary, breaking and entering, and possession of burglary tools, and where defendant claimed that there was insufficient evidence to support his conviction for possession of burglary tools, specifically contending that the state did not present sufficient evidence to show that the gloves or the screwdriver found in his possession were items designed for or commonly used to gain entry during a burglary, or that he intended to use the items for the purpose of committing a burglary, there was insufficient evidence to support defendant's conviction for possession of burglary tools, because although there was testimony that the arresting officer found a screwdriver wrapped inside a pair of gloves in defendant's pocket, the state presented no other evidence that could establish that defendant used or intended to use the screwdriver at the time of entry, or that a screwdriver is designed for, or commonly used in, the commission of a burglary, and although the state explained to the jury why defendant might wear gloves to commit the burglary, there was no evidence from which a rational juror could determine that defendant was wearing gloves at the time of entry. *State v. Begaye*, 2022-NMCA-010, cert. granted.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico criminal law, see 16 N.M.L. Rev. 9 (1986).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 13 Am. Jur. 2d Burglary §§ 74 to 77.

Validity, construction and application of statute relating to burglars' tools, 33 A.L.R.3d 798.

12A C.J.S. Burglary §§ 43 to 48.

## 30-16-6. Fraud.

A. Fraud consists of the intentional misappropriation or taking of anything of value that belongs to another by means of fraudulent conduct, practices or representations.

B. Whoever commits fraud when the value of the property misappropriated or taken is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits fraud when the value of the property misappropriated or taken is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits fraud when the value of the property misappropriated or taken is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits fraud when the value of the property misappropriated or taken is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.



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F. Whoever commits fraud when the value of the property misappropriated or taken exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

G. Whoever commits fraud when the property misappropriated or taken is a firearm that is valued at less than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-16-6, enacted by Laws 1963, ch. 303, § 16-6; 1979, ch. 119, § 1; 1987, ch. 121, § 2; 2006, ch. 29, § 3.**

**The 2006 amendment,** effective July 1, 2006, increased the value of property in Subsection B from $100 or less to $250 or less; increased the value of property in Subsection C from more than $100 but less than $250 to more than $250 but less than $500; increased the value of property in Subsection D from more than $250 but less than $500 to more than $500 but less than $2,500; deleted the former provision that whoever commits fraud when the property misappropriated or taken is a firearm is guilty of a fourth degree felony; and added Subsection G to provide that whoever commits fraud when the property misappropriated is a firearm with a value of less than $2,500 is guilty of a fourth degree felony.

**The 1987 amendment,** effective June 19, 1987, added the third paragraph, substituted "two hundred fifty dollars ($250) for "one hundred dollars ($100)" in the fourth paragraph, and substituted "is over" for "exceeds" in the sixth paragraph.

**ANNOTATIONS**

I. GENERAL CONSIDERATION.
II. ELEMENTS OF OFFENSE.
III. INDICTMENT AND INFORMATION.
IV. EVIDENCE.
A. IN GENERAL.
B. SUFFICIENCY.
V. INSTRUCTIONS.

I. GENERAL CONSIDERATION.

**Significance of value.** — The primary elements of fraud are an intentional misappropriation or taking of anything of value. Particular values are significant only for division of gravity from a petty misdemeanor ($100 or less) to a second degree felony (over $20,000). *State v. Lee*, 2009-NMCA-075, 146 N.M. 605, 213 P.3d 509, cert. denied, 2009-NMCERT-006, 146 N.M. 733, 215, P.3d 42.

**Intent.** — Where the evidence supports a reasonable inference that defendant knew the representations he made were false, there is sufficient evidence of fraudulent intent. *State v. Gardner*, 1985-NMCA-084, 103 N.M. 320, 706 P.2d 862, cert. denied, 103 N.M. 287, 705 P.2d 1138.

**Fraud and embezzlement are mutually exclusive,** and although alternative charges are proper, a defendant cannot be convicted of both fraud and embezzlement. *State v. Hornbeck*, 2008-NMCA-039, 143 N.M. 562, 178 P.3d 847.

**Section inapplicable to judicial proceedings.** — If presentation of a false claim were made to a board constituting a court, proceedings before which would result in a judicial judgment or decree, there could be no prosecution for obtaining money for false pretenses; the remedy would be a prosecution for perjury. *State v. Kelly*, 1921-NMSC-073, 27 N.M. 412, 202 P. 524.

**Conviction under general law improper.** — Where one who sold one neat cattle, the property of another, was prosecuted under former law relating to sale of property without right, the conviction could not stand, for law relating to larceny, embezzlement or killing of domestic animals, applied specifically to that crime and should have been invoked. *State v. Blevins*, 1936-NMSC-052, 40 N.M. 367, 60 P.2d 208.

**Jurisdiction.** — Jurisdiction of prosecution for criminal false pretenses was in the county, district or state where the offense was consummated by the obtaining of the property, even though the inducing pretenses were made elsewhere and the consummation by delivery of the property was effected through the instrumentality of an innocent agent, without the personal presence of the principal. *State v. Faggard*, 1918-NMSC-133, 25 N.M. 76, 177 P. 748 (decided under prior law).

**Effect of Worthless Check Act.** — This section and the Worthless Check Act (30-36-1 to 30-36-9 NMSA 1978) prohibit different offenses, and it is inappropriate to view the Worthless Check Act as an exception to this section. *State v. Higgins*, 1988-NMCA-072, 107 N.M. 617, 762 P.2d 904.

**Effect of Veterans' Benefits Act.** — Where defendant was indicted for fraudulently obtaining reimbursements for travel to and from medical appointments which were reimbursable by the United States Department of Veterans' Affairs pursuant to the Veterans' Benefits Act, 38 U.S.C. §111, the act did not preempt the state's prosecution of defendant for violation of Section 30-16-6 NMSA 1978 or create an unavoidable conflict with state law. *State v. Herrera*, 2014-NMCA-003, cert. denied, 2013-NMCERT-011.

**Place of crime.** — Fraud of which defendant was convicted occurred in New Mexico where defendant issued drafts of an insurance company drawn on a bank in Colorado in payment of false claims. *State v. Archuleta*, 1970-NMCA-131, 82 N.M. 378, 482 P.2d 242, cert. denied, 82 N.M. 377, 482 P.2d 241.

**Convictions violated double jeopardy.** — Where defendant was charged with four counts of fraud and, in the alternative, four counts of embezzlement, and on counts 2 and 4, she was convicted of both the fraud and embezzlement alternatives, although the state is authorized to charge in the alternative, defendant's convictions for both alternatives violate her right to be free from double jeopardy. *State v. Mercer*, 2005-NMCA-023, 137 N.M. 36, 106 P.3d 1283, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

**Subsequent prosecutions not double jeopardy.** — Dismissal of charge of passing forged instrument evidencing an indebtedness of a banking institution with intent to defraud for variance between allegation and proof, in that the instrument in question did not evidence an indebtedness of a bank, and subsequent prosecution for passing same forged bill of exchange with intent to defraud under the appropriate section, did not constitute double jeopardy as one information required proof of facts which the other did not. *Owens v. Abram*, 1954-NMSC-096, 58 N.M. 682, 274 P.2d 630, cert. denied, 348 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 719 (1955).

**Notice of lesser included offense.** — Fraud over $250 is a lesser and necessarily included offense of fraud over $2,500, such that defendant was put on notice of the included offense when the state charged him with the greater offense. *State v. Montoya*, 1993-NMCA-097, 116 N.M. 297, 861 P.2d 978, cert. denied, 116 N.M. 364, 862 P.2d 1223.

**Prosecution for both fraud and making false public voucher permitted.** — The double jeopardy clause does not prohibit the prosecution of an individual under both this section and 30-23-3 NMSA 1978. *State v. Ellenberger*, 1981-NMSC-056, 96 N.M. 287, 629 P.2d 1216.

Because the fraud statute does not require the making of a false voucher, and the false-voucher statute does



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not require the misappropriation or taking of anything of value, and because fraud, unlike the crime of making false public vouchers, requires proof of the victim's reliance, defendant may be prosecuted and sentenced for violation of both statutes. *State v. Whitaker*, 1990-NMCA-014, 110 N.M. 486, 797 P.2d 275, cert. denied, 109 N.M. 631, 788 P.2d 931.

**Alternative charging of fraud or embezzlement.** — The concept of double jeopardy was not involved in charging defendant with fraud or in the alternative embezzlement since the charges were in the alternative, nor were the concepts of included offenses, same evidence or merger applicable. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

**Fraud and fraudulent securities practice separate offenses.** — An analysis of the offense of fraud and the crime of fraudulent securities practice reveals that the two offenses have different elements; therefore, a defendant may be convicted and sentenced for both general fraud and securities fraud. *State v. Ross*, 1986-NMCA-015, 104 N.M. 23, 715 P.2d 471; *State v. Rivera*, 2009-NMCA-132, 147 N.M. 406, 223 P.3d 951, cert. denied, 2009-NMCERT-011, 147 N.M. 463, 225 P.3d 793.

**Convictions under this section and 58-11-65 NMSA 1978 improper.** — Conviction under this section for fraud over $2500 and conviction under 58-11-65 NMSA 1978 for false written statement for the purposes of obtaining credit union funds violated defendant's double jeopardy rights. *State v. Montoya*, 1993-NMCA-097, 116 N.M. 297, 861 P.2d 978, cert. denied, 116 N.M. 364, 862 P.2d 1223.

**Prosecution for violation of civil statute.** — The question of whether a specific contractual provision is based on a valid statute or regulation is irrelevant in a criminal case for fraud. The prosecution here was directed at the alleged criminal fraud of each of the defendants rather than a civil action to enforce the contract. Under these circumstances, defendants' convictions for fraud were not invalid. *State v. Crews*, 1989-NMCA-088, 110 N.M. 723, 799 P.2d 592, cert. denied, 109 N.M. 232, 784 P.2d 419.

**Single larceny doctrine is inapplicable to fraud statute.** *State v. Boergadine*, 2005-NMCA-028, 137 N.M. 92, 107 P.3d 532, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

## II. ELEMENTS OF OFFENSE.

**Ownership of website.** — Where an independent website designer created a website on the internet under contract with the defendant who was seeking to use the website for commercial purposes; the contract recognized the designer's legal ownership of the copyright to the web pages; the contract provided that upon payment to the designer, the defendant would receive a license to use the web pages; the contract never transferred any interest in the web page design or ownership of the web site to the defendant; in breach of the contract, the defendant never paid the designer; the defendant locked out the designer from access to the website by changing the password; the designer was the owner of the website and the defendant was properly convicted of criminal fraud by taking property that belonged to someone other than the defendant. *State v. Kirby*, 2007-NMSC-034, 141 N.M. 838, 161 P.3d 883.

**Fraud is complete once misappropriation or taking occurs by means stated in statute.** *State v. Thoreen*, 1978-NMCA-024, 91 N.M. 624, 578 P.2d 325, cert. denied, 91 N.M. 610, 577 P.2d 1256.

**Completion of the act of fraud.** — The act of fraud is complete at the time of the taking or misappropriation. Obtaining title is not necessary. *State v. Higgins*, 1988-NMCA-072, 107 N.M. 617, 762 P.2d 904.

**Meaning of false pretense.** — A false pretense was such a fraudulent representation of an existing or past fact, by one who knew it not to be true, as was adapted to induce the person to whom it was made to part with something of value. *State v. Tanner*, 1917-NMSC-017, 22 N.M. 493, 164 P. 821.

**To convict defendant of fraud, state had to prove beyond a reasonable doubt** that defendant, by any words or conduct, made a promise that she had no intention of keeping or misrepresented a fact to the victims, intending to deceive or cheat them, and, because of the promise or misrepresentation and the victim's reliance on it, defendant obtained money belonging to someone other than the defendant. *State v. Mercer*, 2005-NMCA-023, 137 N.M. 36, 106 P.3d 1283, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

**Intent to cheat and defraud required.** — To do an act fraudulently is to do it with intent to cheat and defraud; therefore, because an intent to cheat and defraud is required, this is a specific intent crime and the language of this section sets forth the requisite intent. *State v. Dosier*, 1975-NMCA-031, 88 N.M. 32, 536 P.2d 1088, cert. denied, 88 N.M. 28, 536 P.2d 1084.

**Intent to defraud essential element of crime.** — Intent to cheat and defraud was an essential and constituent element of offense prescribed under Laws 1882, ch. 20, § 1 (40-21-3, 1953 Comp.) relating to obtaining property with intent to cheat or defraud. *State v. Ferguson*, 1952-NMSC-052, 56 N.M. 398, 244 P.2d 783.

**Intent to defraud provable by inferences.** — An essential element of fraud or embezzlement is intent, which is seldom provable by direct testimony, and must be proved by the reasonable inferences shown by the evidence and the surrounding circumstances. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

**Intent to defraud must exist at time of taking.** — Contention of defendant, convicted of embezzlement under 30-16-8 NMSA 1978, that this section specifically applied to his case was without merit, where facts showed that he sold a motorcycle to complaining witness, who subsequently loaned it back to him, and thereafter although requested to do so defendant did not return the motorcycle but sold it to a third person, since there was no evidence of any fraudulent intent on the part of defendant when motorcycle was loaned to him by complaining witness. *State v. Gregg*, 1972-NMCA-001, 83 N.M. 397, 492 P.2d 1260, cert. denied, 83 N.M. 562, 494 P.2d 975.

**Intent to defraud inferred from actions.** — Where the defendant conveyed an interest in real property which she knew she did not possess, it can be reasonably inferred that the defendant intended to make false representations and intended to misappropriate the victims' money. *State v. Martinez*, 1979-NMCA-104, 95 N.M. 795, 626 P.2d 1292.

**Separate intent to defraud for each act.** — The fact that defendant specifically requested three additional cash payments for different purposes, which he accompanied by various assurances and justifications, supports the jury's finding that on each occasion, he had a separate intent to defraud. *State v. Boergadine*, 2005-NMCA-028, 137 N.M. 92, 107 P.3d 532, cert denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

**Silence may form basis for criminal misrepresentation,** where the defendant has a legal duty to speak or where such silence is calculated to deceive. *State v. Stettheimer*, 1980-NMCA-023, 94 N.M. 149, 607 P.2d 1167.

**Sufficient evidence of reliance on misrepresentation of fact.** — In defendant's trial for fraud, where the jury was presented with evidence that defendant, by misrepresenting that she was the victim's girlfriend, induced the victim, an eighty year old man, to allow defendant access to his bank accounts and that he would not have allowed such access had he known either that she had married or that she never truly considered herself the victim's girlfriend, a jury could reasonably infer that the



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victim's willingness to allow defendant access to his accounts was grounded on the misrepresentation that she was his girlfriend, and therefore the jury's finding of reliance was supported by substantial evidence. *State v. Garcia*, 2016-NMSC-034, *rev'g* 2015-NMCA-094, 356 P.3d 45.

**Reliance on misrepresentation required.** — A misrepresentation for purposes of criminal fraud may include a deceptive silence or omission. The state must also present evidence sufficient to prove that because of the victim's reliance on the misrepresentation, the defendant obtained the thing of value. *State v. Garcia*, 2015-NMCA-094, cert. granted, 2015-NMCERT-008.

Where defendant, a woman in her fifties, misrepresented her marital status to victim, a man in his mid-eighties, and convinced victim to provide her with access to victim's bank accounts, where defendant transferred funds from victim's accounts to defendant's own bank account for personal use, and where victim testified at trial that he allowed defendant access to his bank accounts because it would be easier for defendant to help him with his personal finances, that he wanted to help defendant out with her children and family, and that he was helping defendant out because he felt sorry for her, the evidence was insufficient to sustain defendant's conviction for fraud because the state failed to carry its burden of proving beyond a reasonable doubt that victim relied on defendant's misrepresentation, that he would not have given defendant access to his bank accounts but for his impression that she was romantically available to him. *State v. Garcia*, 2015-NMCA-094, cert. granted, 2015-NMCERT-008.

**Reliance necessary.** — Under 40-21-1, 1953 Comp., relating to the obtaining of money under false pretenses, it was necessary that the prosecution establish that the victim relied on the false representation and surrendered her money to appellant on the strength of the false representation. *State v. Jones*, 1964-NMSC-028, 73 N.M. 459, 389 P.2d 398 (decided under prior law, statute repealed).

**Actual damage to victim is not element of fraud.** — Although damages are essential to recover on a civil claim for fraud, monetary loss is not a requisite of a criminal conviction. *State v. McCall*, 1984-NMSC-007, 101 N.M. 32, 677 P.2d 1068, *rev'g* 1983-NMCA-109, 101 N.M. 616, 686 P.2d 958.

**Pecuniary loss by victim unnecessary.** — A criminal conviction for fraud does not require the victim suffer a pecuniary loss. Sufficient evidence was presented at trial of an intentional misappropriation or taking of something of value belonging to another by means of fraudulent conduct, practices or representations. Thus, the jury could have reasonably inferred defendants intentionally misappropriated funds invested by their partners and these funds were received due to misrepresentations. *State v. Clifford*, 1994-NMSC-048, 117 N.M. 508, 873 P.2d 254.

**Making false claim through agent.** — Evidence that bank was instructed by defendant to submit items for payment established relation of principal and agent, and submission of bond for consideration and refunding necessarily constituted the false representation as to its legality and validity. *State v. Kelly*, 1921-NMSC-073, 27 N.M. 412, 202 P. 524.

**Repayment will not mitigate completed offense.** — Once a misappropriation or taking occurs by means stated in this section, the crime of fraud is complete, and repayment will not mitigate the offense. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

## III. INDICTMENT AND INFORMATION.

**Joinder appropriate.** — Where the 12 counts of fraud charged were in the execution of a general fraudulent scheme, extending from September 1968 to January 1969, the method of operation in each count was identical and in each instance it was the property of the same insurance company that was misappropriated or taken, the trial court's refusal to sever was proper. *State v. Archuleta*, 1970-NMCA-131, 82 N.M. 378, 482 P.2d 242, cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

**Severance properly denied.** — The trial court did not err in denying defendant's motion to sever counts of fraud and receiving a bribe from other counts where there was no evidence the multiplicity of charges confused the jury, the multiplicity of charges were not cumulative, and the counts were predicate offenses for a racketeering charge. *State v. Armijo*, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

**Alternative charging permissible.** — There was nothing unfair about charging the defendant in the alternative with fraud or embezzlement, particularly since the charges arose out of the same events and carried the same penalties, and defendant was furnished with a most detailed statement of fact including the complete district attorney's file, police reports and a citation of authorities the state was relying on in support of each of the alternative charges. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

**Allegation of ownership.** — Indictment for false pretenses was to allege ownership of the property, unless there was some legal excuse for omitting such allegation. *State v. Faggard*, 1918-NMSC-133, 25 N.M. 76, 177 P. 748; *Territory v. Hubbell*, 1906-NMSC-033, 13 N.M. 579, 86 P. 747.

**Degree of crime measured by value of property obtained.** — The degree of crime under this section must be measured by the value of the property obtained by the defendant as a result of the deception, rather than the value of any property received by the victim. *State v. Martinez*, 1979-NMCA-104, 95 N.M. 795, 626 P.2d 1292.

**Information adequate.** — Amended information charging defendant with unlawfully obtaining money under false pretenses with intent to defraud, which enumerated the section defining the offense and fixing the penalty, was sufficient. *State v. Jones*, 1964-NMSC-028, 73 N.M. 459, 389 P.2d 398.

**Defective indictment.** — An indictment for securing money by false pretense was fatally defective where it was alleged that the means employed were certain bogus bills of sale and a mortgage attached to a draft drawn on the defrauded party, but which failed to allege that draft was ever honored by such party, and money paid by such party on the faith of such representation. *State v. Faggard*, 1918-NMSC-133, 25 N.M. 76, 177 P. 748.

**Information fatally defective.** — Failure to allege intent to cheat and defraud in information charging accused with obtaining money by false representations rendered the information fatally defective and any judgment based thereon became a nullity. *State v. Ferguson*, 1952-NMSC-052, 56 N.M. 398, 244 P.2d 783.

**Variance not material.** — Even if there was a variance between amended information charging defendant with having obtained $500 from named individual, while the proof showed that the $500 check was drawn on the laundry and cleaner's account and signed by the named individual, one of the owners of the laundry, the variance if any was not such as would impair the substantial rights of defendant. *State v. Jones*, 1964-NMSC-028, 73 N.M. 459, 389 P.2d 398.

## IV. EVIDENCE.

### A. IN GENERAL.

**Related incidents admissible.** — In the case of fraud, related incidents of accused's acts are admissible to establish motive, absence of mistake or accident, common scheme or plan or the identity of the person charged with various crimes. *State v. McCallum*, 1975-NMCA-030, 87



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N.M. 459, 535 P.2d 1085, cert. denied, 87 N.M. 457, 535 P.2d 1083.

**Other acts evidencing intent.** — The fact that defendant entered into many contracts which he failed to complete showed that either he was aware of the risks, that he was aware of his capabilities or that he could not have believed that he would complete the contracts, and so his proceeding to contract in spite of his awareness was evidence of his fraudulent intent. *State v. McCallum*, 1975-NMCA-030, 87 N.M. 459, 535 P.2d 1085, cert. denied, 87 N.M. 457, 535 P.2d 1083.

**Repayment will not mitigate completed offense.** — Repayment of a loan obtained by fraud so that the lender suffered no damages is not a defense against a charge of fraud under this section. *State v. McCall*, 1984-NMSC-007, 101 N.M. 32, 677 P.2d 1068, *rev'g* 1983-NMCA-109, 101 N.M. 616, 686 P.2d 958.

**Failure to return money.** — Testimony showing a nonreturn of the money was proper to show the intent of defendant, charged with obtaining money under false pretenses. *State v. Jones*, 1964-NMSC-028, 73 N.M. 459, 389 P.2d 398.

**Proof of false pretenses.** — False pretense could be established by conduct and acts as well as by written or spoken words. *State v. Kelly*, 1921-NMSC-073, 27 N.M. 412, 202 P. 524.

**Confession alone inadequate proof.** — Proof that a crime of fraud was committed cannot be established solely by the extrajudicial confession of the accused. *State v. Dosier*, 1975-NMCA-031, 88 N.M. 32, 536 P.2d 1088, cert. denied, 88 N.M. 28, 536 P.2d 1084.

**Imputation of guilty knowledge.** — Guilty knowledge of a brother of one accused of selling property belonging to another was not imputable to defendant. *State v. Hughes*, 1938-NMSC-077, 43 N.M. 109, 86 P.2d 278.

**When directed verdict appropriate.** — Only where there are no reasonable inferences or sufficient surrounding circumstances establishing defendant's intent can it be said, as a matter of law, that a motion for a directed verdict should have been granted or that a charge should not have been presented to the jury. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

**Question for jury.** — It was for the jury to decide whether defendant obtained the $500 by fraud or converted to his own use the money with which he had been entrusted. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

**Whether defendant received property as loan or for investment jury question.** — In a trial for fraud and embezzlement where the evidence was conflicting, whether the money and checks given to the defendant were loans, as he claimed, or were for investments, as his alleged victims claimed, was for the jury to decide. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

**Subsequent representations admissible to show intent.** — Evidence of representations made to the victims after the defendant had obtained their money, which went into specific details of alleged investments, was properly admitted in defendant's trial for fraud since the evidence explained his "investment" representations and tended to show his intent. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

**Sufficient evidence.** — Where defendant refinanced the marital home without the knowledge or consent of defendant's spouse for $32,635, there was sufficient evidence that the amount of the fraud was greater than $20,000, notwithstanding defendant's argument that because the home was community property, half of the loan proceeds belonged to defendant. *State v. Turner*, 2007-NMCA-105, 142 N.M. 460, 166 P.3d 1114, cert. denied, 2007-NMCERT-008, 142 N.M. 434, 166 P.3d 1088.

Where defendant presented a check for cashing at a store; the check was made payable to defendant in an amount that exceeded $250; the check was drawn on the victim's business account for labor; and the victim testified that the victim had not employed defendant or written a check to defendant in payment for labor, the evidence was sufficient to support defendant's conviction for fraud. *State v. Caldwell*, 2008-NMCA-049, 143 N.M. 792, 182 P.3d 775, cert. denied, 2008-NMCERT-003, 143 N.M. 681, 180 P.3d 1180.

**Evidence sufficient to convict.** — Testimony of a witness which is not inherently improbable because of a physical impossibility that the statements are true or the falsity of the statement is apparent without resort to inferences or deductions is sufficient to convict. *State v. Sanders*, 1994-NMSC-043, 117 N.M. 452, 872 P.2d 870.

Evidence is sufficient when elements of offense are established beyond a reasonable doubt by direct or circumstantial evidence. Fraudulent intent may be inferred from defendant's conduct and words.; *State v. Armijo*, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

**Separate convictions for each act.** — Where defendant first took a $350 check from the customer on February 11, 2002, and six days later, on February 17, 2002, customer gave defendant $300 in cash and two months later, on April 16, 2002, defendant requested more money from customer and on April 18, 2002, defendant received another $1,200 in cash, each time the defendant took money from the customer for repair of her car's transmission, he had not done any work on her car. Therefore, the lengthy stretches of time between these acts and the individual false requests for additional sums of money for parts supports three separate convictions for defendant's acts. *State v. Boergadine*, 2005-NMCA-028, 137 N.M. 92, 107 P.3d 532, cert denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

B. SUFFICIENCY.

**Child support payments.** — Where defendant's words and conduct included his claim that he had already tendered child support payments to his ex-wife and his offer of the photocopied non-carbon records to his ex-wife's attorney to bolster that claim, the intent was to evade payment of the amount he owed. The fact that he did not succeed results only in the lessening of the conviction to attempted fraud. It does not show an absence of an intent to defraud. *State v. Cearley*, 2004-NMCA-079, 135 N.M. 710, 92 P.3d 1284, cert. quashed, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

**Misappropriation of drafts.** — A charge of misappropriation of money may be established by showing that drafts or checks were misappropriated. *State v. Archuleta*, 1970-NMCA-131, 82 N.M. 378, 482 P.2d 242, cert. denied, 82 N.M. 377, 482 P.2d 241.

**False accounts.** — Where defendant made out false accounts in the name of a plumber for work purportedly done on plumbing system of courthouse and submitted them to board of county commissioners, knowing that the work had not been done and securing the proceeds for himself, evidence was sufficient to support conviction of obtaining money under false pretenses. *State v. Garcia*, 1953-NMSC-026, 57 N.M. 166, 256 P.2d 532.

**Proof of value.** — The defendant, who had opened an account, deposited a check he knew was not backed by sufficient funds, and wrote a number of checks, some of which were accepted by local businesses in exchange for merchandise, was improperly convicted of fraud. There was no testimony establishing the "false balance" ever had the values on which the jury was instructed. Proof of value is critical in a fraud prosecution. *State v. Higgins*, 1988-NMCA-072, 107 N.M. 617, 762 P.2d 904.

**Loan.** — There was sufficient evidence to support defendant's conviction of fraud; the evidence showed that defendant borrowed money from the victim after giving the victim a check in repayment of a previous debt, that the check was returned for insufficient funds, and that the



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borrowed money was not used for defendant's stated purpose. *State v. Curry*, 2002-NMCA-092, 132 N.M. 602, 52 P.3d 974, cert. denied, 132 N.M. 397, 49 P.3d 76.

**Spurious claim to loan board.** — False pretense could be predicated upon spurious claim presented to board of loan commissioners established to refund, pursuant to provision of Enabling Act, debts and obligations of the territory and its counties into state bonds. *State v. Kelly*, 1921-NMSC-073, 27 N.M. 412, 202 P. 524.

**Obtaining automobile through fraud.** — Evidence substantially supported a finding that defendant obtained an automobile from victim motor company by means of fraudulent conduct, practices or representations which were relied on by the company. *State v. McKay*, 1969-NMCA-009, 79 N.M. 797, 450 P.2d 435.

**Victims' inability to specify alleged investment no help to defendant.** — The fact that the victims did not know the type of investment their money was to be put into did not aid the defendant because the evidence showed that he had obtained the money by fraudulently representing that it would be invested. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

**Fraudulent construction contract.** — Evidence, viewed in the light most favorable to support the verdict, showing that the defendant entered into a contract with fraud victim to do certain construction work, which was not done, and that defendant even gave the victim a promissory note, evidencing an indebtedness, which was never paid, taken together with the evidence of other similar transactions, constituted substantial evidence to convict him of fraud. *State v. McCallum*, 1975-NMCA-030, 87 N.M. 459, 535 P.2d 1085, cert. denied, 87 N.M. 457, 535 P.2d 1083.

**Defrauding noninnocent victim.** — One could be convicted of obtaining money by false representations whose part in a fraudulent scheme was to sell cases of cotton, which were represented to be cigarettes, to a victim, although the victim understood he was helping to defraud either owners or insurers. *State v. Foster*, 1934-NMSC-083, 38 N.M. 540, 37 P.2d 541.

**Fraudulent obtainment of loan** may be basis for conviction of criminal fraud. *State v. Stettheimer*, 1980-NMCA-023, 94 N.M. 149, 607 P.2d 1167.

**Fraudulent land development project.** — Where defendants were charged with fraud after convincing an elderly couple to invest in a fraudulent investment scheme, evidence that defendants received over $78,000 from the victims for the purpose of investing in a land development project, that the money was instead placed in a bank account in defendants' names, that the money was disbursed by defendants for their personal benefit, and that the land project was never completed, was sufficient to show that defendants misrepresented facts to the victims, intending to deceive or cheat them, and that because of the victims' reliance on defendants' misrepresentations, defendants obtained more than $20,000. *State v. Maxwell*, 2016-NMCA-082, cert. denied.

**Sufficient evidence of securities fraud.** — Where defendants were charged with securities fraud after convincing an elderly couple to invest in a phony real estate investment project, evidence that defendants received $270,000 from the victims for the purpose of investing in a land development project and over $50,000 for the purpose of investing in commodities, that the money was instead placed in accounts solely owned by defendants, that the money was disbursed by defendants for their personal benefit, and that the money was never invested in the real estate project or in commodities, was sufficient to show that defendants sold or offered to sell a security and that in connection with the offer or sale of the security, defendants purposefully used a plan or scheme to deceive or cheat the victims. *State v. Maxwell*, 2016-NMCA-082, cert. denied.

**Evidence sufficient to sustain conviction of attempted fraud.** *State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

## V. INSTRUCTIONS.

**Definition of fraudulent conduct unnecessary.** — Absent a clearly expressed legislative intent requiring otherwise, fraudulent conduct is to be given its usual, ordinary meaning, and hence, there was no jurisdictional error in failing to define fraudulent conduct in an instruction; if defendant desired the term to be defined, he should have submitted a requested instruction. *State v. Dosier*, 1975-NMCA-031, 88 N.M. 32, 536 P.2d 1088, cert. denied, 88 N.M. 28, 536 P.2d 1084.

**Instruction on victim's intelligence not required.** — According to the majority view, statutes covering the crime of obtaining money under false pretenses were designed to protect not only the ordinarily wary and prudent, but also the ignorant, credulous and foolish; hence, trial court did not err in refusing to grant defendant's instruction to the effect that the jury had a right to consider the intelligence of the prosecuting witnesses. *State v. Jones*, 1964-NMSC-028, 73 N.M. 459, 389 P.2d 398.

**Instruction on gambling properly denied.** — Requested instruction that if victim was gambling the defendants must be found not guilty of fraud was properly denied as this section does not exempt fraud perpetrated while gambling. *State v. Dosier*, 1975-NMCA-031, 88 N.M. 32, 536 P.2d 1088, cert. denied, 88 N.M. 28, 536 P.2d 1084.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico Criminal Law, see 20 N.M.L. Rev. 265 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 32 Am. Jur. 2d False Pretenses § 1 et seq.

Telephone conversation as false pretense, 8 A.L.R. 656.

Obtaining money for goods not intended to be delivered as false pretenses, 17 A.L.R. 199.

Presentation of and attempt to establish fraudulent claim against governmental agency, 21 A.L.R. 180.

Loans and renewals thereof, false pretenses, 24 A.L.R. 397, 52 A.L.R. 1167.

Illegal or fraudulent intent of prosecuting witness or person defrauded as defense, 95 A.L.R. 1249, 128 A.L.R. 1520.

Offense of obtaining property by false pretenses predicated upon transaction involving conditional sale, 134 A.L.R. 874.

Obtaining payment by debtor on valid indebtedness by false representation as criminal false pretenses, 20 A.L.R.2d 1266.

Encumbrance: false statement as to existing encumbrance on chattel in obtaining loan or credit as criminal false pretense, 53 A.L.R.2d 1215.

Intent: admissibility to establish fraudulent purpose or intent, in prosecution for obtaining or attempting to obtain money or property by false pretenses, of evidence of similar attempt on other occasions, 78 A.L.R.2d 1359.

"Merger" clause in written contract as precluding conviction for false pretenses based on earlier oral false representations, 94 A.L.R.2d 570.

Repairs: criminal responsibility for fraud or false pretenses in connection with home repairs or installations, 99 A.L.R.2d 925.

Attempts to commit offenses of larceny by trick, confidence game, false pretenses and the like, 6 A.L.R.3d 241.



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Admissibility in prosecution for obtaining money or property by fraud or false pretenses, of evidence of subsequent payments made by accused to victim, 10 A.L.R.3d 572.

Partner: embezzlement, larceny, false pretenses or allied criminal fraud by a partner, 82 A.L.R.3d 822.

Modern status of rule that crime of false pretenses cannot be predicated upon present intention not to comply with promise or statement as to future act, 19 A.L.R.4th 959.

Criminal liability under state laws in connection with application for, or receipt of, public welfare payments, 22 A.L.R.4th 534.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems, 51 A.L.R.4th 971.

Fraud actions: right to recover for mental or emotional distress, 11 A.L.R.5th 88.

Criminal liability of pharmacy or pharmacist for welfare fraud in connection with supplying prescription drugs, 16 A.L.R.5th 390.

Use of fraud or trick as "constructive breaking" for purpose of burglary or breaking and entering offense, 17 A.L.R.5th 125.

Computer fraud, 70 A.L.R.5th 647.

35 C.J.S. False Pretenses §§ 1 to 28; 37 C.J.S. Fraud § 154.

## 30-16-7. Unlawful dealing in federal food coupons or WIC checks.

A. Unlawful dealing in federal food coupons or WIC checks consists of a person buying, selling, trading, bartering or possessing food coupons or WIC checks issued by the United States department of agriculture with the intent to obtain an economic benefit to which the person is not entitled under the rules of the human services department pertaining to the food stamp program or of the department of health pertaining to the special supplemental food program for women, infants and children.

B. Whoever commits unlawful dealing in federal food coupons or WIC checks when the value of the food coupons or WIC checks involved is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits unlawful dealing in federal food coupons or WIC checks when the value of the food coupons or WIC checks involved is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits unlawful dealing in federal food coupons or WIC checks when the value of the food coupons or WIC checks involved is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits unlawful dealing in federal food coupons or WIC checks when the value of the food coupons or WIC checks involved is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. Whoever commits unlawful dealing in federal food coupons or WIC checks when the value of the food coupons or WIC checks involved exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

G. For the purposes of this section, "federal food coupons or WIC checks" includes electronic benefit transfer cards or any other method through which food stamps or WIC benefits may be obtained.

**History: 1953 Comp., § 40A-16-6.1, enacted by Laws 1971, ch. 282, § 1; 1987, ch. 121, § 3; 2003, ch. 251, § 1; 2006, ch. 29, § 4.**

**The 2006 amendment,** effective July 1, 2006, increased the value of food coupons or WIC checks in Subsection B from $100 or less to $250 or less; increased the value of food coupons or WIC checks in Subsection C from more than $100 but less that $250 to more than $250 but less than $500; increased the value of food coupons or WIC checks in Subsection D from more than $250 to more than $500.

**The 2003 amendment,** effective June 20, 2003 added the present Subsection A through F designations; in present Subsection A deleted "and regulations" following "under the rules" near the middle, substituted "department of health" for "health and environment department" following "food stamp program or of the" near the end; substituted "two thousand five" for "twenty-five" preceding "hundred dollars" near the end of present Subsection D; substituted "two" for "twenty-five" preceding "thousand five hundred" near the middle of present Subsection E; and added Subsection G.

**The 1987 amendment,** effective June 19, 1987, added "or WIC checks" following "coupons" in several places throughout the section, substituted all of the language in the first paragraph following "regulations" for "of the health and social services department pertaining to the food stamp program," added the third and last paragraphs, substituted "two hundred fifty dollars ($250)" for "one hundred dollars ($100)" in the fourth paragraph, and substituted "is over twenty-five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000)" for "exceeds twenty-five hundred ($2,500)" in the fifth paragraph.

### ANNOTATIONS

**Single intent crime.** – The single intent crime doctrine applies to the crime of unlawful dealing in food coupons. *State v. Johnson*, 1996-NMCA-017, 121 N.M. 337, 911 P.2d 231, cert. denied 121 N.M. 242, 910 P.2d 318.



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**Evidence sufficient for conviction.** — Evidence that the defendant purchased four booklets of food stamps, each booklet with a face value of $65, on two separate occasions, was sufficient evidence from which the jury could infer the coupons had a value in excess of $250 and was sufficient for conviction. *State v. Buendia*, 1996-NMCA-027, 121 N.M. 408, 912 P.2d 284.

## 30-16-8. Embezzlement.

A. Embezzlement consists of a person embezzling or converting to the person's own use anything of value, with which the person has been entrusted, with fraudulent intent to deprive the owner thereof.

B. Whoever commits embezzlement when the value of the thing embezzled or converted is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits embezzlement when the value of the thing embezzled or converted is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits embezzlement when the value of the thing embezzled or converted is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits embezzlement when the value of the thing embezzled or converted is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. Whoever commits embezzlement when the value of the thing embezzled or converted exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

**History: 1953 Comp., § 40A-16-7, enacted by Laws 1963, ch. 303, § 16-7; 1987, ch. 121, § 4; 1995, ch. 131, § 1; 2006, ch. 29, § 5; 2007, ch. 256, § 1.**

**Cross references.** — For embezzlement by county officers, *see* 4-44-32 NMSA 1978.

For appropriation of trade secrets, *see* 57-3A-1 NMSA 1978 et seq.

**The 2007 amendment,** effective July 1, 2007, deleted the second sentence that provided that each separate incident of embezzlement or conversion constituted a separate offense.

**The 2006 amendment,** effective July 1, 2006, increased the value of the thing embezzled or converted in Subsection B from $100 or less to $250 or less; increased the value of the thing embezzled or converted in Subsection C from more than $100 but less than $250 to more than $250 but less than $500; increased the value of the thing embezzled or converted in Subsection D from more than $250 to more than $500.

**The 1995 amendment,** effective July 1, 1995, added the second sentence in the first paragraph, and substituted "two thousand five hundred dollars" for "twenty five hundred dollars" in the fourth and fifth paragraphs.

**The 1987 amendment,** effective June 19, 1987, added the third and last paragraphs, substituted "two hundred fifty dollars ($250)" for "one hundred dollars ($100)" in the fourth paragraph, while inserting "dollars" following "twenty-five hundred" in that same paragraph, and substituted "is over twenty-five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000)" for "exceeds twenty-five hundred dollars ($2,500)" in the fifth paragraph.

### ANNOTATIONS

I. IN GENERAL.
II. ELEMENTS OF OFFENSE.
III. INDICTMENT AND INFORMATION.
IV. EVIDENCE AND ISSUES.

### I. IN GENERAL.

**Equitable owner of property.** — The equitable owner of property under a real estate contract cannot be criminally charged with embezzling that property. *State v. Earp*, 2014-NMCA-059.

Where defendant purchased a home pursuant to a real estate contract; when defendant failed to pay the balance due on the contract, the seller terminated the contract; prior to vacating the property, defendant removed a number of appliances and fixtures from the house and left the house in a state of disrepair; and defendant was charged with embezzlement, 30-16-8 NMSA 1978 did not apply to property in which defendant had an equitable ownership interest. *State v. Earp*, 2014-NMCA-059.

**Jury deliberatons.** — The trial court did not abuse its discretion in acquiescing to the jury's request for the use of a calculator during its deliberations in a trial for 148 counts of embezzlement. *State v. Lihosit*, 2002-NMCA-006, 131 N.M. 426, 38 P.3d 194, cert. denied, 131 N.M. 564, 40 P.3d 1008.

**Entrustment.** — In order to be guilty of embezzlement, a defendant must have been entrusted with lawful possession of the property prior to its conversion. A showing that a defendant was given mere access to the property converted is insufficient. *State v. Kovach*, 2006-NMCA-122, 140 N.M. 430, 143 P.3d 192.

**Elements of offense.** — The concept that the property belong to someone other than the defendant is implicit in the current statute. *State v. Cramer*, 1977-NMCA-010, 90 N.M. 157, 560 P.2d 948, cert. denied, 90 N.M. 254, 561 P.2d 1347.

Failure to instruct the jury on an essential element of embezzlement , fraudulent intent, is reversible error under Rule 5-608A NMRA. *State v. Clifford*, 1994-NMSC-048, 117 N.M. 508, 873 P.2d 254.

**Fraud and embezzlement are mutually exclusive,** and although alternative charges are proper, a defendant cannot be convicted of both fraud and embezzlement. *State v. Hornbeck*, 2008-NMCA-039, 143 N.M. 562, 178 P.3d 847.

**Offense of embezzlement is purely statutory crime** and does not exist at common law. *State v. Bryant*, 1982-NMCA-178, 99 N.M. 149, 655 P.2d 161.

**Conviction as bar to further prosecution.** — A conviction for embezzling a sum as county clerk and ex-officio clerk of the district court barred further prosecution for



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embezzling another sum as county clerk and ex-officio probate clerk where state was unable to show conversion of any particular sum at any particular time. *State v. Romero*, 1928-NMSC-023, 33 N.M. 314, 267 P. 66.

**Convictions violated double jeopardy.** — Where defendant was charged with four counts of fraud and, in the alternative, four counts of embezzlement, and on counts 2 and 4, she was convicted of both the fraud and embezzlement alternatives, although the state is authorized to charge in the alternative, defendant's convictions for both alternatives violate her right to be free from double jeopardy. *State v. Mercer*, 2005-NMCA-023, 137 N.M. 36, 106 P.3d 1283, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

**Exercise of police power.** — Section 40-45-22, 1953 Comp., relating to embezzlement by public officials of public funds, was a proper exercise of the police power. *State v. Nolan*, 1955-NMSC-059, 59 N.M. 437, 285 P.2d 798 (decided under prior law, statute repealed).

**Purpose of legislation.** — The state's legitimate interest in the protection of public funds may be expressed in penal sanctions the purpose of which is the prevention of certain manifest or anticipated evil, or the preservation of the public health, safety, morals or general welfare. *State v. Nolan*, 1955-NMSC-059, 59 N.M. 437, 285 P.2d 798.

**Presumption of embezzlement constitutional.** — Provision in former law making existence of a shortage in the money or property for which public officials were accountable prima facie evidence of embezzlement did not violate constitutional rights of accused as there was a rational connection between the facts and the fact presumed, and the defendant was not precluded from presenting his defense to the presumed fact. *State v. Chavez*, 1954-NMSC-114, 58 N.M. 802, 277 P.2d 302 (decided under prior law).

**Defendant can be convicted of third-degree felony where series of takings totals more than $2,500,** although each individual taking is less, if the takings are associated with a single, sustained criminal intent. *State v. Pedroncelli*, 1984-NMSC-009, 100 N.M. 678, 675 P.2d 127.

**Child attempting to honor probation commitments.** — If in refusing to purchase marijuana with money entrusted to him by a law enforcement officer, but instead keeping the money for himself, a child on probation was attempting to honor his probation commitments, affirming an order revoking probation based on charges of embezzlement would be inconsistent with the purposes of the Children's Code (Section 32A-1-1 NMSA 1978], since the child had not been aware that the person giving him the money was an undercover officer involved in a sting operation. *In re Danny R.*, 1992-NMCA-056, 114 N.M. 315, 838 P.2d 469, cert. denied, 114 N.M. 123, 835 P.2d 839.

## II. ELEMENTS OF OFFENSE.

**Conversion.** — Conversion occurs when a person who has been entrusted with another's property treats the property as his own and uses it for his own purpose. *State v. Curry*, 2002-NMCA-092, 132 N.M. 602, 52 P.3d 974, cert. denied, 132 N.M. 397, 49 P.3d 76.

**To convict of embezzlement, state had to prove beyond a reasonable doubt** that defendant was entrusted with money that she converted to her own use and, at the time defendant converted the money, she fraudulently intended to deprive the owner of it. *State v. Mercer*, 2005-NMCA-023, 137 N.M. 36, 106 P.3d 1283, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

**Essential element of fraud or embezzlement is intent,** which is seldom provable by direct testimony, and must be proved by the reasonable inferences shown by the evidence and the surrounding circumstances. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

**Embezzlement requires proof that defendant entertained specific intent to deprive owner of property.** — Embezzlement is a crime which requires proof that at the time of the conversion of the property, the defendant entertained a specific intent to deprive the owner of the property. *State v. Gonzales*, 1983-NMCA-041, 99 N.M. 734, 663 P.2d 710, cert. denied, 99 N.M. 644, 662 P.2d 645, and cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

**"Entrust" defined.** — "Entrust" means to commit or surrender to another with a certain confidence regarding his care, use or disposal of that which has been committed or surrendered. *State v. Stahl*, 1979-NMCA-054, 93 N.M. 62, 596 P.2d 275, cert. denied, 93 N.M. 8, 595 P.2d 1203.

**Specific or technical fiduciary relationship is not necessary** to sustain an embezzlement conviction. *State v. Archie*, 1997-NMCA-058, 123 N.M. 503, 943 P.2d 537.

**Intent to "permanently" deprive** is not requisite element of embezzlement. *State v. Moss*, 1971-NMCA-117, 83 N.M. 42, 487 P.2d 1347.

A legislative intent to include the element of intent to permanently deprive the owner of his property in the crime of embezzlement cannot be ascertained by comparing this section with the larceny statute (30-16-1 NMSA 1978), because larceny is defined in terms of stealing while comparable language is not used in the embezzlement statute. *State v. Moss*, 1971-NMCA-117, 83 N.M. 42, 487 P.2d 1347.

**Time of formation of intent.** — It would not be fatal to conviction, resting on entrustment, that the fraudulent intent existed or was formed coincidentally with receipt of the money or property. *State v. Konviser*, 1953-NMSC-057, 57 N.M. 418, 259 P.2d 785.

**Persons capable of entrustment.** — That one is an agent, servant or employee does not deny that "entrustment" may characterize the custody of money or property in his possession as such agent, servant or employee. *State v. Konviser*, 1953-NMSC-057, 57 N.M. 418, 259 P.2d 785.

**Money to be proved missing.** — If money cannot be proved missing by reliable, competent testimony or documentary evidence, an embezzlement charge must be dropped. *State v. Konviser*, 1953-NMSC-057, 57 N.M. 418, 259 P.2d 785.

**Court trying embezzlement not concerned with amount owed victims.** — In a trial for embezzlement, the court is not concerned with the amount owed to the victims by the defendant but with the amount converted in violation of this section. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

**Failure to pay on demand.** — Proof of a demand and a failure to return the property may be evidence of embezzlement because such proof is material to the questions of conversion of the property and a fraudulent intent to deprive the owner of his property, but such a demand and failure to return is not a separate element of the crime. *State v. Moss*, 1971-NMCA-117, 83 N.M. 42, 487 P.2d 1347.

A demand and failure to pay over the money was necessary, both by way of allegation and proof, before a public official could be convicted of embezzlement under Code 1915, § 1546. *State v. Davisson*, 1923-NMSC-045, 28 N.M. 653, 217 P. 240, appeal dismissed, 267 U.S. 574, 45 S. Ct. 229, 69 L. Ed. 795 (1925) (decided under prior law).

**Restitution does not prevent conviction for completed embezzlement.** — Embezzlement is complete when the defendant converts the victim's checks, and restitution does not allow the embezzler to escape prosecution and conviction. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

**Value not jurisdictional.** — Although information should have alleged value, jurisdiction does not depend upon the value of the property embezzled; value merely denotes the grade of the offense. *Roehm v. Woodruff*,



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1958-NMSC-083, 64 N.M. 278, 327 P.2d 339(decided under prior law).

III. INDICTMENT AND INFORMATION.

**Grand jury instructions must include definitions.** — The definitional instructions that are included within the essential UJI elements instruction for a crime shall be given to the grand jury. *State v. Bradford*, 2013-NMCA-071, 305 P.3d 975.

**Failure to give definitional instructions to grand jury.** — Where defendant was charged with embezzlement and the instructions to the grand jury failed to include the definitions of "fraudulent intent" and "converted" in UJI 14-1641 NMRA, the jury instructions were insufficient. *State v. Bradford*, 2013-NMCA-071, 305 P.3d 975.

**Charging in alternative not double jeopardy.** — The concept of double jeopardy was not involved in charging defendant with fraud or in the alternative embezzlement since the charges were in the alternative, nor were the concepts of included offenses, same evidence or merger applicable. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

**Charging in alternative not unfair.** — There was nothing unfair about charging the defendant in the alternative with fraud or embezzlement, particularly since the charges arose out of the same events and carried the same penalties, and defendant was furnished with a most detailed statement of fact including the complete district attorney's file, police reports and a citation of authorities the state was relying on in support of each of the alternative charges. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

**Indictment proper although lesser offense also applicable.** — Where there was sufficient evidence to support a conviction for embezzlement, prosecution therefor was proper, even though the charges might have been covered by the lesser crime of criminal damage to property. *State v. Archie*, 1997-NMCA-058, 123 N.M. 503, 943 P.2d 537.

**Indictment in exact language of statute was sufficiently specific** to require no amplification. *State v. Probert*, 1914-NMSC-025, 19 N.M. 13, 140 P. 1108.

**Means or elements of offense.** — There is no necessity to set forth means or elements of the statutory offense of embezzlement in an information. *Smith v. Abram*, 1954-NMSC-061, 58 N.M. 404, 271 P.2d 1010.

**Failure to meet demands.** — Indictment was to charge that accused was not able to meet the demands of any person lawfully demanding the allegedly embezzled property. *Territory v. Abeyta*, 1907-NMSC-011, 14 N.M. 56, 89 P. 254.

**Allegation of value.** — Where indictment described embezzlement as being of a certain number of dollars, it was not necessary to state further the value. *Territory v. Hale*, 1905-NMSC-021, 13 N.M. 181, 81 P. 583 (decided under prior law).

Indictment was sufficient both as to description of money and value thereof where it alleged "having then and there in his possession the sum of . . . (a certain number of dollars), a better description of the kinds and character of which is to the grand jurors unknown." *Territory v. Hale*, 1905-NMSC-021, 13 N.M. 181, 81 P. 583 (decided under prior law).

Since much property embezzled was never seen by the employer, it was not necessary to exactly describe it in indictment, and money need only have been described in the best way which the circumstances permitted, in the indictment and on trial. *Territory v. Maxwell*, 1882-NMSC-010, 2 N.M. 250 (decided under prior law).

**Allegation of ownership.** — In indictment charging embezzlement it is essential to aver the felonious conversion of the property of another; unless the rule is modified by statute, the allegation must be as accurate as in an indictment for larceny, and in case of an association, facts must be averred to show that the association could own property in its name. *State v. Parsons*, 1917-NMSC-084, 23 N.M. 520, 169 P. 475 (decided under prior law).

**Embezzlement by employee.** — An indictment under Code 1915, § 1544, which did not allege that property embezzled came into possession of accused by virtue of his employment was not fatally defective. *State v. Hill*, 1918-NMSC-046, 24 N.M. 344, 171 P. 790 (decided under prior law).

**Embezzlement of sheep.** — An indictment under Laws 1921, ch. 123, § 1 (40-4-17, 1953 Comp.), alleging that on a day certain the defendant, having been entrusted with certain number of sheep belonging to named person, embezzled and fraudulently converted the same to his own use, stated an offense. *State v. Anaya*, 1922-NMSC-059, 28 N.M. 283, 210 P. 567 (decided under prior law).

**Citation of wrong section.** — Petitioner was not deprived of liberty without due process of law nor denied equal protection of the law under this section merely because an information charging defendant with embezzlement incorrectly refers to a repealed section since the offense was otherwise sufficiently charged. *Smith v. Abram*, 1954-NMSC-061, 58 N.M. 404, 271 P.2d 1010.

IV. EVIDENCE AND ISSUES.

**Single criminal intent doctrine inapplicable.** — Court did not commit fundamental error by refusing to instruct jury that the state was required to prove that each instance of embezzlement charged was the result of a distinct criminal impulse; the single criminal intent doctrine no longer applies to embezzlement cases, in light of the 1995 amendment of this section (adding the second sentence in the first paragraph). *State v. Faubion*, 1998-NMCA-095, 125 N.M. 670, 964 P.2d 834, cert. denied, 125 N.M. 322, 961 P.2d 167 (decided under prior law).

**Testimony of C.P.A.** — In an embezzlement prosecution, a certified public accountant may testify as to his findings from an examination of books and records not in evidence and not produced at the trial. *State v. Schrader*, 1958-NMSC-056, 64 N.M. 100, 324 P.2d 1025.

**Factual question as to ownership of funds.** — Where there was evidence that the victims gave checks to the defendant, knowing they had insufficient funds in the bank to cover the checks, on the defendant's representations that he wanted the checks to show to investors and that the checks would not be cashed, this evidence raised a factual question as to whether ownership of the funds represented by the checks passed or was intended to pass to defendant. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

**No mistake-of-fact instruction unless employee believed he was authorized to expend employer's funds.** — The defendant is not entitled to a mistake-of-fact instruction in a prosecution for embezzlement for using public funds belonging to his employer to pay for the travel expenses of his spouse, who is not employed by the same employer and who has not performed any public service, on the ground that he believed in good faith he was owed money by his employer, where there is no evidence that he in fact believed he possessed the legal authority to expend public funds for his spouse's travel. *State v. Gonzales*, 1983-NMCA-041, 99 N.M. 734, 663 P.2d 710, cert. denied, 99 N.M. 644, 662 P.2d 645, and cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

**Question of entrustment is a question of fact for the jury.** *State v. Peke*, 1962-NMSC-033, 70 N.M. 108, 371 P.2d 226, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962).



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**Jury to be instructed on ordinary meaning of term.** — The usual, ordinary meaning of "entrusted" was applicable to this section, and defendant therefore was not entitled to an instruction defining entrustment as a designated fiduciary relationship. *State v. Moss*, 1971-NMCA-117, 83 N.M. 42, 487 P.2d 1347.

**Since defendant not entrusted with money, offense not embezzlement.** — Although a defendant is in charge of an entire store, where the undisputed facts show that money in a drop-box is not committed or surrendered to the defendant's care, use or disposal, that the money is to be handled exclusively by the manager, and where the defendant is excluded from having anything to do with that money, his offense, as to taking the money in the drop-box, is larceny, not embezzlement, because he had not been entrusted with that money. *State v. Stahl*, 1979-NMCA-054, 93 N.M. 62, 596 P.2d 275, cert. denied, 93 N.M. 8, 595 P.2d 1203.

**Entrustment established.** — Where defendant, for some five years, acted as executive secretary of state association and, in effect, operated the business transactions of the association, including the making of bank deposits and submitting reports to the board of directors, evidence supported the jury finding of entrustment of the money of the association. *State v. Peke*, 1962-NMSC-033, 70 N.M. 108, 371 P.2d 226, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962).

**Sufficiency of evidence.** — There was sufficient evidence to support defendant's conviction of embezzlement; the evidence showed that defendant was entrusted with the victim's money, the victim asked for it back, and defendant, having converted the money for his own use, knowingly wrote a check to the victim that defendant knew would be returned for insufficient funds. *State v. Curry*, 2002-NMCA-092, 132 N.M. 602, 52 P.3d 974, cert. denied, 132 N.M. 397, 49 P.3d 76.

**Insufficient evidence of entrustment to support embezzlement conviction.** — Where defendant, a homebuilder hired to build homes in a luxury golf community in Santa Fe, was charged with embezzlement for his failure to finish several construction projects, and where evidence at trial established that defendant's clients paid initial deposits to defendant to be used toward construction costs of their new homes, there was insufficient evidence to convict defendant of embezzlement because contractors cannot be convicted of embezzlement of down payment of funds upon a failure to complete a project because deposit money is legally the property of the contractor at the time it is paid. Consequently, at the time defendant used the deposit money for purposes other than the construction of the properties, the deposits already legally belonged to defendant; he could not be found to have converted deposits because they were his property, not the property of another. *State v. Kalinowski*, 2020-NMCA-018, cert. denied.

**Electronic monitoring devices covered by embezzlement statute.** — Defendant probationer was entrusted with an electronic monitoring device (EMD) within the meaning of this section, and his disposal of the EMD in an effort to end the state's ability to monitor his movements was evidence that he used it for his own purpose and evidence of his fraudulent intent. *State v. Archie*, 1997-NMCA-058, 123 N.M. 503, 943 P.2d 537.

**Fraud or embezzlement for jury.** — It was for the jury to decide whether defendant obtained the $500 by fraud or converted to his own use the money with which he had been entrusted. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

**Whether defendant received property as loan or for investment jury question.** — In a trial for fraud and embezzlement where the evidence was conflicting, whether the money and checks given to the defendant were loans, as he claimed, or were for investments, as his alleged victims claimed, was for the jury to decide. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

**Evidence of amount owed victims not dispositive of case.** — In a trial for a third-degree embezzlement felony, the fact that the victims eventually "lost" an amount less than $2,500 was not dispositive, as there was substantial evidence that the defendant, with the requisite fraudulent intent, negotiated for his own use checks in the amount of $3,900, which he had been entrusted to hold and not cash. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

**Sale of borrowed property.** — Evidence that defendant sold a motorcycle to complaining witness, that subsequently, motorcycle was loaned back to defendant, and that although requested to do so, defendant did not return motorcycle but sold it to a third person established an embezzlement as defined in this section. *State v. Gregg*, 1972-NMCA-001, 83 N.M. 397, 492 P.2d 1260, cert. denied, 83 N.M. 562, 494 P.2d 975.

**Evidence of intent inconsistent with innocence.** — While evidence was circumstantial, once the jury determined that defendant who sold motorcycle to third party had already sold it to complaining witness, circumstantial evidence of intent was inconsistent with any reasonable theory of innocence. *State v. Gregg*, 1972-NMCA-001, 83 N.M. 397, 492 P.2d 1260, cert. denied, 83 N.M. 562, 494 P.2d 975.

**Embezzlement of checks.** — The state satisfied its burden as to the embezzlement when it showed that two checks were cashed and the other two were deposited in the defendant's personal checking account, and it made very little difference whether other funds were used, as defendant sought to imply, to make up the discrepancy; the embezzlement occurred at the moment of the cashing of the checks. *State v. Peke*, 1962-NMSC-033, 70 N.M. 108, 371 P.2d 226, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962).

**Failure to account for fine.** — A justice of the peace (now magistrate) could be indicted for the embezzlement of a fine imposed and collected for which he never accounted, either before or after expiration of his term of office. *Territory v. Heacock*, 1889-NMSC-006, 5 N.M. 54, 20 P. 171.

**No evidence to support attempt charge.** — Evidence that defendant was loaned a car and hadn't returned it more than three days later, shows that he was guilty of embezzlement or no crime at all, and did not support an issue of "attempt." *State v. Moss*, 1971-NMCA-117, 83 N.M. 42, 487 P.2d 1347.

**Breach of trust not embezzlement.** — Defendant who was guilty of nothing more serious than a breach of trust could not be convicted for embezzlement. *Territory v. Eyles*, 1911-NMSC-068, 16 N.M. 657, 119 P. 1127.

**Unexplained comparison of computer printouts and defendant's records violates right of confrontation.** — Defendant was denied her constitutional right of confrontation at her trial for embezzlement, where the only evidence of shortages attributable to her was obtained by an unexplained comparison of computer printouts with her own records and there was no evidence that the state's only witness understood how the printouts were prepared. *State v. Austin*, 1985-NMCA-118, 104 N.M. 573, 725 P.2d 252, cert. quashed, 104 N.M. 632, 725 P.2d 832.

**When directed verdict proper.** — If there are reasonable inferences and sufficient circumstances then the issue of intent becomes a question of fact for the jury, and only where there are no reasonable inferences or sufficient surrounding circumstances can it be said, as a matter of law, that a motion for a directed verdict should have been granted or that a charge should not have been presented



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to the jury. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

**Circumstantial evidence supported store manager's conviction** of embezzlement, where the state presented evidence of discrepancies between the daily sales reports and deposit slips indicating shortages on six days, and the facts relied upon by defendant were not uncontroverted and consisted of issues of credibility to be resolved by the jury as finders of fact. *State v. James*, 1989-NMCA-089, 109 N.M. 278, 784 P.2d 1021, cert. denied, 109 N.M. 262, 784 P.2d 1005.

**Jury instruction on single larceny doctrine appropriate.** — Single larceny doctrine recognizes either that a taking at one time or place of property belonging to several people may constitute a single crime, or, that a series of takings from one owner may also constitute a single crime and therefore these crimes cannot be separately punished. Since the facts and circumstances showed a series of acts that cannot be said as a matter of law to be either a single taking or separate takings, for a defendant to be separately convicted and sentenced for each taking, the state also had to show separate intent. Under the aforementioned circumstances, it is fundamental error for the trial court not to instruct the jury on the single criminal intent doctrine. *State v. Brooks*, 1994-NMSC-062, 117 N.M. 751, 877 P.2d 557 (decided under prior law).

**Mistake of fact instruction.** — Since there was a question whether defendant rightfully applied certain construction payments to the balance allegedly due him by the plaintiff, defendant was entitled to an instruction on mistake of fact, the omission of which constituted reversible error. *State v. Bunce*, 1993-NMSC-057, 116 N.M. 284, 861 P.2d 965.

**Jury instruction on intent deficient.** — Jury instruction which omitted the essential element of fraudulent intent required by this section was deficient, and required reversal of defendant's conviction for embezzlement. *State v. Green*, 1993-NMSC-056, 116 N.M. 273, 861 P.2d 954.

**Fraudulent intent instruction.** — Failure to instruct the jury on an essential element of embezzlement, fraudulent intent, is reversible error and can never be corrected by including the concept elsewhere in the instructions. *State v. Clifford*, 1994-NMSC-048, 117 N.M. 508, 873 P.2d 254.

**Essential elements of embezzlement.** — The essential elements of the offense of embezzlement are that the property belonged to someone other than the accused, that the accused occupied a designated fiduciary relationship, that the property came into his possession by reason of his employment or office, and that there was a fraudulent intent to deprive the owner of his property. 1953-54 Op. Att'y Gen. No. 54-6053.

**Law reviews.** — For note, "Criminal Law: Applying the General/Specific Statute Rule in New Mexico – State v. Santiallanes," see 32 N.M. L. Rev. 313 (2002).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 26 Am. Jur. 2d Embezzlement §§ 1, 6, 7, 8, 9, 24.

Variance between allegation and proof as to the capacity in which one charged with embezzlement received the property, 12 A.L.R. 603.

Individual criminal responsibility of officer or employee for embezzlement, through corporate act, of property of third person, 33 A.L.R. 787.

Embezzlement by one spouse of other's property, 55 A.L.R. 558.

"Embezzlement" within fidelity bond, 56 A.L.R. 967.

Misappropriation of executor, administrator, guardian or trustee as embezzlement, 75 A.L.R. 299.

Sufficiency of verdict on conviction, which fails to state value of property, 79 A.L.R. 1180.

Larceny and embezzlement distinguished, 146 A.L.R. 532.

Embezzlement by independent collector or collection agency working on commission or percentage, 56 A.L.R.2d 1156.

Criminal responsibility for embezzlement from corporation by stockholder owning entire beneficial interest, 83 A.L.R.2d 791.

Conversion by promoter of money paid for preincorporation subscription for stock shares as embezzlement, 84 A.L.R.2d 1100.

Drawing of check on bank account of employer payable to accused's creditor as constituting embezzlement, 88 A.L.R.2d 688.

Motor vehicles, criminal liability in connection with rental of, 38 A.L.R.3d 949.

Partner: embezzlement, larceny, false pretenses or allied criminal fraud by a partner, 82 A.L.R.3d 822.

Retailer's failure to pay to government sales or use tax funds as constituting larceny or embezzlement, 8 A.L.R.4th 1068.

Bank officer's or employee's misapplication of funds as state criminal offense, 34 A.L.R.4th 547.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems, 51 A.L.R.4th 971.

Who is "officer, director, agent, or employee" of bank, or is "connected in any capacity" with bank and therefore subject to prosecution and punishment for misapplication of bank funds under 18 USCS § 656, 57 A.L.R. Fed. 537.

Bankruptcy: what constitutes embezzlement of funds giving rise to nondischargeable debt under 11 USCS § 523(a)(4), 99 A.L.R. Fed. 124.

29A C.J.S. Embezzlement § 1 et seq.

## 30-16-9. Extortion.

Extortion consists of the communication or transmission of any threat to another by any means whatsoever with intent thereby to wrongfully obtain anything of value or to wrongfully compell [compel] the person threatened to do or refrain from doing any act against his will.

Any of the following acts shall be sufficient to constitute a threat under this section:

A. a threat to do an unlawful injury to the person or property of the person threatened or of another;

B. a threat to accuse the person threatened, or another, of any crime;

C. a threat to expose, or impute to the person threatened, or another, any deformity or disgrace;

D. a threat to expose any secret affecting the person threatened, or another; or

E. a threat to kidnap the person threatened or another.

Whoever commits extortion is guilty of a third degree felony.



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**History: 1953 Comp., § 40A-16-8, enacted by Laws 1963, ch. 303, § 16-8.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**ANNOTATIONS**

**Language of section does not require showing of consented-to taking.** *State v. Barber*, 1979-NMCA-137, 93 N.M. 782, 606 P.2d 192, cert. denied, 94 N.M. 628, 614 P.2d 545.

**Extortion is completed crime** when defendant's threat is communicated to the victim with the requisite statutory intent. *State v. Barber*, 1979-NMCA-137, 93 N.M. 782, 606 P.2d 192, cert. denied, 94 N.M. 628, 614 P.2d 545; *State v. Wheeler*, 1980-NMCA-185, 95 N.M. 378, 622 P.2d 283.

**"Threats" included in section.** — This section includes both written and oral threats and also includes actions constituting threats. *State v. Barber*, 1979-NMCA-137, 93 N.M. 782, 606 P.2d 192, cert. denied, 94 N.M. 628, 614 P.2d 545.

**Allegation of nature of threat.** — Indictment under Laws 1853-1854, p. 94 (former 40-46-1, 1953 Comp.) was insufficient where it simply charged that defendant threatened another, without alleging that such threat was to injure the person or property of another. *State v. Strickland*, 1916-NMSC-008, 21 N.M. 411, 155 P. 719.

**Threat of injury is extortion.** — Where defendant was given a psychological evaluation; defendant asked to see the evaluation report and became angry upon reading the report; subsequently, defendant asked again for a copy of the report; the custodian of the report refused to give defendant a copy of the report because of defendant's mental state; defendant wrote letters to the custodian in which defendant threatened to harm the custodian if the custodian did not give defendant a copy of the report; and defendant has a right to receive a copy of the report, defendant was guilty of extortion. *Rael v. Sullivan*, 918 F.2d 874 (10th Cir. 1990), cert. denied, 499 U.S. 928, 111 S. Ct. 1328, 113 L. Ed. 2d 260 (1991).

**"Unlawful injury" as breach of contract is question for legislature.** — Whether "unlawful injury" within the meaning of Subsection A encompasses a mere breach of contract is a question which the legislature may wish to clarify. *State v. Ashley*, 1989-NMCA-018, 108 N.M. 343, 772 P.2d 377, cert. denied, 108 N.M. 433, 773 P.2d 1240.

**Phrase "to wrongfully compel"** refers to the manner in which the defendant compels an act, rather than the legitimacy of the defendant's objective. *Rael v. Sullivan*, 918 F.2d 874 (10th Cir. 1990), cert. denied, 499 U.S. 928, 111 S. Ct. 1328, 113 L. Ed. 2d 260 (1991).

**Wrongfully compelling an act.** — A bank's policy of requiring execution of a forgery affidavit and prosecution of an alleged forgery as a condition precedent to reimbursement of a customer's account did not constitute extortion under this section. *Sunwest Bank v. Deskalos*, 1995-NMCA-100, 120 N.M. 637, 904 P.2d 1062.

**Defendant's threat to close victim's health club** unless victim gave defendant money to help him buy the building in which the club was operated was a threat of "unlawful injury" within the meaning of Subsection A because the act threatened was a tort. *State v. Ashley*, 1989-NMCA-018, 108 N.M. 343, 772 P.2d 377, cert. denied, 108 N.M. 433, 773 P.2d 1240.

**Law reviews.** — For comment on *Landavazo v. Credit Bureau*, 72 N.M. 456, 384 P.2d 891 (1963), see 4 Nat. Resources J. 584 (1964).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extortion, Blackmail and Threats §§ 1 to 6.

Extortion predicated upon statements or intimations regarding criminal liability in connection with attempt to collect or settle a claim which defendant believed to be valid, 135 A.L.R. 728.

Validity and construction of terroristic threat statutes, 45 A.L.R.4th 949.

Injury to reputation or mental well-being as within penal extortion statutes requiring threat of "injury to the person," 87 A.L.R.5th 715.

35 C.J.S. Extortion §§ 1 to 6; 86 C.J.S. Threats and Unlawful Communications §§ 2 to 6.

## 30-16-10. Forgery.

A. Forgery consists of:

(1) falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud; or

(2) knowingly issuing or transferring a forged writing with intent to injure or defraud.

B. Whoever commits forgery when there is no quantifiable damage or when the damage is two thousand five hundred dollars ($2,500) or less is guilty of a fourth degree felony.

C. Whoever commits forgery when the damage is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

D. Regardless of value, whoever commits forgery of a will, codicil, trust instrument, deed, mortgage, lien or any other instrument affecting title to real property is guilty of a third degree felony.

E. Whoever commits forgery when the damage is over twenty thousand dollars ($20,000) is guilty of a second degree felony.

**History: 1953 Comp., § 40A-16-9, enacted by Laws 1963, ch. 303, § 16-9; 2006, ch. 29, § 6.**

**Cross references.** — For forgery of lottery ticket, *see* 6-24-31 NMSA 1978.

For forgery of credit card, *see* 30-16-31 NMSA 1978.

**The 2006 amendment,** effective July 1, 2006, added Subsection B to provide that if the quantifiable damage is $2,500 or less the crime is a fourth degree felony; added Subsection C to provide that if the damages is more than $2,500 but less than $20,000, the crime is a third degree felony; added Subsection D to provide that regardless of value whoever commits forgery of a will, codicil, trust instrument, deed, mortgage, lien or other instrument affecting title to real property is guilty of a third degree felony; and added Subsection E to provide that if the damage is more than $20,000, the crime is a second degree felony.



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## ANNOTATIONS

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### I. GENERAL CONSIDERATION.

**Request for false notations.** — Although the defendant admittedly told the maker of the checks to put false notations on them indicating that the defendant received the checks in the course of his employment, rather than for personal goods and services, which represented a misrepresentation upon the face of the checks that cast doubt on his general truthfulness and moral character, the notations did not support a logical inference that petitioner knew the checks were forged, since the purpose of the notations was to facilitate cashing the third-party checks, and they served the same purpose regardless of whether the checks were good or were forged. *Stallings v. Tansy*, 28 F.3d 1018 (10th Cir. 1994).

**Writing one's true name in payee line.** — Defendant's alteration of a traveler's check by writing his name in the second payee line after the rightful owner had signed the first payee line did not alter the legal effect of the traveler's check. Any subsequent holder of the check should have known that it was not negotiable. Thus, defendant did not commit forgery. *State v. Carbajal*, 2002-NMSC-019, 132 N.M. 326, 48 P.3d 64.

**Physical act not always a transfer.** — It is possible to have a physical act which is an attempt to transfer one's interest but to have such an attempt thwarted at some stage of perpetration. *State v. Tooke*, 1970-NMCA-068, 81 N.M. 618, 471 P.2d 188, *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

**Presentation of check a complete transfer.** — Where defendant presented a forged check to a bank teller for cashing, fact that the teller, somewhat suspicious, took the check to her supervisor, whereupon the police were called and defendant was arrested, did not convert the crime into an attempt, since the transfer of interest by the defendant had already occurred; the fact that defendant received nothing and that there was no injury or loss was immaterial. *State v. Linam*, 1977-NMCA-082, 90 N.M. 729, 568 P.2d 255, cert. denied, 91 N.M. 3, 569 P.2d 413, *overruled on other grounds by, State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

**Signing brother's name to traffic citation.** — Motorist who gave officer brother's name and signed brother's name to three traffic citations could be prosecuted for forgery; there was no requirement under the forgery laws that he intended to injure or defraud his brother or that he actually succeed in injuring or defrauding someone. *State v. Wasson*, 1998-NMCA-087, 125 N.M. 656, 964 P.2d 820, cert. denied, 125 N.M. 322, 961 P.2d 167.

**Endorsement of own name without authorization not forgery.** — Where defendant endorsed or caused his name to be endorsed to a check, this was not a false endorsement, only an endorsement without authorization; and, thus, not forgery as defined in this section. *State v. Deutsch*, 1985-NMCA-123, 103 N.M. 752, 713 P.2d 1008, cert. denied, 103 N.M. 740, 713 P.2d 556, and cert. denied, 476 U.S. 1183, 106 S. Ct. 2918, 91 L. Ed. 2d 547 (1986).

**Consecutive sentences proper.** — Trial court did not err in imposing consecutive sentences on three counts of forgery, since the common law gave trial courts the discretion to make sentences consecutive or concurrent. *State v. Crouch*, 1965-NMSC-131, 75 N.M. 533, 407 P.2d 671.

**If defendant assumes name and identity of deceased person,** goes into the military and obtains identification under his assumed name, uses the identification to open a checking account, and then writes and signs checks under his assumed name and tenders them to various stores in return for valuable merchandise, such acts do not purport to be those of another and therefore forgery has not been committed. *State v. Cook*, 1979-NMCA-070, 93 N.M. 91, 596 P.2d 860.

**Unauthorized alteration of instrument.** — Unauthorized alteration of a genuine instrument, of the kind contemplated by the statute, with the requisite fraudulent intent, is forgery under this section. *State v. Cowley*, 1968-NMCA-011, 79 N.M. 49, 439 P.2d 567, cert. denied, 79 N.M. 98, 440 P.2d 136.

Where defendant came into possession of a check validly signed (such that it was bearer paper) but not filled in, his unauthorized filling in of the blank spaces of the check was an alteration within the purview of the forgery statute. *State v. Smith*, 1981-NMCA-003, 95 N.M. 432, 622 P.2d 1052.

**Alteration of invoice.** — Unauthorized addition to the invoice of items not purchased by the customer and a change of the amount which the customer had directed to be charged to his account constituted an alteration of the instrument within forgery offense. *State v. Cowley*, 1968-NMCA-011, 79 N.M. 49, 439 P.2d 567, cert. denied, 79 N.M. 98, 440 P.2d 136.

### II. ELEMENTS.

#### A. IN GENERAL.

**Elements.** — Both knowledge and intent are essential elements of forgery. *State v. Morales*, 2000-NMCA-046, 129 N.M. 141, 2 P.3d 878, cert. denied, 129 N.M. 207, 4 P.3d 35.

**Signing documents with a false name** is not a forgery when the signatory has assumed the name as his own identity and when the signed document only imposes liability on the person signing it. *State v. Sandoval*, 2007-NMCA-103, 142 N.M. 412, 166 P.3d 473, cert. quashed, 2008-NMCERT-004, 144 N.M. 49, 183 P.3d 934.

**Elements of offense.** — A forgery is completed when a defendant possessing the requisite intent: (1) falsely makes or alters a writing which purports to have legal efficacy; (2) physically delivers a forged writing; or (3) passes an interest in a forged writing. *State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

**"Issuing" and "transferring".** — The terms "issuing" and "transferring" encompass a delivery to one who is a holder with the passing of interests from one to another. *State v. Tooke*, 1970-NMCA-068, 81 N.M. 618, 471 P.2d 188, *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

A defendant may issue or transfer a forged writing either by a physical delivery of the forged instrument for action by a third party or by passing an interest in the forged instrument to a third party. *State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

A defendant issues a forged writing when he or she knowingly physically delivers the false instrument, offers the false instrument, or otherwise makes the false instrument available for action. *State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

A defendant transfers a forged writing when he or she knowingly conveys an interest contained in the false instrument. For instance, a stock certificate may be forged to indicate a false owner. *State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

**Each forged instrument a separate offense.** — This section makes each act of forgery, each forged instrument, a separate offense. *State v. Baca*, 1997-NMSC-018, 123 N.M. 124, 934 P.2d 1053.



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B. LEGAL EFFICACY.

**Legal efficacy of doctor's note and order for tests.** — A doctor's note and order for diagnostic tests that were used to create an excuse for the defendant's non-appearance at a court-ordered appointment are not instruments purporting to have legal efficacy and cannot be made the foundation for a forgery conviction. *State v. Scott*, 2008-NMCA-075, 144 N.M. 231, 185 P.3d 1081, cert. denied, 2008-NMCERT-004, 144 N.M. 47, 183 P.3d 932.

**Non-commercial documents.** — A non-commercial document purports to have legal efficacy if it is a document required by law to be filed or recorded or necessary or convenient to the discharge of a public official's duties and if it is an instrument which upon its face could be made the foundation of liability and if it is an instrument good and valid for the purpose for which it was created. *State v. Martinez*, 2008-NMCA-058, 144 N.M. 50, 183 P.3d 935, cert. denied, 2008-NMCERT-003, 143 N.M. 682, 180 P.3d 1181.

**The act of signing an intake fingerprint card with an assumed name** when being booked into jail constitutes forgery. *State v. Martinez*, 2008-NMCA-058, 144 N.M. 50, 183 P.3d 935, cert. denied, 2008-NMCERT-003, 143 N.M. 682, 180 P.3d 1181.

**An employment application lacks legal efficacy.** — *State v. Sandoval*, 2007-NMCA-103, 142 N.M. 412, 166 P.3d 473, cert. quashed, 2008-NMCERT-004, 144 N.M. 49, 183 P.3d 934.

**Employment eligibility verification forms,** known as Form I-9; W-4 forms; social security cards; and resident alien cards have legal efficacy. *State v. Sandoval*, 2007-NMCA-103, 142 N.M. 412, 166 P.3d 473, cert. quashed, 2008-NMCERT-004, 144 N.M. 49, 183 P.3d 934.

**Phrase not unconstitutionally vague.** — Phrase "legal efficacy" as applied in forgery statute to a writing is not so vague and uncertain in meaning as to offend constitutional requirements of certainty as it means an instrument which upon its face could be made the foundation of liability or an instrument good and valid for the purpose for which it was created. *State v. Cowley*, 1968-NMCA-011, 79 N.M. 49, 439 P.2d 567, cert. denied, 79 N.M. 98, 440 P.2d 136.

**Objects of forgery.** — Bingo cards purport to have legal efficacy which can be the object of a forgery. *State v. Nguyen*, 1997-NMCA-037, 123 N.M. 290, 939 P.2d 1098.

**Legal efficacy** is an essential element of the forgery offense and a purely legal issue. *State v. Cearley*, 2004-NMCA-079, 135 N.M. 710, 92 P.3d 1284, cert. quashed, 2005-NMCERT-007, 137 N.M. 280, 110 P.3d 506.

**Interpretation of legal efficacy requirement that would expand forgery** to encompass the falsification or alteration of any item with potential evidentiary value is not supported. *State v. Cearley*, 2004-NMCA-079, 135 N.M. 710, 92 P.3d 1284, cert. quashed, 2005-NMCERT-007, 137 N.M. 280, 110 P.3d 506.

The element of forgery requiring that the defendant has falsely made or altered an instrument purporting to have legal efficacy should not be expanded to include instances where the sole legal value of the instrument is its potential use as evidence. *State v. Cearley*, 2004-NMCA-079, 135 N.M. 710, 92 P.3d 1284, cert. quashed, 2005-NMCERT-007, 137 N.M. 280, 110 P.3d 506.

**Inauthentic document that has been presented to opposing counsel during discovery in civil matter** and that has no legal efficacy apart from its potential evidentiary value cannot be the subject of a forgery prosecution. *State v. Cearley*, 2004-NMCA-079, 135 N.M. 710, 92 P.3d 1284, cert. quashed, 2005-NMCERT-007, 137 N.M. 280, 110 P.3d 506.

**"Legal efficacy" of postdated checks.** — Where the forged writing involved an endorsement made or attempted of the name of the payee, the checks, although postdated, upon their face possessed sufficient legal efficacy to defraud and were properly the subject of forgery. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

**Changing legal effect of check.** — Where defendant found a check written out to "Cash" and, when he presented the check to a credit union teller to cash it, he added his name on the payee line next to "Cash," and endorsed the check, his actions did not change the legal effect of the check from a bearer instrument into an order instrument under 55-3-109 NMSA 1978, and he did not commit the crime of forgery. *State v. Herrera*, 2001-NMCA-007, 130 N.M. 85, 18 P.3d 326, cert. denied, 130 N.M. 153, 20 P.3d 810.

**"Legal efficacy" of receipts.** — Documents consisting of a receipt for money purporting to show that defendant had paid cash to the immigration and naturalization service (INS) as a processing fee for immigration applications and a return receipt from the United States postal service indicating INS had received the applications were "of legal efficacy" as required by this section. *State v. Torres*, 2000-NMCA-038, 129 N.M. 51, 1 P.3d 433, cert. denied, 129 N.M. 208, 4 P.3d 36.

**Non-carbon records of checks** do not purport to have legal efficacy in and of themselves. *State v. Cearley*, 2004-NMCA-079, 135 N.M. 710, 92 P.3d 1284, cert. quashed, 2005-NMCERT-007, 137 N.M. 280, 110 P.3d 506.

C. INTENT.

**Intent.** — According to the forgery statute, the appropriate mens rea is that the defendant have actual knowledge that the document is a forgery. *State v. Garvin*, 2005-NMCA-107, 138 N.M. 164, 117 P.3d 970, cert. denied, 2005-NMCERT-008, 138 N.M. 328, 119 P.3d 1265.

**Acceptance of forged instrument is unnecessary** to complete the crime of forgery. *State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

**Gain or loss not required.** — Forgery is complete when the false instrument is issued or transferred with the requisite intent, regardless of its acceptance. The forgery statute does not require that the defendant gain, or that the prospective victim experience a loss or injury to complete the crime. *State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

**One commits forgery when he makes up check** (assuming the requisite knowledge and intent), whether he or someone else places a false signature on it. *State v. Saavedra*, 1979-NMCA-096, 93 N.M. 242, 599 P.2d 395.

**Section requires intent to injure or defraud.** *State v. Thurman*, 1975-NMCA-049, 88 N.M. 31, 536 P.2d 1087, cert. denied, 88 N.M. 29, 536 P.2d 1085, *overruled on other grounds by State v. Ellenberger*, 1981-NMSC-056, 96 N.M. 287, 629 P.2d 1216.

**Intent to injure in general sufficient.** — General intent to injure or defraud was sufficient for conviction of forgery; it was not necessary to allege or prove intent to injure or defraud a particular person. *State v. Smith*, 1927-NMSC-012, 32 N.M. 191, 252 P. 1003.

**Actual injury not required.** — For there to be an intent to defraud, an injury or loss need not have actually resulted and for such an intent it is immaterial that no one was in fact deceived, or that the defendant did not intend to or did not make any financial gain as it is sufficient if the intent was to defraud any person on whom the counterfeit is passed. *State v. Nation*, 1973-NMCA-087, 85 N.M. 291, 511 P.2d 777.

**Sufficient evidence of knowledge and intent.** — Where defendant successfully cashed a check ostensibly signed by defendant's parent on the parent's closed account; when defendant later attempted to cash another check on the same account at the same store, when defendant learned that the police had been called, defendant ran



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out of the store and entered a waiting car behind the store; and defendant's parent testified that the parent had not authorized defendant to sign checks on the closed account, the evidence was to establish knowledge and intent elements for forgery. *State v. Morrales*, 2000-NMCA-046, 129 N.M. 141, 2 P.3d 878, cert. denied, 129 N.M. 207, 4 P.3d 35.

**Intent to injure or defraud.** — The crime of forgery was completed when the false making of the signature with intent to injure or defraud had been accomplished, and an injury or loss need not actually have resulted. *State v. Weber*, 1966-NMSC-164, 76 N.M. 636, 417 P.2d 444.

III. INDICTMENT AND INFORMATION.

**Severance.** — Failure to sever two counts of forgery arising from two separate incidents involving alteration of bingo cards did not prejudice the defendant since the evidence of the two offenses would be independently admissible in separate trials to prove the essential elements of intent and knowledge. *State v. Nguyen*, 1997-NMCA-037, 123 N.M. 290, 939 P.2d 1098.

**Indictment sufficient.** — An indictment for forgery, alleging that the act was unlawfully, falsely and feloniously done, sufficiently excluded authorization by the person whose act it purported to be. *State v. Smith*, 1927-NMSC-012, 32 N.M. 191, 252 P. 1003.

IV. EVIDENCE.

**Circumstantial evidence of knowing forgery.** — Where the state elicited circumstantial evidence of defendant's knowledge that the checks he cashed were forged, which included his failure to make arrangements to pay the merchant after being advised that the checks had not been honored, his prior felony conviction, and his admitted requesting false notations on the checks, which indicated they were given him by employers with whom the merchant was familiar, and that he did so in order to make the checks easier to cash, this was sufficient to support an inference that defendant knew the checks were forged. *State v. Stallings*, 1986-NMCA-086, 104 N.M. 660, 725 P.2d 1228, cert. denied, 104 N.M. 632, 725 P.2d 832.

**Sufficient evidence.** — Where defendant presented a check for cashing at a store; the check was drawn on the victim's business account, payable to defendant in payment for labor; the victim testified that the victim had never employed defendant or written a check to defendant for labor; and a bank employee testified that the signature on the check was not the victim's signature, the evidence was sufficient to support defendant's conviction for forgery. *State v. Caldwell*, 2008-NMCA-049, 143 N.M. 792, 182 P.3d 775, cert. denied, 2000-NMCERT-003, 143 N.M. 681, 180 P.3d 1180.

**Evidence sufficient to find defendant signed checks.** — Although the state did not offer a handwriting expert to match the signature on counterfeit traveller's checks with that of the defendant, the evidence was sufficient for the jury to find beyond a reasonable doubt that the defendant did sign several of the checks; the checks were counterfeit, a hotel room registration card for a room checked out to an accomplice in the fraud bore the defendant's signature; the defendant was identified by several of the store clerks involved as the person who had passed the counterfeit checks in purchasing items; and many of the items purchased were found in the room where the defendant stayed. *State v. Rotibi*, 1994-NMCA-003, 117 N.M. 108, 869 P.2d 296, cert. denied, 117 N.M. 215, 870 P.2d 753.

**Proving forgery of check.** — The court held that proof of forgery of a check need not include a showing that the drawee bank would not have honored it. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81 N.M. 140, 464 P.2d 559, *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

**Lack of account or authority.** — Evidence that the company attempted to be drawn on did not have an account with the drawee bank or that the person who signed the check was not authorized to sign checks on behalf of the corporation were not elements of proof prerequisite to defendant's conviction involving a false endorsement with intent to defraud. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81 N.M. 140, 464 P.2d 559, *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

**Inference of nonauthorization warranted.** — Representations that defendants were the persons named as payees of the checks made for the purpose of inducing the respective clerks to cash the checks, reasonably warranted the inference that defendants did not have the right to use the names of payees of the checks, and were not, in fact, such payees and that they did not have authority to endorse the checks in the names of payees. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81 N.M. 140, 464 P.2d 559, *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

**Substantial evidence supported forgery convictions.** — Where defendant, a franchisee, wrote checks provided by franchisor payable to herself and co-defendant, neither of whom was authorized to receive these funds, in amounts totaling over $200,000, and where defendant was charged with forgery, conspiracy to commit forgery, fraud, conspiracy to commit fraud and embezzlement, and co-defendant was charged with forgery, conspiracy to commit forgery, fraud (over $2,500 but less than $20,000) and fraud (over $20,000), and where defendants claimed that substantial evidence did not support their forgery convictions because the checks and signature stamps used in the scheme were genuine and defendant endorsed the checks with her own genuine signature, there was sufficient evidence to support the forgery convictions because defendant's use of a signature stamp and the checks outside the scope of their authorization were acts which, when combined with the required intent to injure or defraud, constituted forgery. *State v. Candelaria*, 2019-NMCA-032, cert. denied.

**Aiding and abetting check forgery.** — The fact that defendant was not the person who passed an interest in forged checks did not preclude defendant's conviction under this section if the evidence of defendant's aiding and abetting of unidentified woman who actually passed the checks was sufficient. *State v. Martinez*, 1973-NMCA-075, 85 N.M. 198, 510 P.2d 916.

**Mere presence not aiding and abetting.** — The fact that defendant accompanied the forger of certain checks at the time that she cashed them was not sufficient to support a finding of aiding and abetting, for mere presence and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient. *State v. Hermosillo*, 1975-NMCA-113, 88 N.M. 424, 540 P.2d 1313.

**Endorsing and vouching for forged check.** — To be an aider or abettor to a forgery, defendant must have shared an intent to injure or defraud, and where uncontradicted evidence was that defendant vouched for and endorsed check forged by unidentified companion, such evidence, although circumstantial, was sufficient to show such intent. *State v. Martinez*, 1973-NMCA-075, 85 N.M. 198, 510 P.2d 916.

**Guilty knowledge not shown.** — Where the woman who forged signature on certain checks testified that the defendant, who drove her to two different branches of a bank in a three-hour period to cash them, and deposited them in the bank's drawer and cylinder respectively, did not know that the checks were forged, and the only other fact upon which a finding of defendant's guilty knowledge could be based was his presence in a car next to the owners at the time the checks may have been stolen, the evidence did not form a sufficient basis upon which to rest a



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conclusion of defendant's guilty knowledge. *State v. Hermosillo*, 1975-NMCA-113, 88 N.M. 424, 540 P.2d 1313.

**Reasonable hypotheses of innocence.** — Circumstantial evidence was insufficient to allow a finding that defendant aided forger by procuring checks for her because there were too many other explanations to account for her possession of the checks, so that the evidence was not incompatible with the innocence of the accused upon any rational theory and incapable of explanation upon any reasonable hypothesis of the defendant's innocence. *State v. Hermosillo*, 1975-NMCA-113, 88 N.M. 424, 540 P.2d 1313.

**Check forgery substantiated.** — Despite discrepancies in testimony of certain witnesses, there was sufficient corroborated and uncontradicted testimony to substantiate verdict of guilty on three counts of check forgery. *State v. Crouch*, 1965-NMSC-131, 75 N.M. 533, 407 P.2d 671.

**No evidence of check forgery.** — Where there was ample evidence that the maker of check cashed by defendant, which he claimed to have received in payment for three days of work, did not have an account in the bank on which it was drawn, but not one iota of evidence that check was a forgery, conviction of knowingly uttering a forged instrument with intent to defraud was reversed. *State v. Bibbins*, 1960-NMSC-006, 66 N.M. 363, 348 P.2d 484.

**No basis for a charge of forgery when defendant did not make or manufacture a false document.** — Where defendant was convicted of forgery, conspiracy to commit forgery, and perjury, and where the evidence presented indicated that defendant signed an affidavit of New Mexico residency, under penalty of perjury, declaring that he was a friend of a foreign national who sought a driver's license from the motor vehicle division (MVD) and that the foreign national lived with defendant in Albuquerque, when in fact, the foreign national did not live at the address as attested to by defendant in the affidavit, the evidence was insufficient to support forgery or conspiracy to commit forgery, because a forgery statute punishes those who falsely make an affidavit, whereas a perjury statute punishes those who make and certify a false affidavit; if a person includes false statements in an affidavit that the person signs under oath, that person has made and certified a false affidavit, which cannot be the basis of a forgery conviction, and defendant did not make or manufacture a false document, but used a genuine MVD affidavit form and signed it with his actual name. *State v. Leong*, 2017-NMCA-070, cert. denied.

**Transfer of forged prescription.** — Evidence that a physician's signature had been forged on one of his prescription blanks and that defendant presented this forged prescription to a pharmacist and obtained the drug identified in the prescription, was sufficient to show defendant knowingly transferred a forged prescription with an intent to injure or defraud. *State v. Nation*, 1973-NMCA-087, 85 N.M. 291, 511 P.2d 777.

**Forging signature on assignment of title.** — Falsely signing name of automobile owner to assignment of title and notarizing same, where evidence amply supported finding of intent to injure or defraud, constituted crime of forgery. *State v. Weber*, 1966-NMSC-164, 76 N.M. 636, 417 P.2d 444.

**Intent to wrongfully deprive another.** — Evidence was sufficient to support a finding of intent to wrongfully or fraudulently deprive another of a lawful right, interest or property, where car and false assignment were delivered to third-party purchaser who used same for at least nine days, vehicle was sold for less than worth and at private sale rather than public sale to which owner was entitled, and difference between amount owing and purchase price was not paid to owner; furthermore, even if it could be said that defendant, as secured party, legally took possession of car and was thus entitled to dispose of it by private sale, still he failed to give reasonable notification of the time after which sale would be made, or to account for the surplus money received from the sale. *State v. Weber*, 1966-NMSC-164, 76 N.M. 636, 417 P.2d 444.

**Substantial evidence of intent required.** — Guilty knowledge is rarely susceptible of direct and positive proof and generally can be established only through circumstantial evidence, but this does not remove the obligation to examine the evidence to determine whether there was substantial evidence to support a finding of intent. *State v. Hermosillo*, 1975-NMCA-113, 88 N.M. 424, 540 P.2d 1313.

**Admissibility of exhibits.** — Envelope containing money found in defendant's possession shortly after cashing second of two forged checks tended to throw light on the transaction, and considered with the time and distance factors involved, circumstantially connected defendant with the criminal offense. *State v. Belcher*, 1971-NMCA-135, 83 N.M. 130, 489 P.2d 410.

Red plastic wallet identified by witnesses as belonging to defendant, containing identification card bearing the name of the payee named in two forged checks, which was found around the corner from business where second check was cashed, was admissible, despite weakness of evidence of chain of custody after it was found and as to whether the contents were in the same condition at trial as when found; doubt concerning the exhibit would go to the weight to be accorded it. *State v. Belcher*, 1971-NMCA-135, 83 N.M. 130, 489 P.2d 410.

**Cashier's description of contents of forged check** was sufficient proof, and the state's failure to introduce the forged check at trial did not preclude a conviction for forgery. *State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

## V. INSTRUCTIONS.

**Instruction regarding type of intent.** — Where on appeal it was contended an error occurred for the district court to give a general intent instruction without instructing the jury that it did not apply to a specific intent crime, because the instruction substantially followed the applicable law, there was no fundamental error. *State v. Gee*, 2004-NMCA-042, 135 N.M. 408, 89 P.3d 80, cert. denied, 2004-NMCERT-003, 135 N.M. 321, 88 P.3d 261.

## VI. DOUBLE JEOPARDY.

**Double jeopardy.** — A forgery offense may be subsumed within an attempted fraud offense. *State v. Lee*, 2009-NMCA-075, 146 N.M. 605, 213 P.3d 509, cert. denied, 2009-NMCERT-006, 146 N.M. 733, 215 P.3d 42.

Convictions for fraud and forgery may not violate double jeopardy. *State v. Caldwell*, 2008-NMCA-049, 143 N.M. 792, 182 P.3d 775, cert. denied, 2008-NMCERT-003, 143 N.M. 681, 180 P.3d 1180.

Where sufficient evidence exists to establish that each false signing was distinct from the others a defendant's acts are separated by sufficient indicia of distinctness to justify multiple punishments under the same statute. *State v. Glascock*, 2008-NMCA-006, 143 N.M. 328, 176 P.3d 317, cert. quashed, 2009-NMCERT-006, 146 N.M. 734, 215 P.3d 43.

**Forgery and attempted fraud.** — Where defendant was convicted for forgery and attempted fraud over $250 arising out of the unitary conduct of cashing a forged check, the additional element of the attempted fraud offense that the writing have a value over $250 was not sufficiently material to preclude the conclusion that the forgery offense was subsumed within the attempted forgery offense. *State v. Lee*, 2009-NMCA-075, 146 N.M. 605, 213 P.3d 509, cert. denied, 2009-NMCERT-006, 146 N.M. 733, 215 P.3d 42.

**Multiple documents.** — Where defendant signed multiple documents in connection with the refinancing of the marital home without his wife's permission or knowledge, the defendant's conduct was one continuous action rather than three distinct acts with respect to each closing document and constituted one act of forgery. *State v. Turner*,



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2007-NMCA-105, 142 N.M. 460, 166 P.3d 1114, cert. denied, 2007-NMCERT-008, 142 N.M. 434, 166 P.3d 1088.

**Multiple prosecutions not double jeopardy.** — Where charge of violation of former law relating to passing of forged evidence of debt of government, or of banking institution, was dismissed for variance on grounds that the forged instrument was not a document evidencing an indebtedness of a banking institution, and defendant was subsequently charged and convicted of passing the same forged bill of exchange with intent to defraud in violation of statute relating to uttering of forged document, his plea of double jeopardy was without merit as for double jeopardy, the test in determining whether the offenses charged are the same is whether the facts offered in support of one charge would sustain a conviction of the other, and if either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing. *Owens v. Abram*, 1954-NMSC-096, 58 N.M. 682, 274 P.2d 630, cert. denied, 348 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 719 (1955); *see also Owens v. Swope*, 227 F.2d 796 (10th Cir.), cert. denied, 348 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 719 (1955).

**Conviction for same facts under different theories constituted double jeopardy.** — Defendant's conviction on two separate counts of forgery on the same check, the only difference between the two counts being the theory of forgery charged, constituted double jeopardy. Although different subsections of this section provide for alternative means of prosecution, the legislature intended only one conviction for each forgery related to the same facts involving the same check. *State v. Orgain*, 1993-NMCA-006, 115 N.M. 123, 847 P.2d 1377, cert. denied, 115 N.M. 145, 848 P.2d 531.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 36 Am. Jur. 2d Forgery §§ 1 to 26.

Genuine making of instrument for purpose of defrauding as constituting forgery, 41 A.L.R. 229, 46 A.L.R. 1529, 51 A.L.R. 568.

Invalid instrument as subject of forgery, 174 A.L.R. 1300.

Admissibility, in forgery prosecution, of other acts of forgery, 34 A.L.R.2d 777.

Use of fictitious or assumed name, 49 A.L.R.2d 852.

Alteration of figures indicating amount of check, bill, or note without change in written words, as forgery, 64 A.L.R.2d 1029.

Fees: amount of fees allowable to examiners of questioned documents or handwriting experts for serving and testifying, 86 A.L.R.2d 1283.

Stolen money or property as subject of larceny or robbery, 89 A.L.R.2d 1435.

Credit charge or credit sales slip, signing of, 90 A.L.R.2d 822.

Procuring signature by fraud as forgery, 11 A.L.R.3d 1074.

What constitutes a public record or document within statute making falsification, forgery, mutilation, removal, or other misuse thereof an offense, 75 A.L.R.4th 1067.

37 C.J.S. Forgery §§ 1 to 42.

## 30-16-11. Receiving stolen property; penalties.

A. Receiving stolen property means intentionally to receive, retain or dispose of stolen property knowing that it has been stolen or believing it has been stolen, unless the property is received, retained or disposed of with intent to restore it to the owner.

B. The requisite knowledge or belief that property has been stolen is presumed in the case of a dealer who:

(1) is found in possession or control of property stolen from two or more persons on separate occasions;

(2) acquires stolen property for a consideration that the dealer knows is far below the property's reasonable value. A dealer shall be presumed to know the fair market value of the property in which the dealer deals; or

(3) is found in possession or control of five or more items of property stolen within one year prior to the time of the incident charged pursuant to this section.

C. For the purposes of this section:

(1) "dealer" means a person in the business of buying or selling goods or commercial merchandise; and

(2) "stolen property" means any property acquired by theft, larceny, fraud, embezzlement, robbery or armed robbery.

D. Whoever commits receiving stolen property when the value of the property is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

E. Whoever commits receiving stolen property when the value of the property is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

F. Whoever commits receiving stolen property when the value of the property is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

G. Whoever commits receiving stolen property when the value of the property is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.



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H. Whoever commits receiving stolen property when the value of the property exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

I. Whoever commits receiving stolen property when the property is a firearm is guilty of a fourth degree felony when its value is less than two thousand five hundred dollars ($2,500).

**History: 1953 Comp., § 40A-16-11, enacted by Laws 1963, ch. 303, § 16-11; 1969, ch. 171, § 2; 1972, ch. 77, § 1; 1975, ch. 232, § 1; 1983, ch. 253, § 1; 1987, ch. 121, § 5; 2006, ch. 29, § 7.**

**Cross references.** — For failure to show proper authority, hides and pelts of cattle or sheep killed being evidence of larceny or receiving stolen property, *see* 77-17-14 NMSA 1978.

For evidentiary rule regarding presumptions in criminal cases, *see* Rule 11-302 NMRA.

**The 2006 amendment,** effective July 1, 2006, increased the value of the property in Subsection D from $100 or less to $250 or less; increased the value of the property in Subsection E from more than $100 but less than $250 to more than $250 but less than $500; increased the value of the property in Subsection F from more than $250 to more than $500.

**The 1987 amendment,** effective June 19, 1987, added present Subsections E and H, while redesignating former Subsections E, F and G as present Subsections F, G and I.

**The 1983 amendment,** effective June 17, 1983, in Subsection C, divided the formerly undivided language into an introductory paragraph and Paragraph (1), added "and" at the end of Paragraph (1) and added Paragraph (2).

**ANNOTATIONS**

I. IN GENERAL.
II. MULTIPLE PROSECUTIONS.
III. ELEMENTS OF OFFENSE.
IV. EVIDENCE.
V. PROCEDURE.

I. IN GENERAL.

**Unit of prosecution.** — A defendant's possession of a stolen firearm is a separate offense from simultaneous possession of other stolen items. *State v. Watkins*, 2008-NMCA-060, 144 N.M. 66, 183 P.3d 951, cert. denied, 2008-NMCERT-003, 143 N.M. 681, 180 P.3d 1180.

The purpose of Subsection B was not to create a separate crime where several items of property, including a firearm or firearms, were stolen or received together with other stolen property, but was to increase the penalty for the offense where a firearm was the subject of the theft or receiving of stolen property regardless of the value of the firearm. *State v. Smith*, 1983-NMCA-077, 100 N.M. 352, 670 P.2d 963, *overruled by State v. Watkins*, 2008-NMCA-060, 144 N.M. 66, 183 P.3d 951.

Evidence that a defendant was in possession of numerous items of recently stolen personal property, wrongfully taken from different owners at different times, gives rise to a reasonable inference that defendant knew the property was stolen. *State v. Smith*, 1983-NMCA-077, 100 N.M. 352, 670 P.2d 963, *overruled by State v. Watkins*, 2008-NMCA-060, 144 N.M. 66, 183 P.3d 951.

**Validity.** — Even if Subsection B renders this section partially invalid, as trial court had held, Subsection A is valid absent Subsection B. *State v. Elam*, 1974-NMCA-075, 86 N.M. 595, 526 P.2d 189, cert. denied, 86 N.M. 593, 526 P.2d 187.

**Section inapplicable to embezzled property.** — In the absence of a statutory provision which expressly declares the offense of embezzlement to be embraced within the offense of larceny, the crime of receiving stolen property, knowing it to have been stolen, does not include property which was embezzled. *State v. Bryant*, 1982-NMCA-178, 99 N.M. 149, 655 P.2d 161 (decided under prior law).

II. MULTIPLE PROSECUTIONS.

**Multiple charges.** — Even where only one building is burglarized, multiple burglary charges are proper when the security interests of multiple victims are involved. *State v. Soto*, 2001-NMCA-098, 131 N.M. 299, 35 P.3d 304, cert. denied, 131 N.M. 64, 33 P.3d 284.

**Receiving not included in armed robbery.** — Offense of receiving stolen property cannot be included within the offense of armed robbery. *State v. Mares*, 1968-NMCA-042, 79 N.M. 327, 442 P.2d 817.

**Prosecution for armed robbery not barred.** — Plaintiff who was convicted in a justice of the peace court (now replaced by magistrate courts) of the petty misdemeanor of receiving stolen property, and was later convicted in the district court of the second degree felony of armed robbery, was not placed in double jeopardy, nor was the state barred or estopped from prosecuting and convicting him for the armed robbery. *State v. Gleason*, 1969-NMCA-054, 80 N.M. 382, 456 P.2d 215.

**Conviction for receiving as bar to burglary prosecution.** — New Mexico cannot convict a person under one indictment or information of receiving stolen property, and then subsequently convict him under another indictment or information of burglary, if the burglary conviction is dependent upon a theft by him of the same property, and he is shown to have been the person who actually took and asported the property during the burglarious entry. *State v. Gleason*, 1969-NMCA-054, 80 N.M. 382, 456 P.2d 215.

**Theft inconsistent with receiving.** — The felonious receiving of stolen property, knowing the same to have been stolen, was a substantive offense, and distinct from larceny. Where evidence showed defendant guilty of the theft, he could not be convicted of feloniously receiving it. *Territory v. Graves*, 1912-NMSC-027, 17 N.M. 241, 125 P. 604.

**Disposition separate from larceny.** — A thief who holds on to stolen property cannot violate this section by receiving the stolen property because he cannot receive it from himself, nor can the thief violate the statute by retaining the stolen property because larceny is a continuing offense; the thief's disposition, however, is action separate from the larceny, and it is neither absurd nor unreasonable to hold that the thief violates this section when he disposes of the property that he stole. *State v. Tapia*, 1976-NMCA-042, 89 N.M. 221, 549 P.2d 636, cert. denied, 89 N.M. 206, 549 P.2d 284.

Principle that one who is a thief cannot be convicted of "receiving" property he stole since the theft and receipt are the same act was inapplicable where defendant was convicted of "disposing of" property which he may also have stolen although he was acquitted of the theft. *State v. Mitchell*, 1974-NMCA-057, 86 N.M. 343, 524 P.2d 206.

**Meaning of "disposing" shown by legislative history.** — Since the legislature is presumed to have known the law when it added the "disposing" provision by the 1972 amendment, and is presumed to have intended to change it, so that, even if prior law prohibited conviction for both theft and disposing of the same property the legislative history supports the view that the law has been changed. *State v. Tapia*, 1976-NMCA-042, 89 N.M. 221, 549 P.2d 636, cert. denied, 89 N.M. 206, 549 P.2d 284.

**Simultaneous possession of stolen items owned by different individuals** is a single act constituting one



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offense. *Sanchez v. State*, 1982-NMSC-012, 97 N.M. 445, 640 P.2d 1325.

**Property taken from more than one owner or at more than one time** cannot be combined together into one count, thereby combining the values of the stolen items to increase the penalty. *Sanchez v. State*, 1982-NMSC-012, 97 N.M. 445, 640 P.2d 1325.

The defendant may be charged with a separate count for each separate transaction of disposal. *Sanchez v. State*, 1982-NMSC-012, 97 N.M. 445, 640 P.2d 1325.

**Conviction for receipt back of property stolen.** — If a thief steals property, turns that property over to someone and subsequently receives the property back from that person, a receiving conviction based on receipt of the stolen property by the thief would not be prohibited. *State v. Tapia*, 1976-NMCA-042, 89 N.M. 221, 549 P.2d 636, cert. denied, 89 N.M. 206, 549 P.2d 284.

**Each separate "receiving" is a separate crime.** *State v. Bell*, 1977-NMCA-014, 90 N.M. 160, 560 P.2d 951, cert. denied, 90 N.M. 254, 561 P.2d 1347.

If defendant received the stolen pistol at a time different from the time that he received the other stolen properties, then there were two offenses for which two sentences would be imposed even though at the time of discovery defendant possessed all the stolen property involved. *State v. Bell*, 1977-NMCA-014, 90 N.M. 160, 560 P.2d 951, cert. denied, 90 N.M. 254, 561 P.2d 1347.

**Dual prosecutions alleging different ownership of same property.** — A former acquittal under an indictment for buying and receiving stolen property, charged to be the property of A, was no bar to a prosecution for buying and receiving the same property charged to be the property of B. This was true where difference in name of owner of property was "railroad" and "railway." *State v. Jacoby*, 1919-NMSC-012, 25 N.M. 224, 180 P. 462.

## III. ELEMENTS OF OFFENSE.

**Purpose.** — An obvious purpose of this section was to inhibit the movement and disposition of stolen property, and the holding that the section applies to a thief who disposes of stolen property is consistent with that purpose. *State v. Tapia*, 1976-NMCA-042, 89 N.M. 221, 549 P.2d 636, cert. denied, 89 N.M. 206, 549 P.2d 284.

**Meaning of "dispose".** — The ordinary meaning of the language "dispose of stolen property" is to transfer, relinquish or get rid of stolen property, which language does not show an intent to exclude the thief from the prohibition against disposing of stolen property. *State v. Tapia*, 1976-NMCA-042, 89 N.M. 221, 549 P.2d 636, cert. denied, 89 N.M. 206, 549 P.2d 284.

The ordinary meaning of "dispose" is "to transfer, relinquish or get rid of;" thus, when the defendant gave stolen money to friends, he transferred it to them. *State v. Hernandez*, 2003-NMCA-131, 134 N.M. 510, 79 P.3d 1118, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

**Money is "property".** — The legislature intended that "property" include "anything of value;" common sense supports the conclusion that "anything of value" includes money. *State v. Hernandez*, 2003-NMCA-131, 134 N.M. 510, 79 P.3d 1118, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

**Several methods of committing offense.** — Prior to 1972 amendment, this section provided four methods by which offense could be committed, namely, buying, procuring, receiving or concealing stolen property; proof of any one of these methods, coupled with requisite knowledge, was sufficient to sustain a conviction. *State v. Carlton*, 1971-NMCA-019, 82 N.M. 537, 484 P.2d 757, cert. denied, 82 N.M. 534, 484 P.2d 754.

This section contemplates that a person may commit "receiving stolen property" in one of three ways. The property may be "received," or the property may be "retained," or the property may be "disposed" of by a defendant. Proof of any one of these methods, coupled with the requisite knowledge, is sufficient to sustain a conviction. *Sanchez v. State*, 1982-NMSC-012, 97 N.M. 445, 640 P.2d 1325.

**Actual theft and knowledge thereof required.** — To establish the crime of receiving and concealing stolen property it is incumbent upon the state to prove that the property in this case was stolen; and that the accused received the property with knowledge that they were stolen. *State v. Zarafonetis*, 1970-NMCA-064, 81 N.M. 674, 472 P.2d 388, cert. denied, 81 N.M. 669, 472 P.2d 383.

**Knowledge required.** — To constitute the crime of receiving stolen goods, it was essential that accused have knowledge that goods were stolen. *State v. Floyd*, 1918-NMSC-057, 24 N.M. 31, 172 P. 188.

**Lost property not "stolen property".** — Defendant could not be charged with receiving stolen property based on his possession of a lost traveler's check. *State v. Carbajal*, 2001-NMCA-015, 130 N.M. 284, 24 P.3d 316, *rev'd on other grounds*, 2002-NMSC-019, 132 N.M. 326, 48 P.3d 64.

**Specific intent is not essential element** of the crime of receiving stolen property. *State v. Viscarra*, 1972-NMCA-125, 84 N.M. 217, 501 P.2d 261.

**"Dishonest intent" is not essential element.** — "Dishonest intent" is not an element of the statutory crime of receiving stolen property. *State v. Viscarra*, 1972-NMCA-125, 84 N.M. 217, 501 P.2d 261.

**Nature of presumption herein.** — Rule 303(c), N.M.R. Evid. (now Rule 11-302 NMRA), abolishes "true" presumptions in criminal cases and puts the presumptions found in Subsection B of this section into the category of permissible inference, so that that subsection must be read to say that requisite knowledge or belief that property has been stolen may be, rather than is, presumed to exist upon proof of the basic facts. *State v. Jones*, 1975-NMCA-078, 88 N.M. 110, 537 P.2d 1006, cert. denied, 88 N.M. 318, 540 P.2d 248.

## IV. EVIDENCE.

**Possession not inferred solely from access.** — When persons other than the defendant had equal or greater access to the place where the illicit goods were discovered, possession may not be inferred solely from defendant's access. Something more is necessary to establish a link between the items and the defendant before the jury can properly infer that defendant could control the items. *State v. Sizemore*, 1993-NMCA-079, 115 N.M. 753, 858 P.2d 420, cert. denied, 115 N.M. 709, 858 P.2d 85.

**Circumstantial evidence of guilty knowledge.** — Guilty knowledge is rarely susceptible of direct and positive proof and generally can be established only through circumstantial evidence. *State v. Zarafonetis*, 1970-NMCA-064, 81 N.M. 674, 472 P.2d 388, cert. denied, 81 N.M. 669, 472 P.2d 383.

Unless a defendant admits knowledge of the fact that goods he has received are stolen, this knowledge, of necessity, must be established by circumstantial evidence. *State v. Lindsey*, 1969-NMCA-121, 81 N.M. 173, 464 P.2d 903, cert. denied, 81 N.M. 140, 464 P.2d 559, and cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

**Exclusion of reasonable hypotheses of innocence.** — Where circumstantial evidence alone is relied upon for a conviction such evidence must be incompatible with the innocence of the accused upon any rational theory and incapable of explanation upon any reasonable hypothesis of the defendant's innocence. *State v. Zarafonetis*, 1970-NMCA-064, 81 N.M. 674, 472 P.2d 388, cert. denied, 81 N.M. 669, 472 P.2d 383.

**Mere presence insufficient.** — Although defendant was present in the house where the stolen bits were found, his presence alone is insufficient evidence on which



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to base a conviction. *State v. Browder*, 1971-NMCA-150, 83 N.M. 238, 490 P.2d 680.

**Mere possession insufficient.** — Mere possession of recently stolen property is not sufficient to warrant conviction on a charge of receiving stolen property, but possession, if not satisfactorily explained, is a circumstance to be taken into consideration with all of the other facts and circumstances in the case in determining guilt or innocence. *State v. Follis*, 1960-NMSC-074, 67 N.M. 222, 354 P.2d 521; *State v. Olloway*, 1980-NMCA-119, 95 N.M. 167, 619 P.2d 843.

**Inference of possession or knowlege.** — Although knowledge that the property is stolen may be circumstantially proved by unexplained possession, knowledge should not be inferred from possession or possession from knowledge without having some basis in fact for the initial inference. *State v. Sizemore*, 1993-NMCA-079, 115 N.M. 753, 858 P.2d 420, cert. denied, 115 N.M. 709, 858 P.2d 85.

**Possession of stolen property is circumstance to be considered** in determining whether the offense has been committed. *State v. Elam*, 1974-NMCA-075, 86 N.M. 595, 526 P.2d 189, cert. denied, 86 N.M. 593, 526 P.2d 187.

**False explanation of possession.** — Any false explanation of possession of stolen property is a circumstance indicative of guilt. *State v. Elam*, 1974-NMCA-075, 86 N.M. 595, 526 P.2d 189, cert. denied, 86 N.M. 593, 526 P.2d 187.

**Manner of purchase and sale.** — Evidence that defendant had the stolen goods in his possession within a few days after the theft, and both purchased and sold them at prices disproportionately low in comparison with their value, directing that the check in payment of the goods be written so as to exclude his name from the transaction, met the test of substantiality and justified the inference that the goods were received by defendant with knowledge that they were stolen. *State v. Zarafonetis*, 1970-NMCA-064, 81 N.M. 674, 472 P.2d 388, cert. denied, 81 N.M. 669, 472 P.2d 383.

**Concealment and falsifying.** — Evidence that defendant used different names in operating his business, that he used an embosser to obliterate the seals on the stolen books and that he told different stories about his acquisition of the stolen property was sufficient, even apart from evidence of possession, to sustain a conviction under this section. *State v. Elam*, 1974-NMCA-075, 86 N.M. 595, 526 P.2d 189, cert. denied, 86 N.M. 593, 526 P.2d 187.

**Evidence of value.** — The victim's testimony of the value of the stolen items, together with photographic and physical exhibits of the items was sufficient to allow the jury to conclude that the market value of the items possessed by defendant exceeded $500. *State v. Archuleta*, 2012-NMCA-007, 269 P.3d 924, cert. denied, 2011-NMCERT-012.

Motel manager's testimony that he was familiar with the value of the television sets that are sold to motels and testified that a used set like the one involved was worth between $150 and $200 was competent and meets the substantial evidence test. *State v. Williams*, 1972-NMCA-011, 83 N.M. 477, 493 P.2d 962.

**Facsimile of bill of sale.** — Introduction of a photocopy of a bill of sale for an electric typewriter sold by defendant to a witness, the original of which was claimed to have been lost, was not error, despite fact that counsel for defendant speculated the original might have been signed "(owner's name) by (defendant)." *State v. Chacon*, 1969-NMCA-112, 80 N.M. 799, 461 P.2d 932.

**Credibility and weight of evidence for jury.** — The jury was not required to accept a suggested source of acquisition of television set, disregarding all the evidence which supported a finding that defendant knew the set was stolen, since it was for the jury to weigh the evidence and pass on the credibility of the witness. *State v. Lindsey*, 1969-NMCA-121, 81 N.M. 173, 464 P.2d 903, cert. denied, 81 N.M. 140, 464 P.2d 559, and cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

**Review of evidence on appeal.** — In considering the question whether defendant knew property was stolen, the court will view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences in favor of the verdict of conviction of receiving and concealing stolen goods. *State v. Zarafonetis*, 1970-NMCA-064, 81 N.M. 674, 472 P.2d 388, cert. denied, 81 N.M. 669, 472 P.2d 383.

## V. PROCEDURE.

**Venue proper.** — Venue was properly laid in county where concealment of stolen riding equipment occurred. *State v. Carlton*, 1971-NMCA-019, 82 N.M. 537, 484 P.2d 757, cert. denied, 82 N.M. 534, 484 P.2d 754.

**Allegation of ownership was essential in indictment** for buying and receiving stolen property, and a departure in the proof from the allegation in the indictment was necessarily fatal to the proceedings. *State v. Jacoby*, 1919-NMSC-012, 25 N.M. 224, 180 P. 462.

**Allegation of source unnecessary.** — It was not necessary that indictment set out from whom the stolen goods were received. *Territory v. Claypool*, 1903-NMSC-002, 11 N.M. 568, 71 P. 463.

**Charging in alternative.** — An indictment which charged buying, receiving or concealing in the alternative, through the use of the word "or," was established by proof of any one of them, although they were charged in a single count. *Territory v. Neatherlin*, 1906-NMSC-023, 13 N.M. 491, 85 P. 1044.

**Indictment adequate.** — Where the indictment charged defendant with receiving and concealing stolen property contrary to statutory provisions, further alleging that: "On diverse dates between March 20, 1965, and the 19th day of March, 1968 . . . [the defendant] did buy, procure, receive, or conceal things of value knowing the same to have been stolen or acquired by fraud or embezzlement" the indictment was in substantially the form prescribed by statute, and, insofar as form is concerned, no greater degree of conformity was required. *State v. Lindsey*, 1969-NMCA-121, 81 N.M. 173, 464 P.2d 903, cert. denied, 81 N.M. 140, 464 P.2d 559, and cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

**Unclear indictment to be dismissed.** — Where the defendant cannot tell whether he is being charged with "receiving," "retaining" or "disposing" of stolen property, nor can it be determined whether the charges are being "stacked" to enhance the penalty, the indictment is faulty and must be dismissed. *Sanchez v. State*, 1982-NMSC-012, 97 N.M. 445, 640 P.2d 1325.

**Effect of variance.** — In prosecution for receiving and concealing stolen property, alleged variance between all the evidence and the indictment was not ground for acquittal, as court could at any time cause the indictment to be amended, nor did defense counsel's failure to object thereto establish his ineffectiveness. *State v. Chacon*, 1969-NMCA-112, 80 N.M. 799, 461 P.2d 932.

**Use of conjunctive rather than disjunctive.** — Where, through error, the information and the court's instructions defined the offense of buying, receiving or aiding in the concealment of stolen property conjunctively rather than disjunctively as in the statute, the defendant was not aided thereby since there was substantial evidence to show that he was guilty of all three offenses. *State v. Russell*, 1933-NMSC-018, 37 N.M. 131, 19 P.2d 742.

**Instruction regarding type of intent.** — Where on appeal it was contended an error occurred for the district court to give a general intent instruction without instructing the jury that it did not apply to a specific intent crime, because the instruction substantially followed the applicable law, there was no fundamental error. *State v. Gee*,



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2004-NMCA-042, 135 N.M. 408, 89 P.3d 80, cert. denied, 2004-NMCERT-003, 135 N.M. 261, 88 P.3d 261.

**Intent-to-return defense.** — For the intent-to-return defense to apply, the stolen goods should never have been held for any purpose other than to return the goods to the owner. *State v. Lopez*, 1990-NMCA-016, 109 N.M. 578, 787 P.2d 1261.

The prospect of a reward does not defeat the intent-to-return defense. *State v. Lopez*, 1990-NMCA-016, 109 N.M. 578, 787 P.2d 1261.

The Uniform Jury Instructions do not preclude an instruction on the intent-to-return defense when appropriate. *State v. Lopez*, 1990-NMCA-016, 109 N.M. 578, 787 P.2d 1261.

Defendant was entitled to an instruction on the intent-to-return defense, where reasonable doubt could arise from the possibility that defendant's involvement consisted of only awareness of the burglary, knowledge of where the goods were being kept, use of reward money from an investigator to purchase the goods from those holding them, and delivery of the goods to the investigator. *State v. Lopez*, 1990-NMCA-016, 109 N.M. 578, 787 P.2d 1261.

**Waiver of error in instruction.** — Error committed by trial court in instructing the jury that requisite knowledge must, rather than may, be presumed upon proof of basic facts, which was not objected to, was waived and did not constitute fundamental error. *State v. Jones*, 1975-NMCA-078, 88 N.M. 110, 537 P.2d 1006, cert. denied, 88 N.M. 318, 540 P.2d 248.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 66 Am. Jur. 2d Receiving and Transporting Stolen Property §§ 1 to 4.

Possession of recently stolen goods by one charged with receiving them as evidence on question of guilty knowledge, 68 A.L.R. 187.

Thief as accomplice of one charged with receiving stolen property, or vice versa, within rule requiring corroboration or cautionary instruction, 53 A.L.R.2d 817.

Receiving property stolen in another state or country as receiving stolen property, 67 A.L.R.2d 752.

Attempts to receive stolen property, 85 A.L.R.2d 259.

Indictment: sufficiency of description of stolen property in indictment or information for receiving it, 99 A.L.R.2d 813.

Public documents: receipt of public documents taken by another as receipt of stolen property, 57 A.L.R.3d 1211.

Accomplice: receiver of stolen goods as accomplice of thief for purposes of corroboration, 74 A.L.R.3d 560.

What constitutes "recently" stolen property within rule inferring guilt from unexplained possession of such property, 89 A.L.R.3d 1202.

What constitutes "constructive" possession of stolen property to establish requisite element of possession supporting offense of receiving stolen property, 30 A.L.R.4th 488.

Conviction of receiving stolen property, or related offenses, where stolen property previously placed under police control, 72 A.L.R.4th 838.

Possession of stolen property as continuing offense, 24 A.L.R.5th 132.

Participation in larceny or theft as precluding conviction for receiving or concealing the stolen property, 29 A.L.R.5th 59.

76 C.J.S. Receiving Stolen Goods § 1 et seq.

## 30-16-12. Falsely representing oneself as incapacitated.

Falsely representing oneself as disabled consists of a person falsely representing the person's own self to be blind, visually impaired, deaf or having a physical disability for the purpose of obtaining money or other thing of value.

Whoever commits falsely representing oneself as disabled is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-16-12, enacted by Laws 1963, ch. 303, § 16-12; 2007, ch. 46, § 36.**

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

## 30-16-13. Cheating machine or device.

Cheating machine or device consists of any person, with intent to defraud, attempting to operate or causing to be operated any automatic vending machine, parking meter, coin-box telephone, or any machine or receptable [receptacle] designed to receive lawful money of the United States in connection with the sale, use or enjoyment of property or service, by means of any slug, or by any false, counterfeited, mutilated, sweated or foreign coin, or by any means, method, trick or device.

Whoever commits cheating machine or device is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-16-13, enacted by Laws 1963, ch. 303, § 16-13.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

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**Selection of charges.** — Where defendant was alleged to have stolen $400 in quarters from a change machine by using a rigged bill, he was potentially subject to being charged with both larceny and the misdemeanor offense of cheating a machine or device, and the preemption rationale of the general-specific rule did not preclude prosecution under either or both of the statutes. *State v. Davis*, 2000-NMCA-105, 129 N.M. 773, 14 P.3d 38, cert. denied, 130 N.M. 17, 16 P.3d 442.



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## 30-16-14. Failing to label secondhand watches.

Failing to label secondhand watches consists of any person or jeweler failing to identify or specify in any advertising or merchandise display of watches that the watches offered for sale have had any portion of their movements or cases repaired or replaced. Watches which have had the brand name, the name of the maker, the serial number, movement number or any other distinguishing number or identifying mark erased, defaced, removed, altered or covered shall for the purpose of this section be deemed to be secondhand.

For the purpose of this section, sufficient labeling shall consist of any notice affixed to the outside of a watch which clearly and legibly indicates the word "secondhand" printed thereon so that it can be read by a person of normal vision.

Whoever commits failing to label secondhand watches is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-16-14, enacted by Laws 1963, ch. 303, § 16-14; 1965, ch. 71, § 1.**

## 30-16-15. Coercing the purchase of insurance from particular broker.

Coercing the purchase of insurance from particular broker consists of any person engaged in selling real or personal property, or the lending of money, requiring as a condition precedent to the sale, financing the purchase of such property or the lending of money, or the renewal of extension of any loan or mortgage, that the purchaser of such property, or recipient of the financial assistance negotiate any policy of insurance or renewal thereof through a particular insurance company, agent, solicitor or broker.

Nothing in this section shall be construed to prevent the exercise by any person [of] the right to designate minimum standards as to the company, the terms and provisions of the policy and the adequacy of the coverage with respect to insurance on property pledged or mortgaged to such person.

Whoever commits coercing the purchase of insurance from particular broker is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-16-15, enacted by Laws 1963, ch. 303, § 16-15.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

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**Debtor's executed contract, as condition precedent to loan, illegal.** — Where an insurance creditor makes the execution of an insurance contract by the debtor a condition precedent to granting a loan, the contract is clearly illegal. *Capo v. Century Life Ins. Co.*, 1980-NMSC-058, 94 N.M. 373, 610 P.2d 1202.

**Contract not voided by violation.** — Although requirement in loan agreement that borrowers purchase life insurance from named company as a condition precedent to the lending of money was illegal, directly contravening this section, that part of the contract was separable without materially affecting the remainder dealing with the note, mortgage and loan, which were not made unenforceable thereby. *Forrest Currell Lumber Co. v. Thomas*, 1970-NMSC-018, 81 N.M. 161, 464 P.2d 891.

**But refund required.** — This section, prohibiting the coercing of the purchase of insurance from a particular broker, placed a penalty on the party coercing but not on the other; hence, amount obtained by insurance company through the illegal agreement should be returned to the insureds, even though the insurance company could not have avoided liability on its policies because of the illegality. *Forrest Currell Lumber Co. v. Thomas*, 1970-NMSC-018, 81 N.M. 161, 464 P.2d 891.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 43 C.J.S. Innkeepers § 28.

## 30-16-16. Falsely obtaining services or accommodations; probable cause; immunity; penalty.

A. Falsely obtaining services or accommodations consists of a person obtaining service, food, entertainment or accommodations without paying with the intent to cheat or defraud the owner or person supplying the service, food, entertainment or accommodations.

B. A law enforcement officer may arrest without warrant a person the officer has probable cause to believe has committed the crime of falsely obtaining services or accommodations. A merchant, owner or proprietor who causes such an arrest shall not be criminally or civilly liable if the merchant, owner or proprietor has actual knowledge that the person arrested has committed the crime of falsely obtaining services or accommodations.



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C. Whoever commits falsely obtaining services or accommodations when the value of the service, food, entertainment or accommodations furnished is:

(1) less than two hundred fifty dollars ($250) is guilty of a petty misdemeanor;

(2) more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor;

(3) more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony;

(4) more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony; and

(5) more than twenty thousand dollars ($20,000) is guilty of a second degree felony.

**History: 1953 Comp., § 40A-16-16, enacted by Laws 1963, ch. 303, § 16-16; 1981, ch. 254, § 1; 1987, ch. 121, § 6; 2006, ch. 29, § 8.**

**The 2006 amendment,** effective July 1, 2006, increased the value of the services, food, entertainment or accommodations in Paragraph (1) of Subsection C from less than $100 to less than $250; increased the value of the services, food, entertainment or accommodation in Paragraph (2) of Subsection C from more than $100 but less than $250 to more than $250 but less than $500; and increased the value of the thing embezzled or converted in Paragraph (3) of Subsection C from more than $250 to more than $500.

**The 1987 amendment,** effective June 19, 1987, redesignated former Subsections C(2) and C(3) as present Subsections C(3) and C(4), added present Subsections C(2) and C(5), substituted "two hundred fifty dollars ($250) but not more" for "one hundred dollars ($100) but less" in Subsection C(3), and inserted "but not more than twenty thousand dollars ($20,000)" in Subsection C(4).

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**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Modern status of rule that crime of false pretenses cannot be predicated upon present intention not to comply with promise or statement as to future act, 19 A.L.R.4th 959.

43 C.J.S. Innkeepers § 28.

## 30-16-17. Unlawful removal of effects.

Unlawful removal of effects consists of any person removing or causing to be removed any baggage or effects from any hotel, motel, trailer park, inn, rented dwelling or boarding house while there is a lien existing thereon for the proper charges due for fare or board furnished from such hotel, motel, trailer park, inn, rented dwelling or boarding house, and where the owner or person in possession of such baggage or effects is given actual notice of the fact of such lien, or where a notice of such lien has been conspicuously posted upon the premises adjacent to such baggage or effects, giving notice of the fact of such lien and the amount thereof.

Whoever commits unlawful removal of effects is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-16-17, enacted by Laws 1963, ch. 303, § 16-17.**

**Cross references.** — For landlord's lien, *see* 48-3-5 NMSA 1978.

For enforcement of liens, *see* 48-3-13, 48-3-14 NMSA 1978.

For lien in favor of owners or operators of hotels, rooming houses, apartment houses, rental dwellings, auto courts, trailer courts or campgrounds, priority and enforcement of same and penalty for removal of property affected thereby, *see* 48-3-16 to 48-3-18 NMSA 1978.

## 30-16-18. Improper sale, disposal, removal or concealing of encumbered property.

A. Improper sale, disposal, removal or concealing of encumbered property consists of a person knowingly, and with intent to defraud, selling, transferring, removing or concealing, or in any manner disposing of, any personal property upon which a security interest, chattel mortgage or other lien or encumbrance has attached or been retained, without the written consent of the holder of the security interest, chattel mortgage, conditional sales contract, lien or encumbrance.

B. A broker, dealer or an agent, buyer or seller who receives any remuneration whatsoever for transfer of equity or arranges the assumption of any loan on a mobile home or recreational vehicle that has a lien filed upon the vehicle with the motor vehicle division of the taxation and revenue department shall obtain written consent from the lien holder approving transferee's assumption of transferor's obligation to the lien holder within ten days of the transaction before the transaction is entered into, provided that the lien holder's written consent shall not unreasonably be withheld. Failure to do so constitutes an improper sale, disposal, removal or concealing of encumbered property, which is punishable as a petty misdemeanor.



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C. Whoever commits improper sale, disposal, removal or concealing of encumbered property when the value of the property is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

D. Whoever commits improper sale, disposal, removal or concealing of encumbered property when the value of the property is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

E. Whoever commits improper sale, disposal, removal or concealing of encumbered property when the value of the property is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

F. Whoever commits improper sale, disposal, removal or concealing of encumbered property when the value of the property is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

G. Whoever commits improper sale, disposal, removal or concealing of encumbered property when the value of the property exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

**History: 1953 Comp., § 40A-16-18, enacted by Laws 1963, ch. 303, § 16-18; 1977, ch. 281, § 1; 1987, ch. 121, § 7; 2006, ch. 29, § 9.**

**The 2006 amendment,** effective July 1, 2006, increased the value of the property in Subsection C from $100 or less to $250 or less; increased the value of the property in Subsection D from more than $100 but less than $250 to more than $250 but less than $500; and increased the value of the property in Subsection E from more than $250 to more than $500.

**The 1987 amendment,** effective June 19, 1987, substituted "motor vehicle division of the transportation department" for "New Mexico department of motor vehicles" in the first sentence of the second paragraph and "constitutes" for "will constitute" in the second sentence of that paragraph, added the present fourth and last paragraphs, substituted "two hundred fifty dollars ($250)" for "one hundred dollars ($100)" in the fifth paragraph, and substituted "is over twenty-five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000)" for "exceeds twenty-five hundred dollars ($2,500)" in the sixth paragraph.

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**"Security interest" refers to encumbrance under Uniform Commercial Code.** — By adding the reference "security interest," the legislature recognized a new type of encumbrance set out in the Uniform Commercial Code, 55-1-201(37) NMSA 1978. *State v. Woodward*, 1983-NMCA-153, 100 N.M. 708, 675 P.2d 1007.

**Transfers from special account to operating account constituted larceny.** — Under the terms of a "special deposit" agreement, funds deposited in a special account by the depositor were to be paid to the order of a third party, who held a security interest in the funds deposited in the account. The depositor's conduct in persuading the bank to make transfers from the special account to its operating account constituted larceny, theft and false pretenses under New Mexico law. *Wells Fargo Bus. Credit v. Am. Bank of Commerce*, 780 F.2d 871 (10th Cir. 1985).

**"Conditional sales contract".** — The term "conditional sales contract," as used in former law prohibiting sale, encumbrance or concealment of property held under a conditional sales contract, meant all contracts intended to hold title to personal property in the former owner, possessor or grantor. *State v. Shedoudy*, 1941-NMSC-044, 45 N.M. 516, 118 P.2d 280.

**Oral conditional sales contracts not recognized.** — Former law dealing with the crime of unlawfully selling or disposing of personal property held under a conditional sales contract evinced a legislative understanding that conditional sales contracts are written instruments and that oral conditional sales contracts are not recognized under our law. *Allison v. Niehaus*, 1940-NMSC-034, 44 N.M. 342, 102 P.2d 659.

**Criminal intent.** — While Laws 1929, ch. 46 (former 40-21-43 to 40-21-45, 1953 Comp.) did not specifically provide that the prohibited acts of a person, obtaining possession of personal property from its owner by a conditional sales contract and selling it without the consent of such owner, before securing title, be done with criminal intent, the act was manifestly designed to protect the interest of such owner, and the wrong inhered in delaying or defrauding him of his right to repossess his property if the conditional sales contract was breached by the buyer, and the specific conduct charged must have been actuated by such intent, to constitute a crime under the statute. *State v. Shedoudy*, 1941-NMSC-044, 45 N.M. 516, 118 P.2d 280.

**Criminal intent negatived.** — Where mortgagor removed mortgaged cattle to another state for grazing with oral consent on part of the mortgagee, mortgagor did not have the requisite criminal intent in moving the cattle to constitute offense of removing and concealing mortgaged cattle in violation of former law. *Howard v. Singleton*, 1950-NMSC-067, 55 N.M. 8, 225 P.2d 697.

**Removal and concealment after repossession.** — Where the evidence showed that the title holder of an automobile had already repossessed it because of defendant's default at the time defendant took it from garage and concealed it, defendant's taking and concealment, without the consent and knowledge of the title holder, would constitute a crime, but not the crime of unlawfully taking, carrying away and concealing personal property possession of which was obtained under a conditional sales contract. *State v. Shedoudy*, 1944-NMSC-042, 48 N.M. 354, 151 P.2d 57.

**Failure to sell repossessed collateral not treated as election under 55-9-505 NMSA 1978.** — Where a decrease in inventory constitutes a willful and malicious conversion of collateral and a violation of this section, failing to sell the repossessed collateral will not be treated as an election under 55-9-505 NMSA 1978 to retain the collateral in satisfaction of the obligation. *With v. Amador*, 596 F.2d 428 (10th Cir. 1979).

**Sale of borrowed motorcycle.** — Where defendant sold a motorcycle to the complaining witness, subsequently borrowed it back, and then sold it to a third person, he was guilty of embezzlement; this section would have been applicable if the jury had determined that dealings between the defendant and complaining witness amounted to a secured transaction, but jury necessarily determined they did not. *State v. Gregg*, 1972-NMCA-001, 83 N.M. 397, 492 P.2d 1260, cert. denied, 83 N.M. 562, 494 P.2d 975.



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**Argument on value improperly refused.** — On charge that buyer under a conditional sales contract obtained possession of an automobile of a finance company and unlawfully took, carried away and concealed such automobile of the value of more than $100 while its title was in such finance company and without its consent, it was error to refuse to permit accused's counsel to argue whether such value had been established by the evidence. *State v. Shedoudy*, 1941-NMSC-044, 45 N.M. 516, 118 P.2d 280.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 15 Am. Jur. 2d Chattel Mortgages §§ 242, 243; 51 Am. Jur. 2d Liens § 60.

Conditional sale, offense of obtaining property by false pretenses predicated upon transaction involving, 134 A.L.R. 874.

Elements and proof of crime of improper sale, removal, concealment, or disposal of property subject to security interest under UCC, 48 A.L.R.4th 819.

77A C.J.S. Sales § 328 et seq.; 79 C.J.S. Secured Transactions, § 111 et seq.

## 30-16-19. [Shoplifting;] definitions.

As used in Sections 40A-16-19 through 40A-16-23 [40A-16-22] New Mexico Statutes Annotated, 1953 Compilation [30-16-19 through 30-16-23 NMSA 1978]:

A. "store" means a place where merchandise is sold or offered to the public for sale at retail;

B. "merchandise" means chattels of any type or description regardless of the value offered for sale in or about a store; and

C. "merchant" means any owner or proprietor of any store, or any agent, servant or employee of the owner or proprietor.

**History: 1953 Comp., § 40A-16-19, enacted by Laws 1965, ch. 5, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Compiler's notes.** — The reference to "40A-16-19 through 40A-16-23 New Mexico Statutes Annotated, 1953 Compilation" apparently was intended to refer to the sections enacted by Laws 1965, ch. 5, which enacted only 40A-16-19 to 40A-16-22 and no 40A-16-23, 1953 Comp., compiled as 30-16-19, 30-16-20, 30-16-22 and 30-16-23 NMSA 1978. Laws 1967, ch. 230, § 1, subsequently added 40A-16-23, 1953 Comp., relating to a different subject matter and which was formerly compiled herein as 30-16-24 NMSA 1978.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.

## 30-16-20. Shoplifting.

A. Shoplifting consists of one or more of the following acts:

(1) willfully taking possession of merchandise with the intention of converting it without paying for it;

(2) willfully concealing merchandise with the intention of converting it without paying for it;

(3) willfully altering a label, price tag or marking upon merchandise with the intention of depriving the merchant of all or some part of the value of it; or

(4) willfully transferring merchandise from the container in or on which it is displayed to another container with the intention of depriving the merchant of all or some part of the value of it.

B. Whoever commits shoplifting when the value of the merchandise shoplifted:

(1) is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor;

(2) is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor;

(3) is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony;

(4) is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony; or

(5) is more than twenty thousand dollars ($20,000) is guilty of a second degree felony.

C. An individual charged with a violation of this section shall not be charged with a separate or additional offense arising out of the same transaction.

**History: 1953 Comp., § 40A-16-20, enacted by Laws 1965, ch. 5, § 2; 1969, ch. 24, § 1; 1987, ch. 121, § 8; 2006, ch. 29, § 10.**

**The 2006 amendment,** effective July 1, 2006, increased the value of the merchandise in Paragraph (1) of Subsection B from $100 or less to $250 or less; increased the value of the services, food, entertainment or accommodation in Paragraph (2) of Subsection B from more than $100 but less than $250 to more than $250 but less than $500; and increased the value of the thing embezzled or converted in Paragraph (3) of Subsection B from more than $250 to more than $500.



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**The 1987 amendment,** effective June 19, 1987, substituted "one hundred dollars ($100) or less" for "not more than one hundred dollars ($100)" in Subsection B(1), redesignated former Subsections B(2) and B(3) as present Subsections B(3) and B(4), added present Subsections B(2) and B(5), substituted "two hundred fifty dollars ($250)" for "one hundred dollars ($100)" in Subsection B(3), and inserted "but not more than twenty thousand dollars ($20,000)" in Subsection B(4).

**ANNOTATIONS**

**Conviction of both shoplifting and burglary.** — Where the defendant illegally entered a store intending to steal bottles of liquor, took bottles of liquor and did not pay for them, and there was no separation in time or location between the defendant's intent when the defendant entered the store and when the defendant committed the theft, the burglary and the shoplifting arose out of the same transaction and the conviction of the defendant for both shoplifting and burglary was prohibited by this section. *State v. Ramirez*, 2008-NMCA-165, 145 N.M. 367, 198 P.3d 866, cert. denied, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124.

**Proof of market value.** — In the absence of evidence that retail price of $119.97 did not accurately reflect the value of the merchandise in the retail market, evidence of that price was sufficient for the jury to determine there was a market value of more than $100, despite a showing that the wholesale price was only $84.97. *State v. Richardson*, 1976-NMCA-021, 89 N.M. 30, 546 P.2d 878.

A necklace's ticket price of $600 was not sufficient to establish its market value since there was evidence that such jewelry was never sold at the ticket price and that the store made its full anticipated profit selling such jewelry at 50% to 60% off such price. *State v. Contreras*, 1996-NMCA-045, 121 N.M. 550, 915 P.2d 306, cert. denied, 121 N.M. 499, 914 P.2d 636.

**Sufficient evidence of market value.** — Where defendant was charged with shoplifting over $500 for taking a television and the manager of the store testified that the retail price of the television at the time it was taken was $576, that the price had changed after the theft and had a retail price of $478 six months after the theft, that the store listed the television for $498 on its website, and that the store did not price match its website prices or engage in reference pricing in order to late discount to a lower sale price, there was sufficient evidence that the value of the television exceeded $500. *State v. Cofer*, 2011-NMCA-085, 150 N.M. 483, 261 P.3d 1115, cert. denied, 2011-NMCERT-007, 268 P.3d 46.

**Sufficient evidence of value of merchandise stolen.** — In defendant's trial for shoplifting and conspiracy to commit shoplifting, there was sufficient evidence to convict defendant of shoplifting of merchandise with a value of more than $500 where the evidence in the form of testimony and a store-generated training receipt that the value of the merchandise recovered from defendant and his accomplice was $556.39, without tax. *State v. Gallegos*, 2016-NMCA-076, cert. denied.

**"Value" as "market value".** — Although New Mexico's property crime statutes do not state how value is to be determined, the decisions have used the term "market value" as the test. *State v. Richardson*, 1976-NMCA-021, 89 N.M. 30, 546 P.2d 878.

**"Market value" of merchandise does not include the New Mexico gross receipts tax** for the purpose of fixing criminal penalties under this section. *Tunnell v. State*, 1983-NMSC-013, 99 N.M. 446, 659 P.2d 898.

**Tax not included in determining item's "value" unless included in price.** — The amount of gross receipts tax which could have been imposed on a regular sale of merchandise cannot be included for purposes of determining the "value" of the shoplifted item under this section, unless the total advertised retail or actual market price of the merchandise which was shoplifted included the amount of New Mexico gross receipts tax applicable to that particular item of merchandise. *Tunnell v. State*, 1983-NMSC-013, 99 N.M. 446, 659 P.2d 898.

**Valuation of property taken by persons working together.** — Since the defendant and his cohort working together took merchandise from the same store at the same time, the jury properly attributed to the defendant all the merchandise taken, regardless of in whose bag it was found. *State v. Armijo*, 1995-NMCA-115, 120 N.M. 702, 905 P.2d 740, cert. denied, 120 N.M. 636, 904 P.2d 1061.

**Sentencing under habitual offender statute.** — A sentence of eight years' imprisonment, imposed under the habitual offender statute against a defendant convicted for the fifth time on felony shoplifting charges, was not so disproportionate as to require reversal as cruel and unusual punishment under the New Mexico Constitution, notwithstanding facts that three of the convictions were over 15 years old, and the latest charge was only $3 over the minimum threshold for felony shoplifting. *State v. Rueda*, 1999-NMCA-033, 126 N.M. 738, 975 P.2d 351, cert. denied, 127 N.M. 391, 981 P.2d 1209.

**Conspiracy does not arise out of same transaction as shoplifting.** — A charge of conspiracy does not arise out of the same transaction which results in an indictment for shoplifting, and thus cannot be dismissed as in violation of a statute prohibiting the charging of separate or additional offense if it arises out of the same transaction, notwithstanding proof of the subsequent shoplifting may also tend to circumstantially prove the conspiracy charge. *State v. Leyba*, 1979-NMCA-105, 93 N.M. 366, 600 P.2d 312.

**Law reviews.** — For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 50 Am. Jur. 2d Larceny § 71.

Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.

Validity, construction, and effect of statutes establishing shoplifting or its equivalent as separate criminal offense, 64 A.L.R.4th 1088.

52A C.J.S. Larceny § 1(5).

## 30-16-21. Civil liability of adult shoplifter; penalty.

Any person who has reached the age of majority and who has been convicted of shoplifting under Section 30-16-20 NMSA 1978, may be civilly liable for the retail value of the merchandise, punitive damages of not less than one hundred dollars ($100) nor more than two hundred fifty dollars ($250), costs of the suit and reasonable attorney's fees. However, the merchant shall not be entitled to recover damages for the retail value of any recovered undamaged merchandise.

**History: 1953 Comp., § 40A-16-20.1, enacted by Laws 1977, ch. 104, § 1.**



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## 30-16-22. Presumptions created.

Any person who willfully conceals merchandise on his person or on the person of another or among his belongings or the belongings of another or on or outside the premises of the store shall be prima facie presumed to have concealed the merchandise with the intention of converting it without paying for it. If any merchandise is found concealed upon any person or among his belongings it shall be prima facie evidence of willful concealment.

**History: 1953 Comp., § 40A-16-21, enacted by Laws 1965, ch. 5, § 3.**

**Cross references.** — For evidentiary rule regarding presumptions in criminal cases, *see* Rule 11-302 NMRA.

**ANNOTATIONS**

**Section subject to rule of evidence.** — There being no statute providing otherwise, the provisions of this section are subject to Rule 303, N.M.R. Evid. (now Rule 11-302 NMRA). *State v. Matamoros*, 1976-NMCA-028, 89 N.M. 125, 547 P.2d 1167.

**Instructions improper.** — Instructions that one who willfully conceals merchandise on his person shall be "prima facie presumed" to have concealed it with intent of converting it without paying for it, and that concealment on one's person or his belongings is "prima facie evidence" of willful concealment, violated Rule 303(c), N.M.R. Evid. (now Rule 302C NMRA). *State v. Matamoros*, 1976-NMCA-028, 89 N.M. 125, 547 P.2d 1167.

**Error not preserved.** — Although instructions embodying the language of this section violated Rule 303(c), N.M.R. Evid. (now Rule 302C NMRA), requiring instructions on presumptions to be couched in permissive and not mandatory terms, nevertheless since defendant only objected with a general claim that the instructions created an unconstitutional presumption, and did not alert the trial court to the issue under the evidentiary rule, the error would not be considered further. *State v. Matamoros*, 1976-NMCA-028, 89 N.M. 125, 547 P.2d 1167.

**Willful concealment established.** — Showing that defendant entered store which had just opened for the day with a blanket wrapped around him, went to the rack where the expensive rugs were kept and at the door was found to have a rug under his blanket, hidden and folded up, constituted sufficient evidence for a rational juror to find each of the inferred facts in this section beyond a reasonable doubt, and showed a willful concealment. *State v. Matamoros*, 1976-NMCA-028, 89 N.M. 125, 547 P.2d 1167.

## 30-16-23. Reasonable detention.

If any law enforcement officer, special officer or merchant has probable cause for believing that a person has willfully taken possession of any merchandise with the intention of converting it without paying for it, or has willfully concealed merchandise, and that he can recover the merchandise by detaining the person or taking him into custody, the law enforcement officer, special officer or merchant may, for the purpose of attempting to affect [effect] a recovery of the merchandise, take the person into custody and detain him in a reasonable manner for a reasonable time. Such taking into custody or detention shall not subject the officer or merchant to any criminal or civil liability.

Any law enforcement officer may arrest without warrant any person he has probable cause for believing has committed the crime of shoplifting. Any merchant who causes such an arrest shall not be criminally or civilly liable if he has probable cause for believing the person so arrested has committed the crime of shoplifting.

**History: 1953 Comp., § 40A-16-22, enacted by Laws 1965, ch. 5, § 4.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Severability clauses.** — Laws 1965, ch. 5, § 5, provided for the severability of the act if any part or application thereof is held invalid.

**ANNOTATIONS**

**Meaning of "probable cause".** — A merchant has probable cause to detain a person when the totality of the facts and circumstances within the merchant's knowledge and of which the merchant has reasonably trustworthy information are sufficient to warrant a merchant of reasonable caution to believe that the person is willfully concealing merchandise. *Holguin v. Sally Beauty Supply, Inc.*, 2011-NMCA-100, 150 N.M. 636, 264 P.3d 732, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

**Meaning of "willfully concealed".** — When merchandise is concealed in the sense that it is not in plain sight, there must also be circumstances which reflect that the purpose of the concealment is adverse to the store owner's right to be paid for the merchandise before a conclusion can be made that the merchandise was "willfully concealed" under Section 30-16-23 NMSA 1978. *Holguin v. Sally Beauty Supply, Inc.*, 2011-NMCA-100, 150 N.M. 636, 264 P.3d 732, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

**Statutory presumption.** — The factual presumption under Section 30-16-22 NMSA 1978 that allows the finder of fact in a criminal prosecution for shoplifting to infer a specific intent to convert merchandise without paying for it if a person "willfully conceals" merchandise does not apply to the merchant's privilege under Section 30-16-23 NMSA 1978. *Holguin v. Sally Beauty Supply, Inc.*, 2011-NMCA-100, 150 N.M. 636, 264 P.3d 732, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

**Summary judgment not justified.** — Where plaintiff entered defendant's store with a large conspicuous canvas shopping bag; plaintiff picked up a can of hair mousse, put it in the bag and carried it in the bag to the front counter to ask the cashier a question about it; plaintiff was detained and charged with shoplifting; and in plaintiff's civil suit against defendant for damages, the district court granted summary judgment to defendant based on the



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court's findings that when the mousse was put inside the bag, the assistant manager had probable cause to believe that plaintiff was shoplifting and that placing the mousse into the bag satisfied the statutory presumption under Section 30-16-22 NMSA 1978 that plaintiff intended to shoplift, the district court erred in granting summary judgment to defendant. *Holguin v. Sally Beauty Supply, Inc.*, 2011-NMCA-100, 150 N.M. 636, 264 P.3d 732, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

**No reasonable cause to detain.** — In suit for false imprisonment and defamation, where employee of self-service store testified that he saw one of two women plaintiffs who were shopping together remove the sticker from a box of merchandise and put the box in her purse, the women denied placing the box in the purse, and the box, absent its sticker price tag, was found some 15 feet away from its accustomed place after the release of plaintiffs by the police officers who had detained them, the women's denial placed the evidence as to probable or reasonable cause for believing the women were unlawfully taking goods held for sale into conflict, which conflict the trial court, sitting as trier of fact, with ample support, resolved in favor of the women plaintiffs. *Stienbaugh v. Payless Drug Store, Inc.*, 1965-NMSC-033, 75 N.M. 118, 401 P.2d 104.

**Defamatory statements in course of investigation.** — Even assuming there had existed a privilege in pursuing investigation of supposed shoplifting, whether defamatory statement made by employee in presence of both employees and patrons of the store was made in the exercise of that privilege, was a question for the trier of facts. *Stienbaugh v. Payless Drug Store, Inc.*, 1965-NMSC-033, 75 N.M. 118, 401 P.2d 104.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Defamation: actionability of accusation or imputation of shoplifting, 29 A.L.R.3d 961.

Rules or instructions: admissibility of defendant's rules or instructions for dealing with shoplifters, in action for false imprisonment or malicious prosecution, 31 A.L.R.3d 705.

False imprisonment action: construction and effect of statute providing for detention of suspected shoplifters by merchant or employee, 47 A.L.R.3d 998.

Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.

Liability of storekeeper for injury to customer arising out of pursuit of shoplifter, 14 A.L.R.4th 950.

Excessiveness or inadequacy of compensatory damages for false imprisonment or arrest, 48 A.L.R.4th 165.

## 30-16-24. Repealed.

**Repeals.** — Laws 1989, ch. 156, § 8 repealed 30-16-24 NMSA 1978, as enacted by Laws 1967, ch. 230, § 1, relating to appropriating trade secrets, effective June 16, 1989.

For present comparable provisions, *see* 57-3A-1 NMSA 1978 et seq.

## 30-16-24.1. Theft of identity; obtaining identity by electronic fraud.

A. Theft of identity consists of willfully obtaining, recording or transferring personal identifying information of another person without the authorization or consent of that person and with the intent to defraud that person or another or with the intent to sell or distribute the information to another for an illegal purpose.

B. Obtaining identity by electronic fraud consists of knowingly and willfully soliciting, requesting or taking any action by means of a fraudulent electronic communication with intent to obtain the personal identifying information of another.

C. As used in this section:

(1) "fraudulent electronic communication" means a communication by a person that is an electronic mail message, web site or any other use of the internet that contains fraudulent, false, fictitious or misleading information that depicts or includes the name, logo, web site address, email address, postal address, telephone number or any other identifying information of a business, organization or state agency, to which the person has no legitimate claim of right;

(2) "personal identifying information" means information that alone or in conjunction with other information identifies a person, including the person's name, address, telephone number, driver's license number, social security number, date of birth, biometric data, place of employment, mother's maiden name, demand deposit account number, checking or savings account number, credit card or debit card number, personal identification number, electronic identification code, automated or electronic signature, passwords or any other numbers or information that can be used to obtain access to a person's financial resources, obtain identification, act as identification or obtain goods or services; and

(3) "biometric data" means data, such as finger, voice, retina or iris prints or deoxyribonucleic acid, that capture, represent or enable the reproduction of unique physical attributes of a person.

D. Whoever commits theft of identity is guilty of a fourth degree felony.

E. Whoever commits obtaining identity by electronic fraud is guilty of a fourth degree felony.

F. Prosecution pursuant to this section shall not prevent prosecution pursuant to any other provision of the law when the conduct also constitutes a violation of that other provision.



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G. In a prosecution brought pursuant to this section, the theft of identity or obtaining identity by electronic fraud shall be considered to have been committed in the county:

(1) where the person whose identifying information was appropriated, obtained or sought resided at the time of the offense; or

(2) in which any part of the offense took place, regardless of whether the defendant was ever actually present in the county.

H. A person found guilty of theft of identity or of obtaining identity by electronic fraud shall, in addition to any other punishment, be ordered to make restitution for any financial loss sustained by a person injured as the direct result of the offense. In addition to out-of-pocket costs, restitution may include payment for costs, including attorney fees, incurred by that person in clearing the person's credit history, credit rating, criminal history or criminal charges or costs incurred in connection with a legal proceeding to satisfy a debt, lien, judgment or other obligation of that person arising as a result of the offense.

I. The sentencing court shall issue written findings of fact and may issue orders as are necessary to correct public records and errors in credit reports and identifying information that contain false information as a result of the theft of identity or of obtaining identity by electronic fraud.

**History: Laws 2001, ch. 138, § 1; 2005, ch. 296, § 1; 2009, ch. 95, § 3.**

**The 2009 amendment,** effective July 1, 2009, in Subsection A, after "person or another", added the remainder of the sentence; in Paragraph (2) of Subsection C, after "social security number", added "date of birth, biometric data"; after "place of employment" added "mother's"; after "maiden name", deleted "of the person's mother", after "personal identification number", added "electronic identification code, automated or electronic signature", after "can be used to", added "obtain" and after "person's financial resources", added the remainder of the sentence; added Paragraph (3) of Subsection C; in Subsection H, after "credit rating" added "criminal history or criminal charges" and after "in connection with a", changed "civil or administrative" to "legal"; and in Subsection I, after "necessary to correct", changed "a public record" to "public records and errors in credit reports and identifying information".

**The 2005 amendment,** effective July 1, 2005, added Subsection B to define the crime of obtaining identity by electronic fraud; added Subsection C(1) to define "fraudulent electronic communication"; changed the crime of theft of identity from a misdemeanor to a fourth degree felony in Subsection D; added Subsection E to provide that the crime of obtaining identity by electronic fraud is a fourth degree felony; added the crime of obtaining identity by electronic fraud in Subsection G; provided in Subsection G(1) that the crimes are considered to be committed in the county where the person whose identifying information was obtained or sought resided; and added the crime of obtaining identity by electronic fraud in Subsections H and I.

## ANNOTATIONS

**Jurisdiction to prosecute use of identity outside New Mexico.** — Where defendant used the victim's identity to obtain a driver's license in Arizona, rent cars in Arizona, Nevada, and Georgia, and provide booking information upon defendant's arrest in Georgia; none of the acts of using the victim's identity occurred in New Mexico; the victim resided in New Mexico at the time of the transactions; and as a result of defendant's use of the victim's identity, the victim encountered problems trying to get a driver's license in New Mexico and victim received rental car bills in New Mexico that were incurred by defendant outside New Mexico, New Mexico had territorial jurisdiction over the offense, even if the acts were committed outside New Mexico because the crime had an effect upon the victim in New Mexico. *State v. Allen*, 2014-NMCA-111, cert. denied, 2014-NMCERT-010.

**Defendant's conviction for identity theft was preempted by the federal Immigration Reform and Control Act.** — Where defendant was convicted of identity theft for using another person's personal identifying information on documents he submitted to his employer during the hiring process, among which was a federal employment eligibility verification form (Form I-9) which the federal government requires employers to use to verify that an employee may lawfully work in the United States, and where defendant claimed that his conviction for identity theft was preempted by the federal Immigration Reform and Control Act (IRCA), which makes it unlawful for an employer to knowingly hire a non-citizen or non-national who is not authorized to work in the United States, defendant's conviction was improper because IRCA expressly prohibits the use of Form I-9 except for a few enumerated purposes to verify that an individual is not an unauthorized alien, and in this case, the state used Form I-9 to prove the identity theft charge, a non-enumerated purpose. Therefore, the state's use of Form I-9 was prohibited by IRCA and defendant's identity theft conviction was preempted to the extent it was based on Form I-9. Moreover, defendant's conviction constituted fundamental error because it is unclear to what extent the jury's decision was predicated on Form I-9, as opposed to other documents relied on by the *State*. *State v. Prieto-Lozoya*, 2021-NMCA-019, cert. denied.

**Sufficient evidence to support defendant's conviction for identity theft.** — Where defendant was charged with identity theft for using another person's personal identifying information on documents he submitted to his employer during the hiring process, and where the state presented evidence that defendant was not authorized to be in the United States at the time he applied for the job, that he did not apply for the job in his own name, but used the identity of someone else, that he submitted documentation, including a social security card bearing another persons' name and social security number, a permanent resident card bearing another person's name and date of birth, but with defendant's image on the card, a W-4 federal tax withholding form bearing another person's name and social security number, and a federal employment eligibility verification form bearing another person's name, date of birth and social security number, to his employer as part of the hiring process, and that defendant was not authorized to use the personal identifying information of the other person, there was sufficient evidence to prove beyond a reasonable doubt that defendant intended to defraud his employer and that he committed identity theft. *State v. Prieto-Lozoya*, 2021-NMCA-019, cert. denied.



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## 30-16-25. Credit cards; definitions.

As used in Sections 30-16-25 through 30-16-38 NMSA 1978:

A. "cardholder" means the person or organization identified on the face of a credit card to whom or for whose benefit the credit card is issued by an issuer;

B. "credit card" means:

(1) any instrument or device, whether known as a credit card, credit plate, charge card or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services or anything else of value, either on credit or in consideration of an undertaking or guarantee by the issuer of the payment of a check drawn by the cardholder; or

(2) a credit card account number;

C. "expired credit card" means a credit card which shows on its face that it is outdated;

D. "issuer" means the business organization or financial institution, or its duly authorized agent, which issues a credit card;

E. "participating party" means a business organization, or financial institution, other than the issuer, which acquires for value a sales slip or agreement;

F. "sales slip or agreement" means any writing evidencing a credit card transaction;

G. "merchant" means every person who is authorized by an issuer or a participating party to furnish money, goods, services or anything else of value upon presentation of a credit card by a cardholder;

H. "incomplete credit card" means a credit card upon which a part of the matter, other than the signature of the cardholder, which an issuer requires to appear on the credit card before it can be used by a cardholder, has not been stamped, embossed, imprinted or written on it;

I. "revoked credit card" means a credit card for which the permission to use has been suspended or terminated by the issuer, and notice thereof has been given to the cardholder; and

J. "anything of value" includes money, goods and services.

**History: 1953 Comp., § 40A-16-24, enacted by Laws 1971, ch. 239, § 1; 1999, ch. 17, § 1.**

**Cross references.** — For fraudulently obtaining telecommunications services, *see* 30-33-12 to 30-33-14 NMSA 1978.

For the Credit Card Act, *see* 56-4-1 NMSA 1978.

**Repeals and reenactments.** — Laws 1971, ch. 239, § 15, repealed 40A-16-24, 1953 Comp., relating to definitions regarding credit cards, and Laws 1971, ch. 239, § 1, enacted a new section.

**The 1999 amendment,** effective July 1, 1999, updated statutory references, and in Subsection B added the Paragraph (1) designation and added Paragraph (2).

**ANNOTATIONS**

**Definition of credit card.** — An electronic benefits transfer (EBT) card issued to a public assistance recipient is not a credit card under Section 30-16-33 NMSA 1978, *State v. Martinez*, 2001-NMCA-099, 131 N.M. 254, 34 P.3d 643.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Credit card issuer's liability, under state laws, for wrongful billing, cancellation, dishonor, or disclosure, 53 A.L.R.4th 231.

## 30-16-26. Theft of a credit card by taking or retaining possession of card taken.

A person who takes a credit card from the person, possession, custody or control of another without the cardholder's consent, or who with knowledge that it has been so taken, acquires or possesses a credit card with the intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder, is guilty of a fourth degree felony. Taking a credit card without consent includes obtaining it by conduct defined or known as statutory larceny, common-law larceny by trespassory taking, common-law larceny by trick, embezzlement or obtaining property by false pretense, false promise or extortion.

**History: 1953 Comp., § 40A-16-25, enacted by Laws 1971, ch. 239, § 2.**

**Repeals and reenactments.** — Laws 1971, ch. 239, § 15, repealed 40A-16-25, 1953 Comp., relating to false statements of financial condition, and Laws 1971, ch. 239, § 2, enacted a new section.

**ANNOTATIONS**

**Constitutionality.** — Sections 30-16-26 and 30-16-27 NMSA 1978 are not unconstitutionally vague. *State v. Wilson*, 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175.

**Intent.** — Section 30-16-26 NMSA 1978 requires actual knowledge that the credit card was wrongfully



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taken at the time it was acquired, whereas Section 30-16-27 NMSA 1978 applies when the possessor of the card merely has reason to know of the stolen, mislaid, or mistakenly delivered nature of the card, which knowledge could be gained at any time during the possession. Further, Section 30-16-26 appears to proscribe acquisition with the requisite intent, whereas one can legitimately acquire a stolen credit card under Section 30-16-27 and if one develops the requisite intent later one would not be guilty until that time. *State v. Wilson*, 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175.

**Double jeopardy.** — Municipal court conviction of larceny is not the same offense for purposes of double jeopardy as a district court conviction of theft of a credit card. *State v. Rodriguez*, 2005-NMSC-019, 138 N.M. 21, 116 P.3d 92.

Larceny is lesser included offense of theft of a credit card. *State v. Rodriguez*, 2005-NMSC-019, 138 N.M. 21, 116 P.3d 92.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Criminal liability for unauthorized use of credit card, 24 A.L.R.3d 986.

## 30-16-27. Possession of a credit card stolen, lost, mislaid or delivered by mistake.

A person other than the issuer who receives or possesses a credit card that he knows or has reason to know to have been stolen, lost, mislaid or delivered under a mistake as to the identity or address of the cardholder, and who retains possession thereof with the intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder, is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-16-26, enacted by Laws 1971, ch. 239, § 3.**

**Repeals and reenactments.** — Laws 1971, ch. 239, § 15, repealed 40A-16-26, 1953 Comp., relating to the fraudulent taking, receiving or transfer of a credit card, and Laws 1971, ch. 239, § 3, enacted a new section.

ANNOTATIONS

**Constitutionality.** — Sections 30-16-26 and 30-16-27 NMSA 1978 are not unconstitutionally vague. *State v. Wilson*, 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175.

**Intent.** — Section 30-16-26 NMSA 1978 requires actual knowledge that the credit card was wrongfully taken at the time it was acquired, whereas Section 30-16-27 NMSA 1978 applies when the possessor of the card merely has reason to know of the stolen, mislaid, or mistakenly delivered nature of the card, which knowledge could be gained at any time during the possession. Further, Section 30-16-26 NMSA 1978 appears to proscribe acquisition with the requisite intent, whereas one can legitimately acquire a stolen credit card under Section 30-16-27 NMSA 1978 and if one develops the requisite intent later one would not be guilty until that time. *State v. Wilson*, 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175.

## 30-16-28. Fraudulent transfer or receipt of a credit card.

A person other than the issuer, or his authorized agent, who, with intent to defraud, transfers possession of a credit card to a person other than the person whose name appears thereon, or a person who with intent to defraud receives possession of a credit card issued in the name of a person other than himself from a person other than the issuer, or his authorized agent, is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-16-27, enacted by Laws 1971, ch. 239, § 4.**

**Repeals and reenactments.** — Laws 1971, ch. 239, § 15, repealed 40A-16-27, 1953 Comp., relating to the fraudulent making or signing of a credit card, and Laws 1971, ch. 239, § 4, enacted a new section.

## 30-16-29. Fraudulent taking, receiving or transferring credit cards.

Any person who, with intent to defraud, receives, sells or transfers a credit card by making, directly or indirectly, any false statement of a material fact, either orally or in writing, respecting his identity or financial condition or that of any other person, firm or corporation, is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-16-29, enacted by Laws 1971, ch. 239, § 5.**

**Repeals and reenactments.** — Laws 1971, ch. 239, § 15, repealed 40A-16-29, 1953 Comp., relating to fraudulent acts by a merchant, and Laws 1971, ch. 239, § 5, enacted a new section.



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## 30-16-30. Dealing in credit cards of another.

Any person, other than the issuer, who possesses, receives, sells or transfers four or more credit cards, issued in a name or names other than his own in violation of Sections [Section] 30-16-26 or 30-16-27 or 30-16-28 or 30-16-29 NMSA 1978 is guilty of a third degree felony.

**History: 1953 Comp., § 40A-16-30, enacted by Laws 1971, ch. 239, § 6.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Repeals and reenactments.** — Laws 1971, ch. 239, § 15, repealed 40A-16-30, 1953 Comp., relating to possession of incomplete credit card or machinery, plates or other contrivance, and Laws 1971, ch. 239, § 6, enacted a new section.

## 30-16-31. Forgery of a credit card.

A person who, with intent to defraud a purported issuer, or a person or organization providing money, goods, services or anything else of value, or any other person, makes or embosses a purported credit card, or alters such a credit card, without the consent of the issuer, is guilty of a fourth degree felony. A person "makes" a credit card when he makes or draws, in whole or in part, a device or instrument which purports to be the credit card of a named issuer but which is not such a credit card because the issuer did not authorize the making or drawing, or when he alters a credit card which was validly issued. A person "embosses" a credit card when, without the authorization of the named issuer, he completes a credit card by adding any other matter, other than the signature of the cardholder, which an issuer requires to appear on the credit card before it can be used by a cardholder.

**History: 1953 Comp., § 40A-16-31, enacted by Laws 1971, ch. 239, § 7.**

**Repeals and reenactments.** — Laws 1971, ch. 239, § 15, repealed 40A-16-31, 1953 Comp., relating to obtaining a fraudulently acquired transportation ticket at a discount, and Laws 1971, ch. 239, § 7, enacted a new section.

## 30-16-32. Fraudulent signing of credit cards or sales slips or agreements.

Any person, other than a cardholder, or a person authorized by him, who, with intent to defraud, signs the name of another, or of a fictitious person, to a credit card or to a sales slip or agreement is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-16-32, enacted by Laws 1971, ch. 239, § 8.**

ANNOTATIONS

**Due process.** — The phrase "signs the name of another" does not render this section unconstitutionally vague. *State v. Sweat*, 1972-NMCA-162, 84 N.M. 416, 504 P.2d 24.

**Equal protection.** — This section does not deprive a defendant of equal protection of the law. *State v. Sweat*, 1972-NMCA-162, 84 N.M. 416, 504 P.2d 24.

Contention that this section denies equal protection to those who sign the name of another to a credit card, sales slip or agreement because the class of people who use the credit card of another with the same name as theirs, and sign that name, which is both theirs and the cardholder's, are exempt from prosecution, was without merit. *State v. Sweat*, 1972-NMCA-162, 84 N.M. 416, 504 P.2d 24.

**This section is directed to prevention of fraud** in connection with credit cards, sales slips or agreements and applies when a person with the requisite intent signs a name other than his own or the name of a fictitious person. *State v. Sweat*, 1972-NMCA-162, 84 N.M. 416, 504 P.2d 24.

**"Another" means** "other than oneself." *State v. Sweat*, 1972-NMCA-162, 84 N.M. 416, 504 P.2d 24.

**Each use separate offense.** — This section punishes each fraudulent signature. This indicates that the legislature intended to punish each use of a credit card under 30-16-33 NMSA 1978, not the continuing possession and usage of one card. *State v. Salazar*, 1982-NMCA-077, 98 N.M. 70, 644 P.2d 1059.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Successful negotiation of commercial transaction as element of state offense of credit card fraud or false pretense in use of credit card, 106 A.L.R.5th 701.

## 30-16-33. Fraudulent use of a credit card.

A. Fraudulent use of a credit card consists of a person obtaining anything of value, with intent to defraud, by using:



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(1) a credit card obtained in violation of Sections 30-16-25 through 30-16-38 NMSA 1978;

(2) a credit card that is invalid, expired or revoked;

(3) a credit card while fraudulently representing that the person is the cardholder named on the credit card or an authorized agent or representative of the cardholder named on the credit card; or

(4) a credit card issued in the name of another person without the consent of the person to whom the card has been issued.

B. Whoever commits fraudulent use of a credit card when the value of the property or service obtained is two hundred fifty dollars ($250) or less in any consecutive six-month period is guilty of a petty misdemeanor.

C. Whoever commits fraudulent use of a credit card when the value of the property or service obtained is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) in any consecutive six-month period is guilty of a misdemeanor.

D. Whoever commits fraudulent use of a credit card when the value of the property or service obtained is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) in any consecutive six-month period is guilty of a fourth degree felony.

E. Whoever commits fraudulent use of a credit card when the value of the property or service obtained is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) in any consecutive six-month period is guilty of a third degree felony.

F. Whoever commits fraudulent use of a credit card when the value of the property or service obtained is over twenty thousand dollars ($20,000) in any consecutive six-month period is guilty of a second degree felony.

**History: 1953 Comp., § 40A-16-33, enacted by Laws 1971, ch. 239, § 9; 2006, ch. 29, § 11.**

**The 2006 amendment,** effective July 1, 2006, provided in Subsection A that fraudulent use of a credit card consists of a person obtaining anything of value with intent to defraud by using a credit card; changed the 1953 statutory references in Paragraph (1) of Subsection A to the NMSA 1978; replaced the former Subsection B, which provided that if the value of things obtained exceeds $300 in a consecutive six months period, the offense was a third degree felony with new Subsections B through F providing separate penalties for fraudulent use of a credit card depending on the value of the property or service obtained.

**ANNOTATIONS**

**Definition of credit card.** — An electronic benefits transfer (EBT) card issued to a public assistance recipient is not a credit card under Section 30-16-33 NMSA 1978, *State v. Martinez*, 2001-NMCA-099, 131 N.M. 254, 34 P.3d 643.

**Section 30-16-33 NMSA 1978 is not unconstitutionally vague.** *State v. Castillo*, 2011-NMCA-046, 149 N.M. 536, 252 P.3d 760, cert. denied, 2011-NMCERT-004, 150 N.M. 648, 264 P.3d 1171.

**Debit card.** — Debit cards, which are tied to individual checking accounts, as opposed to lines of credit or guarantee of payment by the issuing bank, is not a "credit card" for purposes of Section 30-16-33 NMSA 1978. *State v. Castillo*, 2011-NMCA-046, 149 N.M. 536, 252 P.3d 760, cert. denied, 2011-NMCERT-004, 150 N.M. 648, 264 P.3d 1171.

**Each use separate offense.** — Section 30-16-32 NMSA 1978 punishes each fraudulent signature. This indicates that the legislature intended to punish each use of a credit card under this section, not the continuing possession and usage of one card. *State v. Salazar*, 1982-NMCA-077, 98 N.M. 70, 644 P.2d 1059.

**Consent.** — Consent is not an essential element of the crime defined in Subsection A(3) of this section. *State v. Lopez*, 1973-NMCA-148, 85 N.M. 742, 516 P.2d 1125.

**Admissibility of related incident.** — In prosecution for charging purchase on credit card belonging to another, admission of testimony of a subsequent attempt to charge additional purchases on the following day at the same store was not erroneous, as the second incident was strong evidence of defendant's intent and his plan, and the concurrence of time, place and modus operandi also tended to establish the identity of the accused. *State v. Lopez*, 1973-NMCA-148, 85 N.M. 742, 516 P.2d 1125.

**Opinion evidence on intent.** — It was error to allow store employee who dealt with defendant to express opinion on whether he had reason to believe that defendant intended to defraud the establishment, but considering the strong evidence in the record, this error was not prejudicial. *State v. Lopez*, 1973-NMCA-148, 85 N.M. 742, 516 P.2d 1125.

**Arrest valid.** — Where arresting officer had reasonable grounds to believe that person arrested had committed the crime of misusing an expired credit card, the arrest was valid. *Stone v. United States*, 385 F.2d 713 (10th Cir. 1967), cert. denied, 391 U.S. 966, 88 S. Ct. 2038, 20 L. Ed. 2d 880 (1968).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Successful negotiation of commercial transaction as element of state offense of credit card fraud or false pretense in use of credit card, 106 A.L.R.5th 701.

## 30-16-34. Fraudulent acts by merchants or their employees.

A. A merchant or the employee of a merchant commits fraud if, with intent to defraud, the merchant or employee furnishes or allows to be furnished anything of value upon presentation of a credit card:



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(1) obtained or retained in violation of Sections 30-16-25 through 30-16-38 NMSA 1978;

(2) fraudulently made or embossed;

(3) fraudulently signed;

(4) that the merchant or employee knows is invalid, expired or revoked; or

(5) by a person whom the merchant or employee knows is not the cardholder named on the credit card or an authorized agent or representative of the cardholder named on the credit card.

B. When the value of anything furnished by a merchant, or by an employee of a merchant, in violation of this section:

(1) is two hundred fifty dollars ($250) or less in any consecutive six-month period, the offense is a petty misdemeanor;

(2) is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) in any consecutive six-month period, the offense is a misdemeanor;

(3) is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) in any consecutive six-month period, the offense is a fourth degree felony;

(4) is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) in any consecutive six-month period, the offense is a third degree felony; or

(5) is more than twenty thousand dollars ($20,000) in any consecutive six-month period, the offense is a second degree felony.

C. A merchant or the employee of a merchant commits fraud if, with intent to defraud, the merchant or employee fails to furnish anything of value that the merchant or employee represents in writing to the issuer or to a participating party that the merchant or employee has furnished on a credit card or cards of the issuer. When the difference between the value of anything actually furnished to a person and the value represented by the merchant to the issuer or participating party:

(1) is two hundred fifty dollars ($250) or less in any consecutive six-month period, the offense is a petty misdemeanor;

(2) is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) in any consecutive six-month period, the offense is a misdemeanor;

(3) is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) in any consecutive six-month period, the offense is a fourth degree felony;

(4) is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) in any consecutive six-month period, the offense is a third degree felony; or

(5) is more than twenty thousand dollars ($20,000) in any consecutive six-month period, the offense is a second degree felony.

**History: 1953 Comp., § 40A-16-34, enacted by Laws 1971, ch. 239, § 10; 2006, ch. 29, § 12.**

**The 2006 amendment,** effective July 1, 2006, changed the 1953 statutory reference in Paragraph (1) of Subsection A to the NMSA 1978 section numbers; deleteds the former Subsection B, which provided that if the value of anything furnished by a merchant or a merchant's employee exceeds $300 in any consecutive six-month period, the offense was a third degree felony and replaced it with Paragraphs (1) through (5) that provide penalties based on the value of the items furnished; and deleted former Subsection 3 and replaced it with Paragraphs (1) through (5) that provide penalties based on the value of the thing furnished.

**ANNOTATIONS**

**Falsifying invoice.** — Charge that service station operator falsified an invoice covering a credit card transaction in order to reflect a sale which had not occurred was not within the scope of former credit card statute making it a misdemeanor to use another's card without his consent, and defendant was properly prosecuted under the forgery statute. *State v. Cowley*, 1968-NMCA-011, 79 N.M. 49, 439 P.2d 567, cert. denied, 79 N.M. 98, 440 P.2d 136.

## 30-16-35. Possession of incomplete credit cards or machinery, plates or other contrivance.

A. Any person who possesses an incomplete credit card, with intent to defraud, is guilty of a misdemeanor. Possession of four or more incomplete credit cards, with intent to defraud, is a fourth degree felony.



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B. Any person, who with intent to defraud, possesses machinery, plates or any other contrivance designed to reproduce instruments purporting to be credit cards of an issuer who has not consented to the preparation of such credit cards, is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-16-35, enacted by Laws 1971, ch. 239, § 11.**

## 30-16-36. Receipt of property obtained in violation of act.

A person who receives money, goods, services or anything else of value obtained in violation of Section 30-16-33 NMSA 1978, and who knows or has reason to believe that it was so obtained, violates this section. The degree of the offense is determined as follows:

A. when the value of all things of value obtained from a person in violation of this section is two hundred fifty dollars ($250) or less in any consecutive six-month period, then the offense is a petty misdemeanor;

B. when the value of all things of value obtained from a person in violation of this section is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) in any consecutive six-month period, then the offense is a misdemeanor;

C. when the value of all things of value obtained from a person in violation of this section is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) in any consecutive six-month period, then the offense is a fourth degree felony;

D. when the value of all things of value obtained from a person in violation of this section is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) in any consecutive six-month period, then the offense is a third degree felony; or

E. when the value of all things of value obtained from a person in violation of this section is more than twenty thousand dollars ($20,000) in any consecutive six-month period, then the offense is a second degree felony.

**History: 1953 Comp., § 40A-16-36, enacted by Laws 1971, ch. 239, § 12; 2006, ch. 29, § 13.**

**The 2006 amendment,** effective July 1, 2006, changed the statutory references from the 1953 references to the NMSA 1978 references; increased the value of the property in Subsection A from $100 or less to $250 or less; increased the value of the property in Subsection B from more than $100 but less than $300 in a consecutive six-month period to more than $250 but less than $500 in a consecutive six-month period; replaced former Subsection C, which provided that if the value of things obtained exceeds $300 in a consecutive six-month period the offense was a third degree felony, with Subsections C through E.

## 30-16-37. Obtaining fraudulently acquired transportation ticket at a discount.

Any person who obtains, at a discount price, a ticket issued by an airline, railroad, steamship or other transportation company, which ticket was acquired in violation of Section 30-16-33 NMSA 1978, without reasonable inquiry to ascertain that the person from whom it was obtained had a legal right to possess it, shall be presumed to know that the ticket was acquired under circumstances constituting a violation of Section 30-16-33 NMSA 1978, and shall be guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-16-37, enacted by Laws 1971, ch. 239, § 13.**

## 30-16-38. Applicability of other laws.

The provisions of Sections 30-16-25 through 30-16-38 NMSA 1978 shall not be construed to preclude the applicability of any other provision of the criminal law of this state or any municipality thereof that presently applies or may in the future apply to any transaction that violates the cited provisions, unless the other state or municipal law is inconsistent with the terms of the cited provisions.



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**History: 1953 Comp., § 40A-16-38, enacted by Laws 1971, ch. 239, § 14.**

**Severability.** — Laws 1971, ch. 239, § 16, provided for the severability of the act if any part or application thereof is held invalid.

## 30-16-39. Fraudulent acts to obtain or retain possession of rented or leased vehicle or other personal property; penalty.

A person who rents or leases a vehicle or other personal property and obtains or retains possession of it by means of any false or fraudulent representation, fraudulent concealment, false pretense, trick, artifice or device, including a false representation as to the person's name, residence, employment or operator's license, is guilty of a:

A. petty misdemeanor if the vehicle or property has a value of two hundred fifty dollars ($250) or less;

B. misdemeanor if the vehicle or property has a value of over two hundred fifty dollars ($250) but not more than five hundred dollars ($500);

C. fourth degree felony if the property or vehicle has a value of over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500);

D. third degree felony if the property or vehicle has a value of over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000); and

E. second degree felony if the property or vehicle has a value of over twenty thousand dollars ($20,000).

**History: 1953 Comp., § 40A-16-39, enacted by Laws 1972, ch. 23, § 1; 1979, ch. 251, § 1; 2006, ch. 29, § 14.**

**The 2006 amendment,** effective July 1, 2006, provided in Subsection A that if the value of the vehicle is $250 or less, the crime is a petty misdemeanor; provided in Subsection B that if the value of the vehicles is more than $250 but less than $500, the crime is a misdemeanor; provided in Subsection C that if the value of the vehicle is more than $500 but less than $2,500, the crime is a fourth degree felony; provided in Subsection D that if the value of the vehicle is more than $2,500 but less than $20,000, the crime is a third degree felony; and provided in Subsection E that if the value of the vehicle is more than $20,000, the crime is a second degree felony.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — State regulation of motor vehicle rental ("you-drive") business, 60 A.L.R.4th 784.

## 30-16-40. Fraudulent refusal to return a leased vehicle or other personal property; penalty; presumption.

A. A person who, after leasing a vehicle or other personal property under a written agreement that provides for the return of the vehicle or personal property to a particular place at a particular time and who, with intent to defraud the lessor of the vehicle or personal property, fails to return the vehicle or personal property to the place within the time specified, is guilty of a:

(1) petty misdemeanor if the property or vehicle has a value of two hundred fifty dollars ($250) or less;

(2) misdemeanor if the property or vehicle has a value of over two hundred fifty dollars ($250) but not more than five hundred dollars ($500);

(3) fourth degree felony if the property or vehicle has a value of over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500);

(4) third degree felony if the property or vehicle has a value of over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000); and

(5) second degree felony if the property or vehicle has a value of over twenty thousand dollars ($20,000).

B. Failure of the lessee to return the vehicle or personal property to the place specified within seventy-two hours after mailing to the lessee by certified mail at the lessee's address shown on the leasing agreement a written demand to return the vehicle or personal property shall raise a rebuttable presumption that the failure to return the vehicle or personal property was with intent to defraud.



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**History: 1953 Comp., § 40A-16-40, enacted by Laws 1973, ch. 154, § 1; 1979, ch. 251, § 2; 1998, ch. 67, § 1; 2006, ch. 29, § 15.**

**Cross references.** — For evidentiary rule regarding presumptions in criminal cases, *see* Rule 11-302 NMRA.

**Repeals and reenactments.** — Laws 1973, ch. 154, § 1, repealed former 40A-16-40, 1953 Comp., relating to refusal to return rented or leased vehicle after notice, and enacted a new 40A-16-40, 1953 comp.

**The 2006 amendment,** effective July 1, 2006, deleted former Paragraphs (1) through (4) of Subsection A; added a new Paragraph (1) of Subsection A to provide that if the value of the property or vehicle is $250 or less, the crime is a petty misdemeanor; added Paragraph (2) of Subsection A to provide that if the value of the vehicle or property is more than $100 but less than $500, the crime is a misdemeanor; addeds Paragraph (3) of Subsection A to provide that if the value of the property or vehicle is more than $500 but less than $2,500, the crime is a fourth degree felony; added Paragraph (4) of Subsection A to provide that if the value of the property or vehicle is more than $2,500 but less than $20,000, the crime is a third degree felony; and added Paragraph (5) of Subsection A to provide that if the value of the property or vehicle is more than $20,000, the crime is a second degree felony.

**The 1998 amendment,** effective July 1, 1998, rewrote Paragraphs A(1) and (2) and added Paragraphs A(3) and (4), and in Subsection B, deleted "of" following "leasing agreement".

**ANNOTATIONS**

**"Intent to defraud."** — Where defendant was charged with fraudulent refusal to return leased property and all of the essential elements of the crime were included in the jury instruction, but the jury instructions did not include a definitional instruction clarifying the meaning of the term "intent to defraud", a reasonable juror would understand the meaning of "intent to defraud" and the omission of a definitional instruction did not constitute fundamental error. *State v. Rodarte*, 2011-NMCA-067, 149 N.M. 819, 255 P.3d 397, cert. denied, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — State regulation of motor vehicle rental ("you-drive") business, 60 A.L.R.4th 784.

## 30-16-41. Repealed.

**Repeals.** — Laws 1991, ch. 112, § 10 repealed 30-16-41 NMSA 1978, as enacted by Laws 1974, ch. 89, § 1, relating to unauthorized recording, sale of unauthorized recordings, providing equipment for illegal recording, penalties, and exemptions, effective July 1, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 30, Article 16B NMSA 1978.

## 30-16-42. Repealed.

**Repeals.** — Laws 1991, ch. 112, § 10 repealed 30-16-42 NMSA 1978, as enacted by Laws 1974, ch. 89, § 2, relating to manufacture, distribution or sale of phonograph recordings without name of manufacturer and designation of featured performer or group, and penalties, effective July 1, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 30, Article 16B NMSA 1978.

## 30-16-43. Repealed.

**Repeals.** — Laws 1991, ch. 112, § 10 repealed 30-16-43 NMSA 1978, as enacted by Laws 1974, ch. 89, § 3, relating to rights of parties in private litigation, effective July 1, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 30, Article 16B NMSA 1978.

## 30-16-44. Repealed.

**Repeals.** — Laws 1991, ch. 112, § 10 repealed 30-16-44 NMSA 1978, as enacted by 1975, ch. 335, § 2, relating to forfeitures, property subject, effective July 1, 1991. For provisions of former sections, *see* the 1990 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 30, Article 16B NMSA 1978.

## 30-16-45. Repealed.

**Repeals.** — Laws 1991, ch. 112, § 10 repealed 30-16-45 NMSA 1978, as enacted by Laws 1975, ch. 335, § 3, relating to forfeiture, procedure, effective July 1, 1991. For provisions of former sections, *see* the 1990 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 30, Article 16B NMSA 1978.

## 30-16-46. Legislative finding.

The legislature finds that thefts of crude petroleum oil are a significant problem in this state, and that due to the fungible nature of the product and difficulty of identification and apprehension, extraordinary measures are necessary.

**History: Laws 1981, ch. 257, § 1.**



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## 30-16-47. Documentation required.

A. Any person in possession of crude petroleum oil or any sediment, water or brine produced in association with the production of oil or gas or both for transportation by motor vehicle from or to storage, disposal, processing or refining must also possess specific documentation required by regulation of the oil conservation division of the energy and minerals department, hereinafter in this act [30-16-46 through 30-16-48 NMSA 1978] called "division," which substantiates his right to be in possession of the estimated volume of crude petroleum oil carried in that vehicle. The regulation shall require the documentation to include:

(1) the identity of the operator and the location of the lease from which the crude petroleum oil or any sediment, water or brine produced in association with the production of oil or gas or both, if it is purportedly being transported from a lease; and

(2) the identity of the operator of and the location of the storage facility from which or to which the crude petroleum oil or any sediment, water or brine produced in association with the production of oil or gas or both is being transported; and

(3) the identity of the operator of and the location of the disposal, processing or refining facility to which the crude petroleum oil or any sediment, water or brine produced in association with the production of oil or gas or both is being transported; and

(4) the estimated percentage of crude petroleum oil in the sediment, water or brine produced in association with the production of oil or gas or both, which is being transported; or

(5) the volume of crude petroleum oil being transported; and

(6) any additional information the division finds necessary or convenient.

B. Any person who stores, processes, disposes of or refines any volume of crude petroleum oil must possess specific documentation as prescribed by regulation of the division which substantiates his right to be in possession of the volume of crude petroleum oil he possesses or in possession of an amount of crude petroleum oil which could reasonably justify the amount of processed or refined products produced by him from crude petroleum oil, and in his possession or sold by him.

**History: Laws 1981, ch. 257, § 2.**

## 30-16-48. Penalty; further investigation.

Any person who is found within any geographical area of the state designated by regulation of the division as a crude petroleum oil producing area, in possession of crude petroleum oil, sediment, water or brine produced in association with the production of oil or gas or both, which contains crude petroleum oil, and does not, on a reasonable request of any state police officer or other law enforcement officer as defined in Section 29-7-9 NMSA 1978, produce the required documentation for examination and inspection is guilty of a misdemeanor. If the documentation is produced but differs substantially from the load the transporter is carrying, or differs substantially from crude petroleum oil or processed or refined products produced by him from crude petroleum oil, and in his possession or sold by him, it shall be substantial evidence supporting further investigation by such officer or agent of possible theft of crude petroleum oil.

**History: Laws 1981, ch. 257, § 3.**

**Compiler's notes.** — Section 29-7-9, referred to in this section, was repealed by Laws 1988, ch. 58, § 7. For present comparable provisions, *see* 29-7-7F NMSA 1978.

# ARTICLE 16A

# Computer Crimes

Sec.
30-16A-1. Repealed.
30-16A-2. Repealed.
30-16A-3. Repealed.
30-16A-4. Repealed.



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## 30-16A-1. Repealed.

**Repeals.** — Laws 1989, ch. 215, § 8 repealed 30-16A-1 NMSA 1978, as enacted by Laws 1979, ch. 176, § 1, relating to the short title of the Computer Crimes Act, effective June 16, 1989. For present comparable provisions, *see* 30-45-1 NMSA 1978 et seq.

## 30-16A-2. Repealed.

**Repeals.** — Laws 1989, ch. 215, § 8 repealed 30-16A-2 NMSA 1978, as enacted by Laws 1979, ch. 176, § 2, relating to definitions of the Computer Crimes Act, effective June 16, 1989. For present comparable provisions, *see* 30-45-1 NMSA 1978 et seq.

## 30-16A-3. Repealed.

**Repeals.** — Laws 1989, ch. 215, § 8 repealed 30-16A-3 NMSA 1978, as enacted by Laws 1979, ch. 176, §3, relating to computer fraud, effective June 16, 1989. For present comparable provisions, *see* 30-45-1 NMSA 1978 et seq.

## 30-16A-4. Repealed.

**Repeals.** — Laws 1989, ch. 215, § 8 repealed 30-16A-4 NMSA 1978, as enacted by Laws 1979, ch. 176, § 4, relating to unauthorized computer use, effective June 16, 1989. For present comparable provisions, *see* 30-45-1 NMSA 1978 et seq.

# ARTICLE 16B
# Unauthorized Recording

Sec.
30-16B-1. Short title.
30-16B-2. Definitions.
30-16B-3. Unauthorized recording; prohibited act; penalties.
30-16B-4. Required labeling; penalties.
30-16B-5. Unauthorized recording of live performances; penalties.
30-16B-6. Exemptions.
30-16B-7. Construction.
30-16B-8. Forfeitures; property subject.
30-16B-9. Forfeiture; procedure.

## 30-16B-1. Short title.

Sections 1 through 9 [30-16B-1 through 30-16B-9 NMSA 1978] of this act may be cited as the "Unauthorized Recording Act".

**History: Laws 1991, ch. 112, § 1.**

## 30-16B-2. Definitions.

As used in the Unauthorized Recording Act:

A. "audiovisual recording" means a recording on which images, including images accompanied by sound, are recorded or otherwise stored, including motion picture film, video cassette, video tape, video disc, other recording mediums or a copy that duplicates in whole or in part the original, but does not include recordings produced by an individual for personal use that are not commercially distributed for profit;

B. "fixed" means embodied in a recording or other tangible medium of expression, by or under the authority of the owner, so that the matter embodied is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration;

C. "live performance" means a recitation, rendering or playing of a series of images, musical, spoken or other sounds, or a combination of images and sounds;



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D. "manufacturer" means any person who actually transfers or causes the transfer of a recording, or assembles and transfers any product containing any recording as a component thereof, but does not include the manufacturer of a cartridge or casing for a recording;

E. "owner" means a person who owns the sounds or images fixed in a master phonograph record, master disc, master tape, master film or other recording on which sound or image is or can be recorded and from which the transferred recorded sounds or images are directly or indirectly derived;

F. "person" means any individual, firm, partnership, corporation, association or other entity;

G. "recording" means a tangible medium on which sounds, images or both are recorded or otherwise stored, including an original phonograph record, disc, tape, audio cassette or videocassette, wire, film or other medium now existing or developed later on which sounds, images or both are or can be recorded or otherwise stored, or a copy or reproduction that duplicates in whole or in part the original;

H. "tangible medium of expression" means the material object on which sounds, images or a combination of both are fixed by any method now known or later developed, and from which the sounds, images or combination of both can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device; and

I. "transfer" means to duplicate a recording from one tangible medium of expression to another recording.

**History: Laws 1991, ch. 112, § 2.**

## 30-16B-3. Unauthorized recording; prohibited act; penalties.

A. It is unlawful for any person to:

(1) knowingly transfer for sale or cause to be transferred any recording with intent to sell it or cause it to be sold or use it or cause it to be used for commercial advantage or private financial gain without the consent of the owner;

(2) transport within this state for commercial advantage or private financial gain a recording with the knowledge that the sounds have been transferred without the consent of the owner; or

(3) advertise or offer for sale, sell, rent or cause the sale, resale or rental of or possess for one or more of these purposes any recording that the person knows has been transferred without the consent of the owner.

B. Any person violating the provisions of Subsection A of this section:

(1) when the offense involves seven or more unauthorized recordings embodying sound or seven or more audiovisual recordings, at any one time, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) when the offense involves fewer than seven unauthorized recordings embodying sound or fewer than seven audiovisual recordings, at any one time, is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

**History: Laws 1991, ch. 112, §3; 2005, ch. 248, § 1.**

**The 2005 amendment,** effective July 1, 2005, changed the threshold number of recordings embodying sound from one hundred to seven, deleted the former qualification that the recordings occur during a one-hundred-eighty-day period, and added the qualification that the recordings may occur at any one time in Subsection B(1); and changed the number of recordings embodying sound from fewer than one hundred to fewer than seven, deleted the former qualification that the recordings occur during a one-hundred-eighty-day period and adds the qualification that the recordings may occur at any one time in Subsection B(2).

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Propriety of attorney's surreptitious sound recording of statements by others who are or may become involved in litigation, 32 A.L.R.5th 715.

## 30-16B-4. Required labeling; penalties.

A. It is unlawful for any person for commercial advantage or private financial gain to advertise, offer for sale or resale, sell, resell, lease or possess for any of these purposes any recording



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that the person knows does not contain the true name of the manufacturer in a prominent place on the cover, jacket or label of the recording.

B. Any person violating the provisions of Subsection A of this section:

(1) when the offense involves seven or more unauthorized recordings embodying sound or seven or more audiovisual recordings, at any one time, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) when the offense involves fewer than seven unauthorized recordings embodying sound or fewer than seven audiovisual recordings, at any one time, is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

**History: Laws 1991, ch. 112, § 4; 2005, ch. 248, § 2.**

**The 2005 amendment,** effective July 1, 2005, changed the threshold number of recordings embodying sound from one hundred to seven, deleted the former qualification that the recordings occur during a one-hundred-eighty-day period, and added the qualification that the recordings may occur at any one time in Subsection B(1); and changed the number of recordings embodying sound from fewer than one hundred to fewer than seven, deletes the former qualification that the recordings occur during a one-hundred-eighty-day period and adds the qualification that the recordings may occur at any one time in Subsection B(2).

## 30-16B-5. Unauthorized recording of live performances; penalties.

A. It is unlawful for any person for commercial advantage or private financial gain to advertise, offer for sale, sell, rent, transport, cause the sale, resale, rental or transportation of or possess for one or more of these purposes a recording of a live performance that has been recorded or fixed without the consent of the owner.

B. Any person violating the provisions of Subsection A of this section:

(1) when the offense involves seven or more unauthorized recordings embodying sound or seven or more audiovisual recordings, at any one time, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) when the offense involves fewer than seven unauthorized recordings embodying sound or fewer than seven audiovisual recordings, at any one time, is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

C. In the absence of a written agreement or law to the contrary, the performer of a live performance is presumed to own the rights to record or fix those sounds.

D. For the purposes of this section, a person who is authorized to maintain custody and control over business records that reflect whether the owner of the live performance consented to having the live performance recorded or fixed is a competent witness in a proceeding regarding the issue of consent.

**History: Laws 1991, ch. 112, § 5; 2005, ch. 248, § 3.**

**The 2005 amendment,** effective July 1, 2005, changed the threshold number of recordings embodying sound from one hundred to seven, deleted the former qualification that the recordings occur during a one-hundred-eighty-day period, and added the qualification that the recordings may occur at any one time in Subsection B(1); and changed the number of recordings embodying sound from fewer than one hundred to fewer than seven, deleted the former qualification that the recordings occur during a one-hundred-eighty-day period and added the qualification that the recordings may occur at any one time in Subsection B(2).

## 30-16B-6. Exemptions.

The provisions of the Unauthorized Recording Act do not apply to:

A. any radio or television broadcaster who transfers any recording as part of, or in connection with, a radio or television broadcast transmission or for archival preservation;

B. any recording defined as a public record of any court, legislative body or proceedings of a public body, whether or not a fee is charged or collected for copies; or

C. any person who transfers a recording for his personal use and who does not derive any commercial advantage or private financial gain from the transfer.

**History: Laws 1991, ch. 112, § 6.**



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## 30-16B-7. Construction.

Nothing in the Unauthorized Recording Act shall enlarge or diminish the rights of parties in private litigation.

**History: Laws 1991, ch. 112, § 7.**

## 30-16B-8. Forfeitures; property subject.

Pursuant to the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978], the following are subject to forfeiture:

A. all equipment, devices or articles that have been produced, reproduced, manufactured, distributed, dispensed or acquired in violation of the Unauthorized Recording Act;

B. all devices, materials, products and equipment of any kind that are used or intended for use in producing, reproducing, manufacturing, processing, delivering, importing or exporting any item set forth in and in violation of the Unauthorized Recording Act;

C. all books, business records, materials and other data that are used or intended for use in violation of Section 30-16B-3, 30-16B-4 or 30-16B-5 NMSA 1978; and

D. money or negotiable instruments that are the fruit or instrumentality of the crime.

**History: Laws 1991, ch. 112, § 8; 2015, ch. 152, § 16.**

**The 2015 amendment,** effective July 1, 2015, provided that the provisions of the Forfeiture Act apply to this section; in the undesignated introductory sentence, added "Pursuant to the provisions of the Forfeiture Act"; and in Subsection C, after "Section", deleted "3, 4 or 5 of the Unauthorized Recording Act" and added "30-16B-3, 30-6B-4 or 30-16B-5 NMSA 1978".

## 30-16B-9. Forfeiture; procedure.

The provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of property subject to forfeiture under the Unauthorized Recording Act.

**History: Laws 1991, ch. 112, § 9; 2002, ch. 4, § 13.**

**The 2002 amendment,** effective July 1, 2002, deleted the Subsection A designation; added "The provisions of the Forfeiture Act apply to the seizure, forfeiture and disposal of" in the first sentence; and deleted the last phrase of the first sentence in former Subsection A and former Subsections B through F, which contained standards and procedures for the forfeiture of property subject to forfeiture under the Unauthorized Recording Act.

# ARTICLE 16C

# Unauthorized Theater Recording

Sec.

30-16C-1. Unlawful operation of an audiovisual recording device.

## 30-16C-1. Unlawful operation of an audiovisual recording device.

A. Unlawful operation of an audiovisual recording device consists of a person knowingly operating an audiovisual recording device to record or transmit a motion picture in a motion picture theater without the consent of the motion picture theater owner or manager while a motion picture is being exhibited.

B. A person who commits unlawful operation of an audiovisual recording device is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

C. The owner, manager or lessee of a motion picture theater or an agent or employee of the owner, manager or lessee who alerts law enforcement authorities that an alleged violation of Subsection A of this section is taking place is not liable in any civil action arising from the detention of the person alleged to be operating or to have operated the audiovisual recording device when



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the owner, manager or lessee or an agent or employee of the owner, manager or lessee is acting in good faith, unless the plaintiff can show by a preponderance of the evidence that the detention measures were unreasonable or the period of detention was unreasonably long.

D. This section does not prevent law enforcement personnel from operating an audiovisual recording device in a motion picture theater as part of a lawfully authorized investigation.

E. Nothing in this section prevents prosecution under any other statutes.

F. As used in this section:

(1) "audiovisual recording device" means a device capable of recording or transmitting a motion picture or any part of a motion picture by means of any technology; and

(2) "motion picture theater" means a movie theater, screening room or other venue used primarily for the exhibition of motion pictures.

**History: Laws 2006, ch. 79, § 1.**

**Effective dates.** — Laws 2006, ch. 79, § 2 made the act effective July 1, 2006.

# ARTICLE 16D

# Unlawful Taking of a Vehicle or Motor Vehicle

Sec.
30-16D-1. Unlawful taking of a vehicle or motor vehicle.
30-16D-2. Embezzlement of a vehicle or motor vehicle.
30-16D-3. Fraudulently obtaining a vehicle or motor vehicle.
30-16D-4. Receiving or transferring stolen vehicles or motor vehicles.
30-16D-5. Injuring or tampering with a motor vehicle.
30-16D-6. Altering or changing engine or other numbers.
30-16D-7. Operating a chop shop; penalty.

## 30-16D-1. Unlawful taking of a vehicle or motor vehicle.

A. Unlawful taking of a vehicle or motor vehicle consists of a person taking any vehicle or motor vehicle as defined by the Motor Vehicle Code [Chapter 66, Articles 1 through 8 NMSA 1978] intentionally and without consent of the owner. Whoever commits unlawful taking of a vehicle or motor vehicle is guilty of a:

(1) fourth degree felony for a first offense;

(2) third degree felony for a second offense; and

(3) second degree felony for a third or subsequent offense.

B. The consent of the owner of the vehicle or motor vehicle to its taking shall not in any case be presumed or implied because of the owner's consent on a previous occasion to the taking of the vehicle or motor vehicle by the same or a different person.

C. Nothing in this section shall be construed to prohibit the holder of a lien duly recorded with the motor vehicle division of the taxation and revenue department from taking possession of a vehicle to which possession the lienholder is legally entitled under the provisions of the instrument evidencing the lien. A holder of a duly recorded lien who takes possession of a vehicle without the knowledge of the owner of the vehicle shall immediately notify the local police authority of the fact that the holder has taken possession of the vehicle.

**History: 1953 Comp., § 64-3-504, enacted by Laws 1978, ch. 35, § 91; 1998, ch. 67, § 2; § 66-3-504 NMSA 1978 recompiled and amended as § 30-16D-1 by Laws 2009, ch. 253, § 1 and Laws 2009, ch. 261, § 1.**

**Recompilations.** — Laws 2009, ch. 253, § 1 and Laws 2009, ch. 261, § 1 recompiled and amended former 66-3-504 NMSA 1978, relating to unlawful taking of a vehicle or motor vehicle, as 30-16D-1 NMSA 1978, effective July 1, 2009.

**The 2009 amendment,** effective July 1, 2009, in Subsection A, at the beginning of the sentence, deleted "Any person who" and added the language up to "any vehicle"; after "motor vehicle", added "as defined by the Motor Vehicle Code" and added the language at the beginning of the sentence up to "is", in Paragraph (8) of Subsection A, after "fourth degree felony", deleted "if the vehicle or motor vehicle has a value of less than two thousand five hundred dollars ($2,500)" and added "for a first offense"; in Paragraph (2) of Subsection, after "felony", deleted "if the vehicle or motor vehicle has a value of two thousand five hundred dollars ($2,500) or more"; and added "for a second offense"; added Paragraph (3) of Subsection A; deleted former Subsection C, which provided that district courts have exclusive jurisdiction over offenses



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prescribed in this section; and in Subsection C, changed "division" to "motor vehicle division of the taxation and revenue department".

Laws 2009, ch. 253, § 1 enacted identical amendments to this section. The section was set out as amended by Laws 2009, ch. 261, § 1. *See* 12-1-8 NMSA 1978.

ANNOTATIONS

**Specification of "anything of value" resulted in double jeopardy.** — Where the child was charged with armed robbery for taking both an automobile and the keys to the automobile in violation of Section 30-16-2 NMSA 1978 and for the unlawful taking of a motor vehicle in violation of Section 30-16D-1 NMSA 1978, the child's conduct underlying both crimes was unitary; and both convictions required the same proof of the theft of the automobile, the unlawful taking of a motor vehicle conviction was subsumed by the robbery conviction and the child's conviction for both resulted in double jeopardy. *State v. Gutierrez*, 2011-NMSC-024, 150 N.M. 232, 258 P.3d 1024.

**Sufficient evidence to prove unlawful taking of a motor vehicle.** — In delinquency proceedings where the child was charged with unlawful taking of a motor vehicle and reckless driving, there was sufficient evidence to support the jurors' reasonable determination that the child committed the delinquent act of unlawful taking of a motor vehicle where the state, in addition to presenting Facebook messages in which the child apologized to the victim and claimed that she was intoxicated when she took the victim's vehicle, presented testimony from the victim that after getting out of his vehicle to hug the child goodbye, the child pushed him aside and took off in his vehicle without his permission, and that she failed to stop even though he ran after her, banged on the driver side window, and yelled for her to stop. *State v. Jesenya O.*, 2021-NMCA-030, cert. granted.

## 30-16D-2. Embezzlement of a vehicle or motor vehicle.

A. Embezzlement of a vehicle or motor vehicle consists of a person embezzling or converting to the person's own use a vehicle or motor vehicle as defined by the Motor Vehicle Code [Chapter 66, Articles 1 through 8 NMSA 1978], with which the person has been entrusted, with the fraudulent intent to deprive the owner of the vehicle or motor vehicle.

B. Whoever commits embezzlement of a vehicle or motor vehicle is guilty of a:

(1) fourth degree felony for a first offense;

(2) third degree felony for a second offense; and

(3) second degree felony for a third or subsequent offense.

**History: Laws 2009, ch. 253, § 2 and Laws 2009, ch. 261, § 2.**

**Duplicate laws.** — Laws 2009, ch. 253, § 2 and Laws 2009, ch. 261, § 2 enacted identical sections, effective July 1, 2009. Both have been compiled as 30-16D-2 NMSA 1978.

## 30-16D-3. Fraudulently obtaining a vehicle or motor vehicle.

A. Fraudulently obtaining a vehicle or motor vehicle consists of a person intentionally misappropriating or taking a vehicle or motor vehicle as defined by the Motor Vehicle Code [Chapter 66, Articles 1 through 8 NMSA 1978] that belongs to another person by means of fraudulent conduct, practices or representations.

B. Whoever commits fraudulently obtaining a vehicle or motor vehicle is guilty of a:

(1) fourth degree felony for a first offense;

(2) third degree felony for a second offense; and

(3) second degree felony for a third or subsequent offense.

**History: Laws 2009, ch. 253, § 3 and Laws 2009, ch. 261, § 3.**

**Duplicate laws.** — Laws 2009, ch. 253, § 3 and Laws 2009, ch. 261, § 3 enacted identical sections, effective July 1, 2009. Both have been compiled as 30-16D-3 NMSA 1978.

## 30-16D-4. Receiving or transferring stolen vehicles or motor vehicles.

A. Receiving or transferring a stolen vehicle or motor vehicle consists of a person who, with intent to procure or pass title to a vehicle or motor vehicle as defined by the Motor Vehicle Code [Chapter 66, Articles 1 through 8 NMSA 1978] that the person knows or has reason to believe has been stolen or unlawfully taken, receives or transfers possession of the vehicle or motor vehicle from or to another or who has in the person's possession any vehicle that the person knows or has reason to believe has been stolen or unlawfully taken. This section shall not apply to an officer of the law engaged at the time in the performance of the officer's duty as an officer.



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B. Whoever commits receiving or transferring a stolen vehicle or motor vehicle is guilty of a:
(1) fourth degree felony for a first offense;
(2) third degree felony for a second offense; and
(3) second degree felony for a third or subsequent offense.

**History: 1953 Comp., § 64-3-505, enacted by Laws 1978, ch. 35, § 92; § 66-3-505 NMSA 1978 recompiled and amended as § 30-16D-4 by Laws 2009, ch. 253, § 4 and Laws 2009, ch. 261, § 4.**

**Recompilations.** — Laws 2009, ch. 253, § 4 and Laws 2009, ch. 261, § 4 recompiled and amended former 66-3-505 NMSA 1978, relating to receiving or transferring stolen vehicles or motor vehicles, as 30-16D-4 NMSA 1978, effective July 1, 2009.

**The 2009 amendment,** effective July 1, 2009, in Subsection A, at the beginning of the first sentence, added "Receiving or transferring a stolen vehicle or motor vehicle consists of"; after "motor vehicle", in the first sentence, added "defined by the Motor Vehicle Code that the person"; at the beginning of the second sentence, added "This section shall not apply to" and after "the officer's duty as an officer", deleted the remainder of the sentence which provided that the offense was a fourth degree felony and prescribed penalties; and added Subsection B.

Laws 2009, ch. 253, § 4 enacted identical amendments to this section. The section was set out as amended by Laws 2009, ch. 261, § 4. *See* 12-1-8 NMSA 1978.

ANNOTATIONS

**Statute defines two separate crimes.** — This statute, 30-16D-4 NMSA 1978, defines two separate crimes: (1) taking, receiving, or transferring possession of a vehicle with knowledge or reason to believe it is stolen and with intent to procure or pass title, and (2) unlawful possession of a stolen vehicle. The legislature's use of the word "or" indicates that a person who possesses a stolen vehicle is independent from a person who, with intent to procure or pass title to a vehicle, receives or transfers possession of the vehicle. *State v. Bernard*, 2015-NMCA-089.

Where defendant was convicted of four counts of receiving or transferring stolen vehicles for his unlawful possession of a stolen enclosed trailer, a snowmobile, and two all-terrain vehicles, defendant's claim that the jury instructions failed to instruct the jury that it was required to find that defendant intended to procure or pass title to a vehicle, and therefore improperly omitted an essential element of the offense of possession of a stolen vehicle, was without merit, because the "intent to procure or pass title to a vehicle" is not an essential element of the crime of possession of a stolen vehicle, which is a separate and distinct offense under 30-16D-4 NMSA 1978. *State v. Bernard*, 2015-NMCA-089.

**Double jeopardy analysis applied to unlawful possession of stolen vehicles.** — Where defendant was convicted of four counts of receiving or transferring stolen vehicles for his unlawful possession of a stolen enclosed trailer, a snowmobile, and two all-terrain vehicles (ATV), and where defendant claimed that his four convictions based on a single statute violated the double jeopardy protection against multiple punishments for the same offense, defendant's four convictions were justified because the language of the statute indicates that the legislature sought to address the harm inflicted on the public by a particularized type of criminal enterprise: vehicle theft. Because 30-16D-4 NMSA 1978 appears designed to protect the public from the trafficking of stolen vehicles, it follows that the legislature intended to allow for separate charges for each stolen vehicle separately possessed by an individual. Defendant's acts of possession of a trailer, a snowmobile, and two ATVs are sufficiently distinct to justify four convictions for possession of a stolen vehicle. *State v. Bernard*, 2015-NMCA-089.

**Evidence sufficient to convict of possession of stolen vehicle.** — Where the evidence showed that a stolen vehicle was parked next to defendant's house, the vehicle was partially covered with a tarp, numerous parts had been removed from the vehicle, and the vehicle was covered with dust, the jury could reasonably infer that defendant possessed the stolen vehicle. *State v. Brown*, 2010-NMCA-079, 148 N.M. 888, 242 P.3d 455, cert. denied, 2010-NMCERT-007, 148 N.M. 610, 241 P.3d 611.

**Sufficient evidence of receiving or transferring a stolen vehicle.** — Where defendant was convicted of receiving or transferring a stolen vehicle, and where the state presented evidence that defendant, when stopped by police, was driving a vehicle that had been reported stolen and that the owner of the vehicle identified the vehicle defendant was driving as the one reported stolen, there was sufficient evidence to support defendant's conviction for receiving or transferring a stolen vehicle. *State v. Ford*, 2019-NMCA-073.

## 30-16D-5. Injuring or tampering with a motor vehicle.

A. Injuring or tampering with a motor vehicle consists of a person, individually or in association with another person:

(1) purposely and without authority from the owner starting or causing to be started the engine of any motor vehicle;

(2) purposely and maliciously shifting or changing the starting device or gears of a standing motor vehicle to a position other than that in which they were left by the owner or driver of the motor vehicle;

(3) purposely scratching or damaging the chassis, running gear, body, sides, top covering or upholstering of a motor vehicle that is the property of another;

(4) purposely destroying any part of a motor vehicle or purposely cutting, mashing or marking or in any other way destroying or damaging any part, attachment, fastening or appurtenance of a motor vehicle without the permission of the owner;

(5) purposely draining or starting the drainage of any radiator, oil tank or gas tank upon a motor vehicle without the permission of the owner;



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(6) purposely putting any metallic or other substance or liquid in the radiator, carburetor, oil tank, grease cup, oilers, lamps, gas tanks or machinery of the motor vehicle with the intent to injure or damage or impede the working of the machinery of the motor vehicle;

(7) maliciously tightening or loosening any bracket, bolt, wire, nut, screw or other fastening on a motor vehicle; or

(8) purposely releasing the brake upon a standing motor vehicle with the intent to injure the motor vehicle.

B. Whoever commits injuring or tampering with a motor vehicle is guilty of a misdemeanor.

C. As used in this section, "motor vehicle" means a motor vehicle as defined by the Motor Vehicle Code [Chapter 66, Articles 1 through 8 NMSA 1978].

**History: 1953 Comp., § 64-3-506, enacted by Laws 1978, ch. 35, § 93; § 66-3-506 NMSA 1978 recompiled and amended as § 30-16D-5 by Laws 2009, ch. 253, § 5 and Laws 2009, ch. 261, § 5.**

**Recompilations.** — Laws 2009, ch. 253, § 5 and Laws 2009, ch. 261, § 5 recompiled and amended former 66-3-506 NMSA 1978, relating to injuring or tampering with vehicle, as 30-16D-5 NMSA 1978, effective July 1, 2009.

**The 2009 amendment,** effective July 1, 2009, in Subsection A, at the beginning of the sentence, added "Injuring or tampering with a motor vehicle consists of"; after "association with", deleted the remainder of the sentence, which provided that the offense was a misdemeanor and prescribed penalties and added "another person"; and added Subsections B and C.

Laws 2009, ch. 253, § 5 enacted identical amendments to this section. The section was set out as amended by Laws 2009, ch. 261, § 5. *See* 12-1-8 NMSA 1978.

## 30-16D-6. Altering or changing engine or other numbers.

A. No person shall, with fraudulent intent, deface, remove, cover, destroy or alter the manufacturer's serial number, engine number, decal or other distinguishing number or identification mark or number placed under assignment of the motor vehicle division of the taxation and revenue department of a vehicle required to be registered under the Motor Vehicle Code [Chapter 66, Articles 1 through 8 NMSA 1978] or any vehicle, motor vehicle or motor vehicle engine or component as defined by the Motor Vehicle Code for which a dismantler's notification form has been processed through the division, nor shall any person place or stamp any serial, engine, decal or other number or mark upon the vehicle except one assigned by the division. Any violation of this section is a fourth degree felony.

B. This section shall not prohibit the restoration by an owner of an original serial, engine, decal or other number or mark when the restoration is made under permit issued by the division nor prevent any manufacturer from placing, in the ordinary course of business, numbers, decals or marks upon vehicles or parts thereof.

**History: 1953 Comp., § 64-3-508, enacted by Laws 1978, ch. 35, § 95; § 66-3-508 NMSA 1978 recompiled and amended as § 30-16D-6 by Laws 2009, ch. 253, § 6 and Laws 2009, ch. 261, § 6.**

**Recompilations.** — Laws 2009, ch. 253, § 6 and Laws 2009, ch. 261, § 6 recompiled and amended former 66-3-508 NMSA 1978, relating to altering or changing engine or other numbers, as 30-16D-6 NMSA 1978, effective July 1, 2009.

**The 2009 amendment,** effective July 1, 2009, in Subsection A, added "number" and "decal"; changed "division" to "motor vehicle division of the taxation and revenue department"; after "vehicle engine", added "or component as defined by the Motor Vehicle Code"; in the last sentence, changed "provision is a felony" to "section is a fourth degree felony"; and in Subsection B, added "decals".

Laws 2009, ch. 253, § 6 enacted identical amendments to this section. The section was set out as amended by Laws 2009, ch. 261, § 6. *See* 12-1-8 NMSA 1978.

## 30-16D-7. Operating a chop shop; penalty.

A. Operating a chop shop consists of a person owning, operating, maintaining, controlling or conducting operations in a chop shop, who knows or should have known that it is a chop shop.

B. Whoever commits operating a chop shop is guilty of a third degree felony.

C. As used in this section:

(1) "chop shop" means a premises where a person possesses, receives, stores, disassembles or alters an unlawfully obtained motor vehicle or vehicle as defined in the Motor Vehicle Code [66-1-1 NMSA 1978], including the alteration or concealment of any identifying feature or number, including the manufacturer's serial number, engine number, decal or other distinguishing number



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or identification mark or number placed under assignment of the motor vehicle division of the taxation and revenue department; and

(2) "unlawfully obtained" means obtained by theft, fraud or deceit or obtained without the permission of the owner.

D. Nothing in this section shall be construed to preclude a claim made pursuant to any other section of law.

**History: Laws 2022, ch. 56, § 49.**

**Effective dates.** — Laws 2022, ch. 56, § 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

# ARTICLE 17

# Fire

Sec.
30-17-1. Improper handling of fire.
30-17-2. Use of an engine without spark arrester.
30-17-3. Repealed.
30-17-4. Repealed.
30-17-5. Arson and negligent arson.
30-17-6. Aggravated arson.

## 30-17-1. Improper handling of fire.

Improper handling of fire consists of:

A. setting fire, or causing or procuring a fire to be set to any inflammable vegetation or forest material, growing or being on the lands of another person and without the permission of the owner thereof;

B. allowing fire to escape or spread from the control of the person having charge thereof without using reasonable and proper precaution to prevent such fire from escaping or spreading;

C. burning any inflammable vegetation or forest material, whether upon his own land or that of another person, without using proper and reasonable precaution at all times to prevent the escape of such fire;

D. leaving any campfire burning and unattended upon the lands of another person; or

E. causing a fire to be started in any inflammable vegetation or forest material, growing or being upon the lands of another person, by means of any lighted cigar, cigarette, match or other manner, and leaving such fire unquenched.

Provided, nothing herein shall constitute improper handling of fire where the fire is a backfire set for the purpose of stopping the progress of a fire then actually burning.

Whoever commits improper handling of fire is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-17-1, enacted by Laws 1963, ch. 303, § 17-1.**

**Cross references.** — For arson, *see* 30-17-5, 30-17-6 NMSA 1978.

For provisions covering the lighting, leaving or failure to extinguish fires on state lands, *see* 19-6-1, 19-6-2 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 Am. Jur. 2d Fires §§ 5, 6.

Liability of property owner for damages from spread of accidental fire originating on property, 17 A.L.R.5th 547.

Liability for spread of fire intentionally set for legitimate purpose, 25 A.L.R.5th 391.

36A C.J.S. Fires §§ 2, 3.

ANNOTATIONS

**Law reviews.** — For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

## 30-17-2. Use of an engine without spark arrester.

Use of an engine without spark arrester consists of using or operating any locomotive, logging engine, portable engine, traction engine or stationary engine using any combustible fuel when such engine is not provided with an adequate spark arrester kept in constant use and repair.



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Escape of fire or live sparks from any engine shall be prima facie evidence that such engine has not been adequately equipped with a spark arrester in compliance with this section.

Whoever commits use of an engine without spark arrester is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-17-2, enacted by Laws 1963, ch. 303, § 17-2.**

**Cross references.** — For provisions authorizing counties to require railroads to maintain fireguards, *see* 63-3-25 to 63-3-27 NMSA 1978.

## 30-17-3. Repealed.

**Repeals.** — Laws 1981, ch. 246, § 8 repealed 30-17-3 NMSA 1978, as enacted by Laws 1963, ch. 303, § 17-3, relating to interference with fire controls, effective April 8, 1981.

## 30-17-4. Repealed.

**Repeals.** — Laws 1989, ch. 346, § 13 repealed 30-17-4 NMSA 1978, enacted by Laws 1963, ch. 303, § 17-4, effective February 1, 1990. For present comparable provisions, *see* 60-2C-1 NMSA 1978 et seq.

## 30-17-5. Arson and negligent arson.

A. Arson consists of a person maliciously or willfully starting a fire or causing an explosion with the purpose of destroying or damaging:

(1) a building, occupied structure or property of another person;

(2) a bridge, utility line, fence or sign; or

(3) any property, whether the person's own property or the property of another person, to collect insurance for the loss.

B. Whoever commits arson when the damage is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits arson when the damage is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits arson when the damage is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits arson when the damage is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. Whoever commits arson when the damage is over twenty thousand dollars ($20,000) is guilty of a second degree felony.

G. Negligent arson consists of a person recklessly starting a fire or causing an explosion, whether on the person's property or the property of another person, and thereby directly:

(1) causing the death or bodily injury of another person; or

(2) damaging or destroying a building or occupied structure of another person.

H. Whoever commits negligent arson is guilty of a fourth degree felony.

I. As used in this section, "occupied structure" includes a boat, trailer, car, airplane, structure or place adapted for the transportation or storage of property, for overnight accommodations of persons or for carrying on business therein, whether or not a person is actually present.

**History: 1953 Comp., § 40A-17-5, enacted by Laws 1970, ch. 39, § 1; 2006, ch. 29, § 16.**

**Cross references.** — For provisions covering the lighting, leaving or failure to extinguish fires on state lands, *see* 19-6-1, 19-6-2 NMSA 1978.

**Repeals and reenactments.** — Laws 1970, ch. 39, § 1, repealed 40A-17-5, 1953 Comp., and enacted a new section.

**The 2006 amendment,** effective July 1, 2006, in Subsection B (former Paragraph (1) of Subsection A), increased the damage amount from $100 or less to $250 or less and changed the crime from a misdemeanor to a petty misdemeanor; in Subsection C (former Paragraph (2) of Subsection A), increased the damage from more than $250 but not more than $1,000 to more than $250 but not more than $500 and changed the crime from a fourth degree felony to a misdemeanor; deleted the former provision in Subsection D (former Paragraph (3) of Subsection A) that whoever commits arson when the value of the property is more than $1,000 is guilty of a fourth degree felony; provided in Subsection D that if the damage is more than $500 but not more than $2,500, the crime is a fourth degree felony; added Subsection E to provide that if the damage is more than $2,500 but not more than $20,000, the crime is a third degree felony; and added Subsection F to provide that if the damage is more than $20,000, the crime is a second degree felony.



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**Conduct constituting intentional arson could not be construed as negligent arson.** *State v. Jacobs*, 1985-NMCA-054, 102 N.M. 801, 701 P.2d 400.

**Words "property of another"** include those things that are either structures, fixtures, or appurtenances to real property, but does not include personal property. *In re Gabriel M.*, 2002-NMCA-047, 132 N.M. 124, 45 P.3d 64, cert. denied, 132 N.M. 193, 46 P.3d 100.

**Sufficient evidence to support defendant's conviction for arson.** — Where defendant was convicted of first-degree murder, conspiracy to commit first-degree murder, arson, and tampering with evidence due to his involvement in the murder of a man, and where defendant claimed that the State did not provide sufficient evidence that he burned the property of another or that the burning was malicious, claiming that the evidence established that defendant and his coconspirators burned the body of the victim in a coconspirator's vehicle who consented to setting the vehicle on fire, there was sufficient evidence to support the jury's verdict where evidence was also presented to the jury that the vehicle belonged to the victim or the victim's girlfriend and that defendant intentionally set the vehicle on fire while the victim was inside the vehicle. *State v. Chavez*, 2021-NMSC-017.

**Negligent arson not lesser included offense of malicious arson.** — Where defendant had not been formally charged with negligent arson, and that offense was not a lesser included offense of malicious arson, of which he was charged, defendant's conviction of negligent arson was subject to reversal. *State v. Johnson*, 1985-NMCA-074, 103 N.M. 364, 707 P.2d 1174, cert. quashed, 103 N.M. 344, 707 P.2d 552.

**Sufficient evidence to support arson conviction.** — Where defendant was charged with arson, breaking and entering and violating an order of protection, and where the state presented evidence that defendant had broken into the victim's house through her window on prior occasions, similar to the way the arsonist did on the night of the fire, that defendant's blood was found on a pair of pliers and pruning shears found near the victim's broken window on the night of the fire, tools which the victim did not recognize or notice when she had her window secured earlier that morning, and that defendant had a motive to burn the victim's house down, jealousy following a breakup, there was sufficient evidence for a rational juror to find that defendant broke into the victim's house and set it on fire. *State v. Pamphille*, 2021-NMCA-002, cert. denied.

**Merger with crime of dangerous use of explosives.** — The crime of dangerous use of explosives merges into a conviction for arson. *State v. Rodriguez*, 1992-NMCA-035, 113 N.M. 767, 833 P.2d 244, cert. denied, 113 N.M. 636, 830 P.2d 553.

**Destruction or damage of automobile by fire or explosion.** — Section 64-9-6 D, 1953 Comp. (now repealed but similar to 66-3-506 NMSA 1978), was a general statute directed to destroying or damaging an automobile, whereas this section is a specific statute directed to destroying or damaging an automobile by fire or explosion, and is the applicable statute to charge one with arson of an automobile having a value in excess of $1,000. *State v. Martinez*, 1978-NMCA-069, 91 N.M. 804, 581 P.2d 1299.

**Merger of arson with crime of aggravated assault.** — Conviction of arson requires proof of intent to damage property; conviction of aggravated assault requires proof of use of a deadly weapon to assault or strike at another. Convictions of arson and aggravated assault do not merge because they require proof of different facts and theories. *State v. Rodriguez*, 1992-NMCA-035, 113 N.M. 767, 833 P.2d 244, cert. denied, 113 N.M. 636, 830 P.2d 553.

**Conviction of accessory where principal unknown.** — Circumstantial evidence that defendant aided and abetted arsonist, who was unknown, was sufficient to sustain conviction of defendant under this section. *State v. Atwood*, 1971-NMCA-171, 83 N.M. 416, 492 P.2d 1279, cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972).

**Aiding and abetting shown.** — Evidence that defendant borrowed a water bottle when one was already at his business, purchased dynamite, fuse and caps for a friend "ready for them," caused these items to be left outside a motel room in Roswell where "the party would pick it up," and was at the motel an hour later (after the material was left outside the motel room door) was sufficient to establish that he aided and abetted the arson at his place of business two hours after he was observed at the motel. *State v. Atwood*, 1971-NMCA-171, 83 N.M. 416, 492 P.2d 1279, cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972).

**Conspiracy to damage and burn insured business.** — For a conspiracy to burn an insured business after making it appear to have been burglarized and vandalized, defendant could be prosecuted under both this section and 30-15-3 NMSA 1978, but only a single penalty could be validly imposed. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

Where conspiracy to burglarize and vandalize an insured business prior to proposed arson was directed to acts not covered hereunder, this section did not function as a special provision prohibiting the prosecution of defendant under 30-15-3 NMSA 1978, for the aspect of the conspiracy directed toward the burglary and vandalism. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

**Conspiracy to commit arson outside state.** — In a prosecution for conspiracy to burn defendant's own grain elevator in another state, it was necessary to prove that such burning was arson in the sister state. *State v. Henneman*, 1936-NMSC-021, 40 N.M. 166, 56 P.2d 1130.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 5 Am. Jur. 2d Arson and Related Offenses § 1 et seq.

Criminal responsibility of one cooperating in offense of arson which he is incapable of committing personally, 5 A.L.R. 783, 74 A.L.R. 1110, 131 A.L.R. 1322.

Ownership of property as affecting criminal liability for burning thereof, 17 A.L.R. 1168.

Evidence: admissibility, in prosecution for criminal burning of property, or for maintaining fire hazard, of evidence of other fires, 87 A.L.R.2d 891.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

What constitutes "burning" to justify charge of arson, 28 A.L.R.4th 482.

Pyromania and the criminal law, 51 A.L.R.4th 1243.

6A C.J.S. Arson §§ 1 to 22.

## 30-17-6. Aggravated arson.

Aggravated arson consists of the wilful [willful] or malicious damaging by any explosive substance or the wilful [willful] or malicious setting fire to any bridge, aircraft, watercraft, vehicle,



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pipe line [pipeline], utility line, communication line or structure, railway structure, private or public building, dwelling or other structure, causing a person great bodily harm.

Whoever commits aggravated arson is guilty of a second degree felony.

**History: 1953 Comp., § 40A-17-6, enacted by Laws 1963, ch. 303, § 17-6.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For meaning of "great bodily harm", *see* 30-1-12 NMSA 1978.

ANNOTATIONS

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Vacancy or nonoccupancy of building as affecting its character as "dwelling" as regards arson, 44 A.L.R.2d 1456.

What constitutes "burning" to justify charge of arson, 28 A.L.R.4th 482.

Pyromania and the criminal law, 51 A.L.R.4th 1243.

# ARTICLE 18

# Animals

Sec.
30-18-1. Cruelty to animals; extreme cruelty to animals; penalties; exceptions.
30-18-1.1. Seizure of animals; notice.
30-18-1.2. Disposition of seized animals.
30-18-1.3. Costs.
30-18-2. Repealed.
30-18-2.1. Repealed.
30-18-3. Unlawful branding.
30-18-4. Unlawful disposition of animal.
30-18-5. Illegal confinement of animals.
30-18-6. Transporting stolen livestock.
30-18-7. Misrepresentation of pedigree.
30-18-8. Killing unbranded cattle; killing, without bill of sale, cattle bearing brand of another person; penalty.
30-18-9. Dog fighting and cockfighting; penalty.
30-18-10. Exclusion.
30-18-11. Unlawful tripping of an equine; exception.
30-18-12. Injury to livestock.
30-18-13. Injury to a police dog, police horse or fire dog; harassment of a police dog, police horse or fire dog.
30-18-14. Livestock crimes; livestock inspectors to enforce.
30-18-15. Intracardiac injection prohibited on conscious animal.
30-18-16. Coyote-killing contests prohibited; definition; penalties.

## 30-18-1. Cruelty to animals; extreme cruelty to animals; penalties; exceptions.

A. As used in this section, "animal" does not include insects or reptiles.

B. Cruelty to animals consists of a person:

(1) negligently mistreating, injuring, killing without lawful justification or tormenting an animal; or

(2) abandoning or failing to provide necessary sustenance to an animal under that person's custody or control.

C. As used in Subsection B of this section, "lawful justification" means:

(1) humanely destroying a sick or injured animal; or

(2) protecting a person or animal from death or injury due to an attack by another animal.

D. Whoever commits cruelty to animals is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978. Upon a fourth or subsequent conviction for committing cruelty to animals, the offender is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

E. Extreme cruelty to animals consists of a person:

(1) intentionally or maliciously torturing, mutilating, injuring or poisoning an animal; or

(2) maliciously killing an animal.

F. Whoever commits extreme cruelty to animals is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

G. The court may order a person convicted for committing cruelty to animals to participate in an animal cruelty prevention program or an animal cruelty education program. The court may also order a person convicted for committing cruelty to animals or extreme cruelty to animals to obtain psychological counseling for treatment of a mental health disorder if, in the court's judgment, the



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mental health disorder contributed to the commission of the criminal offense. The offender shall bear the expense of participating in an animal cruelty prevention program, animal cruelty education program or psychological counseling ordered by the court.

H. If a child is adjudicated of cruelty to animals, the court shall order an assessment and any necessary psychological counseling or treatment of the child.

I. The provisions of this section do not apply to:

(1) fishing, hunting, falconry, taking and trapping, as provided in Chapter 17 NMSA 1978;

(2) the practice of veterinary medicine, as provided in Chapter 61, Article 14 NMSA 1978;

(3) rodent or pest control, as provided in Chapter 77, Article 15 NMSA 1978;

(4) the treatment of livestock and other animals used on farms and ranches for the production of food, fiber or other agricultural products, when the treatment is in accordance with commonly accepted agricultural animal husbandry practices;

(5) the use of commonly accepted Mexican and American rodeo practices, unless otherwise prohibited by law;

(6) research facilities licensed pursuant to the provisions of 7 U.S.C. Section 2136, except when knowingly operating outside provisions, governing the treatment of animals, of a research or maintenance protocol approved by the institutional animal care and use committee of the facility; or

(7) other similar activities not otherwise prohibited by law.

J. If there is a dispute as to what constitutes commonly accepted agricultural animal husbandry practices or commonly accepted rodeo practices, the New Mexico livestock board shall hold a hearing to determine if the practice in question is a commonly accepted agricultural animal husbandry practice or commonly accepted rodeo practice.

**History: 1978 Comp., § 30-18-1, enacted by Laws 1999, ch. 107, § 1; 2001, ch. 81, § 1; 2007, ch. 6, § 1.**

**Cross references.** — For dog fighting, *see* 30-18-9 NMSA 1978.

For authority of livestock officers to arrest persons for violations of this article, *see* 77-2-9 NMSA 1978.

**Repeals and reenactments.** — Laws 1999, ch. 107, § 1 repealed 30-18-1 NMSA 1978, as enacted by Laws 1963, ch. 303, § 18-1, and enacted a new section, effective July 1, 1999.

**The 2007 amendment,** effective June 15, 2007, deleted former Subsection K, which provided that this section shall not be interpreted to prohibit cockfighting in New Mexico.

**The 2001 amendment,** effective June 15, 2001, inserted the Subsection A designation and renumbered the remaining Subsections accordingly and made related changes; and rewrote Paragraph I(6) which formerly read "research facilities intermediate handlers, carriers and exhibitors licensed pursuant to the provisions of 7 U.S.C. Section 2136; or".

## ANNOTATIONS

**General criminal negligence.** — Evidence that a defendant acted intentionally, purposely, or deliberately, in harming an animal, is sufficient to establish that the defendant acted with "willful disregard" for that animal's safety for purposes of conviction under the animal cruelty statute. *State v. Stewart*, 2005-NMCA-126, 138 N.M. 500, 122 P.3d 1269

**Article II, Section 5 of the New Mexico Constitution does not render the statutory ban on cockfighting unconstitutional.** *N.M. Gamefowl Assn., Inc. v. State of N.M. ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

**No standing based on economic injury.** — Where plaintiffs alleged purely economic interests that would be harmed by a ban on cockfighting, including reduced gross receipts, loss of employees and a threat to the viability of their businesses, plaintiffs had no standing to challenge the constitutionality of 30-18-1 NMSA 1978 because the constitution does not protect plaintiffs' right to engage in particular business activities so as to avoid economic loss. *N.M. Gamefowl Assn., Inc. v. State of N.M. ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

**No standing based on spectator interest in cockfighting.** — Where plaintiffs alleged past attendance at cockfights and that the ban on cockfighting would prevent them from future attendance at events plaintiffs considered to be an aspect of cultural expression, plaintiffs had no standing to challenge the constitutionality of 30-18-1 NMSA 1978 because there is no credible threat of prosecution related to mere attendance at cockfighting. *N.M. Gamefowl Assn., Inc. v. State ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

**No third party standing.** — Where plaintiffs alleged past attendance at cockfights and that the ban on cockfighting would prevent them from future attendance at events plaintiffs considered to be an aspect of cultural expression and alleged that persons who intend to participate in cockfighting would be injured, but provided no reason why a person who has violated 30-18-1 NMSA 1978 cannot challenge the constitutionality of the statute, plaintiffs had no third-party standing to challenge the constitutionality of Section 30-18-1 NMSA 1978. *N.M. Gamefowl Assn., Inc. v. State ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

**Associational standing.** — Where members of the plaintiff association owned and equipped cocks for the purpose of fighting; the purpose of the association was to keep cockfighting legal; and the association's remedy to have the ban on cockfighting declared unconstitutional addressed the injury claimed by the entire membership of the association, the association had associational standing to challenge the constitutionality of 30-18-1 NMSA 1978. *N.M. Gamefowl Assn., Inc. v. State ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

**Sufficient evidence of cruelty to animals.** — Where defendant was charged with cruelty to animals, and where the state established that defendant kept numerous dogs chained outdoors, that some of the dogs were not given sufficient food, water or shelter, some were emaciated



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to the degree that their ribs and hip bones were visibly protruding, some were infested with ticks, some had visible injuries and open sores, and some had wounds and scarring on their faces, which was consistent with staged dogfighting, there was sufficient evidence to support, beyond a reasonable doubt, that defendant intentionally mistreated, injured or tormented or abandoned or failed to provide necessary sustenance to numerous dogs. *State v. Duttle*, 2017-NMCA-001, cert. denied.

**Sufficient evidence of extreme cruelty to animals.** — Where defendant was charged with extreme cruelty to animals, evidence that of the eight dogs that defendant was convicted of subjecting to extreme cruelty, all eight were without clean water, seven were underweight, one was emaciated, five were severely emaciated, six had obvious scarring consistent with staged dogfighting, six had open wounds and untreated sores, one had a severe eye injury, two had advanced heart worm disease, one was infested with ticks, three had large painful tumors or masses, two exhibited obvious signs of serious illness, and four had teeth that were cut or filed to the gum line, making it extremely painful to eat or drink, was sufficient to support, beyond a reasonable doubt that defendant intentionally or maliciously tortured, mutilated or injured her dogs. *State v. Duttle*, 2017-NMCA-001, cert. denied.

**Meaning of "torture" and "torment".** — The words "torture" and "torment" are commonly defined to include every act, omission or neglect whereby unjustified physical pain and suffering or death is caused or permitted. *State v. Buford*, 1958-NMSC-129, 65 N.M. 51, 331 P.2d 1110 (decided under prior law).

**Animals included.** — The language of former 40-4-3, 1953 Comp., seemed to apply only to brute creatures and work animals, and the history showed that it was passed in relation to other laws governing livestock. *State v. Buford*, 1958-NMSC-129, 65 N.M. 51, 331 P.2d 1110 (decided under prior law).

**Section inapplicable to wild animals.** — This section applies only to cruelty to domesticated animals and wild animals previously reduced to captivity, and under the "general-specific" rule of statutory construction, treatment of wild animals is presumed to be governed by the comprehensive hunting and fishing laws contained in Chapter 17, which therefore preempt this section as to such animals. *State v. Cleve*, 1999-NMSC-017, 127 N.M. 240, 980 P.2d 23.

The game and fish laws in Chapter 17 are expressly intended to cover free-roaming, wild game elk; the animal statutes in Article 18 of Chapter 30 are not. *State v. Parson*, 2005-NMCA-083, 137 N.M. 773, 115 P.3d 236.

**Cockfighting.** — Cruelty to animal statute (former 40-4-3, 1953 Comp.) was not passed with the intention of prohibiting such sports as cockfighting. *State v. Buford*, 1958-NMSC-129, 65 N.M. 51, 331 P.2d 1110 (decided under prior law).

**Disputes over commonly accepted practices.** — The district court in a criminal case in which the defendant is charged with animal cruelty is the proper forum to determine if a dispute exists regarding whether the defendant's conduct is a commonly accepted agricultural animal husbandry practice and to define the parameters of the dispute in order to ensure that the issues are fairly referred to the livestock board. If the district court determines that there is a dispute regarding whether the defendant's conduct is a commonly accepted agricultural animal husbandry practice, the district court must order the livestock board to hold a Section 30-18-1 J NMSA 1978 hearing. *State ex rel. Collier v. N.M. Livestock Bd.*, 2014-NMCA-010, cert. denied, 2013-NMCERT-011.

Where defendant was charged with extreme animal cruelty that arose from the death of a colt as a result of defendant's use of questionable training techniques; defendant never filed a formal motion in the criminal case requesting a Section 30-18-1 J NMSA 1978 hearing before the livestock board to determine whether defendant's training techniques were commonly accepted agricultural animal husbandry practices; the livestock board denied defendant's request that it hold a hearing; and defendant filed a civil action asking the district court to order the livestock board to hold a hearing, defendant's civil action did not state a proper claim for relief because the district court presiding in defendant's pending criminal case was the proper forum to determine if a dispute existed regarding whether defendant's conduct was a commonly accepted agricultural animal husbandry practice and to order the livestock board to hold a Section 30-18-1 J NMSA 1978 hearing. *State ex rel. Collier v. N.M. Livestock Bd.*, 2014-NMCA-010, cert. denied, 2013-NMCERT-011.

**Animals included.** — No legislative intent appears to restrict the sanction of this section to any particular class of animals. 1963-64 Op. Att'y Gen. No. 64-86.

**Cruel sport.** — Placing of a live coon in a shallow barrel which is swiveled to rotate around a pole when pushed, with the object of finding which hound dog can pull the coon out of the barrel in the shortest time, constitutes cruelty to animals as defined in this section. 1963-64 Op. Att'y Gen. No. 64-86.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 4 Am. Jur. 2d Animals § 31 et seq.

Applicability of state animal cruelty statute to medical or scientific experimentation employing animals, 42 A.L.R.4th 860.

What constitutes offense of cruelty to animals - modern cases, 6 A.L.R.5th 733.

Damages for killing or injuring dog, 61 A.L.R.5th 635.

Construction and application of Horse Protection Act of 1970 (15 USCS § 1821 et seq.), 131 A.L.R. Fed. 363.

3A C.J.S. Animals §§ 99 to 116.

## 30-18-1.1. Seizure of animals; notice.

A. A peace officer who reasonably believes that the life or health of an animal is endangered due to cruel treatment may apply to the district court, magistrate court or the metropolitan court in the county where the animal is located for a warrant to seize the animal.

B. If the court finds probable cause that the animal is being cruelly treated, the court shall issue a warrant for the seizure of the animal. The court shall also schedule a hearing on the matter as expeditiously as possible within thirty days unless good cause is demonstrated by the state for a later time.

C. Written notice regarding the time and location of the hearing shall be provided to the owner of the seized animal. The court may order publication of a notice of the hearing in a newspaper closest to the location of the seizure.



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D. If the owner of the animal cannot be determined, a written notice regarding the circumstances of the seizure shall be conspicuously posted where the animal is seized at the time the seizure occurs.

E. At the option and expense of the owner, the seized animal may be examined by a veterinarian of the owner's choice.

F. If the animal is a type of livestock, seizure shall be pursuant to Chapter 77, Article 18 NMSA 1978.

**History: Laws 1999, ch. 107, § 2.** **Effective dates.** — Laws 1999, ch. 107, § 7, made the act effective on July 1, 1999.

## 30-18-1.2. Disposition of seized animals.

A. If the court finds that a seized animal is not being cruelly treated and that the animal's owner is able to provide for the animal adequately, the court shall return the animal to its owner.

B. If the court finds that a seized animal is being cruelly treated or that the animal's owner is unable to provide for the animal adequately, the court shall hold a hearing to determine the disposition of the animal.

C. An agent of the New Mexico livestock board, an animal control agency operated by the state, a county or a municipality, or an animal shelter or other animal welfare organization designated by an animal control agency or an animal shelter, in the custody of which an animal that has been cruelly treated has been placed may petition the court to request that the animal's owner may be ordered to post security with the court to indemnify the costs incurred to care and provide for the seized animal pending the disposition of any criminal charges of committing cruelty to animals pending against the animal's owner.

D. The court shall determine the amount of security while taking into consideration all of the circumstances of the case including the owner's ability to pay, and may conduct periodic reviews of its order. If the posting of security is ordered, the animal control agency, animal shelter or animal welfare organization may, with permission of the court, draw from the security to indemnify the costs incurred to care and provide for the seized animal pending disposition of the criminal charges.

E. If the owner of the animal does not post security within fifteen days after the issuance of the order, or if, after reasonable and diligent attempts the owner cannot be located, the animal may be deemed abandoned and relinquished to the animal control agency, animal shelter or animal welfare organization for adoption or humane destruction; provided that if the animal is livestock other than poultry associated with cockfighting, the animal may be sold pursuant to the procedures set forth in Section 77-18-2 NMSA 1978.

F. Nothing in this section shall prohibit an owner from voluntarily relinquishing an animal to an animal control agency or shelter in lieu of posting security. A voluntary relinquishment shall not preclude further prosecution of any criminal charges alleging that the owner has committed felony cruelty to animals.

G. Upon conviction, the court shall place the animal with an animal shelter or animal welfare organization for placement or for humane destruction.

H. As used in this section, "livestock" means all domestic or domesticated animals that are used or raised on a farm or ranch and exotic animals in captivity and includes horses, asses, mules, cattle, sheep, goats, swine, bison, poultry, ostriches, emus, rheas, camelids and farmed cervidae but does not include canine or feline animals.

**History: Laws 1999, ch. 107, § 3; 2009, ch. 43, § 1.** **The 2009 amendment,** effective June 19, 2009, added Subsections, C, D, E, F and H.

## 30-18-1.3. Costs.

A. Upon conviction, a defendant shall be liable for the reasonable cost of boarding the animal and all necessary veterinary examinations and care provided to the animal. The amount of these



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costs shall be offset by the security posted pursuant to Section 30-18-1.2 NMSA 1978. Unexpended security funds shall be returned to the defendant.

B. In the absence of a conviction, the seizing agency shall bear the costs of boarding the animal and all necessary veterinary examinations and care of the animal during the pendency of the proceedings, return the animal, if not previously relinquished, and all of the security posted pursuant to Section 30-18-1.2 NMSA 1978.

**History: Laws 1999, ch. 107, § 4; 2009, ch. 43, § 2.**

**The 2009 amendment,** effective June 19, 2009, in Subsection A, added "reasonable" before "cost of boarding" and added the last two sentences; in Subsection B, added the provision that the seizing agency shall return the animal and amounts of the security posted.

## 30-18-2. Repealed.

**Repeals.** — Laws 1999, ch. 107 § 6 repealed 30-18-2 NMSA 1978, as enacted by Laws 1963, ch. 303, § 18-2, relating to injury to animals, effective July 1, 1999. For provisions of former section, *see* the 1998 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 30-18-1 NMSA 1978.

## 30-18-2.1. Repealed.

**Repeals.** — Laws 1999, ch. 107 § 6 repealed 30-18-2.1 NMSA 1978, as enacted by Laws 1981, ch. 226, § 1, relating to malicious slaughter of domestic canine animals, effective July 1, 1999. For provisions of former sections, *see* the 1998 NMSA 1978 on *NMOneSource .com*. For present comparable provisions, *see* 30-18-1 NMSA 1978.

## 30-18-3. Unlawful branding.

Unlawful branding consists of either:

A. branding, marking or causing to be branded or marked any animal, which is the property of another, with any brand not the brand of the owner of the animal;

B. defacing or obliterating any brand or mark upon any animal which is the property of another; or

C. using any brand unless said brand shall have been duly recorded in the office of the cattle sanitary board of New Mexico [New Mexico livestock board] or the sheep sanitary board of New Mexico [New Mexico livestock board], whichever is applicable, and the person holds a certificate from the cattle sanitary board [New Mexico livestock board] or the sheep sanitary board [New Mexico livestock board] certifying to the fact of such record.

Whoever commits unlawful branding is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-18-3, enacted by Laws 1963, ch. 303, § 18-3.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Section 47-2-1, 1953 Comp., establishing the cattle sanitary board, and 47-8-2, 1953 Comp., establishing the sheep sanitary board and related sections, were repealed by Laws 1967, ch. 213, § 12. Section 77-2-2 NMSA 1978 created the New Mexico livestock board, and provided that reference to the above-mentioned sanitary boards shall mean the livestock board.

**Cross references.** — For description of bovine animal in a criminal indictment, *see* 31-7-1 NMSA 1978.

For Livestock Code, *see* 77-2-1 NMSA 1978 et seq.

For provisions regarding the branding of animals, and penalties for violation thereof, *see* 77-9-3 to 77-9-5 NMSA 1978.

### ANNOTATIONS

**Due process.** — Subsection C is a reasonable exercise of the police power of New Mexico; in the light of its purpose, its application to innocent acts and the felony penalty it provides do not violate due process requirements. *State v. Vickery*, 1973-NMCA-091, 85 N.M. 389, 512 P.2d 962, cert. denied, 85 N.M. 380, 512 P.2d 953.

**Equal protection.** — As 77-9-4 NMSA 1978 applies to branding requirements generally while Subsection C of this section applies specifically to the use of an unrecorded brand, one section does not provide a different penalty for the identical act prohibited by the other, and hence these sections do not violate the requirement of equal protection of the laws. *State v. Vickery*, 1973-NMCA-091, 85 N.M. 389, 512 P.2d 962, cert. denied, 85 N.M. 380, 512 P.2d 953.

**Purpose of Subsection C** is to prevent a kind of theft peculiarly easy of commission and difficult of discovery and punishment, and to afford special protection to the important industry of stockraising. *State v. Vickery*, 1973-NMCA-091, 85 N.M. 389, 512 P.2d 962, cert. denied, 85 N.M. 380, 512 P.2d 953; *State v. Thompson*, 1953-NMSC-072, 57 N.M. 459, 260 P.2d 370.

**Criminal intent is not element** of crime stated in Subsection C. *State v. Vickery*, 1973-NMCA-091, 85 N.M. 389, 512 P.2d 962, cert. denied, 85 N.M. 380, 512 P.2d 953.

**Brand not proof of defendant's ownership.** — Proof that calf bore defendant's brand in prosecution for stealing and branding the animal did not constitute prima facie evidence that defendant owned the animal under statute



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providing that registration in the brand book under seal of the cattle sanitary board (now New Mexico livestock board) constituted prima facie proof that person owning recorded brand was owner of animal branded with such brand. *State v. Reed*, 1951-NMSC-021, 55 N.M. 231, 230 P.2d 966, cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

**Indictment defective.** — An indictment under Laws 1919, ch. 57, § 1 (former 40-4-15, 1953 Comp.), prohibiting branding of unmarked animals with mark not the recorded, kept up or running mark or brand of the user, was fatally defective if it failed to allege that the brand was placed upon an unbranded animal. *State v. Lopez*, 1922-NMSC-061, 28 N.M. 216, 210 P. 567.

**Instructions on circumstantial evidence.** — Instruction on circumstantial evidence concerning the stealing and unlawful branding of a bull calf was not erroneous because of inclusion of statement "that before you would be authorized to find a verdict of guilty against the defendant where the evidence is circumstantial, the facts and circumstances shown in the evidence must be incompatible upon any reasonable hypothesis with the innocence of the defendant and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the defendant." *State v. Reed*, 1951-NMSC-021, 55 N.M. 231, 230 P.2d 966, cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

The court was not required to give an instruction on circumstantial evidence which was cumulative. *State v. Reed*, 1951-NMSC-021, 55 N.M. 231, 230 P.2d 966, cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 3A C.J.S. Animals §§ 23 to 30.

## 30-18-4. Unlawful disposition of animal.

Unlawful disposition of animal consists of:

A. skinning or removing without the permission of the owner any part of the hide of any neat cattle found dead;

B. abandoning any livestock without giving reasonable notice to the owner, where the livestock has been entrusted by the owner to such person for the herding, care or safekeeping upon a contract for a valuable consideration;

C. taking any livestock for use or work, without the consent of the owner;

D. driving or leading any animal being the property of another from its usual range, without the consent of the owner;

E. contracting, selling or otherwise disposing of any animal, which a person has in his possession or under his control on shares or under contract, without the consent of the owner of such animal; or

F. knowingly buying, taking or receiving from any person having in his possession, or under his control, any animal on shares or under contract, without the consent of the owner of such animal.

Whoever commits unlawful disposition of animal is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-18-4, enacted by Laws 1963, ch. 303, § 18-4.**

**Cross references.** — For notification of intention to slaughter cattle, *see* 7-23-1, 7-23-2 NMSA 1978.

For description of bovine animal in indictment, *see* 31-7-1 NMSA 1978.

ANNOTATIONS

**Former law not violative of equal protection.** — Classification in former law providing for the punishment of all persons who skin or remove the hide from the carcass of neat cattle found dead without the permission of the owner, but exempting all employees of railroad companies so doing when the animal was killed by the railroad company, was entirely constitutional. *State v. Thompson*, 1953-NMSC-072, 57 N.M. 459, 260 P.2d 370 (decided under prior law).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 3A C.J.S. Animals §§ 119, 120.

## 30-18-5. [Illegal confinement of animals.]

Illegal confinement of animals consists of:

A. detaining for more than two (2) hours for the purpose of milking any cow, without the permission of the owner;

B. taking and detaining any bull for the purpose of improving livestock, without the consent of the owner;

C. intentionally separating offspring of livestock from the mother, unless branded. Provided that, when milk cows, which are actually used to furnish milk for household or dairy purposes, have calves, that are unbranded, such young animals may be separated from their mother and inclosed; or

D. confining, or in any manner interfering with the freedom of, or selling, or offering to sell, any freshly branded animal, unless such animal has been previously branded with an older and duly recorded brand for which the person has a legally executed bill of sale from the owner of such brand or unless such animals are with their mother, or unless such animals are the calves of milk cows when such cows are actually used to furnish milk for household purposes or for carrying on a



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dairy; but in every such case the person, firm or corporation, separating calves from their mother for either of these purposes shall, upon the demand of any sheriff, inspector or other officer, produce, in a reasonable time, the mother of each of such calves so that interested parties may ascertain if the cow does or does not claim and suckle such calf.

Whoever commits illegal confinement of animals is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-18-5, enacted by Laws 1963, ch. 303, § 18-5; 1965, ch. 3, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

ANNOTATIONS

**Indictment adequate.** — An indictment under Laws 1901, ch. 23, § 1 (former 40-4-29, 1953 Comp.), prohibiting separation of calves under seven months old from their mothers, was valid, even though it did not directly and positively allege that calves were under seven months of age, it using the words "the said calves being then and there under seven months of age." *State v. Brooken*, 1914-NMSC-075, 19 N.M. 404, 143 P. 479 (decided under prior law).

**Evidence sufficient.** — Evidence that calf was found chained in depression in defendant's pasture and that defendant's riding horse was seen close to such depression was sufficient to support conviction under Laws 1901, ch. 23, § 1 (former 40-4-29, 1953 Comp.). *State v. Blevins*, 1935-NMSC-083, 39 N.M. 532, 51 P.2d 599 (decided under prior law).

## 30-18-6. Transporting stolen livestock.

Transporting stolen livestock consists of knowingly transporting or carrying any stolen or unlawfully possessed livestock or any unlawfully possessed game animal, or any parts thereof.

Whoever commits transporting stolen livestock is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-18-6, enacted by Laws 1963, ch. 303, § 18-6.**

**Cross references.** — For penalties for violation of fish and game laws or regulations, *see* 17-2-10 NMSA 1978.

For seizure and disposition of game and vehicles under fish and game laws, *see* 17-2-19 NMSA 1978 et seq.

For prohibition against transporting game or fish taken from unlicensed parks or lakes, *see* 17-4-10 NMSA 1978.

For transportation of sheep, *see* 77-8-3 NMSA 1978 et seq.

For transportation of livestock, *see* 77-9-28 NMSA 1978 et seq.

For penalties for exporting animals without inspection, *see* 77-9-31 NMSA 1978.

For authority of officers to stop vehicles transporting livestock, *see* 77-9-46, 77-9-51 NMSA 1978.

ANNOTATIONS

**Transporting stolen livestock and larceny of livestock.** — Defendant's conviction for transporting stolen livestock, when considered with his conviction for larceny of livestock, violated his constitutional right to be free of double jeopardy. *State v. Clark*, 2000-NMCA-052, 129 N.M. 194, 3 P.3d 689, cert. denied, 129 N.M. 207, 4 P.3d 35.

**Section inapplicable.** — This section does not apply to the transporting of elk. *State v. Parson*, 2005-NMCA-083, 137 N.M. 773, 115 P.3d 236.

## 30-18-7. Misrepresentation of pedigree.

Misrepresentation of pedigree consists of either the giving, obtaining, misrepresenting or exhibiting of any type of registry certificate or transfer certificate, pertaining to the pedigree registry of any animal, knowing such certificate to be false or misleading, or to have been secured by means of false pretenses or false representations.

Whoever commits misrepresentation of pedigree is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-18-7, enacted by Laws 1963, ch. 303, § 18-7.**

## 30-18-8. [Killing unbranded cattle; killing, without bill of sale, cattle bearing brand of another person; penalty.]

Any person, firm or corporation, who shall kill or cause to be killed, for sale or use any unbranded neat cattle, or any cattle on which the brand has not peeled off and fully healed, unless such cattle shall have an older and duly recorded brand; or shall kill, or cause to be killed for sale or use any neat cattle having a brand not legally owned by such person, firm or corporation, without having taken a duly acknowledged bill of sale for the same from the owner thereof, shall be deemed guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-18-8, enacted by Laws 1965, ch. 7, § 1.**



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## 30-18-9. Dog fighting and cockfighting; penalty.

A. It is unlawful for any person to cause, sponsor, arrange, hold or participate in a fight between dogs or cocks for the purpose of monetary gain or entertainment. Participation in a fight between dogs or cocks for the purpose of monetary gain or entertainment consists of an adult knowingly:

(1) being present at a dog fight without attempting to interfere with or stop the contest; or

(2) owning or equipping one of the participating dogs or cocks with knowledge of the contest.

B. It is unlawful to train, equip or sponsor a dog or cock for the purpose of having it participate in a fight with another dog or cock, respectively, for monetary gain or entertainment.

C. Any person violating the provisions of Subsection A or B of this section, as it pertains to dogs, is guilty of a fourth degree felony.

D. Any person violating the provisions of Subsection A or B of this section as it pertains to cocks:

(1) upon a first conviction, is guilty of a petty misdemeanor;

(2) upon a second conviction, is guilty of a misdemeanor; and

(3) upon a third or subsequent conviction, is guilty of a fourth degree felony.

**History: Laws 1981, ch. 30, § 1; 2007, ch. 6, § 2.**

**The 2007 amendment,** effective June 15, 2007, added "or cocks" after the word "dogs" in Subsection A; changed "such a fight" to "a dog fight" in Paragraph (1) of Subsection A; added "or cock" and "or cock, respectively" after the words "dog" in Subsection B; added "as it pertains to dogs" after the word "section" in Subsection C; and added Subsection D to provide penalties.

## 30-18-10. Exclusion.

Nothing in this act [30-18-9, 30-18-10 NMSA 1978] shall be construed to prohibit or make unlawful the taking of game animals, game birds or game fish by the use of dogs, provided the person so doing is licensed as provided by law and is using such dogs in a lawful manner.

**History: Laws 1981, ch. 30, § 2.**

## 30-18-11. Unlawful tripping of an equine; exception.

A. Unlawful tripping of an equine consists of intentionally using a wire, pole, stick, rope or any other object to cause an equine to lose its balance or fall, for the purpose of sport or entertainment.

B. The provisions of Subsection A of this section do not apply to laying an equine down for medical or identification purposes.

C. As used in this section, "equine" means a horse, pony, mule, donkey or hinny.

D. Whoever commits unlawful tripping of an equine is guilty of a misdemeanor.

E. Whoever commits unlawful tripping of an equine that causes the maiming, crippling or death of the equine is guilty of a fourth degree felony.

**History: Laws 1995, ch. 113, § 1.**

**Effective dates.** — Laws 1995, ch. 113, § 2 makes the act effective July 1, 1995.

## 30-18-12. Injury to livestock.

A. Injury to livestock consists of willfully and maliciously poisoning, killing or injuring livestock that is the property of another.

B. As used in this section, "livestock" means cattle, sheep, buffalo, horses, mules, goats, swine and ratites.

C. Whoever commits injury to livestock is guilty of a fourth degree felony.

**History: Laws 1998, ch. 35, § 1.**

**Effective dates.** — Laws 1998, ch. 35, § 2 makes the act effective July 1, 1998.



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## 30-18-13. Injury to a police dog, police horse or fire dog; harassment of a police dog, police horse or fire dog.

A. As used in this section:

(1) "fire dog" means a dog used by a fire department, special fire district or the state fire marshal for the primary purpose of aiding in the detection of flammable materials or the investigation of fires;

(2) "police dog" means a dog used by a law enforcement or corrections agency that is specially trained for law enforcement or corrections work in the areas of tracking, suspect apprehension, crowd control or drug or explosives detection; and

(3) "police horse" means a horse that is used by a law enforcement or corrections agency for law enforcement or corrections work.

B. Injury to a police dog, police horse or fire dog consists of willfully and with intent to injure or prevent the lawful performance of its official duties:

(1) striking, beating, kicking, cutting, stabbing, shooting or administering poison or any other harmful substance to a police dog, police horse or fire dog; or

(2) throwing or placing an object or substance in a manner that is likely to produce injury to a police dog, police horse or fire dog.

C. Whoever commits injury to a police dog, police horse or fire dog when the injury causes the animal minor physical injury or pain is guilty of a petty misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

D. Whoever commits injury to a police dog, police horse or fire dog when the injury causes the animal serious physical injury or death or directly causes the destruction of the animal is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

E. A person convicted of injury to a police dog, police horse or fire dog may be ordered to make restitution for the animal's veterinary bills or replacement costs of the animal if it is permanently disabled, killed or destroyed.

F. Harassment of a police dog, police horse or fire dog consists of a person willfully and maliciously interfering with or obstructing a police dog, police horse or fire dog by frightening, agitating, harassing or hindering the animal.

G. Whoever commits harassment of a police dog, police horse or fire dog is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

H. Whoever commits harassment of a police dog, police horse or fire dog that results in bodily injury to a person not an accomplice to the criminal offense is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

I. It is an affirmative defense to a prosecution brought pursuant to the provisions of this section that a police dog, police horse or fire dog was not handled in accordance with well-recognized national handling procedures or was handled in a manner contrary to its own department's handling policies and procedures.

**History: Laws 1999, ch. 107, § 5.**

**Effective dates.** — Laws 1999, ch. 107, § 7, makes the act effective on July 1, 1999.

## 30-18-14. Livestock crimes; livestock inspectors to enforce.

Livestock inspectors who are certified peace officers shall enforce the provisions of Chapter 30, Article 18 NMSA 1978 and other criminal laws relating to livestock.

**History: Laws 2001, ch. 8, § 1 and Laws 2001, ch. 341, § 1.**

**Duplicate laws.** — Laws 2001, ch. 8, § 1, approved March 14, 2001, and Laws 2001, ch. 341, § 1, approved April 5, 2001, both effective June 15, 2001, enacted two versions of this section. Laws 2001, ch. 8, § 1 would have read as follows: "Livestock crimes; livestock inspectors to enforce. Livestock inspectors who are certified peace officers may enforce the provisions of Chapter 30, Article 18 NMSA 1978 and other criminal laws relating to livestock."

The section is set out as enacted by Laws 2001, ch. 341, § 1. *See* 12-1-8 NMSA 1978.



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## 30-18-15. Intracardiac injection prohibited on conscious animal.

A. It is unlawful for an employee or agent of an animal control service or facility, animal shelter or humane society to use intracardiac injection to administer euthanasia on a conscious animal if the animal could first be rendered unconscious in a humane manner.

B. A person who violates the provisions of Subsection A of this section is guilty of a misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

**History: Laws 2004, ch. 35, § 1.**

**Effective dates.** — Laws 2004, ch. 35 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

## 30-18-16. Coyote-killing contests prohibited; definition; penalties.

A. It is unlawful for a person to organize, cause, sponsor, arrange, hold or participate in a coyote-killing contest.

B. As used in this section, "coyote-killing contest" means an organized or sponsored competition with the objective of killing coyotes for prizes or entertainment.

C. Organizing, causing, sponsoring, arranging or holding a coyote-killing contest consists of a person knowingly:

(1) planning, organizing or enticing a person to participate in a coyote-killing contest; or

(2) providing the venue for a coyote-killing contest.

D. Participation in a coyote-killing contest consists of a person knowingly taking part in a coyote-killing contest.

E. A person who organizes, causes, sponsors, arranges or holds a coyote-killing contest is guilty of a misdemeanor.

F. A person who participates in a coyote-killing contest is guilty of a petty misdemeanor.

G. Nothing in this section shall be construed to prohibit a person from protecting a person or property or the state game commission from carrying out the statutory authority allowed by Chapter 17 NMSA 1978 in a non-coyote-killing contest setting.

**History: Laws 2019, ch. 151, § 1.**

**Effective dates.** — Laws 2019, ch. 151, § 2 made Laws 2019, ch. 151, § 1 effective July 1, 2019.

# ARTICLE 19

# Gambling

Sec.

30-19-1. Definitions relating to gambling.
30-19-2. Gambling.
30-19-3. Commercial gambling.
30-19-4. Permitting premises to be used for gambling.
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30-19-13. Bribery of participant in a contest.
30-19-14. Testimony of witnesses to gambling.
30-19-15. Unlawful to accept for profit anything of value to be transmitted or delivered for gambling; penalty.

## 30-19-1. Definitions relating to gambling.

As used in Chapter 30, Article 19 NMSA 1978:

A. "antique gambling device" means a gambling device manufactured before 1970 and substantially in original condition that is not used for gambling or commercial gambling or located in a gambling place;



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B. "bet" means a bargain in which the parties agree that, dependent upon chance, even though accompanied by some skill, one stands to win or lose anything of value specified in the agreement. A bet does not include:

(1) bona fide business transactions that are valid under the law of contracts, including:

(a) contracts for the purchase or sale, at a future date, of securities or other commodities; and

(b) agreements to compensate for loss caused by the happening of the chance, including contracts for indemnity or guaranty and life or health and accident insurance;

(2) offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or to the bona fide owners of animals or vehicles entered in such contest;

(3) a lottery as defined in this section; or

(4) betting otherwise permitted by law;

C. "gambling device" means a contrivance other than an antique gambling device that is not licensed for use pursuant to the Gaming Control Act [Chapter 60, Article 2E NMSA 1978] and that, for a consideration, affords the player an opportunity to obtain anything of value, the award of which is determined by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the device;

D. "gambling place" means a building or tent, a vehicle, whether self-propelled or not, or a room within any of them that is not within the premises of a person licensed as a lottery retailer or that is not licensed pursuant to the Gaming Control Act, one of whose principal uses is:

(1) making and settling of bets;

(2) receiving, holding, recording or forwarding bets or offers to bet;

(3) conducting lotteries; or

(4) playing gambling devices; and

E. "lottery" means an enterprise wherein, for a consideration, the participants are given an opportunity to win a prize, the award of which is determined by chance, even though accompanied by some skill. "Lottery" does not include the New Mexico state lottery established and operated pursuant to the New Mexico Lottery Act [Chapter 6, Article 24 NMSA 1978] or gaming that is licensed and operated pursuant to the Gaming Control Act. As used in this subsection, "consideration" means anything of pecuniary value required to be paid to the promoter in order to participate in a gambling or gaming enterprise.

**History: 1953 Comp., § 40A-19-1, enacted by Laws 1963, ch. 303, § 19-1; 1965, ch. 37, § 1; 1985, ch. 108, § 1; 1995, ch. 155, § 37; 1997, ch. 190, § 66; 2002, ch. 102, § 1.**

**Cross references.** — For the Indian Gaming Compact, *see* 11-13-1 NMSA 1978.

**The 2002 amendment,** effective March 5, 2002, substituted "manufactured before 1970" for "twenty-five years of age or older" in Subsection A.

**The 1997 amendment,** effective June 20, 1997, deleted former Subsection C defining "lottery", redesignated former Subsections D and E as Subsections C and D, inserted "that is not licensed for use pursuant to the Gaming Control Act and" near the beginning of Subsection C, inserted "that is not within the premises of a person licensed as a lottery retailer or that is not licensed pursuant to the Gaming Control Act" in the first sentence of Subsection D, added Subsection E, and made minor stylistic changes throughout the section.

**The 1995 amendment,** effective July 1, 1995, in Subsection C, inserted "other than the New Mexico state lottery established and operated pursuant to the New Mexico Lottery Act" and made minor stylistic changes throughout the section.

**The 1985 amendment** added Subsection A, redesignated former Subsections A, B, C, and D as present Subsections B, C, D, and E, respectively, and inserted "other than an antique gambling device" following "contrivance" near the beginning of Subsection D.

**ANNOTATIONS**

**Due process.** — "Gambling device" is defined with acceptable clarity, given the legislative dilemma of drafting criminal statutes general enough to escape legalistic evasion while specific enough to give fair warning of proscribed conduct. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

**Meaning of "lottery".** — A lottery was a game of hazard in which small sums of money were ventured for chance of obtaining a larger value in money or other articles, and the test employed for detecting a lottery was the presence of a prize, chance and consideration, the presence of all three compelling its characterization as such. *State v. Jones*, 1940-NMSC-066, 44 N.M. 623, 107 P.2d 324 (decided under prior law).

**Test employed.** — The test employed for detecting a lottery is the presence of three elements, prize, chance and consideration. *State v. Jones*, 1940-NMSC-066, 44 N.M. 623, 107 P.2d 324 (opinion rendered under prior law).

**Baseball pools.** — Where tickets were sold in books of 120, to be sold at 10 cents each, entitling the holder to a $9.00 prize from a lucky ticket containing the names of two ball teams making the high scores each day, there was a lottery, although the tickets themselves did not convey the information as to the prize. *State v. Butler*, 1938-NMSC-017, 42 N.M. 271, 76 P.2d 1149.



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**"Bank Night" scheme.** — Scheme operated under name "Bank Night" involved an element of "consideration" which together with elements of "prize" and "chance," constituted the scheme of a "lottery" under prior law. *State v. Jones*, 1940-NMSC-066, 44 N.M. 623, 107 P.2d 324.

**Meaning of "gambling device".** — No contrary intent appearing in the statute, the ordinary and usual meaning of the term "gambling devices" is to be used, that is, those devices which are normally associated with gambling. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

Where there is no allegation that owners of slot machines were involved in illegal gambling, and the only persons who played the slot machines were the owners and their social acquaintances, and there is no allegation or proof that anyone playing a machine made any money except through winnings as a player, no "consideration" was paid to owners to play a machine so there is no "gambling device". *State ex rel. N.M. Gaming Control Bd. v. Ten (10) Gaming Devices*, 2005-NMCA-117, 138 N.M. 426, 120 P.3d 848, cert. quashed, 2006-NMCERT-003, 139 N.M. 352, 132 P.3d 1038.

**Computer terminal was not a gambling device.** — Where defendant owned and operated an internet cafe where customers could purchase time on the internet using computer terminals in the cafe as a promotion, defendant gave customers free entries into a sweepstakes that awarded cash prizes determined by chance; defendant's computer system pre-determined the winning sweepstakes entries; sweepstake entries were delivered to customers in the form or a "swipe card" that was swiped into a reader for visual display at the café's counter or at individual computer terminals; money could not be inserted into the computer terminals to participate in the sweepstakes; additional sweepstake entries could only be obtained from the café's counter and then downloaded upon the "swipe card"; and the computer terminals gave consumers anything of value, defendant's computer terminals were not a gambling device. *State v. Vento*, 2012-NMCA-099, 286 P.3d 627, cert. granted, 2012-NMCERT-009.

**Exchange of pull tabs for free games won on video machines.** — The practice of exchanging pull tabs for free games won on electronic video games was impermissible under the Bingo and Raffle Act, Chapter 60, Article 2B NMSA 1978, since to permit operation of the machines for such purpose would be to sanction commercial gambling. *American Legion Post No. 49 v. Hughes*, 1994-NMCA-153, 120 N.M. 255, 901 P.2d 186, cert. quashed, 120 N.M. 117, 898 P.2d 1255.

**Extent of pari-mutuel exemption.** — It was the intention of the legislature to exempt pari-mutuel betting from the general provisions of the gambling laws only when done by patrons who are physically present at the track; one who is not personally present at the track is not a patron thereof and does not come within the pari-mutuel exemption at Section 60-1-10 NMSA 1978. *Schnoor v. Griffin*, 1968-NMSC-067, 79 N.M. 86, 439 P.2d 922 (decided under prior law).

**Off-track betting illegal.** — The giving of money to defendant and his transporting it to the place of betting was inseparable from the act of placing the bet itself; to sanction such a procedure would permit a mode of gambling not allowed by the pari-mutuel statute. *Schnoor v. Griffin*, 1968-NMSC-067, 79 N.M. 86, 439 P.2d 922 (decided under prior law).

**Illegal gambling contract unenforceable.** — The public policy of New Mexico is to restrain and discourage gambling and must override the rule which prevents unjust enrichment, particularly where there is a choice between that which is considered to be for the benefit of the public at large as distinguished from any benefit to an individual litigant. *Schnoor v. Griffin*, 1968-NMSC-067, 79 N.M. 86, 439 P.2d 922 (decided under prior law).

**Applicability of gambling laws to Indians.** — State law did not permit authorization of "all forms of casino-style games" in compacts with Indian tribes negotiated by the governor pursuant to the federal Indian Gaming Regulatory Act. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11.

**State statutes are not superseded by federal laws relating to lottery broadcasting;** being a form of gambling, lotteries are primarily a matter of state interest and policy under the police power. 1963-64 Op. Att'y Gen. No. 63-141 (opinion rendered under prior law).

Since there is no indication of a congressional intent to reserve regulation of the broadcasting of lotteries to the federal government, states may regulate such broadcasts to the same extent as the broadcasting of other gambling information. 1963-64 Op. Att'y Gen. No. 63-141 (opinion rendered under prior law).

**Meaning of "lottery".** — A lottery has been defined as a plan which contains the elements of prize, chance and consideration. 1963-64 Op. Att'y Gen. No. 63-141 (opinion rendered under prior law).

**Test employed.** — The test employed for detecting a lottery is the presence of three elements, prize, chance and consideration. 1965-66 Op. Att'y Gen. No. 65-196; 1959-60 Op. Att'y Gen. No. 60-05; 1955-56 Op. Att'y Gen. No. 6516, No. 6347, No. 6168 (opinion rendered under prior law).

**Consideration present even without purchase from promoter.** — The consideration necessary for a lottery may be present even where no purchase is required as a condition precedent to eligibility for a prize. 1963-64 Op. Att'y Gen. No. 63-141 (opinion rendered under prior law).

Where a lottery plan involves increased traffic to the participating stores with a necessarily resultant increase in sales, therein lies the financial advantage to the promoter and thus consideration as defined in this section. 1963-64 Op. Att'y Gen. No. 63-141 (opinion rendered under prior law).

**Broadening of exclusions.** — By the 1965 amendment to this section the legislature intended to liberalize or broaden the definition of activities that were not prohibited by law. 1964-65 Op. Att'y Gen. No. 65-196.

**Definition of lottery.** — The definition of lottery was intended to broaden the exclusions for certain types of operations which were not basically an attempt to hazard a sum for the hope of a larger sum. 1969 Op. Att'y Gen. No. 69-60.

**Substance of scheme important.** — In analyzing an operation to determine whether or not it is a lottery, the court must look to the substance of the scheme as well as the form. 1969 Op. Att'y Gen. No. 69-60.

**Activity primarily a lottery.** — When a promoter charges more than the usual price of an innocent activity and advertises that prizes will be drawn by lot and awarded to the holder of the ticket for the activity then the activity is primarily a lottery. 1969 Op. Att'y Gen. No. 69-60.

**Drawing hotel room number.** — Where plan was to assign numbers to each of the rooms of a motel, there being some 16 rooms, and as the rooms were filled in the course of the evening, to conduct a drawing, with the person occupying the room number corresponding with the number drawn from the hat to receive his room rent free for that night, the scheme constituted a lottery and was, therefore, illegal under former gambling laws. 1955-56 Op. Att'y Gen. No. 56-6347.

**Store punch card.** — Scheme whereby a punch card is given to each customer purchasing merchandise in a store or chain of stores, and each time the customer purchases items from the store, the dollar amount of the purchase is punched out on the card until the customer's



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purchases reach a certain total, at which point the large seal on the card is removed under which is found one of three dollar amounts representing the customer's prize, or in the alternative, some simple question the answer to which entitles the customer to a prize constituted a lottery under former gambling laws. 1959-60 Op. Att'y Gen. No. 60-05.

**Nature of "pecuniary value" intended.** — Pecuniary value must be paid over and above payment for a legal activity before the giving of a door prize at a legal activity is to be considered an illegal lottery. 1969 Op. Att'y Gen. No. 69-60.

**Pecuniary value.** — Element of pecuniary consideration for the sole purpose of engaging in the gambling enterprise must be present. 1965-66 Op. Att'y Gen. No. 65-196.

**Hazarding of small sum for larger.** — The substance of paying something of pecuniary value in order to participate in the enterprise is that the small sum is hazarded in the hope of winning a larger sum. 1969 Op. Att'y Gen. No. 69-60.

**No pecuniary value paid.** — If one pays the normal going rate for a dinner or theater ticket or style show and a prize or prizes are given in conjunction with those legal activities, one has not paid to the promoter anything of pecuniary value in order to participate in the chance at the prize. 1969 Op. Att'y Gen. No. 69-60.

Drawing of numbered tickets of admission to the state fair, for a prize, in which those individuals who had purchased tickets would be entitled to participate, would be legal, since no consideration would be paid for the privilege of participating in the opportunity to win a prize. 1965-66 Op. Att'y Gen. No. 65-196.

**Specific intent understood.** — The narrow definitions of gambling device and dealing in gambling devices in the New Mexico law require a specific intent to use or transfer for use with a gambling purpose, and use for entertainment alone would not subject the parties to prosecution under the gambling statutes. 1969 Op. Att'y Gen. No. 69-54.

**Chance to win prize determinative.** — If there was no opportunity to obtain anything of value when a gambling device was used for entertainment, then the item would not be a gambling device within the definition of this section. 1969 Op. Att'y Gen. No. 69-54.

**Savings and loan promotion legal.** — A savings and loan association may give every person who deposits a certain amount in a savings account a chance to win a four-day all-expense-paid trip at a drawing without violating the New Mexico gambling laws. 1971 Op. Att'y Gen. No. 71-109.

**Selling of souvenir tokens.** — Where the element of chance is absent, slot machines converted into vending machines which will sell souvenir tokens do not fall within the definition of gambling device. 1972 Op. Att'y Gen. No. 72-39.

**Applicability of gambling laws to Indians.** — Where federal law is silent on gambling and state law prohibits it, and such gambling is carried on by Indians in Indian country, the gambling is illegal, with exclusive jurisdiction resting in the federal courts unless the gambling has already been punished by the tribal court. 1965-66 Op. Att'y Gen. No. 65-221 (opinion rendered under prior law).

Under the federal Assimilative Crimes Act, there would not be a conflict between federal and state laws on gambling if carried on in Indian country and gambling is illegal in the state. 1965-66 Op. Att'y Gen. No. 65-221 (opinion rendered under prior law).

**State courts would have jurisdiction over a non-Indian** charged with conducting a gambling operation on an Indian reservation. 1965-66 Op. Att'y Gen. No. 65-221 (opinion rendered under prior law).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Scheme for advertising or stimulating legitimate business as a lottery, 48 A.L.R. 1115; 57 A.L.R. 424, 103 A.L.R. 866, 109 A.L.R. 709, 113 A.L.R. 1121.

What is a game of chance, 135 A.L.R. 104.

Validity, construction, and application of statutes or ordinances involved in prosecutions for transmission of wagers or wagering information related to bookmaking, 53 A.L.R.4th 801.

Private contests and lotteries: entrants' rights and remedies, 64 A.L.R.4th 1021.

Validity, construction, and application of statute or ordinance prohibiting or regulating use or occupancy of premises for bookmaking or pool selling, 82 A.L.R.4th 356.

## 30-19-2. Gambling.

Gambling consists of:

A. making a bet;

B. entering or remaining in a gambling place with intent to make a bet, to participate in a lottery or to play a gambling device;

C. conducting a lottery; or

D. possessing facilities with intent to conduct a lottery.

Whoever commits gambling is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-19-2, enacted by Laws 1963, ch. 303, § 19-2.**

**Cross references.** — For recovery of gambling losses and avoidance of gambling debts, *see* 44-5-1 NMSA 1978 et seq.

For provision granting immunity from punishment for gambling to one suing to recover losses, *see* 44-5-14 NMSA 1978.

### ANNOTATIONS

**Double jeopardy not threatened.** — Defendant was not convicted of different offense than that with which he was charged, where information cited former 40-22-1, 1953 Comp. and judgment referred to former 40-22-2, 1953 Comp., as the former section merely defines certain acts as unlawful, while the latter section provides the penalty; the essential part of the judgment was finding defendant guilty of operating a game of chance for money, so that the judgment would bar a subsequent prosecution for the same offense. *State v. La Rue*, 1960-NMSC-054, 67 N.M. 149, 353 P.2d 367 (decided under prior law).

**Gambling distinguished from commercial gambling.** — Gambling under Subsection A of this section is distinguishable from commercial gambling under 30-19-3B NMSA 1978 in that this section requires only one act whereas 30-19-3B NMSA 1978 requires



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more than one act to constitute a violation. *State v. Owens*, 1984-NMCA-105, 103 N.M. 121, 703 P.2d 898, cert. quashed, 103 N.M. 62, 702 P.2d 1007 (1985).

**Longstanding prohibition.** — The declared prohibition against gambling in any manner or form has long been a part of the existing law of this state. *Ross v. State Racing Comm'n*, 1958-NMSC-117, 64 N.M. 478, 330 P.2d 701.

**Frequenting and keeping game distinguished.** — To frequent a gambling table of a banking game was one offense and to keep such table was another. *Territory v. Copely*, 1873-NMSC-007, 1 N.M. 571 (decided under prior law).

**Distribution of common lands by lot illegal.** — Scheme whereby community land grant attempted to distribute some 10,000 acres of common lands among almost 2000 heirs by lottery, at a nominal fee, amounted to a violation of the statute law of this state prohibiting lotteries, as well as amounting to a dissipation of the assets of the corporation, contrary to law. *Armijo v. Town of Atrisco*, 1957-NMSC-045, 62 N.M. 440, 312 P.2d 91.

**Hand held "power bingo".** — Hand held electronic devices known as "Power Bingo" are "gambling devices" within the meaning of this section and 30-19-3 NMSA 1978, and such units may not be used in *New Mexico. Citation Bingo, Ltd. v. Otten*, 1996-NMSC-003, 121 N.M. 205, 910 P.2d 281.

**Defendants not exempt from punishment.** — Where defendants, immediately prior to trial for playing at a game of chance for money, filed a civil action for recovery of individual gambling losses under 44-5-14 NMSA 1978, they were not entitled to exemption from punishment provided for in that section. *State v. Schwartz*, 1962-NMSC-119, 70 N.M. 436, 374 P.2d 418.

**Standing to challenge validity.** — Because defendants were charged with a violation of 30-19-3F NMSA 1978, they had no standing to challenge 30-19-3E NMSA 1978 and this section. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

**Admission of "other crimes" held prejudicial.** — The admission of evidence of "other crimes, wrongs and misconduct" is prejudicial error where it laps over into a smear on gambling and general criminal activity, destroying the justification of relevance on a particular issue of intent. *United States v. Biswell*, 700 F.2d 1310 (10th Cir. 1983).

**Gambling contract unenforceable.** — An action cannot be maintained on a contract that is illegal or against public policy, where both parties are equally culpable. *Schnoor v. Griffin*, 1968-NMSC-067, 79 N.M. 86, 439 P.2d 922.

**Raffle where purchase unnecessary.** — The offering by a nightclub and package store of raffle tickets to patrons upon their entry into the premises, for a drawing to be held once a week at which prizes would be given away, so long as an individual might participate in the drawing without being required to purchase something (part with anything of pecuniary value), this would not fall within the statutory definition of a lottery and is not prohibited by this section. 1973-74 Op. Att'y Gen. No. 73-31.

**Raffle at $50 per plate dinner.** — A noncharitable organization may not hold a public dinner, the cost of which is $50 per ticket, and at which the organization gives away prizes varying in value from a few cents to several hundred dollars, drawn by lot. 1969 Op. Att'y Gen. No. 69-60.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38 Am. Jur. 2d Gambling §§ 26 to 54.

Entrapment to commit offense with respect to gambling or lotteries, 31 A.L.R.2d 1212.

Coin-operated pinball machine or similar device, played for amusement alone or confining reward to privilege of free replays, as prohibited or permitted by anti-gambling laws, 89 A.L.R.2d 815.

Bridge as within gambling laws, 97 A.L.R.2d 1420.

Private residence: gambling in private residence prohibited or permitted by anti-gambling laws, 27 A.L.R.3d 1074.

Advertising: promotion schemes of retail stores as criminal offense under anti-gambling laws, 29 A.L.R.3d 888.

Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon, 98 A.L.R.3d 694.

Validity of statute or ordinance prohibiting or regulating bookmaking or pool selling, 80 A.L.R.4th 1079.

Validity, construction, and application of statute or ordinance prohibiting or regulating use or occupancy of premises for bookmaking or pool selling, 82 A.L.R.4th 356.

Construction and application of statute or ordinance prohibiting or regulating bookmaking or pool selling, 84 A.L.R.4th 740.

38 C.J.S. Gaming § 84 et seq.; 54 C.J.S. Lotteries § 22.

## 30-19-3. Commercial gambling.

Commercial gambling consists of either:

A. participating in the earnings of or operating a gambling place;

B. receiving, recording or forwarding bets or offers to bet;

C. possessing facilities with the intent to receive, record or forward bets or offers to bet;

D. for gain, becoming a custodian of anything of value, bet or offered to be bet;

E. conducting a lottery where both the consideration and the prize are money, or whoever with intent to conduct a lottery, possesses facilities to do so; or

F. setting up for use, for the purpose of gambling, or collecting the proceeds of, any gambling device.

Whoever commits commercial gambling is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-19-3, enacted by Laws 1963, ch. 303, § 19-3.**

**Cross references.** — For gambling and gambling houses deemed public nuisances, *see* 30-19-8 NMSA 1978.

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**Constitutionality.** — Subsection F of this section is not void for vagueness and uncertainty. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

**Standing to challenge validity.** — Because defendants were charged with a violation of Subsection F of this section, they had no standing to challenge Subsection E and 30-19-2D NMSA 1978. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.



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**Applicability.** — Former law, designed to prevent and prohibit gambling, was applicable to private individuals and fraternal organizations alike. *State v. Las Cruces Elks Club*, 1950-NMSC-013, 54 N.M. 137, 215 P.2d 821.

**Offense distinguished from permitting of gambling.** — Subsection F of this section and Section 30-19-4B NMSA 1978 do not relate to the same activity, since Subsection F of this section requires a positive act by an accused relating to commercial gambling, while Section 30-19-4B NMSA 1978 connotes mere passive acquiescence in permitting a gambling device to be set up for use for the purpose of gambling in a place under his control. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

As permitting a gambling device to be set up and setting up a gambling device are not identical acts, an individual could not be held accountable under both sections for the same act. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

**Gambling distinguished from commercial gambling.** — Gambling under Section 30-19-2A NMSA 1978 is distinguishable from commercial gambling under Subsection B of this section in that Section 30-19-2A NMSA 1978 requires only one act whereas this section requires more than one act to constitute a violation. *State v. Owens*, 1984-NMCA-105, 103 N.M. 121, 703 P.2d 898, cert. quashed, 103 N.M. 62, 702 P.2d 1007.

**Elements of offense.** — That game be played for money or anything of value was an essential element in violation of former gambling law, as merely playing or operating the gaming device was not actionable. *State v. Valdez*, 1947-NMSC-059, 51 N.M. 393, 185 P.2d 977.

**Computer sweepstakes promotion was a lottery.** — Where defendant owned and operated an internet cafe where customers could purchase time on the internet using computer terminals in the cafe; as a promotion, defendant gave customers free entries into a sweepstakes that awarded cash prizes determined by chance; defendant's computer system pre-determined the winning sweepstakes entries; customers could not obtain a refund of any internet time they did not use which consisted of 99.75% of internet time purchased; and defendant retained 8% of revenues from the sale of internet time and used the balance of the revenues to pay sweepstake prizes to customers, there was sufficient evidence to support the finding that defendant's sweepstakes promotion was a lottery. *State v. Vento*, 2012-NMCA-099, 286 P.3d 627, cert. granted, 2012-NMCERT-009.

**Card game for value.** — The game of solo, played with cards for something of value, was made an offense by the general language of Laws 1921, ch. 86, § 1 (former 40-22-1, 1953 Comp.). *Grafe v. Delgado*, 1924-NMSC-065, 30 N.M. 150, 228 P. 601.

**Slot machines.** — Slot machines, where the chances were unequal with the chances in favor of the machine, were covered by former gambling law as illegal. *Territory v. Jones*, 1908-NMSC-03014 N.M. 579, 99 P. 338 (1908).

**Hand held "power bingo".** — Hand held electronic devices known as "power bingo" are "gambling devices" within the meaning of this section and Section 30-19-2 NMSA 1978, and such units may not be used in New Mexico. *Citation Bingo, Ltd. v. Otten*, 1996-NMSC-003, 121 N.M. 205, 910 P.2d 281.

**Free games as thing of value.** — Where free games were awarded through chance to a player for his enjoyment in successfully operating a pinball machine, he received something of value within proscription of Laws 1921, ch. 86, § 1 (former 40-22-1, 1953 Comp.). *Giomi v. Chase*, 1942-NMSC-071, 47 N.M. 22, 132 P.2d 715.

**Repayment in chewing gum.** — Fact that slot machine always paid player value of his money in chewing gum did not exclude it from operation of anti-gambling law. *State v. Apodaca*, 1926-NMSC-053, 32 N.M. 80, 251 P. 389.

**Supplying of lottery tickets.** — One who supplied lottery tickets to others to be sold, but did not otherwise participate in the promotion of the lottery was nevertheless subject to the penalty. *State v. Butler*, 1938-NMSC-017, 42 N.M. 271, 76 P.2d 1149.

**Essential allegations.** — If allegation that operation of a game of chance "for money or anything of value" was omitted, the indictment or information failed to charge any offense and use of word "unlawfully" operating of a game of chance did not cure the defect. *State v. Valdez*, 1947-NMSC-059, 51 N.M. 393, 185 P.2d 977.

**Failure to charge offense.** — Where information was insufficient in failing to charge an offense under statute prohibiting operation of games of chance "for money or anything of value," did not state particulars of the offense and did not refer to the section of the statute creating the offense, information could not be amended after all the evidence was introduced at the trial. *State v. Ardovino*, 1951-NMSC-018, 55 N.M. 161, 228 P.2d 947, distinguished in *State v. Silva*, 1967-NMCA-008, 78 N.M. 286, 430 P.2d 783.

**Indictment sufficient.** — An information charging accused, under former law, with "having in his possession lottery tickets for the purpose of vending the same contrary to the form of the statute," with bill of particulars describing the form of the tickets used, was sufficient. *State v. Butler*, 1938-NMSC-017, 42 N.M. 271, 76 P.2d 1149.

**Admissions as part of res gestae.** — Unless the corpus delicti of the offense charged has been otherwise established, a conviction cannot be sustained solely on extrajudicial confessions or admissions of an accused, but where evidence establishes the commission of the offense charged independently of the admissions by appellant, admissions at the time of arrest and at the place where the paraphernalia was found are a part of the res gestae and, for that reason, are admissible. *State v. La Rue*, 1960-NMSC-054, 67 N.M. 149, 353 P.2d 367 (decided under prior law).

**Evidence of operating adequate.** — While no gambling was observed on the premises, evidence of discovery of gambling paraphernalia in basement of cafe, in which defendant and others were also found, along with statements of defendant admitting that he was the operator, pointed unerringly to defendant's guilt. *State v. La Rue*, 1960-NMSC-054, 67 N.M. 149, 353 P.2d 367 (decided under prior law).

**Admission of "other crimes" held prejudicial.** — The admission of evidence of "other crimes, wrongs and misconduct" is prejudicial error where it laps over into a smear on gambling and general criminal activity, destroying the justification of relevance on a particular issue of intent. *United States v. Biswell*, 700 F.2d 1310 (10th Cir. 1983).

**Instruction on operation approved.** — Instruction that any person who manages, controls or takes or receives any money or thing of value from game for running the game or like purpose shall be deemed an operator of such game was substantially in the language of the applicable statute and correctly stated the law. *Kilpatrick v. State*, 1953-NMSC-117, 58 N.M. 88, 265 P.2d 978.

**Jury instructions were improper.** — Where defendant owned and operated an internet cafe where customers could purchase time on the internet using computer terminals in the cafe; as a promotion, defendant gave customers free entries into a sweepstakes that awarded cash prizes determined by chance; defendant's computer system pre-determined the winning sweepstakes entries; the jury was instructed on all alternative bases for a commercial gambling conviction, including the definitions of a bet, a lottery, and a gambling device; and the jury returned a general verdict that found defendant guilty of commercial gambling without identifying the underlying basis for the conviction among the alternatives in



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the commercial gambling statute, the district court erred when it used a general verdict form and instructed the jury on the charge of commercial gambling based upon the mutually exclusive theories of a lottery or a bet. *State v. Vento*, 2012-NMCA-099, 286 P.3d 627, cert. granted, 2012-NMCERT-009.

**Questions for jury.** — Where there was a substantial conflict as to whether or not the defendant operated a game of chance for money in his premises on the night in question, it was for the jury to determine the weight of the evidence, and also the credibility of the witnesses, and not the duty of the appellate court to do so. *Kilpatrick v. State*, 1953-NMSC-117, 58 N.M. 88, 265 P.2d 978.

**Consideration.** — Either a promise by the participant to pay if he does not win or payment by the participant subject to return of his money should chance make him the winner is sufficient as consideration; that a subsequent event may relieve from the promise or payment cannot obliterate the fact that at the time the participant enters the scheme consideration is rendered. 1955-56 Op. Att'y Gen. No. 55-6168.

Either a promise to pay or payment is, when tested by the law of contracts, sufficient as consideration. 1955-56 Op. Att'y Gen. No. 56-6347.

**Law reviews.** — For annual survey of New Mexico criminal law, see 16 N.M.L. Rev. 9 (1986).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38 Am. Jur. 2d Gambling §§ 82 to 117.

Connection with place where gaming is carried on which will render one guilty as keeper thereof, 15 A.L.R. 1202.

Possession of gambling device as offense not requiring showing that device was used for gambling or kept for gambling purposes, 162 A.L.R. 1188.

Validity, construction, and application of statutes or ordinances involved in prosecutions for possession of bookmaking paraphernalia, 51 A.L.R.4th 796.

Validity, construction, and application of statute or ordinance prohibiting or regulating use of messenger services to place wagers in pari-mutuel pool, 78 A.L.R.4th 483.

Validity, construction, and application of statute or ordinance prohibiting or regulating use or occupancy of premises for bookmaking or pool selling, 82 A.L.R.4th 356.

38 C.J.S. Gaming § 99 et seq.; 54 C.J.S. Lotteries §§ 22, 23.

## 30-19-4. Permitting premises to be used for gambling.

Permitting premises to be used for gambling consists of:

A. knowingly permitting any property owned or occupied by such person or under his control to be used as a gambling place; or

B. knowingly permitting a gambling device to be set up for use for the purpose of gambling in a place under his control.

Whoever commits permitting premises to be used for gambling is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-19-4, enacted by Laws 1963, ch. 303, § 19-4.**

ANNOTATIONS

**Offense distinguished from commercial gambling.** — Section 30-19-3F NMSA 1978 and Subsection B of this section do not relate to the same activity, since 30-19-3F requires a positive act by an accused relating to commercial gambling, while Subsection B of this section connotes mere passive acquiescence in permitting a gambling device to be set up for use for the purpose of gambling in a place under his control. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

As permitting a gambling device to be set up and setting up a gambling device are not identical acts, an individual could not be held accountable under both sections for the same act. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

**Guilty pleas of others inadmissible.** — Upon trial of one charged with unlawfully and knowingly permitting a game of chance for money to be played on premises occupied by him, the record of the information charging third persons with unlawful gaming and their pleas of guilty thereto was inadmissible as hearsay and as depriving the defendant of his constitutional right to be confronted by the witnesses against him. *State v. Martino*, 1918-NMSC-128, 25 N.M. 47, 176 P. 815.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon, 98 A.L.R.3d 694.

## 30-19-5. Dealing in gambling devices.

A. Dealing in gambling devices consists of manufacturing, transferring commercially or possessing, with intent to transfer commercially, any of the following:

(1) anything which he knows evidences, purports to evidence or is designed to evidence participation in gambling; or

(2) any device which he knows is designed exclusively for gambling purposes or anything which he knows is designed exclusively as a subassembly or essential part of such device. This includes, without limitation, gambling devices, numbers jars, punchboards and roulette wheels.

Proof of possession of any device designed exclusively for gambling purposes which is not in a gambling place and is not set up for use is prima facie evidence of possession with intent to transfer.



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B. The provisions of this section shall not apply to any manufacturer of gambling devices who exports his product exclusively in foreign commerce, and who is under ten thousand dollar ($10,000) bond payable to the state of New Mexico to assure export.

Provided, however, the provisions of this section shall apply to manufacturers of gambling devices used, adapted, devised or designed to be used in bookmaking, in wagering pools with respect to a sporting event, or in a numbers, policy, bolita or similar game.

C. Nothing in this section shall be construed to prohibit the ownership, possession, display, sale, purchase, exchange or transfer of antique gambling devices.

D. Whoever deals in gambling devices, other than those herein specified and excluded, is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-19-5, enacted by Laws 1963, ch. 303, § 19-5; 1965, ch. 230, § 1; 1985, ch. 108, § 2.**

**Cross references.** — For sentencing for misdemeanors, *see* 31-19-1 NMSA 1978.

**The 1985 amendment** effective June 14, 1985, designated the formerly undesignated introductory paragraph as Subsection A, redesignating former Subsections A and B as present Paragraphs (1) and (2) within that subsection, redesignated former Subsection C as present Subsection B, added present Subsection C and designated the formerly undesignated last paragraph as present Subsection D.

ANNOTATIONS

**Specific intent required.** — The narrow definitions of gambling device and dealing in gambling devices in the New Mexico law require a specific intent to use or transfer for use with a gambling purpose, and use for entertainment alone would not subject the parties to prosecution under the gambling statutes. 1969 Op. Att'y Gen. No. 69-54.

**Transporting devices to Indian country.** — Under this section and 30-19-10 NMSA 1978 the state could seize gambling devices being transported across lands under state jurisdiction to Indian country. 1965-66 Op. Att'y Gen. No. 65-221.

**Importation for entertainment.** — Gambling devices may be imported into the state and held for the purposes of providing entertainment for patrons of a nightclub which plans to use the devices with stage money and without any consideration or prize involved in the entertainment. 1969 Op. Att'y Gen. No. 69-54.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38 Am. Jur. 2d Gambling §§ 82 to 106.

Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming "devices" within criminal statute or ordinance, 1 A.L.R.3d 726.

Possession: validity of criminal legislation making possession of gambling or lottery devices or paraphernalia presumptive or prima facie evidence of other incriminating facts, 17 A.L.R.3d 491.

38 C.J.S. Gaming § 99 et seq.

## 30-19-6. Permissive lottery.

A. Nothing in Chapter 30, Article 19 NMSA 1978 shall be held to prohibit any bona fide motion picture theater from offering prizes of cash or merchandise for advertising purposes, in connection with such business or for the purpose of stimulating business, whether or not any consideration other than a monetary consideration in excess of the regular price of admission is exacted for participation in drawings for prizes.

B. Nothing in Chapter 30, Article 19 NMSA 1978 shall be construed to apply to any activity:

(1) regulated by the New Mexico Bingo and Raffle Act [60-2F-1 through 60-2F-26 NMSA 1978]; or

(2) specifically exempted from regulation by the provisions of the New Mexico Bingo and Raffle Act.

**History: 1953 Comp., § 40A-19-6, enacted by Laws 1963, ch. 303, § 19-6; 1981, ch. 231, § 1; 2009, ch. 81, § 27.**

**The 2009 amendment,** effective July 1, 2009, deleted former Subsection A, which provided that Article 19, Chapter 30 NMSA 1978 did not apply to a charitable lottery; deleted former Subsection C, which provided that Article 19, Chapter 30 NMSA 1978 did not apply to county fairs; deleted former Subsection D, which provided that Article 19, Chapter 30 NMSA 1978 did not apply to an organization that is exempt from the state income tax; and added Subsection B.

ANNOTATIONS

**Size of permissive lotteries of necessity limited.** — Although the provision of Laws 1949, ch. 133, § 1 (former 40-22-18, 1953 Comp.) lifting the ban against lotteries conducted at fairs where entire proceeds were expended in the state for benefit of public libraries, churches or religious societies did not place a limitation on the size of such lotteries, the condition imposed confined them to petty lotteries since removal of profit from a lottery would greatly curtail the size. *State v. Jones*, 1940-NMSC-066, 44 N.M. 623, 107 P.2d 324 (decided under prior law).

**Donation of gross proceeds necessary.** — Under Laws 1949, ch. 133, § 1 (former 40-22-18, 1953 Comp.), a lottery scheme which appropriated only net proceeds to a charitable organization was illegal. "All the proceeds" meant "gross proceeds." *Harriman Inst. of Social Research, Inc. v. Carrie Tingley Crippled Children's Hosp.*, 1938-NMSC-062, 43 N.M. 1, 84 P.2d 1088 (decided under prior law).



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**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38 Am. Jur. 2d Gambling § 60.

State lotteries: Actions by ticketholders against state or contractor for state, 40 A.L.R.4th 662.

Private contests and lotteries: entrants' rights and remedies, 64 A.L.R.4th 1021.

Enforceability of contract to share winnings from legal lottery ticket, 90 A.L.R.4th 784.

54 C.J.S. Lotteries § 11.

## 30-19-7. Fraudulently operating a lottery.

Fraudulently operating a lottery consists of operating or managing any lottery which does not provide a fair and equal chance to all participants, or which lottery is conducted in a manner tending to defraud or mislead the public.

Whoever commits fraudulently operating a lottery is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-19-7, enacted by Laws 1963, ch. 303, § 19-7.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Recovery of money or property lost through cheating or fraud in forbidden gambling or game, 39 A.L.R.2d 1213.

Private contests and lotteries: entrants' rights and remedies, 64 A.L.R.4th 1021.

## 30-19-7.2. Recreational bingo exception.

Nothing in this chapter or in the New Mexico Bingo and Raffle Act [60-2F-1 through 60-2F-26 NMSA 1978] prohibits a senior citizen group from organizing and conducting bingo at a senior citizen center, provided that no person other than players participating in the bingo game receive or become entitled to receive any part of the proceeds, either directly or indirectly, from the bingo game, and no minor is allowed to participate in the organization or conduct of games or play bingo. As used in this section, "senior citizen group" means an organization in which the majority of the membership consists of persons who are at least fifty-five years of age and the primary activities and purposes of which are to provide recreational or social activities for those persons.

**History: Laws 1997, ch. 101, § 1.**

**Effective dates.** — Laws 1997, ch. 101 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 20, 1997, 90 days after adjournment of the legislature. *See* Volume 14 NMSA 1978 for "Adjournment Dates of Sessions of Legislature" table.

## 30-19-8. Gambling and gambling houses as public nuisance.

Except as otherwise permitted or excepted under this article [30-19-1 through 30-19-15 NMSA 1978], any gambling device or gambling place is a public nuisance per se.

The attorney general, any district attorney or any citizen of this state may institute an injunction proceeding to have such public nuisance abated. In the event such injunction is issued on behalf of any citizen of this state it shall not be necessary in such proceeding to show that he is personally injured by the act complained of.

**History: 1953 Comp., § 40A-19-8, enacted by Laws 1963, ch. 303, § 19-8.**

**Cross references.** — For provision defining a public nuisance, *see* 30-8-1 NMSA 1978.

For abatement of a public nuisance, *see* 30-8-8 NMSA 1978.

ANNOTATIONS

**Former law not exclusive.** — Laws 1921, ch. 86, § 9 (40-22-9, 1953 Comp.), providing for closing of gaming-house, did not impair or modify the common-law powers of courts to abate public nuisances summarily inasmuch as it was a permissive statute only. *State v. Johnson*, 1948-NMSC-033, 52 N.M. 229, 195 P.2d 1017 (decided under prior law).

**Suit to enjoin pari-mutuel betting not maintainable.** — Plaintiffs could not seek injunctive relief through the general gambling statute, 40-22-6, 1953 Comp., to enjoin defendant from using certain premises for pari-mutuel betting on horse racing, until they could have shown that the pari-mutuel statute, 60-1-10 NMSA 1978, was unconstitutional. *Patton v. Fortuna Corp.*, 1960-NMSC-136, 68 N.M. 40, 357 P.2d 1090.

**Destruction of equipment.** — Under Laws 1921, ch. 86, § 9 (former 40-22-9, 1953 Comp.), any gaming-house, gambling table, banking game, gaming paraphernalia or gaming device or equipment of any sort was a public nuisance and the equipment could be ordered destroyed upon hearing for an injunction in district court. *State v. Las Cruces Elks Club*, 1950-NMSC-013, 54 N.M. 137, 215 P.2d 821.



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**Contempt charge.** — Injunction against use of certain premises for gaming was not ineffectual as a basis for contempt charge because of failure of court to order premises closed. Contempt was sufficiently charged by alleging injunction, and subsequent use of premises. *State v. Dunn*, 1932-NMSC-047, 36 N.M. 258, 13 P.2d 557.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38 Am. Jur. 2d Gambling § 16.

Private residence: gambling in private residence as prohibited or permitted by anti-gambling laws, 27 A.L.R.3d 1074.

66 C.J.S. Nuisances § 48.

## 30-19-9. Evidence of unlawful use of premises.

Evidence that a place has a general reputation as a gambling site or that at or about the time in question it was frequently visited by persons known to be professional gamblers or known as frequentors [frequenters] of gambling places is admissible on the issue of whether such site is a gambling place.

**History: 1953 Comp., § 40A-19-9, enacted by Laws 1963, ch. 303, § 19-9.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Admissibility, in prosecution for gambling or gaming offense, of evidence of other acts of gambling, 64 A.L.R.2d 823.

## 30-19-10. Forfeiture of equipment.

Any gambling device or other equipment of any type used in gambling is subject to forfeiture, and the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of such property.

**History: 1953 Comp., § 40A-19-10, enacted by Laws 1963, ch. 303, § 19-10; 2002, ch. 4, § 14.**

**The 2002 amendment,** effective July 1, 2002, after the first phrase, "Any gambling device or other equipment of any type used in gambling," deleted the rest of the section, which contained standards and procedures for the forfeiture of gambling devices and other equipment of any type used in gambling; and added the present remainder of section.

ANNOTATIONS

**Under law prior to 2002, slot machines in private home that are not used for illegal gambling** are not gaming machines or gambling devices and therefore are not subject to forfeiture because they are not licensed under the Gaming Control Act. *State ex rel. N.M. Gaming Control Bd. v. Ten (10) Gaming Devices*, 2005-NMCA-117, 138 N.M. 426, 120 P.3d 848, cert. quashed, 2006-NMCERT-003, 139 N.M. 352, 132 P.3d 1038.

**Forfeiture of money.** — Money segregated as gambling paraphernalia cannot be restored to the former owner, and such money which has been earmarked as an integral part of gambling equipment may be seized as a gambling device; this rule is not limited to situations where money is placed inside a gambling device such as a slot machine and becomes a component part thereof, but includes money found lying on a card table which had been used in the game. *State v. Casarez*, 1965-NMSC-103, 75 N.M. 436, 405 P.2d 759.

**Applicability.** — Statute providing for forfeiture of gambling devices seized by law enforcement officials has no application to equipment not "used in gambling." 1969 Op. Att'y Gen. No. 69-54.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38 Am. Jur. 2d Gambling §§ 174 to 183.

Money in gambling machine or other receptacle, used in connection with gambling, seized by public authorities, rights and remedies in respect of, 79 A.L.R. 1007.

Forfeiture of property for unlawful use before trial of individual offender, 3 A.L.R.2d 738.

Forfeiture of money used in connection with gambling or lottery, or seized by officers in connection with an arrest or search on premises where such activities took place, 19 A.L.R.2d 1228.

Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming "devices" within criminal statute or ordinance, 1 A.L.R.3d 726.

Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding, 8 A.L.R.3d 473.

Constitutionality of statutes providing for destruction of gambling devices, 14 A.L.R.3d 366.

38A C.J.S. Gaming § 75 et seq.

## 30-19-11. Remedy of lessor.

If the lessee of property has been convicted of using it as a gambling place or if the property has been adjudged to constitute a public nuisance, such lease shall be voidable at the option of the lessor. The lessor shall have the same remedies for regaining possession as in the case of a tenant holding over his term.

**History: 1953 Comp., § 40A-19-11, enacted by Laws 1963, ch. 303, § 19-11.**

**Cross references.** — For forcible entry and detainer, *see* 35-10-1 NMSA 1978 et seq.

For Uniform Owner-Resident Relations Act, *see* 47-8-1 NMSA 1978 et seq.



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## 30-19-12. Duties of enforcement officials.

Upon the filing with any district judge or justice of the peace [magistrate court] of an affidavit in writing made by any citizen that gambling as prohibited by this article [30-19-1 through 30-19-15 NMSA 1978] is being conducted in any building, room, premises or place describing the same for sufficient identification, it shall be the duty of the district judge or justice of the peace [magistrate] with whom such affidavit is filed to immediately issue a warrant commanding the peace officer to whom the same is addressed to forthwith enter and search the building, room, premises or place. In the event the location is being used for purposes prohibited by this article, the peace officer shall arrest without a warrant the parties therein or making their escape therefrom, and who would be subject to arrest with a warrant. The officers shall also take possession of any gambling paraphernalia, device or equipment found therein, and shall hold the same until deprived of the possession thereof by law. It shall be the duty of the peace officers to take any persons so arrested before some magistrate having jurisdiction and to forthwith file a proper complaint against each person so arrested.

**History: 1953 Comp., § 40A-19-12, enacted by Laws 1963, ch. 303, § 19-12.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. The office of justice of the peace was abolished by 35-1-38 NMSA 1978, and the jurisdiction, powers and duties were transferred to the magistrate courts.

ANNOTATIONS

**Disposition of affidavit.** — Former section 40-22-8, 1953 Comp., provided only for the filing of the required affidavit and had no further directive as to the disposition of the same by the judge. *Howard v. United States*, 306 F.2d 392 (10th Cir. 1962).

**Effect of misplacing affidavit.** — If the affidavit provided for in 40-22-8, 1953 Comp., was lost or misplaced, the search warrant and the proceedings leading to its issuance, otherwise in conformity with the statute, could not be thereby invalidated. *Howard v. United States*, 306 F.2d 392 (10th Cir. 1962).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38A C.J.S. Gaming § 75 et seq.

## 30-19-13. Bribery of participant in a contest.

Bribery of participant in a contest consists of:

A. the transferring or promise to transfer anything of value to any person with intent to influence thereby any participant in a contest to refrain from exerting his full skill, speed, strength or endurance in such contest; or

B. the agreeing or offering by a participant in a contest, to refrain from exerting his full skill, speed, strength or endurance, in return for anything of value transferred or promised to himself or another.

The term "participant" as used in this section includes any person who is selected to or expects to take part in any such contest.

Whoever commits bribery of participant in a contest is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-19-13, enacted by Laws 1963, ch. 303, § 19-13.**

**Cross references.** — For other provisions relating to bribery, *see* 30-24-1 to 30-24-3 NMSA 1978.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Bribery in athletic contest, 49 A.L.R.2d 1234.

Private contests and lotteries: entrants' rights and remedies, 64 A.L.R.4th 1021.

Recovery in tort for wrongful interference with chance to win game, sporting event, or contest, 85 A.L.R.4th 1048.

## 30-19-14. Testimony of witnesses to gambling.

Any district judge or justice of the peace [magistrate court] having jurisdiction over any of the crimes enumerated in this article [30-19-1 through 30-19-15 NMSA 1978], or any district attorney inquiring into the alleged violation of any of the provisions of this article, may subpoena persons and compel their attendance as witnesses and may compel such witnesses to testify concerning any violation of this article.

Any person who is so subpoenaed and examined shall be immune to prosecution or conviction for any violation of this article about which he testifies.



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A conviction may be had for any violation of this article upon the unsupported testimony of any accomplice or participant.

**History: 1953 Comp., § 40A-19-14, enacted by Laws 1963, ch. 303, § 19-14.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. The office of justice of the peace has been abolished by 35-1-38 NMSA 1978 and the jurisdiction, powers and duties thereof have been transferred to the magistrate courts.

ANNOTATIONS

**Subpoena powers limited.** — A close study of the statutory language contained in 40-22-11, 1953 Comp., predecessor of this section, leads to the conclusion that the powers vested in district attorneys under the provisions of that section were limited to situations wherein the witnesses were brought before a grand jury, or were subpoenaed to testify as to alleged violations of the gaming laws of the state at the time of trial. 1961-62 Op. Att'y Gen. No. 61-88.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Witness, asking as to pursuing occupation of gambling for purposes of impeachment, 1 A.L.R. 1402.

Admissibility, in prosecution for gambling or gaming offense, of evidence of other acts of gambling, 64 A.L.R.2d 823.

## 30-19-15. Unlawful to accept for profit anything of value to be transmitted or delivered for gambling; penalty.

A. It is unlawful for any person to, directly or indirectly, knowingly accept for a fee, property, salary or reward anything of value from another to be transmitted or delivered for gambling or parimutuel [pari-mutuel] wagering on the results of a race, sporting event, contest or other game of skill or chance or any other unknown or contingent future event or occurrence whatsoever.

B. None of the provisions of this act shall be construed to prohibit the operation or continued operation of bingo programs presently conducted for charitable purposes.

C. Any person violating any of the provisions of this section is guilty of a fourth degree felony.

**History: Laws 1979, ch. 4, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Compiler's notes.** — The term "this act", referred to in Subsection B, means Laws 1979, ch. 4. Laws 1979, ch. 4, § 1, is compiled as this section.

# ARTICLE 20

# Crimes Against Public Peace

Sec.
30-20-1. Disorderly conduct.
30-20-2. Public affray.
30-20-3. Unlawful assembly.
30-20-4. Recompiled.
30-20-5. Recompiled.
30-20-6. Recompiled.
30-20-7. Recompiled.
30-20-8. Recompiled.
30-20-9. Recompiled.
30-20-10. Loitering of minors.
30-20-11. Dueling.
30-20-12. Use of telephone to terrify, intimidate, threaten, harass, annoy or offend; penalty.
30-20-13. Interference with members of staff, public officials or the general public; trespass; damage to property; misdemeanors; penalties.
30-20-14. Institutions permitted to adopt rules.
30-20-15. Construction.
30-20-16. Bomb scares and shooting threats unlawful.
30-20-17. Reward.
30-20-18. Interference with athletic event.

## 30-20-1. Disorderly conduct.

Disorderly conduct consists of:

A. engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to disturb the peace; or

B. maliciously disturbing, threatening or, in an insolent manner, intentionally touching any house occupied by any person.

Whoever commits disorderly conduct is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-20-1, enacted by Laws 1963, ch. 303, § 20-1; 1967, ch. 120, § 1.**



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## ANNOTATIONS

**Prosecution for disorderly conduct while intoxicated.** — The Detoxification Reform Act does not preclude criminal prosecution for disorderly conduct when the accused's conduct otherwise satisfies the statutory elements of the charge, regardless of whether the offender is intoxicated. *State v. Correa*, 2009-NMSC-051, 147 N.M. 291, 222 P.3d 1.

**Insufficient evidence.** — Where police officers responded to a call from defendant's neighbor who alleged that defendant had made death threats to the neighbor; when defendant answered the officers' knock on the door, the officers identified themselves as police officers and asked to talk to defendant; defendant shut and locked the metal security door and refused to talk to the officers; upon a second request for cooperation by the officers, defendant raised his voice, used profanity and instructed the officers to leave; the officers observed that defendant was heavily intoxicated; defendant was joined at the door by his friend who made obscene gestures and yelled profanities at the officers through the screen door; and the record did not reveal any threatening conduct toward the officers, the evidence was insufficient to support defendant's conviction of disorderly conduct. *State v. Correa*, 2009-NMSC-051, 147 N.M. 291, 222 P.3d 1.

**Constitutionality.** — This section is not void for vagueness and is not overly broad. *State v. James M.*, 1990-NMCA-135, 111 N.M. 473, 806 P.2d 1063, cert. denied, 111 N.M. 529, 807 P.2d 227 (1991).

**No common-law crime.** — There is no common-law crime of disorderly conduct; hence, unless the acts complained of fall clearly within the statute, they are not disorderly. *State v. Florstedt*, 1966-NMSC-208, 77 N.M. 47, 419 P.2d 248.

**Elements of offense.** — To violate this section, defendant's conduct must have (1) been indecent or profane and (2) tended to disturb the peace. *State v. James M.*, 1990-NMCA-135, 111 N.M. 473, 806 P.2d 1063, cert. denied, 111 N.M. 529, 807 P.2d 227 (1991).

Evidence supported defendant's conviction of disorderly conduct, where defendant - while pointing and flailing his arms - directed loud and profane language to another person, and defendant's conduct supported an intervening police officer's belief that a fight was possible. *State v. James M.*, 1990-NMCA-135, 111 N.M. 473, 806 P.2d 1063, cert. denied, 111 N.M. 529, 807 P.2d 227 (1991).

**Meaning of "indecent".** — Meaning of indecent includes that tending toward or being in fact something generally viewed as morally indelicate or improper or offensive. *State v. Oden*, 1971-NMCA-062, 82 N.M. 563, 484 P.2d 1273.

**Disturbing peace as breach thereof.** — The meaning of "disturb the peace" in this statute is not strained if equated with the words "breach of the peace" as used in New York statute. *State v. Florstedt*, 1966-NMSC-208, 77 N.M. 47, 419 P.2d 248.

**Tendency to disturb peace.** — All this section required in the case at hand was indecent conduct which tended to disturb the peace; conduct which is inconsistent with the peaceable and orderly conduct of society tends to disturb the peace and quiet of the community. *State v. Oden*, 1971-NMCA-062, 82 N.M. 563, 484 P.2d 1273.

Section contemplates conduct which tends to disturb the peace; a breach of the peace is a disturbance of public order by an act of violence or by any act likely to produce violence or which, by causing consternation and alarm, disturbs the peace and quiet of the community. *State v. Doe*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464.

**Nonprovocative objection to police detention.** — One is not to be punished for nonprovocatively voicing his objection to what he obviously feels is a highly questionable detention by a police officer. *State v. Doe*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464.

**Determining nature of conduct.** — Since disturbance is viewed in relation to the peace and quiet of the community, the question of disturbing the peace would not be determined solely by the reaction of the girls toward whom his conduct was directed. *State v. Oden*, 1971-NMCA-062, 82 N.M. 563, 484 P.2d 1273.

**Conduct indecent.** — Where defendant by language and gesture referred to male and female sex organs while talking to girls on tennis courts and after defendant's companions appeared naked he asked girls if they had ever seen a nude boy before, there was substantial evidence that defendant's conduct was indecent and tended to disturb the peace. *State v. Oden*, 1971-NMCA-062, 82 N.M. 563, 484 P.2d 1273.

**Blocking of road by cars** was not disorderly conduct. *State v. Florstedt*, 1966-NMSC-208, 77 N.M. 47, 419 P.2d 248.

**Elements of breach of peace not present.** — Where the defendant was angry and had his fist clenched but made no gesture or movement toward some police officers, and there was no evidence that a crowd was gathering, that the defendant was inciting belligerent behavior or that he was causing consternation or alarm, then the defendant's words and actions did not constitute disorderly conduct. *State v. Doe*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464.

**Offensive statements directed at police.** — Because police officers are held to a higher standard of tolerance for abuse or offensive language, evidence that defendant directed offensive statements at an officer who had come onto his premises was insufficient to support a conviction for disorderly conduct. *State v. Hawkins*, 1999-NMCA-126, 128 N.M. 245, 991 P.2d 989.

**Tendency to disturb peace not shown.** — Where officer saw no acts of violence or indecent behavior, nor did he hear any boisterous, loud, noisy or profane language and he observed only a gathering crowd of teenagers and people in their early twenties, conviction for disorderly conduct would be overturned as conduct was not such as "tends to disturb the peace." *State v. Florstedt*, 1966-NMSC-208, 77 N.M. 47, 419 P.2d 248.

**Acquittal bars retrial for battery.** — After a magistrate's determination that the defendant was not guilty of resisting and obstructing an officer and disorderly conduct because he was acting in defense of another, the state cannot charge him with battery on a police officer and constitutionally bring him before a new fact finder to relitigate that same factual issue. *State v. Orosco*, 1982-NMCA-181, 99 N.M. 180, 655 P.2d 1024.

**Probable cause for arrest.** — A police officer who heard defendant use loud and profane language and observed a woman whose actions indicated to him that defendant was bothering her had probable cause to arrest defendant for disorderly conduct. *State v. Salas*, 1999-NMCA-099, 127 N.M. 686, 986 P.2d 482, cert. denied, 128 N.M. 149, 990 P.2d 823.

Police did not have probable cause to arrest an anti-war protestor for disorderly conduct where the anti-war protestor chanted the non-abusive, non-profane slogan "police strike" for about one minute and then stood quietly in the street or to arrest an anti-war protestor who was ringing a cow bell during the protest. *Buck v. City of Albuquerque*, 549 F. 3d 1269 (10th Cir. 2008).

**Evidence sufficient for conviction.** — Since the defendant while attempting to drive on military base refused to show his identification to the officer at the gate and the prosecution's witnesses all testified that they perceived the defendant's actions as a physical threat to the officer, and the few inconsistencies in the recollections of three other witnesses did not detract from their account that the defendant was either struggling with the officer or attempting to hit him with his elbow, evidence was sufficient to convict defendant of disorderly conduct. *United*



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*States v. Stenzel*, 49 F.3d 658 (10th Cir.), cert. denied, 516 U.S. 840, 116 S. Ct. 123, 133 L. Ed. 2d 73 (1995).

**Law reviews.** — For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

12 Am. Jur. 2d Breach of Peace and Disorderly Conduct §§ 30 to 37.

Police officer, failure of one on street to obey order of, to move on, as disorderly conduct, 65 A.L.R.2d 1152.

Students: participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly or similar offense, 32 A.L.R.3d 551.

Validity and construction of statutes or ordinances prohibiting profanity or profane swearing or cursing, 5 A.L.R.4th 956.

Insulting words addressed directly to police officer as breach of peace or disorderly conduct, 14 A.L.R.4th 1252.

Validity, construction, and effect of "hate crimes" statutes, "ethnic intimidation" statutes, or the like, 22 A.L.R.5th 261.

27 C.J.S. Disorderly Conduct § 1 (2).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and operation of federal disorderly conduct regulation (36 C.F.R. § 2.34), 180 A.L.R. Fed. 637.

## 30-20-2. Public affray.

Public affray consists of two or more persons voluntarily or by agreement engaging in any fight or using any blows or violence toward each other in an angry or quarrelsome manner in any public place, to the disturbance of others.

Whoever commits public affray is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-20-3, enacted by Laws 1963, ch. 303, § 20-3.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 12 Am. Jur. 2d Breach of Peace and Disorderly Conduct § 18.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault, 24 A.L.R.4th 243.

2A C.J.S. Affray §§ 5 to 14.

## 30-20-3. Unlawful assembly.

Unlawful assembly consists of three or more persons assembling together with intent to do any unlawful act with force or violence against the person or property of another, and who shall make any overt act to carry out such unlawful purpose.

Whoever commits unlawful assembly is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-20-4, enacted by Laws 1963, ch. 303, § 20-4.**

ANNOTATIONS

**Watermelon stealing.** — Boys on a watermelon stealing escapade were guilty of having assembled unlawfully to do an unlawful act of force and violence against the property in question and to commit an unlawful act against the peace. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

**Interfering with mine.** — Testimony that activities of accused prevented workmen from entering mine, that it was planned to shut off pump in mine, without which the mine would be flooded, and that gas bombs were necessary to disperse the crowd about mine shaft was sufficient to sustain a conviction of unlawful assembly under Laws 1876, ch. 10, § 1 (former 40-12-10, 1953 Comp.). *State v. Gennis*, 1937-NMSC-042, 41 N.M. 453, 70 P.2d 902.

**Attack on school bus driver.** — Evidence that defendants acted in concert in meeting school bus and attacking driver thereof was sufficient to support verdict of unlawful assembly under Laws 1876, ch. 10, § 1 (former 40-12-10, 1953 Comp.). *State v. Hawks*, 1923-NMSC-035, 28 N.M. 486, 214 P. 753.

**Indictment sufficient.** — Indictment charging defendant and 100 other persons with unlawful assembly was not defective for failure to allege names of others than defendants or that their names were unknown. *State v. Gennis*, 1937-NMSC-042, 41 N.M. 453, 70 P.2d 902.

**Member of unlawful assembly may not recover for injuries** inflicted upon him by a fellow member while they are carrying out the unlawful purposes of such assembly if there is a causal connection between such act and the injury. *Curry v. Vesely*, 1960-NMSC-007, 66 N.M. 372, 348 P.2d 490.

**Unless unlawful plan abandoned.** — Where boy who, along with a group of others, had been proceeding to picnic grounds to take part in a nighttime gang fight had either never intended to have any part in contemplated fight or had abandoned intention to do so prior to his injury, judgment against driver of other vehicle in the group for injuries in accident caused by his negligence would be affirmed. *Curry v. Vesely*, 1960-NMSC-007, 66 N.M. 372, 348 P.2d 490.

**Suppression of riot as homicide defense.** — Request for directed verdict based on defense of suppression of riot was properly refused in homicide prosecution where there was no proof of any common design by decedent's party to do some unlawful act. *State v. Martinez*, 1949-NMSC-053, 53 N.M. 432, 210 P.2d 620.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 54 Am. Jur. 2d Mobs and Riots §§ 19, 23 et seq.

What constitutes offense of unlawful assembly, 71 A.L.R.2d 875.

"Choice of evils," necessity, duress, or similar defense to state or local criminal charges based on acts of public protest, 3 A.L.R.5th 521.

91 C.J.S. Unlawful Assembly § 2.



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## 30-20-4. Recompiled.

**Recompilations.** — Laws 2005, ch. 22, § 4 recompiled former 30-20-4 NMSA 1978 as 12-10-16 NMSA 1978, effective July 1, 2005.

## 30-20-5. Recompiled.

**Recompilations.** — Laws 2005, ch. 22, § 4 recompiled former 30-20-5 NMSA 1978 as 12-10-17 NMSA 1978, effective July 1, 2005.

## 30-20-6. Recompiled.

**Recompilations.** — Laws 2005, ch. 22, § 4 recompiled former 30-20-6 NMSA 1978 as 12-10-18 NMSA 1978, effective July 1, 2005.

## 30-20-7. Recompiled.

**Recompilations.** — Laws 2005, ch. 22, § 4 recompiled former 30-20-7 NMSA 1978 as 12-10-19 NMSA 1978, effective July 1, 2005.

## 30-20-8. Recompiled.

**Recompilations.** — Laws 2005, ch. 22, § 4 recompiled former 30-20-8 NMSA 1978 as 12-10-20 NMSA 1978, effective July 1, 2005.

## 30-20-9. Recompiled.

**Recompilations.** — Laws 2005, ch. 22, § 4 recompiled former 30-20-9 NMSA 1978 as 12-10-21 NMSA 1978, effective July 1, 2005.

## 30-20-10. Loitering of minors.

Loitering of minors consists of the owner or operator of any saloon permitting a person under the age of twenty-one years to attend, frequent or loiter in or about such premises without being accompanied by the parent or guardian of the person.

Whoever commits loitering of minors is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-20-6, enacted by Laws 1963, ch. 303, § 20-6; 1973, ch. 138, § 17; 1977, ch. 35, § 1.**

ANNOTATIONS

**Instructions to employees no defense.** — That proprietor of saloon in which gambling was permitted instructed his employees not to allow minors to gamble was no defense, where minors were permitted to gamble by his bartender. *Territory v. Church*, 1907-NMSC-025, 14 N.M. 226, 91 P. 720 (decided under prior law).

**Absolute prohibition.** — There is an absolute prohibition against the frequenting and loitering of any minor upon premises used for the sale and consumption of alcoholic beverages. 1957-58 Op. Att'y Gen. No. 58-151.

**Public dance to be kept free of alcohol.** — Where minors for the purposes of a public dance use a segregated part of the American Legion Hall, it must at all times during such use be kept entirely free from alcoholic beverages, such restriction including not only sales and services but the permitting of beverages to be carried into the hall by anyone regardless of the source or place of original purchase. 1957-58 Op. Att'y Gen. No. 58-151.

**Principal business and purpose.** — The only workable method of classifying an establishment as a poolroom (permission of unaccompanied minors to frequent which was prohibited prior to 1977 amendment) was the principal business and purpose test. 1963-64 Op. Att'y Gen. No. 64-32 (opinion rendered under prior law).

**Establishment not poolroom.** — Since principal business and purpose of bowling establishment which also contained four pool tables and a snack bar was not the playing of pool, the establishment was not a poolroom. 1963-64 Op. Att'y Gen. No. 64-32 (opinion rendered under prior law).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity of loitering statutes and ordinances, 25 A.L.R.3d 836.

Validity, construction, and application of loitering statutes and ordinances, 72 A.L.R.5th 1.



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## 30-20-11. Dueling.

Dueling consists of any person:

A. conveying by written or verbal message a challenge to any other person to fight a duel with any deadly weapon, and whether or not such duel ensues;

B. accepting a challenge from another person to fight a duel with any deadly weapon, and whether or not such duel ensues;

C. engaging in or fighting a duel with any deadly weapon; or

D. aiding, encouraging or seconding either party to a duel and being present at such duel when deadly weapons are used.

Whoever commits dueling is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-20-7, enacted by Laws 1963, ch. 303, § 20-7.**

**Cross references.** — For definition of deadly weapon, *see* 30-1-12 NMSA 1978.

ANNOTATIONS

**Purpose of antidueling statutes** is to discourage and discountenance the settlement of quarrels by duel. *State v. Romero*, 1990-NMCA-114, 111 N.M. 99, 801 P.2d 681, cert. denied, 111 N.M. 77, 801 P.2d 659.

**Dueling defined.** — A duel is a combat with deadly weapons between two persons, fought according to the terms of a precedent agreement and under certain agreed and prescribed rules. *State v. Romero*, 1990-NMCA-114, 111 N.M. 99, 801 P.2d 681, cert. denied, 111 N.M. 77, 801 P.2d 659.

**Duel distinguished from affray.** — A duel differs from an affray in that the former is always a result of design while the latter is upon a sudden quarrel. *State v. Romero*, 1990-NMCA-114, 111 N.M. 99, 801 P.2d 681, cert. denied, 111 N.M. 77, 801 P.2d 659.

**Characteristics of dueling.** — A duel has none of the elements of sudden heat and passion. *State v. Romero*, 1990-NMCA-114, 111 N.M. 99, 801 P.2d 681, cert. denied, 111 N.M. 77, 801 P.2d 659.

Duels are generally fought under rules of considerable formality. *State v. Romero*, 1990-NMCA-114, 111 N.M. 99, 801 P.2d 681, cert. denied, 111 N.M. 77, 801 P.2d 659.

**Conviction reversed.** — Conviction for dueling was reversed, where a formal agreement to fight a duel could not be inferred from evidence that the respective combatants went to their home and car to retrieve their weapons, that they were facing each other as they were shooting, and that gunfire took place in rapid succession. *State v. Romero*, 1990-NMCA-114, 111 N.M. 99, 801 P.2d 681, cert. denied, 111 N.M. 77, 801 P.2d 659.

**Am. Jur. 2d, A.L.R. and C.J.S. references.**— 25 Am. Jur. 2d Dueling § 1.

28A C.J.S. Dueling § 2.

## 30-20-12. Use of telephone to terrify, intimidate, threaten, harass, annoy or offend; penalty.

A. It shall be unlawful for any person, with intent to terrify, intimidate, threaten, harass, annoy or offend, to telephone another and use any obscene, lewd or profane language or suggest any lewd, criminal or lascivious act, or threaten to inflict injury or physical harm to the person or property of any person. It shall also be unlawful for any person to attempt by telephone to extort money or other thing of value from any other person, or to otherwise disturb by repeated anonymous telephone calls the peace, quiet or right of privacy of any other person at the place where the telephone call or calls were received, or to maliciously make a telephone call, whether or not conversation ensues, with intent to annoy or disturb another, or to disrupt the telecommunications of another.

B. The use of obscene, lewd or profane language or the making of a threat or statement as set forth in Subsection A shall be prima facie evidence of intent to terrify, intimidate, threaten, harass, annoy or offend.

C. Any offense committed by use of a telephone as set forth in this section shall be deemed to have been committed at either the place where the telephone call or calls originated or at the place where the telephone call or calls were received.

D. Whosoever violates this section is guilty of a misdemeanor, unless such person has previously been convicted of such offense or of an offense under the laws of another state or of the United States which would have been an offense under this section if committed in this state, in which case such person is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-20-8, enacted by Laws 1967, ch. 120, § 2.**

**Cross references.** — For evidentiary rule relating to use of presumptions in criminal cases, *see* Rule 11-302 NMRA.

**Severability.** — Laws 1967, ch. 120, § 3, provides for the severability of the act if any part or application thereof is held invalid.



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**Constitutionality.** — This section is not unconstitutionally overbroad, nor is it void for vagueness. *State v. Gattis*, 1986-NMCA-121, 105 N.M. 194, 730 P.2d 497.

**Applicability of Subsection A.** — The first sentence of Subsection A explicitly covers threats conveyed by telephone. The legislature did not intend that the later portion of the statute relating to malicious calls should duplicate that coverage. When a threat is the sole basis for finding that a call with an otherwise proper purpose is inexcusable, then the first sentence of Subsection A controls. *State v. Stephens*, 1991-NMCA-019, 111 N.M. 543, 807 P.2d 241.

**"Threats"** under this section include, at most, threats of criminal or tortious misconduct. *State v. Stephens*, 1991-NMCA-019, 111 N.M. 543, 807 P.2d 241.

**"Telephoning another".** — Evidence that a third party connected the victim to an existing call between defendant and the third party as a three-way call was sufficient to conclude that defendant violated this section because one can violate Subsection A without physically conducting the acts which initiate a telephone call. *In re. Shaneace L.*, 2001-NMCA-005, 130 N.M. 89, 18 P.3d 330, cert. denied, 130 N.M. 154, 20 P.3d 811, *overruled on other grounds by State v. Trossman*, 2009-NMSC-034, 146 N.M. 462, 212 P.3d 350.

**Determination of intent.** — The language used in calls may be considered in determining defendant's intent in making the calls. Likewise, the time that the calls were made and the previous efforts to make defendant desist may be considered. *State v. Gattis*, 1986-NMCA-121, 105 N.M. 194, 730 P.2d 497.

The victim's testimony that defendant threatened to kill her and her baby shortly after the placing of the telephone call was sufficient evidence from which it could be inferred that defendant had the intent to annoy or harass the victim. *In re. Shaneace L.*, 2001-NMCA-005, 130 N.M. 89, 18 P.3d 330, cert. denied, 130 N.M. 154, 20 P.3d 811, *overruled on other grounds by State v. Trossman*, 2009-NMSC-034, 146 N.M. 462, 212 P.3d 350.

**Sufficient evidence to identify the defendant.** — Where defendant was charged with use of a telephone to terrify, intimidate, threaten, harass, annoy or offend, and bribery or intimidation of a witness, and where, at trial, the victim testified that defendant was her husband, that they had been married for many years but that they had been separated since 2010, that in December 2016, defendant appeared at the victim's home and started an altercation, during which defendant broke the windshield on the victim's car, that later that same day, defendant left two voicemails on the victim's phone threatening to kill her for calling the police, that she was familiar with defendant's voice from the many years that they had been married, that she recognized defendant's voice and cell phone number from the voicemails, and that the day before a magistrate court trial on a domestic violence charge related to the broken windshield, defendant called the victim and threatened to hurt her if she showed up to court, and where the state presented to the jury recordings of the voicemails, the evidence was sufficient to identify defendant as the person who left the voicemails and called the victim directly, and was sufficient to support defendant's convictions. *State v. Vigil*, 2021-NMCA-024, cert. denied.

**Legitimate purpose.** — When a caller has a legitimate purpose and the call communicates that purpose, only in extreme circumstance is the call inexcusable. Such a circumstance can be created by a variety of factors. One factor would be the language employed in the call. Other factors could be the frequency of calls, the time of day of the call, or the strength and frequency of the recipient's objections to such calls. *State v. Stephens*, 1991-NMCA-019, 111 N.M. 543, 807 P.2d 241.

**Evidence insufficient.** — Evidence was insufficient to sustain defendant's conviction, where defendant made telephone calls for the legitimate purpose of seeking assistance from the parents of her granddaughter's boyfriend to try to terminate what she saw as an unhealthy relationship. *State v. Stephens*, 1991-NMCA-019, 111 N.M. 543, 807 P.2d 241.

Evidence of the effect on the recipient of the calls cannot substitute for evidence of the defendant's misconduct. *State v. Stephens*, 1991-NMCA-019, 111 N.M. 543, 807 P.2d 241.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Misuse of telephone as minor criminal offense, 97 A.L.R.2d 503.

Right of telephone or telegraph company to refuse, or discontinue, service because of use of improper language, 32 A.L.R.3d 1041.

Validity, construction, and application of state criminal statute forbidding use of telephone to annoy or harass, 95 A.L.R.3d 411.

Telephone company's liability for disclosure of number or address of subscriber holding unlisted number, 1 A.L.R.4th 218.

Telephone calls as nuisance, 53 A.L.R.4th 1153.

Validity, Construction and Application of Telephone Consumer Protection Act (47 USCS § 227), 132 A.L.R. Fed. 625.

86 C.J.S. Telegraphs, Telephones, Radio and Television § 121.

## 30-20-13. Interference with members of staff, public officials or the general public; trespass; damage to property; misdemeanors; penalties.

A. No person shall, at or in any building or other facility or property owned, operated or controlled by the state or any of its political subdivisions, willfully deny to staff, public officials or the general public:

(1) lawful freedom of movement within the building or facility or the land on which it is situated;

(2) lawful use of the building or facility or the land on which it is situated; or

(3) the right of lawful ingress and egress to the building or facility or the land on which it is situated.

B. No person shall, at or in any building or other facility or property owned, operated or controlled by the state or any of its political subdivision [subdivisions], willfully impede the staff or a



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public official or a member of the general public through the use of restraint, abduction, coercion or intimidation or when force and violence are present or threatened.

C. No person shall willfully refuse or fail to leave the property of or any building or other facility owned, operated or controlled by the state or any of its political subdivisions when requested to do so by a lawful custodian of the building, facility or property if the person is committing, threatens to commit or incites others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of the property, building or facility.

D. No person shall willfully interfere with the educational process of any public or private school by committing, threatening to commit or inciting others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school.

E. Nothing in this section shall be construed to prevent lawful assembly and peaceful and orderly petition for the redress of grievances, including any labor dispute.

F. Any person who violates any of the provisions of this section shall be deemed guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-20-10, enacted by Laws 1970, ch. 86, § 2; 1975, ch. 52, § 2; 1981, ch. 32, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## ANNOTATIONS

**Statutory standard to sustain a conviction under Subsection D.** — Section 30-20-13(D) NMSA 1978 refers to a defendant's intent to do some further act or achieve some additional consequence, interference with the educational process, and therefore 30-20-13(D) NMSA 1978 is a specific intent crime; the actus reas of the offense is threatening to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school. *State v. Quintin C.*, 2019-NMCA-069.

**Insufficient evidence to support conviction for willful interference with the educational process.** — Where, based on evidence presented by the state that child stated that he was creating a "kill list", the trial judge erred in finding that child committed the delinquent act of willfully interfering with the educational process by threatening to commit an act that would disrupt the lawful mission, processes, procedures or functions of the school, because the trial court applied an incorrect legal standard to an essential element of the offense. There was insufficient evidence to support child's conviction. *State v. Quintin C.*, 2019-NMCA-069.

**Criminal trespass charges not a means to enforce rule until filing.** — Criminal trespass charges under Section 30-20-13 NMSA 1978 are not a means to enforce a rule available to the state until the rule is properly filed in compliance with State Rules Act (Section 14-4-1 NMSA 1978). *State v. Joyce*, 1980-NMCA-086, 94 N.M. 618, 614 P.2d 30.

**Flexibility not vagueness.** — Subsection C of this section, referring prior to 1975 amendment specifically to institutions of higher education, allowed control of campus disturbances in terms marked by flexibility and reasonable breadth, rather than meticulous specificity, and was not void for vagueness. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).

**Campus restrictions not overbroad.** — Since this section, referring in Subsection C, prior to 1975 amendment, specifically to institutions of higher education, vindicated significant government interest in the control of campus disturbances, reasonable "time, place and manner" regulations were valid even though they incidentally suppressed otherwise protected conduct. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).

**No invalid delegation of power.** — Subsection C of this section specifies adequate standards and guidelines to be followed, in that criminality is based first on a refusal to leave after requests, and second on a determination by the judge or jury that the person committed the specified disruptive acts. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).

**Nor unbridled discretion.** — Subsection C of this section does not put unbridled discretion in the hands of the administrator or police officer because the decision of each must be checked by the decision of the other, and the discretion of both is limited by the reasonably precise directive of the statute. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).

**Meaning of "impair".** — The term "impair" in Subsection C means, in context, a substantial physical diminution or damage and not just any diminution in quality. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).

**Substantial physical invasion required.** — The word "impair," along with the other operative verbs of present Subsection C (which subsection prior to 1975 amendment referred specifically to institutions of higher education), denotes a substantial physical invasion, and requires interference with the actual functioning of the university. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).

**Willfulness and intent essential.** — Not only must the refusal contemplated by Subsection C of this section be willful but the disruption must also be accompanied by general intent. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).

**Application constitutional.** — Defendants' refusal to honor the request of the university president to leave his office although he had appointments to keep, substantially interfered with the functioning of the president's business, and hence Subsection C of this section (referring prior to 1975 amendment specifically to institutions of higher education) was constitutionally applied to warrant their convictions. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).



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**Limitations on sales of handicrafts on state property.** — Since the legislature intended that those who set the lawful mission, processes, procedures or functions of state property are to be able to avail themselves of Subsection C's provisions in furtherance of those policies and functions, the board of regents of the museum of New Mexico may properly rely on the provisions of this section to effectuate the provisions of a resolution which permits only Indians to sell handicrafts under the portals of the governor's palace. *Livingston v. Ewing*, 1982-NMSC-110, 98 N.M. 685, 652 P.2d 235.

**Law reviews.** — For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense, 32 A.L.R.3d 551.

"Choice of evils," necessity, duress, or similar defense to state or local criminal charges based on acts of public protest, 3 A.L.R.5th 521.

## 30-20-14. Institutions permitted to adopt rules.

Nothing in this act [30-20-13 through 30-20-15 NMSA 1978] shall be construed as limiting the power or duty of any institution of higher education to establish standards of conduct and scholastic achievement relevant to its lawful missions, processes and functions and to invoke appropriate discipline for violations of the standards.

**History: 1953 Comp., § 40A-20-11, enacted by Laws 1970, ch. 86, § 3.**

**Compiler's notes.** — The words "this act" as used in this section refers to Laws 1970, ch. 86 which is compiled as sections 30-20-13 to 30-20-15 NMSA 1978.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Participation of student in demonstration on or near campus as warranting expulsion or suspension from school or college, 32 A.L.R.3d 864.

## 30-20-15. Construction.

This act [30-20-13 through 30-20-15 NMSA 1978] shall be construed to be an alternative to and not in lieu of the provisions of Laws 1969, Chapter 281 [30-20-4 through 30-20-9 NMSA 1978].

**History: 1953 Comp., § 40A-20-12, enacted by Laws 1970, ch. 86, § 4.**

## 30-20-16. Bomb scares and shooting threats unlawful.

A. Making a bomb scare consists of falsely and maliciously stating to another person that a bomb or other explosive has been placed in such a position that property or persons are likely to be injured or destroyed.

B. Making a shooting threat consists of intentionally communicating to another person an intent to bring a firearm to a property or use the firearm with the intent to:

(1) place a person or group of persons in fear of great bodily harm;

(2) prevent or interrupt the occupation or use of a public building; or

(3) cause a response to the threat by a law enforcement official or volunteer agency organized to deal with emergencies.

C. Whoever commits making a bomb scare is guilty of a fourth degree felony.

D. Whoever commits making a shooting threat is guilty of a misdemeanor.

E. A court may order a person convicted for the offense of making a bomb scare or shooting threat to reimburse the victim of the offense for economic harm caused by that offense.

F. As used in this section, "economic harm" means all direct, incidental and consequential financial harm suffered by a victim of the offense of making a bomb scare or shooting threat. "Economic harm" includes:

(1) wages, salaries or other compensation lost as a result of the commission of the offense of making a bomb scare or shooting threat;

(2) the cost of all wages, salaries or other compensation paid to employees for time that those employees are prevented from working as a result of the commission of the offense of making a bomb scare or shooting threat; and



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(3) overhead costs incurred for the period of time that a business is shut down as a result of the commission of the offense of making a bomb scare or shooting threat.

**History: 1953 Comp., § 40A-20-13, enacted by Laws 1975, ch. 285, § 1; 1981, ch. 15, § 1; 2003, ch. 35, § 1; 2022, ch. 56, § 24.**

**The 2022 amendment,** effective May 18, 2022, made making a shooting threat unlawful, and provided a penalty; in the section heading, added "and shooting threats"; added a new Subsection B and redesignated former Subsection B as Subsection C; added a new Subsection D and redesignated former Subsection C and D as Subsections E and F, respectively; in Subsections E and F, after each occurrence of "bomb scare", added "or shooting threat"; and deleted former Subsection E.

**The 2003 amendment,** effective July 1, 2003, designated the former first and second paragraphs as Subsections A and B; added Subsections C, D and E; and substituted "commits making" for "makes" following "Whoever" at the beginning of Subsection B.

ANNOTATIONS

**Restitution.** — Although the trial court may request that an inquiry into defendant's ability to pay be made by a probation officer, it is mandatory that the actual determination of defendant's ability to pay be made by the court. Trial court may not delegate to probation officer determination of defendant's ability to pay obligations imposed by court. Amount of restitution and time of payment must be set by court and not be left to discretion of probation authorities. *State v. Carrasco*, 1997-NMCA-123, 124 N.M. 320, 950 P.2d 293

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity and construction of terroristic threat statutes, 45 A.L.R.4th 949.

Imposition of state or local penalties for threatening to use explosive devices at schools or other buildings, 79 A.L.R.5th 1.

Validity, construction, and application of 18 U.S.C.A. § 844(e), prohibiting use of mail, telephone, telegraph, or other instrument of commerce to convey bomb threat, 160 A.L.R. Fed. 625.

## 30-20-17. Reward.

If a person provides information leading to the conviction, or adjudication of delinquency pursuant to the Children's Code [Chapter 32A NMSA 1978], of another for making a bomb scare, he shall, upon the recommendation of the district attorney, be entitled to a reward in the amount of one hundred dollars ($100).

**History: 1953 Comp., § 40A-20-14, enacted by Laws 1975, ch. 285, § 2.**

## 30-20-18. Interference with athletic event.

Interference with athletic event consists of intentionally throwing any object on or across the field of play of an athletic event with the intent to interfere with the normal conduct of that event while the contestants of that event are on that field. As used in this section, "athletic event" means a scheduled sports event for which an admission fee is charged to the public.

Any person other than an official or a contestant of an athletic event who commits interference with [an] athletic event is guilty of a petty misdemeanor.

**History: Laws 1986, ch. 53, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For assault and battery on a sports official, *see* 30-3-9.1 NMSA 1978.

For sentencing for petty misdemeanors, *see* 31-19-1 NMSA 1978.

# ARTICLE 20A

# Antiterrorism

Sec.
30-20A-1. Short title.
30-20A-2. Definitions.
30-20A-3. Unlawful acts; penalty.
30-20A-4. Exemptions.

## 30-20A-1. Short title.

This act [30-20A-1 through 30-20A-4 NMSA 1978] may be cited as the "Antiterrorism Act".



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**History: Laws 1990, ch. 66, § 1.**

ANNOTATIONS

**Law reviews.** — For comment, "Sacrificing People, Protecting Hate: An Analysis of Anti-Militia Statutes and the Incitement to Violence Exception to Freedom of Speech as Legal Protections for Members of Groups Targeted by Hate-Motivated Violence," see 30 N.M.L. Rev. 253 (2000).

For article, "Terrorism and the Rule of Law", see 35 N.M.L. Rev. 215 (2005).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Victim impact evidence in capital sentencing hearings - post-*Payne v. Tennessee*, 79 A.L.R.5th 33.

## 30-20A-2. Definitions.

As used in the Antiterrorism Act:

A. "civil disorder" means any planned act of violence by an assemblage of two or more persons with the intent to cause damage or injury to another individual or his property;

B. "destructive device" means:

(1) any explosive, incendiary or poison gas:

(a) bomb;

(b) grenade;

(c) rocket having a propellant charge of more than four ounces;

(d) missile having an explosive or incendiary charge of more than one-quarter ounce;

(e) mine; or

(f) similar device;

(2) any type of weapon that can expel or may be readily converted to expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than six-tenths inch in diameter, except a shotgun, shotgun shell or muzzle loading firearm that is generally recognized as particularly suitable for sporting purposes; or

(3) any part or combination of parts either designed or intended for use in converting or assembling any device described in Paragraphs (1) and (2) of this subsection.

The term "destructive device" shall not include any device that is neither designed nor redesigned for use as a weapon;

C. "firearm" means any weapon that can expel or is designed to or may readily be converted to expel a projectile by the action of an explosion, the frame or receiver of any such weapon, any firearm muffler or firearm silencer. "Firearm" includes any handgun, rifle or shotgun; and

D. "law enforcement officer" means any employee of a police or public safety department administered by the state or any political subdivision of the state where the employee is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of this state. "Law enforcement officer" includes any member of the New Mexico national guard; any peace officer of the United States, any state, any political subdivision of a state or the District of Columbia; any member of the New Mexico mounted patrol or the national guard, as defined in 10 U.S.C. Sec. 101(9); any member of the organized militia of any state or territory of the United States, the commonwealth of Puerto Rico or the District of Columbia not included within the definition of national guard; and any member of the armed forces of the United States. "Law enforcement officer" also means any person or entity acting as a contractor for any other law enforcement officer, police or public safety department described in this section.

**History: Laws 1990, ch. 66, § 2.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Victim impact evidence in capital sentencing hearings - post-*Payne v. Tennessee*, 79 A.L.R.5th 33.

## 30-20A-3. Unlawful acts; penalty.

A. Any person who teaches or demonstrates the use, application or making of any firearm, destructive device or technique capable of causing injury or death to any person with the intent that the knowledge or skill taught, demonstrated or gained be unlawfully used in furtherance of a civil disorder is guilty of a fourth degree felony and shall be sentenced under the provisions of the Criminal Sentencing Act [Chapter 31, Article 18 NMSA 1978] to imprisonment for a definite



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term of eighteen months or, in the discretion of the sentencing court, to a fine of not more than five thousand dollars ($5,000), or both.

B. Any person who trains, practices or receives instruction in the use of any firearm, destructive device or technique capable of causing injury or death to any person with the intent that the knowledge or skill taught, demonstrated or gained be unlawfully used in furtherance of a civil disorder is guilty of a fourth degree felony and shall be sentenced under the provisions of the Criminal Sentencing Act to imprisonment for a definite term of eighteen months or, in the discretion of the sentencing court, to a fine of not more than five thousand dollars ($5,000), or both.

**History: Laws 1990, ch. 66, § 3.**

## 30-20A-4. Exemptions.

A. Nothing in the Antiterrorism Act shall make unlawful any activity:

(1) in accordance with Article 2, Section 6 of the constitution of New Mexico;

(2) of any governmental agency;

(3) of any law enforcement agency;

(4) of any hunting, rifle, pistol, shotgun, sportsmen's or conservation club;

(5) lawfully engaged in on a shooting range;

(6) lawfully undertaken pursuant to any shooting school or other program of instruction;

(7) intended to teach the safe handling, including marksmanship, or use of firearms, archery equipment or other weapons or techniques to individuals or groups;

(8) that teaches the use of martial arts or arms for the defense of home, person or property or the lawful use of force as defined in Section 30-2-7 NMSA 1978; or

(9) that is otherwise lawful.

B. Nothing in the Antiterrorism Act shall make unlawful any act of a law enforcement officer that is performed as a part of his official duties.

**History: Laws 1990, ch. 66, § 4.**

# ARTICLE 20B

# Demonstrations at Funerals and Memorial Services

Sec.
30-20B-1. Short title.
30-20B-2. Definitions.
30-20B-3. Prohibited acts.
30-20B-4. Penalties.
30-20B-5. Injunctive relief.

## 30-20B-1. Short title.

This act [30-20B-1 through 30-20B-5 NMSA 1978] may be cited as the "Demonstrations at Funerals and Memorial Services Act".

**History: Laws 2007, ch. 254, § 1.**

**Emergency clause.** — Laws 2007, ch. 254, § 7 contained an emergency clause and was approved on April 2, 2007.

**Severability.** — Laws 2007, ch. 254, § 6 provided for the severability of the Demonstrations at Funerals and Memorial Services Act if any part or application thereof is held invalid.

## 30-20B-2. Definitions.

As used in the Demonstrations at Funerals and Memorial Services Act:

A. "funeral" means the ceremonies, rituals, processions and memorial services held at a funeral site in connection with the viewing, burial, cremation or memorial of or wake for a deceased person;



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B. "funeral site" means a church, synagogue, mosque, funeral home, mortuary, cemetery, grave site, mausoleum or other place at which a funeral is being conducted or is scheduled to be conducted within the next sixty minutes or has been conducted within the last sixty minutes; and

C. "targeted residential picketing" includes the following acts:

(1) marching, standing or patrolling by one or more persons directed solely at a particular residential building in a manner that adversely affects the safety, security or privacy of an occupant of the building; or

(2) marching, standing or patrolling by one or more persons that prevents an occupant of a residential building from gaining access to or exiting from the property on which the residential building is located.

**History: Laws 2007, ch. 254, § 2.**
**Emergency clause.** — Laws 2007, ch. 254, § 7 contained an emergency clause and was approved on April 2, 2007.

**Severability.** — Laws 2007, ch. 254, § 6 provided for the severability of the Demonstrations at Funerals and Memorial Services Act if any part or application thereof is held invalid.

## 30-20B-3. Prohibited acts.

A person shall not, with knowledge of the existence of a funeral or funeral site:

A. engage in any loud singing, playing of music, chanting, whistling, yelling or noisemaking with or without noise amplification, including bullhorns, auto horns and microphones within five hundred feet of any ingress or egress of that funeral site, when the volume of such singing, music, chanting, whistling, yelling or noisemaking is audible at and disturbing to the peace and good order of a funeral at that funeral site;

B. direct abusive epithets or make any threatening gesture that the person knows or reasonably should know is likely to provoke a violent reaction by another person;

C. display within five hundred feet of any ingress or egress of that funeral site any visual images that convey fighting words or actual threats against another person;

D. knowingly obstruct, hinder, impede or block another person's access to or egress from that funeral site or a facility containing that funeral site, except that the owner or occupant of property may take lawful actions to exclude others from that property;

E. knowingly obstruct, hinder, impede or block the progress of a vehicle participating in a procession to or from a funeral site; or

F. knowingly engage in targeted residential picketing at the home or domicile of any surviving member of the deceased person's family or household on the date of the funeral.

**History: Laws 2007, ch. 254, § 3.**
**Emergency clause.** — Laws 2007, ch. 254, § 7 contained an emergency clause and was approved on April 2, 2007.

**Severability.** — Laws 2007, ch. 254, § 6 provided for the severability of the Demonstrations at Funerals and Memorial Services Act if any part or application thereof is held invalid.

## 30-20B-4. Penalties.

Any person who violates Section 3 [30-20B-3 NMSA 1978] of the Demonstrations at Funerals and Memorial Services Act is:

A. for the first offense, guilty of a petty misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978;

B. for the second offense, guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978; and

C. for the third and subsequent offenses, guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: Laws 2007, ch. 254, § 4.**
**Emergency clause.** — Laws 2007, ch. 254, § 7 contained an emergency clause and was approved on April 2, 2007.

**Severability.** — Laws 2007, ch. 254, § 6 provided for the severability of the Demonstrations at Funerals and Memorial Services Act if any part or application thereof is held invalid.



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## 30-20B-5. Injunctive relief.

In addition to the criminal penalties provided in Section 4 [30-20B-4 NMSA 1978] of the Demonstrations at Funerals and Memorial Services Act, the court may enjoin conduct prohibited in Section 3 [30-20B-3 NMSA 1978] of that act if there is credible evidence that a person is likely to violate Section 3 of the Demonstrations at Funerals and Memorial Services Act. Any surviving member of the deceased person's immediate family who is threatened with loss or injury by reason of a violation described in Section 3 of the Demonstrations at Funerals and Memorial Services Act is entitled to sue for and have injunctive relief in any court of competent jurisdiction against any damage or threatened loss or injury by reason of a violation thereof.

**History: Laws 2007, ch. 254, § 5.**

**Emergency clause.** — Laws 2007, ch. 254, § 7 contained an emergency clause and was approved on April 2, 2007.

**Severability.** — Laws 2007, ch. 254, § 6 provided for the severability of the Demonstrations at Funerals and Memorial Services Act if any part or application thereof is held invalid.

# ARTICLE 21

# Sabotage and Disloyalty

Sec.
30-21-1. Sabotage.
30-21-2. Protection of rights of employees.
30-21-3. Detention or arrest of trespassers upon restricted areas.
30-21-4. Improper use of official symbols.
30-21-5. Improper use of official anthems.

## 30-21-1. Sabotage.

Sabotage consists of:

A. intentionally destroying, impairing, injuring, interfering or tampering with real or personal property with reasonable grounds to believe that such act will delay or interfere with the preparation of the United States or of any of the states for defense or for war or with the prosecution of war by the United States; or

B. intentionally making or causing to be made or omitting to note on inspection any defect in any article or thing with reasonable grounds to believe that such article or thing is intended to be used in connection with the preparation of the United States or any of the states for defense or war or for the prosecution of war by the United States.

Whoever commits sabotage is guilty of a second degree felony.

**History: 1953 Comp., § 40A-21-1, enacted by Laws 1963, ch. 303, § 21-1.**

**Cross references.** — For conspiracy to commit a felony, *see* 30-28-2 NMSA 1978.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 70 Am. Jur. 2d Sedition, Subversive Activities and Treason § 61.

Validity of legislation against sabotage, 1 A.L.R. 336, 20 A.L.R. 1535, 73 A.L.R. 1494.

93 C.J.S. War and National Defense § 57.

## 30-21-2. Protection of rights of employees.

Nothing in this article [30-21-1 through 30-21-5 NMSA 1978] shall be construed to impair, curtail or destroy the lawful rights of employees and their representatives to self-organization, or [to] form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

**History: 1953 Comp., § 40A-21-2, enacted by Laws 1963, ch. 303, § 21-2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.



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## 30-21-3. Detention or arrest of trespassers upon restricted areas.

Any peace officer or person employed as a watchman, guard or in a supervisory capacity on premises utilized in the manufacture, transportation or storage of any product in the preparation of the United States or of any of the states for defense or for war, or the manufacture, transportation, distribution or storage of gas, oil, coal, electricity or water or of any public utility, may stop any person found on such premises to which entry without permission is forbidden and where such premises are clearly posted with signs prohibiting entry, and may detain such person for the purpose of demanding the name, address and the individual's business in such place. If such peace officer or employee has reason to believe from the answers or conduct of the person so interrogated that the person detained has no right to be in such destricted [restricted] area, he shall forthwith either release such person, or may arrest the individual without a warrant on the charge of committing the crime of criminal trespass. In the event such peace officer or employee shall arrest such person found in the restricted area he shall forthwith turn the individual over to a peace officer who may arrest the individual without a warrant on the charge of committing criminal trespass.

**History: 1953 Comp., § 40A-21-3, enacted by Laws 1963, ch. 303, § 21-3.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For criminal trespass, *see* 30-14-1 NMSA 1978.

## 30-21-4. Improper use of official symbols.

Improper use of official symbols consists of:

A. the use of the state or national flags for any purpose other than the purposes for which it was designed by law;

B. offering any insult by word or act to the state or national flags; or

C. using the state or national flags for advertising purposes by painting, printing, stamping or otherwise placing thereon or affixing thereto any name or object not connected with the patriotic history of the nation or the state.

Whoever commits improper use of official symbols is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-21-4, enacted by Laws 1963, ch. 303, § 21-4.**

ANNOTATIONS

**Law reviews.** — For comment, "Official Symbols: Use and Abuse," see 1 N.M.L. Rev. 352 (1971).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 Am. Jur. 2d Flag §§ 3 to 5.

Flag desecration: what constitutes violation of flag desecration statutes, 41 A.L.R.3d 502.

36A C.J.S. Flags § 2.

## 30-21-5. Improper use of official anthems.

Improper use of official anthems consists of singing, playing or rendering "The Star Spangled Banner" or "Oh Fair New Mexico" in any public place or assemblage in this state except as an entire or separate composition or number.

Whoever commits improper use of official anthems is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-21-5, enacted by Laws 1963, ch. 303, § 21-5.**

# ARTICLE 22

# Interference with Law Enforcement

Sec.

30-22-1. Resisting, evading or obstructing an officer.
30-22-1.1. Aggravated fleeing a law enforcement officer.
30-22-2. Refusing to aid an officer.
30-22-2.1. Entry into domestic violence safe house or shelter; search warrant.
30-22-3. Concealing identity.



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Sec.
30-22-4. Harboring or aiding a felon.
30-22-5. Tampering with evidence.
30-22-6. Compounding a crime.
30-22-7. Unlawful rescue.
30-22-8. Escape from jail.
30-22-8.1. Escape from a community custody release program.
30-22-8.2. Escape from a secure residential treatment facility.
30-22-9. Escape from penitentiary.
30-22-10. Escape from custody of a peace officer.
30-22-11. Assisting escape.
30-22-11.1. Escape from the custody of the children, youth and families department; escape from juvenile detention.
30-22-11.2. Aggravated escape from the custody of the children, youth and families department.
30-22-12. Furnished [Furnishing] articles for prisoner's escape.
30-22-13. Furnishing drugs or liquor to a prisoner.
30-22-14. Bringing contraband into places of imprisonment; penalties; definitions.
30-22-14.1. Bringing contraband into a juvenile detention facility or juvenile correctional facility; penalty.
30-22-15. Maintaining male and female prisoners together.
30-22-16. Possession of deadly weapon or explosive by prisoner.
30-22-17. Assault by prisoner.
30-22-18. Encouraging violation of probation, parole or bail.
30-22-19. Unlawful assault on any jail.
30-22-20. Unlawful distribution of convict-made goods.
30-22-21. Assault upon peace officer.
30-22-22. Aggravated assault upon peace officer.
30-22-23. Assault with intent to commit violent felony upon peace officer.
30-22-24. Battery upon peace officer.
30-22-25. Aggravated battery upon peace officer.
30-22-26. Assisting in assault upon peace officer.
30-22-27. Disarming a peace officer.

## 30-22-1. Resisting, evading or obstructing an officer.

Resisting, evading or obstructing an officer consists of:

A. knowingly obstructing, resisting or opposing any officer of this state or any other duly authorized person serving or attempting to serve or execute any process or any rule or order of any of the courts of this state or any other judicial writ or process;

B. intentionally fleeing, attempting to evade or evading an officer of this state when the person committing the act of fleeing, attempting to evade or evasion has knowledge that the officer is attempting to apprehend or arrest him;

C. willfully refusing to bring a vehicle to a stop when given a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed officer in an appropriately marked police vehicle; or

D. resisting or abusing any judge, magistrate or peace officer in the lawful discharge of his duties.

Whoever commits resisting, evading or obstructing an officer is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-22-1, enacted by Laws 1963, ch. 303, § 22-1; 1981, ch. 248, § 1.**

**Cross references.** — For authority of conservation officers to enforce these provisions under emergency circumstances, *see* 17-2-19 NMSA 1978.

### ANNOTATIONS

**Lesser included offense.** — Resisting or abusing a peace officer is a lesser included offense within battery on a peace officer under the Blockburger test. *State v. Ford*, 2007-NMCA-052, 141 N.M. 512, 157 P.3d 77, cert. denied, 2007 NMCERT 004, 141 N.M. 568, 158 P.3d 458.

Resisting an officer is a lesser included offense of peace officer battery; the only difference between the two is that peace officer battery requires the resisting or abusing to culminate in a touching, while resisting does not. *State v. Padilla*, 1983-NMCA-096, 101 N.M. 78, 678 P.2d 706, *aff'd in part, rev'd in part on other grounds*, 1984-NMSC-026, 101 N.M. 58, 678 P.2d 686, *aff'd sub nom. Fugate v. New Mexico*, 470 U.S. 904, 105 S. Ct. 1858 (1985), 84 L. Ed. 2d 777.

**Conduct constituting an offense.** — Driving for two miles without responding to a police officer's emergency lights is behavior which violates Section 30-22-1C NMSA 1978. *Marshall v. Columbia Lea Regional Hosp.*, 345 F.3d 1157 (10th Cir. 2003).

**Violation of Subsection C.** — If a stopped driver knows that an officer is trying to effectuate an arrest, then Section 30-22-1B NMSA 1978 applies if the driver tries to leave. *State v. Baldonado*, 1992-NMCA-140, 115 N.M. 106, 847 P.2d 751, cert. denied, 115 N.M. 145, 848 P.2d 531 (1993).

**No probable cause.** — Where police officers went to defendant's home to interview defendant about defendant's co-worker who was suspected to be involved in a rape; defendant was cooperative and invited the officers into defendant's home; during the interview, defendant decided to end the interview and asked the officers to leave; when the officers refused, defendant became agitated, and the officers arrested defendant because the officers speculated that defendant could have been more cooperative and shared more information about the suspect, the officers did not have probable cause to arrest defendant for resisting, evading, obstructing, or refusing to obey an officer. *Manzanares v. Higdon*, 575 F. 3d 1135 (10th Cir. 2009).

Where police officers were investigating defendant's child for commission of a felony; defendant told the officers that defendant did not know the child's birth date and address; when the officers asked defendant for identification, defendant responded that the identification was in defendant's house; and defendant started walking



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toward defendant's house, the officers did not have probable cause to arrest defendant for resisting, evading or obstructing an officer. *Keylon v. City of Albuquerque*, 535 F. 3d 1210 (10th Cir. 2008).

**The word "apprehend"** includes a situation in which an officer is attempting to briefly detain a person for questioning based on reasonable suspicion. *State v. Gutierrez*, 2007-NMSC-033, 142 N.M. 1, 162 P.3d 156.

**Sufficient evidence.** — Where a police officer had one handcuff on defendant when defendant pulled away and the officer had to forcibly finish handcuffing defendant, the evidence was sufficient to support defendant's conviction for resisting, evading or obstructing an officer. *State v. Wilson*, 2007-NMCA-111, 142 N.M. 737, 169 P.3d 1184, cert. denied, 2007-NMCERT-008, 142 N.M. 435, 166 P.3d 1089.

Where police officers arrested defendant for DWI, defendant argued with the officers and refused to cooperate; defendant would not put defendant's legs into the police car preventing the officers from closing the door; when the officers forced defendant's legs into the car, defendant placed defendant's head in a position that prevented the officer from closing the door; defendant intentionally fell out of the car; defendant twice kicked one officer, the evidence was sufficient to support defendant's conviction of resisting and abusing an officer. *State v. Cotton*, 2011-NMCA-096, 150 N.M. 583, 263 P.3d 925, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Where police officers were investigating potential drug manufacturing; the officers were in plain clothes and driving unmarked vehicles; the officers were following defendant when defendant made a U-turn and stopped; one officer approached defendant's vehicle, displayed a badge, and said that the officer wanted to talk with defendant; defendant asked the officer what was going on and the officer again identified the officer as a police officer; defendant began creeping defendant's vehicle toward the officer; the other officer then approached defendant's vehicle, identified the officer as a police officer and displayed a badge; and when the other officer opened the door of defendant's vehicle and told the occupants to show their hands, defendant accelerated the vehicle and the other officer was thrown from the vehicle, there was sufficient evidence to support defendant's conviction of resisting, evading, and obstructing an officer. *State v. Akers*, 2010-NMCA-103, 149 N.M. 53, 243 P.3d 757.

Where the defendant and the defendant's vehicle matched the descriptions given to the officer by the victim of stalking; the officer asked the defendant to stop; the defendant said he needed to use the bathroom in the house where he had parked his vehicle; the officer followed the defendant into the house, but the defendant ran out the back door after he turned and saw the officer behind him and began to run, the officer had reasonable suspicion to temporarily detain the defendant for questioning and the defendant did not have the right to walk away from the officer. *State v. Gutierrez*, 2007-NMSC-033, 142 N.M. 1, 162 P.3d 156.

**Section not vague.** — There is no merit to claim that this section is vague on its face. *State v. Andazola*, 1981-NMCA-002, 95 N.M. 430, 622 P.2d 1050.

**Section places those interfering with officer on notice of criminal sanctions.** — In clear simple language, this statute puts everyone on notice that one would be exposed to criminal sanctions if he resisted or abused any peace officer who was engaged in the lawful discharge of his duties. *State v. Andazola*, 1981-NMCA-002, 95 N.M. 430, 622 P.2d 1050.

**Conviction under this section does not bar civil rights claim.** — Plaintiff's action under 42 U.S.C.S. § 1983 alleging that police officers used excessive force against him would not be barred by his conviction for resisting arrest, whether based on Subsection A or Subsection D. *Martinez v. City of Albuquerque*, 184 F.3d 1123 (10th Cir. 1999).

**Construction of former law.** — Former 40-31-4 and 40-31-5, 1953 Comp., made it unlawful to obstruct justice, the former relating to obstructing an officer in serving process and the latter to resisting or abusing an officer while executing the duties of his office. *City of Clovis v. Archie*, 1955-NMSC-105, 60 N.M. 239, 290 P.2d 1075.

**Applicability of former law.** — Kearny Code, Crimes and Punishments, art. 3, § 4, prescribing penalty for obstruction or assaulting officer serving process was not applicable where the sheriff was not armed with process. *State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211 (decided under prior law).

**Resisting sheriff formerly serious offense.** — Under former law, resisting a sheriff was itself a felony. *State v. Smelcer*, 1924-NMSC-059, 30 N.M. 122, 228 P. 183; *see State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211 (resistance to a sheriff making a lawful arrest, but not armed with process, a misdemeanor) (decided under prior law).

**Double jeopardy.** — Where defendant led police on a high-speed automobile chase and then got out of his car and fled on foot, his acts supported only one crime founded on resisting, evading or obstructing an officer, and vacation of his convictions for two counts of evading an officer was required. *State v. Lefebre*, 2001-NMCA-009, 130 N.M. 130, 19 P.3d 825.

**Jurisdictional exception.** — The jurisdictional exception to double jeopardy permitted defendant's prosecution in the district court on a charge of peace officer battery, after he had pleaded guilty to several misdemeanors, including resisting arrest, in the magistrate court. *State v. Padilla*, 1984-NMSC-026, 101 N.M. 58, 678 P.2d 686, *aff'd sub nom., Fugate v. New Mexico*, 470 U.S. 904, 105 S. Ct. 1858, 84 L. Ed. 2d 777 (1985).

**Conviction varying from crime charged in information.** — The defendant was properly convicted of resisting, evading or obstructing an officer, because the evidence supported the verdict of the jury to that charge, and his opportunity to prepare and defend against the charge was not impaired by the fact that such an offense varied from the crime charged in the criminal information, *i.e.*, aggravated assault upon a peace officer. *State v. Hamilton*, 1988-NMCA-023, 107 N.M. 186, 754 P.2d 857, cert. denied, 107 N.M. 132, 753 P.2d 1320.

**"Abusing" speech equated to "fighting" words.** — "Abusing" speech in Subsection D covers only speech that can be called "fighting" words. Any other interpretation of that subsection applied to speech would render it unconstitutional. *State v. Wade*, 1983-NMCA-084, 100 N.M. 152, 667 P.2d 459.

**"Fighting" words** are those which tend to incite an immediate breach of the peace. *State v. Wade*, 1983-NMCA-084, 100 N.M. 152, 667 P.2d 459.

**Self-defense distinguished from resisting unlawful arrest.** — The right of self-defense against a police officer is a concept different from the right to resist an unlawful arrest, in that self-defense is for the purpose of protecting a person's bodily integrity and health, whereas the purpose of resisting an unlawful arrest is to prevent the arrest. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Limits of right to self-defense.** — One has a right to defend oneself from a police officer, whether the attempted arrest is lawful or unlawful; this right, however, is limited, so that one may defend oneself against excessive use of force by the officer, but one may not resort to self-defense when the officer is using necessary force to effect an arrest. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Involuntary manslaughter while resisting arrest.** — Instruction that killing an officer while resisting a



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lawful arrest was murder in first or second degree was error, since resistance to arrest, where sheriff was not armed with process, was a misdemeanor and death without malice resulting therefrom was involuntary manslaughter. *State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211.

**Lesser included offense instruction.** — In a prosecution for aggravated assault on a peace officer, since there was evidence that resisting in violation of either Subsection B or D was the highest degree of crime committed, the defendant was entitled to a charge on the lesser offense. *State v. Diaz*, 1995-NMCA-137, 121 N.M. 28, 908 P.2d 258, cert. denied, 120 N.M. 828, 907 P.2d 1009.

**Instruction on self-defense.** — Defendant had a limited right of self-defense against police officer, and was entitled to an instruction on that limited right, which the instruction did not cover since it went only to the arrest and did not refer to the right to defend against excessive force whether or not the arrest was unlawful. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Defense of another against excessive police force is a viable defense.** — The right to defense of another against a police officer is not absolute; it does not exist if the officer is using necessary force to effect an arrest. However, a defendant is entitled to a defense of another jury instruction if an officer used force against another that was unreasonable and unnecessary. *State v. Jones*, 2020-NMCA-029.

Where defendant was charged with battery upon a peace officer and resisting or abusing an officer, and where defendant requested a defense of another jury instruction, the district court erred in denying the request and in finding that defending another against excessive force by a police officer was not a viable defense, because defense of another against excessive police force is a viable defense and reasonable minds could differ as to whether the officers used excessive force in this case. *State v. Jones*, 2020-NMCA-029.

**Acquittal bars retrial for battery.** — After a magistrate's determination that the defendant was not guilty of resisting and obstructing an officer and disorderly conduct because he was acting in defense of another, the state cannot charge him with battery on a police officer and constitutionally bring him before a new fact finder to relitigate that same factual issue. *State v. Orosco*, 1982-NMCA-181, 99 N.M. 180, 655 P.2d 1024.

**Evidence insufficient for conviction.** — In the absence of evidence that defendant verbally resisted, evaded or obstructed a police officer, her refusal to allow the officer admission into her home could not be considered unlawful, and the trial court erred in denying her motion for a directed verdict. *State v. Prince*, 1999-NMCA-010, 126 N.M. 547, 972 P.2d 859.

**Insufficient evidence of evading an officer.** — Where defendant was charged with intentionally fleeing, attempting to evade or evading an officer after taking a gun inside a Las Cruces club, there was insufficient evidence to support defendant's conviction, because although defendant refused to comply with the officer's orders to surrender from inside the club, the state failed to present any evidence that defendant fled, attempted to evade, or evaded the officers before they were able to arrest him, and there was no evidence presented to suggest that defendant surreptitiously tried to escape from the building, such as out the back or side door, in order to evade arrest. *State v. Jimenez*, 2017-NMCA-039, cert. denied.

**Burden of proof.** — In order to convict defendant of evading and eluding a police officer, the state had the burden of proving that officer was a peace officer engaged in the lawful discharge of his duty and defendant, with knowledge that officer was attempting to apprehend or arrest him, fled, attempted to evade, or evaded officer. *State v. Gutierrez*, 2005-NMCA-093, 138 N.M. 147, 117 P.3d 953, *aff'd in part, rev'd in part*, 2007-NMSC-033, 142 N.M. 1, 162 P.3d 156.

**Reversal was warranted where defendant was convicted of a crime that the state had not charged.** — Where defendant was charged and convicted of resisting, evading, or obstructing an officer pursuant to § 30-22-1(D) NMSA 1978, but where, at trial, the state used, with some customization, the alternative from the uniform jury instruction that corresponds to § 30-22-1(C) NMSA 1978, the jury was not instructed on the "resisting or abusing" elements of § 30-22-1(D) that differentiates the offense from other forms of resisting, evading, or obstructing an officer. Reversal was therefore warranted, because the jury convicted defendant of a crime for which he had not been charged. *State v. Ocon*, 2021-NMCA-032, cert. denied.

**Law reviews.** — For comment on *State v. Selgado*, 76 N.M. 187, 413 P.2d 469 (1966), see 7 Nat. Resources J. 119 (1967).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Obstructing Justice §§ 10 to 17.

Criminal liability for obstructing process as affected by invalidity or irregularity of the process, 10 A.L.R.3d 1146.

What constitutes obstructing or resisting officer, in absence of actual force, 66 A.L.R.5th 397.

Defenses to state obstruction of justice charge relating to interfering with criminal investigation or judicial proceeding, 87 A.L.R.5th 597.

67 C.J.S. Obstructing Justice §§ 7, 10-14.

## 30-22-1.1. Aggravated fleeing a law enforcement officer.

A. Aggravated fleeing a law enforcement officer consists of a person willfully and carelessly driving a vehicle in a manner that endangers the life of another person after being given a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed law enforcement officer in an authorized emergency vehicle pursuant to Section 66-7-6 NMSA 1978 in pursuit in accordance with the provisions of the Law Enforcement Safe Pursuit Act [29-20-1 to 29-20-4 NMSA 1978].

B. Whoever commits aggravated fleeing a law enforcement officer that does not result in injury or great bodily harm to another person is guilty of a fourth degree felony.

C. Whoever commits aggravated fleeing a law enforcement officer that results in injury to another person is guilty of a third degree felony.



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**History: Laws 2003, ch. 260, § 5; 2022, ch. 56, § 27.**

**The 2022 amendment,** effective May 18, 2022, added penalties for aggravated fleeing a law enforcement officer; in Subsection A, after "by a uniformed law enforcement officer in an", deleted "appropriately marked law enforcement vehicle" and added "authorized emergency vehicle pursuant to Section 66-7-6 NMSA 1978"; in Subsection B, after "fleeing a law enforcement officer", added "that does not result in injury or great bodily harm to another person"; and added Subsection C.

## ANNOTATIONS

**Compliance with the policies of the Law Enforcement Safe Pursuit Act** (Section 29-20-1 NMSA 1978) is not an essential element of the crime of aggravated fleeing. *State v. Padilla*, 2008-NMSC-006, 143 N.M. 310, 176 P.3d 299.

**Compliance with local policy is not an essential element of aggravated fleeing.** — Where defendant was charged with aggravated fleeing, the district did not abuse its discretion in excluding evidence relating to the county's high speed pursuit policy, because a local policy adopted pursuant to the Law Enforcement Safe Pursuit Act (Section 29–20–1 NMSA 1978] is not an element of the crime of aggravated fleeing. *State v. Coleman*, 2011-NMCA-087, 150 N.M. 622, 264 P.3d 523, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

**Proof of compliance with the Pursuit Act (Law Enforcement Safe Pursuit Act, Section 29–20–1 NMSA 1978).** — If defendant claims that a pursuit was not made in accordance with the Pursuit Act, the State must offer evidence to prove that the local pursuit policy complies with the requirements of the Act. *State v. Ross*, 2007-NMCA-126, 142 N.M. 597, 168 P.3d 169, cert. granted, 2007-NMCERT-009, 142 N.M. 716, 169 P.3d 409.

**Substantial evidence.** — Where defendant, who was being chased by a police officer, drove at speeds exceeding 100 miles per hour through residential areas and ignored and drove through several stop signs also while traveling at excessive speeds; and the chase ended only when defendant struck a curb and damaged defendant's vehicle rendering it immobile, there was sufficient evidence that defendant drove willfully and carelessly, endangering the life of other persons. *State v. Coleman*, 2011-NMCA-087, 150 N.M. 622, 264 P.3d 523, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

**Sufficient evidence of aggravated fleeing.** — In defendant's trial for first-degree murder for the killing of a police officer and aggravated fleeing, there was sufficient evidence to support the convictions where the evidence established that during a traffic stop, the officer attempted to approach the vehicle when the vehicle suddenly accelerated out of a parking lot, and where defendant later brought the vehicle to a stop and waited for the pursuing officer to catch up, and when the officer approached the vehicle a second time, defendant fired his gun four times at the officer, and that upon fleeing from the scene of the shooting, defendant drove his vehicle away from a uniformed law enforcement officer in an appropriately marked law enforcement vehicle and in a manner that endangered the lives of others. Defendant's flight from the fallen officer was part of a continuing course of aggravated fleeing. *State v. Romero*, 2019-NMSC-007.

**Aggravated fleeing does not require that an identifiable person was actually endangered as a result of the driver's conduct.** — Where defendant was convicted of aggravated fleeing a law enforcement officer after he led an officer on a high-speed chase through rain-slicked streets during the early morning hours, and where defendant argued that there was insufficient evidence to support his conviction because the crime of aggravated fleeing requires proof that a defendant drove in a manner that actually endangered the life of another individual and in this case, no person was actually in the vicinity of the pursuit, the New Mexico supreme court held that there was sufficient

evidence to support defendant's conviction because the statute requires proof that the defendant drove so dangerously that his or her conduct endangered the lives of others, but does not require that an identifiable person was actually endangered as a result of the defendant's flight from law enforcement. It is the conduct of fleeing the police by driving dangerously, not the result of the conduct, that violates the aggravated fleeing statute, and in this case there was evidence that defendant displayed dangerous driving that put people in the community at risk of harm when he sped at seventy miles per hour on town roads, refused to slow down while passing an apartment complex, and drove onto a sidewalk and crashed into a road sign. *State v. Vest*, 2021-NMSC-020, *rev'g* 2018-NMCA-060, 428 P.3d 287.

**Actual endangerment of another person is an essential element of aggravated fleeing.** — Where defendant was charged with aggravated fleeing of a law enforcement officer following a high-speed chase in which defendant drove at least seventy miles per hour through a residential area, on a wet and slippery road, with at least one curve in it, crashing the car into a traffic sign, rendering the car inoperable, and getting out of the car and leaving it in the middle of the roadway, the state failed to present sufficient evidence to prove that defendant's flight from police actually endangered another person when the uncontroverted testimony was that defendant never encountered any other motorists on the roadway. *State v. Vest*, 2018-NMCA-060, cert. granted.

Where defendant was charged with aggravated fleeing of a law enforcement officer following a high-speed chase in which defendant drove his motorcycle through parking lots, drove on several side streets in which he ran several stop signs, and drove on the highway exceeding the speed limit, causing other motorists to pull off the road, the state failed to present sufficient evidence to prove that defendant endangered another person when the uncontroverted testimony of two participating officers was that the pursuit did not create a public safety issue or place any person in danger. *State v. Chavez*, 2016-NMCA-016, 365 P.3d 61, *vacated by* N.M. Sup. Ct. Order No. S-1-SC-35614 (Aug. 24, 2016).

**"Uniformed law enforcement officer" construed.** — The meaning of "uniform" is a dress of a distinctive design or fashion that serves to identify the individual wearing it as a law enforcement officer. *State v. Montano*, 2020-NMSC-009, *aff'g in part and rev'g in part* 2018-NMCA-047, 423 P.3d 1 and *rev'g State v. Martinez*, A-1-CA-35111, mem. op. (May 14, 2018) (nonprecedential).

**"Appropriately marked law enforcement vehicle" construed.** — A plain meaning construction of "appropriately marked law enforcement vehicle" contemplates that such a vehicle must bear a character, device, label, brand, seal, or other sign that not only makes it suitable to be driven by a law enforcement officer, but also sets it apart as specially suitable to law enforcement use. *State v. Montano*, 2020-NMSC-009, *aff'g in part and rev'g in part* 2018-NMCA-047, 423 P.3d 1 and *rev'g State v. Martinez*, A-1-CA-35111, mem. op. (May 14, 2018) (nonprecedential).

**Statute requires officer to be in uniform and in an appropriately marked law enforcement vehicle.** — In consolidated cases where both defendants were charged with aggravated fleeing from a law enforcement officer where the deputies in each case were driving unmarked patrol vehicles that bore no insignias, stripes, decals, labels, seals, symbols, or other pictorial signs or lettering indicating their identity as law enforcement



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vehicles, and where in one case the officer's attire included a dress shirt with tie, dress slacks, and dress shoes, the New Mexico supreme court held that the officer's attire was not a "uniform" as required by this section because his clothing did not in any way distinguish the deputy as a law enforcement officer, and that the vehicles that the deputies were driving were not "appropriately marked law enforcement vehicles" because they bore no insignias, stripes, decals, labels, seals, symbols or other pictorial signs or lettering indicating their identity as law enforcement vehicles. *State v. Montano*, 2020-NMSC-009, *aff'g in part and rev'g in part* 2018-NMCA-047, 423 P.3d 1 and *rev'g State v. Martinez*, A-1-CA-35111, mem. op. (May 14, 2018) (nonprecedential).

**Plain meaning of "uniformed law enforcement officer".** — A "uniformed law enforcement officer" consists of an officer wearing clothing of a distinctive design or fashion clearly indicating the peace officer's official status and distinguishing the wearer from the general public. *State v. Montano*, 2018-NMCA-047, cert. granted.

**Plain meaning of "appropriately marked law enforcement vehicle".** — A law enforcement vehicle that is "appropriately marked" is marked in a manner that is suitable for being driven by a law enforcement officer and identified as such. *State v. Montano*, 2018-NMCA-047, cert. granted.

**Intent of the requirements that law enforcement officer be in uniform and in an appropriately marked vehicle.** — The intent of this section's uniform and appropriately marked law enforcement vehicle requirements is to establish a defendant's knowledge that he is fleeing a police officer. *State v. Montano*, 2018-NMCA-047, cert. granted.

Where a deputy sheriff, working as an investigator and wearing a dress shirt with tie, dress slacks and dress shoes and displaying his badge on the breast pocket of his shirt, and driving a Ford expedition that had no decals, striping, insignia, or lettering, but had a government license plate, wigwag headlights, red and blue flashing lights mounted on the grill and the top of the rear window, flashing brake lights, and a siren, attempted to stop defendant's vehicle for a vehicle registration infraction by utilizing the red and blue flashing lights on his vehicle and siren, and where defendant failed to stop, drove through a residential neighborhood at speeds that exceeded the posted speed limit, and failed to stop at stop signs and intersections, there was insufficient evidence to convict defendant of aggravated fleeing, because although the deputy's vehicle was "appropriately marked" as that term is used in 30-22-1.1(A) NMSA 1978 because the emergency lights and siren identified the vehicle as a law enforcement vehicle, the deputy was not "uniformed" as that term is used in 30-22-1.1(A) because the deputy's clothing, even with his badge affixed to his shirt, was not sufficient to identify him as a law enforcement officer. *State v. Montano*, 2018-NMCA-047, cert. granted.

## 30-22-2. Refusing to aid an officer.

Refusing to aid an officer consists of refusing to assist any peace officer in the preservation of the peace when called upon by such officer in the name of the United States or the state of New Mexico.

Whoever commits refusing to aid an officer is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-22-2, enacted by Laws 1963, ch. 303, § 22-2.**

**Cross references.** — For provisions authorizing officer to call on others for aid in execution of process, and setting penalty for refusal to provide such aid when called upon, *see* 29-1-7, 29-1-8 NMSA 1978.

ANNOTATIONS

**Refusing assistance to sheriff.** — A sheriff or his legally constituted deputy could call on any citizen or citizens to assist him in the execution of his office, and any person who refused such assistance without sufficient excuse was subject to penalty. *Territory v. Taylor*, 1903-NMSC-003, 11 N.M. 588, 71 P. 489.

**Grounds for summoning posse.** — The grounds for summoning the posse comitatus were found in the common law and statutes which were largely declaratory thereof and the court did not have authority to invest the sheriff with further grounds. *Eaton v. Bernalillo Cnty.*, 1942-NMSC-040, 46 N.M. 318, 128 P.2d 738.

## 30-22-2.1. Entry into domestic violence safe house or shelter; search warrant.

A. It is not a violation of Section 30-22-1 or Section 30-22-4 NMSA 1978 for a person who is a member, resident, employee or volunteer of or is otherwise associated with a domestic violence safe house or shelter to request that a law enforcement officer show a valid search warrant before allowing the officer to enter the domestic violence safe house or shelter. Nothing in this section shall prevent a law enforcement officer from executing a valid search warrant.

B. Prior to attempting to serve an arrest warrant within a domestic violence safe house or shelter, a law enforcement officer shall obtain a valid search warrant, unless exigent circumstances exist necessitating immediate entry.

**History: Laws 2009, ch. 84, § 1.**

**Effective dates.** — Laws 2009, ch. 84 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.



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## 30-22-3. Concealing identity.

Concealing identity consists of concealing one's true name or identity, or disguising oneself with intent to obstruct the due execution of the law or with intent to intimidate, hinder or interrupt any public officer or any other person in a legal performance of his duty or the exercise of his rights under the laws of the United States or of this state.

Whoever commits concealing identity is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-22-3, enacted by Laws 1963, ch. 303, § 22-3.**

**ANNOTATIONS**

**Constitutionality.** — This section is not unconstitutionally vague on the basis that it does not provide a time limit within which one must disclose one's identity. *State v. Dawson*, 1999-NMCA-072, 127 N.M. 472, 983 P.2d 421.

**Time for response to request for identification.** — This section requires a person to furnish identifying information immediately upon request or, if the person has reasonable concerns about the validity of the request, so soon thereafter as not to cause substantial inconvenience or expense to law enforcement officers. *State v. Dawson*, 1999-NMCA-072, 127 N.M. 472, 983 P.2d 421.

**Concealing information other than true name.** — Identity is not limited to name alone; thus, in the context of a valid traffic stop, a failure to provide the information contained in a driver's license (address, date of birth and social security number) falls within the reach of this section regardless of whether a driver also provides his or her true name. *State v. Andrews*, 1997-NMCA-017, 123 N.M. 95, 934 P.2d 289.

**Information supplied during traffic stop.** — This section is sufficiently definite, in the context of a valid traffic stop, so that ordinary drivers would understand that they had to provide more than just a name, and the authority to request such identification does not encourage arbitrary and discriminatory law enforcement. *State v. Andrews*, 1997-NMCA-017, 123 N.M. 95, 934 P.2d 289.

**Use of section as defense to tort.** — The defendant was entitled to qualified immunity since the facts and circumstances within his knowledge would have led a reasonable officer to conclude that the plaintiff concealed his identity in violation of this section. *Albright v. Rodriquez*, 51 F.3d 1531 (10th Cir. 1995).

**Evidence sufficient for conviction.** — Since the overwhelming evidence was that the defendant responded with profanity and recalcitrance to multiple requests that he produce some identification and a person genuinely puzzled by those requests most likely would have queried the officers rather than responding belligerently, the record contains sufficient evidence for the district court to reasonably conclude the defendant violated both 30-20-1 NMSA 1978 and this section. *United States v. Stenzel*, 49 F.3d 658 (10th Cir.), cert. denied, 516 U.S. 840, 116 S. Ct. 123, 133 L. Ed. 2d 73 (1995).

**Sufficient evidence of concealing identity.** — Where a law enforcement officer, in response to a report of a male subject acting suspiciously, observed defendant jumping back and forth over the fence of a business establishment in the early hours of the morning, and where defendant declined to give the officer his name, there was sufficient evidence to find that the officer was acting in the legal performance of her duty as a police officer in stopping defendant, and that defendant concealed his name or identity with the intent to obstruct, hinder or delay the officer's investigation. *State v. Ortiz*, 2017-NMCA-006, cert. denied.

**"Legal performance of duty" construed.** — This section mandates that the officer asking for identity be acting in the "legal performance of his duty," which requires that the state prove that the officer had reasonable suspicion to detain and question a defendant. *State v. Aguilar*, 2021-NMCA-018, cert. denied.

**The evidence of reasonable suspicion was insufficient to support defendant's concealing identity conviction.** — Where defendant was charged with possession of a controlled substance and concealing identity after a restaurant manager called police to report that a group of people, which included defendant, was engaged in possible drug activity at the restaurant, and where defendant filed a motion to suppress evidence seized from him following his arrest, claiming that reasonable suspicion of the commission of a crime is a required element of concealing identity, and that the state failed to introduce sufficient evidence at trial to prove that the arresting officer had reasonable suspicion, defendant's conviction for concealing identity was not supported by substantial evidence, because a detention for questioning about identity is not within a "legal performance of the officer's duty" unless that officer has reasonable suspicion that a crime has been or is being committed, and in this case, the only evidence the officer offered at trial was that he was dispatched to the restaurant because the restaurant's manager suspected that a group of people, which included defendant, were using drugs inside the restroom. This evidence is insufficient to establish that the officer had a reasonable suspicion, based on the facts and circumstances known to him, that defendant had criminally trespassed on the restaurant premises or that defendant was engaged in drug activity. *State v. Aguilar*, 2021-NMCA-018, cert. denied.

**Qualified immunity of arresting officer.** — In a civil rights action against a police officer who arrested the plaintiff for failing to provide proper identification during a traffic stop, the officer did not violate the plaintiff's clearly established rights and was entitled to qualified immunity. *Nagol v. New Mexico*, 923 F. Supp. 190 (D.N.M. 1996).

**Constitutional challenge not ripe.** — Since the plaintiff was arrested but not convicted for a violation of this section and failed to show a credible threat that he might be arrested under this section in the future, he could not challenge the validity of the section in federal court. *Nagol v. New Mexico*, 923 F. Supp. 190 (D.N.M. 1996).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — What amounts to disguise, 1 A.L.R. 642.

Criminal liability for false personation during stop for traffic infraction, 26 A.L.R.5th 378.

## 30-22-4. Harboring or aiding a felon.

Harboring or aiding a felon consists of any person, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister by consanguinity or affinity, who knowingly conceals any offender or gives such offender any other aid, knowing that he has committed a felony, with the intent that he escape or avoid arrest, trial, conviction or punishment.



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In a prosecution under this section it shall not be necessary to aver, nor on the trial to prove, that the principal felon has been either arrested, prosecuted or tried.

Whoever commits harboring or aiding a felon is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-22-4, enacted by Laws 1963, ch. 303, § 22-4.**

**ANNOTATIONS**

**Constitutionality.** — This section is not unconstitutional for vagueness. *State v. Rogers*, 1980-NMCA-059, 94 N.M. 527, 612 P.2d 1338, cert. denied, 94 N.M. 629, 614 P.2d 546 .

**Common law.** — This section grew out of the common law of accessories after the fact. *State v. Martinez*, 1989-NMCA-047, 109 N.M. 34, 781 P.2d 306, cert. denied, 108 N.M. 668, 777 P.2d 907.

The offense of harboring a felon had its genesis in the common law offense of accessory after the fact. *State v. Gardner*, 1991-NMCA-058, 112 N.M. 280, 814 P.2d 458, cert. denied, 112 N.M. 235, 814 P.2d 103.

**Classifications reasonable.** — Exemption of certain named groups of persons from application of this section on the basis of relationship to the felon are reasonable classifications and do not violate the equal protection clauses of the New Mexico and United States constitutions. *State v. Lucero*, 1975-NMSC-061, 88 N.M. 441, 541 P.2d 430.

**Elements of offense.** — Under this section and the common law applicable to accessories, in order to convict a defendant as an accessory, the state must prove that a felony has been committed and that the defendant knew the offender committed a felony. *State v. Gardner*, 1991-NMCA-058, 112 N.M. 280, 814 P.2d 458, cert. denied, 112 N.M. 235, 814 P.2d 103.

This section requires that the state prove that a specific felony has been committed, whether or not the perpetrator has been arrested, prosecuted, or tried. *State v. Gardner*, 1991-NMCA-058, 112 N.M. 280, 814 P.2d 458, cert. denied, 112 N.M. 235, 814 P.2d 103.

State failed to prove that defendant knew that the person that she allegedly "harbored" had committed a felony; the state had to prove that the person had actually committed the felony, and also had to prove that defendant knew that such felony had been committed by that person. *State v. Maes*, 2003-NMCA-054, 133 N.M. 536, 65 P.3d 584, cert. denied, 133 N.M. 593, 66 P.3d 962.

**To aid** means to assist, support or help. *State v. Lucero*, 1975-NMSC-061, 88 N.M. 441, 541 P.2d 430.

**"Felon".** — The legislature intended to include, within the meaning of the word "felon", felons already convicted but who are wanted for punishment as well as persons who have committed a felony but who have not been arrested, prosecuted, or tried. *State v. Serna*, 1991-NMCA-102, 112 N.M. 738, 819 P.2d 688.

A felony under this section is a crime defined at law as a felony; the status of the person harbored or aided, such as a juvenile, is not the determinant. *State v. Contreras*, 2002-NMCA-031, 131 N.M. 651, 41 P.3d 919, cert. denied, 131 N.M. 737, 42 P.3d 842.

**If revealing felon would also reveal spouse.** — This section does not exempt a defendant from prosecution where she could not have revealed the presence of a felon in her house without also revealing the presence of her husband, another felon. *State v. Mobbley*, 1982-NMCA-122, 98 N.M. 557, 650 P.2d 841, cert. denied, 98 N.M. 590, 651 P.2d 636.

**Crimes of harboring felon and conspiracy to harbor felon** do not merge. *State v. Smith*, 1985-NMCA-011, 102 N.M. 512, 697 P.2d 512, cert. denied.

**Harboring does not supersede crime of assisting escape.** — The offense of harboring or aiding a felon was not meant to supersede the crime of assisting escape. *State v. Martinez*, 1989-NMCA-047, 109 N.M. 34, 781 P.2d 306, cert. denied, 108 N.M. 668, 777 P.2d 907.

**Evidence sufficient.** — Evidence that defendant's girl friend, with whom he lived, was present and witnessed shootings by him (even though she claimed not to have seen gun or observed shootings), was with defendant at the place of the shootings afterwards and later at the house in which they were apprehended, that she undertook to close door upon the arresting officer, and that she ran toward the front of the house while defendant secreted himself in a closet, together with all inferences reasonably deducible therefrom, supported conviction for aiding defendant with intent that he escape or avoid arrest. *State v. Lucero*, 1975-NMSC-061, 88 N.M. 441, 541 P.2d 430.

**Law reviews.** — For article, "The Advocate's Role in the Legal System," see 6 N.M.L. Rev. 1 (1975). *State v. Maes*, 2003-NMCA-054, 133 N.M. 536, 65 P.3d 584.

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 39 Am. Jur. 2d Harboring Criminals, § 1 et seq.

## 30-22-5. Tampering with evidence.

A. Tampering with evidence consists of destroying, changing, hiding, placing or fabricating any physical evidence with intent to prevent the apprehension, prosecution or conviction of any person or to throw suspicion of the commission of a crime upon another.

B. Whoever commits tampering with evidence shall be punished as follows:

(1) if the highest crime for which tampering with evidence is committed is a capital or first degree felony or a second degree felony, the person committing tampering with evidence is guilty of a third degree felony;

(2) if the highest crime for which tampering with evidence is committed is a third degree felony or a fourth degree felony, the person committing tampering with evidence is guilty of a fourth degree felony;

(3) if the highest crime for which tampering with evidence is committed is a misdemeanor or a petty misdemeanor, the person committing tampering with evidence is guilty of a petty misdemeanor; and

(4) if the highest crime for which tampering with evidence is committed is indeterminate, the person committing tampering with evidence is guilty of a fourth degree felony.



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**History: 1953 Comp., § 40A-22-5, enacted by Laws 1963, ch. 303, § 22-5; 2003, ch. 296, § 1.**

**The 2003 amendment,** effective July 1, 2003, redesignated the text of the former section as Subsection A and the preliminary language of Subsection B and added Paragraphs B(1) to (4).

ANNOTATIONS

**Standard for sufficiency of evidence to support a tampering conviction.** — Absent either direct evidence of a defendant's specific intent to tamper or evidence from which the factfinder may infer such intent, the evidence cannot support a tampering conviction. *State v. Guerra*, 2012-NMSC-027, 284 P.3d 1076.

Where the state alleged that defendant tampered with evidence based on the fact that defendant had a weapon at the scene of the crime, defendant used the weapon to kill someone, the weapon was removed from the scene of the crime, and the weapon was never recovered, the evidence was insufficient as a matter of law to support defendant's conviction of tampering with evidence because the state cannot convict a defendant of tampering with evidence simply because evidence that must have once existed cannot be found. *State v. Guerra*, 2012-NMSC-027, 284 P.3d 1076.

**Sentencing under the "indeterminate crime" provision.** — When the state seeks a conviction under Section 30-22-5 NMSA 1978, tampering with evidence of a capital, first or second degree felony, a determination that defendant tampered with evidence related to a capital, first or second degree felony must be made by the jury. Absent this determination, the court is limited to sentencing defendant under the "indeterminate crime" provision. *State v. Alvarado*, 2012-NMCA-089, *overruled by State v. Radosevich*, 2018-NMSC-028.

Where defendant was charged with first degree murder and tampering with evidence; and the jury acquitted defendant of murder and convicted defendant of tampering with evidence, defendant was properly sentenced under the indeterminate crime provision of Section 30-22-5 NMSA 1978. *State v. Alvarado*, 2012-NMCA-089, *overruled by State v. Radosevich*, 2018-NMSC-028.

**Factors that determine punishment are elements of tampering with evidence.** — The factors listed in Subsection B of Section 30-22-5 NMSA 1978 are elements of the offense of tampering with evidence, rather than mere sentencing factors. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2013-NMCERT-012.

Where after defendant shot and killed the victim, defendant put the gun in a crawl space under the house; defendant was charged with second-degree murder and tampering with evidence of a capital crime or a first or second degree felony; and the jury instruction on tampering with evidence required the jury to find that defendant hid the gun in an effort to avoid being apprehended, prosecuted or convicted, but did not require the jury to find that the evidence that was tampered with related to a first or second degree felony, the jury instruction omitted an essential element of the crime that the gun was evidence of a capital crime or a first or second degree felony and violated defendant's right under the sixth and fourteenth amendments to have a jury find all elements of the offense beyond a reasonable doubt. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2013-NMCERT-012.

**Unconstitutional application of tampering with evidence statute.** — Section 30-22-5(B)(4) NMSA 1978 cannot be constitutionally applied to impose greater punishment for commission of tampering where the underlying crime is indeterminate than the punishment prescribed under 30-22-5(B)(3) NMSA 1978 where the underlying crime is a misdemeanor or petty misdemeanor. *State v. Radosevich*, 2018-NMSC-028, *rev'g* 2016-NMCA-060, 376 P.3d 871, and *overruling State v. Jackson*, 2010-NMSC-032, 237 P.3d 754 and *State v. Alvarado*, 2012-NMCA-089.

Where defendant was convicted of fourth-degree tampering with evidence pursuant to 30-22-5(B)(4) NMSA 1978, although the tampering jury instruction did not identify an underlying offense, defendant's conviction for fourth-degree felony tampering with evidence was a denial due process of law, because to impose a greater penalty for commission of tampering pursuant to Subsection (B)(4), where the evidence does not establish the underlying offense, than for commission of tampering pursuant to 30-22-5(B)(3) NMSA 1978, where the evidence establishes an underlying misdemeanor offense, is both a denial of due process of law and a violation of the accused's right to have a jury determine guilt beyond a reasonable doubt on every element that may establish the range of permissible penalties. *State v. Radosevich*, 2018-NMSC-028, *rev'g* 2016-NMCA-060, 376 P.3d 871, and *overruling State v. Jackson*, 2010-NMSC-032, 237 P.3d 754 and *State v. Alvarado*, 2012-NMCA-089.

**Elements of tampering with evidence.** — The degree and identification of the underlying crime to which the tampering offense relates, if any, are elements of tampering that should be decided by the jury. As such, the underlying crime to which tampering relates, if any, should be identified in the tampering instruction and found by the jury. Tampering with evidence can also be a stand-alone crime that is not tied to a separate offense. Where there is no separate identified crime, the tampering offense is linked to an indeterminate crime. *State v. Radosevich*, 2016-NMCA-060, 376 P.3d 871, *rev'd*, 2018-NMSC-028.

Where defendant was initially charged with assault with intent to commit murder and tampering with evidence, and where the district court directed a verdict on the charged offense of assault with intent to commit murder and then sua sponte instructed the jury on a new and different charge of aggravated assault with a deadly weapon after the close of evidence, the offense to which defendant's tampering was related failed for insufficient evidence, and defendant's conviction for aggravated assault with a deadly weapon was reversed, rendering the underlying offense for which defendant might have tampered to be an unidentified, indeterminate crime. The district court, therefore, wrongfully convicted defendant of having tampered with evidence of a third- or fourth-degree felony in the absence of such a finding by the jury. *State v. Radosevich*, 2016-NMCA-060, 376 P.3d 871, *rev'd*, 2018-NMSC-028.

**Elements of tampering with evidence.** — The crime of tampering with evidence is complete when the accused commits an act of tampering with the requisite specific intent to prevent the apprehension, prosecution, or conviction of any person, regardless of whether the accused's objective is a separate crime or whether a separate criminal investigation ever exists or could exist. *State v. Jackson*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754, *rev'g* 2009-NMCA-068, 146 N.M. 563, 212 P.3d 1117, *overruled by State v. Radosevich*, 2018-NMSC-028.

Where defendant, who was required as a condition of probation to submit to random urinalyses, reported to the probation office to provide a urine sample with a bottle of clean urine hidden in defendant's pants; the probation officer discovered the bottle of urine when it fell from defendant's pants; and defendant admitted to the probation officer that defendant attempted to provide a false urine sample, defendant was guilty of tampering with evidence. *State v. Jackson*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754, *rev'g* 2009-NMCA-068, 146 N.M. 563, 212 P.3d 1117, *overruled by State v. Radosevich*, 2018-NMSC-028.

**This section applies only to conduct which interferes with the investigation or prosecution of a crime.** *State v. Jackson*, 2009-NMCA-068, 146 N.M.



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563, 212 P.3d 1117; *rev'd*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754, *overruled by State v. Radosevich*, 2018-NMSC-028.

**Partial destruction of evidence.** — Where the defendant swiped a portion of white powder on a laminated card that was found in the defendant's wallet with his thumb and ate the powder, the defendant was guilty of tampering with evidence and an instruction on the lesser included offense of attempted tampering with evidence was not warranted, even though the defendant had not destroyed all of the white powder on the card. *State v. McClennen*, 2008-NMCA-130, 144 N.M. 878, 192 P.3d 1255.

**The fact that the defendant once held a weapon at a murder scene** that was not recovered is no basis from which to infer that the defendant acted to destroy or hide physical evidence of a crime. *State v. Silva*, 2007-NMCA-117, 142 N.M. 686, 168 P.3d 1110, *aff'd in part, rev'd in part*, 2008-NMSC-051, 144 N.M. 815, 192 P.3d 1192.

**Double jeopardy.** — Convictions for both possession of a controlled substance (cocaine) and tampering with evidence (cocaine) did not violate defendant's double jeopardy rights. *State v. Franco*, 2005-NMSC-013, 137 N.M. 447, 112 P.3d 1104.

**Separate convictions of tampering with evidence did not violate double jeopardy.** — Where defendant shot the victim in the chest in defendant's vehicle, drove the unconscious victim in the vehicle to an isolated area, shot the victim twice in the head while the victim was still alive, poured gasoline on the victim, and lit the victim on fire; defendant gave the vehicle to a friend; and when the friend returned the vehicle, defendant set fire to the vehicle, defendant's three convictions of tampering with evidence were not based on unitary conduct and did not violate defendant's right to be free from double jeopardy. *State v. Urioste*, 2011-NMCA-121, 267 P.3d 820, cert. granted, 2011-NMCERT-012.

**Possession and tampering distinguished.** — Possession of a controlled substance can be committed without tampering with evidence. Conversely, tampering with evidence, even if the evidence is illegal drugs, can be committed without possessing the drugs. *State v. Franco*, 2005-NMSC-013, 137 N.M. 447, 112 P.3d 1104.

Possession of a controlled substance requires proof defendant knew or believed it was cocaine or some other substance that is regulated, which is not required to prove tampering, while tampering with evidence requires proof defendant intended to prevent the apprehension, prosecution, or conviction of herself or others, which is not required to prove possession. *State v. Franco*, 2005-NMSC-013, 137 N.M. 447, 112 P.3d 1104.

**Removing documents from their proper files** amounts to "hiding" evidence prohibited by this section. *State v. Casteneda*, 1982-NMCA-046, 97 N.M. 670, 642 P.2d 1129.

**Hiding evidence.** — There was ample evidence of intent to tamper with evidence where directories crucial to the proof of the prosecution's case were removed from the defendant's offices to the office of someone not affiliated with defendant's association. In short, evidence relevant to a criminal prosecution for securities fraud was hidden for the purpose of avoiding the prosecution. *State v. Shade*, 1986-NMCA-072, 104 N.M. 710, 726 P.2d 864, cert. quashed, 104 N.M. 702, 726 P.2d 856, *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**Accomplice liability.** — One may be found guilty of tampering on a theory of accomplice liability in aiding the destruction of evidence. *State v. Casteneda*, 1982-NMCA-046, 97 N.M. 670, 642 P.2d 1129.

**Intent requirements** can be met regardless of whether a crime has in fact been committed and regardless of any belief or knowledge by the police concerning crimes or suspected crimes, or cause by the police to apprehend an individual. *State v. Arellano*, 1977-NMCA-126, 91 N.M. 195, 572 P.2d 223.

**Series of acts.** — The state presented sufficient evidence to support defendant's three separate convictions of tampering with evidence, given that defendant sent a note to three co-defendants in an attempt to cover up the crimes. *State v. Reyes*, 2002-NMSC-024, 132 N.M. 576, 52 P.3d 948.

Where defendant disposed of evidence at three distinct times in different locations, defendant's acts supported three convictions for tampering with evidence. *State v. DeGraff*, 2006-NMSC-011, 139 N.M. 211, 131 P.3d 61.

**Sufficient evidence of tampering with evidence.** — At defendant's trial for murder, kidnapping and tampering with evidence, where the state provided evidence establishing that defendant beat the victim with a baseball bat, mopped up the victim's blood and hid the bat behind a washing machine, there was sufficient evidence to prove, beyond a reasonable doubt, that defendant intended to hide evidence from the police in order to avoid apprehension or prosecution. *State v. Telles*, 2019-NMCA-039, cert. denied.

**Sufficient evidence of attempted tampering with evidence.** — At defendant's trial for murder, kidnapping and tampering with evidence, where the state provided evidence establishing that defendant beat the victim with a baseball bat, moved the victim's body to a back room and then rolled the body in a carpet, there was sufficient evidence to prove, beyond a reasonable doubt, that defendant hid the body in an unsuccessful attempt to prevent the police from discovering the victim. *State v. Telles*, 2019-NMCA-039, cert. denied.

**Sufficient evidence.** — Where defendant lived with the victim for approximately one and a half months before the victim disappeared; a few weeks later, the victim's decomposed body was discovered wrapped in a blue air mattress and sheets, and covered with a mattress in an alley approximately 500 feet from defendant's apartment; defendant's parent testified that the parent sent a blue air mattress and a set of sheets to defendant; grid marks on the air mattress resembled the grid marks of a shopping cart; there was a shopping cart at the scene; shopping carts were found in defendant's apartment; DNA found on a pair of jeans near the body provided a possible link between the body and defendant; and the victims' blood was found on the carpet in defendant's apartment, the evidence was sufficient to permit the jury to find defendant guilty of tampering with evidence. *State v. Schwartz*, 2014-NMCA-066, cert. denied, 2014-NMCERT-006.

Where defendant drove a pickup toward a group of children who were trick-or-treating on Halloween; the chaperone pushed the children out of the way but was struck and killed; and after the accident, defendant removed decals on the truck and cleaned the front of the truck, the evidence was sufficient to support defendant's conviction of tampering with evidence. *State v. Melendrez*, 2014-NMCA-062, cert. denied, 2014-NMCERT-006.

Where defendant testified that after defendant shot and killed the victim and then put the gun in a crawl space under the house; an officer testified that the gun was found in a crawl space under the house that was concealed behind a dog house where the dog was chained; and after defendant was arrested, defendant telephoned a person and asked the person to go under the house where the dog was because there was a water leak, the evidence was sufficient to support defendant's conviction for tampering with evidence of a capital crime or a first or second degree felony. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2013-NMCERT-012.



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Where defendant directed an accomplice to remove stolen property from defendant's car; defendant saw the accomplice take the property from the car to another location; and defendant drove the car to defendant's parents' home for the purpose of disposing of the property, the evidence was sufficient to support defendant's conviction for tampering with evidence under a theory of accomplice liability. *State v. Johnson*, 2004-NMSC-029, 136 N.M. 348, 98 P.3d 998, cert. denied, 543 U.S. 1177, 125 S. Ct. 1334, 161 L. Ed. 2d 162 (2005).

Where, in a vehicular homicide case, the victim was carrying a twelve pack of a common brand of beer; defendant's vehicle hit the victim; defendant's friend discovered part of a twelve pack of the same brand of beer lodged in the damaged grille of defendant's car; and the police found beer cans near the victim's body, a partial twelve pack of the same brand of beer and damaged vehicle parts in a bag in defendant's home, and the friend's fingerprints on one of the cans of beer and on the grille of defendant's car, the evidence was sufficient to support defendant's conviction for tampering with evidence. *State v. Guzman*, 2004-NMCA-097, 136 N.M. 253, 96 P.3d 1173, cert. denied, 2004-NMCERT-008, 136 N.M. 491, 100 P.3d 197.

Where, as defendant was approaching defendant's truck, police officers were converging on defendant to arrest defendant on a warrant; when defendant saw the police, defendant dropped bags of drugs behind the seat of the truck; and the officers discovered the drugs behind the seat of the truck, the evidence was sufficient to support defendant's conviction for tampering with evidence. *State v. Graham*, 2003-NMCA-127, 134 N.M. 613, 81 P.3d 556, *rev'd on other grounds*, 2005-NMSC-004, 137 N.M. 197, 109 P.3d 285.

Where the non-conflicting testimony of witnesses established that while defendant was attending a party, defendant went to the victim's apartment to purchase marijuana and shot and killed the victim; defendant returned to the party with the gun in defendant's hand; defendant was showing off the gun at the party and stated that defendant had taken the gun from the victim and "blasted" the victim; defendant twice asked a person at the party to hide the gun; defendant tried unsuccessfully to sell the gun to two persons at the party; and the police were unable to find the gun, there was sufficient evidence to support defendant's conviction of tampering with evidence. *State v. Garcia*, 2011-NMSC-003, 149 N.M. 185, 246 P.3d 1057.

Where the defendant fled the scene of a shooting with the weapons used in the crime; attempted to flee New Mexico; falsely identified himself to police officers; and concealed the weapons in his car, the evidence was sufficient to support the defendant's conviction of tampering with evidence. *State v. Rudolfo*, 2008-NMSC-036, 144 N.M. 305, 187 P.3d 170.

Where defendant's primary co-conspirator beat, drugged, and tied the victim to a bed in defendant's residence; defendant did not object to the treatment of the victim; while the primary co-conspirator was absent from the residence for a lengthy period of time, defendant watched the victim and did not assist the victim or call the police; defendant did not object when the primary co-conspirator expressed an intention to kill the victim and burn the victim's car; defendant purchased charcoal liter fluid at the direction of the primary co-conspirator; defendant did not object when defendant's co-conspirators put the victim in the trunk of the victim's car; while defendant remained at the residence, defendant's co-conspirators used the liter fluid to burn the car and kill the victim; and the following day, defendant washed the victim's blood splatter from the living room blinds, there was sufficient evidence to convict defendant of tampering with evidence. *State v. Bahney*, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003.

**Sufficient evidence of tampering with evidence.** — Where defendant was charged with first-degree murder in the shooting death of two victims, tampering with evidence and breaking and entering, there was sufficient evidence to support his conviction for tampering with evidence where the state presented testimony from a witness who saw defendant in the possession of a firearm just hours after the time when the murders were believed to have occurred, but did not have a gun when police stopped him soon thereafter. The jury could logically infer that defendant had a gun, which he disposed of between the time of the murders and when he was arrested, and then lied about it to police, and that defendant hid the gun to prevent apprehension, prosecution, or conviction of that crime. *State v. Carrillo*, 2017-NMSC-023.

**Sufficient evidence to support tampering with evidence conviction.** — Where defendant was charged with first-degree murder and tampering with evidence, and where several witnesses observed defendant shoot the victim while he was sitting in his vehicle, and where the police found the gun that fired the bullets that killed the victim and discharged the bullet casings found at the crime scene, the jury was free to infer that defendant discarded the gun after killing the victim and fleeing the scene. There was sufficient evidence presented to prove beyond a reasonable doubt that defendant disposed of the gun to prevent apprehension, prosecution, or conviction. *State v. Ramirez*, 2018-NMSC-003.

**Sufficient evidence to support a tampering conviction.** — Where defendant's accomplices testified that the knife used to kill the victim belonged to defendant, and that after defendant learned that the victim had been killed, defendant let her accomplices into her house and allowed them to shower and change out of their bloody clothes, and that one of the accomplices cleaned the blood off of defendant's knife in defendant's restroom and in defendant's presence, and where there was evidence that the accomplice used bleach from defendant's home to clean the knife, the evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that defendant intended the destruction of evidence, including the removal of the victim's blood from her knife, in order to avoid being prosecuted for murder, and that defendant helped the accomplice clean the knife by providing the accomplice with space and chemicals to do so. *State v. Montoya*, 2016-NMCA-098, cert. denied.

**Substantial evidence of tampering with evidence.** — Where the defendant was bent down behind a fence; when police officers approached, the defendant stood up and walked toward a shed; the defendant did not stop when the officers called out to the defendant; the defendant's body movements appeared as if the defendant had disposed of something; the defendant then walked back to the officers; the officers found a bag of cocaine in front of the shed; and when the cocaine was found, the defendant placed the defendant's hands behind the defendant's back and turned around without any request by the officers, there was sufficient evidence to support a tampering with evidence conviction. *State v. Delgado*, 2009-NMCA-061, 146 N.M. 402, 210 P.3d 828, cert. denied, 2010-NMCERT-007, 148 N.M. 610, 241 P.3d 611.

**Evidence sufficient.** — Where defendant shot multiple times into a house with two different weapons, killing one victim and wounding one victim; and defendant testified that immediately after the shooting, defendant took the guns and put them behind defendant's refrigerator, there was sufficient evidence to support defendant's conviction of tampering with evidence. *State v. Torrez*, 2013-NMSC-034.

**Evidence sufficient to convict.** — Testimony by a witness whom the factfinder has believed may be rejected by an appellate court only if there is a physical impossibility that the statements are true or the falsity of the statement is apparent without resort to inferences or deductions. Where testimony is not inherently improbable under this standard, it must be given weight, and have



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attached to it the credibility, apparently assigned it by the jury. *State v. Sanders*, 1994-NMSC-043, 117 N.M. 452, 872 P.2d 870.

Evidence that defendant stated that he had killed someone and thrown the body in the trash along with evidence that the victim's nude body was found without identification, covered with plastic bags and duct tape, inside a dumpster was sufficient for conviction. *State v. Rojo*, 1999-NMSC-001, 126 N.M. 438, 971 P.2d 829.

Where defendant admitted that he assisted accomplice in throwing victim into a well and that he threw the stolen firearms into the woods, the jury could infer that he committed these acts to avoid apprehension, and this is sufficient evidence for the conviction of tampering with evidence. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, *overruled on other grounds by State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

**Sufficient evidence of intent.** — Where defendant, charged with second-degree murder and tampering with evidence, testified that after he stabbed the victim, he threw the knife out the car window as he drove away from the crime scene, defendant's specific intent to prevent his apprehension or prosecution can be inferred from his overt act of disposing of the murder weapon; the evidence was sufficient to support defendant's conviction for tampering with evidence. *State v. Sanchez*, 2015-NMCA-077, cert. denied, 2015-NMCERT-006.

**No fundamental error where state failed to prove an essential element of tampering with evidence when the evidence at trial clearly established the missing element.** — Where defendant was charged with third-degree tampering with evidence of a second-degree felony, but where the jury instruction did not require the jury to find that defendant's act of tampering related to a second-degree felony, the failure to instruct the jury on one of the elements of the offense of third-degree tampering was error, offending defendant's sixth amendment right to a jury determination of guilt beyond a reasonable doubt as to every element of the crime charged; the error, however, did not amount to fundamental error as it was clear from the record that the evidence presented at trial established the missing element. *State v. Sanchez*, 2015-NMCA-077, cert. denied, 2015-NMCERT-006.

**Sufficient evidence of tampering with evidence.** — Where defendant was convicted of second-degree murder and tampering with evidence, there was sufficient evidence to support defendant's conviction for tampering with evidence where the State sought to prove that defendant hid a vehicle connected to the shooting and that he intended to prevent the apprehension, prosecution or conviction of himself, and where the evidence at trial established that defendant drove the vehicle away from the shooting, left it parked in an alley and contacted an unidentified person who helped defendant obtain and pour gasoline on the vehicle and then start it on fire. Based on this evidence, the jury rationally could have inferred that defendant parked the car in the alley and returned to set it aflame and that his intent in doing so was to prevent his apprehension, prosecution, or conviction for the killing of the victim. *State v. Chavez*, 2022-NMCA-007, cert. granted.

**Tampering with evidence conviction reversed where crime for which tampering with evidence was based was reversed.** — Where defendant was convicted of second-degree murder and tampering with evidence in the third degree based on a finding that the highest degree for which tampering with evidence was committed was a second degree felony, and where the district court erred in denying defendant's proposed voluntary manslaughter instruction, thus requiring the reversal of defendant's second-degree murder conviction, defendant's tampering with evidence conviction also required reversal, because if the district court had correctly instructed the jury on voluntary manslaughter, the jury could have returned a guilty verdict on that charge, which is a third degree felony, and the jury's verdict would have amounted to a determination that defendant tampered with evidence of a third degree felony, and any conviction for tampering would have been a fourth degree felony. *State v. Chavez*, 2022-NMCA-007, cert. granted.

**Evidence insufficient to convict.** — Where the state alleged that the defendant had a gun at the scene of the crime, a gun was used to murder the victim, the murder weapon was removed from the scene of the murder, and the murder weapon was never recovered, the state failed to meet its burden of proof because the state failed to offer direct evidence of the defendant's specific intent to tamper with evidence or evidence of an overt act from which the jury may infer such intent. *State v. Silva*, 2008-NMSC-051, 144 N.M. 815, 192 P.3d 1192.

Where defendant was convicted of tampering with a gun that defendant had used to shoot into an occupied house; the state provided evidence that defendant took the gun when defendant left the crime scene; the State offered no evidence that defendant actively hid or disposed of the gun; the police recovered the gun from another person during a traffic stop a few weeks after the shooting; the state did not offer any evidence regarding how the other person acquired possession of the gun; and the only evidence that defendant tampered with the gun was that the police could not find the gun when they searched defendant's house, the evidence was insufficient to support defendant's conviction. *State v. Arrendondo*, 2012-NMSC-013, 278 P.3d 517.

Since defendant merely dropped some items from his hand to the ground upon the officers' announcement of police presence, there was insufficient evidence to support a finding of either element of intent or action under this section. *State v. Roybal*, 1992-NMCA-114, 115 N.M. 27, 846 P.2d 333, cert. denied, 114 N.M. 550, 844 P.2d 130.

Where there is no evidence suggesting that defendant encouraged his accomplice to dispose of the gun or was present when the accomplice threw it away, there was insufficient evidence to support defendant's convictions for tampering with evidence and conspiracy to tamper with evidence. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

**Insufficient evidence to support tampering with evidence conviction.** — Where defendant was charged with trafficking a controlled substance, tampering with evidence, resisting, evading, or obstructing an officer, and possession of drug paraphernalia, and where defendant claimed there was insufficient evidence to support his conviction for tampering with evidence based on the state's evidence that defendant threw baggies of crack cocaine into a vehicle in plain view of multiple officers following a traffic stop, defendant's conviction for tampering with evidence was not supported by sufficient evidence because the evidence was never concealed from officers, and New Mexico courts have drawn a distinction between acts occurring in the presence of an officer and those that attempted to conceal evidence outside the view of an officer. *State v. Jackson*, 2021-NMCA-059, cert. denied.

**Insufficient evidence.** — Where the defendant, who was on probation, was required to submit to random urinalysis; the defendant provided a false urine sample; and there was no evidence that a violation of the criminal laws was being investigated or prosecuted by the probation officer, there was no evidence to support the defendant's conviction for tampering with evidence. *State v. Jackson*, 2009-NMCA-068, 146 N.M. 563, 212 P.3d 1117, *rev'd*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754, *overruled by State v. Radosevich*, 2018-NMSC-028.

Where, in a case in which the victim died from multiple stab wounds, the only evidence presented by the state was that a knife or sharp object existed, that defendant's



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clothing might have been blood stained and that ten days passed between the murder and defendant's arrest, but there was no evidence of an overt act to destroy or hide any knife or blood stained clothing, the evidence was insufficient to support a finding beyond a reasonable doubt of intent by defendant to disrupt the police investigation or that defendant actively destroyed or hid evidence. *State v. Duran*, 2006-NMSC-035, 140 N.M. 94, 140 P.3d 515.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Intentional spoliation of evidence, interfering with prospective civil action, as actionable, 70 A.L.R.4th 984.

Criminal liability of attorney for tampering with evidence, 49 A.L.R. 5th 619.

Negligent spoliation of evidence, interfering with prospective civil action, as actionable, 101 A.L.R.5th 61.

## 30-22-6. Compounding a crime.

Compounding a crime consists of knowingly agreeing to take anything of value upon the agreement or understanding, express or implied, to compound or conceal a crime or to abstain from a prosecution therefor, or to withhold any evidence thereof.

For purposes of this section, a person may be prosecuted and convicted of compounding a crime though the person guilty of the original crime has not been charged, indicted or tried.

Whoever commits compounding a crime is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-22-6, enacted by Laws 1963, ch. 303, § 22-6.**

**ANNOTATIONS**

**Threat of prosecution for bad check.** — Specific language of this section controls over the more general language of the Worthless Check Act (30-36-1 NMSA 1978 et seq.), even if the latter act could by implication be construed to authorize a threat of prosecution in a bad check notice. 1965-66 Op. Att'y Gen. No. 65-197.

Written notice that a check has been returned unpaid for lack of funds or credit, as called for in the Worthless Check Act (30-36-1 NMSA 1978 et seq.), may not contain a statement that the district attorney has been contacted and that criminal proceedings will be instituted unless the check is paid within a period of time. 1965-66 Op. Att'y Gen. No. 65-197.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 15A Am. Jur. 2d Compounding Crimes §§ 1 to 4.

15A C.J.S. Compounding Offenses § 3.

## 30-22-7. Unlawful rescue.

Unlawful rescue consists of intentionally, and without lawful authority, rescuing any person lawfully in custody or confinement.

Whoever commits unlawful rescue of a person charged with or convicted of a crime not constituting a capital felony, or who is charged with but not convicted of a capital felony, is guilty of a third degree felony.

Whoever commits unlawful rescue of an individual convicted of a capital felony is guilty of a first degree felony.

**History: 1953 Comp., § 40A-22-7, enacted by Laws 1963, ch. 303, § 22-7.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue § 5.

30A C.J.S. Escape and Related Offenses; Rescue § 28 et seq.

## 30-22-8. Escape from jail.

Escape from jail consists of any person who shall have been lawfully committed to any jail, escaping or attempting to escape from such jail.

Whoever commits escape from jail is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-22-8, enacted by Laws 1963, ch. 303, § 22-8.**

**ANNOTATIONS**

**Section does not require commitment under criminal charge.** — This section does not require commitment on a criminal charge. A literal reading of the statute would indicate that any person who has been committed to jail pursuant to lawful authority who escapes or attempts to escape is guilty of escape from jail. *State v. Alderette*, 1990-NMCA-132, 111 N.M. 297, 804 P.2d 1116.

**Commitment pursuant to arrest warrant.** — Whether "committed" in this section means "placing in confinement" or "an order of confinement," defendant held by virtue of an arrest warrant for a petty misdemeanor



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was "committed" to jail when he left the jail through the roof. *State v. Garcia*, 1968-NMCA-007, 78 N.M. 777, 438 P.2d 521.

**Physical confinement not required.** — Physical confinement in jail at the time a defendant escapes is not an element required for conviction under this section. "Lawfully committed", as used in this section, includes situations in which an inmate has been lawfully ordered to be confined in jail and thereafter is temporarily released on a furlough, but is legally obligated to return to jail at a specific time. *State v. Hill*, 1994-NMCA-069, 117 N.M. 807, 877 P.2d 1110, cert. denied, 118 N.M. 90, 879 P.2d 91.

**Kitchen part of jail.** — Evidence that kitchen was used for preparation of prisoners' meals and that it was part of the jail, supported guilty verdict which necessarily determined that the kitchen was an integral part and parcel of the jail and that the defendant had escaped therefrom. *State v. Weaver*, 1971-NMCA-172, 83 N.M. 362, 492 P.2d 144.

**Escape deemed from penitentiary, not jail.** — Where the trial court had ordered the defendant released from the penitentiary into the custody of the county sheriff until after his arraignment, the order provided for a change in the location of his physical confinement but did not change the fact that the defendant's lawful custody or confinement was in the penitentiary, and the defendant was properly convicted of escape from the penitentiary under 30-22-9B NMSA 1978, rather than escape from jail under this section. *State v. Martin*, 1980-NMCA-019, 94 N.M. 251, 609 P.2d 333, cert. denied, 94 N.M. 628, 614 P.2d 545.

**Escape from work detail while serving jail sentence.** — Where the defendant was assigned to a work detail at the county fairgrounds while serving a lawful sentence at a county jail, and it was while so assigned that he escaped, the defendant was guilty of escape from jail. *State v. Gilman*, 1981-NMCA-123, 97 N.M. 67, 636 P.2d 886, cert. denied, 97 N.M. 483, 641 P.2d 514; *State v. Coleman*, 1984-NMCA-037, 101 N.M. 252, 680 P.2d 633, cert. denied, 101 N.M. 185, 679 P.2d 1283.

**Defendant's failure to return home while being electronically monitored** could not constitute an escape under this section since the statute requires the defendant to escape from a "jail" to which he or she has been committed and a person who is on home detention is not obliged to be in jail and cannot be said to be constructively in jail. *State v. Martinez*, 1998-NMCA-047, 125 N.M. 83, 957 P.2d 68, cert. denied, 125 N.M. 146, 958 P.2d 104.

**Fundamental error to instruct the jury on escape from an inmate-release program when defendant was charged with escape from jail.** — Where defendant was charged with escape from jail, and where, at trial, the district court judge instructed the jury using the uniform jury instruction that lists the essential elements for the crime of escape from an inmate-release program, defendant's conviction for escape from jail resulted in fundamental error, because the district court instructed the jury on a crime for which defendant was never charged. It is improper to instruct the jury as to a crime not formally charged if that crime is not a lesser-included offense of the crime formally charged. *State v. Grubb*, 2020-NMCA-003.

**Sufficient evidence of escape from jail.** — Where defendant was charged with escape from jail, and where at trial the state presented evidence that the district court revoked defendant's probation, sentenced him to two years and six months incarceration, and granted him furlough, and that defendant failed to report to the detention center at the end of the furlough period, there was sufficient evidence to support defendant's conviction for escape from jail, because based on the evidence presented, the jury could reasonably conclude that defendant failed to return to lawful custody or confinement within the time fixed for his return and that his failure to return was done willfully. *State v. Grubb*, 2020-NMCA-003.

**Invalid conviction as defense.** — So long as the commitment to custody is valid on its face, it is no defense to a charge of escaping jail that the incarceration was based on a violation of a law which was allegedly unconstitutionally applied. *State v. Lopez*, 1968-NMSC-098, 79 N.M. 235, 441 P.2d 764.

**Law reviews.** — For article, "The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?" see 2 N.M.L. Rev. 141 (1972).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 1, 2, 3, 4.

Escape or prison breach as affected by means employed, 96 A.L.R.2d 520.

Duress, necessity, or conditions of confinement as justification for escape from prison, 69 A.L.R.3d 678.

Conviction for escape where prisoner fails to leave confines of prison or institution, 79 A.L.R.4th 1060.

Duress, necessity, or conditions of confinement as justification for escape from prison, 54 A.L.R.5th 141.

30A C.J.S. Escape §§ 2 to 15.

## 30-22-8.1. Escape from a community custody release program.

A. Escape from a community custody release program consists of a person, excluding a person on probation or parole, who has been lawfully committed to a judicially approved community custody release program, including a day reporting program, an electronic monitoring program, a day detention program or a community tracking program, escaping or attempting to escape from the community custody release program.

B. Whoever commits escape from a community custody release program, when the person was committed to the program for a misdemeanor charge, is guilty of a misdemeanor.

C. Whoever commits escape from a community custody release program, when the person was committed to the program for a felony charge, is guilty of a felony.

**History: Laws 1999, ch. 118, § 1.**

**Effective dates.** — Laws 1999, ch. 118, § 2, made the act effective on July 1, 1999.

ANNOTATIONS

**Electronic monitoring programs.** — Electronic monitoring programs may be used as part of a community custody release program: they are not limited to probation and parole programs. *State v. Frost*, 2003-NMCA-002, 133 N.M. 45, 60 P.3d 492, cert. denied, 133 N.M. 126, 61 P.3d 835.

**Community release programs.** — A case by case release of defendants may be considered as a judicially approved community release program. *State v. Duhon*,



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2005-NMCA-120, 138 N.M. 466, 122 P.3d 50, cert. quashed, 2006-NMCERT-003, 139 N.M. 352, 132 P.3d 1038.

**Habitual offender enhancement not prohibited.** — Where defendant was convicted of felony possession of a controlled substance and subsequently committed to a community custody release program (CCP), and where two weeks after being committed to CCP, defendant cut off his ankle monitor and failed to respond to messages from monitoring officers, it was not error for the state to use defendant's felony possession charge to determine whether to charge defendant for misdemeanor or felony escape from CCP and to use defendant's felony possession conviction to enhance his sentence for escape from CCP, because defendant's degree of escape from CCP was based upon the felony possession charge, while the enhancement of his felony escape sentence was based upon his three prior felony convictions. *State v. Sanchez*, 2019-NMCA-006, cert. denied.

## 30-22-8.2. Escape from a secure residential treatment facility.

A. Escape from a secure residential treatment facility consists of a person lawfully committed for a criminal offense to a secure residential treatment facility escaping from the facility.

B. Whoever commits escape from a secure residential treatment facility is guilty of a misdemeanor.

C. As used in this section, "secure residential treatment facility" means a secure facility not located within a correctional facility or detention center in which residents are being treated for substance abuse problems, and personnel and physical barriers prevent the residents from leaving.

**History: Laws 2006, ch. 31, § 1.**

**Effective dates.** — Laws 2006, ch. contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

## 30-22-9. Escape from penitentiary.

Escape from penitentiary consists of any person who shall have been lawfully committed to the state penitentiary:

A. escaping or attempting to escape from such penitentiary; or

B. escaping or attempting to escape from any other lawful place of custody or confinement and although not actually within the confines of the penitentiary.

Whoever commits escape from penitentiary is guilty of a second degree felony.

**History: 1953 Comp., § 40A-22-9, enacted by Laws 1963, ch. 303, § 22-9.**

**Cross references.** — For officer of penitentiary aiding escape of prisoner, *see* 33-2-8 NMSA 1978.

For escape by prisoners under inmate-release programs, *see* 33-2-46 NMSA 1978.

ANNOTATIONS

**Escape constitutes a continuing offense** so that an escapee continues to commit the offense as long as he voluntarily remains at large. *State v. Martinez*, 1989-NMCA-047, 109 N.M. 34, 781 P.2d 306, cert. denied, 108 N.M. 668, 777 P.2d 907.

**Actual custody required.** — In order to sustain a charge of escape under this section, a person who has been convicted and sentenced must first have undergone some moment of actual custody, either through an administrative booking or in-take processing with the department of corrections. Absent such custody, a person cannot be said to have committed escape from the penitentiary within the meaning of this section. *State v. Pearson*, 2000-NMCA-102, 129 N.M. 762, 13 P.3d 980.

**Conviction not double jeopardy.** — Assuming without deciding that some administrative sanctions had been levied against defendant for his escape from prison, conviction under this section did not constitute double jeopardy. *State v. Budau*, 1973-NMCA-151, 86 N.M. 21, 518 P.2d 1225, cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974).

**Application to honor farm constitutional.** — Defendant's argument that application of this section to escapees from the prison honor farm constituted cruel and unusual punishment because of the difference in facilities at the farm compared with the state penitentiary was without merit. *State v. Budau*, 1973-NMCA-151, 86 N.M. 21, 518 P.2d 1225, cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974).

**Honor farm part of penitentiary.** — Prison honor farm was an integral part and parcel of the state penitentiary, and escape therefrom was an escape from the state penitentiary. *State v. Budau*, 1973-NMCA-151, 86 N.M. 21, 518 P.2d 1225, cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974); *State v. Peters*, 1961-NMSC-160, 69 N.M. 302, 366 P.2d 148 (1961), cert. denied, 369 U.S. 831, 82 S. Ct. 849, 7 L. Ed. 2d 796 (1962).

**Escapee does not forfeit right of appeal.** — A person convicted of a crime does not forfeit his right to appeal simply because he has escaped from confinement. He still has a right to have his conviction reversed if he was erroneously convicted or if his constitutional rights were violated. *Mascarenas v. State*, 1980-NMSC-074, 94 N.M. 506, 612 P.2d 1317.

Regardless of the outcome of the appeal, the escapee may still be criminally liable for the act of escape; therefore, there is no need to use the forfeiture of the constitutional right of appeal as a further sanction. *Mascarenas v. State*, 1980-NMSC-074, 94 N.M. 506, 612 P.2d 1317.

**Collateral attack of legality of commitment.** — To collaterally attack the lawfulness of his commitment to the penitentiary prior to his escape, a defendant must come forward with substantive evidence to show that at the time of his escape he was illegally incarcerated. *State*



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*v. Ellis*, 1980-NMCA-187, 95 N.M. 427, 622 P.2d 1047, cert. denied, 95 N.M. 426, 622 P.2d 1046.

**Escape deemed from penitentiary, not jail.** — Where the trial court had ordered the defendant released from the penitentiary into the custody of the county sheriff until after his arraignment, the order provided for a change in the location of his physical confinement but did not change the fact that the defendant's lawful custody or confinement was in the penitentiary, and the defendant was properly convicted of escape from the penitentiary under this section, rather than escape from jail under 30-22-8 NMSA 1978. *State v. Martin*, 1980-NMCA-019, 94 N.M. 251, 609 P.2d 333, cert. denied, 94 N.M. 628, 614 P.2d 545.

**Law reviews.** — For comment on *State v. Vaughn*, 74 N.M. 365, 393 P.2d 711 (1964), and *Sanders v. Cox*, 74 N.M. 524, 395 P.2d 353 (1964), see 4 Nat. Resources J. 616 (1964).

For article, "Approaching Statutory Interpretation in New Mexico," see 8 Nat. Resources J. 689 (1968).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 1, 2, 3, 4.

Escape or prison breach as affected by means employed, 96 A.L.R.2d 520.

Duress, necessity, or conditions of confinement as justification for escape from prison, 69 A.L.R.3d 678.

Conviction for escape where prisoner fails to leave confines of prison or institution, 79 A.L.R.4th 1060.

Duress, necessity, or conditions of confinement as justification for escape from prison, 54 A.L.R.5th 141.

What constitutes "custody" under 18 USCS § 751(a) defining offense of escape from custody, 114 A.L.R. Fed. 581.

30A C.J.S. Escape §§ 16 to 18.

## 30-22-10. Escape from custody of a peace officer.

Escape from custody of a peace officer consists of any person who shall have been placed under lawful arrest for the commission or alleged commission of any felony, unlawfully escaping or attempting to escape from the custody or control of any peace officer.

Whoever commits escape from custody of a peace officer is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-22-10, enacted by Laws 1963, ch. 303, § 22-10.**

### ANNOTATIONS

**Actual custody required.** — The defendant, who was transported from jail to the state hospital for evaluation, from which hospital he escaped, could not be found guilty of escape from a peace officer. This section applies only to those who are in the actual custody or control of a peace officer while under arrest, and cannot be extended to legal or "constructive custody" as well. *State v. Trujillo*, 1987-NMCA-141, 106 N.M. 616, 747 P.2d 262.

**Double jeopardy.** — Combination of administrative punishment and judicial sentence following plea of guilty to escape from custody of peace officer (for escaping from penitentiary honor farm) did not amount to double jeopardy in violation of the state and federal constitutions. *State v. Millican*, 1972-NMSC-064, 84 N.M. 256, 501 P.2d 1076.

**Escape from lawful arrest.** — Although marijuana discovered by officer should have been suppressed, because the search and seizure was the fruit of an illegal detention, nonetheless arrests by the officer, after smelling and seeing the marijuana, were in the lawful discharge of his duties and thus defendants' convictions for escape from custody were proper. *State v. Bloom*, 1977-NMSC-012, 90 N.M. 226, 561 P.2d 925, *rev'd on other grounds*, 1977-NMSC-016, 90 N.M. 192, 561 P.2d 465.

**Disposition of original charge immaterial.** — Offense is committed if escape occurs after arrest for commission or alleged commission of a felony whether defendant is later found guilty of originally charged felony or not. *State v. Martinez*, 1968-NMSC-097, 79 N.M. 232, 441 P.2d 761.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — What constitutes "custody" under 18 USCS § 751(a) defining offense of escape from custody, 114 A.L.R. Fed. 581.

## 30-22-11. Assisting escape.

Assisting escape consists of:

A. intentionally aiding any person confined or held in lawful custody or confinement to escape; or

B. any officer, jailer or other employee, intentionally permitting any prisoner in his custody to escape.

Whoever commits assisting escape is guilty of a third degree felony.

**History: 1953 Comp., § 40A-22-11, enacted by Laws 1963, ch. 303, § 22-11.**

**Cross references.** — For unlawful rescue of prisoner, *see* 30-22-7 NMSA 1978.

For officer of penitentiary aiding escape of prisoner, *see* 33-2-8 NMSA 1978.

### ANNOTATIONS

**Harboring or aiding felon does not supersede this offense.** — The offense of harboring or aiding a felon was not meant to supersede the crime of assisting escape. *State v. Martinez*, 1989-NMCA-047, 109 N.M. 34, 781 P.2d 306, cert. denied, 108 N.M. 668, 777 P.2d 907.

**Charge not double jeopardy.** — Charging defendant with three counts of assisting escape, in a prosecution arising out of the escape of three prison inmates, did not violate the constitutional prohibition against double jeopardy. *State v. Martinez*, 1989-NMCA-047, 109 N.M. 34, 781 P.2d 306, cert. denied, 108 N.M. 668, 777 P.2d 907.

**Person properly charged with offense.** — An individual who intentionally aids a person to avoid recapture, who he knows has escaped from lawful custody, may



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properly be charged with the offense of assisting escape. *State v. Martinez*, 1989-NMCA-047, 109 N.M. 34, 781 P.2d 306, cert. denied, 108 N.M. 668, 777 P.2d 907.

**Defenses of consanguinity or affinity not applicable.** — Nothing in this section evinces a legislative intent to immunize a defendant from prosecution for assisting the escape of inmates because of consanguinity or affinity. The defenses of consanguinity or affinity recognized under 30-22-4 NMSA 1978 are not applicable to a charge filed under this section. *State v. Martinez*, 1989-NMCA-047, 109 N.M. 34, 781 P.2d 306, cert. denied, 108 N.M. 668, 777 P.2d 907.

**Defect in indictment insubstantial.** — Although the indictment charged that defendant assisted a prisoner in escaping from jail while the statute condemned assisting a prisoner in his endeavor to escape, such defect was formal rather than substantial as the act of escape includes endeavoring to escape, and as this slightly faulty allegation was not called to the attention of the trial court, it was cured by the verdict. *State v. Montgomery*, 1923-NMSC-001, 28 N.M. 344, 212 P. 341.

**Merger of this section and furnishing articles for escape.** — The charges of assisting escape and furnishing articles for escape should not be merged for sentencing purposes when the facts supporting the convictions are not identical in that the jury could properly have found that the defendant's participation in the escape extended significantly beyond furnishing tangible objects to effect the escape. *State v. Gibson*, 1992-NMCA-017, 113 N.M. 547, 828 P.2d 980, cert. denied, 113 N.M. 524, 828 P.2d 957.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 30A C.J.S. Escape §§ 19 to 25.

## 30-22-11.1. Escape from the custody of the children, youth and families department; escape from juvenile detention.

Escape from the custody of the children, youth and families department consists of any person who has been adjudicated as a delinquent child and has been committed lawfully to the custody of a department juvenile justice facility or who is alleged to be a delinquent child and has been lawfully detained in a juvenile detention facility:

A. escaping or attempting to escape from custody within the confines of a children, youth and families department juvenile justice facility; or

B. escaping or attempting to escape from another lawful place of custody or confinement that is not within the confines of a children, youth and families department juvenile justice facility.

Any person who commits escape from the custody of a children, youth and families department juvenile justice facility is guilty of a misdemeanor.

**History: Laws 1993, ch. 121, § 1; 2009, ch. 239, § 3.**

**Effective dates.** — Laws 1993, ch. 121, § 2 made the act effective on July 1, 1993.

**Applicability.** — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

**The 2009 amendment,** effective July 1, 2009, in the first paragraph, after "juvenile justice facility", added the remainder of the sentence.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and application of juvenile escape statues, 46 A.L.R.5th 523.

## 30-22-11.2. Aggravated escape from the custody of the children, youth and families department.

Aggravated escape from the custody of the children, youth and families department consists of any person who has been adjudicated as a delinquent child and has been committed lawfully to the custody of a department juvenile justice facility or who is alleged to be a delinquent child and has been lawfully detained in a juvenile detention facility:

A. escaping or attempting to escape from custody within the confines of a children, youth and families department juvenile justice facility and committing assault or battery on another person in the course of escaping or attempting to escape; or

B. escaping or attempting to escape from a lawful place of custody or confinement that is not within the confines of a children, youth and families department juvenile justice facility and committing assault or battery on another person in the course of escaping or attempting to escape.

Any person who commits aggravated escape from the custody of the children, youth and families department is guilty of a fourth degree felony.

**History: Laws 1994, ch. 18, § 1; 2009, ch. 239, § 4.**

**Effective dates.** — Laws 1994, ch. 18, § 3 made the act effective on July 1, 1994.

**Applicability.** — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be



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placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

**The 2009 amendment,** effective July 1, 2009, in the first paragraph, after "juvenile justice facility", added the remainder of the sentence.

## 30-22-12. Furnished [Furnishing] articles for prisoner's escape.

Furnishing articles for prisoner's escape consists of:

A. intentionally giving to any person in lawful custody or confinement any deadly weapon or explosive substance, without the express consent of the officer in charge of such place of confinement; or

B. intentionally giving to any person in lawful custody or confinement any disguise, instrument, tool or other thing useful to aid any prisoner to effect an escape, with intent to assist a prisoner to escape from custody.

Whoever commits furnishing articles for prisoner's escape is guilty of a second degree felony.

**History: 1953 Comp., § 40A-22-12, enacted by Laws 1963, ch. 303, § 22-12.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For definition of deadly weapon, *see* 30-1-12 NMSA 1978.

ANNOTATIONS

**Merger of this section and assisting escape.** — The charges of assisting escape and furnishing articles for escape should not be merged for sentencing purposes when the facts supporting the convictions are not identical in that the jury could properly have found that the defendant's participation in the escape extended significantly beyond furnishing tangible objects to effect the escape. *State v. Gibson*, 1992-NMCA-017, 113 N.M. 547, 828 P.2d 980, cert. denied, 113 N.M. 524, 828 P.2d 957.

**Evidence sufficient to support conviction.** — There was sufficient evidence to convict where (1) defendant planned the escape with others; (2) defendant agreed to provide a gun for the escape and said that he had obtained the gun; (3) a co-defendant delivered the gun to the escapees; and (4) after the escape defendant provided bullets for the gun. *State v. Gibson*, 1992-NMCA-017, 113 N.M. 547, 828 P.2d 980, cert. denied, 113 N.M. 524, 828 P.2d 957.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Nature and elements of offense of conveying contraband to state prisoner, 64 A.L.R.4th 902.

## 30-22-13. Furnishing drugs or liquor to a prisoner.

Furnishing drugs or liquor to a prisoner consists of directly or indirectly furnishing any narcotic drug or intoxicating liquor to any person held in lawful custody or confinement, unless such narcotic drug or intoxicating liquor is furnished pursuant to the direction or prescription of a regularly licensed physician attending such person or penal facility.

Whoever commits furnishings [furnishing] drugs or liquor to a prisoner is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-22-13, enacted by Laws 1963, ch. 303, § 22-13.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Nature and elements of offense of conveying contraband to state prisoner, 64 A.L.R.4th 902.

Validity, construction, and application of state statue criminalizing possession of contraband by individual in penal or correctional institution, 45 A.L.R.5th 767.

72 C.J.S. Prisons § 75.

## 30-22-14. Bringing contraband into places of imprisonment; penalties; definitions.

A. Bringing contraband into a prison consists of knowingly and voluntarily carrying, transporting or depositing contraband onto the grounds of the penitentiary of New Mexico or any other institution designated by the corrections department for the confinement of adult prisoners. Whoever commits bringing contraband into a prison is guilty of a third degree felony.

B. Bringing contraband into a jail consists of knowingly and voluntarily carrying contraband into the confines of a county or municipal jail. Whoever commits bringing contraband into a jail is guilty of a fourth degree felony.



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C. As used in this section, "contraband" means:

(1) a deadly weapon, as defined in Section 30-1-12 NMSA 1978, or an essential component part thereof, including ammunition, explosive devices and explosive materials, but does not include a weapon carried by a peace officer in the lawful discharge of duties;

(2) currency brought onto the grounds of the institution for the purpose of transfer to a prisoner, but does not include currency carried into areas designated by the warden as areas for the deposit and receipt of currency for credit to a prisoner's account before contact is made with the prisoner;

(3) an alcoholic beverage;

(4) a controlled substance, as defined in the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978], but does not include a controlled substance carried into a prison through regular prison channels and pursuant to the direction or prescription of a regularly licensed physician; or

(5) an electronic communication or recording device brought onto the grounds of the institution for the purpose of transfer to or use by a prisoner.

D. As used in this section, "electronic communication or recording device" means any type of instrument, device, machine or equipment that is designed to transmit or receive telephonic, electronic, digital, cellular, satellite or radio signals or communications or that is designed to have sound or image recording abilities or any part or component of such instrument, device, machine or equipment. "Electronic communication or recording device" does not include a device that is or will be used by prison or jail personnel in the regular course of business or that is otherwise authorized by the warden.

E. Nothing in this section shall prohibit the use of hearing aids, voice amplifiers or other equipment necessary to aid prisoners who have documented hearing or speech deficiencies or their visitors. Rules for such devices shall be established by the warden or director of each jail, detention center and prison.

**History: 1953 Comp., § 40A-22-13.1, enacted by Laws 1976, ch. 15, § 1; 2013, ch. 55, § 1.**

**The 2013 amendment,** effective July 1, 2013, provided that electronic communication devices are contraband and prohibited in jails and prisons; in Subsection A, in the first sentence, after "consists of", added "knowingly and voluntarily"; in Subsection B, after "consists of", added "knowingly and voluntarily"; in Paragraph (1) of Subsection C, after "Section", added "30-1-12 NMSA 1978"; added Paragraph (5) of Subsection C; and added Subsections D and E.

ANNOTATIONS

**To be guilty of bringing contraband into a jail,** a person must enter the jail voluntarily. *State v. Cole*, 2007-NMCA-099, 142 N.M. 325, 164 P.3d 1024.

**Knowing possession.** — Failing to include the element of knowing possession in the jury instructions for this crime constituted fundamental error. *State v. Gonzalez*, 2005-NMCA-031, 137 N.M. 107, 107 P.3d 547.

**Contraband includes cocaine.** — Subsection C(4) of Section 30-22-14 NMSA 1978 includes cocaine in its definition of "contraband". *State v. Gonzalez*, 2005-NMCA-031, 137 N.M. 107, 107 P.3d 547.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Nature and elements of offense of conveying contraband to state prisoner, 64 A.L.R.4th 902.

Validity and construction of prison regulation of inmates' possession of personal property, 66 A.L.R.4th 800.

## 30-22-14.1. Bringing contraband into a juvenile detention facility or juvenile correctional facility; penalty.

A. Bringing contraband into a juvenile detention facility or juvenile correctional facility consists of carrying, transporting or depositing contraband onto the grounds of any facility designated by the children, youth and families department for the detention or commitment of children. Whoever commits bringing contraband into a juvenile correctional facility is guilty of a third degree felony. Whoever commits bringing contraband into a juvenile detention facility is guilty of a fourth degree felony.

B. As used in this section, "contraband" means:

(1) any deadly weapon, as defined in Section 30-1-12 NMSA 1978, or an essential component part thereof, including ammunition, explosive devices and explosive materials, but does not include a weapon carried by a peace officer in the lawful discharge of his duties;

(2) currency brought onto the grounds of a juvenile detention facility or juvenile correctional facility and not declared upon entry to the facility for the purpose of transfer to a child



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detained in or committed to the facility, but does not include currency carried into areas designated by the facility administrator as areas for the deposit and receipt of currency for credit to a child's account before contact is made with any child;

(3) any alcoholic beverage brought within the physical confines of the juvenile detention or juvenile correctional facility; or

(4) any controlled substance, as defined in the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978], but does not include a controlled substance carried into a juvenile detention facility or juvenile correctional facility through regular facility channels and pursuant to the direction or prescription of a regularly licensed physician.

**History: Laws 1997, ch. 44, § 1.**

**Effective dates.** — Laws 1997, ch. 44, § 2 made the act effective on July 1, 1997.

## 30-22-15. Maintaining male and female prisoners together.

Maintaining male and female prisoners together consists of any sheriff, jailer or guard, keeping male and female prisoners in the same cell or room, unless such prisoners are man and wife.

Whoever commits maintaining male and female prisoners together is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-22-14, enacted by Laws 1963, ch. 303, § 22-14.**

## 30-22-16. Possession of deadly weapon or explosive by prisoner.

Possession of deadly weapon or explosive by prisoner in lawful custody consists of any inmate of a penal institution, reformatory, jail or prison farm or ranch possessing any deadly weapon or explosive substance.

Whoever commits possession of deadly weapon or explosive by prisoner is guilty of a second degree felony.

**History: 1953 Comp., § 40A-22-15, enacted by Laws 1963, ch. 303, § 22-15; 1986, ch. 4, § 1.**

**Cross references.** — For definition of deadly weapon, *see* 30-1-12 NMSA 1978.

For sentencing for second degree felonies, *see* 31-18-15 NMSA 1978.

**The 1986 amendment** substituted "second degree felony" for "third degree felony" in the second paragraph.

### ANNOTATIONS

**Indicia of distinctness was not sufficient to support separate convictions for possession of a deadly weapon by a prisoner.** — Where defendant was convicted of two counts of possession of a deadly weapon by a prisoner based on evidence that, during a search of defendant's dormitory-style pod, prison staff found "two makeshift weapons" in defendant's bunk, defendant's two convictions violated his double jeopardy rights because evidence that the two weapons were similar in nature, were found in the same area of defendant's bunk, were found during the same search, and the fact that there was no evidence to suggest that defendant came into possession of the weapons at different times, do not support a reasonable inference of distinctness, and therefore it cannot be presumed that the legislature intended to punish defendant for each weapon he possessed under the circumstances of this case. *State v. Benally*, 2021-NMSC-027, *aff'g* 2019-NMCA-048, 448 P.3d 592.

**Sufficient evidence of possession of a deadly weapon by a prisoner.** — Where defendant was charged with two counts of possession of a deadly weapon by a prisoner, and where the state presented evidence that a razor blade was discovered concealed above defendant's bunk bed and a sharpened mop handle was discovered inside his mattress, in addition to statements made by defendant indicating that he had knowledge of the makeshift weapons, a jury could have reasonably inferred that defendant had knowledge of and control over both weapons, and therefore there was sufficient evidence to support defendant's convictions based on constructive possession. *State v. Benally*, 2019-NMCA-048, cert. granted.

**Insufficient indicia of distinctness to justify multiple punishments for possession of a deadly weapon by a prisoner.** — Where defendant was convicted of two counts of possession of a deadly weapon by a prisoner based on evidence that a razor blade was discovered concealed above his bunk bed and a sharpened mop handle was discovered inside his mattress, there was insufficient evidence to indicate possessory conduct sufficiently distinct in nature to support multiple punishments, and the minor differences in functionality between the two prison-made weapons possessed by defendant does not justify convicting him of separate counts of possession of a deadly weapon by a prisoner. *State v. Benally*, 2019-NMCA-048, cert. granted.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Sufficiency of evidence of possession in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons, 43 A.L.R.4th 788.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.



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## 30-22-17. Assault by prisoner.

Assault by prisoner consists of intentionally:

A. placing an officer or employee of any penal institution, reformatory, jail or prison farm or ranch, or a visitor therein, in apprehension of an immediate battery likely to cause death or great bodily harm;

B. causing or attempting to cause great bodily harm to an officer or employee of any penal institution, reformatory, jail or prison farm or ranch, or a visitor therein; or

C. confining or restraining an officer or employee of any penal institution, reformatory, jail or prison farm or ranch, or a visitor therein, with intent to use such person as a hostage.

Whoever commits assault by prisoner is guilty of a third degree felony.

**History: 1953 Comp., § 40A-22-16, enacted by Laws 1963, ch. 303, § 22-16.**

**Cross references.** — For definition of great bodily harm, *see* 30-1-12 NMSA 1978.

For assault, generally, *see* 30-3-1 to 30-3-3 NMSA 1978.

For kidnapping, *see* 30-4-1 NMSA 1978.

ANNOTATIONS

**This section and 30-22-24 NMSA 1978 relate to two different crimes.** — Although it is possible for the same set of facts to fall within the ambit of this section and 30-22-24 NMSA 1978, relating to battery upon a peace officer, they do not deal with the same crime, but with two different crimes. *State v. Rhea*, 1980-NMSC-033, 94 N.M. 168, 608 P.2d 144.

**Merger of this section and false imprisonment.** — The charge of assault by a prisoner should not be merged for sentencing purposes with the charge of false imprisonment where the facts supporting the two charges are not identical. Merger is also inappropriate in such a case because the statute prohibiting assault and the statute prohibiting false imprisonment advance two distinct social norms. *State v. Gibson*, 1992-NMCA-017, 113 N.M. 547, 828 P.2d 980, cert. denied, 113 N.M. 524, 828 P.2d 957.

**Jailers as peace officers.** — Legislature did not exclude jailers from definition of peace officers: a jailer is an officer in the public domain, charged with the duty to maintain public order. *State v. Rhea*, 1980-NMSC-033, 94 N.M. 168, 608 P.2d 144.

**Evidence sufficient.** — Evidence introduced to show how the defendant and his cohorts carefully orchestrated a prison escape was sufficient for the jury to find that the defendant planned, anticipated, and intended the assault and false imprisonment of a peace officer during the escape. The defendant need not have known the peace officer's name, but only that the victim would be a peace officer. *State v. Gibson*, 1992-NMCA-017, 113 N.M. 547, 828 P.2d 980, cert. denied, 113 N.M. 524, 828 P.2d 957.

**Evidence of great bodily harm.** — Evidence that after throwing hot coffee at the sheriff, defendant attempted to choke him with one hand while he tried to get the sheriff's gun with the other hand, along with the sheriff's testimony that while being choked his breath was practically cut off and he realized that "it was he or I, one or the other," was evidence that the choking created a high probability of death, which is one part of the definition of great bodily harm, and justified instructing the jury to consider whether defendant caused great bodily harm under this section. *State v. Hollowell*, 1969-NMCA-105, 80 N.M. 756, 461 P.2d 238.

**Acquittal of charge for which confined no defense.** — Despite the fact that at the time he committed assault defendant was confined in the city jail on a charge for which he was later found not guilty, conviction imposed, upon his guilty plea, for assault by prisoner was not violative of defendant's constitutional rights. *Chavez v. State*, 1969-NMCA-085, 80 N.M. 560, 458 P.2d 812.

## 30-22-18. Encouraging violation of probation, parole or bail.

Encouraging violation of probation, parole or bail consists of intentionally aiding or encouraging a person known by him to be on parole, probation or bail to abscond or to violate a term or condition of his probation, parole or bail.

Whoever commits encouraging violation of probation, parole or bail is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-22-17, enacted by Laws 1963, ch. 303, § 22-17.**

## 30-22-19. Unlawful assault on any jail.

Unlawful assault on any jail consists of any person or group of persons assaulting or attacking any jail, prison or other public building or place of confinement of prisoners held in lawful custody or confinement.

Whoever commits unlawful assault on any jail, prison or other public building or place of confinement of prisoners held in lawful custody or confinement is guilty of a third degree felony.

**History: 1953 Comp., § 40A-22-18, enacted by Laws 1963, ch. 303, § 22-18.**



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ANNOTATIONS

**Statute not unconstitutionally vague.** — Where defendants were charged with unlawful assault on a jail based on evidence that they, and several other inmates, defied an order to lock down during a shift change of correction officers while incarcerated in the Otero county detention center, and where defendants claimed that the assault on a jail statute is unconstitutionally vague, defendants' constitutional claim is without merit because a person of ordinary intelligence using common sense would understand that § 30-22-19 NMSA 1978 prohibits a violent attack on a jail's facilities or operations, regardless of whether the attack originates inside or outside of the jail, and defendants' conduct in barricading a door with a mattress and plastic cot and rushing officers with the mattresses to push them back down soaped-up stairs in an effort to prevent prison officials, law enforcement, or facility personnel from entering a pod, constituted unlawful assault on a jail. Moreover, the assault on a jail statute has guidelines prohibiting certain conduct, whether by persons incarcerated or not, and the decision to charge defendants with assault on a jail entailed no application of discretion, much less of an arbitrary nature. *State v. Anderson* and *State v. Wilson*, 2021-NMCA-031, cert. granted.

**Disorderly conduct and evading or obstructing an officer are not lesser included offenses of unlawful assault on a jail.** — Where defendants were charged with unlawful assault on a jail based on evidence that they, and several other inmates, defied an order to lock down during a shift change of correction officers while incarcerated in the Otero county detention center, and where defendants claimed that the district court erred in denying their lesser included offense instructions of disorderly conduct and evading or obstructing an officer, the district court did not err in denying the requested instructions, because disorderly conduct and evading or obstructing an officer are not lesser included offenses of assault on a jail. Defendants' conduct did not occur in a public place as required by § 30-20-1(A) NMSA 1978, nor were their actions acts of violence capable of disturbing a community of the sort protected from such by § 30-22-19 NMSA 1978, and defendants' actions did not equate to an effort to avoid apprehension or arrest as contemplated by § 30-22-1(B) NMSA 1978. *State v. Anderson* and *State v. Wilson*, 2021-NMCA-031, cert. granted.

**Substantial evidence of assault on a jail.** — Where defendants were charged with unlawful assault on a jail based on evidence that they, and several other inmates, defied an order to lock down during a shift change of correction officers while incarcerated in the Otero county detention center, there was sufficient evidence to support defendants' convictions where the state presented video evidence that showed inmates' efforts to disobey the shift change lockdown order by misusing jail property to disable access into the pod by prison officials and law enforcement officers arriving to assist them, and the surveillance footage clearly depicted defendants participating in the conflict. Defendants' collective actions attacked the jail and imperiled the function and safety of the facility in a dangerous and destructive manner that satisfied the state's burden under § 30-22-19 NMSA 1978. *State v. Anderson* and *State v. Wilson*, 2021-NMCA-031, cert. granted.

**Collateral estoppel.** — Acquittal of defendant on charge of assault on a jail did not collaterally estop state from bringing subsequent prosecution against him on charge of assault with intent to commit a violent felony, even where both offenses allegedly occurred at same time and place, since charge of assault with intent to commit a violent felony required a jury to consider facts not required in the first trial. *State v. Tijerina*, 1973-NMSC-105, 86 N.M. 31, 519 P.2d 127, cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

## 30-22-20. Unlawful distribution of convict-made goods.

Unlawful distribution of convict-made goods consists of any person knowingly distributing, exchanging, selling or offering for sale any goods, wares or merchandise manufactured, produced or mined, either wholly or in part, by prisoners held in lawful custody or confinement of any other state or country.

Nothing in this section shall be construed to forbid the sale or distribution of goods, wares or merchandise:

A. made by prisoners of this state;

B. made by prisoners on parole or probation; or

C. which are sold or exchanged to a qualified purchaser and where such goods are to be initially used or possessed solely by a qualified purchaser. As used in this subsection, "qualified purchaser" means a state agency, local public bodies, agencies of the federal government, tribal and pueblo governments, nonprofit organizations properly registered under state law and supported wholly or in part by funds derived from public taxation and persons, partnerships, corporations or associations which provide public school transportation services to a state agency or local public body pursuant to contract.

Whoever commits unlawful distribution of convict-made goods is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-22-19, enacted by Laws 1963, ch. 303, § 22-19; 1982, ch. 35, § 1.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 60 Am. Jur. 2d Penal and Correctional Institutions §§ 171, 172.

18 C.J.S. Convicts § 20.



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## 30-22-21. Assault upon peace officer.

A. Assault upon a peace officer consists of:

(1) an attempt to commit a battery upon the person of a peace officer while he is in the lawful discharge of his duties; or

(2) any unlawful act, threat or menacing conduct which causes a peace officer while he is in the lawful discharge of his duties to reasonably believe that he is in danger of receiving an immediate battery.

B. Whoever commits assault upon a peace officer is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-22-20, enacted by Laws 1971, ch. 265, § 1.**

**Cross references.** — For assaults and batteries, *see* 30-3-1 to 30-3-5 NMSA 1978.

For petty misdemeanor of resisting or obstructing an officer, *see* 30-22-1 NMSA 1978.

For third-degree felony of assault by prisoner, *see* 30-22-17 NMSA 1978.

### ANNOTATIONS

**Sufficient evidence.** — Where defendant approached a police officer with clenched fists, shouting and threatening to punch the officer, and defendant had chest-butted another officer, the evidence was sufficient to support defendant's conviction for assault upon a police officer. *State v. Ford*, 2007-NMCA-052, 141 N.M. 512, 157 P.3d 77, cert. denied, 2007-NMCERT-004, 141 N.M. 568, 158 P.3d 458.

**Fact that defendant's gunfire hit police officers** does not show an absence of evidence of assault, where there is evidence of an assault under Subsection A(2) of Section 30-22-21 NMSA 1978. *State v. Brown*, 1979-NMCA-038, 93 N.M. 236, 599 P.2d 389, cert. quashed, 93 N.M. 172, 598 P.2d 215, and cert. denied, 444 U.S. 1084, 100 S. Ct. 1041, 62 L. Ed. 2d 769 (1980).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Extent of injuries: admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries, 87 A.L.R.2d 926.

6A C.J.S. Assault and Battery § 81.

## 30-22-22. Aggravated assault upon peace officer.

A. Aggravated assault upon a peace officer consists of:

(1) unlawfully assaulting or striking at a peace officer with a deadly weapon while he is in the lawful discharge of his duties;

(2) committing assault by threatening or menacing a peace officer who is engaged in the lawful discharge of his duties by a person wearing a mask, hood, robe or other covering upon the face, head or body, or while disguised in any manner so as to conceal identity; or

(3) willfully and intentionally assaulting a peace officer while he is in the lawful discharge of his duties with intent to commit any felony.

B. Whoever commits aggravated assault upon a peace officer is guilty of a third degree felony.

**History: 1953 Comp., § 40A-22-21, enacted by Laws 1971, ch. 265, § 2.**

**Cross references.** — For definition of deadly weapon, *see* 30-1-12 NMSA 1978.

For aggravated assault, *see* 30-3-2 NMSA 1978.

For third-degree felony of assault by prisoner, *see* 30-22-17 NMSA 1978.

### ANNOTATIONS

**Lesser included offense.** — When an accused is charged under Section 30-22-1B NMSA 1978, the fleeing, evading method of resisting, evading or obstructing an officer, it is not a lesser included offense of aggravated assault upon a peace officer. *State v. Hamilton*, 1988-NMCA-023, 107 N.M. 186, 754 P.2d 857, cert. denied, 107 N.M. 132, 753 P.2d 1320.

**Intent required to sustain conviction** under this section is that of conscious wrongdoing. *Rutledge v. Fort*, 1986-NMSC-017, 104 N.M. 7, 715 P.2d 455, *overruled on other grounds by Reese v. State*, 1987-NMSC-079, 106 N.M. 498, 745 P.2d 1146.

**Conscious wrongdoing required.** — Conscious wrongdoing is an essential element of Paragraph (1) of Subsection A, and instructions in the language of the statute were insufficient to inform the jury of the intent required. *State v. Cutnose*, 1974-NMCA-130, 87 N.M. 307, 532 P.2d 896, cert. denied, 87 N.M. 299, 532 P.2d 888 (1975).

**Sufficient evidence of aggravated assault on a peace officer based on a theory of accessory liability.** — Where police officers attempted to execute a search of defendant's residence pursuant to a warrant, and where, as officers approached a camper on the property, the officers heard and saw gunfire coming from the camper, striking one of the officers, evidence that defendant owned the camper and was inside the camper at the time of the gunfire, and that DNA tests performed on several of the firearms retrieved from the camper found that defendant was either a major contributor of the DNA or could not be eliminated as a contributor, was sufficient for a reasonable jury to infer that defendant either shot at the officers himself, or, given the availability of firearms and ammunition inside his camper, defendant encouraged, helped, or caused others to shoot at the officers. *State v. Uribe-Vidal*, 2018-NMCA-008.

**Defendant's knowledge as to identity of peace officer** assaulted is a necessary element of the crimes defined in this section and Section 30-22-24 NMSA 1978. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119; *Reese v. State*, 1987-NMSC-110, 106 N.M. 505, 745 P.2d 1153.

To deny the defendant the right to have the jury informed as to his knowledge of the identity of police officer he assaulted would be to deny him the right to have the jury apprised of a necessary element of the crime for



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which he is charged, and that in turn would be to deny him his constitutional guarantee of due process of law, *Reese v. State*, 1987-NMSC-110, 106 N.M. 505, 745 P.2d 1153.

**Officer's performance is essential element of crime** because of the requirement that the jury be instructed that the officer must have been performing his duties and the restriction on fiddling with an elements instruction. *State v. Rhea*, 1979-NMCA-121, 93 N.M. 478, 601 P.2d 448.

**Omission of essential elements in jury instruction did not amount to fundamental error.** — Where defendant was charged with aggravated assault on a police officer based on facts that he walked towards a police officer, who was in the lawful performance of his duties, with a knife and made a stabbing motion, and where, at trial, the given jury instruction erroneously failed to inform the jury that it was also required to find that defendant used a deadly weapon and that his conduct was unlawful, the omission did not rise to the level of fundamental error because an appellate court may affirm a conviction notwithstanding the absence of an implicit jury finding on an omitted element if the jury, having considered the parties' legal and factual presentations and having returned a guilty verdict on the given instructions, undoubtedly would have found the essential element if properly instructed, and the facts and circumstances of this case show that the jury implicitly found the missing elements in reaching its verdict. The jury explicitly found that defendant walked towards the officer with a large, sharp knife and made a stabbing motion, placing the officer in an objectively reasonable fear for his personal safety, amounting to a finding that defendant used the knife as a weapon, and undoubtedly would have found, if instructed properly, that the knife was capable of causing death or great bodily harm and that defendant acted unlawfully. *State v. Ocon*, 2021-NMCA-032, cert. denied.

**Sufficient evidence to support jury's verdict despite erroneous instruction.** — Where defendant was charged with aggravated assault on a police officer based on facts that he walked towards a police officer, who was in the lawful performance of his duties, with a knife and made a stabbing motion, and where, at trial, the given jury instruction erroneously failed to inform the jury that it was also required to find that defendant used a deadly weapon and that his conduct was unlawful, there was sufficient evidence to support the jury's verdict where the jury was instructed that to convict defendant of aggravated assault upon a peace officer, it had to find beyond a reasonable doubt that defendant walked toward the officer with a knife and made a stabbing motion, defendant's conduct caused the officer to believe defendant was about to intrude on the officer's personal safety by touching or applying force to the officer in a rude, insolent or angry manner, that a reasonable person in the same circumstances as the officer would have the same belief, and that defendant used a knife, and where the state presented lapel camera video and still photos showing the knife laying on the kitchen floor, and established, through testimony of the officer, that defendant thrusted and slashed at the officer with a knife and reared back in a stabbing motion, placing the officer in fear for his life. *State v. Ocon*, 2021-NMCA-032, cert. denied.

**When officer in lawful discharge of duties.** — Even if an officer makes an arrest without probable cause, the officer is performing official duties if the officer is acting in good faith and within the scope of what the officer is employed to do. *State v. Tapia*, 2000-NMCA-054, 129 N.M. 209, 4 P.3d 37, cert. denied, 129 N.M. 208, 4 P.3d 36.

**Jury instruction on self-defense.** — Where a police officer stopped defendant for failing to wear a seat belt; defendant became angry and grabbed defendant's driver's license from the officer; the officer drew a gun; defendant drove away; when the officer caught up with defendant, defendant approached the officer in an aggressive manner, cursing the officer; the officer sprayed defendant with pepper spray and drew the officer's gun; and defendant picked up a tire iron and approached the officer, the officer used reasonable force and defendant was not entitled to a self-defense instruction. *State v. Ellis*, 2008-NMSC-032, 144 N.M. 253, 186 P.3d 245, *rev'g* 2007-NMCA-037, 141 N.M. 370, 155 P.3d 775.

**Failure to instruct reversible error.** — The failure to instruct that the officer must have been performing his duties is the omission of an essential element, and this omission requires reversal of a conviction of aggravated assault upon a peace officer. *State v. Rhea*, 1979-NMCA-121, 93 N.M. 478, 601 P.2d 448.

**Assault with razor.** — Testimony of police officers concerning incidents where defendant struck at officers with a straight razor was substantial evidence to support defendant's conviction for aggravated assault upon a peace officer. *State v. Vallejos*, 1974-NMCA-009, 86 N.M. 39, 519 P.2d 135.

**Lesser included offense instruction on resisting arrest.** — In a prosecution for aggravated assault on a peace officer, since there was evidence that resisting in violation of either Subsection B or D of 30-22-1 NMSA 1978 was the highest degree of crime committed, the defendant was entitled to a charge on the lesser offense. *State v. Diaz*, 1995-NMCA-137, 121 N.M. 28, 908 P.2d 258, cert. denied, 120 N.M. 828, 907 P.2d 1009.

**Conviction of resisting, evading, or obstructing police officer.** — The defendant was properly convicted of resisting, evading or obstructing an officer, because the evidence supported the verdict of the jury to that charge, and his opportunity to prepare and defend against the charge was not impaired by the fact that such an offense varied from the crime charged in the criminal information, i.e., aggravated assault upon a peace officer. *State v. Hamilton*, 1988-NMCA-023, 107 N.M. 186, 754 P.2d 857, cert. denied, 107 N.M. 132, 753 P.2d 1320.

**Collateral estoppel.** — The state is collaterally estopped from attempting to prove in district court that the defendant was the driver of a car used in an assault when it has already tried and failed to prove this same issue in municipal court. *Abramson v. Griffin*, 693 F.2d 1009 (10th Cir. 1982).

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Intent to do physical harm as essential element of crime of assault with deadly or dangerous weapon, 92 A.L.R.2d 635.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

## 30-22-23. Assault with intent to commit violent felony upon peace officer.

A. Assault with intent to commit a violent felony upon a peace officer consists of any person assaulting a peace officer while he is in the lawful discharge of his duties with intent to kill the peace officer.



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B. Whoever commits assault with intent to commit a violent felony upon a peace officer is guilty of a second degree felony.

**History: 1953 Comp., § 40A-22-22, enacted by Laws 1971, ch. 265, § 3.**

**Cross references.** — For assault with intent to commit a violent felony, generally, *see* 30-3-3 NMSA 1978.

For instruction on justifiable homicide, *see* UJI 14-5171 NMRA.

For instruction on self-defense, *see* UJI 14-5181 NMRA.

ANNOTATIONS

**Sufficient evidence.** — Where the defendant rapidly accelerated his vehicle toward the police officer who had been pursuing him in a high speed chase after the officer got out of his car and the defendant pointed a rifle or a shotgun at the officer after the defendant had already fired three shots at the officer, the evidence was sufficient to sustain the court's finding that the defendant committed an assault with intent to commit a violent felony upon a peace officer. *State v. Demongey*, 2008-NMCA-066, 144 N.M. 333, 187 P.3d 679, cert. quashed, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

**Insufficient evidence of assault with intent to commit a violent felony upon a peace officer.** — Where, during a law enforcement officer's attempt to arrest defendant pursuant to a warrant, defendant first attempted to flee, and upon being tackled by the officer, defendant shot the officer in the leg and took off running, and where the officer testified at trial that prior to the shooting, it was very dark and it was very difficult for him to see because he did not have a flashlight and there was no outdoor lighting nearby, that once he was shot, defendant took off running, that he could not see defendant, that he did not know where defendant was, and that he figured defendant was going to try and kill him, there was insufficient evidence to support defendant's conviction for assault with intent to commit a violent felony upon a peace officer, because there was no evidence proving defendant's menacing conduct or an explicit or implied threat of further violence; the evidence presented merely allowed the jury to speculate, rather than infer, that defendant separately acted in a manner that caused the officer reasonable fear of an immediate battery after he was shot by defendant. *State v. Baca*, 2020-NMCA-049.

**Standing to challenge section's validity.** — Where defendant was convicted of committing aggravated battery upon peace officer (30-22-25 NMSA 1978), a lesser included offense of this section, defendant's rights under this section were not at issue, despite the fact that it had been charged in the indictment, and he had no standing to challenge its constitutionality. *State v. Bojorquez*, 1975-NMCA-075, 88 N.M. 154, 538 P.2d 796, cert. denied, 88 N.M. 318, 540 P.2d 248.

**Acts constituting one offense.** — An assault arising from a series of three successive shots fired at a single victim, not separated by a significant amount of time, and arising from a single, continuous intent constituted one offense, and conviction of the defendant on two counts of assault violated his double jeopardy rights. *State v. Handa*, 1995-NMCA-042, 120 N.M. 38, 897 P.2d 225, cert. denied, 119 N.M. 771, 895 P.2d 671.

**Lawful discharge of duties jury question.** — Whether police officers were in the lawful discharge of their duties when they were shot by the defendant is a question for the jury to decide. *State v. Brown*, 1979-NMCA-038, 93 N.M. 236, 599 P.2d 389, cert. quashed, 93 N.M. 172, 598 P.2d 215, and cert. denied, 444 U.S. 1084, 100 S. Ct. 1041, 62 L. Ed. 2d 769 (1980).

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Malice or intent to kill where killing is by blow without weapon, 22 A.L.R.2d 854.

Homicide: acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa, 37 A.L.R.2d 1068.

## 30-22-24. Battery upon peace officer.

A. Battery upon a peace officer is the unlawful, intentional touching or application of force to the person of a peace officer while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner.

B. Whoever commits battery upon a peace officer is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-22-23, enacted by Laws 1971, ch. 265, § 4.**

**Cross references.** — For battery, *see* 30-3-4 NMSA 1978.

ANNOTATIONS

**Lesser included offense.** — Resisting or abusing a peace officer is a lesser included offense within battery on a peace officer under the Blockburger test. *State v. Ford*, 2007-NMCA-052, 141 N.M. 512, 157 P.3d 77, cert. denied, 2007-NMCERT-004, 141 N.M. 569, 158 P.3d 459.

**Lawful discharge of duties.** — An officer detaining a person without legal authority other than the bare fact of the officer's employment as a peace officer is not in the lawful discharge of the officer's duties. *State v. Phillips*, 2009-NMCA-021, 145 N.M. 615, 203 P.3d 146, cert. quashed, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

The statutory requirement that the victim have been a peace officer in the lawful discharge of the officer's duties has two components: (1) whether the officer was discharging the officer's duties and (2) whether the officer's discharge of the officer's duties was lawful. *State v. Phillips*, 2009-NMCA-021, 145 N.M. 615, 203 P.3d 146, cert. quashed, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

Where the defendant was intoxicated to the point that the defendant was stumbling and unable to keep his balance; the defendant admitted the defendant had been drinking and gave off a strong odor of alcohol; the officer did not believe there was probable cause to arrest the defendant for any crime; the officer was concerned that the defendant's intoxication made the defendant a threat to the defendant or to others the defendant might encounter; the officer placed the defendant in the officer's patrol car for the purpose of driving the defendant to the defendant's home; and the defendant became angry and punched the officer, the officer was acting in the lawful discharge of the officer's duties because the officer had probable cause to believe that the defendant was unable



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to care for himself and the officer was acting within the officer's actual authority under Section 43-2-2 NMSA 1978 of the Detoxification Reform Act to detain the defendant. *State v. Phillips*, 2009-NMCA-021, 145 N.M. 615, 203 P.3d 146, cert. quashed, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

**Constitutionality since act coupled with words.** — Where a defendant coupled his rude, insolent, or angry remarks with force upon a police officer, the jury could properly find defendant guilty of battery upon a police officer. Thus the statute is not vague or overbroad. *State v. Cruz*, 1990-NMCA-103, 110 N.M. 780, 800 P.2d 214, cert. denied, 110 N.M. 749, 799 P.2d 1121.

**Intent required to sustain conviction** under this section is that of conscious wrongdoing. *Rutledge v. Fort*, 1986-NMSC-017, 104 N.M. 7, 715 P.2d 455, *overruled on other grounds by Reese v. State*, 1987-NMSC-079, 106 N.M. 498, 745 P.2d 1146.

**Knowledge that victim is peace officer.** — Defendant's knowledge as to the identity of the peace officer assaulted is a necessary element of the crimes defined in 30-22-22 NMSA 1978 and this section. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119; *Reese v. State*, 1987-NMSC-110, 106 N.M. 505, 745 P.2d 1153.

To deny the defendant the right to have the jury informed as to his knowledge of the identity of police officer he assaulted would be to deny him the right to have the jury apprised of a necessary element of the crime for which he is charged, and that in turn would be to deny him his constitutional guarantee of due process of law. *Reese v. State*, 1987-NMSC-110, 106 N.M. 505, 745 P.2d 1153.

**Instruction concerning knowledge.** — An instruction regarding a defendant's knowledge that the victim is a peace officer is necessary only when defendant raises lack of such knowledge as a defense to the charge and there is evidence that the defendant acted without knowing that the victim was a peace officer. *State v. Hilliard*, 1988-NMCA-066, 107 N.M. 506, 760 P.2d 799, cert. denied, 107 N.M. 468, 760 P.2d 160.

**This section and 30-22-17 NMSA 1978 relate to two different crimes.** — Although it is possible for the same set of facts to fall within the ambit of this section and 30-22-17 NMSA 1978, relating to assault by a prisoner, they do not deal with the same crime, but with two different crimes. *State v. Rhea*, 1980-NMSC-033, 94 N.M. 168, 608 P.2d 144.

**Requirements for instruction on challenge to officer's authority.** — Failure of the trial court to instruct jury that to convict defendant they had to find that her battery (slapping the detective's hand) posed an actual injury, actual threat to safety, or a meaningful challenge to authority was reversible error and mandated a new trial. *State v. Cooper*, 2000-NMCA-041, 129 N.M. 172, 3 P.3d 149.

**Instruction requiring proof of merely rude, insolent or angry behavior insufficient.** — Subsection A includes as unlawful only those acts that physically injure officers, that actually harm officers by jeopardizing their safety, or that meaningfully challenge their authority; an instruction that the state must prove the defendant acted in a rude, insolent or angry manner clearly did not describe the element of harm to the safety or authority of the officers, and was fundamental error. *State v. Padilla*, 1997-NMSC-022, 123 N.M. 216, 937 P.2d 492.

**Finding by prison disciplinary committee was not a conviction under the statute.** — Where defendant, who was serving a prison sentence, had an altercation with a prison guard; the guard filed a misconduct report; and a prison disciplinary committee found defendant "guilty of a Major Report of Charge, NMSA 30-22-24, Battery Upon a Police Officer", the fact that the conduct at issue in the hearing is also defined as a criminal offense did not mean that the disciplinary committee charged and convicted defendant under the criminal felony law. *Ramer v. Kerby*, 936 F.2d 1102 (10th Cir. 1991).

**Jailers as peace officers.** — Legislature did not exclude jailers from definition of peace officers: a jailer is an officer in the public domain, charged with the duty to maintain public order. *State v. Rhea*, 1980-NMSC-033, 94 N.M. 168, 608 P.2d 144.

**Correctional officer is "peace officer".** — The legislature has amended the correctional officers statute to provide that crimes against correctional officers and employees of the Corrections Department acting as peace officers were deemed crimes against peace officers. *State v. Gutierrez*, 1993-NMCA-058, 115 N.M. 551, 854 P.2d 878, cert. denied, 115 N.M. 545, 854 P.2d 872.

**A public service officer is not a "peace officer".** — Where defendant was charged with felony battery upon a peace officer after he hit the forearm of a public service officer (PSO) performing her duties under the Detoxication Reform Act (DRA), §§ 43-2-1.1 through 43-2-23 NMSA 1978, by escorting defendant to her vehicle to place him into protective custody, and where defendant filed a motion to dismiss, asserting that the evidence presented was insufficient to support defendant's charge of felony battery upon a peace officer because a PSO is not a "peace officer" as a matter of law, the district court did not err in reducing defendant's criminal charge from felony battery upon a peace officer to petty misdemeanor battery, because PSOs are not vested with a duty to maintain public order or to make arrests and therefore are not peace officers. *State v. Becenti*, 2021-NMCA-060.

**Sufficient evidence to find that the victim was a peace officer.** — In defendant's trial for battery on a peace officer, the victim's testimony that he was a corrections officer employed by the metropolitan detention center was substantial evidence that he was a peace officer under this statute. *State v. Salas*, 2017-NMCA-057, cert. denied.

**Juvenile correctional officer is peace officer** for purposes of the battery on a peace officer statute, despite the fact that JCOs are no longer under the control of the New Mexico Corrections Department. *State v. Gutierrez*, 1993-NMCA-058, 115 N.M. 551, 854 P.2d 878, cert. denied, 115 N.M. 545, 854 P.2d 872.

**Double jeopardy.** — The jurisdictional exception to double jeopardy permitted defendant's prosecution in the district court on a charge of peace officer battery, after he had pleaded guilty to several misdemeanors, including resisting arrest, in the magistrate court. *State v. Padilla*, 1984-NMSC-026, 101 N.M. 58, 678 P.2d 686, *aff'd sub nom., Fugate v. New Mexico*, 470 U.S. 904, 105 S. Ct. 1858, 84 L. Ed. 2d 777 (1985).

**Officers acting in good faith.** — Even if an arrest was illegal, the courts cannot condone the use of force in resisting every subsequent act made in good faith by a law enforcement officer, as police officers acting in good faith, although mistakenly, should be relieved of the threat of physical harm. *State v. Doe*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464.

**Test is whether officer engaged in performance of official duties.** — Even if an arrest is effected without probable cause, a police officer is engaged in the performance of his official duties and therefore protected under this section if he is simply acting within the scope of what he is employed to do; the test is whether he is acting within that compass or is engaging in a personal frolic of his own. *State v. Doe*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464.

**When officer in lawful discharge of duties.** — An officer is in the lawful discharge of his duties if he is acting within the scope of what he is employed to do. *State v. Gonzales*, 1982-NMCA-043, 97 N.M. 607, 642 P.2d 210.

If there is evidence that a peace officer used excessive force, there is a factual issue for the jury as to whether the



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officer acted within the scope of what he was employed to do and, thus, a factual issue as to whether the officer was performing his duties. *State v. Gonzales*, 1982-NMCA-043, 97 N.M. 607, 642 P.2d 210.

**Scope of contact with person.** — The jury was properly instructed that it could find defendant guilty of battery under this section if it found that defendant knocked or took a flashlight out of the arresting officer's hand. The word "person" as used in this statute includes anything intimately connected with a person. *State v. Ortega*, 1992-NMCA-003, 113 N.M. 437, 827 P.2d 152.

**Included offense.** — Battery upon a peace officer is included within the charge of aggravated battery upon a peace officer, and thus defendant's conviction was for an offense included within charge of which he had notice. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

**Lesser included offense.** — Where defendant admitted to intentionally kicking a police officer to avoid being shot, he was not entitled to an instruction on resisting, obstructing or evading a police officer as a lesser included offense of battery on a peace officer. *State v. Hill*, 2001-NMCA-094, 131 N.M. 195, 34 P.3d 139.

**Verbatim instruction not required.** — In a prosecution for battery upon a police officer, the trial court did not commit error in refusing defendant's requested jury instruction seeking the use of the words "lawful discharge of his duties" instead of "performing the duties of a peace officer." *State v. Nemeth*, 2001-NMCA-029, 130 N.M. 261, 23 P.3d 936, *overruled on other grounds by State v. Ryon*, 2005-NMSC-005, 137 N.M. 174, 108 P.3d 1032.

**Instruction on simple battery warranted.** — One cannot batter a peace officer while in the lawful discharge of his duties without battering the person of another, and there being evidence that the police officer was not in the lawful discharge of his duties in connection with the altercation, the trial court erred in refusing to instruct on simple battery as well as on battery on an officer. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

If there is a factual issue as to performance of duties, the defendant is entitled to an instruction on simple battery as a lesser included offense to battery upon a police officer. *State v. Gonzales*, 1982-NMCA-043, 97 N.M. 607, 642 P.2d 210.

**Instruction on right to detain.** — There was no error in refusing a requested instruction on an officer's right to detain a person which focused only on the officer's initial approach to defendant and disregarded the officer's attempt to arrest after defendant allegedly hit the officer, since in light of the evidence, the requested instruction was incomplete and would have confused the jury on the issue of lawful discharge of duties. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

**When charge barred by acquittal on other charges.** — After a magistrate's determination that the defendant was not guilty of resisting and obstructing an officer and disorderly conduct because he was acting in defense of another, the state cannot charge him with battery on a police officer and constitutionally bring him before a new fact finder to relitigate that same factual issue. *State v. Orosco*, 1982-NMCA-181, 99 N.M. 180, 655 P.2d 1024.

**Sufficient evidence.** — Where police officers were attempting to arrest defendant's relative, defendant aggressively approached the officers by raising defendant's fists, shouting and coming close to the officers, and while one officer attempted to handcuff defendant, defendant kicked the officer in the leg, injuring the officer, there was sufficient evidence to support defendant's conviction for battery on a peace officer. *State v. Ford*, 2007-NMCA-052, 141 N.M. 512, 157 P.3d 77, cert. denied, 2007-NMCERT-004, 141 N.M. 569, 158 P.3d 459.

**Conviction supported by evidence.** — Testimony of police officer that he and defendant exchanged blows was sufficient evidence of intentional touching to support defendant's conviction for battery under this section, notwithstanding the officer's concession on cross-examination that he couldn't actually remember whether defendant had hit him. *State v. Ortega*, 1992-NMCA-003, 113 N.M. 437, 827 P.2d 152.

**Spitting or throwing urine upon a peace officer** could reasonably be found by a jury to come within the purview of battery upon a peace officer. *State v. Jones*, 2000-NMCA-047, 129 N.M. 165, 3 P.3d 142, cert. denied, 129 N.M. 207, 4 P.3d 35 .

**Evidence sufficient** to sustain defendant's conviction where he spit on and kicked an officer while being restrained. *State v. Martinez*, 2002-NMCA-036, 131 N.M. 746, 42 P.3d 851, cert. denied, 131 N.M. 737, 42 P.3d 842.

**Defense of another against excessive police force is a viable defense.** — The right to defense of another against a police officer is not absolute; it does not exist if the officer is using necessary force to effect an arrest. However, a defendant is entitled to a defense of another jury instruction if an officer used force against another that was unreasonable and unnecessary. *State v. Jones*, 2020-NMCA-029.

Where defendant was charged with battery upon a peace officer and resisting or abusing an officer, and where defendant requested a defense of another jury instruction, the district court erred in denying the request and in finding that defending another against excessive force by a police officer was not a viable defense, because defense of another against excessive police force is a viable defense and reasonable minds could differ as to whether the officers used excessive force in this case. *State v. Jones*, 2020-NMCA-029.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

## 30-22-25. Aggravated battery upon peace officer.

A. Aggravated battery upon a peace officer consists of the unlawful touching or application of force to the person of a peace officer with intent to injure that peace officer while he is in the lawful discharge of his duties.

B. Whoever commits aggravated battery upon a peace officer, inflicting an injury to the peace officer which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a fourth degree felony.



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C. Whoever commits aggravated battery upon a peace officer, inflicting great bodily harm, or does so with a deadly weapon or in any manner whereby great bodily harm or death can be inflicted, is guilty of a third degree felony.

**History: 1953 Comp., § 40A-22-24, enacted by Laws 1971, ch. 265, § 5.**

**Cross references.** — For definitions of deadly weapon and great bodily harm, *see* 30-1-12 NMSA 1978.

For aggravated battery, *see* 30-3-5 NMSA 1978.

ANNOTATIONS

**Knowledge of the victim's identity as a peace officer.** — Knowledge of the victim's identity as a peace officer is an essential element of the crime of aggravated battery upon a peace officer, which the state has the burden to prove beyond a reasonable doubt. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Sufficient evidence of aggravated battery on a peace officer based on a theory of accessory liability.** — Where police officers attempted to execute a search of defendant's residence pursuant to a warrant, and where, as officers approached a camper on the property, the officers heard and saw gunfire coming from the camper, striking one of the officers, evidence that defendant owned the camper and was inside the camper at the time of the gunfire, and that DNA tests performed on several of the firearms retrieved from the camper found that defendant was either a major contributor of the DNA or could not be eliminated as a contributor, was sufficient for a reasonable jury to infer that defendant either shot at the officers himself, or, given the availability of firearms and ammunition inside his camper, defendant encouraged, helped, or caused others to shoot at the officers. *State v. Uribe-Vidal*, 2018-NMCA-008.

**Convictions of aggravated battery upon a peace officer and attempted first degree murder violated double jeopardy.** — Where defendant, who was imprisoned in a county detention center, attacked and stabbed a correctional officer five times with a metal shank, defendant's convictions for attempted murder and aggravated battery of a peace officer did not violate double jeopardy. *State v. Urquizo*, 2012-NMCA-113, 288 P.3d 919, cert. granted, 2012-NMCERT-011.

**Although the defendant's mental state, rather than the victim's conduct, is the touchstone of the defendant's knowledge that the victim is a peace officer,** the defendant's intent to commit aggravated battery on a peace officer may be established by circumstantial evidence, which may include the fact that the victim was in full uniform, had a badge visibly displayed, was driving a marked police vehicle, or had identified himself or herself as a police officer. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Battery under Section 30-3-4 NMSA 1978 is a lesser included offense of aggravated battery upon a peace officer.** *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

**Claim of self-defense negates** a specific element of battery upon a peace officer. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011, 138 N.M. 636, 124 P.3d 564.

**Lesser offense.** — The offense of aggravated battery upon a peace officer is a lesser included offense of the crime of assault with intent to commit a violent felony upon a peace officer (30-22-23 NMSA 1978). *State v. Bojorquez*, 1975-NMCA-075, 88 N.M. 154, 538 P.2d 796, cert. denied, 88 N.M. 318, 540 P.2d 248.

**Battery upon officer included.** — Battery upon a peace officer is a charge included within the charge of aggravated battery upon a peace officer, and thus defendant's conviction was for an offense included within the charge of aggravated battery of an officer of which he had notice. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

## 30-22-26. Assisting in assault upon peace officer.

A. Every person who assists or is assisted by one or more other persons to commit a battery upon any peace officer while he is in the lawful discharge of his duties is guilty of a fourth degree felony.

B. This section is designed to protect officers from assaults and batteries by multiple assailants while quelling riots and other unlawful assemblages.

**History: 1953 Comp., § 40A-22-25, enacted by Laws 1971, ch. 265, § 6.**

ANNOTATIONS

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

## 30-22-27. Disarming a peace officer.

A. Disarming a peace officer consists of knowingly:

(1) removing a firearm or weapon from the person of a peace officer when the officer is acting within the scope of his duties; or

(2) depriving a peace officer of the use of a firearm or weapon when the officer is acting within the scope of his duties.



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B. The provisions of Subsection A of this act shall not apply when a peace officer is engaged in criminal conduct.

C. Whoever commits disarming a peace officer is guilty of a third degree felony.

**History: Laws 1997, ch. 122, § 1.**

**Effective dates.** — Laws 1997, ch. 122, § 2 makes the act effective July 1, 1997.

ANNOTATIONS

**"Use of a firearm" defined.** — The plain language of the statute penalizes a defendant for depriving an officer of the use of a firearm at any point during the officer's acting within the scope of his duties, rather than limiting its applicability to a deprivation that occurs only when the officer is attempting or intends an immediate use of the firearm. *State v. Ortiz*, 2017-NMCA-006, cert. denied.

**Sufficient evidence of attempt to disarm a peace officer.** — Where a law enforcement officer, in response to a report of a male subject acting suspiciously, detained and transported defendant to the police department due to his bizarre behavior, and where defendant began hitting his head against the wall and door of the holding cell requiring medical attention, and while being transported to the hospital, defendant grabbed the officer's shotgun from the front seat of the patrol vehicle with both hands, despite being handcuffed, and tried to pull the weapon from the front seat to the back seat of the patrol car, the evidence produced at trial was sufficient for the district court to conclude that defendant intentionally grabbed the shotgun intending to pull it through the partition between the front and back seat of the patrol vehicle, and that doing so would deprive the officer, who was acting within the scope of his duties, of its use. *State v. Ortiz*, 2017-NMCA-006, cert. denied.

# ARTICLE 23
# Misconduct by Officials

Sec.
30-23-1. Demanding illegal fees.
30-23-2. Paying or receiving public money for services not rendered.
30-23-3. Making or permitting false public voucher.
30-23-4. Injunction to restrain unlawful payment of public funds.
30-23-5. Unlawful speculation in claims against state.
30-23-6. Unlawful interest in a public contract.
30-23-7. Civil damages for engaging in illegal acts.

## 30-23-1. Demanding illegal fees.

Demanding illegal fees consists of any public officer or public employee knowingly asking or accepting anything of value greater than that fixed or allowed by law for the execution or performance of any service or duty.

Whoever commits demanding illegal fees is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-23-1, enacted by Laws 1963, ch. 303, § 23-1.**

**Cross references.** — For section making knowingly demanding or receiving illegal fees one of the grounds for discharge of local officer, *see* 10-4-2 NMSA 1978.

ANNOTATIONS

**Not lesser included offense of Section 30-23-2 NMSA 1978.** — The offense of demanding illegal fees, as contained in this section, is not a lesser included offense of paying or receiving public money for services not rendered under Section 30-23-2 NMSA 1978. *State v. Casteneda*, 1982-NMCA-046, 97 N.M. 670, 642 P.2d 1129.

**Municipal court fees.** — Absent statutory authority, a municipality may not charge filing fees or other cost for cases filed in its municipal courts. 1967-68 Op. Att'y Gen. No. 68-65.

**Unauthorized inspection fees.** — For the cattle sanitary board (now the livestock board) to charge slaughterhouses any inspection fees which are not authorized expressly by statute might put the board in possible criminal jeopardy in view of this section. 1965-66 Op. Att'y Gen. No. 66-128.

**Dual salaries.** — An individual employed as a full-time district court reporter and as a deputy court clerk over the same period of time may not receive salaries for both jobs. 1963-64 Op. Att'y Gen. No. 64-152.

**Law reviews.** — For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 63A Am. Jur. 2d Public Officers and Employees §§ 407, 410.

67 C.J.S. Officers §§ 255 to 263.

## 30-23-2. Paying or receiving public money for services not rendered.

Paying or receiving public money for services not rendered consists of knowingly making or receiving payment or causing payment to be made from public funds where such payment purports to be for wages, salary or remuneration for personal servives [services] which have not in fact been rendered.



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Nothing in this section shall be construed to prevent the payment of public funds where such payments are intended to cover lawful remuneration to public officers or public employees for vacation periods or absences from employment because of sickness, or for other lawfully authorized purposes.

Whoever commits paying or receiving public money for services not rendered is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-23-2, enacted by Laws 1963, ch. 303, § 23-2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## ANNOTATIONS

**Section not vague.** — This section gives fair warning against expenditure of public funds for services not rendered, while excluding lawful payments for vacation time or sick leave or other lawfully authorized purposes, and hence, there is no vagueness in the statute as written. *State v. Gurule*, 1977-NMCA-001, 90 N.M. 87, 559 P.2d 1214, cert. denied, 90 N.M. 254, 561 P.2d 1347.

**Application of this section is not left to administrative discretion,** and lawfulness of authorization is not determined by an administrative official but by a court. *State v. Gurule*, 1977-NMCA-001, 90 N.M. 87, 559 P.2d 1214, cert. denied, 90 N.M. 254, 561 P.2d 1347.

**Section 30-23-1 NMSA 1978 not lesser included offense.** — The offense of demanding illegal fees, as contained in Section 30-23-1 NMSA 1978, is not a lesser included offense of paying or receiving public money for services not rendered contained in this section. *State v. Casteneda*, 1982-NMCA-046, 97 N.M. 670, 642 P.2d 1129.

**Charging in alternative.** — Indictment charging defendant in the alternative with knowingly making or receiving payment or causing payment to be made from public funds charged one crime committed in various ways and was not legally deficient. *State v. Gurule*, 1977-NMCA-001, 90 N.M. 87, 559 P.2d 1214, cert. denied, 90 N.M. 254, 561 P.2d 1347.

**Indictment was not duplicitous** because the statement of facts and subsequent proof related to a series of items, even though each might have been alleged as a separate violation. *State v. Gurule*, 1977-NMCA-001, 90 N.M. 87, 559 P.2d 1214, cert. denied, 90 N.M. 254, 561 P.2d 1347.

**Notice sufficient.** — Where defendant asserted he could not properly prepare his defense because he was not informed as to which of 17 instances the state would attempt to prove, and the statement of facts informed defendant that the state was relying on each of the instances to prove the one offense charged in the indictment, defendant was informed of the crime charged in sufficient detail to enable him to prepare his defense. *State v. Gurule*, 1977-NMCA-001, 90 N.M. 87, 559 P.2d 1214, cert. denied, 90 N.M. 254, 561 P.2d 1347.

**Section does not concern judgments for damages** for breach of contract awarded to discharge tenured teacher. *Sanchez v. Board of Educ.*, 1969-NMSC-063, 80 N.M. 286, 454 P.2d 768.

**Public policy.** — While the provisions of former 40-8-12, 1953 Comp., were probably not broad enough to cover travel expenses and per diem allowances, they indicated quite clearly a strong public policy of requiring rendition of services prior to any payment therefor or in connection therewith. 1961-62 Op. Att'y Gen. No. 62-55.

**Locale of services rendered.** — Former 40-8-12, 1953 Comp., required that payment was only to be made for services actually rendered to the state of New Mexico; however, it did not mean that the services would necessarily have to be rendered in the state. 1955-56 Op. Att'y Gen. No. 6469.

**State funds covered.** — This section places restrictions on the payment of funds which are the property of the state. 1975-76 Op. Att'y Gen. No. 75-10.

**Separation of powers to be respected.** — This section cannot be read to impose limits on the health and social services (now the human services) department's use of federal funds in administering social service programs, since the legislature is prevented by the separation of powers doctrine from imposing any conditions on the executive branch's use of federal or non-state money. 1975-76 Op. Att'y Gen. No. 75-10.

**Executive departments not unreasonably obstructed.** — This section is not applicable to disbursements from revolving funds established out of its general appropriation by the health and social services department (now the human services department) as advances to "providers" under certain federal programs conducted by the department, which advances the providers must return; to read these sections so as to prohibit such advances would unreasonably obstruct the department in the exercise of its statutory powers. 1975-76 Op. Att'y Gen. No. 75-10.

**Dual salaries.** — A person may not be employed as a juvenile probation officer and deputy court clerk and paid as both although performing no services as deputy court clerk since this section makes it a misdemeanor to pay or to receive public money for services not rendered. 1963-64 Op. Att'y Gen. No. 64-152.

**Commencement of salary.** — Contracts employing new faculty members cannot provide for the commencement of salary payments before teaching services are rendered. 1971-72 Op. Att'y Gen. No. 72-44.

**Payment for sick leave authorized.** — Continued payment during sick leave is not payment of public money for services not rendered, even though no services are rendered during the time the employee is absent from work because sick leave is part of the compensation for services which were rendered before the sick leave was taken. 1973-74 Op. Att'y Gen. No. 73-34.

**When services already rendered.** — Payment of wages to teachers during sick leave must be made in consideration of services performed; payments made before the services were performed would be payment of "public money for services not rendered" and would violate this section. 1971-72 Op. Att'y Gen. No. 72-33.

**Use of sick leave for maternity purposes.** — This section is not violated if the school board allows an employee to use sick leave for maternity purposes, where the employee received payment during "maternity leave" only to the extent of her accumulated sick leave. 1973-74 Op. Att'y Gen. No. 73-34.

**Absence of professor from class.** — Unless a faculty member's failure to meet a class on a particular day could be said as a matter of law to constitute a failure to render contracted-for services, no violation of this section would be involved if an institution of higher education failed to deduct salary for such day not actually taught. 1969-70 Op. Att'y Gen. No. 70-73.

**Jury duty constitutes lawfully authorized purpose** within the meaning of this section. 1975-76 Op. Att'y Gen. No. 75-33.

**Fees for mileage for jury duty.** — School employees need not lose regular compensation while serving on jury duty, but may receive no more than their ordinary rate of compensation during the period of jury duty; however, school employees serving on juries would be entitled to accept the allowance for mileage. 1975-76 Op. Att'y Gen. No. 75-33.



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**Payment for vacation periods.** — If the board of regents of the school for the deaf decided that time spent by school employees on jury duty would be "vacation periods," then payment of wages during such absence would not be prohibited by former 40-8-12, 1953 Comp. 1961-62 Op. Att'y Gen. No. 62-73.

**Educational leave is lawfully authorized purpose.** — Grant of educational leave with pay to a state employee to attend university program on public science policy and administration is "for other lawfully authorized purposes" under this section and does not violate constitutional or statutory provisions. 1971-72 Op. Att'y Gen. No. 72-67.

**Training public employee for special program.** — The New Mexico boys' school may properly send one of the employees of the institution to another state for a period of one month for indoctrination in the duties of a youth forestry camp director so that such employee may assist the New Mexico boys' school in managing a forestry camp for boys established in New Mexico. 1963-64 Op. Att'y Gen. No. 63-126.

**Restitution.** — Upon conviction under this section, 30-23-7 NMSA 1978 would come into play and recovery thereunder could be had. 1963-64 Op. Att'y Gen. No. 64-152.

**Law reviews.** — For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

## 30-23-3. Making or permitting false public voucher.

Making or permitting false public voucher consists of knowingly, intentionally or wilfully [willfully] making, causing to be made or permitting to be made, a false material statement or forged signature upon any public voucher, or invoice supporting a public voucher, with intent that the voucher or invoice shall be relied upon for the expenditure of public money.

Whoever commits making or permitting false public voucher is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-23-3, enacted by Laws 1963, ch. 303, § 23-3.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For forgery, *see* 30-16-10 NMSA 1978.

### ANNOTATIONS

**Section not vague.** — Section is not unconstitutionally vague, ambiguous or indefinite; it gives fair warning of the prohibited acts and declares those acts to be a crime. *State v. Sierra*, 1977-NMCA-075, 90 N.M. 680, 568 P.2d 206, cert. denied, 91 N.M. 4, 569 P.2d 414.

**"Material."** — Meaning of "material" herein is not vague, ambiguous or indefinite, as it imports nothing less than a matter which is so substantial and important as to influence a party. *State v. Sierra*, 1977-NMCA-075, 90 N.M. 680, 568 P.2d 206, cert. denied, 91 N.M. 4, 569 P.2d 414.

**"Public money".** — The term "public money", as used in this section, is sufficiently specific to not require a person of ordinary intelligence to guess at the conduct the statute proscribes. *State v. Hearne*, 1991-NMCA-046, 112 N.M. 208, 813 P.2d 485.

**Section applies to public employees.** — This section is unambiguous and applies to public employees as well as public officials. *State v. Ellenberger*, 1981-NMSC-056, 96 N.M. 287, 629 P.2d 1216.

The heading of this article, "Misconduct by Officials," does not restrict its application to public officials. *State v. Ellenberger*, 1981-NMSC-056, 96 N.M. 287, 629 P.2d 1216.

**Applicability not determined by nature of expenditure.** — It cannot be the nature of the expenditure which determines the applicability of this section. If the nature of the expenditure was relied upon to determine if funds were "public money", then absurd results are produced. Any public official could falsify public vouchers for his own purposes and then defend himself by claiming the funds were not "public money" because they were not spent for a "public purpose". *State v. Hearne*, 1991-NMCA-046, 112 N.M. 208, 813 P.2d 485.

**Money donated to university by private individual.** — It would be against public policy to allow a university official to enter into private agreements to expend funds made available only to pursue the agenda of the donating entity. To rule otherwise would mean any benefactor of the university could create a fund, give authority over the fund to a university official and claim the fund did not contain public money, thereby circumventing all university spending and accounting policies. *State v. Hearne*, 1991-NMCA-046, 112 N.M. 208, 813 P.2d 485.

**State university head coach.** — This section applies to a state university head coach. *State v. Ellenberger*, 1981-NMSC-056, 96 N.M. 287, 629 P.2d 1216.

**Prosecution for both fraud and violation of this section permitted.** — The double jeopardy clause does not prohibit the prosecution of an individual under both this section and 30-16-6 NMSA 1978. *State v. Ellenberger*, 1981-NMSC-056, 96 N.M. 287, 629 P.2d 1216.

Because the fraud statute does not require the making of a false voucher, and the false-voucher statute does not require the misappropriation or taking of anything of value, and because fraud, unlike the crime of making false public vouchers, requires proof of the victim's reliance, defendant may be prosecuted and sentenced for violation of both statutes. *State v. Whitaker*, 1990-NMCA-014, 110 N.M. 486, 797 P.2d 275, cert. denied, 109 N.M. 631, 788 P.2d 931.

**Joinder of fraud, bribery and racketerring counts.** — The trial court did not err in denying defendant's motion to sever counts of fraud and receiving a bribe from other counts where there was no evidence the multiplicity of charges confused the jury, the multiplicity of charges were not cumulative, and the counts were predicate offenses for a racketeering charge. *State v. Armijo*, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

**Evidence sufficient to convict.** — *See State v. Armijo*, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

**Dual salaries prohibited.** — A person may not be employed as a juvenile probation officer and deputy court clerk and paid as both although performing no services as deputy court clerk since this section makes it a fourth-degree felony to make or permit to be made a false public voucher for the expenditure of public money. 1963-64 Op. Att'y Gen. No. 64-152.

**Restitution.** — Upon conviction under this section, 30-23-7 NMSA 1978 would come into play and recovery thereunder could be had. 1963-64 Op. Att'y Gen. No. 64-152.

**Law reviews.** — For comment, "The Use of an Information Following the Return of a Grand Jury No Bill: State v. Joe Nestor Chavez," see 10 N.M.L. Rev. 217 (1979-1980).



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## 30-23-4. Injunction to restrain unlawful payment of public funds.

Any citizen of this state may file suit in the district court to restrain the payment or receipt of public money in violation of Sections 23-2 and 23-3 [30-23-2 and 30-23-3 NMSA 1978]. Jurisdiction to entertain and adjudicate such suits is conferred upon the district courts, and such suits shall be subject to the same rules, statutes and law with respect to procedure, venue and appeals as ordinary civil actions for injunctive relief.

**History: 1953 Comp., § 40A-23-4, enacted by Laws 1963, ch. 303, § 23-4.**

**Cross references.** — For civil actions for injunctive relief, *see* Rules 1-065 and 1-066 NMRA.

ANNOTATIONS

**Citizen's authority restricted.** — The authority granted private citizens by former law was restricted to the bringing of actions to restrain the payment or receipt of public funds. *Hatch v. Keehan*, 1956-NMSC-019, 61 N.M. 1, 293 P.2d 314.

**Recovery of funds not authorized.** — A private citizen was not authorized by former law to bring an action for the recovery or restoration of public funds. *Hatch v. Keehan*, 1956-NMSC-019, 61 N.M. 1, 293 P.2d 314.

## 30-23-5. Unlawful speculation in claims against state.

Unlawful speculation in claims against state consists of any public officer or public employee directly or indirectly buying, selling, bartering, dealing in or speculating in or with any certificate, warrant or other evidence of indebtedness issued by the state, a municipality or other political subdivision, unless such certificate, warrant or other evidence of indebtedness shall have been lawfully issued to such person in payment of his salary or in consideration for services rendered by such person for supplies furnished by him.

Whoever commits unlawful speculation in claims against state is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-23-5, enacted by Laws 1963, ch. 303, § 23-5.**

## 30-23-6. Unlawful interest in a public contract.

Unlawful interest in a public contract consists of:

A. any public officer or public employee receiving anything of value, directly or indirectly, from either a seller or a seller's agents, or a purchaser or a purchaser's agents in connection with the sale or purchase of securities, goods, leases, lands or anything of value by the state or any of its political subdivisions, unless:

(1) prior written consent of the head of the department of the state or political subdivision involved in the transaction is obtained and filed as a matter of public record in the office of secretary of state; and

(2) subsequent to the transaction a statement is filed as a matter of public record in the office of secretary of state by the purchaser or seller giving anything of value to a public officer or public employee and this statement contains the date the services were rendered, the amount of remuneration for the rendered services and the nature of the rendered services;

B. any seller, or his agents, or a purchaser, or his agents, offering to pay or paying anything of value directly or indirectly to a public officer or public employee in connection with the sale or purchase of securities or goods by the state or any of its political subdivisions unless the requirements of Paragraphs (1) and (2) of Subsection A of this section ar [are] complied with.

Any person violating the provisions of Subsection B of this section, where such violations forms the basis for prosecution and conviction of a public officer or public employee, shall be disqualified from transacting any business with the state or its political subdivisions for a period of five years from the date of such violation.

Nothing in this section shall prohibit a public officer or public employee from receiving his regular remuneration for services rendered to the state or its political subdivisions in connection with the aforementioned transactions.

Whoever commits unlawful interest in public contracts where the value received by him is fifty dollars ($50.00) or less is guilty of a misdemeanor.



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Whoever commits unlawful interest in public contracts where the value received by him is more than fifty dollars ($50.00) is guilty of a fourth degree felony. Any public officer or public employee convicted of a felony hereunder is forever disqualified from employment by the state or any of its political subdivisions.

**History: 1953 Comp., § 40A-23-6, enacted by Laws 1963, ch. 303, § 23-6.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 63A Am. Jur. 2d Public Officers and Employees § 411.

## 30-23-7. Civil damages for engaging in illegal acts.

In addition to any criminal penalties imposed by Section 23-6 [30-23-6 NMSA 1978], a public officer or public employee convicted of violating such section shall be liable for anything of value received by him to the department of the state or political subdivision in whose employ or service he was at the time of such violation of that section. Action for recovery of amounts under this section shall be brought in the district court of the county in which any element of the crime occurred. The actions shall be brought in the name of the state for the benefit and use of the department of the state or political subdivision in whose employ or service the public officer or public employee was at the time of the commission of the crime.

**History: 1953 Comp., § 40A-23-7, enacted by Laws 1963, ch. 303, § 23-7.**

**ANNOTATIONS**

**Conviction required.** — A judgment of conviction is the condition precedent to the maintenance by the state of an action for restitution. 1963-64 Op. Att'y Gen. No. 64-152.

**Upon conviction under Sections 30-23-2 or 30-23-3 recovery could be had hereunder.** 1964 Op. Att'y Gen. No. 64-152.

# ARTICLE 24

# Bribery

Sec.
30-24-1. Bribery of public officer or public employee.
30-24-2. Demanding or receiving bribe by public officer or public employee.
30-24-3. Bribery or intimidation of a witness; retaliation against a witness.
30-24-3.1. Acceptance of a bribe by a witness.

## 30-24-1. Bribery of public officer or public employee.

Bribery of public officer or public employee consists of any person giving or offering to give, directly or indirectly, anything of value to any public officer or public employee, with intent to induce or influence such public officer or public employee to:

A. give or render any official opinion, judgment or decree;

B. be more favorable to one party than to the other in any cause, action, suit, election, appointment, matter or thing pending or to be brought before such person;

C. procure him to vote or withhold his vote on any question, matter or proceeding which is then or may thereafter be pending, and which may by law come or be brought before him in his public capacity;

D. execute any of the powers in him vested; or

E. perform any public duty otherwise than as required by law, or to delay in or omit to perform any public duty required of him by law.

Whoever commits bribery of public officer or public employee is guilty of a third degree felony.

**History: 1953 Comp., § 40A-24-1, enacted by Laws 1963, ch. 303, § 24-1.**

**Cross references.** — For bribery of public treasurers or employees, *see* 6-10-53 NMSA 1978.

For bribery of contest participants, *see* 30-19-13 NMSA 1978.



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ANNOTATIONS

**Applicability to public employees.** — This section includes bribery of public employees as well as public officers. *State v. Glen Slaughter & Assocs.*, 1994-NMCA-169, 119 N.M. 219, 889 P.2d 254.

**Bribery statute excludes operation of common law of bribery.** *State v. Quinn*, 1930-NMSC-065, 35 N.M. 62, 290 P. 786; *State v. Collins*, 1922-NMSC-063, 28 N.M. 230, 210 P. 569 (decided under prior law).

**Execution of powers vested.** — The word "vested" in Subsection D does not mean "specifically granted by statute or regulation"; instead, "vested by law" should be read to mean "empowered by the sovereign authority of the government." *State v. Glen Slaughter & Assocs.*, 1994-NMCA-169, 119 N.M. 219, 889 P.2d 254.

The improper acts alleged against the executive director of the New Mexico Public School Insurance Authority and the New Mexico Retiree Health Care Authority were ones that he could perform because of his employment by the sovereign authority of the state; if a public employee takes a bribe to execute powers possessed by virtue of holding public employment, Subsection D is violated. *State v. Glen Slaughter & Assocs.*, 1994-NMCA-169, 119 N.M. 219, 889 P.2d 254.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 12 Am. Jur. 2d Bribery §§ 1 to 17.

Charge of bribery or cognate offense predicated upon an unaccepted offer by or to an official, 52 A.L.R. 816.

Nonexistence of duty upon part of official to do, or refrain from doing, the act in respect of which it was sought to influence him, as defense to prosecution for bribery or acceptance of bribe, 158 A.L.R. 323.

Other bribery or acceptance of bribe, admissibility of evidence tending to show commission of, in prosecution for bribery or accepting bribes, 20 A.L.R.2d 1012.

Entrapment to commit bribery or offer to bribe, 69 A.L.R.2d 1397.

Validity of state statute prohibiting award of government contract to person or business entity previously convicted of bribery or attempting to bribe state public employee, 7 A.L.R.4th 1202.

11 C.J.S. Bribery § 3 et seq.

## 30-24-2. Demanding or receiving bribe by public officer or public employee.

Demanding or receiving bribe by public officer or public employee consists of any public officer or public employee soliciting or accepting, directly or indirectly, anything of value, with intent to have his decision or action on any question, matter, cause, proceeding or appointment influenced thereby, and which by law is pending or might be brought before him in his official capacity.

Whoever commits demanding or receiving bribe by public officer or public employee is guilty of a third degree felony, and upon conviction thereof such public officer or public employee shall forfeit the office then held by him.

**History: 1953 Comp., § 40A-24-2, enacted by Laws 1963, ch. 303, § 24-2.**

**Cross references.** — For removal of local officers, *see* 10-4-1 NMSA 1978 et seq.

For acceptance of bribes by irrigation district officials, *see* 73-9-33, 73-10-18, NMSA 1978.

ANNOTATIONS

**Statutory crime void.** — The statutory crime of demanding or receiving a bribe as a public official (Section 30-24-2 NMSA 1978) to the extent that it relates specifically to legislators is voided by the constitutional crime of soliciting a bribe as a member of the legislature (N.M. Const., art. IV, § 39). *State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**Demand for sexual favor to forego arrest deemed bribe.** — Where police officer coerced victim to perform fellatio on him so she would not be arrested for driving violations, police officer could properly be charged with demanding a bribe and with criminal sexual penetration. *State v. Johnson*, 1984-NMCA-094, 102 N.M. 110, 692 P.2d 35, *overruled in part on other grounds by Manlove v. Sullivan*, 1989-NMSC-029, 108 N.M. 471, 775 P.2d 237.

**Assistant district attorney could be prosecuted for attempted bribery** under Laws 1912, ch. 75. *State v. Collins*, 1922-NMSC-063, 28 N.M. 230, 210 P. 569 (decided under prior law).

**Attorney was disbarred** for conviction of bribery under this section. *In re Esquibel*, 1992-NMSC-007, 113 N.M. 24, 822 P.2d 121.

**Indictment sufficient.** — Indictment charging justice of the peace with having wrongfully handed over papers in a case, decided by him and appealed, to a third party upon payment of a bribe, instead of transmitting them to the clerk of the district court, was not insufficient. *State v. Williams*, 1916-NMSC-073, 22 N.M. 337, 161 P. 334 (decided under prior law).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 12 Am. Jur. 2d Bribery § 11.

Solicitation or receipt of funds by public officer or employee for political campaign expenses or similar purposes as bribery, 55 A.L.R.2d 1137.

Construction and application of § 2C1.1 of United States Sentencing Guidelines (18 USCS APPX § 2C1.1) pertaining to offenses involving public officials offering, giving, soliciting, or receiving bribes, or extortion under color of official right, 144 A.L.R. Fed. 615.

Who is public official within meaning of federal statute punishing bribery of public official (18 U.S.C.A. § 201), 161 A.L.R. Fed. 491.

11 C.J.S. Bribery § 11.

## 30-24-3. Bribery or intimidation of a witness; retaliation against a witness.

A. Bribery or intimidation of a witness consists of any person knowingly:



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(1) giving or offering to give anything of value to any witness or to any person likely to become a witness in any judicial, administrative, legislative or other official cause or proceeding to testify falsely or to abstain from testifying to any fact in such cause or proceeding;

(2) intimidating or threatening any witness or person likely to become a witness in any judicial, administrative, legislative or other official cause or proceeding for the purpose of preventing such individual from testifying to any fact, to abstain from testifying or to testify falsely; or

(3) intimidating or threatening any person or giving or offering to give anything of value to any person with the intent to keep the person from truthfully reporting to a law enforcement officer or any agency of government that is responsible for enforcing criminal laws information relating to the commission or possible commission of a felony offense or a violation of conditions of probation, parole or release pending judicial proceedings.

B. Retaliation against a witness consists of any person knowingly engaging in conduct that causes bodily injury to another person or damage to the tangible property of another person, or threatening to do so, with the intent to retaliate against any person for any information relating to the commission or possible commission of a felony offense or a violation of conditions of probation, parole or release pending judicial proceedings given by a person to a law enforcement officer.

C. Whoever commits bribery or intimidation of a witness is guilty of a third degree felony.

D. Whoever commits retaliation against a witness is guilty of a second degree felony.

**History: 1953 Comp., § 40A-24-3, enacted by Laws 1963, ch. 303, § 24-3; 1987, ch. 227, § 1; 1991, ch. 84, § 1; 1997, ch. 208, § 1.**

**Cross references.** — For perjury, *see* 30-25-1 NMSA 1978.

**The 1997 amendment,** effective July 1, 1997, substituted "is guilty of a third degree felony" for "or retaliation against a witness is guilty of a fourth degree felony" at the end of Subsection C, and added Subsection D.

**The 1991 amendment,** effective April 2, 1991, redesignated former Subsections A and C as Paragraphs (1) and (2) of Subsection A and former Subsection D as Subsections B and C; deleted "and maliciously" following "knowingly" in the introductory phrase of Subsection A; deleted former Subsection B which read "who is a witness or is likely to become a witness, receiving or agreeing to receive any bribe or anything of value to testify falsely or to abstain from testifying to any fact in any cause in any judicial, administrative, legislative or other official cause or proceeding"; added Paragraph (3) of Subsection A; substituted "engaging in conduct that causes" for "and maliciously engaging in any conduct and thereby causing" near the beginning of Subsection B; and made related stylistic changes.

**The 1987 amendment,** effective June 19, 1987, rewrote the catchline, which read "Bribery of witness," substituted "or intimidation of a witness consists of any person knowingly and maliciously" for "of witness consists of any person" in the introductory language, deleted "pending or about to be brought" preceding "to testify" in Subsection A, added "or" at the end of Subsection A, deleted "pending or about to be brought in this state or" at the end of Subsection B and "pending or about to be brought" following "proceeding" in Subsection C, inserted Subsection D and substituted "or intimidation of a witness or retaliation against a witness" for "of witness" in the last undesignated paragraph.

## ANNOTATIONS

**Constitutionality.** — The phrase "possible commission of a felony" was not shown to be unconstitutionally vague with respect to the defendant, who held a knife to the victim's throat and committed other violent acts, taunted the victim to call the police, and told her that he would kill her before they arrived. *State v. Perea*, 1999-NMCA-138, 128 N.M. 263, 992 P.2d 276, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Strict construction.** — This section is criminal in nature and must be construed strictly. *State v. Bell*, 1967-NMSC-184, 78 N.M. 317, 431 P.2d 50.

**Elements of offense.** — In a prosecution for intimidation of a witness, the state is not required to prove that defendant knew that he committed certain acts that under the law amounted to a felony. *State v. Perea*, 1999-NMCA-138, 128 N.M. 263, 992 P.2d 276, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Conviction of crime charged not required.** — A defendant may be convicted of bribery or intimidation of witness even if the defendant is acquitted of any crime associated with the actions relating to "the commission or possible commission of a felony." *State v. Perea*, 1999-NMCA-138, 128 N.M. 263, 992 P.2d 276, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Nature of offense.** — Liability for retaliation against a witness may be imposed even if the threat is communicated to a person other than the witness, so long as it is reasonable to expect that the person who receives the threat would inform the victim, and liability does not depend on whether defendant intended to carry out his threat. *State v. Warsop*, 1998-NMCA-033, 124 N.M. 683, 954 P.2d 748, cert. denied, 124 N.M. 589, 953 P.2d 1087.

**Juvenile offender.** — A juvenile may be convicted of intimidation of a witness even though he may only be found delinquent in the underlying offense. *In re Gabriel M.*, 2002-NMCA-047, 132 N.M. 124, 45 P.3d 64, cert. denied, 132 N.M. 193, 46 P.3d 100.

**Cause not pending.** — Where alleged acts of bribery of witnesses in a homicide case took place after the death of defendant's wife but long before any final decision was made concerning the holding of an inquest or the filing of a criminal complaint against the defendant no proceeding was pending or about to be brought within the meaning of this section at the time of those alleged acts of bribery. *State v. Bell*, 1967-NMSC-184, 78 N.M. 317, 431 P.2d 50, superseded by statute, *State v. Clements*, 2009-NMCA-85, 146 N.M. 745, 215 P.3d 54.

**Allegation of knowledge or intent.** — In prosecution for intimidating witness, indictment was not defective for failing to charge that accused knowingly committed the



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act or that he did it with corrupt intent. *State v. Lazarovich*, 1921-NMSC-071, 27 N.M. 282, 200 P. 422.

**Jury instructions.** — Giving of instruction that allowed the jury to convict defendant of intimidation of a witness without making the requisite finding that the information related to "the commission or possible commission of a felony" as opposed to a misdemeanor was reversible error. *State v. Perea*, 1999-NMCA-138, 128 N.M. 263, 992 P.2d 276, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Lesser included offenses.** — Under the *State v. Meadors* , 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731, analysis because retaliation against a witness did not subsume the elements of the crime of intimidation of a witness nor was the defendant provided notice, defendant was erroneously convicted of intimidation of a witness as an uncharged lesser included offense of retaliation. *State v. McGee*, 2002-NMCA-090, 132 N.M. 537, 51 P.3d 1191, cert. denied, 132 N.M. 551, 52 P.3d 411.

**Circumstantial evidence.** — Because proof of intent is rarely provable by direct evidence, circumstantial evidence must often be relied upon for its proof. Thus, circumstantial evidence, like direct evidence, will support a jury's finding of specific intent. *State v. McGee*, 2004-NMCA-014, 135 N.M. 73, 84 P.3d 690, cert. denied, 2004-NMCERT-001, 135 N.M. 160, 85 P.3d 802.

**Sufficient evidence.** — Where a witness had testified at defendant's trial which resulted in defendant's conviction for three charges and when defendant encountered the witness after the trial, defendant said "There's the son of a bitch. I'll kill that mother fucker", the evidence was sufficient to support defendant's conviction for retaliating against a witness. *State v. Estrada*, 2001-NMCA-034, 130 N.M. 358, 24 P.3d 793, cert. denied, 130 N.M. 459, 26 P.3d 163.

Where defendant had telephone conversations with a murder suspect during which they agreed that defendant would attend the murder suspect's trial because defendant's presence might intimidate a key witness into not testifying against the murder suspect, the evidence was sufficient to support defendant's conviction for conspiracy to intimidate a witness. *State v. Martinez*, 2008-NMCA-1160, 143 N.M. 428, 176 P.3d 1160, cert. denied, 2008-NMCERT-001, 143 N.M. 397, 176 P.3d 1129.

Where a police officer charged defendant, who was a county commissioner, with DWI and defendant, in defendant's capacity as chairperson of the county commission, wrote the officer a letter stating that defendant had received information indicating that the officer and the officer's spouse were violating the guidelines of a federal food commodities program, there was sufficient evidence to support defendant's conviction for intimidation of a witness. *State v. Fernandez*, 1994-NMCA-056, 117 N.M. 673, 875 P.2d 1104, cert. denied, 117 N.M. 744, 877 P.2d 44.

**Sufficient evidence of intimidation of a witness.** — In defendant's trial for criminal sexual contact of a minor and intimidation of a witness, where, in response to the prosecutor's leading questions, the nine-year-old child testified that defendant told the child not to tell anyone what happened, that defendant said that if the child told someone, defendant would take the child far away and leave him there, and that the child was afraid of defendant, there was a factual basis upon which the jury could conclude that defendant threatened the child, and the jury could reasonably infer that defendant intimidated the child with the intent to keep him from reporting the incident to law enforcement. *State v. Luna*, 2018-NMCA-025, cert. denied.

**Sufficient evidence to identify the defendant.** — Where defendant was charged with use of a telephone to terrify, intimidate, threaten, harass, annoy or offend, and bribery or intimidation of a witness, and where, at trial, the victim testified that defendant was her husband, that they had been married for many years but that they had been separated since 2010, that in December 2016, defendant appeared at the victim's home and started an altercation, during which defendant broke the windshield on the victim's car, that later that same day, defendant left two voicemails on the victim's phone threatening to kill her for calling the police, that she was familiar with defendant's voice from the many years that they had been married, that she recognized defendant's voice and cell phone number from the voicemails, and that the day before a magistrate court trial on a domestic violence charge related to the broken windshield, defendant called the victim and threatened to hurt her if she showed up to court, and where the state presented to the jury recordings of the voicemails, the evidence was sufficient to identify defendant as the person who left the voicemails and called the victim directly, and was sufficient to support defendant's convictions. *State v. Vigil*, 2021-NMCA-024, cert. denied.

**Insufficient evidence.** — Where the witness told police that the witness suspected that defendant had burned down one of defendant's houses and that the witness had observed defendant attempt to set fire to another of defendant's houses; two years later, defendant was convicted of a misdemeanor charge of criminal damage to property; the witness testified at defendant's trial, and two days after the trial, the witness received a threatening letter from defendant, there was insufficient evidence to support defendant's conviction for retaliating against a witness because the letter was sent in retaliation for the witness' misdemeanor trial testimony, not in retaliation for the witness' arson report. *Torres v. Lytle*, 461 F. 3d 1301 (10th Cir. 2006).

**Insufficient evidence of intimidation or threatening of a witness.** — Where defendant was charged with criminal sexual penetration of a minor and intimidation or threatening of a witness, and where the state relied on testimony elicited from the victim that defendant's son called her on the telephone after the incident and threatened her, there was insufficient evidence to support defendant's conviction for intimidation or threatening of a witness, because the state did not present any evidence that defendant helped or encouraged his son to intimidate or threaten the victim, nor did it establish that defendant requested his son place the call to the victim or was even aware that his son had called the victim. *State v. Garcia*, 2019-NMCA-056, cert. denied.

**Sufficient evidence of bribery of a witness.** — Where defendant was charged with criminal sexual penetration of a minor and bribery of a witness, and where the state relied on testimony elicited from the victim that after the assault, defendant threw her pants at her, instructed her to put them on, and stated, "remember, if you say anything, I'll get you again," there was sufficient evidence to prove beyond a reasonable doubt that defendant intended to keep the victim from truthfully reporting to a law enforcement officer or any agency of governing information relating to the commission of the felony of criminal sexual penetration. *State v. Garcia*, 2019-NMCA-056, cert. denied.

**Evidence sufficient.** — Where defendant assaulted defendant's spouse; defendant was aware of and afraid that defendant might go to jail because of the assault; and before the police arrived to investigate the incident, defendant told the spouse that defendant would kill the spouse and the spouse's children if the spouse said anything, there was sufficient evidence to support defendant's conviction for intimidation. *State v. Clements*, 2009-NMCA-085,146 N.M. 745, 215 P.3d 54, cert. denied, 2009-NMCERT-007, 147 N.M. 362, 223 P.3d 359.

Testimony from witness that the defendant ordered him to "keep his mouth shut" and offered to buy the witness an airline ticket to get out of town was sufficient for a rational jury to find each element of the crime of bribery of a witness beyond a reasonable doubt. *State v. Coffin*, 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

**Defendant's conviction for intimidation of a witness was time-barred.** — Where defendant was charged



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with numerous counts of criminal sexual penetration of a minor (CSPM), one count of attempt to commit CSPM, and one count of intimidation of a witness, a third-degree felony, and where defendant's intimidation of the victim occurred in 2008 and defendant was not charged or indicted until 2016, defendant's conviction for intimidation of a witness was time-barred because the defendant's prosecution for that charge exceeded the applicable limitations period of five years, pursuant to 30-1-8(B) NMSA 1978, between when the crime was committed in August 2008 and when the information was filed in March 2016. *State v. Costillo*, 2020-NMCA-051.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d Obstructing Justice §§ 46, 47, 64 to 66.

Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness, 8 A.L.R.4th 769.

Admonitions against perjury or threats to prosecute potential defense witness, inducing refusal to testify, as prejudicial error, 88 A.L.R.4th 388.

67 C.J.S. Obstructing Justice §§ 16 to 18.

## 30-24-3.1. Acceptance of a bribe by a witness.

A. No person who is a witness or is likely to become a witness shall receive, agree to receive or solicit any bribe or anything of value to:

(1) testify falsely or to abstain from testifying to any fact in any cause in any judicial, administrative, legislative or other proceeding; or

(2) abstain from truthfully reporting to a law enforcement officer or any agency of government that is responsible for enforcing criminal laws information relating to the commission or possible commission of a felony offense or a violation of conditions of probation, parole or release pending judicial proceedings.

B. Whoever receives, agrees to receive or solicits a bribe is guilty of a fourth degree felony.

**History: Laws 1991, ch. 84, § 2.**

# ARTICLE 25

# Perjury and False Affirmations

Sec.
30-25-1. Perjury.
30-25-2. Refusal to take oath or affirmation.

## 30-25-1. Perjury.

A. Perjury consists of making a false statement under oath, affirmation or penalty of perjury, material to the issue or matter involved in the course of any judicial, administrative, legislative or other official proceeding or matter, knowing such statement to be untrue.

B. Whoever commits perjury is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-25-1, enacted by Laws 1963, ch. 303, § 25-1; 2009, ch. 78, § 9.**

**Cross references.** — For provision making false swearing to accounts by county officers perjury, *see* 4-44-32 NMSA 1978.

For perjury in land contest proceedings, *see* 19-7-66 NMSA 1978.

For bribery of witness, *see* 30-24-3 NMSA 1978.

For perjury concerning regulated oil and gas wells, *see* 70-2-10 NMSA 1978.

**The 2009 amendment,** effective July 1, 2009, in Subsection A, after "affirmation", added "or penalty of perjury" and after "official proceeding" added "or matter".

### ANNOTATIONS

I. GENERAL CONSIDERATION.
II. MATERIALITY.

### I. GENERAL CONSIDERATION.

**Essential elements of perjury** are that the testimony of the defendant in the prior case was false testimony under oath made on a material matter with knowledge that it was false. *State v. Naranjo*, 1979-NMCA-150, 94 N.M. 413, 611 P.2d 1107, *rev'd on other grounds*, 1980-NMSC-061, 94 N.M. 407, 611 P.2d 1101.

**Materiality essential element of perjury.** — Under the Fifth and Sixth Amendments of the United States constitution, a defendant is entitled to have the question of materiality submitted to the jury, and *State v. Albin*, 1986-NMCA-046, 104 N.M. 315, 720 P.2d 1256, and *State v. Gallegos*, 1982-NMCA-062, 98 N.M. 31, 644 P.2d 545, are overruled to the extent they hold that materiality is an element for the trial court to decide as a matter of law. *State v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234, *aff'd in pertinent part*, 1999-NMSC-041, 128 N.M. 261, 992 P.2d 274.

**"Willfulness" not required.** — "Willfulness" as an aspect distinct from "knowledge" is not a part of the offense established by the statute and the trial court did not err in refusing to instruct on "willfulness." *State v. Borunda*, 1972-NMCA-018, 83 N.M. 563, 494 P.2d 976, cert. denied, 83 N.M. 562, 494 P.2d 975.



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**Rule for proving perjury.** — In prosecution for perjury, it is necessary to prove the falsity of defendant's sworn statements beyond a reasonable doubt. This may be done by the testimony of one witness supported by corroborating evidence or circumstances, but the corroboration must go beyond slight or indifferent particulars; it must strongly support the accusing witness. *State v. Borunda*, 1972-NMCA-018, 83 N.M. 563, 494 P.2d 976, cert. denied, 83 N.M. 562, 494 P.2d 975; *Territory v. Remuzon*, 1886-NMSC-019, 3 N.M. (Gild.) 648, 9 P. 598, *overruled on other grounds by Territory v. Lockhart*, 1896-NMSC-014, 8 N.M. 523, 45 P. 1106; *Territory v. Williams*, 1898-NMSC-015, 9 N.M. 400, 54 P. 232; *State v. Naranjo*, 1980-NMSC-061, 94 N.M. 407, 611 P.2d 1101.

**Reason for special rule.** — Justification for special rule in perjury cases is that it is not unreasonable that a conviction for perjury ought not to rest entirely upon an oath against an oath. *State v. Borunda*, 1972-NMCA-018, 83 N.M. 563, 494 P.2d 976, cert. denied, 83 N.M. 562, 494 P.2d 975.

**Requirements of proof in perjury case** are strictest in law, outside of treason charges. *State v. Naranjo*, 1979-NMCA-150, 94 N.M. 413, 611 P.2d 1107, *rev'd on other grounds*, 1980-NMSC-061, 94 N.M. 407, 611 P.2d 1101.

**Presumption of truth under oath until dispelled.** — In a perjury prosecution, the state must begin with the fact that an accused is clothed with a presumption that one will tell the truth when under oath and that, until this presumption is dispelled, one did tell the truth under oath: if the state does not prove the falsity of the statement under oath, the presumption must prevail that he did tell the truth. *State v. Naranjo*, 1979-NMCA-150, 94 N.M. 413, 611 P.2d 1107, *rev'd on other grounds*, 1980-NMSC-061, 94 N.M. 407, 611 P.2d 1101.

**Knowledge inferred.** — The jury could have inferred that defendant knew his testimony to be false when he gave it through reasoning that an ordinary person under similar circumstances testifying as to a specific date and time as defendant did should have known that his testimony was not true. *State v. Montoya*, 1966-NMSC-224, 77 N.M. 129, 419 P.2d 970.

**Perjury before grand jury.** — Penalty provided by former 40-32-1, 1953 Comp., for perjury "committed in any other case" applied to a conviction under former 40-32-2, 1953 Comp., for perjury before the grand jury. *State v. Reed*, 1957-NMSC-009, 62 N.M. 147, 306 P.2d 640, distinguished in *State v. Borunda*, 1972-NMCA-018, 83 N.M. 563, 494 P.2d 976, cert. denied, 83 N.M. 562, 494 P.2d 975 (decided under prior law).

**False value given property.** — A surety who swore falsely as to value of his property was guilty of perjury. *Territory v. Weller*, 1883-NMSC-004, 2 N.M. 470.

**Statements at variance with previous unsworn statements.** — The state is not entitled to a conviction for perjury merely on proof that statements under oath were at variance with previous unsworn statements. *State v. Naranjo*, 1979-NMCA-150, 94 N.M. 413, 611 P.2d 1107, *rev'd on other grounds*, 1980-NMSC-061, 94 N.M. 407, 611 P.2d 1101.

**Evidence was sufficient to find that defendant testified falsely** when he claimed in a prior homicide trial that he, and not the defendant therein, had committed the murder, where along with direct evidence to that effect, the testimony of four witnesses placed the other man at the scene of the crime, one of whom saw gun in his hand. *State v. Borunda*, 1972-NMCA-018, 83 N.M. 563, 494 P.2d 976, cert. denied, 83 N.M. 562, 494 P.2d 975.

Evidence establishing that defendant made false statements when he testified that the false testimony of another was correct was sufficient for conviction. *State v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234, *aff'd in pertinent part*, 1999-NMSC-041, 128 N.M. 261, 992 P.2d 274.

**Allegations of charge must be direct and specific.** — Before a charge of perjury can be sustained, the allegations must be direct and specific, the indictment must particularize where the testimony was false, a general allegation of falsity being insufficient, and, if the offense encompasses many allegedly perjurious statements, the defendant must be told in the indictment where and to what extent the statements alleged to have been made by him were false. *State v. Naranjo*, 1980-NMSC-061, 94 N.M. 407, 611 P.2d 1101.

**Evidence admissible.** — On trial for perjury for false swearing in a prosecution for adultery, defendant's admissions of marriage were admissible. *United States v. Chaves*, 1891-NMSC-027, 6 N.M. 180, 27 P. 489; *United States v. de Amador*, 1891-NMSC-025, 6 N.M. 173, 27 P. 488; *United States v. de Lujan*, 1891-NMSC-026, 6 N.M. 179, 27 P. 489.

**Perjury as basis for post-conviction relief.** — Defendant's contention that he was convicted on the basis of perjured testimony given by an informer was not supported with the requisite showing of a factual basis for the claim, and hence his motion for post-conviction relief was properly denied without a hearing. *Nieto v. State*, 1968-NMCA-045, 79 N.M. 330, 443 P.2d 500.

## II. MATERIALITY.

**"Material" construed.** — The false testimony giving rise to a charge of perjury in a grand jury investigation does not actually have to impede or influence the investigation to be material; rather the false testimony is material if it has the capacity or tendency to influence or impede the investigation. *State v. Watkins*, 1979-NMCA-003, 92 N.M. 470, 590 P.2d 169.

**Materiality of testimony.** — False testimony is material if it has the capacity or tendency to influence the decision of the tribunal or the inquiring or investigative body, or to impede the proceeding, with respect to matters which such tribunal is competent to consider. *State v. Gallegos*, 1982-NMCA-062, 98 N.M. 31, 644 P.2d 545, cert. denied, 98 N.M. 336, 648 P.2d 794, *overruled on other grounds by State v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234.

A lie removing a murder suspect from the scene of the murder has the capacity or tendency to impede the administration of justice. *State v. Gallegos*, 1982-NMCA-062, 98 N.M. 31, 644 P.2d 545, cert. denied, 98 N.M. 336, 648 P.2d 794, *overruled on other grounds by State v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234.

**Question of law.** — Materiality is a question of law to be decided by the trial court. *State v. Gallegos*, 1982-NMCA-062, 98 N.M. 31, 644 P.2d 545, cert. denied, 98 N.M. 336, 648 P.2d 794, *overruled on other grounds by State v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234.

**Testimony held material.** — False testimony given by defendant in larceny proceedings, which was designed to establish an alibi, was material to the issues involved in the larceny case and therefore constituted perjury. *State v. Montoya*, 1966-NMSC-224, 77 N.M. 129, 419 P.2d 970.

**Averment of materiality.** — Where the indictment fully set forth the question averred to be material, in relation to which the testimony was given, it was sufficient in this respect. *Territory v. Lockhart*, 1896-NMSC-014, 8 N.M. 523, 45 P. 1106.

**Evidentiary basis for determining materiality.** — In order for the trial court to make a determination of materiality as a matter of law of an allegedly perjured statement, all that is needed, by way of evidentiary support, is the text of the statement and knowledge of the principal issue in the judicial proceeding in which the statement was made. *State v. Albin*, 1986-NMCA-046, 104 N.M. 315, 720 P.2d 1256, cert. denied, 104 N.M. 246, 719 P.2d 1267, *overruled by State v. Benavidez*, 1999-NMCA-53, 127 N.M. 189, 979 P.2d 234.

Since materiality is properly determinable as an issue of law, there cannot appropriately be any evidentiary or



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factual burden. *State v. Albin*, 1986-NMCA-046, 104 N.M. 315, 720 P.2d 1256, cert. denied, 104 N.M. 246, 719 P.2d 1267, *overruled by State v. Benavidez*, 1999-NMCA-53, 127 N.M. 189, 979 P.2d 234.

**Law reviews.** — For article, "Lawyers, Linguists, Story-Tellers, and Limited English-Speaking Witnesses," see 27 N.M.L. Rev. 77 (1997).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 60A Am. Jur. 2d Perjury §§ 1 to 4, 7, 8 to 14, 22 to 24, 27 to 35, 91.

Fear or compulsion, false statement made under, as perjury, 4 A.L.R. 1319.

Perjury in verifying pleadings, 7 A.L.R. 1283.

Marriage license, perjury as predicated upon statements upon application for, 101 A.L.R. 1263.

Administrative requirement, oath taken in pursuance of, as predicate for criminal offense of perjury, 108 A.L.R. 1240.

Recantation as defense in perjury prosecution, 64 A.L.R.2d 276.

Statement of belief or opinion as perjury, 66 A.L.R.2d 791.

Circumstantial evidence, conviction of perjury where one or more of elements is established solely by, 88 A.L.R.2d 852.

Perjury or false swearing as contempt, 89 A.L.R.2d 1258.

Defense: invalidity of statute or ordinance giving rise to proceedings in which false testimony was received as defense for prosecution for perjury, 34 A.L.R.3d 413.

Jurisdiction: offense of perjury as affected by lack of jurisdiction by court or government body before which false testimony was given, 36 A.L.R.3d 1038.

Propriety of sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial, 34 A.L.R.4th 888.

Materiality of testimony forming basis of perjury charge as question for court or jury in state trial, 37 A.L.R.4th 948.

Admonitions against perjury or threats to prosecute potential defense witness, inducing refusal to testify, as prejudicial error, 88 A.L.R.4th 388.

Right of defendant in prosecution for perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury - state cases, 41 A.L.R.5th 1.

Two-witness rule in perjury prosecutions under 18 USCS § 1621, 49 A.L.R. Fed. 185.

Determination of "materiality" under 18 USCS § 1623, penalizing false material declarations before grand jury or court, 60 A.L.R. Fed. 76.

Construction and application of § 2J1.3 of United States sentencing guidelines (18 USCS Appx 1.3 § 2J), pertaining to sentencing for perjury, subornation of perjury, witness bribery, and departures therefrom, 130 A.L.R. Fed. 269.

70 C.J.S. Perjury §§ 1 to 28.

## 30-25-2. Refusal to take oath or affirmation.

Refusal to take oath or affirmation consists of the refusal of any person, when legally called upon to give testimony before any court, administrative proceeding, legislative proceeding or other authority in this state, authorized to administer oaths or affirmations, to take such oath or affirmation.

Whoever commits refusal to take oath or affirmation is guilty of a petty misdemeanor.

**History: 1953 Comp., § 40A-25-2, enacted by Laws 1963, ch. 303, § 25-2.**

# ARTICLE 26

# Interference with Public Records

Sec.
30-26-1. Tampering with public records.
30-26-2. Refusal to surrender public record.

## 30-26-1. Tampering with public records.

Tampering with public records consists of:

A. knowingly altering any public record without lawful authority;

B. any public officer or public employee knowingly filing or recording any written instrument, judicial order, judgment or decree in a form other than as the original thereof in fact appeared;

C. any public officer or public employee knowingly falsifying or falsely making any record or file, authorized or required by law to be kept;

D. any public officer or public employee knowingly issuing or causing to be issued, any false or untrue certified copy of a public record; or

E. knowingly destroying, concealing, mutilating or removing without lawful authority any public record or public document belonging to or received or kept by any public authority for information, record or pursuant to law.



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Whoever commits tampering with public records is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-26-1, enacted by Laws 1963, ch. 303, § 26-1.**

**Cross references.** — For altering, changing or making away with bill pending in or passed by the legislature, *see* N.M. Const., art. IV, § 21.

ANNOTATIONS

**Medicaid documents.** — Evidence that Medicaid cards sold by defendant to undercover agents were public documents was sufficient for conviction under this section. *State v. Dartez*, 1998-NMCA-009, 124 N.M. 455, 952 P.2d 450, cert. denied, 124 N.M. 311, 950 P.2d 284.

**Falsifying record.** — Public officer or employee who knowingly and willfully made as a matter of public record in his office any false or untrue statement of fact, or so caused or permitted the same to be made or entered, or otherwise falsified or made falsely any public record of his office, violated Laws 1939, ch. 8, § 1 (former 40-36-1, 1953 Comp.) and incurred its penalties. *State v. Gallegos*, 1944-NMSC-009, 48 N.M. 72, 145 P.2d 999 (decided under prior law).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 66 Am. Jur. 2d Records and Recording Laws §§ 10, 11.

What constitutes a public record or document within statute making falsification, forgery, mutilation, removal, or other misuse thereof an offense, 75 A.L.R.4th 1067.

76 C.J.S. Records § 57 et seq.

## 30-26-2. Refusal to surrender public record.

Refusal to surrender public record consists of any person wrongfully or unlawfully refusing or neglecting to deliver unto the proper authority, any record of either house of the legislature, of any court of this state or of any department of the state or local government which he has in his possession, within three days after demand therefor shall have been made by the proper officer.

Whoever commits refusal to surrender public records is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-26-2, enacted by Laws 1963, ch. 303, § 26-2.**

**Cross references.** — For altering, changing or making away with bill pending in or passed by the legislature, *see* N.M. Const., art. IV, § 21.

For duty of public officers to deliver records to their successors, *see* 10-17-5 NMSA 1978.

# ARTICLE 27

# Malicious Prosecution, etc.

Sec.
30-27-1. Malicious criminal prosecution.
30-27-2. Repealed.
30-27-2.1. Impersonating a peace officer.
30-27-3. Barratry.
30-27-4. Securing signature to petition by unlawful means.
30-27-5. Simulating legal process.

## 30-27-1. Malicious criminal prosecution.

Malicious criminal prosecution consists of maliciously procuring or attempting to procure an indictment or otherwise causing or attempting to cause a criminal charge to be preferred or prosecuted against an innocent person, knowing him to be innocent.

Whoever commits malicious criminal prosecution is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-27-1, enacted by Laws 1963, ch. 303, § 27-1.**

ANNOTATIONS

**Bad check as probable cause.** — Allegation of complaint that two years before prosecution took place plaintiff had given a fraudulent check sufficiently showed that "probable cause" existed for bringing the criminal action and made immaterial other allegations with reference to defendant's motive in commencing prosecution. *Marchbanks v. Young*, 1943-NMSC-024, 47 N.M. 213, 139 P.2d 594.

**Mayor not liable.** — Under the circumstances mayor charged by plaintiff with false arrest and imprisonment and malicious prosecution had probable cause to believe that a crime or misdemeanor was being committed in his presence where plaintiff, stockholder and manager of a racing firm whose lease of racetrack had been canceled by the city, stopped a circus cortege on the highway before it could enter the track for the purpose of wintering therein; hence, verdict in mayor's favor was supported by the evidence. *Cherry v. Williams*, 1957-NMSC-086, 63 N.M. 244, 316 P.2d 880.

**Law reviews.** — For note, "Municipal Assumption of Tort Liability for Damage Caused by Police Officers," see 1 N.M.L. Rev. 263 (1971).



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**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 52 Am. Jur. 2d Malicious Prosecution § 197.

Institution of confessed judgment proceedings as ground of action for abuse of process or malicious prosecution, 87 A.L.R.3d 554.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 A.L.R.3d 826.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for malicious prosecution, 94 A.L.R.3d 791.

Venue in action for malicious prosecution, 12 A.L.R.4th 1278.

Termination of criminal proceedings as result of compromise or settlement of accused's civil liability as precluding malicious prosecution action, 26 A.L.R.4th 565.

Nature of termination of civil action required to satisfy element of favorable termination to support action for malicious prosecution, 30 A.L.R.4th 572.

Liability of attorney, acting for client, for malicious prosecution, 46 A.L.R.4th 249.

Malicious prosecution: defense of acting on advice of justice of the peace, magistrate, or lay person, 48 A.L.R.4th 250.

Liability of better business bureau or similar organization in tort, 50 A.L.R.4th 745.

Excessiveness or inadequacy of compensatory damages for malicious prosecution, 50 A.L.R.4th 843.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence, 81 A.L.R.4th 1031.

Admissibility of evidence of polygraph test result, or offer or refusal to take test, in action for malicious prosecution, 10 A.L.R.5th 663.

54 C.J.S. Malicious Prosecution § 7.

## 30-27-2. Repealed.

**Repeals.** — Laws 1999, ch. 120, § 2 repealed 30-27-2 NMSA 1978, as enacted by Laws 1963, ch. 303, § 27-2, relating to impersonation of a public officer, effective July 1, 1999. For provisions of former section, *see* the 1998 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 30-27-2.1 NMSA 1978.

## 30-27-2.1. Impersonating a peace officer.

A. Impersonating a peace officer consists of:

(1) without due authority exercising or attempting to exercise the functions of a peace officer; or

(2) pretending to be a peace officer with the intent to deceive another person.

B. Whoever commits impersonating a peace officer is guilty of a misdemeanor. Upon a second or subsequent conviction, the offender is guilty of a fourth degree felony.

C. As used in this section, "peace officer" means any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes.

**History: Laws 1999, ch. 120, § 1.**

**Cross references.** — For unauthorized wearing of state police uniform or badge or unauthorized marking of car, *see* 29-2-14 NMSA 1978.

**Effective dates.** — Laws 1999, ch. 120, § 3, makes the act effective on July 1, 1999.

ANNOTATIONS

**Public officials of other states and the federal government.** — Section 30-27-2.1 NMSA 1978 is not limited to only those persons impersonating public officials of the state of New Mexico, but includes impersonating public officials of other states and the federal government. *State v. Ramos-Arenas*, 2012-NMCA-117, 290 P.3d 733, cert. denied, 2012-NMCERT-010.

**Impersonating a border patrol agent.** — Where defendant impersonated a border patrol agent, defendant impersonated a peace officer in violation of Section 30-27-2.1 NMSA 1978. *State v. Ramos-Arenas*, 2012-NMCA-117, 290 P.3d 733, cert. denied, 2012-NMCERT-010.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 32 Am. Jur. 2d False Personation § 1 et seq.

Intent as affecting false personation, 97 A.L.R. 1510.

Criminal liability for false personation during stop for traffic infraction, 26 A.L.R.5th 378.

35 C.J.S. False Personation § 3.

## 30-27-3. Barratry.

Barratry consists of:

A. intentionally instigating, maintaining, exciting, prosecuting or encouraging the bringing of any suit in any court of this state in which such person has no interest, with the intent to distress or harass the defendant;

B. intentionally bringing or prosecuting any false suit by a person on his own account, with intent to distress or harass the defendant therein;

C. any attorney-at-law seeking or obtaining employment in any suit or case to prosecute or defend the same by means of personal solicitation of such employment or, procuring another to solicit employment for him; or



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D. any attorney-at-law seeking or obtaining employment in any suit, by giving to the person from whom the employment is sought anything of value or directly or indirectly paying the debts or liabilities of the person from whom such employment is sought or loaning or promising to give or otherwise grant anything of value to the person from whom such employment is sought before such employment in order to induce such employment.

Whoever commits barratry is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-27-3, enacted by Laws 1963, ch. 303, § 27-3.**

**Cross references.** — For rule relating to attorney conflict of interest, *see* Rule 16-108 NMRA.

For requirement that attorney's claims and contentions be meritorious, *see* Rule 16-301 NMRA.

For rule relating to attorney advertising, *see* Rule 16-702 NMRA.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 14 Am. Jur. 2d Champerty and Maintenance § 20.

Purchase of cause of action by attorney as champertous, 4 A.L.R. 173.

Quantum meruit or implied contract, right of attorney to recover upon, for services rendered under champertous contract, 85 A.L.R. 1365.

Validity of agreement between attorney and layman to divide attorney's fees or compensation for business of third person, 86 A.L.R. 195.

Solicitation, right of attorney to recover for services performed under contract procured by, 86 A.L.R. 517.

Government or agencies of government, law as to champerty or maintenance as applied to agreement with respect to bringing and prosecution of claims against, 106 A.L.R. 1494.

Contract by one person to defend litigation that has been or may be instituted against another as champertous, 121 A.L.R. 847.

Assertion of defense of champerty in action by champertous assignee, 22 A.L.R.2d 1000.

Validity and propriety of arrangement by which attorney pays or advances expenses of client, 8 A.L.R.3d 1155.

Maintenance of lawyer reference system by organization having no legal interest in proceedings, 11 A.L.R.3d 1206.

7A C.J.S. Attorney and Client § 149; 14 C.J.S. Champerty and Maintenance §§ 25, 26.

## 30-27-4. Securing signature to petition by unlawful means.

Securing signature to petition by unlawful means consists of securing the signature of any person to any petition now or hereafter provided for by the laws of this state, by paying or promising to pay the signer anything of value, direct or indirect, or by securing such signature by force, threats or intimidation, or by forging or copying the names of any person to any such petition.

Whoever commits securing signature to petition by unlawful means is guilty of a misdemeanor.

**History: 1953 Comp., § 40A-27-4, enacted by Laws 1963, ch. 303, § 27-4.**

**Cross references.** — For forgery, *see* 30-16-10 NMSA 1978.

## 30-27-5. Simulating legal process.

A. Simulating legal process consists of knowingly issuing or delivering to a person a document that falsely simulates civil or criminal process. "Civil or criminal process" means a document or order, including but not limited to a summons, lien, complaint, warrant, injunction, writ, notice, pleading or subpoena.

B. Whoever commits simulating legal process is guilty of a misdemeanor.

**History: Laws 2005, ch. 327, § 1.**

**Effective dates.** — Laws 2005, ch. 327 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

# ARTICLE 28

# Initiatory Crimes

Sec.
30-28-1. Attempt to commit a felony.
30-28-2. Conspiracy.
30-28-3. Criminal solicitation; penalty.



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## 30-28-1. Attempt to commit a felony.

Attempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission.

Whoever commits attempt to commit a felony upon conviction thereof, shall be punished as follows:

A. if the crime attempted is a capital or first degree felony, the person committing such attempt is guilty of a second degree felony;

B. if the crime attempted is a second degree felony, the person committing such attempt is guilty of a third degree felony;

C. if the crime attempted is a third degree felony, the person committing such attempt is guilty of a fourth degree felony; and

D. if the crime attempted is a fourth degree felony, the person committing such attempt is guilty of a misdemeanor.

No person shall be sentenced for an attempt to commit a misdemeanor.

**History: 1953 Comp., § 40A-28-1, enacted by Laws 1963, ch. 303, § 28-1.**

### ANNOTATIONS

**Single intent crime.** — The crime of attempt to commit a felony requires the specific intent to commit the underlying crime. *State v. Villa*, 2003-NMCA-142, 134 N.M. 679, 82 P.3d 46, *aff'd in part, rev'd in part*, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017.

**Legal adequacy.** — If a jury could have found a defendant guilty of attempted second degree murder without determining that he intended to kill his ex-wife, it could have convicted him of an attempt to commit reckless or unintentional second degree murder, a crime that does not exist. *State v. Carrasco*, 2007-NMCA-152, 143 N.M. 62, 172 P.3d 611, cert. quashed, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124.

**Child abuse.** — There is such a crime as attempt to commit child abuse when the theory of the case is intentional child abuse. *State v. Herrera*, 2001-NMCA-073, 131 N.M. 22, 33 P.3d 22, cert. denied, 131 N.M. 64, 33 P.3d 284, 182.

**Sufficient evidence.** — Where a videotape of a transaction in which the victim's ATM card was inserted into an ATM machine showed that the person using the ATM machine had tattoos on the person's arms, the jury was able to compare stills of the videotape with the tattoos on defendant's arms; and several days after the victim's purse had been stolen, the victim's driver's license was found in defendant's vehicle, and defendant told a police offer that defendant tried to use the victim's ATM card, but the machine ate it, the evidence was sufficient to support defendant's conviction for attempt to commit unauthorized use of an ATM card of another. *State v. Verdugo*, 2007-NMCA-095, 142 N.M. 267, 164 P.3d 966, cert. quashed, 2008-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Where defendant purchased nine gallons of iodine and possessed over 5,000 pseudoephedrine pills, a quart of acetone, scales, and an air purifier; and most of the pills had been removed from their blister packs, the evidence was sufficient to support defendant's conviction for attempted trafficking in methamphetamine by manufacturing, even though defendant did not possess all of the materials necessary to manufacture methamphetamine. *State v. Brenn*, 2005-NMCA-121, 138 N.M. 451, 121 P.3d 1050, cert. denied, 2005-NMCERT-010, 138 N.M. 494, 122 P.3d 1263.

Where the evidence showed that defendant purchased thirty-five boxes of matches from several different stores, one right after the other; the matchboxes contained red phosphorous, a key ingredient in the manufacture of methamphetamine; defendant bought the boxes of matches for her sister and turned them over to her sister; defendant knew that the matchboxes were scraped for red phosphorous and that the substance was used in the manufacture of methamphetamine; the matchboxes were going to be used in the manufacture of methamphetamine; and together with her sister, defendant purchased or financed the purchase of Coleman fuel and distilled water, which are ingredients commonly used in the manufacture of methamphetamine, there was substantial evidence to convict defendant of attempted manufacture of methamphetamine. *State v. Kent*, 2006-NMCA-134, 140 N.M. 606, 145 P.3d 86, cert. denied, 2006-NMCERT-010, 140 N.M. 674, 146 P.3d 809.

**Sufficient evidence of attempted second degree murder.** — Where the defendant rapidly accelerated his vehicle toward the police officer who had been pursuing him in a high speed chase after the officer got out of his car and the defendant pointed a rifle or a shotgun at the officer after the defendant had already fired three shots at the officer, the evidence was sufficient to sustain the court's finding that the defendant committed attempted second degree murder. *State v. Demongey*, 2008-NMCA-066, 144 N.M. 333, 187 P.3d 679, cert. quashed, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

**Double jeopardy.** — Defendant's convictions for aggravated battery with a deadly weapon and attempted murder arising out of unitary conduct did not violate the double jeopardy clause. *State v. Armandarez*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

Where defendant intended to steal the property of only one victim and defendant used separate and discrete acts of force and threats against two victims, defendant's convictions for two counts of attempted armed robbery did not violate the double jeopardy clause. *State v. Bernal*, 2006-NMSC-050, 140 N.M. 644, 146 P.3d 289.

The crime of attempted CSP III is subsumed within assault with attempt to commit CSP. *State v. Schackow*, 2006-NMCA-123, 140 N.M. 506, 143 P.3d 745, cert. denied, 2006-NMCERT-009, 140 N.M. 542, 144 P.3d 101.

Since defendant was not tried on charge of attempt to commit aggravated battery, which charge was dismissed before any evidence was presented, there was no issue as to double punishment or merged offenses when defendant was tried and convicted of aggravated burglary. *State v. Hibbs*, 1971-NMCA-100, 82 N.M. 722, 487 P.2d 150.

Crime of attempt to commit a felony (burglary) did not merge with the crime of possession of burglary tools, as the "overt act" required in the attempt statute did not necessarily involve possession of burglary tools; hence defendant's sentence for each crime did not constitute double punishment. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927.



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Defendant's right to freedom from double jeopardy was not violated by punishment for attempted first degree murder, aggravated battery with a deadly weapon, and criminal sexual penetration. *State v. Traeger*, 2000-NMCA-015,128 N.M. 668, 997 P.2d 142, *aff'd in part, rev'd in part on other grounds*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

**Convictions of aggravated battery upon a peace officer and attempted first degree murder violated double jeopardy.** — Where defendant, who was imprisoned in a county detention center, attacked and stabbed a correctional officer five times with a metal shank, defendant's convictions for attempted murder and aggravated battery of a peace officer did not violate double jeopardy. *State v. Urquizo*, 2012-NMCA-113, 288 P.3d 919, cert. granted, 2012-NMCERT-011.

**Convictions of attempted murder and aggravated battery violated double jeopardy.** — Where defendant was convicted of attempted murder and aggravated battery with a deadly weapon; defendant's conduct was unitary; the indictment for attempted murder required the state to prove that defendant attempted to commit murder and "began to do an act which constituted a substantial part of murder" but failed to commit the offense; the indictment for aggravated battery required the state to prove that defendant touched or applied force to the victims with a deadly weapon intending to injure the victims; the state's theory of the case to support both charges was that defendant beat, stabbed, and slashed the victims; and the state offered the same testimony to prove both charges, the aggravated battery elements were subsumed within the attempted murder elements and defendant's convictions violated the prohibition against double jeopardy. *State v. Swick*, 2012-NMSC-018, 279 P.3d 747, *rev'g* 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462, *overruling State v. Armendariz*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

**Statute is general law, inapplicable if special law covers same matter.** — Albuquerque's ordinance making it unlawful for any person under the influence to operate a vehicle is enforceable under and consistent with state law. The fact that the ordinance defines an attempted misdemeanor does not render it invalid under this section, which is a general law not applicable if a special law covers the same matter. Moreover, former 64-15-7, 1953 Comp. (similar to 66-7-8 NMSA 1978), specifically authorized Albuquerque to adopt additional traffic regulations. *City of Albuquerque v. Chavez*, 1978-NMCA-032, 91 N.M. 559, 577 P.2d 457, cert. denied, 91 N.M. 610, 577 P.2d 1256.

**Overt act necessary.** — To constitute an attempt, defendant must do an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81 N.M. 140, 464 P.2d 559, *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

An attempt has been accomplished when an overt act, in furtherance of and tending to effect the commission of the felony, has been performed or undertaken with intent to commit the felony. *State v. Flowers*, 1971-NMSC-091, 83 N.M. 113, 489 P.2d 178).

**Attempted murder does not require** that victim be injured. *State v. Gillette*, 1985-NMCA-037, 102 N.M. 695, 699 P.2d 626.

**Overt act described.** — Overt act required hereunder must be more than preparation; it must be in part execution of the intent to commit the crime, and slight acts in furtherance of that intent will constitute an attempt. *State v. Trejo*, 1972-NMCA-019, 83 N.M. 511, 494 P.2d 173; *State v. Stettheimer*, 1980-NMCA-023, 94 N.M. 149, 607 P.2d 1167.

**Purpose and effort involved.** — The word "attempt" was more comprehensive than the word "intent," implying both the purpose and the actual effort to carry that purpose into execution. *State v. Grayson*, 1946-NMSC-025, 50 N.M. 147, 172 P.2d 1019.

**Nature of attempted act.** — If the intended act is not criminal there can be no criminal liability for an attempt to commit it. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

**Attempt under this section requires intent to commit felony;** therefore, this is a specific intent crime and the statutory language states this requisite intent. *State v. Dosier*, 1975-NMCA-031, 88 N.M. 32, 536 P.2d 1088, cert. denied, 88 N.M. 28, 536 P.2d 1084.

**Specific intent required for attempted first degree murder.** — Where defendant shot at officers to escape apprehension during prison break, there was insufficient evidence that defendant had formed a specfic intent to kill as opposed to mere impulsive reactions; there was, therefore, insufficient evidence to convict him for attempted first degree murder. *State v. Hernandez*, 1998-NMCA-167, 126 N.M. 377, 970 P.2d 149, cert. denied, 126 N.M. 533, 972 P.2d 352.

**Sufficient evidence of unlawful transportation of a firearm.** — Where defendant was convicted of unlawful transportation of a firearm, and where defendant admitted that he was a felon at the time of the charged offense, and where the state presented evidence at trial that he was driving his accomplice around town and was aware that his accomplice had brought a gun into the car, there was sufficient evidence for a jury to find that defendant transported a firearm. *State v. Torres*, 2018-NMSC-013.

**Sufficient evidence of first-degree murder and attempted first-degree murder.** — Where defendant was convicted of first-degree murder and attempted first-degree murder, and where the state presented evidence at trial that defendant spent the day before the murder with another man who had a motive to kill the victim, that defendant secured for himself and the other man a ride to the apartment complex where the victim lived, that defendant and the other man disappeared from sight before gunshots were heard, that defendant and the other man were seen running back to their vehicle before driving off, and that occupants of the vehicle testified that defendant smelled like burnt matches, which is similar to the smell of gunpowder, there was sufficient evidence to support a jury finding that defendant had the deliberate intent to kill the victim, that he helped in the planning of the crime, and that he actively participated in the actual attempt to kill the victim. *State v. Torres*, 2018-NMSC-013.

**Intent must be corroborated by objective facts.** — To convict a defendant of an attempt, the required criminal intent must be sufficiently corroborated by objective facts. Such corroboration is required to prevent conviction on the basis of criminal intent alone. *State v. Lopez*, 1983-NMSC-069, 100 N.M. 291, 669 P.2d 1086.

**Instruction on intent essential.** — Since specific intent to murder was gist of crime of attempt to commit murder under Laws 1853-1854, p. 92 (former 40-6-10, 1953 Comp.), refusal to instruct on question of intent constituted error. *State v. Grayson*, 1946-NMSC-025, 50 N.M. 147, 172 P.2d 1019.

**Intent instruction.** — The crime of attempted sodomy (now criminal sexual penetration, Section 30-9-11 NMSA 1978) was a specific intent crime, and where there were no instructions regarding the element of specific intent, conviction would be reversed. *State v. Foster*, 1974-NMCA-150, 87 N.M. 155, 530 P.2d 949.

**Factual impossibility not defense.** — A defense of impossibility is not available to a defendant charged with an attempt to traffic in a controlled substance, i.e., cocaine, where the defendant received money for what he represented as cocaine, but which due to a



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circumstance unknown to him, in fact was not. *State v. Lopez*, 1983-NMSC-069, 100 N.M. 291, 669 P.2d 1086.

**Section does not apply to attempts regarding controlled substances.** — The legislature intended to punish attempts regarding controlled substances under 30-31-25A(3) NMSA 1978 specifically as felonies and consequently, this section does not apply to such attempts covered by 30-31-25A(3) NMSA 1978. *State v. Mirabal*, 1989-NMCA-057, 108 N.M. 749, 779 P.2d 126, cert. denied, 108 N.M. 713, 778 P.2d 911.

**"Attempt" inconsistent with completed crime.** — For an attempt under this section, the perpetrator must have failed to effect commission of the crime, and if the evidence is of the completed crime, then the crime of "attempt" is not involved. *State v. Andrada*, 1971-NMCA-033, 82 N.M. 543, 484 P.2d 763, cert. denied, 82 N.M. 534, 484 P.2d 754.

**Evidence of completed crime.** — An attempt to commit a felony is an act done with intent to commit such crime but which fails of completion. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

To instruct on an "attempt" where there is no evidence tending to establish failure to complete the crime would present a false issue to the jury. *State v. Andrada*, 1971-NMCA-033, 82 N.M. 543, 484 P.2d 763, cert. denied, 82 N.M. 534, 484 P.2d 754.

**Attempted burglary.** — The jury, after it had found that the defendant shattered grocery store window, validly inferred that the window was broken in an attempt to enter and unlawfully take property from inside the store. *State v. Serrano*, 1964-NMSC-161, 74 N.M. 412, 394 P.2d 262.

**Attempted forgery.** — It is possible to have a physical act which is an attempt to transfer one's interest in forged item but to have such an attempt thwarted at some stage of perpetration. *State v. Tooke*, 1970-NMCA-068, 81 N.M. 618, 471 P.2d 188, *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

Evidence that defendant represented himself as being person named as payee of check, and presented identification to this effect, supported conviction for attempted forgery, regardless of fact that state did not undertake to prove that the checks if presented to drawee bank would not have been paid, or that defendant did not have the right to use the payee's name. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

**Attempted trafficking in cocaine.** — Defendant failed to effect the crime of possession with intent to distribute because he never actually possessed the package containing cocaine which was addressed to him; nevertheless, the fact that he never actually possessed the package did not negate his intent to possess the package, as evidenced by his attempting to pick up the package, nor did it negate his intent to distribute the cocaine, as is evidenced by the amount of cocaine found in the package. Therefore, he was properly convicted of attempted trafficking under this section and 30-31-20A(3). *State v. Curry*, 1988-NMCA-031, 107 N.M. 133, 753 P.2d 1321, cert. denied, 107 N.M. 132, 753 P.2d 1320.

Defendant was properly convicted for attempted trafficking in cocaine since he committed the overt acts of accepting a sizeable amount of cash from an undercover narcotics officer and engaging in prior discussion of the illicit transaction. *State v. Green*, 1993-NMSC-056, 116 N.M. 273, 861 P.2d 954.

**Attempted sodomy.** — Defendant's beating of minor, partially stripping him and straddling him with his fly open constituted active efforts to consummate the crime of sodomy (now criminal sexual penetration) and were more than mere preparation. *State v. Trejo*, 1972-NMCA-019, 83 N.M. 511, 494 P.2d 173.

**Murder during attempt to commit felony.** — Felony-murder provision is applicable once conduct in furtherance of the commission of a felony has progressed sufficiently to constitute an attempt to commit the felony. *State v. Flowers*, 1971-NMSC-091, 83 N.M. 113, 489 P.2d 178.

There was ample evidence to support a finding that defendant had accomplished an attempt to unlawfully take decedent's automobile before the bullet struck decedent in the head, and that defendant, at the time he killed decedent, was in the act of committing at least this felony. *State v. Flowers*, 1971-NMSC-091, 83 N.M. 113, 489 P.2d 178.

**Transferred intent applicable to attempted murder.** — The doctrine of transferred intent applies to both murder and attempted murder. *State v. Gillette*, 1985-NMCA-037, 102 N.M. 695, 699 P.2d 626.

**Multiple counts proper where there are multiple victims.** — The single violent act of firebombing a residence with six people inside gives rise to six counts of attempted second degree murder. *State v. Johnson*, 1985-NMCA-074, 103 N.M. 364, 707 P.2d 1174, cert. quashed, 103 N.M. 344, 707 P.2d 552.

**No such crime as attempted "depraved mind" murder.** — The crime of attempted "depraved mind" murder does not exist since in order to convict for such an offense, the jury would have to find that the defendant intended to perpetrate an unintentional killing, a logical impossibility. *State v. Johnson*, 1985-NMCA-074, 103 N.M. 364, 707 P.2d 1174, cert. quashed, 103 N.M. 344, 707 P.2d 552.

**Attempted second degree murder of unintended victims.** — If defendant committed an act, intending to kill someone but knowing that his act created a strong probability of death or great bodily harm to others, he is guilty of attempted second degree murder as to the others. *State v. Johnson*, 1985-NMCA-074, 103 N.M. 364, 707 P.2d 1174, cert. quashed, 103 N.M. 344, 707 P.2d 552.

**Information adequate.** — Information charging defendant with attempting to break and enter a certain grocery in the nighttime with intent to take property therefrom, alleged a felony offense, and since under the applicable statutory sections, theft of property of any value would have been a felony, value need not have been specified in the information. *State v. Serrano*, 1964-NMSC-161, 74 N.M. 412, 394 P.2d 262.

**Information insufficient.** — An information that merely stated that crime was committed by assault failed to charge an attempt to commit the crime of murder by poisoning, drowning or strangling contemplated under Laws 1854-1855, p. 92 (former 40-6-10, 1953 Comp.). *State v. Grayson*, 1946-NMSC-025, 50 N.M. 147, 172 P.2d 1019 (decided under prior law).

**Circumstantial evidence.** — A conviction of poisoning with intent to kill or injure under Laws 1854-1855, p. 94 (former 40-6-11, 1953 Comp.) could be had on circumstantial evidence. *State v. Holden*, 1941-NMSC-017, 45 N.M. 147, 113 P.2d 171.

**Inadmissible hearsay.** — In prosecution for murder and attempted murder admission of extra-judicial statements attributed to children of victims was error where the children were not called as witnesses because defendant was denied his constitutional right of confrontation, being deprived of opportunity to cross-examine. *State v. Lunn*, 1971-NMCA-048, 82 N.M. 526, 484 P.2d 368.

**Instruction on abandoned intent not warranted.** — Where defendant was charged with aiding and abetting in an attempted rape, and the evidence was uncontradicted that codefendant ripped off victim's shirt and attempted to take off her pants before he stopped his aggression, that the defendant had been in the automobile



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prior to this action, and was in close proximity at the time, having left the automobile at the request of codefendant, therefore implicating himself in and giving his tacit consent to codefendant's actions, defendant's requested instruction on abandonment of criminal intent was properly refused. *State v. LeMarr*, 1971-NMSC-082, 83 N.M. 18, 487 P.2d 1088.

**Instruction on attempted rape.** — In prosecution under federal act for rape on an Indian reservation, the federal court had jurisdiction to instruct on lesser included offenses under state law, and it was error not to instruct on attempted rape and other lesser offenses for which there was some evidence. *Joe v. United States*, 510 F.2d 1038 (10th Cir. 1974).

**Defendant could not create provocation which would reduce** attempted murder to attempted manslaughter, and his requested instruction on attempted voluntary manslaughter was therefore properly refused. *State v. Durante*, 1986-NMCA-024, 104 N.M. 639, 725 P.2d 839.

**Instruction on aggravated battery as lesser included offense.** — Where there is no showing that the defendant either intended to scare or intended to injure the victim, but the facts clearly show that the defendant intended to kill the victim, the trial court is correct in rejecting an aggravated battery instruction as a lesser included offense of attempted murder with a firearm. *State v. Simonson*, 1983-NMSC-075, 100 N.M. 297, 669 P.2d 1092.

In a prosecution for attempted murder, the trial court properly instructed the jury on aggravated battery as a lesser included offense at the state's request, because the elements of the lesser crime were a subset of the elements of the charged crime and, further, the defendant could not have committed the greater offense in the manner charged in the indictment without also committing the lesser offense. *State v. Meadors*, 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731.

**Evidence sufficient to sustain conviction of attempted fraud.** — Because of defendant's intimate knowledge of the workings of the county government – he had recently been county manager – the jury could properly find that defendant made knowingly false representations. This information coupled with the testimony of two commissioners contradicting defendant's testimony was found sufficient for conviction of attempted fraud. *State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For note, "Criminal Law - The Use of Transferred Intent in Attempted Murder, a Specific Intent Crime: State v. Gillette," see 17 N.M.L. Rev. 189 (1987).

For annual survey of New Mexico Criminal Law, see 20 N.M.L. Rev. 265 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 158 to 160, 601.

Assault: attempt to commit assault as criminal offense, 79 A.L.R.2d 597.

Receiving stolen goods: attempts to receive stolen property, 85 A.L.R.2d 259.

Escape from prison, attempt to escape or commit prison breach as affected by means employed, 96 A.L.R.2d 520.

Larceny by trick, confidence game, false pretenses, and the like, attempts to commit offenses of, 6 A.L.R.3d 241.

Woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony, 34 A.L.R.3d 858.

Impossibility: comment note on impossibility of consummation of substantive crime as defense in criminal prosecution or for conspiracy or attempt to commit crime, 37 A.L.R.3d 375.

Duress, necessity, or conditions of confinement as justification for escape from prison, 69 A.L.R.3d 678.

Drunken driving: attempt to commit crime as to driving, being in control of, or operating a motor vehicle while intoxicated, 93 A.L.R.3d 7.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.

Construction and application of state statute governing impossibility of consummation as defense to prosecution for attempt to commit crime, 41 A.L.R.4th 588.

Duress, necessity, or conditions of confinement as justification for escape from prison, 54 A.L.R.5th 141.

22 C.J.S. Criminal Law §§ 114, 116 to 121.

## 30-28-2. Conspiracy.

A. Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state.

B. Whoever commits conspiracy shall be punished as follows:

(1) if the highest crime conspired to be committed is a capital or first degree felony, the person committing such conspiracy is guilty of a second degree felony;

(2) if the highest crime conspired to be committed is a second degree felony, the person committing such conspiracy is guilty of a third degree felony; and

(3) if the highest crime conspired to be committed is a third degree felony or a fourth degree felony, the person committing such conspiracy is guilty of a fourth degree felony.

**History: 1953 Comp., § 40A-28-2, enacted by Laws 1963, ch. 303, § 28-2; 1979, ch. 257, § 1.**

**Cross references.** — For compounding a crime, *see* 30-22-6 NMSA 1978.

ANNOTATIONS

I. GENERAL CONSIDERATION.
II. ELEMENTS OF CONSPIRACY.
III. DOUBLE JEOPARDY.
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A. IN GENERAL.
B. CIRCUMSTANTIAL EVIDENCE.
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I. GENERAL CONSIDERATION.

**Search of rental vehicle.** — A passenger in a rental vehicle who is charged with conspiracy and is not on the rental contract does not have standing to challenge a



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search of the vehicle. *State v. Van Dang*, 2005-NMSC-033, 138 N.M. 408, 120 P.3d 830.

**Section applicable to crimes within and outside of Criminal Code.** — This section applies to conspiracies to commit crimes whether they are contained in the Criminal Code or are found elsewhere in the New Mexico statutes, *e.g.*, securities laws. *State v. Shafer*, 1985-NMCA-018, 102 N.M. 629, 698 P.2d 902, cert. denied, 102 N.M. 613, 698 P.2d 886.

**Conspiracy to commit depraved-mind murder.** — This section does not encompass conspiracy to commit depraved-mind murder. *State v. Baca*, 1997-NMSC-059, 124 N.M. 333, 950 P.2d 776.

**Conspiracy to manufacture methamphetamine.** — Subsection A of this section does not clearly and unequivocally alert a person to the possibility of prosecution and punishment for conspiracy to manufacture methamphetamine. The court was not persuaded that a defendant-seller shares a purchaser's intent to commit a crime merely because the defendant had knowledge of the purchaser's intended use of those goods or services at the time of the sale. In this context, knowledge of the other's criminal objective is not necessarily equivalent to an intention to bring about the objective. *State v. Maldonado*, 2005-NMCA-072, 137 N.M. 699, 114 P.3d 379, cert. quashed, 2006-NMCERT-001, 139 N.M. 272, 131 P.3d 659.

**Number of criminal conspiracies.** — The number of agreements to break the law determines the number of criminal conspiracies subject to prosecution. *State v. Sanders*, 1994-NMSC-043, 117 N.M. 452, 872 P.2d 870.

**Convictions of all conspirators unnecessary.** — Although it takes two or more to effect a conspiracy, conviction of all conspirators, or even more than one, is not required and ordinarily, the entry of a nolle prosequi as to other alleged conspirators does not vitiate the conviction of a remaining defendant charged with conspiring with them. *State v. Verdugo*, 1969-NMSC-008, 79 N.M. 765, 449 P.2d 781.

**Fact that co-defendant's substantive crimes dismissed not determinative for conspiracy convictions.** — There was sufficient evidence from which the jury could have inferred that defendant had agreed with co-defendant, as a sales representative and later as a sales manager of the condominium project, to sell unregistered securities and to engage in sales practices which had the effect of operating as a fraud upon purchasers. The fact that the substantive crimes of fraudulent practices and the sale or offer to sell unregistered securities as to the co-defendant were dismissed by the trial court is not determinative for the conspiracy convictions. The substantive crimes and the crime of conspiracy are different, and involve separate concepts; and failure to convict on one does not prevent a conviction on the other. *State v. Shade*, 1986-NMCA-072, 104 N.M. 710, 726 P.2d 864, cert. quashed, 104 N.M. 702, 726 P.2d 856, *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**Applicability of Wharton's rule.** — Wharton's rule provides that an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the particular crime is of such a nature as to necessarily require the participation of two persons for its commission. The conduct involved in a conspiracy to commit trafficking under the Controlled Substances Act (Section 30-31-1 NMSA 1978 et seq.) is not like those offenses to which Wharton's rule traditionally applies and therefore the rule's presumption does not apply to such a conspiracy. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**Expansion of Wharton's Rule discouraged.** — Where the conspiracy and the substantive offense are the same crime because the concerted action was logically necessary to prove the substantive offense, the multiple punishment, double-description analysis under principles of double jeopardy is the better analysis to be applied, and the future expansion of Wharton's Rule is expressly discouraged. *State v. Silvas*, 2015-NMSC-006, *aff'g* 2013-NMCA-093, 310 P.3d 621.

**Trafficking controlled substances with intent to distribute and conspiracy based on a single act.** — Where defendant was convicted of trafficking a controlled substance by possession with intent to distribute in violation of 30-31-20(A) NMSA 1978, and conspiracy to commit the same crime in violation of this section, both charges based on evidence of a single sale of drugs by defendant; the defendant's conduct underlying both crimes was unitary, and the state relied on the same evidence, the single sale of drugs from defendant to the co-conspirator, as the basis to convict for both crimes; the defendant was convicted twice and is being punished twice for the same offense, resulting in a double jeopardy violation. *State v. Silvas*, 2015-NMSC-006, *aff'g* 2013-NMCA-093, 310 P.3d 621.

**Wharton's Rule precluded a charge of conspiracy conspiracy to commit trafficking drugs.** — Where defendant was convicted for trafficking by possession with intent to distribute methamphetamine and for conspiracy to commit trafficking; the trafficking charge was based on a single sale of methamphetamine by defendant and to defendant's co-conspirator; defendant and the co-conspirator were the only parties involved in the transaction; and the conspiracy charge was based on the same conduct as the trafficking charge, Wharton's Rule precluded the charge of conspiracy. *State v. Silvas*, 2013-NMCA-093, cert. granted, 2013-NMCERT-009.

**Conspiracy not barred by incarceration.** — Incarceration may prevent active participation in carrying out some of the acts of a conspiracy; it has no effect whatever in dampening initiatory conspiratorial activity. *State v. Gilbert*, 1982-NMCA-081, 98 N.M. 77, 644 P.2d 1066.

**Conspiracy not susceptible to firearm enhancement.** — Since conspiracy is an initiatory crime which involves no physical act other than communication, it is not conceivable how a firearm could be used in the commission of that offense. Accordingly, the crime of conspiracy is not susceptible to firearm enhancement under § 31-18-16 NMSA 1978. *State v. Padilla*, 1994-NMCA-067, 118 N.M. 189, 879 P.2d 1208.

**Derivative liability.** — Defendant, as a conspirator, can be guilty of a substantive offense on a theory of derivative liability. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

**Aiding and abetting and conspiracy are distinct and separate concepts.** *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

**Knowledge essential to aiding and abetting.** — One does not become a party to a conspiracy by aiding and abetting it unless one knows of the conspiracy. *State v. Dressel*, 1973-NMCA-113, 85 N.M. 450, 513 P.2d 187.

**Jury question.** — When a series of illegal transactions has occurred, the issue of whether there is one conspiracy directed toward several acts or multiple conspiracies is a factual one for the jury. *State v. Hernandez*, 1986-NMCA-040, 104 N.M. 268, 720 P.2d 303, cert. denied, 104 N.M. 201, 718 P.2d 1349.

**Sentencing for conspiracy to commit murder.** — Conspiracy to commit murder is a felony "resulting in the death of a human being" within the meaning of Section 31-18-15A(2) (now Section 31-18-15A(4)) NMSA



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1978. *State v. Shije*, 1998-NMCA-102, 125 N.M. 581, 964 P.2d 142.

**Conspiracy as basis for post-conviction relief.** — Where defendant claimed that an assistant district attorney, a state police officer and two other persons violated this section, that this conspiracy was directed against him and that as a result his conviction, judgment and sentence were illegal, but did not allege in what manner the alleged conspiracy affected him, he failed to state a basis for post-conviction relief. *State v. Dominguez*, 1969-NMCA-045, 80 N.M. 328, 455 P.2d 194.

**Unit of prosecution for conspiracy is an agreement.** — The unit of prosecution for conspiracy is the agreement to commit crime, not the criminal objectives of the agreement, that is, the individual crimes that the agreement sets out to accomplish. The legislature established a rebuttable presumption that multiple crimes are the object of only one, overarching, conspiratorial agreement subject to one severe punishment set at the highest crime conspired to commit. The totality of the circumstances test is the mechanism to determine the exceptional instances in which the presumption of singularity may be overcome by demonstrating the existence of more than one conspiracy. The factor considered in the totality of circumstances analysis include whether the location of the conspiracies is the same, whether there is a significant degree of temporal overlap between the conspiracies, whether there is an overlap of personnel between the conspiracies, whether overt acts charged and the role played by the defendant in the conspiracies are similar, whether there was a common goal among the conspirators, and whether the agreement contemplated bringing to pass a continuous result that would not continue without the continuous cooperation of the conspirators. *State v. Gallegos*, 2011-NMSC-027, 149 N.M. 704, 254 P.3d 655.

## II. ELEMENTS OF CONSPIRACY.

**Conspiracy is defined** as a common design or agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means. *State v. Chavez*, 1983-NMSC-037, 99 N.M. 609, 661 P.2d 887.

**Overt act not required.** — Section does not require overt act in connection with the conspiracy, as conspiracy in New Mexico is complete when the prohibited agreement is reached. *State v. Davis*, 1978-NMCA-122, 92 N.M. 341, 587 P.2d 1352, cert. denied, 92 N.M. 353, 588 P.2d 554.

The overt act which constitutes the object of a conspiracy is no part of the crime of conspiracy; an overt act is not required, but the crime is complete when the felonious agreement is reached. *State v. Leyba*, 1979-NMCA-105, 93 N.M. 366, 600 P.2d 312; *State v. Gilbert*, 1982-NMCA-081, 98 N.M. 77, 644 P.2d 1066.

**Common design is essence** of conspiracy. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151; *State v. Farris*, 1970-NMCA-067, 81 N.M. 589, 470 P.2d 561.

**Mutually implied understanding is sufficient** so far as combination or confederacy is concerned. *State v. Farris*, 1970-NMCA-067, 81 N.M. 589, 470 P.2d 561; *State v. Davis*, 1978-NMCA-122, 92 N.M. 341, 587 P.2d 1352, cert. denied, 92 N.M. 353, 588 P.2d 554.

**Common design or mutually implied understanding.** — Conspiracy is defined in terms of a common design or mutually implied understanding. *State v. Armijo*, 1976-NMCA-125, 90 N.M. 10, 558 P.2d 1149.

For a conspiracy to exist there must be a common design or a mutually implied understanding; an agreement. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

**Common design may be established** by circumstantial evidence. *State v. Davis*, 1978-NMCA-122, 92 N.M. 341, 587 P.2d 1352, cert. denied, 92 N.M. 353, 588 P.2d 554.

**Formal agreement not necessary.** — To establish conspiracy formal agreement need not be proved; a mutually implied understanding is sufficient to establish the conspiracy. *State v. Dressel*, 1973-NMCA-113, 85 N.M. 450, 513 P.2d 187; *State v. Sheets*, 1981-NMCA-064, 96 N.M. 75, 628 P.2d 320, cert. quashed, 96 N.M. 116, 628 P.2d 686.

**Knowledge of conspiracy necessary.** — One cannot be a party to a conspiracy unless one knows of the conspiracy. *State v. Sheets*, 1981-NMCA-064, 96 N.M. 75, 628 P.2d 320, cert. quashed, 96 N.M. 116, 628 P.2d 686.

**Mere passive submission or acquiescence of conduct of others insufficient.** — To be guilty of conspiracy to shoot from a motor vehicle, there must have been an agreement that one of the parties thereto would shoot a firearm recklessly from the vehicle; the agreement could be explicit or a mutually implied understanding, but mere passive submission or acquiescence in the conduct of others would not suffice. *State v. Mariano R.*, 1997-NMCA-018, 123 N.M. 121, 934 P.2d 315.

**It takes at least two persons to effect a conspiracy** as the essence of a conspiracy is a common design or agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means. *State v. Dressel*, 1973-NMCA-113, 85 N.M. 450, 513 P.2d 187; *State v. Sheets*, 1981-NMCA-064, 96 N.M. 75, 628 P.2d 320, cert. quashed, 96 N.M. 116, 628 P.2d 686.

**Conspiracy as single agreement.** — Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

**Mere presence insufficient.** — Where there was no evidence that defendant's partner had any knowledge whatsoever of defendant's scheme, even though she was present with him while he was effectuating it, the evidence was insufficient to sustain a conviction for conspiracy. *State v. Dressel*, 1973-NMCA-113, 85 N.M. 450, 513 P.2d 187.

## III. DOUBLE JEOPARDY.

**Entailing single punishment.** — The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one; thus, where there is only one conspiracy and, therefore, only one conspiracy offense, only a single penalty can be validly imposed. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

**Conspiracy and the completed offense are separate offenses** and conviction of both does not amount to double jeopardy. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

**Double jeopardy not bar to conspiracy and substantive crime convictions.** — Plea of double jeopardy is no defense to convictions for a substantive offense and a conspiracy to commit that offense. *State v. Smith*, 1985-NMCA-011, 102 N.M. 512, 697 P.2d 512.

**Conspiracy to commit first-degree murder is a second-degree felony and a fifteen-year term of imprisonment is an appropriate sentence.** — Where defendant was convicted of first-degree murder, conspiracy to commit first-degree murder, arson, and tampering with evidence due to his involvement in the murder of a man, and where defendant claimed that his fifteen-year sentence for conspiracy to commit first-degree murder violated double jeopardy and was an unconstitutional sentencing enhancement based on the victim's death, defendant's fifteen year sentence was the proper basic sentence for a second-degree felony that resulted in the death of a human being. The fact that defendant's sentence for conspiracy to commit first-degree murder took into account the factual consequence of the conduct, the victim's death, did not violate double jeopardy and was not an unconstitutional enhancement but rather the appropriate basic sentence for a second-degree felony that



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resulted in the death of a human being. *State v. Chavez*, 2021-NMSC-017.

**Punishment for both constitutional.** — Although defendant had been convicted and was being punished for his conspiracy at the time of his trial, he was not placed in double jeopardy by being convicted and sentenced on the substantive counts. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

**Conspiracy does not arise out of same transaction as shoplifting.** — A charge of conspiracy does not arise out of the same transaction which results in an indictment for shoplifting, and thus cannot be dismissed as in violation of a statute prohibiting the charging of separate or additional offense if it arises out of the same transaction, notwithstanding proof of the subsequent shoplifting may also tend to circumstantially prove the conspiracy charge. *State v. Leyba*, 1979-NMCA-105, 93 N.M. 366, 600 P.2d 312.

**Two distinct crimes shown.** — Evidence that a conspiracy to commit burglary was entered on the evening of November 16th, that the conspirators unsuccessfully attempted to carry out the conspiracy at 10:30 p.m. of that day, and that the burglary was performed between 9:00 and 9:30 a.m. of November 17th, showed two distinct crimes, and there was no factual basis for the contention that they were either the same or so similar that multiple convictions were prohibited. *State v. Watkins*, 1975-NMCA-126, 88 N.M. 561, 543 P.2d 1189, cert. denied, 89 N.M. 6, 546 P.2d 71.

**Convictions for trafficking controlled substances with intent to distribute and conspiracy based on a single act.** — Where defendant was convicted of trafficking a controlled substance by possession with intent to distribute in violation of 30-31-20(A) NMSA 1978 and conspiracy to commit the same crime in violation of this section, both charges based on evidence of a single sale of drugs by defendant; the defendant's conduct underlying both crimes was unitary, and the state relied on the same evidence, the single sale of drugs from defendant to the co-conspirator, as the basis to convict for both crimes; the defendant was convicted twice and is being punished twice for the same offense, resulting in a double jeopardy violation. *State v. Silvas*, 2015-NMSC-006, *aff'g* 2013-NMCA-093, 310 P.3d 621.

**Two convictions for one conspiracy unconstitutional.** — Because the defendant robbed two different victims but only one conspiracy to commit the robberies existed, it was a violation of double jeopardy to convict the defendant for two conspiracies, as he was punished twice for the same offense. *State v. Jackson*, 1993-NMCA-092, 116 N.M. 130, 860 P.2d 772, cert. denied, 115 N.M. 795, 858 P.2d 1274.

**Rebuttable presumption that multiple crimes are the object of only one overarching conspiratorial agreement.** — Where the jury returned four conspiracy convictions against defendant arising from one shooting, conspiracy to commit aggravated battery (great bodily harm), conspiracy to commit aggravated battery (deadly weapon), conspiracy to commit aggravated assault and conspiracy to commit shooting at a dwelling, the state failed to overcome the presumption of a single overarching conspiratorial agreement where the evidence established that the location and time of the alleged conspiracies were the same, the personnel involved in the several charged conspiracies were the same, and defendant's role in the several charged conspiracies was the same. Defendant's multiple conspiracy convictions violated double jeopardy. *State v. Comitz*, 2019-NMSC-011.

**Rebuttable presumption that multiple crimes are the object of only one overarching conspiratorial agreement.** — Where the jury returned four conspiracy convictions against defendant arising from one shooting, conspiracy to commit aggravated battery (great bodily harm), conspiracy to commit aggravated battery (deadly weapon), conspiracy to commit aggravated assault and conspiracy to commit shooting at a dwelling, the state failed to overcome the presumption of a single overarching conspiratorial agreement where the evidence established that the location and time of the alleged conspiracies were the same, the personnel involved in the several charged conspiracies were the same, and defendant's role in the several charged conspiracies was the same. Defendant's multiple conspiracy convictions violated double jeopardy. *State v. Comitz*, 2019-NMSC-011.

**Rebuttable presumption of one conspiratorial agreement.** — Where defendant was found guilty of conspiracy to commit criminal sexual penetration (CSPM) of a minor, conspiracy to commit kidnapping, conspiracy to commit intimidation or threatening a witness, and conspiracy to commit bribery of a witness, and where the evidence established that the conspiracy convictions involved the same victim and the same perpetrators, and occurred in the same location during the same time period, without any intervening events, the state did not present any evidence to overcome the presumption of singularity. Moreover, the actions of defendant and defendant's son were aimed at furthering a single goal or purpose, facilitating the commission of CSPM upon the victim. *State v. Garcia*, 2019-NMCA-056, cert. denied.

**Conviction for multiple conspiracies violated double jeopardy.** — Where defendant and another assailant broke into the home of the victim armed with metal bars or bats and defendant struck victim with a metal bar, there was only one conspiracy to commit multiple crimes and defendant's conviction of the lesser conspiracy to commit aggravated battery violated double jeopardy. *State v. Trujillo*, 2012-NMCA-112, 289 P.3d 238, cert. granted, 2012-NMCERT-011.

Where, following a fight at a bar between the victim and a conspirator, defendant and a conspirator assaulted the victim at a conspirator's residence and tied the victim up; defendant guarded the victim with a knife; another conspirator gave the victim an overdose of heroin; defendant and conspirators carried the victim to the victim's car and drove the car to a church; the victim was still alive; defendant tried three times to snap the victim's neck, a conspirator tried to suffocate the victim with a plastic bag, and defendant tried to strangle the victim with the victim's shoelaces; defendant and the conspirators left the church and after consulting with other conspirators, returned to the church and set the victim and the victim's car on fire; defendant and other conspirators went to the residence of a conspirator with whom the victim had the bar fight and the conspirator paid fifty dollars to each conspirator; the entire sequence of events from the bar fight to the arson of the victim's car occurred within an eight hour period; during that time, the conspirators exchanged numerous phone calls; and defendant was convicted of conspiracies to commit kidnapping, first degree murder, and aggravated arson, defendant entered into only one agreement and took part in only one conspiracy and the court vacated defendant's convictions of conspiracy to commit kidnapping and arson. *State v. Gallegos*, 2011-NMSC-027, 149 N.M. 704, 254 P.3d 655.

## IV. EVIDENCE AND PROOF.

### A. IN GENERAL.

**Traffic in drugs in a drug-free school zone.** — To convict a defendant of conspiracy to traffic drugs in a drug-free school zone, the state must prove that the defendant had knowledge that the transaction was occurring within a drug-free school zone. *State v. Wilson*, 2010-NMCA-018, 147 N.M. 706, 228 P.3d 490, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.



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**Other evidence.** — While common design is the essence of a conspiracy, this fact may be established by evidence other than that the parties came together and actually agreed upon a method of operation for the accomplishment of the offense. *State v. Deaton*, 1964-NMSC-062, 74 N.M. 87, 390 P.2d 966.

**Laying foundation for testimony.** — When a sufficient foundation is laid by the evidence to establish the existence of a conspiracy, the acts and declarations of coconspirators in pursuance of the common purpose are admissible, whether conspiracy is directly charged or not. *State v. Farris*, 1970-NMCA-067, 81 N.M. 589, 470 P.2d 561.

Out-of-court statements made by a coconspirator about matters relating to the conspiracy are not admissible unless and until a prima facie case of conspiracy is shown by other independent evidence. *State v. Harge*, 1979-NMCA-120, 94 N.M. 11, 606 P.2d 1105, *overruled on other grounds by State v. Penner*, 1983-NMCA-116, 100 N.M. 377, 671 P.2d 38.

**Order of proof not dispositive.** — The trial court has wide discretion in supervising the order of proof in a conspiracy case, and hence regardless of whether acts and declarations of one coconspirator were admitted prior to prima facie proof of a conspiracy, the dispositive issue was whether there was prima facie proof of a conspiracy apart from those acts and declarations, that is, evidence sufficient to make a prima facie case which would support a finding. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

**Presenting co-defendant's guilty plea in defendant's conspiracy trial.** — The fact that a co-defendant has pled guilty to conspiracy to commit murder, presented to the jury in a case involving the defendant's conspiracy, does not come within Rule 803(22), N.M.R. Evid. (*now see* Paragraph V of Rule 11-803 NMRA), and is hearsay. *State v. Urioste*, 1980-NMCA-103, 94 N.M. 767, 617 P.2d 156, cert. denied, 94 N.M. 806, 617 P.2d 1321.

B. CIRCUMSTANTIAL EVIDENCE.

**Conspiracy proved by inference.** — Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state. Direct evidence of an overt act is not required and the crime of conspiracy is complete when the felonious agreement is reached. The agreement may be inferred from statements relating circumstances from which the jury could infer that defendant had agreed to act with another. *State v. Gonzales*, 2008-NMCA-146, 145 N.M. 110, 194 P.3d 725, cert. denied, 2008-NMCERT-009, 145 N.M. 257, 196 P.3d 488; *State v. Lopez*, 2007-NMSC-049, 142 N.M. 613, 168 P.3d 743; *State v. Walters*, 2007-NMSC-050, 142 N.M. 644, 168 P.3d 1068.

**Established through circumstantial evidence.** — A conspiracy may be established by circumstantial evidence, the agreement being a matter of inference from the facts and circumstances, which, considered as a whole, show the parties united to accomplish the fraudulent scheme. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

Whether the defendant combined with another for an unlawful purpose may be shown by circumstantial evidence or by a showing that evidence exists from which reasonable inferences may be drawn supporting the existence of a conspiracy as shown from the facts and circumstances. *In re Ruben O.*, 1995-NMCA-051, 120 N.M. 160, 899 P.2d 603, cert. denied, 120 N.M. 68, 898 P.2d 120.

**Circumstantial evidence for fact of inception of common design.** — Question of when conspirators began to act in pursuance of a common design is ordinarily not the subject of direct proof; circumstances must be relied on to establish the fact. *State v. Farris*, 1970-NMCA-067, 81 N.M. 589, 470 P.2d 561.

**Agreement a matter of inference.** — A mutually implied understanding is sufficient so far as combination or confederacy is concerned, which agreement is generally a matter of inference deduced from the facts and circumstances, and from the acts of the person accused done in pursuance of an apparent criminal purpose. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151; *State v. Deaton*, 1964-NMSC-062, 74 N.M. 87, 390 P.2d 966.

**Inference of conspiracy.** — Conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties. *State v. Dressel*, 1973-NMCA-113, 85 N.M. 450, 513 P.2d 187; *State v. Sheets*, 1981-NMCA-064, 96 N.M. 75, 628 P.2d 320, cert. quashed, 96 N.M. 116, 628 P.2d 686.

C. ACTS OF CONSPIRATORS.

**Acts and declarations of coconspirators may be admitted into evidence** whether or not conspiracy is directly charged. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

**Acts made during existence of conspiracy.** — The acts and declarations of a conspirator to be admissible against his coconspirator must occur during the existence of the conspiracy. *State v. Farris*, 1970-NMCA-067, 81 N.M. 589, 470 P.2d 561.

**Act made prior to consummation of crime.** — A conspirator may testify to acts done or statements made by a coconspirator from the commencement to the consummation of the offense. *State v. Robinson*, 1972-NMCA-080, 84 N.M. 2, 498 P.2d 694.

**Acts made prior to abandonment.** — Rule that statements of a conspirator made after abandonment of the conspiracy or after it has terminated without accomplishing its object are inadmissible as against a co-conspirator, refers to those statements originally made among conspirators, and not the testimony given at trial about those statements. *State v. Robinson*, 1972-NMCA-080, 84 N.M. 2, 498 P.2d 694.

**Acts prior to inception of conspiracy.** — While the acts and declarations of one conspirator during the existence of a conspiracy are competent evidence against his coconspirators, no act or declaration made before the inception of the conspiracy may be binding, or given in evidence against the coconspirator on trial. *State v. Farris*, 1970-NMCA-067, 81 N.M. 589, 470 P.2d 561.

D. SUFFICIENCY OF EVIDENCE.

**Conspiracy to manufacture methamphetamine.** — Where the evidence showed that defendant and others went into a store to purchase Sudafed for methamphetamine, that each person went into the store separately in order to purchase a larger quantity of Sudafed, that Sudafed was used in the manufacture of methamphetamine, and that defendant actually manufactured methamphetamine on the day after the trip to the store to purchase the Sudafed, the jury could reasonably conclude that defendant conspired to manufacture methamphetamine. *State v. Brown*, 2010-NMCA-079, 148 N.M. 888, 242 P.3d 455, cert. denied, 2010-NMCERT-007, 148 N.M. 611, 241 P.3d 612.

**Conspiracy to intimidate a witness.** — Evidence that defendant agreed with an accused murderer to appear in court to shake up an eye witness to the murder and make him afraid to testify truthfully or to have a lapse of memory in the murder trial and to otherwise attempt to make sure that the witness refrained from testifying in a manner that would harm the accused murderer, was sufficient to support the conviction of defendant for conspiracy to intimidate a witness. *State v. Martinez*, 2008-NMCA-019, 143 N.M. 428, 176 P.3d 1160, cert. denied, 2008-NMCERT-001, 143 N.M. 397, 176 P.3d 1129.

**Conspiracy to commit kidnapping.** — Evidence that defendants, following an argument with the victims



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about missing drugs, made the victims strip to their underwear and sit on a couch, that one defendant held a knife to the throat of one victim, that defendants searched victims' clothes for the missing drugs, and that defendants removed money and identification from the victims' clothes, was sufficient to support an inference that the defendants worked together to confine the victims in the apartment and was sufficient to support the convictions for conspiracy to commit kidnapping. *State v. Herrera*, 2015-NMCA-116, cert. denied, 2015-NMCERT-010.

**Conspiracy to commit forgery.** — In defendant's trial for forgery, where the evidence established beyond a reasonable doubt that four personal checks belonging to four different people were washed and passed at four different times, and where there was testimony that defendant had entered into an agreement with others to change genuine checks so that their effect was different from the original, there was sufficient evidence to prove beyond a reasonable doubt that defendant committed conspiracy to commit forgery. *State v. Estrada*, 2016-NMCA-066, cert. denied.

**Sufficient evidence of conspiracy to commit first-degree murder.** — Where defendant was convicted of conspiracy to commit first-degree murder, and where the state presented evidence at trial that defendant spent the day before the murder with another man who had a motive to kill the victim, that defendant secured for himself and the other man a ride to the apartment complex where the victim lived, that defendant and the other man disappeared from sight before gunshots were heard, that defendant and the other man were seen running back to their vehicle before driving off, and that occupants of the vehicle testified that defendant smelled like burnt matches, which is similar to the smell of gunpowder, there was sufficient evidence for a reasonable jury to find that defendant was part of an agreement with one or more to murder the victim. *State v. Torres*, 2018-NMSC-013.

**Evidence sufficient.** — Where defendant's primary co-conspirator beat, drugged, and tied the victim to a bed in defendant's residence; defendant did not object to the treatment of the victim; while the primary co-conspirator was absent from the residence for a lengthy period of time, defendant watched the victim and did not assist the victim or call the police; defendant did not object when the primary co-conspirator expressed an intention to kill the victim and burn the victim's car; defendant purchased charcoal liter fluid at the direction of the primary co-conspirator; defendant did not object when defendant's co-conspirators put the victim in the trunk of the victim's car; and while defendant remained at the residence, defendant's co-conspirators used the liter fluid to burn the car and kill the victim, there was sufficient evidence to convict defendant of conspiracy to commit kidnapping. *State v. Bahney*, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003.

Where defendant's friends asked defendant for a ride from a party; one of the friends suggested that they go "do some shootings"; defendant agreed to the plan and drove to the location of a trailer selected by the friend; the friend exited defendant's vehicle and fired three shots at the trailer; the owner of the trailer had recently moved from the trailer, but kept some possessions in the trailer and parked two vehicles in front of the trailer; and defendant claimed that defendant had no reason to know that the trailer was occupied at the time of the shooting, the evidence was sufficient to prove that defendant had the requisite intent to agree and the intent to commit shooting at a dwelling. *State v. Coleman*, 2011-NMCA-087, 150 N.M. 622, 264 P.3d 523, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Where there was evidence that defendant or accomplice or both assaulted victim and split the money taken from the victim, this is sufficient evidence for the conviction of conspiracy to commit a robbery. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, overruled on other grounds, *State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

The size, frequency and manner of the transactions were evidence sustaining defendant's conviction for conspiracy with two others to traffic in heroin. *State v. Armijo*, 1976-NMCA-125, 90 N.M. 10, 558 P.2d 1149.

Review of the record indicates the existence of substantial evidence to support the jury verdicts for conspiracy to commit fraud, and the evidence was such that the jury could reasonably determine that defendants knowingly committed the offense of conspiracy to commit fraud upon the district and state in excess of $20,000. *State v. Crews*, 1989-NMCA-088, 110 N.M. 723, 799 P.2d 592, cert. denied, 109 N.M. 232, 784 P.2d 419.

**Series of agreements.** — The evidence was sufficient to convict defendant of separate counts of conspiracy to commit murder, kidnapping and armed robbery, where the evidence in the light most favorable to the state showed a distinct agreement to commit each crime. *State v. Reyes*, 2002-NMSC-024, 132 N.M. 576, 52 P.3d 948.

**Tampering with evidence.** — Where there is no evidence suggesting that defendant encouraged his accomplice to dispose of the gun or was present when the accomplice threw it away, there was insufficient evidence to support defendant's convictions for tampering with evidence and conspiracy to tamper with evidence. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

**Sufficient evidence of conspiracy to commit tampering with evidence.** — Where defendant was convicted of second-degree murder, tampering with evidence and conspiracy to commit tampering with evidence, there was sufficient evidence to support defendant's conviction for conspiracy to commit tampering with evidence where the State sought to prove that defendant and another person by words or conduct agreed together to commit tampering with evidence by destroying a vehicle linked to the murder, and where the evidence at trial established that defendant drove the vehicle away from the shooting, left it parked in an alley and contacted an unidentified person who helped defendant obtain and pour gasoline on the vehicle and then start it on fire. Based on this evidence, the jury rationally could have concluded that defendant and the unidentified person who accompanied him to the gas station and the alley where the vehicle was parked agreed by words or conduct to set the car on fire with the intent to destroy evidence. *State v. Chavez*, 2022-NMCA-007, cert. granted.

**Conspiracy to commit tampering with evidence conviction reversed where conviction for underlying offense was reversed.** — Where defendant was convicted of conspiracy to commit tampering with evidence in the fourth degree, based on a finding that defendant tampered with evidence of second degree murder, making the tampering at issue a third degree tampering with evidence, and where the district court erred in instructing the jury, thus requiring the reversal of defendant's second-degree murder conviction, defendant's conviction for conspiracy to commit tampering with evidence also required reversal, because the reversal of defendant's murder conviction rendered the degree of tampering that was conspired to be committed indeterminate, and where a jury does not find the level of the underlying offense, its determination that the defendant tampered with evidence can only support a conviction for misdemeanor tampering with evidence. This section only prohibits conspiracy to commit felonies, and therefore conspiracy to commit a misdemeanor is not a crime in New Mexico. *State v. Chavez*, 2022-NMCA-007, cert. granted.



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**Sufficient evidence.** — Defendant's appearance along with several other people in a hardware store's surveillance footage showing burglaries was sufficient circumstantial evidence to show that defendant had agreed with at least one of the other people to commit the burglaries to support defendant's conviction for conspiracy to commit burglary. *State v. Gonzales*, 2008-NMCA-146, 145 N.M. 110, 194 P.3d 725, cert. denied, 2008-NMCERT-009, 145 N.M. 257, 196 P.3d 488.

There was sufficient evidence to support defendant's conviction for conspiracy to commit first-degree murder where defendant testified that defendant incapacitated one of the occupants of a cabin while defendant's companions murdered and robbed the other occupants of the cabin. *State v. Nieto*, 2000-NMSC-031, 129 N.M. 688, 12 P.3d 442.

**Sufficient evidence of underlying crime(s).** — Where the jury must determine which of two underlying crimes is supported by evidence, as opposed to determining the legality or constitutionality of the underlying crimes, a conviction for conspiracy will be upheld, notwithstanding that one of the underlying crimes may not have been supported by sufficient evidence. *State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**Evidence found sufficient for conviction.** *State v. Bankert*, 1994-NMSC-052, 117 N.M. 614, 875 P.2d 370; *State v. Sellers*, 1994-NMCA-053, 117 N.M. 644, 875 P.2d 400, cert. denied, 118 N.M. 90, 879 P.2d 91; *State v. Hernandez*, 1997-NMCA-006, 122 N.M. 809, 932 P.2d 499.

**Evidence was insufficient** to support verdict of conspiracy to commit trafficking by manufacture where the evidence established that there was a meth lab in the kitchen of defendant's friend's trailer and additional meth lab equipment in a bedroom; that defendant was present in the trailer, hiding in a closet in a different bedroom when the meth lab was discovered; and that both defendant and his friend were present in the trailer when the meth lab was discovered because the evidence did not lead to an inference that defendant had an agreement with friend to commit the offense of trafficking by manufacture. *State v. Stefani*, 2006-NMCA-073, 139 N.M. 719, 137 P.3d 659, cert. denied, 2006-NMCERT-006, 140 N.M. 224, 141 P.3d 1278.

**Evidence that defendant used his truck to block the victim from leaving defendant's property;** that defendant told the other defendants involved in the beating of the victim by telephone to "hurry up" because defendant did not know how long he could hold the victim; that when the other defendants arrived, the defendant became involved in the beating of the victim, permitted the jury to conclude that the defendants shared an intent to hold the victim and then beat him. *State v. Huber*, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096, cert. denied, 2006-NMCERT-007, 140 N.M. 279, 142 P.3d 360.

V. INDICTMENT AND INFORMATION.

**Sufficiency of indictment.** — An indictment for conspiracy to commit perjury did not need to specify the perjury defendant allegedly conspired to commit because the offense of conspiracy was complete when the agreement was reached. *State v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234, *aff'd in part*, 1999-NMSC-041, 128 N.M. 261, 992 P.2d 274.

**Charging in alternative.** — Where defendant was charged under two counts enveloping a single conspiracy which violated two statutes, the trial court did not err in refusing to dismiss either count as duplicitous, as although there was only one conspiracy, the two counts alternatively charged the single conspiracy. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

Where the conspiracy to burglarize and vandalize an insured business involved acts not covered by the arson statute (Section 30-17-5 NMSA 1978), that section was not a special provision prohibiting the prosecution of defendant under Section 30-15-3 NMSA 1978 relating to damaging insured property, for the aspect of the conspiracy directed toward burglary and vandalism. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

**Law reviews.** — For note, "Criminal Law - The Use of Transferred Intent in Attempted Murder, a Specific Intent Crime: State v. Gillette," see 17 N.M.L. Rev. 189 (1987).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 16 Am. Jur. 2d Conspiracy §§ 1 to 11.

Right of accused to bill of particulars, 5 A.L.R.2d 444.

Joint liability for slander, 26 A.L.R.2d 1031.

Liability for procuring breach of contract, 26 A.L.R.2d 1227, 96 A.L.R.3d 1294, 44 A.L.R.4th 1078.

Conviction or acquittal of attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa, 53 A.L.R.2d 622.

Limitation of actions: when does statute of limitations begin to run against civil action or criminal prosecution for conspiracy, 62 A.L.R.2d 1369.

Gambling, criminal conspiracies as to, 91 A.L.R.2d 1148.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence, 4 A.L.R.3d 671.

Jurisdiction to prosecute conspirator who is not in state at time of substantive criminal act, for offense committed pursuant to conspiracy, 5 A.L.R.3d 887.

False testimony: actionability of conspiracy to give or procure false testimony or other evidence, 31 A.L.R.3d 1423.

Impossibility: comment note on impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime, 37 A.L.R.3d 375.

Spouses, criminal conspiracy between, 74 A.L.R.3d 838.

Entrapment: availability of defense of entrapment where one accused of conspiracy denies participation in offense, 5 A.L.R.4th 1128.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators, 19 A.L.R.4th 192.

Federal criminal liability of narcotics conspirator for different substantive crime of other conspirator, 77 A.L.R. Fed. 661.

When is conspiracy continuing offense for purposes of statute of limitations under 18 USCS § 3282, 109 A.L.R. Fed. 616.

## 30-28-3. Criminal solicitation; penalty.

A. Except as to bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others, a person is guilty of criminal solicitation if, with the intent that another person engage in conduct constituting a felony, he solicits, commands, requests, induces, employs or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony within or without the state.



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B. In any prosecution for criminal solicitation, it is an affirmative defense that under circumstances manifesting a voluntary and complete renunciation of criminal intent, the defendant:

(1) notified the person solicited; and

(2) gave timely and adequate warning to law enforcement authorities or otherwise made a substantial effort to prevent the criminal conduct solicited.

The burden of raising this issue is on the defendant, but does not shift the burden of proof of the state to prove all of the elements of the crime of solicitation beyond a reasonable doubt.

C. It is not a defense that the person solicited could not be guilty of the offense solicited due to insanity, minority or other lack of criminal responsibility or incapacity. It is not a defense that the person solicited is unable to commit the crime solicited because of lack of capacity, status or other characteristic needed to commit the crime solicited, so long as the person soliciting or the person solicited believes that he or they have such capacity, status or characteristics.

D. A person is not liable for criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the offense solicited. When the solicitation constitutes a felony offense other than criminal solicitation, which is related to but separate from the offense solicited, the defendant is guilty of such related felony offense and not of criminal solicitation. Provided, a defendant may be prosecuted for and convicted of both the criminal solicitation as well as any other crime or crimes committed by the defendant or his accomplices or co-conspirators [coconspirators], or the crime or crimes committed by the person solicited.

E. Any person convicted of criminal solicitation shall be punished as follows:

(1) if the highest crime solicited is a capital or first degree felony, the person soliciting such felony is guilty of a second degree felony;

(2) if the highest crime solicited is a second degree felony, the person soliciting such a felony is guilty of a third degree felony; and

(3) if the highest crime solicited is a third degree felony or a fourth degree felony, the person soliciting such felony is guilty of a fourth degree felony.

**History: Laws 1979, ch. 265, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## ANNOTATIONS

**Intent.** — Criminal solicitation is not committed in a vacuum; it is a specific intent crime that requires the solicitation of a substantive underlying crime. A person is guilty of criminal solicitation if, with the intent that another person engage in conduct constituting a felony, the soliciting person solicits, commands, requests, induces, employs or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony within or without the state. *State v. Martinez*, 2008-NMSC-060, 145 N.M. 220, 195 P.3d 1232.

**Offense of solicitation requires some form of actual communication** from the defendant to either an intermediary or the person intended to be solicited, indicating the subject matter of the solicitation. *State v. Cotton*, 1990-NMCA-025, 109 N.M. 769, 790 P.2d 1050, cert. denied, 109 N.M. 751, 790 P.2d 1032.

Under this section, proof that defendant solicited, commanded, requested, induced, or employed another to commit a felony necessarily requires evidence that the defendant, in some manner, in fact communicated the solicitation to the person or persons intended to be solicited. *State v. Cotton*, 1990-NMCA-025, 109 N.M. 769, 790 P.2d 1050, cert. denied, 109 N.M. 751, 790 P.2d 1032.

**Offense complete when solicitation made.** — The offense of solicitation is complete when the solicitation is made and it is immaterial that the object of the solicitation is never consummated, or that no overt steps are subsequently taken toward its consummation. *State v. Casteneda*, 1982-NMCA-046, 97 N.M. 670, 642 P.2d 1129.

**Agreement not required.** — The crime of solicitation does not require an agreement. There need be only unilateral acts on the part of the accused of an inducement or request for another to commit a felony. *State v. Gilbert*, 1982-NMCA-081, 98 N.M. 77, 644 P.2d 1066.

**"Facilitate" and "promote" construed.** — The terms "facilitate" and "promote" have common, well defined definitions, meaning respectively "to make easier or less difficult," and to "further, or encourage." *State v. Casteneda*, 1982-NMCA-046, 97 N.M. 670, 642 P.2d 1129.

**Sufficient evidence of criminal solicitation to commit tampering with evidence.** — Where defendant was charged with voluntary manslaughter in the stabbing death of his friend, and where the evidence established that defendant called his girlfriend from the jail knowing that the police were investigating the stabbing, and told her to take his backpack, which contained cans of Dust-Off that the victim had been sniffing or "huffing", and when defendant's girlfriend told defendant that she could not because the police were everywhere, defendant asked her to take the Dust-Off cans out of the backpack and tell the police the backpack belonged to someone else, the evidence supports findings that defendant intended his girlfriend to tamper with evidence consisting of his backpack and the Dust-Off cans inside it and that defendant requested his girlfriend to tamper with evidence by concealing it and lying about ownership of the backpack, for the purpose of preventing his prosecution or conviction for stabbing the victim. *State v. Fox*, 2017-NMCA-029, cert. granted.

**Double jeopardy.** — Even though, under Subsection D of this section, defendant could be convicted of criminal solicitation and conspiracy to commit murder, the trial court's merger of the two offenses for sentencing purposes violated his right to be protected from double jeopardy.



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*State v. Vallejos*, 2000-NMCA-075, 129 N.M. 424, 9 P.3d 668, cert. denied, 129 N.M. 385, 9 P.3d 68.

**Convictions of voluntary manslaughter and aggravated burglary did not violate double jeopardy.** — Where defendant shot the victim in the chest in defendant's vehicle, drove the unconscious victim in the vehicle to an isolated area, and defendant shot the victim twice in the head while the victim was still alive, defendant's convictions of voluntary manslaughter for shooting the victim in the chest and aggravated battery for shooting the victim in the head were not based on unitary conduct and did not violate defendant's right to be free from double jeopardy. *State v. Urioste*, 2011-NMCA-121, 267 P.3d 820, cert. granted, 2011-NMCERT-012.

**Solicitation incidental to conspiracy to commit murder.** — The last sentence of Subsection D means that the charges of both criminal solicitation and conspiracy to commit murder can be prosecuted and submitted to the jury which can convict defendant of both charges; however, according to the first two sentences, defendant will not be held "liable" or "guilty" of criminal solicitation upon formal adjudication or entry of judgment and sentence by the trial court. *State v. Vallejos*, 2000-NMCA-075, 129 N.M. 424, 9 P.3d 668, cert. denied, 129 N.M. 385, 9 P.3d 68.

**Solicitation incidental to conspiracy or liability as accessory.** — If the theory of guilt of the principal offense is that of accessory liability for fraud or conspiracy to commit fraud, solicitation will be necessarily incidental to it and there can be no liability for solicitation. *State v. McCall*, 1983-NMCA-109, 101 N.M. 616, 686 P.2d 958, *rev'd on other grounds*, 1984-NMSC-007, 101 N.M. 32, 677 P.2d 1068.

**Separate sentences for conspiracy and solicitation, if solicitation constitutes conspiracy, impermissible.** — A formal adjudication of guilt of both conspiracy to commit and solicitation of the same felony is proper; however, the imposition of a separate sentence for solicitation when (1) a defendant is convicted and sentenced for conspiracy and (2) the solicitation also constitutes the conspiracy is not permissible. *State v. Shade*, 1986-NMCA-072, 104 N.M. 710, 726 P.2d 864, cert. quashed, 104 N.M. 702, 726 P.2d 856, *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**Conduct incidental to commission of the offense committed.** — Even though the defendant's actions in negotiating for the purchase of drugs fall within the definition of criminal solicitation, his conduct was necessarily incidental to the crime of trafficking through the sale of a controlled substance and he could not be guilty of solicitation to traffic. *State v. Pinson*, 1995-NMCA-045, 119 N.M. 752, 895 P.2d 274.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Solicitation to commit crime against more than one person or property, made in single conversation, as single or multiple crimes, 24 A.L.R.4th 1324.

15A C.J.S. Conspiracy §§ 34 to 78.

# ARTICLE 29

# Glues

Sec.
30-29-1. Glues; limiting the sales; requiring records; penalty.
30-29-2. Glue; aerosol spray; abuse or possession for abuse; penalty.

## 30-29-1. Glues; limiting the sales; requiring records; penalty.

A. No person shall sell glue to any person under eighteen years of age. A New Mexico driver's license shall be prima facie proof of age.

B. Wholesale distributors of glue shall make available to the health services division of the health and environment department [department of health] and to law enforcement agencies of the state, county and municipality during business hours their records of all sales to retailers of glue.

C. As used in this section, "glue" means what is commonly referred to as plastic or model airplane cement and includes any cement containing hexane, benzene, toluene, xylene, carbon tetrachloride, chloroform, ethylene dichloride, acetone, cyclohexanone, methyl ethyl ketone, methylisobutyl ketone, amyl acetate, butyl acetate, ethyl acetate, tricresyl phosphate, butyl alcohol, ethyl alcohol, isopropyl alcohol or methylcellosolve acetate.

D. Any person violating any provision of this section is guilty of a petty misdemeanor.

**History: 1953 Comp., § 12-3-40, enacted by Laws 1968, ch. 23, § 1; 1977, ch. 253, § 24; 1979, ch. 82, § 2.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department, and enacted a new 9-7-4 NMSA 1978, creating the department of health.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Penal offense of sniffing glue or similar volatile intoxicants, 32 A.L.R.3d 1438.

## 30-29-2. Glue; aerosol spray; abuse or possession for abuse; penalty.

A. No person shall intentionally smell, sniff or inhale the fumes or vapors from a glue, aerosol spray product or other chemical substance for the purpose of causing a condition of or inducing



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symptoms of intoxication, elation, euphoria, dizziness, excitement, irrational behavior, exhilaration, stupefaction or dulling of the senses, or for the purpose of in any manner changing, distorting or disturbing the audio, visual or mental processes.

B. No person shall intentionally possess a glue, aerosol spray product or other chemical substance for any purpose set forth in Subsection A of this section.

C. As used in this section, "glue" means what is commonly referred to as plastic or model airplane cement and includes any cement containing hexane, benzene, toluene, xylene, carbon tetrachloride, chloroform, ethylene dichloride, acetone, cyclohexanone, methyl ethyl ketone, methylisobutyl ketone, amyl acetate, butyl acetate, ethyl acetate, tricresyl phosphate, butyl alcohol, ethyl alcohol, isopropyl alcohol or methylcellosolve acetate.

D. The provisions of this section do not apply to any aerosol spray product or other chemical substance used for legitimate medicinal purposes and obtained either on a prescription basis or for medicinal purposes by a person over the age of eighteen.

E. Any person who violates any provision of this section is guilty of a misdemeanor. The sentence or fine may be waived in the discretion of the court in the case of any person who has not been previously convicted of violating this section and who has successfully completed a drug education or treatment program approved by the court.

**History: Laws 1979, ch. 82, § 1.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Products liability: recovery for injury or death resulting from intentional inhalation of product's fumes or vapors to produce intoxicating or similar effect, 50 A.L.R.5th 275.

# ARTICLE 30

# Mercury

Sec.
30-30-1. Illegal possession of mercury.

## 30-30-1. Illegal possession of mercury.

Illegal possession of mercury consists of possessing more than one pound of mercury without also possessing a bona fide bill of sale or other instrument in writing relating to the mercury in possession stating the name and address of the seller, the name and address of the purchaser, the date of the sale, the amount sold and the price paid therefor; provided however, this section shall not be applicable to any person engaged in the business of mining, processing mercury, or to any person using mercury as an integral part of a tool, instrument or device in his business, or to a law enforcement officer in discharge of his duties.

Whoever commits illegal possession of mercury is guilty of a fourth degree felony.

**History: 1953 Comp., § 54-5-17, enacted by Laws 1967, ch. 88, § 1.**

**Cross references.** — For evidentiary rule relating to the use of presumptions in criminal cases, *see* Rule 11-302 NMRA.

**ANNOTATIONS**

**Section is not an unreasonable restriction of property rights** in violation of due process requirements. *State v. Davis*, 1969-NMCA-047, 80 N.M. 347, 455 P.2d 851, cert. denied, 80 N.M. 316, 454 P.2d 973.

**Reasonable regulation of possession.** — As physical characteristics of mercury are such that there is no way to identify a particular lot of mercury, it is reasonably necessary to regulate possession of mercury in order to prevent theft, and the regulation of possession, as limited in this section, is reasonable, and does not violate the requirements of due process. *State v. Davis*, 1969-NMCA-047, 80 N.M. 347, 455 P.2d 851, cert. denied, 80 N.M. 316, 454 P.2d 973.

While it is true that this section prohibits a formerly legal possession, the act prohibited is intentional possession of mercury in those instances covered hereunder. *State v. Davis*, 1969-NMCA-047, 80 N.M. 347, 455 P.2d 851, cert. denied, 80 N.M. 316, 454 P.2d 973.

**Section neither destroys presumption of innocence nor shifts burden of proof.** *State v. Davis*, 1969-NMCA-047, 80 N.M. 347, 455 P.2d 851, cert. denied, 80 N.M. 316, 454 P.2d 973.

**State required to prove possession.** — The presumption of innocence in this section is not destroyed by an inference of guilt based either on a suspicion or an unproven fact as it requires the state to prove possession of a specified item (mercury) in a stated amount (more than one pound). *State v. Davis*, 1969-NMCA-047,



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80 N.M. 347, 455 P.2d 851, cert. denied, 80 N.M. 316, 454 P.2d 973.

**Along with absence of bill of sale.** — The state has the burden of proving that the defendant did not possess a bona fide bill of sale or other written instrument relating to the mercury in defendant's possession; this negative may be proved by the unexplained absence of a bill of sale or instrument in writing from which it may be (but is not required to be) inferred that defendant did not possess such an item, such inference being an evidentiary matter. *State v. Cranford*, 1971-NMCA-008, 82 N.M. 331, 481 P.2d 410.

**Locus of bill of sale.** — The bill of sale or other written instrument need not be on defendant's person in order to be possessed by the defendant. *State v. Davis*, 1969-NMCA-047, 80 N.M. 347, 455 P.2d 851, cert. denied, 80 N.M. 316, 454 P.2d 973.

**Intent essential.** — Criminal intent, an intent to possess the mercury, is required for violation of this section. *State v. Davis*, 1969-NMCA-047, 80 N.M. 347, 455 P.2d 851, cert. denied, 80 N.M. 316, 454 P.2d 973.

**Evidence sufficient.** — Evidence that, according to defendant, 60 pounds of mercury found in his closet was not supposed to be there, along with evidence that defendant acknowledged his guilt to investigating officer, permitted the inference that defendant did not possess a bona fide bill of sale or other written instrument relating to the mercury in his possession. *State v. Cranford*, 1971-NMCA-008, 82 N.M. 331, 481 P.2d 410.

# ARTICLE 31

# Controlled Substances

Sec.
30-31-1. Short title.
30-31-2. Definitions.
30-31-3. Duty to administer.
30-31-4. Nomenclature.
30-31-5. Schedules; criteria.
30-31-6. Schedule I.
30-31-7. Schedule II.
30-31-8. Schedule III.
30-31-9. Schedule IV.
30-31-10. Schedule V.
30-31-11. Regulations.
30-31-12. Registration requirements.
30-31-13. Registrations.
30-31-14. Revocation and suspension of registration.
30-31-15. Order to show cause.
30-31-16. Records of registrants.
30-31-17. Order forms.
30-31-18. Prescriptions.
30-31-19. Distributions by manufacturers or distributors.
30-31-20. Trafficking controlled substances; violation.
30-31-21. Distribution to a minor.
30-31-22. Controlled or counterfeit substances; distribution prohibited.
30-31-23. Controlled substances; possession prohibited.
30-31-24. Controlled substances; violations of administrative provisions.
30-31-25. Controlled substances; prohibited acts.
30-31-25.1. Possession, delivery or manufacture of drug paraphernalia prohibited; exceptions.
30-31-26. Penalties under other laws.
30-31-27. Bar to prosecution.
30-31-27.1. Overdose prevention; limited immunity.
30-31-28. Conditional discharge for possession as first offense.
30-31-29. Probationary period.
30-31-30. Powers of enforcement personnel.
30-31-31. Administrative inspections and warrants.
30-31-32. Administrative inspections.
30-31-33. Injunctions.
30-31-34. Forfeitures; property subject.
30-31-35. Forfeiture; procedure.
30-31-36. Summary forfeiture.
30-31-37. Burden of proof.
30-31-38. Cooperative duties of board.
30-31-39. Education.
30-31-40. Research; confidentiality.
30-31-41. Anabolic steroids; possession; distribution; penalties; notice.

## 30-31-1. Short title.

Chapter 30, Article 31 NMSA 1978 may be cited as the "Controlled Substances Act".

**History: 1953 Comp., § 54-11-1, enacted by Laws 1972, ch. 84, § 1; 2005, ch. 280, § 1.**

**The 2005 amendment,** effective June 17, 2005, added the statutory reference to the act.

### ANNOTATIONS

**Civil and criminal penalties.** — The Double Jeopardy Clause of the New Mexico constitution does not prohibit the legislature from assessing both civil and criminal penalties for violations of the Controlled Substances Act. However, if the state elects to seek both criminal conviction and forfeiture of assets, the penalties must be parsed in a single, bifurcated proceeding. *State v. Esparza*, 2003-NMCA-075, 133 N.M. 772, 70 P.3d 762, cert. denied, 133 N.M. 771, 70 P.3d 761.

**Constitutionality.** — The title of Laws 1972, Chapter 84 does not violate N.M. Const., art. IV, § 16 by embracing more than one subject, because although the act amends sections of the state Drug and Cosmetic Act, the amendments are all concerned with drugs. *State v. Romero*, 1974-NMCA-015, 86 N.M. 99, 519 P.2d 1180.

**Uniform scheme for controlling registrants and nonregistrants.** — The legislature did not establish a parallel scheme for punishing violations of the Controlled Substances Act. That is, there is not one system for controlling registrants authorized to conduct transactions in controlled substances and another for nonregistrants. The punishment for violating a provision of the act depends not on the offender's status but on the nature of the violation. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879



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P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**Law reviews.** — For note, "Criminal Procedure - Civil Forfeiture and Double Jeopardy: State v. Nunez," see 31 N.M.L. Rev. 401 (2001).

For note and comment, "Complying with Nunez: The Necessary Procedure for Obtaining Forfeiture of Property and Avoiding Double Jeopardy after State v. Esparza," see 34 N.M. L. Rev. 561 (2004).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19, 33, 130, 141, 191, 206.

Prosecutions based upon alleged illegal possession of instruments to be used in violation of narcotics laws, 92 A.L.R.3d 47.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

Liability for discharge of at-will employee for refusal to submit to drug testing, 79 A.L.R.4th 105.

Defense of necessity, duress, or coercion in prosecution for violation of state narcotics laws, 1 A.L.R.5th 938.

Validity, construction and application of state "drug kingpin" statutes, 30 A.L.R.5th 121.

Validity, construction and application of state or local law prohibiting maintenance of vehicle for purpose of keeping or selling controlled substances, 31 A.L.R.5th 760.

Validity, construction, and application of state statue criminalizing possession of contraband by individual in penal or correctional institution, 45 A.L.R.5th 767.

Availability of defense of duress or coercion in prosecution for violation of federal narcotics laws, 75 A.L.R. Fed. 722.

When may offender found guilty of multiple crimes under Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS §§ 841-851) be punished for only one offense, 80 A.L.R. Fed. 794.

Validity under federal constitution of regulations, rules, or statutes requiring random or mass drug testing of public employees or persons whose employment is regulated by state, local, or federal government, 86 A.L.R. Fed. 420.

Supreme Court's views on mandatory testing for drugs or alcohol, 145 A.L.R. Fed. 335.

28 C.J.S. Drugs and Narcotics § 8 et seq.

## 30-31-2. Definitions.

As used in the Controlled Substances Act:

A. "administer" means the direct application of a controlled substance by any means to the body of a patient or research subject by a practitioner or the practitioner's agent;

B. "agent" includes an authorized person who acts on behalf of a manufacturer, distributor or dispenser. It does not include a common or contract carrier, public warehouseperson or employee of the carrier or warehouseperson;

C. "board" means the board of pharmacy;

D. "bureau" means the narcotic and dangerous drug section of the criminal division of the United States department of justice, or its successor agency;

E. "controlled substance" means a drug or substance listed in Schedules I through V of the Controlled Substances Act or rules adopted thereto;

F. "counterfeit substance" means a controlled substance that bears the unauthorized trademark, trade name, imprint, number, device or other identifying mark or likeness of a manufacturer, distributor or dispenser other than the person who in fact manufactured, distributed or dispensed the controlled substance;

G. "deliver" means the actual, constructive or attempted transfer from one person to another of a controlled substance or controlled substance analog, whether or not there is an agency relationship;

H. "dispense" means to deliver a controlled substance to an ultimate user or research subject pursuant to the lawful order of a practitioner, including the administering, prescribing, packaging, labeling or compounding necessary to prepare the controlled substance for that delivery;

I. "dispenser" means a practitioner who dispenses and includes hospitals, pharmacies and clinics where controlled substances are dispensed;

J. "distribute" means to deliver other than by administering or dispensing a controlled substance or controlled substance analog;

K. "drug" or "substance" means substances recognized as drugs in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States or official national formulary or any respective supplement to those publications. It does not include devices or their components, parts or accessories;

L. "manufacture" means the production, preparation, compounding, conversion or processing of a controlled substance or controlled substance analog by extraction from substances of natural origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation or compounding of a controlled substance:



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(1) by a practitioner as an incident to administering or dispensing a controlled substance in the course of the practitioner's professional practice; or

(2) by a practitioner, or by the practitioner's agent under the practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis and not for sale;

M. "narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis:

(1) opium and opiate and any salt, compound, derivative or preparation of opium or opiate;

(2) any salt, compound, isomer, derivative or preparation that is a chemical equivalent of any of the substances referred to in Paragraph (1) of this subsection, except the isoquinoline alkaloids of opium;

(3) opium poppy and poppy straw, including all parts of the plant of the species Papaver somniferum L. except its seeds; or

(4) coca leaves and any salt, compound, derivative or preparation of coca leaves, any salt, compound, isomer, derivative or preparation that is a chemical equivalent of any of these substances except decocainized coca leaves or extractions of coca leaves that do not contain cocaine or ecgonine;

N. "opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. "Opiate" does not include, unless specifically designated as controlled under Section 30-31-5 NMSA 1978, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts, dextromethorphan. "Opiate" does include its racemic and levorotatory forms;

O. "person" means an individual, partnership, corporation, association, institution, political subdivision, government agency or other legal entity;

P. "practitioner" means a physician, certified advanced practice chiropractic physician, doctor of oriental medicine, dentist, physician assistant, certified nurse practitioner, clinical nurse specialist, certified nurse-midwife, prescribing psychologist, veterinarian, euthanasia technician, pharmacist, pharmacist clinician or other person licensed or certified to prescribe and administer drugs that are subject to the Controlled Substances Act;

Q. "prescription" means an order given individually for the person for whom is prescribed a controlled substance, either directly from a licensed practitioner or the practitioner's agent to the pharmacist, including by means of electronic transmission, or indirectly by means of a written order signed by the prescriber, bearing the name and address of the prescriber, the prescriber's license classification, the name and address of the patient, the name and quantity of the drug prescribed, directions for use and the date of issue and in accordance with the Controlled Substances Act or rules adopted thereto;

R. "scientific investigator" means a person registered to conduct research with controlled substances in the course of the person's professional practice or research and includes analytical laboratories;

S. "ultimate user" means a person who lawfully possesses a controlled substance for the person's own use or for the use of a member of the person's household or for administering to an animal under the care, custody and control of the person or by a member of the person's household;

T. "drug paraphernalia" means, except as to use in accordance with the Cannabis Regulation Act [26-2C-1 to 26-2C-42 NMSA 1978] or the Lynn and Erin Compassionate Use Act [Chapter 26, Article 2B NMSA 1978], all equipment, products and materials of any kind that are used, intended for use or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance or controlled substance analog in violation of the Controlled Substances Act. It includes:

(1) kits used, intended for use or designed for use in planting, propagating, cultivating, growing or harvesting any species of plant that is a controlled substance or controlled substance analog or from which a controlled substance can be derived;

(2) kits used, intended for use or designed for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances or controlled substance analogs;



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(3) isomerization devices used, intended for use or designed for use in increasing the potency of any species of plant that is a controlled substance;

(4) testing equipment used, intended for use or designed for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances or controlled substance analogs;

(5) scales or balances used, intended for use or designed for use in weighing or measuring controlled substances or controlled substance analogs;

(6) diluents and adulterants, such as quinine hydrochloride, mannitol, mannite dextrose and lactose, used, intended for use or designed for use in cutting controlled substances or controlled substance analogs;

(7) blenders, bowls, containers, spoons and mixing devices used, intended for use or designed for use in compounding controlled substances or controlled substance analogs;

(8) capsules, balloons, envelopes and other containers used, intended for use or designed for use in packaging small quantities of controlled substances or controlled substance analogs;

(9) containers and other objects used, intended for use or designed for use in storing or concealing controlled substances or controlled substance analogs;

(10) hypodermic syringes, needles and other objects used, intended for use or designed for use in parenterally injecting controlled substances or controlled substance analogs into the human body;

(11) objects used, intended for use or designed for use in ingesting, inhaling or otherwise introducing cocaine into the human body, such as:

(a) metal, wooden, acrylic, glass, stone, plastic or ceramic pipes, with or without screens, permanent screens, hashish heads or punctured metal bowls;

(b) water pipes;

(c) carburetion tubes and devices;

(d) smoking and carburetion masks;

(e) miniature cocaine spoons and cocaine vials;

(f) chamber pipes;

(g) carburetor pipes;

(h) electric pipes;

(i) air-driven pipes;

(j) chilams;

(k) bongs; or

(l) ice pipes or chillers; and

(12) in determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(a) statements by the owner or by anyone in control of the object concerning its use;

(b) the proximity of the object, in time and space, to a direct violation of the Controlled Substances Act or any other law relating to controlled substances or controlled substance analogs;

(c) the proximity of the object to controlled substances or controlled substance analogs;

(d) the existence of any residue of a controlled substance or controlled substance analog on the object;

(e) instructions, written or oral, provided with the object concerning its use;

(f) descriptive materials accompanying the object that explain or depict its use;

(g) the manner in which the object is displayed for sale; and

(h) expert testimony concerning its use;

U. "controlled substance analog" means a substance other than a controlled substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I, II, III, IV or V or that was specifically designed to produce effects substantially similar to that of controlled substances in Schedule I, II, III, IV or V. Examples of chemical classes in which controlled substance analogs are found:

(1) include:

(a) phenethylamines;

(b) N-substituted piperidines;

(c) morphinans;



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(d) ecgonines;
(e) quinazolinones;
(f) substituted indoles; and
(g) arylcycloalkylamines; and

(2) do not include those substances that are generally recognized as safe and effective within the meaning of the Federal Food, Drug, and Cosmetic Act or have been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug, and Cosmetic Act;

V. "human consumption" includes application, injection, inhalation, ingestion or any other manner of introduction;

W. "drug-free school zone" means a public school, parochial school or private school or property that is used for a public, parochial or private school purpose and the area within one thousand feet of the school property line, but it does not mean any post-secondary school; and

X. "valid practitioner-patient relationship" means a professional relationship, as defined by the practitioner's licensing board, between the practitioner and the patient.

**History: 1953 Comp., § 54-11-2, enacted by Laws 1972, ch. 84, § 2; 1979, ch. 2, § 1; 1981, ch. 31, § 1; 1987, ch. 68, § 1; 1989, ch. 177, § 19; 1990, ch. 19, § 2; 1997, ch. 244, § 2; 1997, ch. 253, § 3; 2000, ch. 53, § 1; 2001, ch. 50, § 2; 2002, ch. 100, § 2; 2005, ch. 152, § 9; 2006, ch. 17, § 1; 2008, ch. 44, § 5; 2009, ch. 102, § 2; 2017, ch. 140, § 2; 2019, ch. 116, § 9; 2021 (1st S.S.), ch. 4, § 63.**

**Cross references.** — For the Federal Food, Drug and Cosmetic Act, referred to in the last undesignated paragraph of Subsection W, *see* 21 U.S.C. § 301 et seq. For Section 505 of that act, also referred to in the last undesignated paragraph of Subsection W, *see* 21 U.S.C. § 355.

**Compiler's notes.** — Senate Bill 6, enacted by the Fifty-Third Legislature, First Session, 2017, was vetoed by the governor on March 11, 2017. Pursuant to the First Judicial District Court's decision in State ex rel. New Mexico Legislative Council v. Honorable Susana Martinez, Governor of the State of New Mexico et al., D-101-CV-2017-01550, and affirmed by S.Ct. Order No. S-1-SC-36731, on April 25, 2018, which held that Article IV, Section 22 of the New Mexico Constitution requires that objections must accompany a returned bill, Senate Bill 6 was chaptered into law by the Secretary of State.

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, removed the definitions of "hashish", "hemp", and "marijuana", and revised the definition of "drug paraphernalia", as used in the Controlled Substances Act; deleted former Subsections L and M and redesignated former Subsection N as Subsection L; deleted former Subsection O and redesignated former Subsections P through AA as Subsections M through X, respectively; in Subsection T, after "means", added "except as to use in accordance with the Cannabis Regulation Act or the Lynn and Erin Compassionate Use Act", deleted former Paragraph W(7) and redesignated former Paragraphs W(8) through W(13) as Paragraphs T(7) through T(12), respectively, in Paragraph T(11), after "introducing", deleted "marijuana", after "cocaine", deleted "hashish or hashish oil", deleted former Subparagraph W(12)(e) and redesignated former Subparagraphs W(12)(f) through W(12)(m) as Subparagraphs T(11)(e) through T(11)(l), respectively; and in Subsection U, added new paragraph designations "(1)" and "(2)" and redesignated former Paragraphs X(1) through X(7) as Subparagraphs U(1)(a) through U(1)(g), respectively, after Subparagraph U(1)(g), deleted "Specifically excluded from the definition of 'controlled substance analog' are", and in Paragraph U(2), added "do not include".

**The 2019 amendment,** effective July 1, 2019, defined "hemp" as used in the Controlled Substances Act; added new Subsection M and redesignated former Subsections M through Z as Subsections N through AA, respectively.

**The 2017 amendment,** effective June 16, 2017, excluded the plant Cannabis sativa L, and any part of the plant, from the definition of "marijuana" in the Controlled Substances Act; in Subsection N, after "that is incapable of germination", added "or the plant Cannabis sativa L, and any part of the plant, whether growing or not, containing a delta-9 tetrahydrocannabinol concentration of no more than three-tenths percent on a dry weight basis".

**The 2009 amendment,** effective June 19, 2009, in Subsection R, added "euthanasia technician".

**The 2008 amendment,** effective May 14, 2008, added "certified advanced practice chiropractic physician" in Subsection R.

**The 2006 amendment,** effective July 1, 2006, revised Subsection Y to add parochial and private schools to the definition of a drug-free school zone.

**The 2005 amendment,** effective June 17, 2005, provided in Subsection S that a "prescription" means an order given by a licensed practitioner or the practitioner's agent, including an order given by electronic transmission, and providing that the order bear the name and address of the prescriber, his license classification, the name and address of the patient, the name and quantity of the drug prescribed, directions for use, and the date of issue; and added the definition of "valid practitioner-patient relationship" in Subsection Z to mean the relationship defined by the practitioner's licensing board.

**The 2002 amendment,** effective July 1, 2002, inserted "physician assistant, prescribing psychologist" in Subsection R.

**The 2001 amendment,** effective June 15, 2001, substituted "rules" for "regulations" in Subsections E and S, and inserted "pharmacist, pharmacist clinician" to the definition of "practitioner" in Subsection R.

**The 1997 amendment,** effective June 20, 1997, added "certified nurse-midwife" and "or certified" following "licensed" in Subsection R.

**The 1990 amendment,** effective July 1, 1990, added Subsection Y and made minor stylistic changes throughout the section.

**The 1989 amendment,** effective July 1, 1989, substituted "drug or substance" for "drug, substance or immediate precursor" in Subsection E; deleted former Subsection M, which read: "'immediate precursor' means a substance which the board has designated by regulation as being the principal compound commonly used or produced primarily



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as an immediate chemical intermediary used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail or limit manufacture"; redesignated former Subsections N through Y as present Subsections M through X; made minor stylistic changes in Paragraph (4) of Subsection O, in the first sentence of Subsection W, and in Subsection X; and in Subsection V inserted "or controlled substance analogs" in Paragraph (9) and in subparagraph (c) of Paragraph (13).

## ANNOTATIONS

**Drug paraphernalia defined.** — Section 30-31-2V NMSA 1978 clearly and unambiguously does not include ephedrine within its definition of drug paraphernalia. *State v. Mcwhorter*, 2005-NMCA-133, 138 N.M. 580, 124 P.3d 215, cert. denied, 138 N.M. 586, 124 P.3d 564.

**Constitutionality.** — The Drug Paraphernalia Act is not vague or overbroad. *The General Stores, Inc. v. Bingaman*, 695 F.2d 502 (10th Cir. 1982).

**Personal use exception.** — Trafficking by manufacture as defined in Section 30-31-2M NMSA 1978 does not allow for a personal use exception. *State v. Marshall*, 2004-NMCA-104, 136 N.M. 240, 96 P.3d 801, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

**Search for "controlled substances".** — Specification in a search warrant of "controlled substances" kept on premises contrary to law was as precise as the situation permitted considering the wide variety of drugs used by addicts, the words used in the warrant having a definite meaning in that they referred to certain and definite lists of drugs and their derivatives, and left nothing to the discretion of the officers. *State v. Quintana*, 1975-NMCA-034, 87 N.M. 414, 534 P.2d 1126, cert. denied, 88 N.M. 29, 536 P.2d 1085, and cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975).

**Term "constructive transfer" is not void under due process clause** on the grounds of vagueness. *State v. McHorse*, 1973-NMCA-144, 85 N.M. 753, 517 P.2d 75.

**Constructive delivery.** — A "constructive delivery" occurs when the conduct of the parties is such as to be inconsistent with any other supposition than that there has been a change in the nature of the holding. *State v. McHorse*, 1973-NMCA-144, 85 N.M. 753, 517 P.2d 75.

**Aiding actual transfer.** — Testimony that seller handed marijuana to defendant, who in turn handed it to undercover agent, was sufficient evidence of aiding and abetting "actual transfer" of marijuana. *State v. Montoya*, 1974-NMCA-025, 86 N.M. 155, 520 P.2d 1100.

**"Distributing" includes prescription for other than legitimate medical purpose.** — When a physician writes a prescription neither for a legitimate medical purpose nor in the usual course of his professional practice, he is "distributing" drugs. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**Agency not defense to distribution charge.** — Court properly refused instructions defining agency and telling the jury that if the accused had acted as agent for police officers in obtaining heroin he could not be convicted of distributing it, since agency is not a defense to a distribution charge. *State v. Bustamante*, 1978-NMCA-062, 91 N.M. 772, 581 P.2d 460.

**Mailing as distribution.** — Placing a controlled substance in the mail was a constructive transfer which had the effect of turning the controlled substance over to an agent for delivery and constituted a distribution. *State v. McHorse*, 1973-NMCA-144, 85 N.M. 753, 517 P.2d 75.

**Distribution to minor.** — Neither the federal constitution nor 18 U.S.C. § 1716 preempt New Mexico jurisdiction over distribution of controlled substances to a minor through the use of the mails. *State v. McHorse*, 1973-NMCA-144, 85 N.M. 753, 517 P.2d 75.

**Subsection M virtually identical to USCA.** — Subsection M of this section is virtually identical to the definition of manufacturing found in the Uniform Controlled Substances Act (1994). *State v. Marshall*, 2004-NMCA-104, 136 N.M. 240, 96 P.3d 801, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

**Distribution not required from manufacturing.** — There is nothing in the language of Subsection M of this section to suggest that manufacturing requires distribution or an intent to distribute. *State v. Marshall*, 2004-NMCA-104, 136 N.M. 240, 96 P.3d 801, cert. denied, 2004-NMCERT-008, 136 N.M. 491, 100 P.3d 197.

**No personal use exception in Subsection M.** — The legislature has not included personal use as one of the exceptions specifically set forth in Subsection M of this section. *State v. Marshall*, 2004-NMCA-104, 136 N.M. 240, 96 P.3d 801, cert. denied, 2004-NMCERT-008, 136 N.M. 491, 100 P.3d 197.

**Growing marijuana as manufacturer.** — Defendant was a "manufacturer" of marijuana within the contemplation of 54-7-2, 1953 Comp. (now repealed), by reason of his being a grower and cultivator thereof. *State v. Gonzales*, 1967-NMCA-030, 78 N.M. 591, 435 P.2d 210; *State v. Ortiz*, 1967-NMCA-019, 78 N.M. 507, 433 P.2d 92 (decided under former law, statute repealed).

**Marijuana is not a narcotic drug** under present statutes. *State v. Mabrey*, 1975-NMCA-098, 88 N.M. 227, 539 P.2d 617.

**Marijuana was formerly classified as narcotic.** — Expert witness' identification of substance as cannabis leaves, or a substance neither chemically or physically distinguishable from cannabis, was sufficient evidence for jury to find that the substance was a "narcotic drug" under former law. *State v. Tapia*, 1966-NMSC-245, 77 N.M. 168, 420 P.2d 436 (decided under prior law).

**Cannabis sativa.** — State was not required to show that the cannabis leaves were sown or cultivated, as indicated by the name "sativa." *State v. Tapia*, 1966-NMSC-245, 77 N.M. 168, 420 P.2d 436 (decided under prior law).

**Substances held identical.** — Marijuana, cannabis indica and cannabis sativa L. have been held to be identical as a matter of law. *State v. Everidge*, 1967-NMSC-035, 77 N.M. 505, 424 P.2d 787, cert. denied, *sub nom. Greene v. United States*, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967); *State v. Romero*, 1964-NMSC-245, 74 N.M. 642, 397 P.2d 26 (decided before 1979 amendment).

"Marijuana" and "cannabis indica" are merely geographical oriented names of cannabis, whereas "cannabis sativa L." is the botanical name of cannabis. *State v. Romero*, 1964-NMSC-245, 74 N.M. 642, 397 P.2d 26 (decided before 1979 amendment).

**"Mature stalks" of marijuana exempt.** — Where expert testified that marijuana in defendant's possession was a "mature stalk" which is specifically exempted under this section, conviction for unlawful possession of marijuana could not be sustained. *State v. Benavidez*, 1962-NMSC-137, 71 N.M. 19, 375 P.2d 333.

**Cocaine may be classified as "narcotic".** — The legislature can rationally classify cocaine, a nonnarcotic central nervous system stimulant, as a narcotic for penalty and regulatory purposes. *State v. Chouinard*, 1981-NMSC-096, 96 N.M. 658, 634 P.2d 680, cert. denied, 456 U.S. 930, 102 S. Ct. 1980, 72 L. Ed. 2d 447 (1982).

**Heroin is narcotic drug as matter of law.** *State v. Gonzales*, 1974-NMCA-080, 86 N.M. 556, 525 P.2d 916, *overruled on other grounds by* State v. Bender, 1978-NMSC-044, 91 N.M. 670, 579 P.2d 796 (decided under prior law).

**Jury instruction.** — Trial court did not err in instructing the jury, as a matter of law, that heroin was a



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narcotic drug, since Subsection P (now Subsection O) of this section includes opium and any derivative of opium within the definition of narcotic drug, and 30-31-6 NMSA 1978 lists heroin as one of the opium derivatives. *State v. Romero*, 1974-NMCA-015, 86 N.M. 99, 519 P.2d 1180.

**A natural person is included within definition of "person."** *State v. Tucker*, 1974-NMCA-049, 86 N.M. 553, 525 P.2d 913, cert. denied, 86 N.M. 528, 525 P.2d 888; *State v. Romero*, 1974-NMCA-015, 86 N.M. 99, 519 P.2d 1180; *State v. McHorse*, 1973-NMCA-144, 85 N.M. 753, 517 P.2d 75.

**"Prescription" construed.** — If a written direction is not for a substance to be used in treating illness, it is not a prescription as that term is used in the Controlled Substances Act (30-31-1 NMSA 1978). *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**Drug paraphernalia guidelines adequately clear.** — The guidelines present in Subsection W (now Subsection V) are adequate to alert law enforcement officers as to what activity is specifically proscribed. *The General Stores, Inc. v. Bingaman*, 695 F.2d 502 (10th Cir. 1982).

**Drug paraphernalia.** — The "intended for use" language in Subsection W (now Subsection V) is applicable to the state of mind of the individual charged with the offense of selling, distributing or displaying drug paraphernalia. The statutory definition of "drug paraphernalia" is thus clear and provides notice of what is prohibited. *The General Stores, Inc. v. Bingaman*, 695 F.2d 502 (10th Cir. 1982).

**Drug paraphernalia descriptive materials.** — Subsection W(13)(f) (now Subsection V(13(f)), regarding descriptive materials accompanying an object, does not constitute a chilling factor nor invade the right of free speech. Any effect on protected speech is incidental. *The General Stores, Inc. v. Bingaman*, 695 F.2d 502 (10th Cir. 1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 1, 2, 6, 8, 9, 10, 14 et seq., 33, 40, 43, 47, 48, 49, 54 et seq., 66, 67, 69, 72, 75, 76, 96, 98, 100, 120 et seq., 130, 136, 140, 141, 153, 161 et seq., 179 et seq., 191, 200, 206, 211, 212, 229 et seq.

Chemically synthesized LSD, STP, MDA or other hallucinogenic or psychedelic substances as narcotics for purposes of drug prosecution, 50 A.L.R.3d 1284.

Sufficiency of prosecution proof that substance defendant is charged with possessing or selling, or otherwise unlawfully dealing in, is marijuana, 75 A.L.R.3d 717.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

28 C.J.S. Drugs and Narcotics § 1 et seq.

## 30-31-3. Duty to administer.

A. The board shall administer the Controlled Substances Act and may add by regulation substances to the list of substances enumerated in Schedules I through IV pursuant to the procedures of the Uniform Licensing Act [61-1-1 through 61-1-31 NMSA 1978]. In determining whether a substance has the potential for abuse, the board shall consider the following:

(1) the actual or relative abuse of the substance;

(2) the scientific evidence of the pharmacological effect of the substance, if known;

(3) the state of current scientific knowledge regarding the substance;

(4) the history and current pattern of abuse;

(5) the scope, duration and significance of abuse;

(6) the risk to the public health; and

(7) the potential of the substance to produce psychic or physiological dependence liability.

B. After considering the factors enumerated in Subsection A of this section, the board shall make findings and issue regulations controlling the substance if it finds the substance has a potential for abuse.

C. If any substance is designated as a controlled substance under federal law and notice is given to the board, the board may, by regulation, similarly control the substance under the Controlled Substances Act after providing for a hearing pursuant to the Uniform Licensing Act.

D. Authority to control under this section does not extend to distilled spirits, wine, malt beverages, tobacco or pesticides as defined in the Pesticide Control Act [76-4-1 through 76-4-39 NMSA 1978].

**History: 1953 Comp., § 54-11-3, enacted by Laws 1972, ch. 84, § 3; 1989, ch. 177, § 20; 2006, ch. 16, § 1.**

**The 2006 amendment,** effective July 1, 2006, deleted former Subsection E which provided that the board exclude any nonnarcotic substance from a schedule if the substance may, under 61-11-22 NMSA 1978, be lawfully sold over the counter without a prescription.

**The 1989 amendment,** effective July 1, 1989, in Subsection A deleted former Paragraph (8), which read: "whether the substance is an immediate precursor of a substance already controlled under the Controlled Substances Act"; inserted "of this section" in Subsection B; deleted former Subsection C, which read: "If the board designates a substance as an immediate precursor, substances which are precursors of the controlled precursor shall not be subject to control solely because they are precursors of the controlled precursor"; redesignated former Subsections D through F as present Subsections C through E; substituted all of the language of Subsection D beginning with "pesticides" for "economic poisons as defined in Section 45-9-2 NMSA 1953"; and in Subsection E substituted "Section 61-11-22 NMSA 1978" for "Section 67-9-53 NMSA 1953".



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ANNOTATIONS

**Board's scheduling of drugs not unconstitutional delegation of authority.** — To allow the board of pharmacy to schedule drugs, resulting in the attachment of differing criminal penalties for the possession of scheduled drugs, is not an unconstitutional delegation of authority under N.M. Const., art. III, § 1. *Montoya v. O'Toole*, 1980-NMSC-045, 94 N.M. 303, 610 P.2d 190.

**Penalty provisions applicable to drugs scheduled by regulation.** — Express legislative authority is not required to make the penalty provisions of the Controlled Substances Act (30-31-1 NMSA 1978) applicable to drugs scheduled by administrative regulation. *State v. Reams*, 1981-NMCA-158, 98 N.M. 372, 648 P.2d 1185, *aff'd in part, rev'd on other grounds*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

**Law reviews.** — For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

For annual survey of New Mexico law relating to constitutional law, see 12 N.M.L. Rev. 191 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19, 33, 179, 181, 187, 188.

28 C.J.S. Drugs and Narcotics § 117 et seq.

## 30-31-4. Nomenclature.

The controlled substances listed or to be listed in Schedules I through V are included by whatever official, common, usual, chemical or trade name designated.

**History: 1953 Comp., § 54-11-4, enacted by Laws 1972, ch. 84, § 4.**

## 30-31-5. Schedules; criteria.

There are established five schedules of controlled substances to be known as Schedules I, II, III, IV and V.

A. The board shall place a substance in Schedule I if it finds that the substance:

(1) has a high potential for abuse; and

(2) has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.

B. The board shall place a substance in Schedule II if it finds that:

(1) the substance has a high potential for abuse;

(2) the substance has a currently accepted medical use in treatment in the United States or currently accepted medical use with severe restrictions; and

(3) the abuse of the substance may lead to severe psychic or physical dependence.

C. The board shall place a substance in Schedule III if it finds that:

(1) the substance has a potential for abuse less than the substances listed in Schedules I and II;

(2) the substance has a currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to moderate or low physical dependence or high psychological dependence.

D. The board shall place a substance in Schedule IV if it finds that:

(1) the substance has a low potential for abuse relative to the substances in Schedule III;

(2) the substance has a currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substance in Schedule III.

E. The board shall place a substance in Schedule V if it finds that:

(1) the substance has a currently accepted medical use in treatment in the United States; and

(2) abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substances in Schedule IV.

**History: 1953 Comp., § 54-11-5, enacted by Laws 1972, ch. 84, § 5.**

ANNOTATIONS

**Board's scheduling of drugs not unconstitutional delegation of authority.** — To allow the board of pharmacy to schedule drugs, resulting in the attachment of differing criminal penalties for the possession of scheduled drugs, is not an unconstitutional delegation of authority under N.M. Const., art. III, § 1. *Montoya v. O'Toole*, 1980-NMSC-045, 94 N.M. 303, 610 P.2d 190.

**Cocaine may be classified as narcotic.** — The legislature can rationally classify cocaine, a nonnarcotic central nervous system stimulant, as a narcotic for penalty and regulatory purposes because of the similarity between



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cocaine and narcotic drugs in terms of cocaine's potential for societal harm. *Chouinard v. State*, 1980-NMCA-168, 96 N.M. 783, 635 P.2d 986, *rev'd on other grounds*, 1981-NMSC-096, 96 N.M. 658, 634 P.2d 680, cert. denied, 456 U.S. 930, 102 S. Ct. 1980, 72 L. Ed. 2d 447 (1982).

## 30-31-6. Schedule I.

The following controlled substances are included in Schedule I:

A. any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, unless specifically exempted, whenever the existence of these isomers, esters, ethers and salts is possible within the specific chemical designation:

(1) acetylmethadol;
(2) allylprodine;
(3) alphacetylmethadol;
(4) alphameprodine;
(5) alphamethadol;
(6) benzethidine;
(7) betacetylmethadol;
(8) betameprodine;
(9) betamethadol;
(10) betaprodine;
(11) clonitazene;
(12) dextromoramide;
(13) dextrorphan;
(14) diampromide;
(15) diethylthiambutene;
(16) dimenoxadol;
(17) dimepheptanol;
(18) dimethylthiambutene;
(19) dioxaphetyl butyrate;
(20) dipipanone;
(21) ethylmethylthiambutene;
(22) etonitazene;
(23) etoxeridine;
(24) furethidine;
(25) hydroxypethidine;
(26) ketobemidone;
(27) levomoramide;
(28) levophenacylmorphan;
(29) morpheridine;
(30) noracymethadol;
(31) norlevorphanol;
(32) normethadone;
(33) norpipanone;
(34) phenadoxone;
(35) phenampromide;
(36) phenomorphan;
(37) phenoperidine;
(38) piritramide;
(39) proheptazine;
(40) properidine;
(41) racemoramide; and
(42) trimeperidine;

B. any of the following opium derivatives, their salts, isomers and salts of isomers, unless specifically exempted, whenever the existence of these salts, isomers and salts of isomers is possible within the specific chemical designation:



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(1) acetorphine;
(2) acetyldihydrocodeine;
(3) benzylmorphine;
(4) codeine methylbromide;
(5) codeine-N-oxide;
(6) cyprenorphine;
(7) desomorphine;
(8) dihydromorphine;
(9) etorphine;
(10) heroin;
(11) hydromorphinol;
(12) methyldesorphine;
(13) methyldihydromorphine;
(14) morphine methylbromide;
(15) morphine methylsulfonate;
(16) morphine-N-oxide;
(17) myrophine;
(18) nicocodeine;
(19) nicomorphine;
(20) normorphine;
(21) pholcodine; and
(22) thebacon;

C. any material, compound, mixture or preparation that contains any quantity of the following hallucinogenic substances, their salts, isomers and salts of isomers, unless specifically exempted, whenever the existence of these salts, isomers and salts of isomers is possible within the specific chemical designation:

(1) 3,4-methylenedioxy amphetamine;
(2) 5-methoxy-3,4-methylenedioxy amphetamine;
(3) 3,4,5-trimethoxy amphetamine;
(4) bufotenine;
(5) diethyltryptamine;
(6) dimethyltryptamine;
(7) 4-methyl-2,5-dimethoxy amphetamine;
(8) ibogaine;
(9) lysergic acid diethylamide;
(10) mescaline;
(11) peyote, except as otherwise provided in the Controlled Substances Act;
(12) N-ethyl-3-piperidyl benzilate;
(13) N-methyl-3-piperidyl benzilate;
(14) psilocybin;
(15) psilocyn;
(16) synthetic cannabinoids, including:
(a) 1-[2-(4-(morpholinyl)ethyl]-3-(1-naphthoyl)indole;
(b) 1-butyl-3-(1-napthoyl)indole;
(c) 1-hexyl-3-(1-naphthoyl)indole;
(d) 1-pentyl-3-(1-naphthoyl)indole;
(e) 1-pentyl-3-(2-methoxyphenylacetyl) indole;
(f) cannabicyclohexanol (CP 47, 497 and homologues: 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497); and 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol;
(g) 6aR,10aR)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10, 10a-tetrahydrobenzo[c]chromen-1-ol);
(h) dexanabinol, (6aS,10aS)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol;
(i) 1-pentyl-3-(4-chloro naphthoyl) indole;



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(j) (2-methyl-1-propyl-1H-indol-3-yl)-1-naphthalenyl-methanone; and

(k) 5-(1,1-dimethylheptyl)-2-(3-hydroxy cyclohexyl)-phenol;

(17) 3,4-methylenedioxymethcathinone;

(18) 3,4-methylenedioxypyrovalerone;

(19) 4-methylmethcathinone;

(20) 4-methoxymethcathinone;

(21) 3-fluoromethcathinone; and

(22) 4-fluoromethcathinone;

D. the enumeration of peyote as a controlled substance does not apply to the use of peyote in bona fide religious ceremonies by a bona fide religious organization, and members of the organization so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the organization or its members shall comply with the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 and all other requirements of law;

E. the enumeration of Schedule I controlled substances does not apply to:

(1) hemp pursuant to rules promulgated by the board of regents of New Mexico state university on behalf of the New Mexico department of agriculture;

(2) cultivation of hemp by persons pursuant to rules promulgated by the board of regents of New Mexico state university on behalf of the New Mexico department of agriculture;

(3) tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinols, including tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinols with concentrations of up to five percent as measured using a post-decarboxylation method and based on percentage dry weight, possessed by a person in connection with the cultivation, transportation, testing, researching, manufacturing or other processing of the plant Cannabis sativa L., or any part of the plant whether growing or not, if authorized pursuant to rules promulgated, pursuant to the Hemp Manufacturing Act [Chapter 76, Article 24 NMSA 1978], by the board of regents of New Mexico state university on behalf of the New Mexico department of agriculture or the department of environment; or

(4) tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinols, including tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinols in any concentration possessed by a person in connection with the extraction of tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinols, if authorized pursuant to rules promulgated, pursuant to the Hemp Manufacturing Act, by the board of regents of New Mexico state university on behalf of the New Mexico department of agriculture or the department of environment; and

F. controlled substances added to Schedule I by rule adopted by the board pursuant to Section 30-31-3 NMSA 1978.

**History: 1953 Comp., § 54-11-6, enacted by Laws 1972, ch. 84, § 6; 1978, ch. 22, § 8; 2005, ch. 280, § 2; 2007, ch. 210, § 8; 2011, ch. 16, § 1; 2017, ch. 139, § 2; 2017, ch. 140, § 3; 2018, ch. 41, § 1; 2019, ch. 116, § 10; 2021 (1st S.S.), ch. 4, § 64.**

**Cross references.** — For the Comprehensive Drug Abuse Prevention and Control Act of 1970, *see* 21 U.S.C. § 801 et seq.

**Compiler's notes.** — Laws 2018, ch. 41, § 2 provided that if acts making amendments to Section 30-31-6 NMSA 1978 are enacted by the first and second sessions of the fifty-third legislature, the provisions of those acts shall be reconciled and compiled in accordance with the provisions of Section 12-1-8 NMSA 1978, notwithstanding that the amendments were not made in the same session of the legislature. This section includes language enacted by Laws 2017, ch. 139, § 2 and Laws 2017, ch. 140, § 3, which were given force of law by the New Mexico Supreme Court in State of ex rel. New Mexico Legislative Council v. Honorable Susana Martinez, Governor of the State of New Mexico et al., S.Ct. Order No. S-1-SC-36731, which held that Article IV, Section 22 of the New Mexico Constitution requires that objections must accompany a returned bill, and has been reconciled with Laws 2018, ch. 41, § 1 pursuant to Laws 2018, ch. 41, § 2.

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, removed "marijuana", "tetrahydrocannabinols" and "hashish" from the list of Schedule I controlled substances, and made conforming amendments; in Subsection C, deleted Paragraph C(10) and redesignated former Paragraphs C(11) through C(16) as Paragraphs C(10) through C(15), respectively, deleted former Paragraphs C(17) and C(18) and redesignated former Paragraphs C(19) through C(25) as Paragraphs C(16) through C(22), respectively; and in Subsection E, after "the enumeration of", deleted "marijuana, tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinol as", and deleted former Paragraphs E(5) and E(6), which related to the use of marijuana, tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinols and the use, dispensing and prescribing of prescription drugs that contain marijuana, tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinols.

**The 2019 amendment,** effective July 1, 2019, exempted hemp from the list of Schedule I controlled substances; in Subsection E, Paragraph E(1), deleted "industrial", after "hemp by", deleted "qualified entities" and added "persons", and after "pursuant to rules", deleted "adopted by" and added "promulgated by the board of regents of New Mexico state university on behalf of", and



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added new Paragraphs E(3) and E(4) and redesignated former Paragraphs E(3) and E(4) as Paragraphs E(5) and E(6), respectively.

**The 2018 amendment,** effective July 25, 2018, exempted the use, dispensing, possession, prescribing, storage or transport of a prescription drug that the United States food and drug administration has approved and that contains marijuana, a tetrahydrocannabinol derivative or a chemical derivative of tetrahydrocannabinol from the enumeration of marijuana, tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinol as Schedule I controlled substances; and in Subsection E, added Paragraph E(4).

**2017 Amendments.** — Laws 2017, ch. 140, § 3, effective June 16, 2017, specified that the enumeration of marijuana, tetrahydrocannabinols, or chemical derivatives of tetrahydrocannabinol as Schedule I controlled substances does not apply to cultivation of industrial hemp by qualified entities pursuant to rules adopted by the New Mexico department of agriculture; and added Paragraph E(1) and designated the remaining language of Subsection E as Paragraph E(2).

Laws 2017, ch. 139, § 2, effective June 16, 2017, specified that the enumeration of marijuana, tetrahydrocannabinols, or chemical derivatives of tetrahydrocannabinol as Schedule I controlled substances does not apply to industrial hemp, pursuant to rules promulgated by the board of regents of New Mexico state university on behalf of the New Mexico department of agriculture; and added Paragraph E(1) and designated the remaining language of Subsection E as Paragraph E(2).

**The 2011 amendment,** effective March 31, 2011, in Paragraphs (19) through (25) of Subsection C, added synthetic cannabinoids and other synthetic drugs to the list of Schedule I controlled substances.

**The 2007 amendment,** effective July 1, 2007, amended Subsection E to exclude from Schedule I marijuana that is used by qualified patients pursuant to the Lynn and Erin Compassionate Use Act.

**The 2005 amendment,** effective June 17, 2005, added Subsection F to provide that the board may by rule add controlled substances to Schedule I.

**ANNOTATIONS**

**Sufficient evidence that chemicals were synthetic cannabinoids.** — Where defendant was convicted of trafficking methamphetamine and distribution of synthetic cannabinoids based on evidence that an accomplice, at the direction of defendant, delivered methamphetamine and the chemicals PB-22 and 5F-PB22 hidden in deodorant sticks to an inmate confined in the Curry county detention center, and where defendant claimed that the state failed to prove that the substances were synthetic cannabinoids because the particular chemicals were not listed as controlled substances under the New Mexico Controlled Substances Act (CSA), there was sufficient evidence to establish beyond a reasonable doubt that the chemicals collected from the deodorant sticks were "synthetic cannabinoids" within the meaning of this section where the state presented testimony from an expert in forensic chemistry that the chemicals PB-22 and 5F-PB22 are categorized as synthetic cannabinoids because while completely synthetic, the chemicals mimic the effects of cannabis. *State v. Salazar*, 2018-NMCA-030, cert. denied.

**Insufficient evidence that substance was synthetic cannabinoid.** — Where defendant was arrested and charged with a single count of possession of synthetic cannabinoids, and where defendant claimed that there was insufficient evidence to support his conviction because the state failed to meet its burden of proving that the substance in his possession was a synthetic cannabinoid, there was insufficient evidence to support defendant's conviction where the state failed to introduce evidence that scientific testing was ever done to determine what chemicals were present in or applied to the substance found in defendant's possession, and therefore could not prove that the substance contained a chemical that falls either into one of the classes of chemicals listed in a statute or regulation or within the neurochemical definition of synthetic cannabinoid. *State v. Arias*, 2018-NMCA-057.

**Law reviews.** — For discussion of Indian law concerning peyote's use for religious purposes, see 18 N.M.L. Rev. 403 (1988).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

## 30-31-7. Schedule II.

A. The following controlled substances are included in Schedule II:

(1) any of the following substances, except those narcotic drugs listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(a) opium and opiate, and any salt, compound, derivative or preparation of opium or opiate;

(b) any salt, compound, isomer, derivative or preparation thereof that is chemically equivalent or identical with any of the substances referred to in Subparagraph (a) of this paragraph, but not including the isoquinoline alkaloids of opium;

(c) opium poppy and poppy straw; and

(d) coca leaves and any salt, compound, derivative or preparation of coca leaves, and any salt, compound, derivative or preparation thereof that is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions that do not contain cocaine or ecgonine;

(2) any of the following opiates, including their isomers, esters, ethers, salts and salts of isomers, whenever the existence of these isomers, esters, ethers and salts is possible within the specific chemical designation:

(a) alphaprodine;



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(b) anileridine;
(c) bezitramide;
(d) dihydrocodeine;
(e) diphenoxylate;
(f) fentanyl;
(g) hydromorphone;
(h) isomethadone;
(i) levomethorphan;
(j) levorphanol;
(k) meperidine;
(l) metazocine;
(m) methadone;
(n) methadone—intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane;
(o) moramide—intermediate,2-methyl-3-morpholino-1,1-diphenyl-propane-carboxylic acid;
(p) oxycodone;
(q) pethidine;
(r) pethidine—intermediate—A, 4-cyano-1-methyl-4-phenylpiperidine;
(s) pethidine—intermediate—B, ethyl-4-phenyl-piperidine-4-carboxylate;
(t) pethidine—intermediate—C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;
(u) phenazocine;
(v) piminodine;
(w) racemethorphan; and
(x) racemorphan;

(3) unless listed in another schedule, any material, compound, mixture or preparation that contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:
(a) amphetamine, its salts, optical isomers and salts of its optical isomers;
(b) phenmetrazine and its salts;
(c) methamphetamine, its salts, isomers and salts of isomers; and
(d) methylphenidate; and

(4) controlled substances added to Schedule II by rule adopted by the board pursuant to Section 30-31-3 NMSA 1978.

B. Where methadone is prescribed, administered or dispensed by a practitioner of a drug abuse rehabilitation program while acting in the course of the practitioner's professional practice, or otherwise lawfully obtained or possessed by a person, such person shall not possess such methadone beyond the date stamped or typed on the label of the container of the methadone, nor shall any person possess methadone except in the container in which it was originally administered or dispensed to such person, and such container shall include a label showing the name of the prescribing physician or practitioner, the identity of methadone, the name of the ultimate user, the date when the methadone is to be administered to or used or consumed by the named ultimate user shown on the label and a warning on the label of the methadone container that the ultimate user must use, consume or administer to the ultimate user the methadone in such container. Any person who violates this subsection is guilty of a felony and shall be punished by imprisonment for not less than one year nor more than five years, or by a fine of up to five thousand dollars ($5,000), or both.

**History: 1953 Comp., § 54-11-7, enacted by Laws 1972, ch. 84, § 7; 1978, ch. 22, § 9; 1979, ch. 112, § 1; 2005, ch. 280, § 3; 2007, ch. 210, § 9; 2021 (1st S.S.), ch. 4, § 65.**

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, removed marijuana, tetrahydrocannabinols and chemical derivatives of tetrahydrocannabinols from the list of Schedule II controlled substances; and in Subsection A, deleted Subparagraphs A(1)(e) and A(1)(f).

**The 2007 amendment,** effective July 1, 2007, included in Schedule II marijuana, tetrahydrocannabinols and its derivatives that are used by qualified patients pursuant to the Lynn and Erin Compassionate Use Act.

**The 2005 amendment,** effective June 17, 2005, added Subsection A(4) to provide that the board may by rule add controlled substances to Schedule II; deleted the former provision in Subsection B that a drug abuse rehabilitation program was defined in Section 26-2-13A(3) NMSA 1978.

**ANNOTATIONS**

**Morphine.** — Although the word "morphine" does not appear in the schedules in this act, the trial court



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could properly take judicial notice that morphine is an opium derivative under this section. *State v. Yanez*, 1976-NMCA-073, 89 N.M. 397, 553 P.2d 252.

**Percodan.** — Percodan is a Schedule II controlled substance. *State v. Sanchez*, 1979-NMCA-133, 93 N.M. 596, 603 P.2d 335.

**Cocaine may be classified as narcotic.** — The legislature can rationally classify cocaine, a nonnarcotic central nervous system stimulant, as a narcotic for penalty and regulatory purposes because of the similarity between cocaine and narcotic drugs in terms of cocaine's potential for societal harm. *Chouinard v. State*, 1980-NMCA-168, 96 N.M. 783, 635 P.2d 986, *rev'd on other grounds*, 1981-NMSC-096, 96 N.M. 658, 634 P.2d 680, cert. denied, 456 U.S. 930, 102 S. Ct. 1980, 72 L. Ed. 2d 447 (1982).

**Proof of abusive quantity of amphetamine not required.** — The state need not prove that an amphetamine alleged to have been sold by the defendant was of a sufficient quantity to have a potential for abuse associated with a stimulant effect, since, in Subsection A(3), the statutory words "having a potential for abuse" modify "substances," not "any quantity." *State v. Hernandez*, 1986-NMCA-017, 104 N.M. 97, 717 P.2d 73, cert. denied, 103 N.M. 798, 715 P.2d 71; *State v. Martinez*, 1986-NMCA-069, 104 N.M. 584, 725 P.2d 263.

**Identification of cocaine by expert.** — Expert testimony is not required to establish that a witness sold cocaine to a defendant. *State v. Rubio*, 1990-NMCA-090, 110 N.M. 605, 798 P.2d 206.

## 30-31-8. Schedule III.

The following controlled substances are included in Schedule III:

A. any material, compound, mixture or preparation containing limited quantities of any substance having a stimulant effect on the central nervous system which is controlled and listed in Schedule II;

B. unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(1) any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid, except those substances which are specifically listed in another schedule;

(2) chlorhexadol;

(3) glutethimide;

(4) lysergic acid;

(5) lysergic acid amide;

(6) methyprylon;

(7) phencyclidine;

(8) sulfondiethylmethane;

(9) sulfonethylmethane; or

(10) sulfonmethane;

C. nalorphine;

D. any material, compound, mixture or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) not more than one and eight-tenths grams of codeine, or any of its salts, per one hundred milliliters or not more than ninety milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(2) not more than one and eight-tenths grams of codeine, or any of its salts, per one hundred milliliters or not more than ninety milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(3) not more than three hundred milligrams of dihydrocodeinone, or any of its salts, per one hundred milliliters or not more than fifteen milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(4) not more than three hundred milligrams of dihydrocodeinone, or any of its salts, per one hundred milliliters or not more than fifteen milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts;

(5) not more than one and eight-tenths grams of dihydrocodeine, or any of its salts, per one hundred milliliters or not more than ninety milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts;

(6) not more than three hundred milligrams of ethylmorphine, or any of its salts, per one hundred milliliters or not more than fifteen milligrams per dosage unit, with one or more active non-narcotic ingredients in recognized therapeutic amounts;



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(7) not more than five hundred milligrams of opium per one hundred milliliters or per one hundred grams, or not more than twenty-five milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts; or

(8) not more than fifty milligrams of morphine, or any of its salts, per one hundred milliliters or per one hundred grams with one or more active, non-narcotic ingredients in recognized therapeutic amounts;

E. controlled substances added to Schedule III by rule adopted by the board pursuant to Section 30-31-3 NMSA 1978; and

F. the board may exempt by regulation any compound, mixture or preparation containing any stimulant or depressant substance listed in Subsections A and B of this section from the application of any part of the Controlled Substances Act if the compound, mixture or preparation contains any active medicinal ingredients not having a stimulant or depressant effect on the central nervous system and if the admixtures are included in combinations, quantity, proportion or concentration that vitiate the potential for abuse of the substances which have a stimulant or depressant effect on the central nervous system.

**History: 1953 Comp., § 54-11-8, enacted by Laws 1972, ch. 84, § 8; 2005, ch. 280, § 4.**

**Compiler's notes.** — For conditions under which the board may exempt certain compounds, mixtures or preparations enumerated in this section from the application of the Controlled Substances Act, *see* 30-31-10 NMSA 1978.

**The 2005 amendment,** effective June 17, 2005, added Subsection E to provide that the board may by rule add controlled substances to Schedule III.

## 30-31-9. Schedule IV.

The following controlled substances are included in Schedule IV:

A. any material, compound, mixture or preparation which contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(1) barbital;

(2) chloral betaine;

(3) chloral hydrate;

(4) ethchlorvynol;

(5) ethinamate;

(6) methohexital;

(7) meprobamate;

(8) methylphenobarbital;

(9) paraldehyde;

(10) petrichloral; or

(11) phenobarbital;

B. controlled substances added to Schedule IV by rule adopted by the board pursuant to Section 30-31-3 NMSA 1978; and

C. the board may exempt by regulation any compound, mixture or preparation containing any depressant substance listed in Subsection A of this section from the application of all or any part of the Controlled Substances Act if the compound, mixture or preparation contains any active medicinal ingredients not having a depressant effect on the central nervous system and if the admixtures are included in combinations, quantity, proportion or concentration that vitiate the potential for abuse of the substances which have a depressant effect on the central nervous system.

**History: 1953 Comp., § 54-11-9, enacted by Laws 1972, ch. 84, § 9; 2005, ch. 280, § 5.**

**Compiler's notes.** — For conditions under which the board may exempt certain compounds, mixtures or preparations enumerated in this section from the application of the Controlled Substances Act, *see* 30-31-10 NMSA 1978.

**The 2005 amendment,** effective June 17, 2005, added Subsection E to provide that the board may by rule add controlled substances to Schedule IV.



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## 30-31-10. Schedule V.

A. The following controlled substances are included in Schedule V:

(1) any compound, mixture or preparation that contains the following limited quantities of any of the following narcotic drugs, and that also contains one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(a) not more than two hundred milligrams of codeine, or any of its salts, per one hundred milliliters or per one hundred grams;

(b) not more than one hundred milligrams of dihydrocodeine, or any of its salts, per one hundred milliliters or per one hundred grams;

(c) not more than one hundred milligrams of ethylmorphine, or any of its salts, per one hundred milliliters or per one hundred grams;

(d) not more than two and five-tenths milligrams of diphenoxylate and not less than twenty-five micrograms of atropine sulfate per dosage unit; or

(e) not more than one hundred milligrams of opium per one hundred milliliters or per one hundred grams; and

(2) any compound, mixture or preparation that contains any detectable quantity of pseudoephedrine, its salts or its optical isomers, or salts of its optical isomers. A compound, mixture or preparation as specified in this paragraph shall be dispensed, sold or distributed only by a licensed pharmacist or pharmacist intern or a registered pharmacy technician. Unless pursuant to a valid prescription, a person purchasing, receiving or otherwise acquiring the compound, mixture or preparation shall:

(a) produce a driver's license or other government-issued photo identification showing the date of birth of the person;

(b) sign a written log, receipt or other program or mechanism indicating the date of the transaction, name of the person, driver's license number or government-issued identification number, name of the pharmacist, pharmacist intern or pharmacy technician conducting the transaction, the product sold and the total quantity, in grams or milligrams, of pseudoephedrine purchased; and

(c) be limited to no more than nine grams of any product, mixture or preparation within a thirty-day period.

B. The board may by regulation exempt any compound, mixture or preparation containing any depressant or stimulant substance enumerated in Schedules III, IV or V from the application of the Controlled Substances Act if:

(1) the compound, mixture or preparation contains one or more active medicinal ingredients not having a depressant or stimulant effect on the central nervous system; and

(2) such ingredients are included in such combinations, quantity, proportion or concentration as to vitiate the potential for abuse of the substances which do have a depressant or stimulant effect on the nervous system.

C. The board may, by rule, exempt a product containing pseudoephedrine from Schedule V if the board determines that the product is formulated as to effectively prevent the conversion of pseudoephedrine into methamphetamine.

D. The board shall monitor prices charged for compounds, mixtures and preparations that contain pseudoephedrine and may adopt rules to prevent unwarranted price increases as a result of compliance with this section.

**History: 1953 Comp., § 54-11-10, enacted by Laws 1972, ch. 84, § 10; 2006, ch. 16, § 2.**

**The 2006 amendment,** effective July 1, 2006, added Paragraph (2) of Subsection A to include pseudoephedrine as a controlled substance; permitted only licensed pharmacists, interns or technicians to sell pseudoephedrine; limited the amount of pseudoephedrine that may be sold to a purchaser; and unless pursuant to a prescription, required persons who purchase pseudoephedrine to provide identification and to sign a log; added Subsection C to provide that the board may exempt a product containing pseudoephedrine from Schedule V if the board determines the product is formulated to prevent the conversion of the product to methamphetamine; and added Subsection D to provide that the board shall monitor prices charged for products with pseudoephedrine and adopt rules to prevent unwarranted price increases.



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## 30-31-11. Regulations.

The board may promulgate regulations and charge reasonable fees relating to the registration and control of the manufacture, distribution and dispensing of controlled substances; provided, however, that in no case shall the fees exceed eighty dollars ($80.00) per year. If the board determines to increase any fee, the board shall notify, in addition to any other notice required by law, the affected professional group of the board's intention to increase the fee and the date for the scheduled hearing to review the matter.

**History: 1953 Comp., § 54-11-11, enacted by Laws 1972, ch. 84, § 11; 1989, ch. 57, § 1; 1994, ch. 42, § 1.**

**The 1994 amendment,** effective May 18, 1994, substituted "eighty dollars ($80.00) per year" for "sixty dollars per year for a period of three years after January 1, 1989" in the first sentence and deleted the former second sentence, which read: "After January 1, 1992, if the board determines, for good cause shown, that a fee increase is necessary, the board may increase the fees, but in no case shall the fees exceed seventy-five dollars ($75.00) per year".

**The 1989 amendment,** effective June 16, 1989, added the proviso at the end of the first sentence and added the last two sentences.

### ANNOTATIONS

**Interests of state legitimate.** — The regulations propounded under this section and 26-1-18 NMSA 1978 do not violate due process since the state has a legitimate interest in the control of dangerous drugs sold or distributed therein and has not brought within the orbit of state power any matters unrelated to local interests. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**License fee not violative of commerce clause.** — Although the regulations adopted pursuant to this section and Section 26-1-18 NMSA 1978 include a license fee to cover administrative costs, their primary purpose is the protection of the public from dangerous drugs, a purpose within the traditional definition of police power; and where the burden of a small fee does not outweigh the substantial state benefit derived from the control, and the regulations do not discriminate against interstate commerce since there are no drug manufacturers within the state, there is no violation of the commerce clause. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**Formal findings unnecessary.** — In propounding regulations the board of pharmacy need not make formal findings, but must only insure that the public and the reviewing courts are informed as to the reasoning behind the regulation; the comments of the one board member suffice in this regard. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**No unconstitutional delegation of power.** — Granting of authority to the board of pharmacy was not an unconstitutional delegation of legislative authority nor is there any constitutional prohibition to granting the board the power to adopt registration fees without specification of any statutory minimum. 1973-74 Op. Att'y Gen. No. 73-07.

**Registration fees authorized.** — This section grants to the state board of pharmacy authority to set registration fees for all persons required to register under the Controlled Substances Act. 1973-74 Op. Att'y Gen. No. 73-07.

It is presumed that the authority conferred on the board of pharmacy would be exercised with fair and just regard for the interest affected; and a $10.00 registration fee appears to meet this standard. 1973-74 Op. Att'y Gen. No. 73-07.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19, 33.

28 C.J.S. Drugs and Narcotics § 117 et seq.

## 30-31-12. Registration requirements.

A. A person who manufactures, distributes or dispenses a controlled substance or who proposes to engage in the manufacture, distribution or dispensing of a controlled substance shall obtain a registration issued by the board in accordance with its regulations.

B. Persons registered by the board to manufacture, distribute, dispense or conduct research with controlled substances may possess, manufacture, distribute, dispense, prescribe or conduct research with those substances to the extent authorized by their registration and in conformity with the other provisions of the Controlled Substances Act.

C. The following persons need not register and may lawfully possess controlled substances:

(1) an agent of a registered manufacturer, distributor or dispenser of a controlled substance if the agent is acting in the usual course of the agent's principal's business or employment;

(2) a common or contract carrier or warehouseman, or an employee whose possession of a controlled substance is in the usual course of the common or contract carrier or warehouseman's business; or

(3) an ultimate user.

D. The board may waive by regulation the requirement for registration of certain manufacturers, distributors or dispensers if it is consistent with the public health and safety.

E. The board may inspect the establishment of a registrant or applicant for registration in accordance with the board's regulations.



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**History: 1953 Comp., § 54-11-12, enacted by Laws 1972, ch. 84, § 12; 1975, ch. 346, § 1; 2002, ch. 55, § 1; 2009, ch. 72, § 1.**

**The 2009 amendment,** effective July 1, 2009, in Subsection A, after "shall obtain", deleted "annually".

**The 2002 amendment,** effective May 15, 2002, in Subsection A, deleted the former second to fourth sentences, which related to the annual registration of practitioners by their respective examining and licensing authorities rather than directly by the board of pharmacy.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 69, 72, 75, 76.
28 C.J.S. Drugs and Narcotics § 29 et seq.

## 30-31-13. Registrations.

A. The board shall register an applicant to manufacture or distribute controlled substances unless it determines that the issuance of that registration would be inconsistent with the public interest. In determining the public interest, the board shall consider the following factors:

(1) maintenance of effective controls against diversion of controlled substances into other than legitimate medical, scientific or industrial channels;

(2) compliance with applicable state and local law;

(3) any convictions of the applicant under any federal or state laws relating to any controlled substance;

(4) past experience in the manufacture or distribution of controlled substances, and the existence in the applicant's establishment of effective controls against diversion;

(5) furnishing by the applicant of false or fraudulent material in any application filed under the Controlled Substances Act;

(6) suspension or revocation of the applicant's federal registration to manufacture, distribute or dispense controlled substances as authorized by federal law; and

(7) any other factors relevant to and consistent with the public health and safety.

B. Registration under this section does not entitle a registrant to manufacture and distribute controlled substances in Schedules I or II other than those allowed in the registration.

C. Compliance by manufacturers and distributors with the provisions of the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 respecting registration, excluding state registration fees entitles them to be registered under the Controlled Substances Act.

D. Practitioners must be registered to dispense any controlled substances or to conduct research with controlled substances in Schedules II through V if they are authorized to dispense or conduct research under Section 39 [30-31-40 NMSA 1978] of the Controlled Substances Act. The board need not require separate registration under this act for practitioners engaging in research with nonnarcotic controlled substances in Schedules II through V where the registrant is already registered under the Controlled Substances Act in another capacity. Practitioners or scientific investigators registered under the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 to conduct research with Schedule I substances may conduct research with Schedule I substances within this state upon furnishing the board evidence of that federal registration.

**History: 1953 Comp., § 54-11-13, enacted by Laws 1972, ch. 84, § 13.**

**Cross references.** — For the Comprehensive Drug Abuse Prevention and Control Act of 1970, *see* 21 U.S.C. § 801 et seq.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons § 69.
28 C.J.S. Drugs and Narcotics § 31 et seq.

## 30-31-14. Revocation and suspension of registration.

A. A registration under Section 30-31-13 NMSA 1978 to manufacture, distribute or dispense a controlled substance may be suspended or revoked upon a finding that the registrant:

(1) has furnished false or fraudulent material information in any application filed with the board;

(2) has been convicted of a felony under any state or federal law relating to a controlled substance;

(3) has had his federal registration suspended or revoked to manufacture, distribute or dispense controlled substances; or



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(4) has had his practitioner's license suspended or revoked by his professional licensing board.

B. A hearing to revoke or suspend a registration of a practitioner shall be held before a special hearing panel consisting of the board and two additional persons designated to sit on the hearing panel by the practitioner's own examining and licensing authority.

C. The special hearing panel may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist.

D. If the special hearing panel suspends or revokes a registration, all controlled substances owned or possessed by the registrant at the time of suspension or the effective date of the revocation order may be placed under seal. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court.

E. Upon a revocation order becoming final, the board may apply to the court for an order to sell all controlled substances under seal. The court shall order the sale of such controlled substances under such terms and conditions that the court deems appropriate.

F. The board shall promptly notify the bureau of all orders suspending or revoking registration and all sales of controlled substances.

**History: 1953 Comp., § 54-11-14, enacted by Laws 1972, ch. 84, § 14; 1975, ch. 346, § 2.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons § 76.

Revocation or suspension of license or permit to practice pharmacy or operate drugstore because of improper sale or distribution of narcotic or dangerous drugs, 17 A.L.R.3d 1408.

28 C.J.S. Drugs and Narcotics § 42.

## 30-31-15. Order to show cause.

A. Before denying, suspending or revoking a registration or refusing a renewal of registration, the board shall serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked or suspended or why the renewal should not be refused. The order to show cause shall contain a statement of the basis of the order and shall require the applicant or registrant to appear before the board not less than thirty days after the date of service of the order, but in the case of a denial of renewal of registration the order shall be served not later than thirty days before the expiration of the registration unless the proceedings relate to suspension or revocation of a registration. These proceedings shall be conducted in accordance with the Uniform Licensing Act [61-1-1 NMSA 1978] without regard to any criminal prosecution or other proceeding. Proceedings to suspend or revoke a registration or to refuse renewal of registration shall not abate the existing registration which shall remain in effect pending the outcome of the proceeding.

B. The board may suspend, without an order to show cause, any registrant simultaneously with the institution of proceedings under Section 14 [30-31-14 NMSA 1978] or where renewal of registration is refused if it finds that there is such a substantial and imminent danger to the public health or safety which warrants this action. The suspension shall continue in effect until the conclusion of the proceedings, including judicial review, unless sooner withdrawn by the board or dissolved by a court of competent jurisdiction.

**History: 1953 Comp., § 54-11-15, enacted by Laws 1972, ch. 84, § 15.**

## 30-31-16. Records of registrants.

A. Every registrant under the Controlled Substances Act manufacturing, distributing or dispensing a controlled substance shall maintain, on a current basis, a complete and accurate record of each substance manufactured, received, sold or delivered by him in accordance with regulations of the board.



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Inventories as required in the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 shall be deemed in compliance with inventory requirements under this section.

B. Records for drugs under Schedules I and II shall be kept separate from other records. Prescriptions for all Schedule I and II drugs and narcotic prescriptions for controlled substances listed in Schedules III, IV and V shall be maintained separately from other prescription drugs in accordance with regulations of the board.

C. Records for nonnarcotic controlled substances under Schedules III, IV and V shall be maintained either separately or in such form that they are readily retrievable and are marked for ready identification in accordance with regulations of the board. Prescriptions for nonnarcotic controlled substances shall be maintained either in a separate prescription file or in such form that they are readily retrievable from other prescription records and are marked for ready identification in accordance with regulations of the board.

D. Records shall be maintained for a period of at least three years from the date of the record and may be inspected as required by authorized agents of the board.

E. A practitioner is not required to keep records of controlled substances listed in Schedules II through V that he prescribes or administers in the lawful course of his professional practice. He shall keep records of controlled substances that he dispenses other than by prescribing or administering.

F. Each pharmacy licensed in the state shall provide information relating to the dispensing of any controlled substance designated by the board. The board shall administer the collection and dissemination of the information obtained. The manner of reporting and the extent of the required information shall be designated by regulation of the board.

**History: 1953 Comp., § 54-11-16, enacted by Laws 1972, ch. 84, § 16; 1994, ch. 42, § 2.**

**Cross references.** — For definitions applicable to Medical Practice Act, *see* 61-6-6 NMSA 1978.

For definitions applicable to Physician Assistants Act, *see* 61-6-7.1 NMSA 1978.

For pharmacist clinician prescriptive authority, *see* 61-11B-3 NMSA 1978.

For the Comprehensive Drug Abuse Prevention and Control Act of 1970, *see* 21 U.S.C. § 801 et seq.

**The 1994 amendment,** effective May 18, 1994, substituted "that" for "which" in both sentences in Subsection E and added Subsection F.

## 30-31-17. Order forms.

Controlled substances in Schedules I and II shall be distributed by a registrant to another registrant only pursuant to an order form. Compliance with the provisions of the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 respecting order forms shall be deemed compliance with this section.

**History: 1953 Comp., § 54-11-17, enacted by Laws 1972, ch. 84, § 17.**

**Cross references.** — For the Comprehensive Drug Abuse Prevention and Control Act of 1970, *see* 21 U.S.C. § 801 et seq.

## 30-31-18. Prescriptions.

A. No controlled substance listed in Schedule II, which is a prescription drug as determined by the federal food and drug administration, may be dispensed without a written prescription of a practitioner, unless administered directly to an ultimate user. No prescription for a Schedule II substance may be refilled. No person other than a practitioner shall prescribe or write a prescription.

B. Prescriptions for Schedules II through IV shall contain the following information:

(1) the name and address of the patient for whom the drug is prescribed;

(2) the name, address and registry number of the person prescribing the drug; and

(3) the identity of the pharmacist of record.

C. A controlled substance included in Schedules III or IV, which is a prescription drug as determined under the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act, Chapter 26, Article 1 NMSA 1978], shall not be dispensed without a written or oral prescription of a practitioner, except when administered directly by a practitioner to an ultimate user. The



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prescription shall not be filled or refilled more than six months after the date of issue or be refilled more than five times, unless renewed by the practitioner and a new prescription is placed in the file. Prescriptions shall be retained in conformity with the regulations of the board.

D. The label affixed to the dispensing container of a drug listed in Schedules II, III or IV, when dispensed to or for a patient, shall contain the following information:

(1) date of dispensing and prescription number;

(2) name and address of the pharmacy;

(3) name of the patient;

(4) name of the practitioner; and

(5) directions for use and cautionary statements, if any.

E. The label affixed to the dispensing container of a drug listed in Schedule II, III or IV, when dispensed to or for a patient, shall contain a clear concise warning that it is a crime to transfer the drug to any person other than the patient.

F. No controlled substance included in Schedule V, which is a proprietary nonprescription drug, shall be distributed, offered for sale or dispensed other than for a medical purpose and a record of the sale shall be made in accordance with the regulations of the board.

G. In emergency situations, as defined by regulation, Schedule II drugs may be dispensed upon oral prescription of a practitioner, if reduced promptly to writing and filed by the pharmacy in accordance with regulations of the board.

**History: 1953 Comp., § 54-11-18, enacted by Laws 1972, ch. 84, § 18; 2005, ch. 152, § 10.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not a part of the law. Laws 1987, ch. 270, § 1 changed the "New Mexico Drug and Cosmetic Act" to the "New Mexico Drug, Device and Cosmetic Act".

**The 2005 amendment,** effective June 17, 2005, deleted the provision in Subsection B(2) which required prescriptions to contain the name of the pharmacist and dispensing date of the drug be inscribed on the face of the prescription; added Subsection B(3) to require that prescriptions contain the identity of the pharmacist of record.

ANNOTATIONS

**Physician's assistants are not authorized to prescribe controlled substances** in violation of Subsection A. *N.M. Bd. of Pharmacy v. N.M. Bd. of Osteopathic Medical Exm'rs.*, 1981-NMCA-034, 95 N.M. 780, 626 P.2d 854.

**Law reviews.** — For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

## 30-31-19. Distributions by manufacturers or distributors.

A registered manufacturer or distributor may distribute controlled substances to the following:

A. a registered manufacturer, pharmacy or distributor;

B. a registered practitioner;

C. a registered hospital or clinic; and

D. to a person in charge of a registered laboratory, but only for use by that laboratory for scientific and medical purposes.

**History: 1953 Comp., § 54-11-19, enacted by Laws 1972, ch. 84, § 19.**

## 30-31-20. Trafficking controlled substances; violation.

A. As used in the Controlled Substances Act, "traffic" means the:

(1) manufacture of a controlled substance enumerated in Schedules I through V or a controlled substance analog as defined in Subsection W of Section 30-31-2 NMSA 1978;

(2) distribution, sale, barter or giving away of:

(a) a controlled substance enumerated in Schedule I or II that is a narcotic drug;

(b) a controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug; or

(c) methamphetamine, its salts, isomers and salts of isomers; or

(3) possession with intent to distribute:



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(a) a controlled substance enumerated in Schedule I or II that is a narcotic drug;

(b) controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug; or

(c) methamphetamine, its salts, isomers and salts of isomers.

B. Except as authorized by the Controlled Substances Act, it is unlawful for a person to intentionally traffic. A person who violates this subsection is:

(1) for the first offense, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) for the second and subsequent offenses, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. A person who knowingly violates Subsection B of this section within a drug-free school zone excluding private property residentially zoned or used primarily as a residence is guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: 1953 Comp., § 54-11-20, enacted by Laws 1972, ch. 84, § 20; 1974, ch. 9, § 1; 1980, ch. 23, § 1; 1987, ch. 68, § 2; 1990, ch. 19, § 3; 2006, ch. 17, § 2.**

**Cross references.** — For instructions as to trafficking in controlled substances, *see* UJI 14-3110 NMRA et seq.

**The 2006 amendment,** effective July 1, 2006, added Subparagraph (c) to Paragraph (2) of Subsection A to provide that traffic means distribution, sale, barter or giving away of methamphetamine and its salts and isomers and added Subparagraph (c) to Paragraph (3) of Subsection A to provide that traffic means the possession with intent to distribute methamphetamine and its salts and isomers.

**The 1990 amendment,** effective July 1, 1990, substituted "Subsection W" for "Subsection X" in Paragraph (1) and made minor stylistic changes in Paragraphs (2) and (3) of Subsection A, and added Subsection C.

**ANNOTATIONS**

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I. GENERAL CONSIDERATION.

**Advice about possible sentence enhancements.** — Where the defendant entered a no contest plea to trafficking cocaine; the district court informed the defendant that the trafficking charge would be a second degree felony with a maximum basic sentence of nine years and that the basic sentence could be enhanced under the habitual offender statute if the defendant had any undisclosed prior felony convictions; the state filed supplemental criminal information alleging that the defendant had three prior felony convictions, two of which were trafficking offenses; there was no indication in the record that before the defendant entered a plea of no contest to the three prior convictions that the defendant was advised about a potential enhancement under the trafficking statute or that the trafficking charge could be treated as a first degree felony with a basic sentence of eighteen years, the court did not adequately and accurately advise the defendant of the possible sentencing enhancements the defendant faced by pleading no contest. *Marquez v. Hatch*, 2009-NMSC-040, 146 N.M. 556, 212 P.3d 1110.

**Act not applicable.** — Where defendant did not engage in extraction from substance of natural origin or chemical synthesis, cultivating and growing psilocybin mushrooms, even if by artificial means, is not prohibited by this section. *State v. Pratt*, 2005-NMCA-099, 138 N.M. 161, 117 P.3d 967, cert. denied, 2005-NMCERT-008, 138 N.M. 328, 119 P.3d 1265.

**Title constitutional.** — The title of Laws 1972, Chapter 84, of which this section is a part, does not violate N.M. Const., art. IV, § 16, by embracing more than one subject, because although the act also amends sections of the state Drug and Cosmetic Act (Drug, Device and Cosmetic Act, 26-1-1 NMSA 1978), the amendments are all concerned with drugs. *State v. Romero*, 1974-NMCA-015, 86 N.M. 99, 519 P.2d 1180.

Defendant's contention that this section violated N.M. Const., art. IV, § 16, because it is concerned with trafficking in controlled substances, while title of the act of which it is a part does not include trafficking, was without merit since prohibition on trafficking was a detail germane to drugs, their administration and penalties. *State v. Romero*, 1974-NMCA-015, 86 N.M. 99, 519 P.2d 1180.

**Title of act constitutional.** — Sections 30-31-21 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties, are not unconstitutional because "unlawful activities" are not mentioned in the title of the act. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**Constitutionality.** — Subsection A(3) is not unconstitutionally overbroad, as it does not sweep within its ambit actions that would ordinarily be deemed to be constitutionally-protected activities. *State v. Curry*, 1988-NMCA-031, 107 N.M. 133, 753 P.2d 1321, cert. denied, 107 N.M. 132, 753 P.2d 1320.

**Special laws prohibited.** — Section 30-31-20B(2) NMSA 1978 applies to all second and subsequent trafficking offenses, and, therefore, does not violate the prohibition against special laws of N.M. Const., art. IV, § 24; nor does it violate the requirements of equal protection. *State v. Bejar*, 1985-NMCA-093, 104 N.M. 138, 717 P.2d 591, cert. quashed, 104 N.M. 54, 716 P.2d 245 (1986).

**Section applicable to physician.** — This section applies to a physician who gives out drugs for something other than a legitimate medical purpose. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Delivery which is effected by a physician which is not for a legitimate medical purpose is not excepted from the prohibitions of the Controlled Substances Act. When a physician acts without any legitimate medical purpose and beyond the course of professional practice by selling prescriptions that allow the bearer to obtain controlled



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substances, his conduct should be treated like that of any street-corner pill pusher. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**Miranda warnings from informer unnecessary.** — Claim that defendant should have been given Miranda warnings immediately prior to selling heroin to informer, who was accompanied by an undercover policewoman, was without merit. *State v. Anaya*, 1969-NMCA-120, 81 N.M. 52, 462 P.2d 637.

**Sections not inconsistent.** — There is no conflict between Section 30-31-22A NMSA 1978 which excludes narcotic drugs enumerated in Schedule I, such as heroin, from its purview, and this section, under which trafficking in narcotic drugs is prohibited. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**Plain meaning of this section should be given effect,** unless this leads to an absurd or unreasonable result. *State v. Marshall*, 2004-NMCA-104, 136 N.M. 240, 96 P.3d 801, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

**Heroin is narcotic drug as matter of law.** *State v. Gonzales*, 1974-NMCA-080, 86 N.M. 556, 525 P.2d 916, *overruled on other grounds by State v. Bender*, 1978-NMSC-044, 91 N.M. 670, 579 P.2d 796 (decided under prior law).

**Because there is no evidence that defendant engaged in "extraction from substances of natural origin or chemical synthesis" as defined by Section 30-31-2 M NMSA 1978,** his acts of cultivating or growing mushrooms, even if by artificial means, are not prohibited by Subsection A(1) of this section. *State v. Pratt*, 2005-NMCA-099, 138 N.M. 161, 117 P.3d 967, cert. denied, 2005-NMCERT-008, 138 N.M. 163, 117 P.3d 967.

**Attempt to acquire by misrepresentation not more specific statute.** — A defendant charged with attempt to traffic cocaine under Subsection A of this section was not entitled to be charged under Section 30-31-25A(3) NMSA 1978 ("attempt to acquire controlled substance by misrepresentation") since the elements defined in both offenses are so distinct that the specific-statute doctrine does not apply. *State v. Villalobos*, 1995-NMCA-105, 120 N.M. 694, 905 P.2d 732, cert. quashed, 121 N.M. 676, 916 P.2d 1343 (1996).

**Trafficking committed irrespective of manufacturer's intention.** — The crime of trafficking by manufacturing is committed irrespective of any consideration of whether the manufacturer intended to distribute the controlled substance or keep it for his or her personal use. *State v. Marshall*, 2004-NMCA-104, 136 N.M. 240, 96 P.3d 801, cert. denied, 2004-NMCERT-008, 136 N.M. 491, 100 P.3d 197.

**Entrapment submitted to jury.** — Issue of entrapment in prosecution for selling and distribution of heroin was properly submitted to the jury, where the evidence raised a factual question concerning defendant's predisposition to sell or distribute heroin and concerning the extent of agent's activity in connection with the heroin. *State v. Wilson*, 1974-NMCA-059, 86 N.M. 348, 524 P.2d 520.

**Severance not necessary.** — It was not error for the trial court to refuse to grant motion for severance where defendant was charged with having made three sales to the same individual in the same community and all within a comparatively short period of time, and no prejudice to defendant had been shown. *State v. Riordan*, 1974-NMCA-013, 86 N.M. 92, 519 P.2d 1029.

**First offense punishable as second degree felony.** — Sentence of 10 to 50 years imposed on defendant, convicted of trafficking prior to the 1974 amendment to this section, was proper; as the statute then declared the crime to be a second degree felony, Section 31-18-11 NMSA 1978 (now repealed), making a "felony" as to which a penalty is not specified a fourth degree felony, was not applicable. *State v. Herrera*, 1974-NMSC-037, 86 N.M. 224, 522 P.2d 76 (decided under prior law).

**Procedure upon conviction of subsequent offense.** — Upon proof that a conviction is a second or subsequent conviction for trafficking, Subsection B requires that the previous sentence be vacated and that the sentence imposed by law be imposed. *State v. Bejar*, 1985-NMCA-093, 104 N.M. 138, 717 P.2d 591, cert. quashed, 104 N.M. 54, 716 P.2d 245 (1986).

**Notice prior to sentencing as second offender.** — Although former narcotic drug statute failed to specify the precise manner in which a prior conviction was to be brought to the attention of the defendant and the court, essential fairness required that there be some pleading filed by the state, whether it be by motion or otherwise, by which a defendant would be given notice and opportunity to be heard before an increased penalty could be imposed. *State v. Rhodes*, 1966-NMSC-064, 76 N.M. 177, 413 P.2d 214, appeal after remand, 1967-NMSC-052, 77 N.M. 536, 425 P.2d 47; *State v. Santillanes*, 1981-NMSC-064, 96 N.M. 477, 632 P.2d 354.

Since there was never any charge filed against defendant which would give him notice that, if convicted, he would be sentenced as a second offender, and even though no objection was made by the defendant or his counsel to the questioning by the court as to the prior conviction, sentencing him as a second offender was a denial of due process of law, in that there was no notice or true opportunity to be heard, in a constitutional sense. *State v. Rhodes*, 1966-NMSC-064, 76 N.M. 177, 413 P.2d 214, appeal after remand, 1967-NMSC-052, 77 N.M. 536, 425 P.2d 47.

**Enhancement proceeding.** — When an enhancement proceeding is brought after the defendant has begun serving his sentence on the most recent convictions, there is no violation of either the right of due process or the right against double jeopardy, even in the absence of statutory authorization of such a procedure. *State v. Santillanes*, 1981-NMSC-064, 96 N.M. 477, 632 P.2d 354.

Since defendant's prior convictions for cocaine trafficking and possession of marijuana with intent to distribute resulted from a single arrest, the court did not make an impermissible "double use" of the prior convictions by utilizing the prior cocaine trafficking conviction to enhance the defendant's present cocaine trafficking conviction to a first degree felony pursuant to Section 30-31-20B(2) NMSA 1978, and then using the other prior conviction for possession of marijuana to enhance defendant's sentence under the general habitual-offender statute, Section 31-18-17 NMSA 1978. *State v. Hubbard*, 1992-NMCA-014, 113 N.M. 538, 828 P.2d 971, cert. denied, 113 N.M. 352, 826 P.2d 573.

**Conditional discharge is not a prior offense for enhancement purposes.** — Where defendant received a conditional discharge dismissing his first drug trafficking offense, and four years later was arrested and charged with trafficking methamphetamine, the conditional discharge could not be considered a prior offense for purposes of enhancement, because a conditional discharge entered without an adjudication of guilt is not considered a conviction. *State v. Lassiter*, 2016-NMCA-078, cert. denied.

**When federal offense is prior conviction.** — State convictions of trafficking of a controlled substance are "subsequent" to a federal conviction since the elements necessary to prove the federal offense are the same as those required to prove the state charges. Therefore, the federal offense is a prior conviction for purposes of the penalty provisions of the Controlled Substances Act.



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*State v. Garduno*, 1979-NMSC-072, 93 N.M. 335, 600 P.2d 281.

**Applicability of habitual offender statute.** — In 1983 the habitual offender statute was amended to include persons convicted of narcotics offenses, overruling that part of *State v. Lujan*, 1966-NMSC-051, 76 N.M. 111, 412 P.2d 405, which held that the Habitual Offender Act (Habitual Criminal Act) did not apply to persons convicted under the Controlled Substances Act. *Minner v. Kerby*, 30 F.3d 1311 (10th Cir. 1994).

## II. ELEMENTS OF TRAFFICKING CONTROLLED SUBSTANCE.

**Proof of knowledge of drug-free school zone required.** — The term "knowingly" in Subsection C of Section 30-31-20 NMSA 1978 requires specific knowledge that the offense of trafficking controlled substances will occur within the drug-free school zone, and the state must prove knowledge of the drug-free school zone as an essential element of distributing drugs in a drug-free school zone. *State v. Wilson*, 2010-NMCA-018, 147 N.M. 706, 228 P.3d 490, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

Where undercover police officers stopped defendant and asked defendant for drugs; defendant told the officers that defendant was going to buy drugs down the street; defendant left and returned with a third person to the officers' car; the third person sold cocaine to the officers; the sale occurred within a drug-free school zone; and there was no evidence that defendant knew that the sale of the drugs would occur within a drug-free school zone, the evidence was insufficient to support defendant's conviction of conspiracy to traffic cocaine within a drug-free school zone. *State v. Wilson*, 2010-NMCA-018, 147 N.M. 706, 228 P.3d 490, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

**Section does not require specific intent.** — Trafficking in a controlled substance by distribution is not a specific intent crime. Since this section prohibiting trafficking by "distribution, sale, barter or giving away any controlled substance . . . which is a narcotic drug" only describes a particular act without reference to a defendant's intent to do some further act or achieve some additional consequence, the crime is properly one of general intent. *State v. Bender*, 1978-NMSC-044, 91 N.M. 670, 579 P.2d 796.

**Trafficking by distribution is not a specific intent crime.** *State v. Turner*, 1981-NMCA-144, 97 N.M. 575, 642 P.2d 178, cert. quashed, 98 N.M. 51, 644 P.2d 1039 (1982).

**Elements of offense of transferring controlled substance.** — In order to find a defendant guilty of transferring a controlled substance, the state must prove beyond a reasonable doubt that: (1) the defendant transferred a controlled substance; (2) the defendant knew or believed it was a controlled substance; and (3) the transfer occurred in New Mexico on a particular date. *Martinez v. State*, 1978-NMSC-051, 91 N.M. 747, 580 P.2d 968.

**Knowledge of presence and narcotic character of drug essential.** — In a prosecution for trafficking in narcotics, the state must prove that defendant knew of the presence and narcotic character of the object possessed. *State v. Gonzales*, 1974-NMCA-080, 86 N.M. 556, 525 P.2d 916, *overruled on other grounds by State v. Bender*, 1978-NMSC-044, 91 N.M. 670, 579 P.2d 796.

**Knowledge with control.** — Since he was not in physical possession of the heroin when it was found by the officers, to be convicted defendant must have constructively possessed it, that is, he must have had knowledge of the presence of the heroin and control over it. *State v. Herrera*, 1977-NMCA-028, 90 N.M. 306, 563 P.2d 100, cert. denied, 90 N.M. 636, 567 P.2d 485.

**Ownership not element.** — This section prohibits a defendant from transferring narcotics by way of distribution, sale, barter, or gift: Ownership is not an element. *State v. Hernandez*, 1986-NMCA-040, 104 N.M. 268, 720 P.2d 303, cert. denied, 104 N.M. 201, 718 P.2d 1349.

## III. DOUBLE JEOPARDY.

**Trafficking methamphetamine by manufacture and possession of drug paraphernalia.** — Where the defendant was convicted of trafficking methamphetamine by manufacture for possession of items that could be used to manufacture methamphetamine and possession of drug paraphernalia for possession of items that could be used to consume methamphetamine and marijuana, and where the items used to consume drugs were not necessary to manufacture methamphetamine, the defendant's conduct was not unitary and the defendant's convictions did not violate double jeopardy. *State v. Vance*, 2009-NMCA-024, 145 N.M. 706, 204 P.3d 31, cert. denied, 2009-NMCERT-001, 145 N.M. 655, 203 P.3d 870.

**Double jeopardy.** — Since marijuana is not defined as a narcotic drug, trial court acquired no jurisdiction when defendant was charged with violating this section by selling marijuana, hence, there was no basis for a claim of double jeopardy where defendant was later charged under the proper section. *State v. Mabrey*, 1975-NMCA-098, 88 N.M. 227, 539 P.2d 617.

The defendant's distribution of drug samples and subsequent distribution of larger quantities of the same drugs to the same persons constituted separate transaction under this section and convictions on distinct counts of trafficking a controlled substance did not violate double jeopardy. *State v. Borja-Guzman*, 1996-NMCA-025, 121 N.M. 401, 912 P.2d 277, cert. denied, 121 N.M. 375, 911 P.2d 883.

Where a trial court convicted defendant of one count of a second offense of trafficking a controlled substance and one count of conspiracy to commit that offense, and in sentencing defendant, the trial court used defendant's prior convictions twice to increase the punishment, the prior trafficking conviction could not be used to set defendant's underlying conspiracy to commit trafficking conviction as a second degree felony, and then be used to enhance defendant's sentence under the habitual offender statute. *State v. Lacey*, 2002-NMCA-032, 131 N.M. 684, 41 P.3d 952, cert. denied, 131 N.M. 737, 42 P.3d 842.

**Convictions for trafficking controlled substances with intent to distribute and conspiracy based on a single act.** — Where defendant was convicted of trafficking a controlled substance by possession with intent to distribute in violation of Subsection A of this section and conspiracy to commit the same crime in violation of 30-28-2 NMSA 1978, both charges based on evidence of a single sale of drugs by defendant; the defendant's conduct underlying both crimes was unitary, and the state relied on the same evidence, the single sale of drugs from defendant to the co-conspirator, as the basis to convict for both crimes; the defendant was convicted twice and is being punished twice for the same offense, resulting in a double jeopardy violation. *State v. Silvas*, 2015-NMSC-006, *aff'g* 2013-NMCA-093, 310 P.3d 621.

**Merger with charge of conspiracy to racketeer.** — In order for the jury to have convicted defendant of conspiracy to racketeer pursuant to the court's instruction, it was also necessary for the state to prove, and the jury to find, that she and another conspired to traffic by manufacture. Thus, the two offenses for which defendant was convicted merged under the facts and circumstances of the case. *State v. Wynne*, 1988-NMCA-106, 108 N.M. 134, 767 P.2d 373, cert. denied, 108 N.M. 115, 767 P.2d 354 (1989).

**Possession deemed lesser offense.** — Possession of heroin is a lesser offense included within the offense of possession with intent to distribute heroin. *State v. Alderete*, 1977-NMCA-130, 91 N.M. 373, 574 P.2d 592, cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).



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**Separate offenses.** — As there is no ambiguity in this section, which prohibits the sale of "any" controlled substance, where evidence showed sales to two separate people, there were two offenses and consecutive sentences received by defendant did not constitute an abuse of the trial court's discretion. *State v. Burrell*, 1976-NMCA-025, 89 N.M. 64, 547 P.2d 69.

**Drug trafficking statute authorizes separate prosecution and punishment for distinct transfers of controlled substances.** — Where defendant was convicted of trafficking cocaine by distribution and possession of cocaine with intent to distribute, his constitutional right to be free from double jeopardy was not violated, because the legislature clearly intended, in its enactment of 30-31-20 NMSA 1978 criminalizing drug trafficking, to authorize separate prosecution and punishment for each individual transfer or delivery under the circumstances where the transfer is not contemporaneous, and the evidence presented at trial showed that defendant's convictions arose from two separate transfers of a controlled substance, where in each exchange defendant transferred a distinct quantity of cocaine to the undercover officer in exchange for a distinct sum of money. *State v. Bello*, 2017-NMCA-049, cert. denied.

## IV. EVIDENCE AND PROOF.

### A. IN GENERAL.

**Inference of knowledge of presence of drugs.** — While knowledge of the presence of drugs may be inferred where exclusive possession of the premises is shown, where exclusive possession is not shown, additional evidence is required to support such an inference. *State v. Becerra*, 1991-NMCA-090, 112 N.M. 604, 817 P.2d 1246, cert. denied, 112 N.M. 440, 816 P.2d 509.

**Inference of control of drugs.** — Control of the premises on which contraband is found is not sufficient to support a determination of criminal liability. There must be knowledge of the presence of the contraband, and there must be evidence sufficient to support an inference of control of the contraband. *State v. Becerra*, 1991-NMCA-090, 112 N.M. 604, 817 P.2d 1246, cert. denied, 112 N.M. 440, 816 P.2d 509.

**Constructive possession.** — Constructive possession is sufficient to convict for trafficking by possession with intent to distribute. *State v. Zamora*, 2005-NMCA-039, 137 N.M. 301, 110 P.3d 517, cert. quashed, 2005-NMCERT-012, 138 N.M. 772, 126 P.3d 1136.

**Narcotic character.** — The burden of proof was on the defendant to prove that substance identified as heroin was not a narcotic drug as an exemption or exception. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**Proving intent by inference.** — Intent may be proved by inference from the surrounding facts and circumstances, such as the quantity and manner of packaging of the controlled substance. *State v. Muniz*, 1990-NMCA-105, 110 N.M. 799, 800 P.2d 734, cert. denied, 110 N.M. 749, 799 P.2d 1121.

**Proving knowledge of narcotic character.** — While there is no requirement that proof of possession with knowledge of narcotic character should be by direct or uncontradicted evidence, nevertheless, the evidence must be such as discloses some conduct, declarations or actions on the part of the defendant sufficient to satisfy the fact finder beyond a reasonable doubt that he had knowledge of the presence and nature of the narcotics. *State v. Garcia*, 1966-NMSC-063, 76 N.M. 171, 413 P.2d 210, *overruled on other gounds by State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.

**Proof of possession of controlled substance** may be established by evidence of the conduct and actions of a defendant, and by circumstantial evidence connecting the defendant with the crime. *State v. Donaldson*, 1983-NMCA-064, 100 N.M. 111, 666 P.2d 1258, cert. denied, 100 N.M. 53, 665 P.2d 809.

**When inference of constructive possession proper.** — Since defendant's wife resided with him, he was not in exclusive possession of the premises, and an inference of constructive possession could not be drawn against him unless there were incriminating statements or circumstances tending to support the inference. *State v. Herrera*, 1977-NMCA-028, 90 N.M. 306, 563 P.2d 100, cert. denied, 90 N.M. 636, 567 P.2d 485.

**Admission of gun evidence was harmless error.** — Where defendant was charged with trafficking a controlled substance, tampering with evidence, resisting, evading, or obstructing an officer, and possession of drug paraphernalia after law enforcement officers conducted a traffic stop, during which defendant was found with a large amount of money on his lap and sixty-three small baggies of crack cocaine, and subsequently searched defendant's home, finding a .380 caliber semi-automatic pistol, several small zip-lock baggies, several digital scales, and a brown bag with small zip-lock baggies inside, and where, at trial, defendant objected to the admission of evidence that a gun was found at his residence, claiming that he was not armed at the time of his arrest and that the gun evidence created the impression that he was dangerous and that, in turn, encouraged the jury to convict him of trafficking a controlled substance rather than simple possession, the admission of the gun evidence, assuming error, was harmless. It was doubtful that the admission of the gun evidence had any probable impact on the jury's deliberations regarding trafficking versus possession, considering the evidence that defendant was apprehended with sixty-three baggies of crack cocaine, individually packaged, indicating that the drugs were intended for sale to individuals, in addition to the discovery of digital scales and empty small baggies at defendant's residence. *State v. Jackson*, 2021-NMCA-059, cert. denied.

### B. CIRCUMSTANTIAL EVIDENCE.

**Conviction sustained by circumstantial evidence.** — A conviction for trafficking in a controlled substance can be sustained by circumstantial evidence. *State v. Chouinard*, 1981-NMSC-096, 96 N.M. 658, 634 P.2d 680, cert. denied, 456 U.S. 930, 102 S. Ct. 1980, 72 L. Ed. 2d 447 (1982).

Circumstantial evidence is sufficient to support a conviction for possession of heroin with an intent to distribute where the defendant was caught with a small amount of heroin, there is an inference that more heroin was flushed down a toilet, and there was paraphernalia at the scene of the arrest consistent with distribution of heroin. *State v. Bejar*, 1984-NMCA-031, 101 N.M. 190, 679 P.2d 1288, cert. denied, 101 N.M. 189, 679 P.2d 1287; *State v. Bejar*, 1985-NMCA-093, 104 N.M. 138, 717 P.2d 591, cert. quashed, 104 N.M. 54, 716 P.2d 245.

**Circumstantial evidence on nature of substance.** — Although there was no direct scientific evidence that the substance which defendant was convicted of trafficking in by possession with intent to distribute was heroin, there was substantial, almost overwhelming, circumstantial evidence to that effect, which was sufficient to sustain the convictions. *State v. Armijo*, 1976-NMCA-125, 90 N.M. 10, 558 P.2d 1149.

**Inference of trafficking from amount of drug found.** — Evidence that the heroin found weighed 3.3 grams and was 16% pure while street heroin is usually 3% to 5% pure and packaged in weights of 20 to 40 milligrams, that reduction of the heroin to street purity packaged for street sale would result in at least 264 caps of heroin, that heroin is generally packaged for resale on the street in small tinfoil packets such as were found and that



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search failed to disclose paraphernalia indicating use of the heroin on the premises, permitted the inference that defendant intended to distribute the heroin. *State v. Herrera*, 1977-NMCA-028, 90 N.M. 306, 563 P.2d 100, cert. denied, 90 N.M. 636, 567 P.2d 485.

Proof of possession of a large quantity of a controlled substance, inconsistent with personal use, is sufficient proof of trafficking in a controlled substance. *State v. Donaldson*, 1983-NMCA-064, 100 N.M. 111, 666 P.2d 1258, cert. denied, 100 N.M. 53, 665 P.2d 809.

**Amount of drug inconsistent with personal use.** — If the amount of an illegal drug found in an accused's possession is not by itself sufficient to prove inconsistency with personal use, then the state must present testimony that the amount of drugs in the accused's possession is inconsistent with personal use or that the other items found in possession of the accused, such as drug paraphernalia or significant sums of cash, showed that the accused intended to transfer drugs. *State v. Hubbard*, 1992-NMCA-014, 113 N.M. 538, 828 P.2d 971, cert. denied, 113 N.M. 352, 826 P.2d 573.

**Using weight alone to show intent to distribute.** — Where there was no evidence of the concentration of the drug, and no evidence of how long it would normally take a single drug user to consume a given quantity, the weight of the amount recovered (just under two ounces) could not in itself enable a fact finder to conclude, beyond a reasonable doubt, that defendant intended to distribute the substance. *State v. Becerra*, 1991-NMCA-090, 112 N.M. 604, 817 P.2d 1246, cert. denied, 112 N.M. 440, 816 P.2d 509.

**Conspiracy to traffic.** — The size (one-half to one ounce amounts), frequency (nine transactions in approximately seven weeks) and manner of the transactions (cash, after the receipt of a phone call) were evidence sustaining defendant's conviction for conspiracy with two others to traffic in heroin, and the jury could properly conclude that the heroin defendant supplied was for resale. *State v. Armijo*, 1976-NMCA-125, 90 N.M. 10, 558 P.2d 1149.

## C. SUFFICIENCY OF EVIDENCE.

**Evidence of trafficking by possession was sufficient.** — Where a police officer found defendant passed out in a car; when defendant stepped out of the car, a plastic bag containing crack cocaine fell out of defendant's purse; the officer arrested defendant and conducted inventory searches of the car; the officer found two separate amounts of cash totaling $520, a crack pipe, a second bag containing nineteen "rocks" of crack cocaine, three cell phones and baggies in the console of the car; the car was owned by defendant and defendant was the sole occupant of the car; and an expert witness testified that based on the amount of cocaine, baggies, multiple cell phones and amount of cash found in the car, defendant was a trafficker, there was sufficient evidence to support defendant's conviction of trafficking by possession with intent to distribute cocaine. *State v. Rael-Gallegos*, 2013-NMCA-092, cert. denied, 2013-NMCERT-009.

**Sufficient evidence to convict of manufacturing methamphetamine.** — Where a police officer was dispatched to investigate a trash fire; the officer observed bottles of acetone in the burnt trash pile; the officer discovered a meth lab in the house near the trash fire; the officer discovered mail in the house with defendant's name on it; two persons who were on the property stated that defendant lived in the house; one person testified that defendant used Sudafed and the acetone to make methamphetamine, and that the person had obtained methamphetamine from defendant on the day the officer discovered the meth lab; and the other person testified that defendant had been at the house on the morning the officer discovered the meth lab, the evidence was sufficient to permit the jury to reasonably infer that defendant manufactured methamphetamine. *State v. Brown*, 2010-NMCA-079, 148 N.M. 888, 242 P.3d 455, cert. denied, 2010-NMCERT-007, 148 N.M. 611, 241 P.3d 612.

**Sufficient evidence.** — Where defendant quoted a price for methamphetamine to two contacts who wanted to sell the methamphetamine to undercover police officers; the contacts left defendant to meet the officers to confirm that the price was acceptable; the contacts returned to defendant and purchased the methamphetamine; and the contacts then delivered the methamphetamine to the officers in a public school parking lot, there was sufficient evidence to convict defendant, as a principal, of causing the transfer of methamphetamine in a drug free zone. *State v. Montes*, 2007-NMCA-083, 142 N.M. 211, 164 P.3d 102.

**Sufficient evidence of trafficking cocaine by distribution and by possession with intent to distribute.** — Where defendant was convicted of trafficking cocaine by distribution and by possession with intent to distribute, there was sufficient evidence to support defendant's convictions where the state presented evidence that the undercover officer gave an intermediary a $20 bill and watched as defendant removed an unknown substance from his mouth, gave it to the intermediary in exchange for the buy money, and the intermediary returned and gave the officer a package containing a small rock, which later tested positive as cocaine, and evidence that defendant sold the officer a second rock for $10 after the officer complained about the small size of the first rock of cocaine, from which a jury could reasonably infer that defendant was in possession of the first rock of cocaine and intended to transfer it to the officer through the intermediary and that defendant transferred the second rock of cocaine directly to the undercover officer. *State v. Bello*, 2017-NMCA-049, cert. denied.

**Sufficient evidence of trafficking controlled substances.** — Where defendant was charged with trafficking methamphetamine and distribution of synthetic cannabinoids after the state alleged that an accomplice, at the direction of defendant, delivered methamphetamine and synthetic cannabinoids hidden in deodorant sticks to an inmate confined in the Curry county detention center, there was sufficient evidence to sustain defendant's convictions beyond a reasonable doubt where the state presented evidence of recorded phone calls between defendant and the inmate where, according to testimony by the investigating officer, the two men used code words to discuss that defendant was going to obtain illegal narcotics by using the inmate's money from the jail, hide the narcotics in hygiene products, and send the hygiene products into the jail through a third person, and evidence that an inspection of the hygiene products at issue contained a green leafy substance and crystal-like substance wrapped in small baggies in the bottom of deodorant sticks, which were later identified as methamphetamine and synthetic cannabinoids. *State v. Salazar*, 2018-NMCA-030, cert. denied.

**Sufficient evidence of conspiracy to commit drug trafficking.** — Where defendant was convicted by a jury of conspiracy to commit drug trafficking, there was sufficient evidence to support the conviction where evidence established that defendant was associated with a methamphetamine trafficking organization known as the AZ Boys, that the organization was run by defendant's boyfriend and his brother, that defendant had asked a friend, who later became a police informant, to transport drugs, that the informant made several trips transporting drugs with defendant and her boyfriend in exchange for cash and drugs, and that law enforcement recovered four pounds of methamphetamine from the spare tire of the truck the informant had driven for the organization, and, based on evidence that defendant had options available to her other



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than committing the offense, a rational jury could have determined beyond a reasonable doubt that defendant did not act under duress. *State v. Catt*, 2019-NMCA-013, cert. denied.

**Overt act for attempt to manufacture methamphetamine.** — Defendant's acts, including obtaining and possessing suspiciously large amounts of pseudoephedrine and iodine, by traveling to Clovis to obtain inexpensive iodine, renting a motel room where unpackaged pseudoephedrine was stored, and smoking methamphetamine in a room containing over 5,000 pseudoephredrine pills, are sufficient to constitute an overt act in furtherance of the manufacture of methamphetamine. *State v. Brenn*, 2005-NMCA-121, 138 N.M. 451, 121 P.3d 1050, cert. denied, 2005-NMCERT-010, 138 N.M. 494, 122 P.3d 1263.

**Conviction despite no actual possession.** — Defendant failed to effect the crime of possession with intent to distribute because he never actually possessed the package containing cocaine which was addressed to him; nevertheless, the fact that he never actually possessed the package did not negate his intent to possess the package, as evidenced by his attempting to pick up the package, nor did it negate his intent to distribute the cocaine, as is evidenced by the amount of cocaine found in the package. Therefore, he was properly convicted of attempted trafficking under Section 30-28-1 NMSA 1978 and Subsection A(3) of this section. *State v. Curry*, 1988-NMCA-031, 107 N.M. 133, 753 P.2d 1321, cert. denied, 107 N.M. 132, 753 P.2d 1320.

When the evidence shows a third party engaging in drug trafficking by possession with intent to distribute a narcotic drug, and the defendant is the third party's accomplice, the evidence is sufficient to support a conviction under Subsection A(3). The fact defendant never touched the cocaine and was often not in the same room where the drug deal took place is not controlling. *State v. Bankert*, 1994-NMSC-052, 117 N.M. 614, 875 P.2d 370.

There was sufficient evidence for conviction since it was shown that the defendant was the owner of the premises from which the sale of illegal drugs was carried out in her presence and within her view. *State v. Chandler*, 1995-NMCA-033, 119 N.M. 727, 895 P.2d 249, cert. denied, 119 N.M. 617, 894 P.2d 394.

**Expert testimony identifying substance.** — Direct testimony by expert that he analyzed substance according to standard tests and found it to be morphine was sufficient evidence that the substance, which had been sold by defendant, was morphine, despite the fact that on cross-examination the expert did not remember specifically which tests he had used, nor how many different tests he conducted. *State v. Baca*, 1970-NMCA-075, 81 N.M. 686, 472 P.2d 651, cert. denied, 81 N.M. 721, 472 P.2d 984.

**Sufficient evidence to convict.** — Where (1) defendant "transferred cocaine to another"; (2) defendant "knew that it was cocaine or believed it to be cocaine or believed it to be some drug or other substance the possession of which is regulated or prohibited by law"; and (3) "this happened in New Mexico on or about the 21st day of July, 1994" there was sufficient evidence to convict. *State v. Cooper*, 1998-NMCA-180, 126 N.M. 500, 972 P.2d 1, cert. denied, 126 N.M. 532, 972 P.2d 351.

The following substantial evidence supports a conviction for trafficking cocaine with intent to distribute: (1) testimony that people came to the motel door asking for defendant; (2) the presence of a digital scale and razor blade indicating that cocaine was being cut and weighed for distribution; (3) evidence that a portion of the crack cocaine was ready for sale while another bundle was not yet cut in the bathroom; (4) defendant's presence in the bathroom area; and (5) the testimony of one of the detectives that the quantity seized and the drug paraphernalia were consistent with trafficking. *State v. Zamora*, 2005-NMCA-039, 137 N.M. 301, 110 P.3d 517, cert. quashed, 2005-NMCERT-012, 138 N.M. 772, 126 P.3d 1136.

**Identity of substance a jury question.** — Evidence that defendant stated he had brought five vials of morphine to an arranged meeting, that the vial sold, which was sealed and contained a yellowish liquid labeled dilaudid HCL, was taken from the same pocket as other vials and looked the same as others tested and shown to contain a morphine derivative, along with defendant's statement that he had injected the contents of a vial several hours before and was still feeling the effects, and fact that one of the users of the contents of the vial in question claimed to experience a "tingly feeling" was sufficient to present a jury question as to whether the contents of the vial sold were a controlled substance, and being substantial was sufficient to sustain conviction. *State v. Burrell*, 1976-NMCA-025, 89 N.M. 64, 547 P.2d 69.

**Inference of trafficking from possession by nonuser.** — Where evidence showed that defendant was in possession of more than 30 caps of heroin, while defendant himself testified that he was not and had never been a heroin user, the only possible inference was that defendant, at the least, intended to give the heroin away, and this evidence was sufficient to conclude that he was trafficking in heroin. *State v. Quintana*, 1975-NMCA-034, 87 N.M. 414, 534 P.2d 1126, cert. denied, 88 N.M. 28, 536 P.2d 1085, and cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975).

**Attempted trafficking of cocaine.** — Defendant was properly convicted for attempted trafficking in cocaine since he committed the overt acts of accepting a sizeable amount of cash from an undercover narcotics officer and engaging in prior discussion of the illicit transaction. *State v. Green*, 1993-NMSC-056, 116 N.M. 273, 861 P.2d 954.

**Purchaser not guilty of solicitation to traffic.** — Even though the defendant's actions in negotiating for the purchase of drugs fall within the definition of criminal solicitation, his conduct was necessarily incidental to the crime of trafficking through the sale of a controlled substance and he could not be guilty of solicitation to traffic. *State v. Pinson*, 1995-NMCA-045, 119 N.M. 752, 895 P.2d 274.

**Growing marijuana.** — Growing marijuana, without more, does not support a charge of trafficking in marijuana by manufacture. *State v. Shaulis-Powell*, 1999-NMCA-090, 127 N.M. 667, 986 P.2d 463, cert. denied, 127 N.M. 391, 981 P.2d 1209.

**Sufficient evidence.** — Where a police officer conducted a search incident to the arrest of defendant for DWI; the officer found a uniquely folded dollar bill in defendant's pocket; the officer unfolded the dollar bill and uncovered a white, powdery substance that was later confirmed to be cocaine; and the officer testified that dollar bills were often used as a way to conceal and later ingest cocaine, the evidence was sufficient for a reasonable jury to conclude that the evidence found on defendant was cocaine and that based on the way the dollar bill was folded and its location in defendant's pocket, defendant was aware that the substance was cocaine or another controlled substance. *State v. Armendariz-Nunez*, 2012-NMCA-041, 276 P.3d 963, cert. denied, 2012-NMCERT-003.

## V. INDICTMENT AND INFORMATION.

**Indictment charging alternatives.** — Where an indictment charged that the defendants "did intentionally distribute, possess with intent to distribute, or aided and abetted one another in the distribution of a controlled substance," the indictment gave each defendant notice that he must defend against each of these alternatives. *State v. Turner*, 1981-NMCA-144, 97 N.M. 575, 642 P.2d 178, cert. quashed, 98 N.M. 51, 644 P.2d 1039 (1982).

**Failure of indictment to refer to Subsection B does not render it invalid.** *State v. Bustamante*, 1978-NMCA-062, 91 N.M. 772, 581 P.2d 460.



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VI. JURY INSTRUCTIONS.

**Jury instruction for attempt to manufacture.** — The jury was properly instructed that it could convict defendant of attempt to manufacture methamphetamine under the theory of accessory liability if it found, beyond a reasonable doubt, that defendant intended that the crime of manufacturing be committed, an attempt to commit the crime was committed, and defendant helped, encouraged or caused the attempt to commit the crime. *State v. Brenn*, 2005-NMCA-121, 138 N.M. 451, 121 P.3d 1050, cert. denied, 2005-NMCERT-010, 138 N.M. 494, 122 P.3d 1263.

**Instructing on lesser included offense.** — Although possession of heroin is a lesser included offense of trafficking in heroin, it should not be instructed on when the evidence does not support the defendant's claim that possession was the highest crime which occurred. *State v. Hernandez*, 1986-NMCA-040, 104 N.M. 268, 720 P.2d 303, cert. denied, 104 N.M. 201, 718 P.2d 1349.

**Although possession is not an element** of trafficking by manufacture and a jury instruction on possession was not required to be given with the instruction on trafficking by manufacture, where possession is an issue in dispute, it would be error not to give the instruction on possession. *State v. Stefani*, 2006-NMCA-073, 139 N.M. 719, 137 P.3d 659, cert. denied, 2006-NMCERT-006, 140 N.M. 224, 141 P.3d 1278.

**Law reviews.** — For note and comment, "State v. Urioste: A Prosecutor's Dream and Defendant's Nightmare," see 34 N.M. L. Rev. 517 (2004).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M. L. Rev. 63 (1974).

For article, "Evidence II: Evidence of Other Crimes as Proof of Intent," see 13 N.M.L. Rev. 423 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 179, 181, 187, 188, 191.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 81 A.L.R.3d 1192.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute - state cases, 83 A.L.R.4th 629.

Entrapment as defense to charge of selling or supplying narcotics where government agents supplied narcotics to defendant and purchased them from him, 9 A.L.R.5th 464.

Validity, construction, and application of state laws imposing tax or license fee on possession, sale, or the like, of illegal narcotics, 12 A.L.R.5th 89.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 A.L.R.5th 1.

Validity, construction, and application of state statutes prohibiting sale or possession of controlled substances within specified distance of schools, 27 A.L.R.5th 593.

Criminality of act of directing to, or recommending, source from which illicit drugs may be purchased, 34 A.L.R.5th 125.

Sufficiency of evidence that possessor of heroin had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 78 A.L.R. Fed. 413.

Sufficiency of evidence that possessor of cocaine had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 80 A.L.R. Fed. 397.

Admissibility of expert evidence concerning meaning of narcotics code language in federal prosecution for narcotics dealing - modern cases, 104 A.L.R. Fed. 230.

Illegal drugs or narcotics involved in alleged offense as subject to discovery by defendant under Rule 16 of Federal Rules of Criminal Procedure, 109 A.L.R. Fed. 363.

Propriety of instruction of jury on "conscious avoidance" of knowledge of nature of substance or transaction in prosecution for possession or distribution of drugs, 109 A.L.R. Fed. 710.

Under what circumstances should total weight of mixture or substance in which detectable amount of controlled substance is incorporated be used in assessing sentence under United States sentencing guideline § 2D1.1 - post-*Chapman* cases, 113 A.L.R. Fed. 91.

28 C.J.S. Drugs and Narcotics § 159 et seq.

## 30-31-21. Distribution to a minor.

Except as authorized by the Controlled Substances Act, no person who is eighteen years of age or older shall intentionally distribute a controlled substance to a person under the age of eighteen years. Any person who violates this section with respect to a controlled substance enumerated in Schedule I, II, III or IV or a controlled substance analog of any controlled substance enumerated in Schedule I, II, III or IV is:

(1) for the first offense, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) for the second and subsequent offenses, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: 1953 Comp., § 54-11-21, enacted by Laws 1972, ch. 84, § 21; 1974, ch. 9, § 2; 1980, ch. 23, § 2; 1987, ch. 68, § 3; 2021 (1st S.S.), ch. 4, § 66.**

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, removed the distribution of marijuana from the application of the section; and deleted former Subsection A and former subsection designation "B".

ANNOTATIONS

**Constitutionality.** — Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties therefor, are not unconstitutional under N.M. Const., art. IV, § 16, because of the fact that "unlawful activities" are not mentioned in the title of the act. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**Greater penalty imposed on seller than on user.** — The legislature clearly intended to impose greater penalties on the seller of a controlled substance than upon the user. *State v. Sandoval*, 1982-NMCA-091, 98 N.M. 417, 649 P.2d 485.

**Distribution by mail.** — Neither the federal constitution nor 18 U.S.C. § 1716 preempts New Mexico jurisdiction over distribution of controlled substances to



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a minor through the use of the mails. *State v. McHorse*, 1973-NMCA-144, 85 N.M. 753, 517 P.2d 75.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M. L. Rev. 63 (1974).

For note and comment, "State v. Urioste: A Prosecutor's Dream and Defender's Nightmare," see 34 N.M. L. Rev. 517 (2004).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Giving, selling or prescribing dangerous drugs as contributing to the delinquency of a minor, 36 A.L.R.3d 1292.

## 30-31-22. Controlled or counterfeit substances; distribution prohibited.

A. Except as authorized by the Controlled Substances Act, it is unlawful for a person to intentionally distribute or possess with intent to distribute a controlled substance or a controlled substance analog except a substance enumerated in Schedule I or II that is a narcotic drug, a controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug or methamphetamine, its salts, isomers and salts of isomers. A person who violates this subsection with respect to:

(1) synthetic cannabinoids is:

(a) for the first offense, guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(b) for the second and subsequent offenses, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(c) for the first offense, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(d) for the second and subsequent offenses, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(2) any other controlled substance enumerated in Schedule I, II, III or IV or a controlled substance analog of a controlled substance enumerated in Schedule I, II, III or IV except a substance enumerated in Schedule I or II that is a narcotic drug, a controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug or methamphetamine, its salts, isomers and salts of isomers, is:

(a) for the first offense, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(b) for the second and subsequent offenses, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(3) a controlled substance enumerated in Schedule V or a controlled substance analog of a controlled substance enumerated in Schedule V is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars ($100) or more than five hundred dollars ($500) or by imprisonment for a definite term not less than one hundred eighty days but less than one year, or both.

B. It is unlawful for a person to distribute gamma hydroxybutyric acid or flunitrazepam to another person without that person's knowledge and with intent to commit a crime against that person, including criminal sexual penetration. For the purposes of this subsection, "without that person's knowledge" means the person is unaware that a substance with the ability to alter that person's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is being distributed to that person. Any person who violates this subsection is:

(1) for the first offense, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) for the second and subsequent offenses, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Except as authorized by the Controlled Substances Act, it is unlawful for a person to intentionally create or deliver, or possess with intent to deliver, a counterfeit substance. A person who violates this subsection with respect to:

(1) a counterfeit substance enumerated in Schedule I, II, III or IV is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and



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(2) a counterfeit substance enumerated in Schedule V is guilty of a petty misdemeanor and shall be punished by a fine of not more than one hundred dollars ($100) or by imprisonment for a definite term not to exceed six months, or both.

D. A person who knowingly violates Subsection A or C of this section while within a drug-free school zone with respect to:

(1) synthetic cannabinoids is:

(a) for the first offense, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(b) for the second and subsequent offenses, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(c) for the first offense, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(d) for the second and subsequent offenses, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(2) any other controlled substance enumerated in Schedule I, II, III or IV or a controlled substance analog of a controlled substance enumerated in Schedule I, II, III or IV except a substance enumerated in Schedule I or II that is a narcotic drug, a controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug or methamphetamine, its salts, isomers and salts of isomers, is:

(a) for the first offense, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(b) for the second and subsequent offenses, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(3) a controlled substance enumerated in Schedule V or a controlled substance analog of a controlled substance enumerated in Schedule V is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(4) the intentional creation, delivery or possession with the intent to deliver:

(a) a counterfeit substance enumerated in Schedule I, II, III or IV is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(b) a counterfeit substance enumerated in Schedule V is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) or by imprisonment for a definite term not less than one hundred eighty days but less than one year, or both.

E. Notwithstanding the provisions of Subsection A of this section, distribution of a small amount of synthetic cannabinoids for no remuneration shall be treated as provided in Paragraph (1) of Subsection B of Section 30-31-23 NMSA 1978.

**History: 1953 Comp., § 54-11-22, enacted by Laws 1972, ch. 84, § 22; 1974, ch. 9, § 3; 1977, ch. 183, § 1; 1980, ch. 23, § 3; 1987, ch. 68, § 4; 1990, ch. 19, § 4; 2005, ch. 280, § 6; 2006, ch. 17, § 3; 2011, ch. 16, § 2; 2021 (1st S.S.), ch. 4, § 67.**

**Cross references.** — For legal use of marijuana in research, *see* 26-2A-1 to 26-2A-7 NMSA 1978.

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, removed the distribution of marijuana from the application of the section; in Subsection A, Paragraph A(1), after the paragraph designation, deleted "marijuana or"; and in Subsection D, Paragraph D(1), after the paragraph designation, deleted "marijuana or".

**The 2011 amendment,** effective March 31, 2011, made it a crime to possess and distribute synthetic cannabinoids.

**The 2006 amendment,** effective July 1, 2006, added a provision to Subsection A to provide that it is unlawful to possess with intent to distribute methamphetamine and its salts and isomers; added the provision to Paragraph (2) of Subsection A that a person who violates Subsection A with respect to methamphetamine and its salts and isomers is subject to the penalties specified in Paragraph (2) of Subsection A; deleted the former provision in Subsection D that excluded private property residentially zoned or used primarily as a residence; and added the provision in Paragraph (2) of Subsection D that a person who violates Subsections A and C while in a drug-free school zone with respect to methamphetamine and its salts and isomers is subject to the penalties specified in Paragraph (2) of Subsection D.

**The 2005 amendment,** effective June 17, 2005, added Subsection B to provide that it is unlawful distribute the specified chemicals to a person without that person's knowledge with the intent to commit a crime against that person; defined "without that person's knowledge"; and provided that a first offense of violating Subsection B is a third degree felony and a second and subsequent offense is a second degree felony.



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**The 1990 amendment,** effective July 1, 1990, added Subsection C, designated the former last sentence of Subsection B as present Subsection D, and made minor stylistic changes in Subsections A and B.

## ANNOTATIONS

I. GENERAL CONSIDERATION.
II. ELEMENTS OF DISTRIBUTION OF CONTROLLED OR COUNTERFEIT SUBSTANCE.
III. DOUBLE JEOPARDY.
IV. EVIDENCE AND PROOF.
A. IN GENERAL.
B. CIRCUMSTANTIAL EVIDENCE.
C. SUFFICIENCY OF EVIDENCE.
V. JURY INSTRUCTIONS.

### I. GENERAL CONSIDERATION.

**Title constitutional.** — Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties therefor, are not unconstitutional on the grounds that "unlawful activities" are not mentioned in the title of the act. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**Greater penalty imposed on seller than on user.** — The legislature clearly intended to impose greater penalties on the seller of a controlled substance than upon the user. *State v. Sandoval*, 1982-NMCA-091, 98 N.M. 417, 649 P.2d 485.

**Marijuana use not intrinsic part of religion.** — Where the evidence shows that defendant's belief was derived from defendant's personal views of the bible, and those views under the evidence are no more than that the use and distribution of marijuana was permitted because marijuana is a gift from God, such a personal use does not amount to an intrinsic part of a religion. *State v. Brashear*, 1979-NMCA-027, 92 N.M. 622, 593 P.2d 63.

**Effect of Subsection C (now Subsection E).** — The "notwithstanding" provision of Subsection C (now E) does not provide for a lesser penalty for the first marijuana distribution offense but rather affects only the penalties for second and subsequent marijuana distribution offenses; for second and subsequent marijuana distribution offenses that factually come within Subsection C (now Subsection E), the penalty of Section 30-31-23B(3) NMSA 1978 applies, and a defendant thus avoids the higher penalty stated in Subsection A(1)(b) of this section. *State v. Bustamante*, 1978-NMCA-062, 91 N.M. 772, 581 P.2d 460.

**Penalty applicable to drugs scheduled by regulation.** — Express legislative authority is not required to make the penalty provisions of the Controlled Substances Act applicable to drugs scheduled by administrative regulation. *State v. Reams*, 1981-NMCA-158, 98 N.M. 372, 648 P.2d 1185, *aff'd in part, rev'd on other grounds*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

**Sections not conflicting.** — There is no conflict between Subsection A of this section and Sections 30-31-20A(3) and B NMSA 1978. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**Distribution of quaalude.** — This section, and not Section 26-1-16A NMSA 1978, is the appropriate legislation under which defendants are to be prosecuted for allegedly unauthorized distribution of quaalude. *State v. Reams*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

**Sentencing under Habitual Offenders Act.** — In 1983 the habitual offender statute was amended to include persons convicted of narcotics offenses, overruling that part of *State v. Lujan*, 1966-NMSC-051, 76 N.M. 111, 412 P.2d 405, which held that the Habitual Offender Act did not apply to persons convicted under the Controlled Substances Act. *Minner v. Kerby*, 30 F.3d 1311 (10th Cir. 1994).

**Applicability of former habitual criminal law to burglary conviction after drug offense.** — There was no conflict between the provisions of Subsection A of this section and Section 31-18-5 NMSA 1978 (repealed, *see* Section 31-18-17 NMSA 1978), nor any legislative intent within the Controlled Substances Act, to prohibit use of a Controlled Substances Act conviction to enhance a subsequent burglary conviction, since it was the fact of the prior felony that was the basis for the enhanced sentence for the current burglary. *State v. Jordan*, 1975-NMCA-102, 88 N.M. 230, 539 P.2d 620.

### II. ELEMENTS OF DISTRIBUTION OF CONTROLLED OR COUNTERFEIT SUBSTANCE.

**Distribution by prescription.** — When a physician writes a prescription neither for a legitimate medical purpose nor in the usual course of his professional practice, he is "distributing" drugs. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**Narcotic drugs not included.** — Subsection A of this section concerns unlawful conduct involving controlled substances other than the narcotic drugs enumerated in Schedules I and II. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**Drugs excluded.** — The "except" language in Subsection A excludes a narcotic drug such as heroin, enumerated in Schedule I, from the purview of the subsection. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**Sale of narcotics is not involved under this section.** *State v. Montoya*, 1974-NMCA-025, 86 N.M. 155, 520 P.2d 1100, *overruled on other grounds by State v. Bender*, 1978-NMSC-044, 91 N.M. 670, 579 P.2d 796.

**Mere possession insufficient.** — A conviction based on the offense of possession of marijuana with intent to illegally sell and deliver cannot be sustained upon proof of illegal possession alone and the verdict and judgment based thereon must be reversed. *State v. Moreno*, 1961-NMSC-070, 69 N.M. 113, 364 P.2d 594.

**Place of distribution immaterial.** — The crime of possession with intent to distribute is complete if there is possession with the requisite intent, and the state is not required to prove the place of the intended distribution. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300, cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975).

### III. DOUBLE JEOPARDY.

**Double jeopardy.** — Defendant's convictions for possession of methamphetamine and possession of methamphetamine with intent to distribute based on a single act of possessing methamphetamine violated the Double Jeopardy Clause. *State v. Quick*, 2009-NMSC-015, 146 N.M. 80, 206 P.3d 985.

**Lesser included offense.** — The separate crimes of possession of methamphetamine and possession of methamphetamine with intent to distribute apply in the alternative when based on a single act of possession. *State v. Quick*, 2009-NMSC-015, 146 N.M. 80, 206 P.3d 985.

**Possession is lesser offense necessarily included in distribution of marijuana.** *State v. Medina*, 1975-NMCA-033, 87 N.M. 394, 534 P.2d 486.

**Distribution prosecution barred by conviction of possession.** — Where defendant was convicted of the lesser offense of possession of marijuana, the principles



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of double jeopardy barred his subsequent prosecution of the greater offense of distribution. *State v. Medina*, 1975-NMCA-033, 87 N.M. 394, 534 P.2d 486.

**Retrial for possession barred.** — When two counts were charged in an indictment, one for illegal possession of marijuana and the other for possession with intent to sell, an instruction by the court that the jury was to disregard the possession count if it found defendant guilty of the latter offense operated as an acquittal on the possession count and prevented retrial of this issue when the verdict on possession with intent to distribute was overturned. *State v. Moreno*, 1961-NMSC-070, 69 N.M. 113, 364 P.2d 594.

**Constructive proof of possession sufficient.** — Proof of actual possession is not necessary to sustain a conviction of possession of marijuana with intent to distribute. Constructive possession will suffice. *State v. Muniz*, 1990-NMCA-105, 110 N.M. 799, 800 P.2d 734, cert. denied, 110 N.M. 749, 799 P.2d 1121.

## IV. EVIDENCE AND PROOF.

### A. IN GENERAL.

**Police officer's suspicions based on experience.** — Where the police officer had 11 years of experience, of which he had spent eight years in the drug interdiction program actively participating in exercises on the freeways in various counties, and he estimated making an average of five drug trafficking arrests per year during that time, with up to 85 percent of those arrests involving rental cars and he testified that in his experience, it was common to find rental cars being used to transport drugs, frequently where the actual renter of the vehicle was not present, in light of the totality of the circumstances and the officer's training and experience, the officer's suspicion about drugs was based on specific articulable facts and the reasonable inferences that could be drawn from those facts. *State v. Van Dang*, 2005-NMSC-033, 138 N.M. 408, 120 P.3d 830.

**Nature of substance inferred.** — Where all of the alleged marijuana was in the form of bricks having the same size, color and appearance as those tested, the fact finder could infer from the evidence that the remaining substance was the same as the tested portion. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300, cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975).

**Evidence not inherently improbable.** — Testimony in prosecution for unlawful sale and possession of marijuana was not inherently improbable despite fact that defendant was claimed to have insisted on delivering the cigarettes in question in the restroom where only he and undercover officer were present, yet afterwards supposedly received the money for the transaction and discussed other possible dealings in a car in the presence of several other persons. *State v. Soliz*, 1969-NMCA-043, 80 N.M. 297, 454 P.2d 779.

**Establishing entrapment.** — The necessity of having to resort to a greater degree of subterfuge, or to exercise more persistence, in making inquiries to set up an illegal sale of marijuana, without more, does not constitute evidence of illegal entrapment, nor is it necessary that a suspected crime be in the process of being committed in order to show a predisposition to commit that crime. *State v. Akin*, 1965-NMSC-078, 75 N.M. 308, 404 P.2d 134.

**Similar offenses indicative of predisposition.** — When the defense is entrapment, evidence of similar narcotics offenses bears on the defendant's predisposition, or readiness and willingness, to commit the offenses for which he is charged; and evidence of prior similar sales of heroin within a period shortly before those in question was admissible on the issue of entrapment. *State v. Anaya*, 1969-NMCA-120, 81 N.M. 52, 462 P.2d 637.

**Entrapment for the jury.** — Defendant's testimony that he was having financial difficulties, with his wife expecting a baby and his daughter having problems, and that he considered agent's numerous requests that he obtain marijuana for a month or two before he finally agreed to involve himself, raised a factual issue as to whether the criminal conduct was the product of the agent's creative activity. *State v. Martinez*, 1971-NMCA-110, 83 N.M. 13, 487 P.2d 923.

**Entrapment not shown.** — Suggestion that the act of officer in supplying the defendant with his favorite brand of whiskey constituted undue inducement was without merit where defendant not only dealt in the illegal sale of beer but also drank beer and whiskey of his own as well as that furnished by others. *State v. Akin*, 1965-NMSC-078, 75 N.M. 308, 404 P.2d 134.

**Evidence of knowledge and control.** — Even if someone else had knowledge of the presence of marijuana in defendant's bedroom and exercised some control over it, defendant could also have had sufficient knowledge and control to be in constructive possession, and the link establishing defendant's knowledge and control was evidence of his commerce in illicit drugs. *State v. Muniz*, 1990-NMCA-105, 110 N.M. 799, 800 P.2d 734, cert. denied, 110 N.M. 749, 799 P.2d 1121.

### B. CIRCUMSTANTIAL EVIDENCE.

**Inference of intent to distribute.** — While there was no evidence of defendants' sale or an attempted sale of marijuana, the possession of 246.15 pounds of the substance, together with the defendants' activities, allowed the court to infer that the defendants had the necessary intent to distribute. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300, cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975).

Evidence of the amount of the cocaine possessed, about three grams, and evidence of the packaging and purity of the cocaine, as well as evidence that defendant had on his person a relatively large amount of cash, supported the state's argument that appellant intended to distribute the cocaine. *Minner v. Kerby*, 30 F.3d 1311 (10th Cir. 1994).

### C. SUFFICIENCY OF EVIDENCE.

**Shared criminal intent.** — Evidence regarding marijuana transaction established more than the mere presence of the defendant during the consummation of the sale, supporting a finding that he was in charge and directing the sale, or at least counseling, aiding and abetting in its consummation and sharing a criminal intent and purpose with the others. *State v. Favela*, 1968-NMCA-065, 79 N.M. 490, 444 P.2d 1001.

**Evidence of possession.** — There was sufficient evidence for conviction since it was shown that the defendant was the owner of the premises from which the sale of illegal drugs was carried out in her presence and within her view. *State v. Chandler*, 1995-NMCA-033, 119 N.M. 727, 895 P.2d 249, cert. denied, 119 N.M. 617, 894 P.2d 394.

**Constructive possession and sale shown.** — Evidence that witness bought six ounces of marijuana from defendant, who then gave witness detailed instructions as to the location of the drug behind a metal shack near the road leading to the airport, was ample evidence that defendant had constructive possession of and sold the marijuana to the witness. *State v. Wesson*, 1972-NMCA-013, 83 N.M. 480, 493 P.2d 965.

**Testimony of a single witness was sufficient evidence for conviction** of unlawful possession and sale of marijuana. *State v. Soliz*, 1969-NMCA-043, 80 N.M. 297, 454 P.2d 779.

**Modified trustworthiness standard did not apply to defendant's extrajudicial statements.** — Where defendant was convicted of conspiracy to commit drug trafficking by distribution, his pre-crime and course-of-crime statements were not subject to the modified



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trustworthiness standard, because the majority position views statements made prior to and in the course of the crime as bearing none of the indicia of unreliability as post-crime confessions and that there is little need for independent proof that the crime occurred as a safeguard against a conviction for an imagined crime where the defendant's statements at issue were made in the course of the crime. *State v. Saiz*, 2017-NMCA-072, cert. denied.

**Sufficient evidence of conspiracy to commit trafficking by distribution.** — Where defendant was convicted of conspiracy to commit drug trafficking by distribution, defendant's statements assuring the undercover officer of the existence of an agreement to sell him methamphetamine and his actions attempting to achieve the sale were sufficient evidence to prove beyond a reasonable doubt that defendant committed conspiracy to commit drug trafficking by distribution, and it was irrelevant that defendant did not receive money from the undercover officer, no drugs were ever produced or verified, and no co-conspirator was ever seen, identified, or verified. *State v. Saiz*, 2017-NMCA-072, cert. denied.

**Evidence sufficient to find intent to distribute.** — In prosecution for possession of methamphetamine with intent to distribute, based upon the record, where the state presented enough circumstantial evidence to support an inference of both knowledge and control, and therefore possession of methamphetamine, there was sufficient evidence from which a rational jury could have found that defendant intended to distribute that methamphetamine. *State v. Barber*, 2004-NMSC-019, 135 N.M. 621, 92 P.3d 633.

**Evidence sufficient to infer knowledge.** — Defendant's conduct in selling pills, coupled with his assertion that they would get an undercover agent "good and high," was sufficient evidence from which to infer defendant's knowledge of a controlled substance. *State v. Martinez*, 1986-NMCA-069, 104 N.M. 584, 725 P.2d 263.

**Evidence sufficient to support conviction.** — Evidence, including defendant's exclusive control of the vehicle in which marijuana was found, his lies to the arresting officer, and his nervous demeanor were sufficient to allow a jury to find that he had knowledge of the marijuana. *State v. Hernandez*, 1998-NMCA-082, 125 N.M. 661, 964 P.2d 825.

An undercover agent's testimony that defendant sold him marijuana on two occasions was sufficient evidence to support defendant's conviction for distributing marijuana. *State v. Laskay*, 1986-NMCA-008, 103 N.M. 799, 715 P.2d 72.

Defendant's conviction for possession of marijuana with intent to distribute was affirmed, where the evidence showed that: (1) the black book that defendant used for his drug transactions was kept in his residence, (2) defendant used the bedroom in which the marijuana was found at least to the extent of keeping his correspondence, including a bill for the pager used in his drug transactions, and (3) the marijuana found in a closet was packaged for distribution. *State v. Muniz*, 1990-NMCA-105, 110 N.M. 799, 800 P.2d 734, cert. denied, 110 N.M. 749, 799 P.2d 1121.

Evidence was sufficient to support defendant's conviction for possession of a controlled substance with intent to distribute where he was in a closed bathroom alone with the drugs and paraphernalia, he had no clean clothes with him, and after five minutes in the bathroom, he had not taken a shower and there was no indication that he was planning to do so; additionally, the folded business card found on the toilet with a powdery substance in the crease and with handwritten notations of what appeared to have been drug transactions, connected defendant to the control over and distribution of the drugs. *State v. Barber*, 2003-NMCA-053, 133 N.M. 540, 65 P.3d 1095, *aff'd*, 2004-NMSC-019, 135 N.M. 621, 92 P.3d 633.

**Sufficient evidence that chemicals were synthetic cannabinoids.** — Where defendant was convicted of trafficking methamphetamine and distribution of synthetic cannabinoids based on evidence that an accomplice, at the direction of defendant, delivered methamphetamine and the chemicals PB-22 and 5F-PB22 hidden in deodorant sticks to an inmate confined in the Curry county detention center, and where defendant claimed that the state failed to prove that the substances were synthetic cannabinoids because the particular chemicals were not listed as controlled substances under the New Mexico Controlled Substances Act (CSA), there was sufficient evidence to establish beyond a reasonable doubt that the chemicals collected from the deodorant sticks were "synthetic cannabinoids" within the meaning of this section where the state presented testimony from an expert in forensic chemistry that the chemicals PB-22 and 5F-PB22 are categorized as synthetic cannabinoids because while completely synthetic, the chemicals mimic the effects of cannabis. *State v. Salazar*, 2018-NMCA-030, cert. denied.

**Sufficient evidence of distribution of synthetic cannabinoids.** — Where defendant was charged with trafficking methamphetamine and distribution of synthetic cannabinoids after the state alleged that an accomplice, at the direction of defendant, delivered methamphetamine and synthetic cannabinoids hidden in deodorant sticks to an inmate confined in the Curry county detention center, there was sufficient evidence to sustain defendant's convictions beyond a reasonable doubt where the state presented evidence of recorded phone calls between defendant and the inmate where, according to testimony by the investigating officer, the two men used code words to discuss that defendant was going to obtain illegal narcotics by using the inmate's money from the jail, hide the narcotics in hygiene products, and send the hygiene products into the jail through a third person, and evidence that an inspection of the hygiene products at issue contained a green leafy substance and crystal-like substance wrapped in small baggies in the bottom of deodorant sticks, which were later identified as methamphetamine and synthetic cannabinoids. *State v. Salazar*, 2018-NMCA-030, cert. denied.

## V. JURY INSTRUCTIONS.

**Instructing on intent.** — An instruction substantially in terms of the statute is sufficient. *State v. Tucker*, 1974-NMCA-049, 86 N.M. 553, 525 P.2d 913, cert. denied, 86 N.M. 528, 525 P.2d 888, *overruled on other grounds by State v. Bender*, 1978-NMSC-044, 91 N.M. 670, 579 P.2d 796.

Instructions which are phrased in the terms of this statute were sufficient on element of intent. *State v. Fuentes*, 1973-NMCA-069, 85 N.M. 274, 511 P.2d 760, cert. denied, 85 N.M. 265, 511 P.2d 751.

**Instruction defining possession.** — In prosecution for possession of methamphetamine with intent to distribute, although defendant would have been entitled to a jury instruction defining possession, absent defense counsel's request, the trial court was not required to provide the instruction sua sponte. *State v. Barber*, 2004-NMSC-019, 135 N.M. 621, 92 P.3d 633.

**Presumption of innocence.** — In prosecution for unlawfully selling and unlawfully furnishing or giving away marijuana, it was error for the trial court to fail to instruct the jury on the presumption of innocence, where defendant requested an instruction thereon. *State v. Henderson*, 1970-NMCA-022, 81 N.M. 270, 466 P.2d 116.

**Law reviews.** — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M. L. Rev. 63 (1974).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 179, 181, 187, 188, 191.



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Free exercise of religion as defense to prosecution for narcotic or psychedelic drug offense, 35 A.L.R.3d 939.

Permitting unlawful use of narcotics in private home as criminal offense, 54 A.L.R.3d 1297.

Conviction of possession of illicit drugs found in premises or of which defendant was in nonexclusive possession, 56 A.L.R.3d 948.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute - state cases, 83 A.L.R.4th 629.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 A.L.R.5th 1.

Sufficiency of random sampling of drug or contraband to establish jurisdictional amount required for conviction, 45 A.L.R.5th 1.

Sufficiency of evidence that possessor of heroin had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 78 A.L.R. Fed. 413.

Sufficiency of evidence that possessor of marijuana had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 79 A.L.R. Fed. 113.

Sufficiency of evidence that possessor of controlled substance other than cocaine, heroin, or marijuana had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 80 A.L.R. Fed. 507.

Sufficiency of showing, in prosecution under Travel Act (18 USC § 1952), of act by accused, subsequent to accused's travel or use of facilities in interstate or foreign commerce, which furthers unlawful activity involving narcotics or controlled substances, 113 A.L.R. Fed. 625.

Admissibility, under Rule 404(b) of Federal Rules of Evidence (28 USCS Appx, Federal Rules of Evidence, Rule 404(b)), of evidence of accused's prior use of illegal drugs in prosecution for conspiracy to distribute such drugs, 114 A.L.R. Fed. 511.

28 C.J.S. Drugs and Narcotics § 156 et seq.

## 30-31-23. Controlled substances; possession prohibited.

A. It is unlawful for a person intentionally to possess a controlled substance unless the substance was obtained pursuant to a valid prescription or order of a practitioner while acting in the course of professional practice or except as otherwise authorized by the Controlled Substances Act. It is unlawful for a person intentionally to possess a controlled substance analog.

B. A person who violates this section with respect to:

(1) one ounce or less of synthetic cannabinoids is, for the first offense, guilty of a petty misdemeanor and shall be punished by a fine of not less than fifty dollars ($50.00) or more than one hundred dollars ($100) and by imprisonment for not more than fifteen days, and, for the second and subsequent offenses, is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars ($100) or more than one thousand dollars ($1,000) or by imprisonment for a definite term less than one year, or both;

(2) more than one ounce and less than eight ounces of synthetic cannabinoids is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars ($100) or more than one thousand dollars ($1,000) or by imprisonment for a definite term less than one year, or both; or

(3) eight ounces or more of synthetic cannabinoids is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. A minor who violates this section with respect to the substances listed in this subsection is guilty of a petty misdemeanor and, notwithstanding the provisions of Sections 32A-1-5 and 32A-2-19 NMSA 1978, shall be required to perform no more than forty-eight hours of community service. For the third or subsequent violation by a minor of this section with respect to those substances, the provisions of Section 32A-2-19 NMSA 1978 shall govern punishment of the minor. As used in this subsection, "minor" means a person who is less than eighteen years of age. The provisions of this subsection apply to the following substances:

(1) synthetic cannabinoids;

(2) any of the substances listed in Paragraphs (17) through (22) of Subsection C of Section 30-31-6 NMSA 1978; or

(3) a substance added to Schedule I by a rule of the board adopted on or after March 31, 2011 if the board determines that the pharmacological effect of the substance, the risk to the public health by abuse of the substance and the potential of the substance to produce psychic or physiological dependence liability is similar to the substances described in Paragraph (1) or (2) of this subsection.

D. Except as provided in Subsections B and F of this section, and for those substances listed in Subsection E of this section, a person who violates this section with respect to any amount of any controlled substance enumerated in Schedule I, II, III or IV or a controlled substance analog of a



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substance enumerated in Schedule I, II, III or IV is guilty of a misdemeanor and shall be punished by a fine of not less than five hundred dollars ($500) or more than one thousand dollars ($1,000) or by imprisonment for a definite term less than one year, or both.

E. A person who violates this section with respect to phencyclidine as enumerated in Schedule III or a controlled substance analog of phencyclidine; methamphetamine, its salts, isomers or salts of isomers as enumerated in Schedule II or a controlled substance analog of methamphetamine, its salts, isomers or salts of isomers; flunitrazepam, its salts, isomers or salts of isomers as enumerated in Schedule I or a controlled substance analog of flunitrazepam, including naturally occurring metabolites, its salts, isomers or salts of isomers; gamma hydroxybutyric acid and any chemical compound that is metabolically converted to gamma hydroxybutyric acid, its salts, isomers or salts of isomers as enumerated in Schedule I or a controlled substance analog of gamma hydroxybutyric acid, its salts, isomers or salts of isomers; gamma butyrolactone and any chemical compound that is metabolically converted to gamma hydroxybutyric acid, its salts, isomers or salts of isomers as enumerated in Schedule I or a controlled substance analog of gamma butyrolactone, its salts, isomers or salts of isomers; 1-4 butane diol and any chemical compound that is metabolically converted to gamma hydroxybutyric acid, its salts, isomers or salts of isomers as enumerated in Schedule I or a controlled substance analog of 1-4 butane diol, its salts, isomers or salts of isomers; or a narcotic drug enumerated in Schedule I or II or a controlled substance analog of a narcotic drug enumerated in Schedule I or II is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

F. Except for a minor as provided in Subsection C of this section, a person who violates Subsection A of this section while within a posted drug-free school zone, excluding private property residentially zoned or used primarily as a residence and excluding a person in or on a motor vehicle in transit through the posted drug-free school zone, with respect to:

(1) one ounce or less of synthetic cannabinoids is, for the first offense, guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars ($100) or more than one thousand dollars ($1,000) or by imprisonment for a definite term less than one year, or both, and for the second or subsequent offense, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(2) more than one ounce and less than eight ounces of synthetic cannabinoids is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(3) eight ounces or more of synthetic cannabinoids is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(4) any amount of any other controlled substance enumerated in Schedule I, II, III or IV or a controlled substance analog of a substance enumerated in Schedule I, II, III or IV, except phencyclidine as enumerated in Schedule III, a narcotic drug enumerated in Schedule I or II or a controlled substance analog of a narcotic drug enumerated in Schedule I or II, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(5) phencyclidine as enumerated in Schedule III, a narcotic drug enumerated in Schedule I or II, a controlled substance analog of phencyclidine or a controlled substance analog of a narcotic drug enumerated in Schedule I or II is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: 1953 Comp., § 54-11-23, enacted by Laws 1972, ch. 84, § 23; 1974, ch. 9, § 4; 1980, ch. 23, § 4; 1983, ch. 183, § 1; 1987, ch. 68, § 5; 1989, ch. 123, § 1; 1990, ch. 19, § 5; 1990, ch. 33, § 1; 2005, ch. 280, § 7; 2011, ch. 16, § 3; 2019, ch. 217, § 1; 2021, ch. 15, § 1; 2021 (1st S.S.), ch. 4, § 68.**

**Cross references.** — For penalty for consumption or possession of alcoholic beverages on school property, *see* 22-5A-5 NMSA 1978.

For legal use of marijuana in research, *see* 26-2A-1 to 26-2A-7 NMSA 1978.

For provision authorizing conditional discharge for first possession offense, and providing for expungement of records relating to a minor so discharged, *see* 30-31-28 NMSA 1978.

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, removed the possession of marijuana from the application of the section; deleted former Subsection B and redesignated former Subsections C through G as Subsections B through F, respectively; in Subsection C, Paragraph C(2), after "Paragraphs", changed "(2) through (25)" to "(17) through (22)"; in Subsection D, after "Subsections B", deleted "C" and after the next occurrence of "and", deleted "G" and added "F", and after "Subsection", changed "F" to "E"; and in Subsection F, after "Subsection", changed "D" to "C", in Paragraph F(1), after "one ounce or less of", deleted



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"marijuana or", in Paragraph F(2), after "less than eight ounces of", deleted "marijuana or", and in Paragraph F(3), after "eight ounces or more of", deleted "marijuana or".

**The 2021 amendment,** effective June 18, 2021, eliminated the fine for possession of certain controlled substances committed by minors as a first offense, capped the number of hours of community service that may be imposed for minors who have committed the crime of possession of certain controlled substances as a first offense, and made technical changes; in Paragraph B(1), after "Section", changed "3 of this 2019 act" to "31-19A-1 NMSA 1978"; and in Subsection D, after "shall be", deleted "punished by a fine not to exceed one hundred dollars ($100) or" and added "required to perform no more than".

**The 2019 amendment,** effective July 1, 2019, decreased penalties for possession of marijuana; added new Subsection B and redesignated former Subsections B through D as Subsections C through E, respectively; in Subsection C, in Paragraph C(1), after "one ounce or less of", deleted "marijuana or", in Paragraph C(2), after "less than eight ounces of", deleted "marijuana or", in Paragraph C(3), after "eight ounces or more of", deleted "marijuana or"; and in Subsection E, after "Except", added "as provided in Subsections B, C and G of this section, and", and after "listed in Subsection", deleted "E" and added "F".

**The 2011 amendment,** effective March 31, 2011, made it a crime to possess synthetic cannabinoids and added Subsection C to make it a crime for a minor to possess synthetic cannabinoids, other synthetic drugs and substances added to Schedule I by the board of pharmacy.

**The 2005 amendment,** effective June 17, 2005, provided in Subsection D that it is a fourth degree felony to violate this section with respect to flunitrazepam, gamma hydroxybutyric acid and gamma butyrolactone, 1-4 butane diol; added Subsections E (1) through (5) to provide penalties for violations of Subsection A of this section in posted drug-free school zones, excluding certain private residential property and motor vehicles, with respect to the listed substances.

**The 1990 amendment,** effective July 1, 1990, substituted "or" for "and" at the end of Paragraph (2) of Subsection B, deleted former Paragraph (4) of Subsection B pertaining to violations with respect to specific controlled substances and providing a penalty, added Subsection C, redesignated former Paragraph (5) of Subsection B as Subsection D, and rewrote the provision which read "phencyclidine as enumerated in Schedule III a narcotic drug enumerated in Schedule I or II or a controlled substance analog of phencyclidine or a controlled substance analog of a narcotic drug enumerated in Schedule I or II, is guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.".

**The 1989 amendment,** effective July 1, 1989, inserted "or a controlled substance analog of phencyclidine" in Subsection B(4) and "or a controlled substance analog of phencyclidine or a controlled substance analog of a narcotic drug enumerated in Schedule I or II" in Subsection B(5); and made minor stylistic changes throughout Subsection B.

## ANNOTATIONS

I. GENERAL CONSIDERATION.
II. ELEMENTS OF POSSESSION.
III. DOUBLE JEOPARDY.
IV. EVIDENCE AND PROOF.
A. IN GENERAL.
B. CIRCUMSTANTIAL EVIDENCE.
C. SUFFICIENCY OF EVIDENCE.
V. INDICTMENT AND INFORMATION.

### I. GENERAL CONSIDERATION.

**Jury unanimity as to the form of cocaine involved in a lesser included offense of possession was not required.** — Where police officers found crack cocaine in defendant's vehicle and powder cocaine that belonged to defendant in the vehicle of defendant's friend; defendant was charged with one count of trafficking and one count of the lesser included offense of possession; the jury found defendant guilty of possession of cocaine; defendant claimed that there were two substances at issue and that the trial court failed to instruct the jury that any conviction of possession had to be based on the same substance considered by the jury for the trafficking offense; the state's theories of possession were based on the crack cocaine found in defendant's vehicle and the powder cocaine found in the friend's vehicle; and witnesses testified that a lab analysis does not distinguish between crack cocaine and powder cocaine and that both forms of cocaine were in quantities large enough to qualify for a count of trafficking, jury unanimity was not required as to the specific form of cocaine involved, jury unanimity was required only on the overall verdict. *State v. Godoy*, 2012-NMCA-084, 284 P.3d 410, cert. denied, 2012-NMCERT-007.

**Section is within scope of state's power and is valid on its face.** *Yanez v. Romero*, 619 F.2d 851 (10th Cir.), cert. denied, 449 U.S. 876, 101 S. Ct. 221, 66 L. Ed. 2d 98 (1980).

**Possession of heroin deemed felony under Habitual Offender Act.** — When a federal conviction is had in New Mexico upon a purchase of heroin in New Mexico, the "purchase" of heroin necessarily includes the actual or constructive "possession" of heroin, and actual or constructive possession of heroin is a felony under the laws of New Mexico for purposes of the Habitual Offender Act. *State v. Montoya*, 1980-NMSC-093, 94 N.M. 704, 616 P.2d 417.

**Habitual offender law inapplicable.** — Since the legislature intended an enhanced penalty to apply to a violation of the Controlled Substances Act it so provided within the act, the legislature did not intend that the habitual offender law was to apply to second or subsequent violations of Subsection B(5) (now D) of this section. *State v. Alderete*, 1975-NMCA-080, 88 N.M. 150, 538 P.2d 422.

**Comparison not warranted.** — Former Narcotic Drug Act (54-7-1, 1953 Comp. et seq.) was completely lacking in any legislative direction as to procedures in the event of second or subsequent convictions, and a comparison between the Narcotic Drug Act and former habitual criminal law was of no value. *State v. Rhodes*, 1966-NMSC-064, 76 N.M. 177, 413 P.2d 214.

**Due process certainty.** — The language of definitional Section 30-31-20 NMSA 1978 (now 30-31-2N NMSA 1978), referring to all parts of the cannabis plant whether growing or not, coupled with Subsection B(3) of this section, is not so indefinite that men of common intelligence must guess at its meaning and scope. *State v. Olive*, 1973-NMCA-131, 85 N.M. 664, 515 P.2d 668, cert. denied, 85 N.M. 639, 515 P.2d 643.

**Equal protection.** — Fact that the Controlled Substances Act does not specifically state when weighing of marijuana is to be done does not mean that Subsection B(3) of this section, as applied to defendant convicted of possession of more than eight ounces of "green" marijuana, was a violation of his rights to equal protection since it was the possession of marijuana, on the date of the offense, which was the prohibited act and not the amount in some subsequent form suitable to a particular defendant. *State v. Olive*, 1973-NMCA-131, 85 N.M. 664, 515 P.2d 668, cert. denied, 85 N.M. 639, 515 P.2d 643.

**Due process requirements in sentence enhancement.** — To meet due process requirements of essential fairness in sentencing defendant for a second drug offense, there must be some pleading filed by the state, whether by motion or otherwise, by which defendant is given notice of the state's charges, and defendant must be given an opportunity to be heard on the charges before an increased



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penalty can be imposed. *State v. Rhodes*, 1966-NMSC-064, 76 N.M. 177, 413 P.2d 214.

**Title constitutionally adequate.** — Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties therefor, are not unconstitutional on the grounds that "unlawful activities" are not mentioned in the title of the act. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**Standing to challenge section.** — Defendant's contention that this section violated his constitutional rights because he was a narcotic addict, where there was no evidence that he was an addict, was without merit. *State v. Jaramillo*, 1975-NMCA-091, 88 N.M. 179, 538 P.2d 1201.

**Marijuana use not intrinsic part of religion.** — Where the evidence shows that defendant's belief was derived from defendant's personal views of the bible, and those views under the evidence are no more than that the use and distribution of marijuana was permitted because marijuana is a gift from God, such a personal use does not amount to an intrinsic part of a religion. *State v. Brashear*, 1979-NMCA-027, 92 N.M. 622, 593 P.2d 63.

**Possession of narcotics, not addiction can be subject of prosecution.** — Addiction is a disease which cannot be the subject of prosecution under the eighth and fourteenth amendments of the United States constitution: possession of narcotics as a crime is valid and distinguishable. *Yanez v. Romero*, 619 F.2d 851 (10th Cir.), cert. denied, 449 U.S. 876, 101 S. Ct. 221, 66 L. Ed. 2d 98 (1980).

**Legal to search defendant admitting "dope" possession.** — Once the defendant voluntarily made the statement that there was "dope" in his pocket, a police officer had probable cause to believe that a crime was being committed, specifically, possession of a controlled substance. This provided a proper legal foundation for both a full search and the actual arrest of the defendant. *State v. Blakely*, 1993-NMCA-053, 115 N.M. 466, 853 P.2d 168, cert. denied, 115 N.M. 535, 854 P.2d 362.

## II. ELEMENTS OF POSSESSION.

**Possession.** — Mere proximity to illegal drugs, mere presence on the property where they are located, or mere association with persons who do control them, without more, is insufficient to support a finding of possession. *United States v. Espinosa*, 771 F.2d 1382 (10th Cir.), cert. denied, 474 U.S. 1023, 106 S.Ct. 579, 88 L. Ed. 2d 561 (1985).

**Possession and tampering distinguished.** — Possession of a controlled substance requires proof defendant knew or believed it was cocaine or some other substance that is regulated, which is not required to prove tampering, while tampering with evidence requires proof defendant intended to prevent the apprehension, prosecution or conviction of herself or others, which is not required to prove possession. *State v. Franco*, 2005-NMSC-013, 137 N.M. 447, 112 P.3d 1104.

Possession of a controlled substance can be committed without tampering with evidence. Conversely, tampering with evidence, even if the evidence is illegal drugs, can be committed without possessing the drugs. *State v. Franco*, 2005-NMSC-013, 137 N.M. 447, 112 P.3d 1104.

**Prohibition of "use" not vague.** — Former section prohibiting "unlawful use" of marijuana was not unconstitutionally vague, since all use of marijuana not falling within a stated exception was made unlawful. *State v. Covens*, 1971-NMCA-141, 83 N.M. 175, 489 P.2d 888 (decided under prior law).

**Meaning of "eight ounces".** — Weight of eight ounces mentioned in Subsection B(3) of this section means the weight of the plant, or the plant's derivative products, weighed in the form seized, whether that form be the green plant, the dried plant or the various products which may be derived from the plant. *State v. Olive*, 1973-NMCA-131, 85 N.M. 664, 515 P.2d 668, cert. denied, 85 N.M. 639, 515 P.2d 643.

**Intent required.** — Under 54-5-16, 1953 Comp. (now repealed), an intent to possess anhalonium (peyote) was required for conviction. *State v. Pedro*, 1971-NMCA-145, 83 N.M. 212, 490 P.2d 470 (decided under prior law, statute repealed).

**Locus of offense jurisdictional.** — Since state in prosecution for unlawful use of heroin failed to establish where defendant used the narcotic, an essential element of the offense charged, this jurisdictional error would be raised sua sponte by the appellate court and defendant's conviction reversed for failure of proof. *State v. Losolla*, 1972-NMCA-085, 84 N.M. 151, 500 P.2d 436.

**Possession coupled with knowledge.** — The state must prove that defendant had physical or constructive possession, coupled with knowledge of the presence and narcotic character of the substance possessed. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300, cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975); *State v. Baca*, 1974-NMCA-098, 87 N.M. 12, 528 P.2d 656, cert. denied, 87 N.M. 5, 528 P.2d 649; *State v. Bauske*, 1974-NMCA-078, 86 N.M. 484, 525 P.2d 411; *State v. Mosier*, 1971-NMCA-138, 83 N.M. 213, 490 P.2d 471; *State v. Maes*, 1970-NMCA-053, 81 N.M. 550, 469 P.2d 529, cert. denied, *sub nom. State v. Felix*, 81 N.M. 588, 470 P.2d 309 (1970).

**Possession means care, control and management** on the occasion in question. *State v. Mosier*, 1971-NMCA-138, 83 N.M. 213, 490 P.2d 471; *State v. Maes*, 1970-NMCA-053, 81 N.M. 550, 469 P.2d 529, cert. denied, *sub nom. State v. Felix*, 81 N.M. 588, 470 P.2d 309 (1970).

**Constructive possession defined.** — Constructive possession exists when the accused has knowledge of the presence of the narcotic and control over it. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300, cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975); *State v. Montoya*, 1973-NMCA-060, 85 N.M. 126, 509 P.2d 893.

**Exclusive possession is not required to support a conviction.** *State v. Favela*, 1968-NMCA-065, 79 N.M. 490, 444 P.2d 1001.

## III. DOUBLE JEOPARDY.

**Possession of methamphetamine and possession of drug paraphernalia .** — The legislature did not intend to punish a defendant for possession of a controlled substance and possession of paraphernalia when the paraphernalia consists of only a container that is storing a personal supply of the charged controlled substance and where the defendant was convicted of possession of methamphetamine and possession of drug paraphernalia based on the possession of a baggie that held the methamphetamine, the defendant's conviction of possession of drug paraphernalia violated double jeopardy. *State v. Almeida*, 2008-NMCA-068, 144 N.M. 235, 185 P.3d 1085.

**Lesser included offense.** — The separate crimes of possession of methamphetamine and possession of methamphetamine with intent to distribute apply in the alternative when based on a single act of possession. *State v. Quick*, 2009-NMSC-015, 146 N.M. 80, 206 P.3d 985.

**Possession of methamphetamine is a lesser included charge of possession with intent to distribute** methamphetamine and a conviction of both charges when defendant's conduct was unitary is a violation of double jeopardy. *State v. Lopez*, 2008-NMCA-002, 143 N.M. 274, 175 P.3d 942, cert. denied, 2008-NMCERT-007, 144 N.M. 593, 189 P.3d 1215.

**Possession is lesser offense necessarily included in distribution of marijuana.** *State v. Medina*, 1975-NMCA-033, 87 N.M. 394, 534 P.2d 486.

**Distribution prosecution barred by conviction of possession.** — The possession of marijuana was a lesser offense necessarily included in the greater offense



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of distribution of marijuana, and since the defendant was convicted of the lesser offense, the principles of double jeopardy barred the subsequent prosecution of the greater offense. *State v. Medina*, 1975-NMCA-033, 87 N.M. 394, 534 P.2d 486.

**Retrial for possession barred.** — Since two counts were charged in an indictment, one for illegal possession of marijuana and the other for possession with intent to sell, an instruction by the court that the jury was to disregard the possession count if it found defendant guilty of the latter offense operated as an acquittal on the possession count and prevented retrial of this issue when the verdict on possession with intent to distribute was overturned. *State v. Moreno*, 1961-NMSC-070, 69 N.M. 113, 364 P.2d 594.

**No double jeopardy violation.** — Convictions for possession of cocaine and tampering with evidence did not violate defendant's double jeopardy rights. *State v. Franco*, 2005-NMSC-013, 137 N.M. 447, 112 P.3d 1104.

## IV. EVIDENCE AND PROOF.

**Authentication of substance as cocaine by lay testimony.** — Where defendant was charged with trafficking and the lesser included offense of possession of cocaine; the state failed to present a laboratory analysis authenticating the substance found in defendant's vehicle as crack cocaine; when arrested, defendant raised the inference that the substance was an illegal narcotic by telling the arresting police officers that defendant was the user and that the substance was for defendant's personal use; three officers testified that the substance field tested for the presence of cocaine; one officer testified that the result of the test was positive; and two officers testified that based on their experience and training, the substance had the appearance of crack cocaine, the officers' opinions, combined with the actions and statements of defendant, provided sufficient evidence to support the admissibility of the crack cocaine into evidence. *State v. Godoy*, 2012-NMCA-084, 284 P.3d 410, cert. denied, 2012-NMCERT-007.

**Field drug test.** — The state has the burden to establish the validity of the scientific principles on which a field drug test is based and its scientific reliability when the state elects to rely on a field test to prove the identity of contraband. The testimony by a law enforcement officer will not, without more, be sufficient to support admission of the results, when the officer cannot explain the scientific principles that the test uses, the percentage of false positives or negatives that the test will produce, or the factors that may produce those false results. The state can avoid admissibility problems altogether by using a competent laboratory to identify the substance at issue. *State v. Morales*, 2002-NMCA-052, 132 N.M. 146, 45 P.3d 406, cert. denied, 132 N.M. 193, 46 P.3d 100.

### A. IN GENERAL.

**Testimony concerning a forensic laboratory report.** — Where the court admitted a forensic laboratory report that a substance was cocaine; the report was admitted into evidence through the testimony of a forensic chemist who did not conduct the tests underlying the report; the witness's testimony was an explanation regarding how the test was performed and the witness's approval of the testing chemist's results; there was nothing in the witness's testimony indicating that the witness relied on the witness's own analysis to arrive at the witness's own conclusions; the only other evidence that the substance was cocaine was the testimony of a police officer who performed a field test on the substance; and the state failed to prove the scientific reliability of the field test, the admission of the laboratory report and the witness's testimony regarding the testing chemist's opinion was error, the error was not harmless, and the error violated defendant's right of confrontation. *State v. Delgado*, 2010-NMCA-078, 148 N.M. 870, 242 P.3d 437, cert. denied, 2010-NMCERT-007, 148 N.M. 610, 241 P.3d 611, on remand of 2009-NMCA-061, 146 N.M. 402, 210 P.3d 828, cert granted, 2009-NMCERT-006, 146 N.M. 733, 215 P.3d 42.

**Chain of custody.** — Where, during a search incident to arrest, the arresting police officer found on defendant a plastic "bindle" containing a white crystalline substance which the officer recognized as methamphetamine; the arresting officer observed another officer perform a presumptive field test on the substance; the arresting officer took the substance into evidence and transferred the substance to an evidence technician who sent the substance to the sate laboratory; an analyst in the drug analysis unit obtained the evidence from the laboratory's evidence custodian; the analyst performed two tests on the evidence and concluded that the substance was methamphetamine; the analyst sealed the evidence so that it would be apparent if any one tried to tamper with or alter it and returned the evidence to the evidence custodian, there was sufficient evidence to support the verdict that the substance seized from defendant was the same substance that was tested by the state laboratory and determined to be methamphetamine. *State v. Rodriguez*, 2009-NMCA-090, 146 N.M. 824, 215 P.3d 762, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

**Purchaser not guilty of solicitation to traffic.** — Even though the defendant's actions in negotiating for the purchase of drugs fall within the definition of criminal solicitation, his conduct was necessarily incidental to the crime of trafficking through the sale of a controlled substance and he could not be guilty of solicitation to traffic. *State v. Pinson*, 1995-NMCA-045, 119 N.M. 752, 895 P.2d 274.

**Proof of possession of controlled substance** may be established by evidence of the conduct and actions of a defendant, and by circumstantial evidence connecting the defendant with the crime. *State v. Donaldson*, 1983-NMCA-064, 100 N.M. 111, 666 P.2d 1258, cert. denied, 100 N.M. 53, 665 P.2d 809.

**Evidence of possession.** — When an accused is not in exclusive possession of the places in which an illegal substance is found, the state is required to prove that the accused knew the substance was there and that the accused exercised control over it. *State v. Morales*, 2002-NMCA-052, 132 N.M. 146, 45 P.3d 406, cert. denied, 132 N.M. 193, 46 P.3d 100.

**Direct proof unnecessary.** — Proof of possession with knowledge of narcotic character need not be by direct or uncontradicted evidence. *State v. Garcia*, 1966-NMSC-063, 76 N.M. 171, 413 P.2d 210, *overruled on other grounds by State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.

**Trace amount not sufficient to infer knowledge.** — The presence of a trace amount of cocaine in a cellophane cigarette wrapper carried in defendant's pocket was not, by itself, sufficient to establish that defendant had knowledge of the substance or that the substance was cocaine. *State v. Reed*, 1998-NMSC-030, 125 N.M. 552, 964 P.2d 113.

**Conduct permitting inference of guilt.** — Evidence sufficient to support a violation of this section must be such as discloses some conduct, declarations or actions on the part of the accused from which the fact finder may fairly infer and which is sufficient to satisfy it beyond a reasonable doubt of knowledge in the accused of the presence and nature of the narcotics. *Doe v. State*, 1975-NMCA-108, 88 N.M. 347, 540 P.2d 827, cert. denied, 88 N.M. 318, 540 P.2d 248; *State v. Garcia*, 1966-NMSC-063, 76 N.M. 171, 413 P.2d 210, *overruled on other grounds by State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.

**Proving knowing possession.** — To show knowing possession of narcotics, the conduct and behavior of the



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parties, their admissions or contradictory statements and explanations are frequently sufficient; possession and knowledge that object is a narcotic drug can also be proven circumstantially. *State v. Baca*, 1974-NMCA-098, 87 N.M. 12, 528 P.2d 656, cert. denied, 87 N.M. 5, 528 P.2d 649.

**Right to control.** — An accused has constructive possession when he maintains control or a right to control the contraband. *State v. Bauske*, 1974-NMCA-078, 86 N.M. 484, 525 P.2d 411.

**Power to produce or dispose is evidence of control.** *State v. Montoya*, 1973-NMCA-060, 85 N.M. 126, 509 P.2d 893.

**Insufficiency of positive drug test by itself.** — The common law rule in New Mexico requires additional proof of an intentional or knowing prior possession corroborating a positive drug test before a defendant can be charged and convicted of possession of a controlled substance; while a positive drug test might be circumstantial evidence of possession, it is insufficient, standing alone, to convict for that crime. *State v. McCoy*, 1993-NMCA-064, 116 N.M. 491, 864 P.2d 307, *rev'd in part on other grounds sub nom. State v. Hodge*, 1994-NMSC-087, 118 N.M. 410, 882 P.2d 1.

**No burden on state to negate plant maturity.** — In prosecution for possession, the state was not required to expressly prove that substance identified as marijuana was not the mature stalk. *State v. Everidge*, 1967-NMSC-035, 77 N.M. 505, 424 P.2d 787, cert. denied, *sub nom. Greene v. United States*, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

**Failure to prove plant maturity is fatal.** — Since the state's expert witness was unable to say whether the substance he tested was cannabis indica or cannabis sativa L., and could only identify it as mature stalk of some kind of cannabis, possession of which mature stalk did not constitute a violation of the statute under which the state had elected to proceed, defendant's conviction for possession of marijuana would be reversed. *State v. Benavidez*, 1962-NMSC-137, 71 N.M. 19, 375 P.2d 333 (decided under prior law).

**Evidence of predisposition.** — In view of evidence that defendant, a heroin addict, had been brought off methadone rapidly when a methadone maintenance program was closed, that he encountered a waiting requirement for entry into a different methadone program, during which time he contacted his former heroin supplier (now an informer) who supplied him with heroin, and that defendant being utterly without funds, the two arranged a marijuana transaction during the course of which defendant was arrested, subsequently being convicted of unlawful possession, the jury could reasonably have believed that the parties pooled their thoughts to plan a criminal enterprise in which the defendant was predisposed to participate. *State v. Fiechter*, 1976-NMSC-006, 89 N.M. 74, 547 P.2d 557.

**Entrapment for the jury.** — Evidence that defendant had previously been involved in "hauling" marijuana, that he had furnished informer with LSD in the past and that he himself had taken drugs went toward defendant's predisposition to commit the crime and bore on the credibility of his testimony that representations by informer involving thereto and violence were the inducing cause of the crime (possession of LSD); and since there were conflicts on the entrapment issue, the trial court properly refused to rule there was entrapment as a matter of law. *State v. Sena*, 1971-NMCA-044, 82 N.M. 513, 484 P.2d 355.

**"Ingestion" not possession.** — The mere presence of drugs in the urine or bloodstream does not constitute possession. *State v. McCoy*, 1993-NMCA-064, 116 N.M. 491, 864 P.2d 307, *rev'd in part on other grounds sub nom. State v. Hodge*, 1994-NMSC-087, 118 N.M. 410, 882 P.2d 1.

To convict the defendant of possession of cocaine that he had ingested, it is necessary to prove that he voluntarily and knowingly ingested the drug in New Mexico. *State v. Franks*, 1994-NMCA-097, 119 N.M. 174, 889 P.2d 209.

**Possession through ingestion.** — The defendant's statement that he took cocaine was probative of the offense since the fact that he thought that cocaine was present in his body tended to establish that: (1) cocaine was present in his body, (2) he knew that it was cocaine when he ingested it, and (3) the ingestion was voluntary. *State v. Franks*, 1994-NMCA-097, 119 N.M. 174, 889 P.2d 209.

**Evidence sufficient for conviction** includes any clearly identifiable amount of controlled substances. *State v. Wood*, 1994-NMCA-060, 117 N.M. 682, 875 P.2d 1113, cert. denied, 117 N.M. 744, 877 P.2d 44.

**Evidence not inherently improbable.** — Testimony in prosecution for unlawful sale and possession of marijuana was not inherently improbable despite fact that defendant was claimed to have insisted on delivering the cigarettes in question in the restroom where only he and undercover officer were present, yet afterwards supposedly received the money for the transaction and discussed other possible dealings in a car in the presence of several other persons. *State v. Soliz*, 1969-NMCA-043, 80 N.M. 297, 454 P.2d 779.

**Prejudicial hearsay.** — Testimony by undercover officer that defendant's name had been called to his attention by local officers as a person allegedly dealing in marijuana was clearly hearsay and clearly prejudicial and necessitated reversal of her conviction for possession of marijuana. *State v. Alberts*, 1969-NMCA-064, 80 N.M. 472, 457 P.2d 991.

B. CIRCUMSTANTIAL EVIDENCE.

**Inference of possession permissible from exclusive possession.** — When one has exclusive possession of a home or apartment in which narcotics are found, it may be inferred, even in the absence of other incriminating evidence, that such person knew of the presence of the narcotics and had control of them. *State v. Baca*, 1974-NMCA-098, 87 N.M. 12, 528 P.2d 656, cert. denied, 87 N.M. 5, 528 P.2d 649.

**Nonexclusive possession distinguished.** — When a person is not in exclusive possession of premises, it may not be inferred that he knew of the presence of the marijuana (or narcotics) or had control over same unless there are some other incriminating circumstances or statements tending to buttress such an inference. *State v. Bidegain*, 1975-NMCA-065, 88 N.M. 384, 540 P.2d 864, *rev'd in part on other grounds*, 1975-NMSC-060, 88 N.M. 466, 541 P.2d 971; *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300, cert. denied, 88 N.M. 29, 536 P.2d 1085; *State v. Baca*, 1974-NMCA-098, 87 N.M. 12, 528 P.2d 656, cert. denied, 87 N.M. 5, 528 P.2d 649.

Since defendant's wife resided with him, he was not in exclusive possession of the premises, and an inference of constructive possession could not be drawn against him unless there were incriminating statements or circumstances tending to support the inference. *State v. Herrera*, 1977-NMCA-028, 90 N.M. 306, 563 P.2d 100, cert. denied, 90 N.M. 636, 567 P.2d 485.

**Possession of agent.** — An accused has constructive possession of narcotics found in the physical possession of his agent or any other person when the defendant has the immediate right to exercise dominion and control over the narcotics. *State v. Bauske*, 1974-NMCA-078, 86 N.M. 484, 525 P.2d 411.

**Constructive possession shown.** — Where police officers found crack cocaine in defendant's vehicle and powder cocaine in the vehicle of defendant's friend; and defendant's friend testified that the powder cocaine belonged to defendant and that the friend had agreed to transport the powder cocaine to defendant's house and to take the blame if they were caught, the evidence was sufficient to



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prove that defendant constructively possessed the powder cocaine found in the vehicle of defendant's friend because defendant knew or believed that the substance was cocaine and defendant knew where the cocaine was located and exercised control over it. *State v. Godoy*, 2012-NMCA-084, 284 P.3d 410, cert. denied, 2012-NMCERT-007.

Finding of numerous unused tinfoils inside the house occupied by defendant and his wife and fact that on the way to the police station, when defendant's wife remarked that the police got everything that "we had," defendant told his wife to keep her mouth shut, were sufficient to sustain the inference that defendant constructively possessed the heroin that was found outside. *State v. Herrera*, 1977-NMCA-028, 90 N.M. 306, 563 P.2d 100, cert. denied, 90 N.M. 636, 567 P.2d 485.

A showing that heroin was found in the bathroom of the master bedroom usually occupied by defendant and his wife, that defendant was a former heroin addict who for the last three years had been undergoing methadone treatments and according to his own testimony took methadone daily and that the wife claimed to have never seen heroin and other items before and not to know what they were used for, constituted substantial evidence of defendant's constructive knowledge and possession of the heroin. *State v. Baca*, 1974-NMCA-098, 87 N.M. 12, 528 P.2d 656, cert. denied, 87 N.M. 5, 528 P.2d 649.

Evidence was sufficient to find that defendant constructively possessed an eyeglass case left under patrol car seat by his wife, knowing it contained heroin, where it took defendant three blocks to stop his car for the police, various parts of the fix kit were found in the car trunk and in the eyeglass case, including a syringe with defendant's fingerprint, his wife's purse held squares of tinfoil and there were fresh needle marks on defendant's arm. *State v. Bauske*, 1974-NMCA-078, 86 N.M. 484, 525 P.2d 411.

There was sufficient evidence to show constructive possession of controlled substance with knowledge thereof where defendant was in possession of a motel room for six days before a legal search of that room revealed heroin. *State v. Montoya*, 1973-NMCA-060, 85 N.M. 126, 509 P.2d 893.

Constructive possession of cocaine was shown based on evidence that the defendant owned and had control of the car she was traveling in with her daughter, the daughter had cocaine concealed on her person, the daughter was easily influenced to do wrong, and the defendant insisted that police arrest her instead of her daughter. *State v. Hernandez*, 1997-NMCA-006, 122 N.M. 809, 932 P.2d 499.

Even though defendant did not have exclusive possession of the bedroom where drugs and paraphernalia were discovered, physical evidence and her own incriminating statements rationally supported the necessary inferences to find her guilty of criminal possession. *State v. Phillips*, 2000-NMCA-028, 128 N.M. 777, 999 P.2d 421, cert. denied, 128 N.M. 689, 997 P.2d 821.

## C. SUFFICIENCY OF EVIDENCE.

**Substantial evidence of possession.** — Where the defendant was bent down behind a fence; when police officers approached, the defendant stood up and walked toward a shed; the defendant did not stop when the officers called out to the defendant; the defendant's body movements appeared as if the defendant had disposed of something; the defendant then walked back to the officers; the officers found a bag of cocaine in front of the shed; and when the cocaine was found, the defendant placed the defendant's hands behind the defendant's back and turned around without any request by the officers, there was sufficient evidence that the defendant had consecutive possession of the cocaine. *State v. Delgado*, 2009-NMCA-061, 146 N.M. 402, 210 P.3d 828, cert. granted, 2009-NMCERT-006, 146 N.M. 734, 215 P.3d 43, remanded, 2010-NMCA-078, 148 N.M. 870, 242 P.3d 437, cert. denied, 2010-NMCERT-007, 148 N.M. 610, 241 P.3d 611.

**Place of possession.** — Defendant's conviction for possession of cocaine warranted reversal since there was insufficient evidence to prove that the drugs were actually possessed and ingested in New Mexico, although the defendant's urine tested positive for cocaine. *State v. McCoy*, 1993-NMCA-064, 116 N.M. 491, 864 P.2d 307, *rev'd in part on other grounds sub nom. State v. Hodge*, 1994-NMSC-087, 118 N.M. 410, 882 P.2d 1.

**Sufficient evidence.** — Where police officers testified that they found a glass pipe containing a white substance in the center console of the vehicle defendant was driving and subsequent forensic testing revealed that the substance was methamphetamine, the circumstantial evidence was sufficient to establish that defendant possessed or constructively possessed the methamphetamine and the pipe and to permit the jury to infer that defendant knew that the substance was methamphetamine and that defendant intended to use the pipe to inhale methamphetamine. *State v. Lopez*, 2009-NMCA-127, 147 N.M. 364, 223 P.3d 361, cert. denied, 2009-NMCERT-010, 147 N.M. 452, 224 P.3d 1257.

**Substantial evidence of possession.** — Evidence that a voice identified as female defendant's responded to the officers' knock, that thereafter running was heard from the front portion of the trailer to the vicinity of the trailer in which the bathrooms were located, that the toilet was flushed and heroin was recovered therefrom immediately thereafter, and that upon entry the officers found the defendant standing in a location consistent with her having been the person who flushed the toilet, along with evidence that the other occupants of the trailer were infants and young children, two sleeping adults and another adult in the living room, was substantial and supported defendant's conviction for possession of heroin. *State v. Anaya*, 1976-NMCA-055, 89 N.M. 302, 551 P.2d 992.

**Sufficient evidence of possession of controlled substances.** — Where defendant was arrested for driving on a revoked license, and where the arresting officer found on defendant's person ninety-seven empty small baggies and a straw with a burnt end, items which are commonly used to package methamphetamine, a small plastic bag with a white powdery substance, later identified as methamphetamine, and found in defendant's vehicle three additional baggies that contained what was identified in a field test as methamphetamine, there was sufficient evidence for the jury to find defendant guilty beyond a reasonable doubt of possession of methamphetamine. *State v. Tidey*, 2018-NMCA-014, cert. denied.

**Sufficient evidence of possession of methamphetamine.** — Evidence that the arresting officer discovered methamphetamine in a pack of cigarettes removed from defendant's shirt pocket was sufficient to support defendant's conviction for possession of controlled substances. *State v. Howl*, 2016-NMCA-084, cert. denied.

**Sufficiency of evidence.** — Evidence that defendant knowingly transferred a forged prescription was sufficient to sustain a conviction for knowingly possessing the drug involved. *State v. Nation*, 1973-NMCA-087, 85 N.M. 291, 511 P.2d 777.

Appellant's acts of purchasing the cigarettes, receiving actual delivery thereof and then distributing them amply supported the conclusion that he had marijuana in his possession, as such term was defined in the instructions. *State v. Romero*, 1968-NMCA-078, 79 N.M. 522, 445 P.2d 587.

**Sufficient evidence of joint dominion and control of drugs and drug paraphernalia.** — Where defendant was charged with homicide by vehicle (driving while under the influence of drugs), causing great bodily injury (driving while under the influence of drugs), possession of drug paraphernalia, and possession of marijuana following a car collision in which defendant was the driver and where defendant's passenger, the owner of the vehicle that defendant



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was driving, was killed and another driver was severely injured, and where investigators discovered marijuana and drug paraphernalia in the vehicle defendant was driving, and where defendant implied that the evidence was equally consistent with his passenger possessing the marijuana or others having deposited the marijuana in the vehicle, there was sufficient evidence to permit a rational jury to conclude beyond a reasonable doubt that defendant possessed the marijuana based on evidence that the marijuana and drug paraphernalia were in a location subject to the joint dominion and control of defendant and his passenger, and witness testimony that the marijuana leaves and drug paraphernalia were in the vehicle prior to police arriving on the scene. *State v. Martinez*, 2020-NMCA-043, cert. denied.

**Evidence of possession insufficient.** — Evidence that one defendant was in bed asleep when the officers entered the trailer, that plastic baggie tops were found on top of the commode in the bathroom off the bedroom where he was sleeping and that after his arrest defendant asked another man in the trailer to do him an unidentified favor was insufficient to sustain his conviction for possession of heroin flushed down a toilet by someone in the trailer. *State v. Anaya*, 1976-NMCA-055, 89 N.M. 302, 551 P.2d 992.

Since there was no evidence that female defendant had any control over the keys to the car in which she was riding or to the footlockers in its trunk, or that she had any knowledge whatsoever of the contents of the car trunk, it was held that the evidence relied upon to sustain her conviction was totally insubstantial. *State v. Bidegain*, 1975-NMCA-065, 88 N.M. 384, 540 P.2d 864, *rev'd in part on other grounds*, 1975-NMSC-060, 88 N.M. 466, 541 P.2d 971.

Where the only evidence concerning cocaine was that some was found in a vial in a box on the coffee table of the main room of defendants' house, and there was no testimony that any of the defendants knew of the contents of the vial or of its character, nor evidence that any of the defendants had the power to produce or dispose of the narcotic in question, nor any evidence that the defendants had any common purpose in the cocaine which was found, the trial court erred in finding that there was sufficient evidence to convict the defendants for possession of cocaine. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300, cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975).

**Insufficient evidence that substance was synthetic cannabinoid.** — Where defendant was arrested and charged with a single count of possession of synthetic cannabinoids, and where defendant claimed that there was insufficient evidence to support his conviction because the state failed to meet its burden of proving that the substance in his possession was a synthetic cannabinoid, there was insufficient evidence to support defendant's conviction where the state failed to introduce evidence that scientific testing was ever done to determine what chemicals were present in or applied to the substance found in defendant's possession, and therefore could not prove that the substance contained a chemical that falls either into one of the classes of chemicals listed in a statute or regulation or within the neurochemical definition of synthetic cannabinoid. *State v. Arias*, 2018-NMCA-057.

**Ignorance of nature of substance.** — Evidence that defendant, an Arapahoe Indian, after treatment for illness by an "Indian doctor," was given "medicine" to carry on his person as "protection," which medicine, unknown to defendant, was anhalonium (or peyote), could not support a conviction for possession of the substance. *State v. Pedro*, 1971-NMCA-145, 83 N.M. 212, 490 P.2d 470.

**Knowledge not shown.** — A degree of furtiveness on the part of juveniles in smoking and passing a pipe around between buildings while changing classes, in light of a school regulation prohibiting the smoking of tobacco, was not conduct sufficient to infer that the smokers knew the character of the substance they were using. *Doe v. State*, 1975-NMCA-108, 88 N.M. 347, 540 P.2d 827, cert. denied, 88 N.M. 318, 540 P.2d 248.

**Testimony of a single witness was sufficient evidence** for a conviction of unlawful possession and sale of marijuana. *State v. Soliz*, 1969-NMCA-043, 80 N.M. 297, 454 P.2d 779.

V. INDICTMENT AND INFORMATION.

**Information and proof not variant.** — Information charging defendant with unlawful possession of "certain narcotic drugs, to-wit, cannabis indica, also known as marijuana" was not at fatal variance with proof of possession of leaves and seeds of "marijuana," despite fact that there was no testimony identifying the substance by true botanical name or referring to its chemical breakdown or grouping. *State v. Romero*, 1964-NMSC-245, 74 N.M. 642, 397 P.2d 26.

**Law reviews.** — For note and comment, "State v. Urioste: A Prosecutor's Dream and Defender's Nightmare," see 34 N.M. L. Rev. 517 (2004).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M. L. Rev. 63 (1974).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 179, 181, 187, 188, 191.

Conviction of possession of illicit drugs found in premises of which defendant was not in exclusive possession, 56 A.L.R.3d 948.

Conviction of possession of illicit drugs found in automobile of which defendant was not sole occupant, 57 A.L.R.3d 1319.

Sufficiency of prosecution proof that substance defendant is charged with possessing or selling, or otherwise unlawfully dealing in, is marijuana, 75 A.L.R.3d 717.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

Constitutionality of state legislation imposing criminal penalties for personal possession or use of marijuana, 96 A.L.R.3d 225.

Minimum quanity of drug required to support claim that defendant is guilty of criminal "possession" of drug under state law, 4 A.L.R.5th 1.

Sufficiency of random sampling of drug or contraband to establish jurisdictional amount required for conviction, 45 A.L.R.5th 1.

Drug abuse: what constitutes illegal constructive possession under 21 USCS § 841(a)(1), prohibiting possession of a controlled substance with intent to manufacture, distribute, or dispense the same, 87 A.L.R. Fed. 309.

Under what circumstances should total weight of mixture or substance in which detectable amount of controlled substance is incorporated be used in assessing sentence under United States sentencing guideline § 2D1.1 - post-*Chapman* cases, 113 A.L.R. Fed. 91.

28 C.J.S. Drugs and Narcotics § 166 et seq.

## 30-31-24. Controlled substances; violations of administrative provisions.

A. It is unlawful for any person:

(1) who is subject to Sections 30-31-11 through 30-31-19 NMSA 1978 to intentionally distribute or dispense a controlled substance in violation of Section 30-31-18 NMSA 1978;



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(2) who is a registrant, to intentionally manufacture a controlled substance not authorized by his registration, or to intentionally distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person;

(3) to intentionally refuse or fail to make, keep or furnish any record, notification, order form, statement, invoice or information required under the Controlled Substances Act; or

(4) to intentionally refuse an entry into any premises for any inspection authorized by the Controlled Substances Act.

B. Any person who violates this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: 1953 Comp., § 54-11-24, enacted by Laws 1972, ch. 84, § 24; 1974, ch. 9, § 5; 1980, ch. 23, § 5.**

ANNOTATIONS

**Title of act constitutionally adequate.** — Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties therefor, are not unconstitutional on the ground that "unlawful activities" are not mentioned in the title of the act. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 76, 191, 206.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 A.L.R.5th 1.

28 C.J.S. Drugs and Narcotics § 101 et seq.

## 30-31-25. Controlled substances; prohibited acts.

A. It is unlawful for any person:

(1) who is a registrant to distribute a controlled substance classified in Schedules [Schedule] I or II, except pursuant to an order form as required by Section 30-31-17 NMSA 1978;

(2) to intentionally use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended or issued to another person;

(3) to intentionally acquire or obtain, or attempt to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge;

(4) to intentionally furnish false or fraudulent material information in, or omit any material information from, any application, report or other document required to be kept or filed under the Controlled Substances Act, or any record required to be kept by that act; or

(5) to intentionally make, distribute or possess any punch, die, plate, stone or other thing designed to print, imprint or reproduce the trademark, trade name or other identifying mark, imprint or device of another or any likeness of any of the foregoing, upon any drug or container or labeling thereof so as to render the drug a counterfeit substance.

B. Any person who violates this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: 1953 Comp., § 54-11-25, enacted by Laws 1972, ch. 84, § 25; 1974, ch. 9, § 6; 1979, ch. 122, § 1; 1980, ch. 23, § 6.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For meaning of "counterfeit substance", *see* 30-31-2 NMSA 1978.

For forgery, *see* 30-16-10 NMSA 1978.

ANNOTATIONS

**Title of act constitutionally adequate.** — Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties therefor, are not unconstitutional on grounds that "unlawful activities" are not mentioned in the title of the act. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**Subsection A(3) is not impermissibly vague.** — Subsection A(3) provides a person with fair warning of the nature of the proscribed act, and it is therefore not impermissibly vague. *State v. Mirabal*, 1989-NMCA-057, 108 N.M. 749, 779 P.2d 126, cert. denied, 108 N.M. 713, 778 P.2d 911.

**Section 30-28-1 NMSA 1978 does not apply to attempts covered by Subsection A(3).** — The legislature intended to punish attempts under Subsection A(3) specifically as felonies and consequently, Section 30-28-1 NMSA 1978 does not apply to such attempts covered by Subsection A(3). *State v. Mirabal*, 1989-NMCA-057, 108 N.M. 749, 779 P.2d 126, cert. denied, 108 N.M. 713, 778 P.2d 911.

**Application of Subsection A(3) to a physician** does not violate due process guarantees because effecting delivery through a prescription not for a legitimate medical purpose is prohibited as distribution or trafficking. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**Subsection A(3) not more specific statute than Section 30-31-20 NMSA 1978.** — A defendant charged with attempt to traffic cocaine under Section 30-31-20 NMSA 1978 was not entitled to be charged under Subsection A(3) of this section since the elements defined in both offenses are so distinct that the specific-statute doctrine



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had no application. *State v. Villalobos*, 1995-NMCA-105, 120 N.M. 694, 905 P.2d 732, cert. quashed, 121 N.M. 676, 916 P.2d 1343 (1996).

**Proof of possession.** — In a prosecution for violation of Subsection A(3), constructive possession requires no more than knowledge of a narcotic and control over it; control, in turn, requires no more than the power to produce or dispose of the narcotic. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**Constructive possession.** — In addition to proof of defendant's knowledge of the presence and character of the item possessed, the state must show the immediate right to exercise dominion and control over the narcotics to establish constructive possession. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**By circumstantial evidence.** — Proof of possession of a controlled substance may be through circumstantial evidence. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19, 33, 130, 141, 191, 206.

Narcotics conviction as crime of moral turpitude justifying disbarment or other disciplinary action against attorney, 99 A.L.R.3d 288.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 A.L.R.5th 1.

28 C.J.S. Drugs and Narcotics § 117 et seq.

## 30-31-25.1. Possession, delivery or manufacture of drug paraphernalia prohibited; exceptions.

A. It is unlawful for a person to use or possess with intent to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the Controlled Substances Act. The provisions of this subsection do not apply to a person who is in possession of:

(1) hypodermic syringes or needles for the purpose of participation in or administration of the Harm Reduction Act [24-2C-1 to 24-2C-6 NMSA 1978];

(2) supplies or devices obtained pursuant to the Harm Reduction Act in accordance with rules established by the department of health for the harm reduction program; or

(3) supplies or devices used for the testing of controlled substances or controlled substance analogs for dangerous adulterants.

B. It is unlawful for a person to deliver, possess with intent to deliver or manufacture with the intent to deliver drug paraphernalia with knowledge, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the Controlled Substances Act. The provisions of this subsection do not apply to:

(1) department of health employees or their designees while they are directly and immediately engaged in activities related to the harm reduction program authorized by the Harm Reduction Act; or

(2) the sale or distribution of hypodermic syringes and needles by pharmacists licensed pursuant to the Pharmacy Act [Chapter 61, Article 11 NMSA 1978].

C. A person who violates the provisions of Subsection A of this section shall be issued a penalty assessment pursuant to Section 31-19A-1 NMSA 1978 and is subject to a fine of fifty dollars ($50.00). A person who violates the provisions of Subsection B of this section is guilty of a misdemeanor.

D. A person eighteen years of age or over who violates the provisions of Subsection B of this section by delivering drug paraphernalia to a person under eighteen years of age and who is at least three years the person's junior is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: 1978 Comp., § 30-31-25.1, enacted by Laws 1981, ch. 31, § 2; 1997, ch. 256, § 7; 2001, ch. 189, § 1; 2019, ch. 217, § 2; 2022, ch. 4, § 4.**

**The 2022 amendment,** effective May 18, 2022, provided that possession of certain harm reduction program supplies or devices is an exception to the prohibition of possession of drug paraphernalia; and in Subsection A, added new paragraph designation "(1)", and added new Paragraphs A(2) and A(3).



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**The 2019 amendment,** effective July 1, 2019, decreased penalties for possession of drug paraphernalia; in Subsection C, after the first occurrence of "violates", deleted "this section with respect to" and added "the provisions of", after "Subsection A of this section", added "shall be issued a penalty assessment pursuant to Section 3 of this 2019 act and", and after "is", deleted "guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than fifty dollars ($50.00) nor more than one hundred dollars ($100) or by imprisonment for a definite term less than one year, or both" and added "subject to a fine of fifty dollars ($50.00)".

**The 2001 amendment,** effective June 15, 2001, in the section heading, deleted "or delivery to a minor" following "manufacturer" and inserted "exceptions"; in Subsection B, inserted the Paragraph (1) designation and added Paragraph B(2).

**The 1997 amendment,** effective June 20, 1997, added the second sentences in Subsections A and B and, in Subsection C, deleted former paragraph designations at the beginning of the sentences and added "Any person who violates this section with respect to" at the beginning of the second sentence.

ANNOTATIONS

**Double jeopardy.** — The legislature did not intend to punish a defendant for possession of a controlled substance and possession of paraphernalia when the paraphernalia consists of only a container that is storing a personal supply of the charged controlled substance and where the defendant was convicted of possession of methamphetamine and possession of drug paraphernalia based on the possession of a baggie that held the methamphetamine, the defendant's conviction of possession of drug paraphernalia violated double jeopardy. *State v. Almeida*, 2008-NMCA-068, 144 N.M. 235, 185 P.3d 1085.

**Separate convictions for possession of drug paraphernalia violated double jeopardy.** — Where defendant was convicted of two counts of possession of drug paraphernalia, one based on his possession of over ninety small, plastic baggies and the second based on his possession of a red straw with a burnt end, both of which are commonly used to package methamphetamine, defendant's constitutional right to be free from double jeopardy was violated, because the evidence was seized from the same location and was intended for the same purpose, the packaging of methamphetamine, and there was no intervening act or any other factor that would distinguish defendant's act of possessing separate containers for holding the methamphetamine that was also found in defendant's possession. *State v. Tidey*, 2018-NMCA-014, cert. denied.

**Sufficient evidence.** — Where police officers testified that they found a glass pipe containing a white substance in the center console of the vehicle defendant was driving and subsequent forensic testing revealed that the substance was methamphetamine, the circumstantial evidence was sufficient to establish that defendant possessed or constructively possessed the methamphetamine and the pipe and to permit the jury to infer that defendant knew that the substance was methamphetamine and that defendant intended to use the pipe to inhale methamphetamine. *State v. Lopez*, 2009-NMCA-127, 147 N.M. 364, 223 P.3d 361, cert. denied, 2009-NMCERT-010, 147 N.M. 452, 224 P.3d 1257.

**Sufficient evidence of possession of drug paraphernalia.** — Sufficient evidence supported defendant's conviction for possession of drug paraphernalia where a reasonable jury could infer that defendant had knowledge of and control over drug paraphernalia based on evidence that a glass pipe similar to those used to ingest methamphetamine was found in defendant's vehicle and methamphetamine was found on defendant's person. *State v. Howl*, 2016-NMCA-084, cert. denied.

**Trafficking methamphetamine by manufacture and possession of drug paraphernalia.** — Where the defendant was convicted of trafficking methamphetamine by manufacture for possession of items that could be used to manufacture methamphetamine and possession of drug paraphernalia for possession of items that could be used to consume methamphetamine and marijuana and where the items used to consume drugs were not necessary to manufacture methamphetamine, the defendant's conduct was not unitary and the defendant's convictions did not violate double jeopardy. *State v. Vance*, 2009-NMCA-024, 145 N.M. 706, 204 P.3d 31, cert. denied, 2009-NMCERT-001, 145 N.M. 655, 203 P.3d 870.

**Vehicle search without consent allowed.** — Where police officer could have arrested defendant for possession of drug paraphernalia, the officer, therefore, is allowed to search defendant's vehicle without consent. United States v. Malouff, 114 Fed. Appx. 975 (10th Cir. 2004).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute - state cases, 83 A.L.R.4th 629.

Validity, under Federal Constitution, of so-called "head shop" ordinances or statutes, prohibiting manufacture and sale of drug use related paraphernalia, 69 A.L.R. Fed. 15.

Validity and construction of Drug Paraphernalia Act (21 USCS § 863), 123 A.L.R. Fed. 637.

## 30-31-26. Penalties under other laws.

A. Any penalty imposed for violation of the Controlled Substances Act is in addition to any civil or administrative penalty or sanction otherwise provided by law.

B. A municipality may, by ordinance, prohibit distribution or possession of a controlled substance enumerated in Schedules I, II, III or IV but penalty provisions shall be the same as those provided for a similar crime in the Controlled Substances Act.

**History: 1953 Comp., § 54-11-26, enacted by Laws 1972, ch. 84, § 26.**

## 30-31-27. Bar to prosecution.

If a violation of the Controlled Substances Act is a violation of a federal law, the law of another state or the ordinance of a municipality, a conviction or acquittal under federal law, the law of another state or the ordinance of a municipality for the same act is a bar to prosecution.



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**History: 1953 Comp., § 54-11-27, enacted by Laws 1972, ch. 84, § 27.**

**Cross references.** — For constitutional prohibition against double jeopardy, *see* N.M. Const., art. II, § 15.

## 30-31-27.1. Overdose prevention; limited immunity.

A. A person who, in good faith, seeks medical assistance for someone experiencing an alcohol- or drug-related overdose shall not be arrested, charged, prosecuted or otherwise penalized, nor shall the property of the person be subject to civil forfeiture, for violating any of the following if the evidence for the alleged violation was obtained as a result of the need for seeking medical assistance:

(1) the provisions of Section 30-31-23 NMSA 1978 or Subsection A of Section 30-31-25.1 NMSA 1978;

(2) a restraining order; or

(3) the conditions of probation or parole.

B. A person who experiences an alcohol- or drug-related overdose and is in need of medical assistance shall not be arrested, charged, prosecuted or otherwise penalized, nor shall the property of the person be subject to civil forfeiture, for violating any of the following if the evidence for the alleged violation was obtained as a result of the overdose and the need for seeking medical assistance:

(1) the provisions of Section 30-31-23 NMSA 1978 or Subsection A of Section 30-31-25.1 NMSA 1978;

(2) a restraining order; or

(3) the conditions of probation or parole.

C. The act of seeking medical assistance for someone who is experiencing an alcohol- or drug-related overdose may be used as a mitigating factor in a criminal prosecution pursuant to the Controlled Substances Act for which immunity is not provided pursuant to this section.

D. For the purposes of this section, "seeking medical assistance" means:

(1) reporting an alcohol- or drug-related overdose or other medical emergency to law enforcement, the 911 system or another emergency dispatch system, a poison control center or a health care provider; or

(2) assisting an individual who is reporting an alcohol- or drug-related overdose or providing care to an individual who is experiencing an alcohol- or drug-related overdose or other medical emergency while awaiting the arrival of a health care provider.

**History: Laws 2007, ch. 260, § 1; 2019, ch. 211, § 3.**

**The 2019 amendment,** effective July 1, 2019, expanded limited immunity for those who seek medical assistance for someone experiencing a drug-related overdose to include alcohol overdose, and provided an exemption from civil forfeiture for the property of a person who, in good faith, seeks medical assistance for someone experiencing an alcohol- or drug-related overdose, and provided similar protections for the person who is experiencing an overdose who seeks medical assistance; in Subsection A, after "experiencing", deleted "a" and added "an alcohol- or", after "shall not be", added "arrested", after "prosecuted", added "or otherwise be penalized, nor shall the property of the person be subject to civil forfeiture", and after "for", deleted "possession of a controlled substance" and added "violating any of the following if the evidence for the alleged violation was obtained as a result of the need for seeking medical assistance:", added new paragraph designation "(1)", in Paragraph A(1), after "Section 30-31-23", added "NMSA 1978 or Subsection A of Section 30-31-25.1", after the next occurrence of "NMSA 1978", deleted "if the evidence for the charge of possession of a controlled substance was gained as a result of the seeking of medical assistance", and added new Paragraphs A(2) and A(3); in Subsection B, after "experiences", deleted "a" and added "an alcohol- or", after "shall not be", added "arrested", after "prosecuted", added "or otherwise penalized, nor shall the property of the person be subject to civil forfeiture", after "for", deleted "possession of a controlled substance pursuant to" and added "violating any of the following if the evidence for the alleged violation was obtained as a result of the overdose and the need for seeking medical assistance:", added new paragraph designation "(1)", in Paragraph B(1), after "Section 30-31-23", added "NMSA 1978 or Subsection A of Section 30-31-25.1", after the next occurrence of NMSA 1978", deleted "if the evidence for the charge of possession of a controlled substance was gained as a result of the overdose and the need for medical assistance", and added new Paragraphs B(2) and B(3); in Subsection C, after "experiencing", deleted "a" and added "an alcohol- or", after "Controlled Substances Act", added "for which immunity is not provided pursuant to this section."; and added new Subsection D.

## 30-31-28. Conditional discharge for possession as first offense.

A. If any person who has not previously been convicted of violating the laws of any state or any laws of the United States relating to narcotic drugs, marijuana, hallucinogenic or depressant or stimulant substances, is found guilty of a violation of Section 23 [30-31-23 NMSA 1978], after trial



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or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings and place him on probation upon reasonable conditions and for a period, not to exceed one year, as the court may prescribe.

B. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against the person and discharge him from probation before the expiration of the maximum period prescribed from the person's probation.

C. If during the period of his probation the person does not violate any of the conditions of the probation, then upon expiration of the period the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt, but a nonpublic record shall be retained by the attorney general solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, the person qualifies under this section. A discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the penalties prescribed under this section for second or subsequent convictions or for any other purpose. Discharge and dismissal under this section may occur only once with respect to any person.

D. Upon the dismissal of a person and discharge of the proceedings against him under this section, a person, if he was not over eighteen years of age at the time of the offense, may apply to the court for an order to expunge from all official records all recordation relating to his arrest, indictment or information, trial, finding or plea of guilty, and dismissal and discharge pursuant to this section except nonpublic records filed with the attorney general. If the court determines, after hearing, that the person was dismissed and the proceedings against him discharged and that he was not over eighteen years of age at the time of the offense, it shall enter the order. The effect of the order shall be to restore the person, in the contemplation of the law, to the status he occupied before the arrest or indictment or information. No person in whose behalf an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

**History: 1953 Comp., § 54-11-28, enacted by Laws 1972, ch. 84, § 28.**

**ANNOTATIONS**

**Conditional discharge dismissal not "conviction".** — A dismissal under the conditional discharge statute, Section 30-31-28 NMSA 1978, is not a "conviction" as contemplated by this section, or for any other purpose. *State v. Fairbanks*, 2004-NMCA-005, 134 N.M. 783, 82 P.3d 954.

**Habitual offender statute.** — Although the habitual offender statute applies to a prior felony conviction under the Controlled Substances Act, Sections 30-31-1 to 30-31-41 NMSA 1978, it does not apply if there is a conditional discharge under Section 30-31-28 NMSA 1978. *State v. Fairres*, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

**Prior conviction, not prior sentence, is dispositive for repeat offender status.** — Where defendant was convicted of drug charges in New Mexico; the New Mexico court deferred defendant's sentence for a two-year probationary period; the deferred sentence was a final judgment subject to appeal; and after defendant successfully completed the probation, defendant was entitled to have the New Mexico charges dismissed, the deferred sentence was a prior conviction for purposes of sentence enhancement. *United States v. Meraz*, 998 F.2d 182 (10th Cir. 1993).

## 30-31-29. Probationary period.

Notwithstanding any other provision of law, the court may place on probation for a period not to exceed one year any person convicted of a violation of the Controlled Substances Act where the maximum length of the term of imprisonment is one year or less if:

A. the judge does not impose a prison sentence; or

B. the judge suspends all of any prison sentence which he imposes.

**History: 1953 Comp., § 54-11-28.1, enacted by Laws 1975, ch. 80, § 1.**

## 30-31-30. Powers of enforcement personnel.

Any officer or employee designated by the board may:



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A. serve search warrants, arrest warrants and administrative inspection warrants;

B. make arrests without warrant for any offense under the Controlled Substances Act committed in his presence, or if he has probable cause to believe that the person to be arrested has committed or is committing a violation of the Controlled Substances Act which may constitute a felony; or

C. make seizures of property pursuant to the Controlled Substances Act.

**History: 1953 Comp., § 54-11-29, enacted by Laws 1972, ch. 84, § 29.**

**Cross references.** — For constitutional guarantee against unreasonable searches and seizures, *see* N.M. Const., art. II, § 10.

For issuance of arrest and search warrants, *see* Rules 5-208 and 5-211 NMRA.

ANNOTATIONS

**Warrantless arrests in public.** — Statutory provisions regarding warrants must be considered in para materia with N.M. Const., art. II, § 10. Subsection B cannot establish conclusively that an arrest based on such authority comports with the constitutional protection afforded by N.M. Const., art. II, § 10. Warrantless arrests made under the authority of the statute may be presumed reasonable but that presumption may be rebutted under an interpretation of what is constitutional. *Campos v. State*, 1994-NMSC-012, 117 N.M. 155, 870 P.2d 117.

**Probable cause plus exigent circumstances.** — Warrantless search of defendant's tractor and trailer was justified by probable cause arising from detailed information supplied by informant, along with exigent circumstances attendant in the case of moving vehicles. *State v. One 1967 Peterbilt Tractor*, 1973-NMSC-025, 84 N.M. 652, 506 P.2d 1199.

**Law reviews.** — For note, "New Mexico Requires Exigent Circumstances for Warrantless Public Arrests: *Campos v. State*," see 25 N.M.L. Rev. 315 (1995).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Odor of narcotics as providing probable cause for warrantless search, 5 A.L.R.4th 681.

## 30-31-31. Administrative inspections and warrants.

Issuance and execution of administrative inspection warrants shall be as follows:

A. a magistrate, within his jurisdiction and upon proper oath or affirmation showing probable cause, may issue warrants for the purpose of conducting administrative inspections and seizures of property authorized by the Controlled Substances Act. For purposes of the issuance of administrative inspection warrants, probable cause exists upon showing a valid public interest in the effective enforcement of the Controlled Substances Act sufficient to justify administrative inspection of the area, premises, building or conveyance in the circumstances specified in the application for the warrant;

B. a warrant shall issue only upon an affidavit of a designated officer or employee having actual knowledge of the alleged facts, sworn to before the magistrate and establishing the grounds for issuing the warrant. If the magistrate is satisfied that grounds for the warrant exist, he shall issue a warrant identifying the area, premises, building or conveyance to be inspected, the purpose of the inspection, and, if appropriate, the type of property to be inspected, if any. The warrant shall:

(1) state the grounds for its issuance and the name of each person whose affidavit has been taken in its support;

(2) be directed to a person authorized by Section 29 [30-31-30 NMSA 1978] or a state police officer to serve and carry out the warrant;

(3) command the person to whom it is directed to inspect the area, premises, building or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(4) identify the items or types of property to be seized, if any; and

(5) direct that it be served during normal business hours or other hours designated by the magistrate and designate the magistrate to whom it shall be returned;

C. a warrant issued pursuant to this section must be served and returned within five days of its date unless, upon a showing of a need for additional time, the court orders otherwise. If property is seized pursuant to a warrant, a copy of the warrant shall be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken. The return of the warrant shall be made promptly, accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person serving the warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one credible person other than the person serving the warrant. A copy of the inventory shall be delivered to the person from whom or from whose premises the property was taken and the applicant for the warrant; and



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D. the magistrate who has issued a warrant shall attach a copy of the return and all papers returnable in connection with it and file them with the clerk of the magistrate court.

**History: 1953 Comp., § 54-11-30, enacted by Laws 1972, ch. 84, § 30.**

**Cross references.** — For constitutional guarantee against unreasonable searches and seizures, *see* N.M. Const., art. II, § 10.

For issuance of search warrants generally, *see* Rule 5-211 NMRA.

**ANNOTATIONS**

**Probable cause.** — Application for a warrant to search defendant's car, which as grounds for its issuance merely claimed that a packet of marijuana had been found in the trunk thereof, did not state probable cause and was constitutionally inadequate, as it gave no clue relating to the basis for the statement. *State v. Lewis*, 1969-NMCA-041, 80 N.M. 274, 454 P.2d 360, *overruled on other grounds by State v. Nemrod*, 1973-NMCA-059, 85 N.M. 118, 509 P.2d 885, *overruled on other grounds by State v. Vigil*, 1974-NMCA-065, 86 N.M. 388, 524 P.2d 1004, cert. denied, 87 N.M. 345, 533 P.2d 578 (S. Ct. 1975), 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

**Affidavit.** — Former law providing for issuance of a search warrant upon affidavit by a legal voter of the state, for the purpose of searching for narcotic drugs, did not require a recital in the affidavit that the affiant was a legal voter. *State v. Chavez*, 1966-NMSC-269, 77 N.M. 274, 421 P.2d 796, denial of motion for post-conviction relief, *aff'd*, 1968-NMCA-096, 79 N.M. 741, 449 P.2d 343 (decided under prior law).

## 30-31-32. Administrative inspections.

The board may make administrative inspections of controlled premises in accordance with the following provisions:

A. for purposes of this section, "controlled premises" means:

(1) places where persons registered or exempted from registration requirements under the Controlled Substances Act are required to keep records; and

(2) places, including factories, warehouses, establishments and conveyances in which persons registered or exempted from registration requirements under the Controlled Substances Act are permitted to hold, manufacture, compound, process, sell, deliver or otherwise dispose of any controlled substance;

B. when authorized by an administrative inspection warrant issued pursuant to Section 30 [30-31-31 NMSA 1978], an officer or employee designated by the board, upon presenting the warrant and appropriate credentials to the owner, operator or agent in charge, may enter the controlled premises for the purpose of conducting an administrative inspection;

C. when authorized by an administrative inspection warrant, an officer or employee designated by the board may:

(1) inspect and copy records required by the Controlled Substances Act to be kept;

(2) inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, containers and labeling found therein, and, except as provided in Subsection E, all other things bearing on violations of the Controlled Substances Act, including records, files, papers, processes, controls and facilities; and

(3) inventory any stock of any controlled substance and obtain samples;

D. this section does not prevent entries and administrative inspections, including seizures of property, without a warrant:

(1) if the owner, operator or agent in charge of the controlled premises consents;

(2) in situations presenting substantial imminent danger to health or safety; or

(3) in all other situations in which a warrant is not constitutionally required;

E. an inspection authorized by this section shall not extend to financial data, sales data other than shipment data or pricing data unless the owner, operator or agent in charge of the controlled premises consents in writing.

**History: 1953 Comp., § 54-11-31, enacted by Laws 1972, ch. 84, § 31.**

**Cross references.** — For constitutional guarantee against unreasonable searches and seizures, *see* N.M. Const., art. II, § 10.

For issuance of search warrants, *see* Rule 5-211 NMRA.



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## 30-31-33. Injunctions.

A. The district courts may exercise jurisdiction to restrain or enjoin violations of the Controlled Substances Act.

B. The defendant may demand trial by jury for an alleged violation of an injunction or restraining order under this section.

**History: 1953 Comp., § 54-11-32, enacted by Laws 1972, ch. 84, § 32.**

**Cross references.** — For statutory provisions regarding contempt, *see* 34-1-2 to 34-1-5 NMSA 1978.

For issuance of injunctions, see Rules 1-065 and 1-066 NMRA.

## 30-31-34. Forfeitures; property subject.

The following are subject to forfeiture pursuant to the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978]:

A. all raw materials, products and equipment of any kind, including firearms that are used or intended for use in manufacturing, compounding, processing, delivering, importing or exporting any controlled substance or controlled substance analog in violation of the Controlled Substances Act;

B. all property that is used or intended for use as a container for property described in Subsection A of this section;

C. all conveyances, including aircraft, vehicles or vessels that are used or intended for use to transport or in any manner to facilitate the transportation for the purpose of sale of property described in Subsection A of this section;

D. all books, records and research products and materials, including formulas, microfilm, tapes and data that are used or intended for use in violation of the Controlled Substances Act;

E. narcotics paraphernalia or money that is a fruit or instrumentality of the crime;

F. notwithstanding Subsection C of this section and the provisions of the Forfeiture Act:

(1) a conveyance used by a person as a common carrier in the transaction of business as a common carrier shall not be subject to forfeiture pursuant to this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of the Controlled Substances Act;

(2) a conveyance shall not be subject to forfeiture pursuant to this section by reason of an act or omission established for the owner to have been committed or omitted without the owner's knowledge or consent;

(3) a conveyance is not subject to forfeiture for a violation of law the penalty for which is a misdemeanor; and

(4) a forfeiture of a conveyance encumbered by a bona fide security interest shall be subject to the interest of a secured party if the secured party neither had knowledge of nor consented to the act or omission; and

G. all drug paraphernalia as defined by Subsection T of Section 30-31-2 NMSA 1978.

**History: 1953 Comp., § 54-11-33, enacted by Laws 1972, ch. 84, § 33; 1975, ch. 231, § 1; 1981, ch. 31, § 3; 1987, ch. 68, § 6; 1989, ch. 196, § 1; 2015, ch. 152, § 17; 2021 (1st S.S.), ch. 4, § 69.**

**The 2021 (1st S.S.) amendment,** effective June 29, 2021, amended a reference to another section of law; and in Subsection G, after "Subsection", deleted "V" and added "T".

**The 2015 amendment,** effective July 1, 2015, removed controlled substances from the list of items subject to forfeiture; deleted former Subsection A and added the undesignated introductory phrase "pursuant to the provisions of the Forfeiture Act"; redesignated Subsections B through H as Subsections A through G, respectively; in Subsection A, after "firearms", deleted "which" and added "that"; in Subsection B, after "property", deleted "which" and added "that", and after "Subsection A", deleted "or B"; in Subsection C, after "vessels", deleted "which" and added "that", and after "Subsection A", deleted "or B"; in Subsection D, after "data", deleted "which" and added "that"; in Subsection E, after "money", deleted "which" and added "that"; in the introductory sentence of Subsection F, after "Subsection", deleted "D" and added "C", and after "section", added "and the provisions of the Forfeiture Act"; in Paragraph (1) of Subsection F, at the beginning of the paragraph, deleted "no" and added "a", after "used by", deleted "any" and added "a", after the second occurrence of "carrier", deleted "is" and added "shall not be", and after "forfeiture", deleted "under" and added "pursuant to"; in Paragraph (2) of Subsection F, at the beginning of the paragraph, deleted "no" and added "a", after "conveyance", deleted "is" and added "shall not be", after "forfeiture", deleted "under" and added "pursuant to", after "reason of", deleted "any" and added "an", and after "omitted without", deleted "his" and added "the owner's"; and in Subsection G, after "Subsection", deleted "W" and added "V".



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**The 1989 amendment,** effective July 1, 1989, inserted "including firearms" in Subsection B.

ANNOTATIONS

**Forfeiture not unconstitutional taking.** — Forfeiture under former Narcotic Drug Act (Section 54-7-1, 1953 Comp. et seq.) of tractor and trailer used in transportation of amphetamines did not constitute the taking of property without just compensation. *State v. One 1967 Peterbilt Tractor*, 1973-NMSC-025, 84 N.M. 652, 506 P.2d 1199.

**Nor excessive fine.** — Disproportionate ratio between the value of a tractor and trailer which had been carrying amphetamines and the amount of fine imposed for the crime of possession did not render the forfeiture statute unconstitutional as an excessive fine. *State v. One 1967 Peterbilt Tractor*, 1973-NMSC-025, 84 N.M. 652, 506 P.2d 1199.

**Provisions penal in nature.** — The forfeiture provisions of the Controlled Substances Act are penal in nature. *State v. Ozarek*, 1978-NMSC-001, 91 N.M. 275, 573 P.2d 209.

**Section to be strictly construed.** — Forfeitures are not favored at law, and statutes are to be construed strictly against forfeiture. *State v. Ozarek*, 1978-NMSC-001, 91 N.M. 275, 573 P.2d 209.

**The fourth amendment exclusionary rule is applicable** to forfeiture proceedings. *Albuquerque Police Dep't v. Martinez*, 1995-NMCA-088, 120 N.M. 408, 902 P.2d 563, cert. denied, 120 N.M. 213, 900 P.2d 962.

**Forfeiture of pickup truck is civil proceeding.** — The forfeiture of a pickup truck under this section, although quasi-criminal and gauged by standards applicable to a criminal proceeding, is a civil proceeding. *State v. Barela*, 1979-NMCA-156, 93 N.M. 700, 604 P.2d 838, cert. denied, 94 N.M. 674, 615 P.2d 991 (1980), *overruled on other grounds by State v. Vigil*, 1974-NMCA-065, 86 N.M. 388, 524 P.2d 1004, cert. denied, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

**Proof of violation required for forfeiture.** — Money seized from defendant's vehicle during a routine traffic stop was not subject to forfeiture in the absence of any evidence that it was seized in connection with the commission of a criminal offense and prohibited by the Controlled Substances Act. *State ex rel. Tucumcari Police Dep't v. $104,999.00 in U.S. Currency*, 2000-NMCA-084, 129 N.M. 552, 10 P.3d 876, cert. denied, 129 N.M. 519, 10 P.3d 843.

**Possession must be for sale.** — In order for property to be forfeited under this section, possession of a controlled substance must be for the purpose of sale. *State ex rel. Dep't of Pub. Safety v. One 1990 Chevrolet Pickup*, 1993-NMCA-068, 115 N.M. 644, 857 P.2d 44, cert. denied, 115 N.M. 602, 856 P.2d 250.

**Transportation need not be for purpose of sale.** — A vehicle is subject to forfeiture under Subsection D if used to transport an illegal substance, and the transportation need not be for the purpose of sale. *State v. Stevens*, 1983-NMSC-108, 100 N.M. 577, 673 P.2d 1310.

**Nature of burden on owner.** — The burden imposed on the owner is the burden of going forward and not the burden of persuasion. *State v. Ozarek*, 1978-NMSC-001, 91 N.M. 275, 573 P.2d 209.

**Shifting the burden.** — The owner need only assert that the vehicle was used without his knowledge and consent to shift the burden to the state. *State v. Ozarek*, 1978-NMSC-001, 91 N.M. 275, 573 P.2d 209.

**Interest of innocent co-owner exempt.** — An innocent co-owner's interest in a truck seized due to illegal use by the guilty co-owner is exempt from forfeiture. *In re Forfeiture of One 1970 Ford Pickup*, 1991-NMCA-124, 113 N.M. 97, 823 P.2d 339.

**Misdemeanor offenses excluded.** — Subsections D and G(3) should be construed together as providing for forfeiture in those trafficking and distribution cases where the crime involved constitutes a felony, and the purpose of Subsection G(3) is to exclude misdemeanor drug trafficking offenses. *State ex rel. Dep't of Pub. Safety v. One 1990 Chevrolet Pickup*, 1993-NMCA-068, 115 N.M. 644, 857 P.2d 44, cert. denied, 115 N.M. 602, 856 P.2d 250.

**Law reviews.** — For note, "New Mexico Restricts the Use of Civil Forfeiture: *State v. One 1990 Chevrolet Pickup*," see 24 N.M.L. Rev. 377 (1994).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Forfeiture of money to state or local authorities based on its association with or proximity to other contraband, 38 A.L.R.4th 496.

Necessity of conviction of offense associated with property seized in order to support forfeiture of property to state or local authorities, 38 A.L.R.4th 515.

Forfeitability of property held in marital estate under uniform controlled substances act or similar statute, 84 A.L.R.4th 620.

Real property as subject of forfeiture under uniform controlled substances act or similar statutes, 86 A.L.R.4th 995.

Timeliness of institution of proceedings for forfeiture under Uniform Controlled Substances Act or similar statute, 90 A.L.R.4th 493.

Forfeitability of property under Uniform Controlled Substances Act or similar statute where amount of controlled substance seized is small, 6 A.L.R.5th 652.

Forfeiture of homestead based on criminal activity conducted on premises - state cases, 16 A.L.R.5th 855.

Validity and construction of state statutes criminalizing the act of permitting real property to be used in connection with illegal drug activities, 24 A.L.R.5th 428.

Forfeiture of personal property used in illegal manufacture, processing, or sale of controlled substances under § 511 of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 881), 59 A.L.R. Fed. 765, 109 A.L.R. Fed. 322.

Validity, construction, and application of criminal forfeiture provisions of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 853), 88 A.L.R. Fed. 189.

Seizure or forfeiture of real property used in illegal possession, manufacture, processing, purchase, or sale of controlled substances under § 511(a)(7) of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 881(a)(7)), 104 A.L.R. Fed. 288.

Who is exempt from forfeiture of drug proceeds under "innocent owner" provision of 21 USCS § 881(a)(6), 109 A.L.R. Fed. 322.

What constitutes establishment of prima facie case for forfeiture of real property traceable to proceeds from sale of controlled substances under § 511(a)(6) of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCA § 881(a)(6)), 146 A.L.R. Fed. 597.

When does forfeiture of currency, bank account, or cash equivalent violate excessive fines clause of Eighth Amendment, 164 A.L.R. Fed. 591.

## 30-31-35. Forfeiture; procedure.

The provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of property subject to forfeiture and disposal pursuant to the Controlled Substances Act.



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**History: 1953 Comp., § 54-11-34, enacted by Laws 1972, ch. 84, § 34; 1973, ch. 211, § 1; 1975, ch. 231, § 2; 1977, ch. 139, § 1; 1980, ch. 7, § 1; 1981, ch. 66, § 1; 2002, ch. 4, § 15; 2015, ch. 152, § 18.**

**The 2015 amendment,** effective July 1, 2015, after "disposal", deleted "under" and added "pursuant to".

## ANNOTATIONS

**Forfeiture of cash.** — State police officers who seize cash under the authority of the Controlled Substances Act are required to comply with the requirements of the Forfeiture Act. *Albin v. Bakas*, 2007-NMCA-076, 141 N.M. 742, 160 P.3d 923, cert. denied, 2007-NMCERT-006, 142 N.M. 16, 162 P.3d 171.

**Forfeiture cases are purely *in rem* proceedings.** *In re Forfeiture of One 1980 Honda Accord*, 1988-NMCA-114, 108 N.M. 274, 771 P.2d 982 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

**Jurisdiction.** — In forfeiture cases, execution on the judgment resulting in the removal of the *res* from the control of the district court deprives the court of its *in rem* jurisdiction. An exception to this rule occurs when the *res* is released accidentally, fraudulently or improperly. *In re Forfeiture of One 1980 Honda Accord*, 1988-NMCA-114, 108 N.M. 274, 771 P.2d 982 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

County, by executing on a district court's judgment of forfeiture of an automobile and transferring the title of the vehicle, removed the *res* from the court's control and ended the court's constructive possession of the vehicle. *In re Forfeiture of One 1980 Honda Accord*, 1988-NMCA-114, 108 N.M. 274, 771 P.2d 982 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

When a state entity initiates a forfeiture proceeding, thereby invoking the jurisdiction of the courts of New Mexico, those courts retain *in personam* jurisdiction until all appeals have been exhausted. *Mitchell v. City of Farmington Police Dep't*, 1991-NMSC-035, 111 N.M. 746, 809 P.2d 1274 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

**Due process notice requirements.** — The forfeiture provisions of the Controlled Substances Act are penal in nature and consequently no preseizure notice or hearing is constitutionally required, the provision for a hearing within 30 days of seizure being sufficient to satisfy due process standards. *In re One Cessna Aircraft*, 1977-NMSC-007, 90 N.M. 40, 559 P.2d 417 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

**Hearing required to meet due process.** — The failure of a city ordinance to provide for a hearing for people who lose alleged drug paraphernalia violates the due process guarantee of the constitution. Providing a hearing within 30 days satisfies the due process requirement. *Weiler v. Carpenter*, 695 F.2d 1348 (10th Cir. 1982) (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

**Jeopardy can attach** in a civil forfeiture proceeding arising under the Controlled Substances Act when the final disposition of the case results in a stipulated dismissal and a loss of a property interest without a judgment of forfeiture. *State v. Tijerino*, 2004-NMCA-039, 135 N.M. 313, 87 P.3d 1095, cert. denied, 2004-NMCERT-003, 135 N.M. 320, 88 P.3d 261.

**Double jeopardy rights protected.** — Because civil forfeiture under the Controlled Substances Act is punishment for double-jeopardy purposes under the New Mexico Constitution, all forfeiture complaints and criminal charges for violations of the Controlled Substances Act may both be brought only in a single, bifurcated proceeding. *State v. Nunez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

**Double jeopardy.** — Where the city's forfeiture complaint was filed on June 4, 2001, the stipulated order of dismissal releasing the vehicle to the credit company was entered on August 21, 2001, and the criminal charges against both defendants were not filed until October 1, 2001, there was never a single bifurcated proceeding and if the city and state had combined these cases in a single bifurcated proceeding, there would be no double jeopardy issue. *State v. Tijerino*, 2004-NMCA-039, 135 N.M. 313, 87 P.3d 1095, cert. denied, 2004-NMCERT-003, 135 N.M. 320, 88 P.3d 261.

**State's burden of proof in forfeiture proceeding.** — In the forfeiture portion of the trial, the burden of proof is on the state to prove by clear and convincing evidence that the property in question is subject to forfeiture. *State v. Nunez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

**Inability to post supersedeas bond** may not operate to deny the right to a stay of a forfeiture judgment. *Mitchell v. City of Farmington Police Dep't*, 1991-NMSC-035, 111 N.M. 746, 809 P.2d 1274 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

**Criminal standards applicable.** — Proceeding under former Narcotic Drug Act (54-7-1, 1953 Comp. et seq.) to declare the forfeiture of a tractor and trailer found to contain a large quantity of amphetamines, notwithstanding such was not a criminal proceeding, was properly gauged by the same standards applicable in a criminal proceeding. *State v. One 1967 Peterbilt Tractor*, 1973-NMSC-025, 84 N.M. 652, 506 P.2d 1199 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

**Fourth Amendment exclusionary rule is applicable** to forfeiture proceedings. *Albuquerque Police Dep't v. Martinez*, 1995-NMCA-088, 120 N.M. 408, 902 P.2d 563 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

**Illegal evidence inadmissible.** — If the evidence supporting a forfeiture was obtained by an unconstitutional search and seizure, that evidence would be inadmissible and would necessitate reversal of the judgment of forfeiture. *State v. One 1967 Peterbilt Tractor*, 1973-NMSC-025, 84 N.M. 652, 506 P.2d 1199 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

**Waiver of hearing.** — Since the defendant opted for silence to protect his right against self-incrimination, he waived his right to a timely hearing following seizure. *State ex rel. Albuquerque Police Dep't v. One Black 1983 Chevrolet Van*, 1995-NMCA-082, 120 N.M. 280, 901 P.2d 211 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

**Term "law enforcement agency"** used in this section may include a district attorney's office. 1989 Op. Att'y Gen. No. 89-32 (opinion rendered under prior law, *see now* Section 31-27-1 NMSA 1978).

**Disposition of forfeited properties.** — Moneys or other properties do not have to revert to the general fund under this provision provided the moneys or other properties are used by law enforcement agencies in the enforcement of the Controlled Substances Act. 1977 Op. Att'y Gen. No. 77-14 (opinion rendered under prior law, *see now* Section 31-27-1 NMSA 1978).

The state police bureau of narcotics may receive the proceeds of forfeitures of property seized before November 25, 1986, even though not disposed of by order of the district court prior to that date. 1987 Op. Att'y Gen. No. 87-20 (opinion rendered under prior law, *see now* Section 31-27-1 NMSA 1978).

Statute requires that the proceeds of vehicles sold by a law enforcement agency must revert to the applicable general fund. 1989 Op. Att'y Gen. No. 89-32 (opinion rendered under prior law, *see now* Section 31-27-1 NMSA 1978).

**Law reviews.** — For note, "Criminal Procedure - Civil Forfeiture and Double Jeopardy: State v. Nunez," see 31 N.M.L. Rev. 401 (2001).

For note, "Criminal Procedure – Civil Forfeiture and Double Jeopardy: State v. Nunez," see 31 N.M. L. Rev. 401 (2001).



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For note and comment, "Complying with Nunez: The Necessary Procedure for Obtaining Forfeiture of Property and Avoiding Double Jeopardy after State v. Esparza," see 34 N.M. L. Rev. 561 (2004).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 191, 206.

Validity and construction of provisions of Uniform Controlled Substances Act providing for forfeiture hearing before law enforcement officer, 84 A.L.R.4th 637.

Effect of forfeiture proceedings under Uniform Controlled Substances Act or similar statute on lien against property subject to forfeiture, 1 A.L.R.5th 317.

Forfeitability of property, under Uniform Controlled Substances Act or similar statute, where property or evidence supporting forfeiture was illegally seized, 1 A.L.R.5th 346.

Application of forfeiture provisions of Uniform Controlled Substances Act or similar statute where drugs were possessed for personal use, 1 A.L.R.5th 375.

Delay in setting hearing date or in holding hearing as affecting forfeitability under Uniform Controlled Substances Act or similar statute, 6 A.L.R.5th 711.

Forfeiture of personal property used in illegal manufacture, processing, or sale of controlled substances under § 511 of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 881), 59 A.L.R. Fed. 765, 109 A.L.R. Fed. 322.

Delay between seizure of personal property by federal government and institution of proceedings for forfeiture thereof as violative of fifth amendment due process requirements, 69 A.L.R. Fed. 373.

What constitutes establishment of prima facie case for forfeiture of real property traceable to proceeds from sale of controlled substances under § 511(a)(6) of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCA § 881(a)(6)), 146 A.L.R. Fed. 597.

28 C.J.S. Drugs and Narcotics § 6 et seq.

## 30-31-36. Summary forfeiture.

A. Controlled substances listed in Schedule I or controlled substance analogs of substances listed in Schedule I that are possessed, transferred, sold or offered for sale in violation of the Controlled Substances Act are contraband and shall be seized and summarily forfeited to the state.

B. Controlled substances listed in Schedule I or controlled substance analogs of substances listed in Schedule I which are seized or come into the possession of the state, the owners of which are unknown, are contraband and shall be summarily forfeited to the state.

C. Species of plants from which controlled substances in Schedules I and II or controlled substance analogs of substances listed in Schedules I and II may be derived which have been planted or cultivated in violation of the Controlled Substances Act, or of which the owners or cultivators are unknown or which are wild growths, may be seized and summarily forfeited to the state.

**History: 1953 Comp., § 54-11-35, enacted by Laws 1972, ch. 84, § 35; 1987, ch. 68, § 7.**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Effect of forfeiture proceedings under Uniform Controlled Substances Act or similar statute on lien against property subject to forfeiture, 1 A.L.R.5th 317.

Forfeitability of property, under Uniform Controlled Substances Act or similar statute, where property or evidence supporting forfeiture was illegally seized, 1 A.L.R.5th 346.

Application of forfeiture provisions of Uniform Controlled Substances Act or similar statute where drugs were possessed for personal use, 1 A.L.R.5th 375.

Forfeitability of property under Uniform Controlled Substances Act or similar statute where amount of controlled substance seized is small, 6 A.L.R.5th 652.

Delay between seizure of personal property by federal government and institution of proceedings for forfeiture thereof as violative of fifth amendment due process requirements, 69 A.L.R. Fed. 373.

## 30-31-37. Burden of proof.

It is not necessary for the state to negate any exemption or exception in the Controlled Substances Act in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under the Controlled Substances Act. The burden of proof of any exemption or exception is upon the person claiming it.

**History: 1953 Comp., § 54-11-36, enacted by Laws 1972, ch. 84, § 36.**

ANNOTATIONS

**State not required to disprove excuses or exemptions.** — The state's burden of proving guilt beyond a reasonable doubt does not entail the burden of disproving all excuses, provisos, exceptions and exemptions which might possibly relieve a defendant of criminal liability for the offense with which he is charged. *State v. Everidge*, 1967-NMSC-035, 77 N.M. 505, 424 P.2d 787, cert. denied, *sub nom. Greene v. U.S.*, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

**Burden on defendant to negate narcotic character of substance.** — The burden of proof is on the defendant, not the state, to prove that the substance identified as heroin was not a narcotic drug as an exemption or exception. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**State's burden of proof in forfeiture proceeding.** — In the forfeiture portion of the trial, the burden of proof is on the state to prove by clear and convincing evidence that the property in question is subject to forfeiture. *State v. Nunez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 28 C.J.S. Drugs and Narcotics § 148 et seq.



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## 30-31-38. Cooperative duties of board.

A. The board shall cooperate with federal and other state agencies in discharging its responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end it may:

(1) arrange for the exchange of information among governmental officials concerning the use and abuse of controlled substances;

(2) cooperate in training programs concerning controlled substances law enforcement at local and state levels; and

(3) cooperate with the bureau by establishing a centralized unit to accept, catalogue, file and collect statistics and make the information available for federal, state and local law enforcement purposes. It shall not furnish the name or identity of a patient or research subject whose identity could not be obtained under Section 39 [30-31-40 NMSA 1978].

B. Results, information and evidence received from the bureau relating to the regulatory functions of the Controlled Substances Act, including results of inspections conducted by it, may be relied and acted upon by the board in the exercise of its regulatory functions under the Controlled Substances Act.

**History: 1953 Comp., § 54-11-37, enacted by Laws 1972, ch. 84, § 37.**

## 30-31-39. Education.

The board shall provide for educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with these programs it may:

A. promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry;

B. assist the regulated industry in contributing to the reduction of misuse and abuse of controlled substances; and

C. assist in the education and training of state and local law enforcement officials in their efforts to control misuse and abuse of controlled substances.

**History: 1953 Comp., § 54-11-38, enacted by Laws 1972, ch. 84, § 38.**

## 30-31-40. Research; confidentiality.

A. The board shall encourage research on misuse and abuse of controlled substances. In connection with the research, and in furtherance of the enforcement of the Controlled Substances Act, it may register public agencies, institutions of higher education and private organizations or individuals for the purpose of conducting research, demonstrations or special projects which bear directly on misuse and abuse of controlled substances.

B. The board may authorize persons engaged in research on the use and effects of controlled substances to withhold the names and other identifying characteristics of individuals who are subjects of the research. Persons who obtain this authorization are not compelled in any civil, criminal, administrative, legislative or other proceeding to identify the individuals who are the subjects of research for which the authorization was obtained.

C. The board may authorize the possession and distribution of controlled substances by persons engaged in research. Such authorization shall contain the conditions and terms of the research to be conducted. Persons who obtain this authorization are exempt from state prosecution for possession and distribution of controlled substances to the extent of the authorization.

D. A practitioner engaged in medical practice or research shall not be required to furnish the name or identity of a patient or research subject to the board, nor may he be compelled in any state or local civil, criminal, administrative, legislative or other proceedings to furnish the name or identity of an individual that the practitioner is obligated to keep confidential.



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**History: 1953 Comp., § 54-11-39, enacted by Laws 1972, ch. 84, § 39.**

**Cross references.** — For confidentiality of health information involving specific individuals, *see* 14-6-1 NMSA 1978.

## 30-31-41. Anabolic steroids; possession; distribution; penalties; notice.

A. Except as authorized by the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act, Chapter 26, Article 1 NMSA 1978], it is unlawful for any person to intentionally possess anabolic steroids. Any person who violates this subsection is guilty of a misdemeanor.

B. Except as authorized by the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act], it is unlawful for any person to intentionally distribute or possess with intent to distribute anabolic steroids. Any person who violates this subsection is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Except as authorized by the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act], it is unlawful for any person eighteen years of age or older to intentionally distribute anabolic steroids to a person under eighteen years of age. Any person who violates this subsection is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

D. A copy of this act shall be distributed to each licensed athletic trainer by the athletic trainers advisory board and displayed prominently in the athletic locker rooms of all state post-secondary and public schools.

**History: Laws 1987, ch. 271, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not a part of the law. Laws 1987, ch. 270, § 1 changed the "New Mexico Drug and Cosmetic Act" to the "New Mexico Drug, Device and Cosmetic Act".

**Cross references.** — For definition of dangerous drug for purposes of the New Mexico Drug, Device and Cosmetic Act, *see* 26-1-2 NMSA 1978.

# ARTICLE 31A

# Imitation Controlled Substances

Sec.
30-31A-1. Short title.
30-31A-2. Definitions.
30-31A-3. Duty to administer.
30-31A-4. Manufacture, distribution [or possession] of imitation controlled substance.
30-31A-5. Sale to a minor.
30-31A-6. Possession with intent to distribute an imitation controlled substance.
30-31A-7. Advertisement.
30-31A-8. Defenses.
30-31A-9. Forfeitures; property subject.
30-31A-10. Forfeiture; procedure.
30-31A-11. Summary forfeiture.
30-31A-12. Powers of enforcement personnel.
30-31A-13. Administrative inspections and warrants.
30-31A-14. Injunctions.
30-31A-15. Immunity.

## 30-31A-1. Short title.

This act [30-31A-1 through 30-31A-15 NMSA 1978] may be cited as the "Imitation Controlled Substances Act".

**History: Laws 1983, ch. 148, § 1.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Federal criminal liability of narcotics conspirator for different substantive crime of other conspirator, 77 A.L.R. Fed. 661.

## 30-31A-2. Definitions.

As used in the Imitation Controlled Substances Act:



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A. "board" means the board of pharmacy;

B. "controlled substance" means a substance as defined in Subsection E of Section 30-31-2 NMSA 1978;

C. "distribute" means the sale or possession with the intent to sell of an imitation controlled substance;

D. "imitation controlled substance" means a substance that is not a controlled substance which by dosage unit appearance, including color, shape, size and markings and by representations made would lead a reasonable person to believe that the substance is a controlled substance. The fact finder may consider;

(1) statements made by an owner or by anyone else in control of the substance concerning the nature of the substance or its use or effect;

(2) statements made to the recipient that the substance may be resold for inordinate profit;

(3) whether the substance is packaged in a manner normally used for illicit controlled substances;

(4) evasive tactics or actions utilized by the owner or person in control of the substance to avoid detection by law enforcement authorities;

(5) prior convictions, if any, of the owner or anyone in control of the object, under state or federal law related to controlled substances or fraud; and

(6) whether the physical appearance of the substance is substantially identical to a controlled substance; and

E. "manufacture" means the production, preparation, compounding, processing, encapsulating, packaging or repackaging or labeling or relabeling as an imitation controlled substance.

**History: Laws 1983, ch. 148, § 2.**

ANNOTATIONS

**Admissibility of prior convictions under Section 31-31A-2(D)(5) NMSA 1978.** — Any evidence of a prior conviction referred to in Section 31-31A-2(D)(5) NMSA 1978 must also be admissible under Rules 11-403 and 11-404(B) NMRA. *State v. Serna*, 2013-NMSC-033.

**Admission of prior convictions under Section 31-31A-2(D)(5) NMSA 1978 was error.** — Where defendant was charged with trafficking imitation controlled substances for selling baking soda as cocaine; pursuant to Section 31-31A-2(D)(5) NMSA 1978, the district court allowed testimony about defendant's prior criminal convictions for possession of a controlled substance and credit card fraud; and the evidence of defendant's prior convictions went solely to propensity, painting defendant as a bad character from the drug world, the convictions were inadmissible. *State v. Serna*, 2013-NMSC-033.

## 30-31A-3. Duty to administer.

The board shall administer the Imitation Controlled Substances Act.

**History: Laws 1983, ch. 148, § 3.**

## 30-31A-4. Manufacture, distribution [or possession] of imitation controlled substance.

It is unlawful for any person to manufacture, distribute or possess with intent to distribute an imitation controlled substance. Any person who violates the provisions of this section is guilty of a fourth degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: Laws 1983, ch. 148, § 4.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

ANNOTATIONS

**Act not unconstitutionally vague or overbroad.** — The language of this act clearly prohibits the manufacture, distribution, or possession with the intent to distribute a substance that looks like and is represented as being a controlled substance but is not, evincing a legislative intent to require general criminal intent while restricting from its reach those actions ordinarily deemed to be constitutionally protected. *State v. Castleman*, 1993-NMCA-019, 116 N.M. 467, 863 P.2d 1088, cert. quashed, 115 N.M. 796, 115 N.M. 796, 858 P.2d 1275.

**Jury instruction on "transfer" proper.** — Trial court did not err in employing the term "transfer" in charging the jury in a prosecution for violating this section, since it is not much broader than the term "sell". *State v.*



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*Castleman*, 1993-NMCA-019, 116 N.M. 467, 863 P.2d 1088, cert. quashed, 115 N.M. 795, 115 N.M. 796, 858 P.2d 1275.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and effect of state statute regulating sale of counterfeit or imitation controlled substances, 84 A.L.R.4th 936.

## 30-31A-5. Sale to a minor.

No person who is eighteen years of age or older shall intentionally sell an imitation controlled substance to a person under the age of eighteen years. Any person who violates this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: Laws 1983, ch. 148, § 5.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and effect of state statute regulating sale of counterfeit or imitation controlled substances, 84 A.L.R.4th 936.

## 30-31A-6. Possession with intent to distribute an imitation controlled substance.

It is unlawful for any person intentionally to possess an imitation controlled substance with the intent to distribute. Any person who violates this section is guilty of a fourth degree felony.

**History: Laws 1983, ch. 148, § 6.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and effect of state statute regulating sale of counterfeit or imitation controlled substances, 84 A.L.R.4th 936.

## 30-31A-7. Advertisement.

It is unlawful for any person to place in any newspaper, magazine, handbill or other publication, or to post or distribute in any place visible to the general public, any advertisement or solicitation with reasonable knowledge that the purpose of the advertisement or solicitation is to promote the distribution of imitation controlled substances. Any person who violates this section is guilty of a misdemeanor.

**History: Laws 1983, ch. 148, § 7.**

## 30-31A-8. Defenses.

In any prosecution for unlawful delivery of an imitation controlled substance, it is no defense that the defendant believed the imitation controlled substance to be a controlled substance.

**History: Laws 1983, ch. 148, § 8.**

## 30-31A-9. Forfeitures; property subject.

The following are subject to forfeiture:

A. all raw materials, products and equipment of any kind that are used in the manufacturing, compounding or processing of any imitation controlled substance in violation of the Imitation Controlled Substances Act;

B. all property that is used or intended for use as a container for property described in Subsection A of this section; and

C. all books, records and research products and materials, including formulas, microfilm, tapes and data, that are used or intended for use in violation of the Imitation Controlled Substances Act.



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**History: Laws 1983, ch. 148, § 9; 2015, ch. 152, § 19.**

**The 2015 amendment,** effective July 1, 2015, removed imitation controlled substances from the provisions of this section; deleted former Subsection A, relating to imitation controlled substances, and redesignated the succeeding subsections accordingly; in new Subsection A, after "any kind", deleted "which" and added "that", after "used in", added "the"; in Subsection B, after "property", deleted "which" and added "that", and after "Subsection A", deleted "or B"; and in Subsection C, after "data,", deleted "which" and added "that".

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and application of criminal forfeiture provisions of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 853), 88 A.L.R. Fed. 189.

## 30-31A-10. Forfeiture; procedure.

The provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of property subject to forfeiture and disposal under the Imitation Controlled Substances Act.

**History: Laws 1983, ch. 148, § 10; 2002, ch. 4, § 16.**

**Cross references.** — For Rules of Civil Procedure for the District Courts, *see* Rule 1-001 NMRA et seq.

**The 2002 amendment,** effective July 1, 2002, substituted the present provisions of the section for the former provisions which detailed forteiture procedures for property seized under the Imitation Controlled Substances Act.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Forfeitability of property under Uniform Controlled Substances Act or similar statute where amount of controlled substance seized is small, 6 A.L.R.5th 652.

Delay in setting hearing date or in holding hearing as affecting forfeitability under Uniform Controlled Substances Act or similar statute, 6 A.L.R.5th 711.

## 30-31A-11. Summary forfeiture.

Imitation controlled substances that are possessed, transferred, sold or offered for sale in violation of the Imitation Controlled Substances Act are contraband and shall be seized and summarily forfeited to the state.

**History: Laws 1983, ch. 148, § 11.**

## 30-31A-12. Powers of enforcement personnel.

Any officer or employee designated by the board or other law enforcement officer may:

A. serve search warrants, arrest warrants and administrative inspection warrants;

B. make arrests without warrant for any offense under the Imitation Controlled Substances Act committed in his presence or if he has probable cause to believe that the person to be arrested has committed or is committing a violation of the Imitation Controlled Substances Act which may constitute a felony; or

C. make seizures of property pursuant to the Imitation Controlled Substances Act.

**History: Laws 1983, ch. 148, § 12.**

## 30-31A-13. Administrative inspections and warrants.

Magistrate or metropolitan courts may issue administrative inspection warrants upon a showing of probable cause.

**History: Laws 1983, ch. 148, § 13.**

## 30-31A-14. Injunctions.

The district courts may exercise jurisdiction to restrain or enjoin violations of the Imitation Controlled Substances Act.

**History: Laws 1983, ch. 148, § 14.**



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## 30-31A-15. Immunity.

No civil or criminal liability shall be imposed by virtue of the Imitation Controlled Substances Act on any person registered under the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978] who manufactures, distributes or possesses an imitation controlled substance for use as a placebo by a registered practitioner in the course of professional practice or research.

**History: Laws 1983, ch. 148, § 15.**

# ARTICLE 31B

# Drug Precursors


Sec.
30-31B-1. Short title.
30-31B-2. Definitions.
30-31B-3. Drug precursors list.
30-31B-4. Duty to administer.
30-31B-5. Nomenclature.
30-31B-6. Regulations.
30-31B-7. Licenses.
30-31B-8. Revocation and suspension of license.
30-31B-9. Order to show cause.
30-31B-10. Records of licensees.
30-31B-11. Distribution by manufacturers.
30-31B-12. Drug precursors; prohibited acts; penalties.
30-31B-13. Powers of enforcement personnel.
30-31B-14. Administrative inspection warrants.
30-31B-15. Administrative inspections.
30-31B-16. Injunctions.
30-31B-17. Summary forfeiture.
30-31B-18. Burden of proof.


## 30-31B-1. Short title.

Chapter 30, Article 31B NMSA 1978 may be cited as the "Drug Precursor Act".

**History: Laws 1989, ch. 177, § 1.; 2004, ch. 9, § 1; 2004, ch. 12 § 1.**

**The 2004 amendment,** effective July 1, 2004, substituted "Chapter 30, Article 31B NMSA 1978" for "sections 1 through 18 of this act".

Laws 2004, ch. 12, § 1, effective July 1, 2004, enacted identical amendments to this section. The section was set out as amended by Laws 2004, ch. 12 § 1. *See* 12-1-8 NMSA 1978.

## 30-31B-2. Definitions.

As used in the Drug Precursor Act:

A. "administer" means the direct application of a controlled substance by any means to the body of a patient or research subject by a practitioner or the practitioner's agent;

B. "agent" includes an authorized person who acts on behalf of a manufacturer, distributor or dispenser. "Agent" does not include a common or contract carrier, public warehouseperson or employee of the carrier or warehouseperson;

C. "board" means the board of pharmacy;

D. "bureau" means the bureau of narcotics and dangerous drugs of the United States department of justice or its successor agency;

E. "controlled substance" means a drug or substance listed in Schedules I through V of the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978] or regulations adopted thereto;

F. "controlled substance analog" means a substance other than a controlled substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I, II, III, IV or V or that was specifically designed to produce effects substantially similar to that of controlled substances in Schedule I, II, III, IV or V. Examples of chemical classes in which controlled substance analogs are found include, but are not limited to, the following:

(1) phenethylamines;
(2) N-substituted piperidines;
(3) morphinans;
(4) ecgonines;
(5) quinazolinones;



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(6) substituted indoles; and

(7) arylcycloalkylamines.

Specifically excluded from the definition of "controlled substance analog" are those substances that are generally recognized as safe and effective within the meaning of the Federal Food, Drug and Cosmetic Act or have been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug and Cosmetic Act;

G. "deliver" means the actual, constructive or attempted transfer from one person to another of a controlled substance or controlled substance analog, whether or not there is an agency relationship;

H. "dispense" means to deliver a controlled substance to an ultimate user or research subject pursuant to the lawful order of a practitioner, including the administering, prescribing, packaging, labeling or compounding necessary to prepare the controlled substance for that delivery;

I. "dispenser" means a practitioner who dispenses and includes hospitals, pharmacies and clinics where controlled substances are dispensed;

J. "distribute" means to deliver other than by administering or dispensing a controlled substance or controlled substance analog;

K. "drug" means substances recognized as drugs in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, official national formulary or any respective supplement to these publications. "Drug" does not include devices or their components, parts or accessories;

L. "drug precursor" means a substance, material, compound, mixture or preparation listed in Section 30-31B-3 NMSA 1978 or regulations adopted thereto or any of their salts or isomers. "Drug precursor" specifically excludes those substances, materials, compounds, mixtures or preparations that are prepared for dispensing pursuant to a prescription or over-the-counter distribution as a substance that is generally recognized as safe and effective within the meaning of the Federal Food, Drug and Cosmetic Act or have been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug and Cosmetic Act, unless the board makes the findings required pursuant to Subsection B of Section 30-31B-4 NMSA 1978;

M. "immediate precursor" means a substance that is a compound commonly used or produced primarily as an immediate chemical intermediary used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail or limit the manufacture of controlled substances;

N. "license" means a license issued by the board to manufacture, possess, transfer or transport a drug precursor;

O. "manufacture" means the production, preparation, compounding, conversion or processing of a drug precursor by extraction from substances of natural origin, independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation or compounding of a controlled substance by a practitioner:

(1) as an incident to the practitioner's administering or dispensing of a controlled substance in the course of professional practice; or

(2) by the practitioner's agent under the practitioner's supervision for the purpose of or as an incident to research, teaching or chemical analysis and not for sale;

P. "person" includes an individual, sole proprietorship, partnership, corporation, association, the state or a political subdivision of the state or other legal entity;

Q. "possession" means to actively or constructively exercise dominion over;

R. "practitioner" means a physician, certified advanced practice chiropractic physician, dentist, veterinarian or other person licensed to prescribe and administer drugs that are subject to the Controlled Substances Act;

S. "prescription" means an order given individually for the person for whom is prescribed a controlled substance, either directly from the prescriber to the pharmacist or indirectly by means of a written order signed by the prescriber and in accordance with the Controlled Substances Act or regulations adopted thereto; and



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T. "transfer" means the sale, possession with intent to sell, barter or giving away of a drug precursor.

**History: Laws 1989, ch. 177, § 2; 2004, ch. 9, § 2; 2004, ch. 12, § 2; 2008, ch. 44, § 6.**

**Cross references.** — For the Federal Food, Drug and Cosmetic Act, *see* 21 U.S.C. § 301 et seq. For Section 505 of that act, *see* 21 U.S.C. § 355.

**The 2008 amendment,** effective May 14, 2008, added "certified advanced practice chiropractic physician" in Subsection R.

**The 2004 amendment,** effective July 1, 2004, in Subsection L, added "unless the board makes the findings required pursuant to Subsection B of Section 30-31B-4 NMSA 1978"; and in Subsection T, changed "controlled substance" to "drug precursor".

**ANNOTATIONS**

**Pseudoephedrine cold tablets.** — The defendant was improperly convicted of possession of drug precursors for possession of pseudoephedrine cold tablets in their original packaging. *State v. Vance*, 2009-NMCA-024, 145 N.M. 706, 204 P.3d 31, cert. denied, 2009-NMCERT-001, 145 N.M. 655, 203 P.3d 870.

## 30-31B-3. Drug precursors list.

Any substance, material, compound, mixture or preparation of the following substances or any of their salts or isomers are subject to regulation by the board and to the requirements of the Drug Precursor Act:

A. 1-phenylcyclohexylamine;
B. 1-piperidinocyclohexanecarbonitrile;
C. ephedrine;
D. psuedoephedrine;
E. methylamine;
F. methylformamide;
G. phenylacetic acid; and
H. phenylacetone.

**History: Laws 1989, ch. 177, § 3.**

## 30-31B-4. Duty to administer.

A. The board shall administer the Drug Precursor Act and by regulation may add substances to the list of drug precursors enumerated in Section 30-31B-3 NMSA 1978. The board shall promulgate regulations pursuant to the procedures of the Uniform Licensing Act [61-1-1 NMSA 1978].

B. In determining whether to add to the list of drug precursors a substance, material, compound, mixture or preparation that is generally recognized as safe and effective within the meaning of the Federal Food, Drug and Cosmetic Act or that has been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug and Cosmetic Act, the board shall consider:

(1) whether the substance, material, compound, mixture or preparation is:

(a) a source of a substance already controlled under the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978 NMSA 1978]; or

(b) subject to being easily converted to an immediate precursor of a substance already controlled under the Controlled Substances Act ;

(2) the relative ease by which use of the substance, material, compound, mixture or preparation can facilitate the manufacture of a controlled substance;

(3) legitimate uses that would be unduly hampered by listing the substance, material, compound, mixture or preparation as a drug precursor;

(4) whether the substance, material, compound, mixture or preparation is formulated to effectively prevent its conversion into an immediate precursor of a substance already controlled under the Controlled Substances Act; and

(5) any other factors relevant to and consistent with the public health and safety.



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C. In determining whether a substance, material, compound, mixture or preparation should be added to the list of drug precursors, the board shall consider:

(1) whether the substance, material, compound, mixture or preparation is an immediate precursor of a substance already controlled under the Controlled Substances Act;

(2) the relative ease by which use of the substance, material, compound, mixture or preparation can facilitate the manufacture of a controlled substance;

(3) legitimate uses which would be unduly hampered by listing the substance, material, compound, mixture or preparation as a drug precursor; and

(4) any other factors relevant to and consistent with the public health and safety.

D. After considering the factors enumerated in Subsection B or C of this section, the board shall make findings and issue regulations listing the substance, material, compound, mixture or preparation as a drug precursor if it finds that the substance, material, compound, mixture or preparation has a significant potential for use in the manufacture of controlled substances.

E. If the board designates a substance, material, compound, mixture or preparation as a drug precursor, then substances, materials, compounds, mixtures or preparations which are precursors of the drug precursor so designated shall not be subject to control solely because they are precursors of a drug precursor.

F. If any substance, material, compound, mixture or preparation is designated as controlled under federal law and notice is given to the board, the board may, by regulation, similarly control the substance under the Drug Precursor Act after providing for a hearing pursuant to the Uniform Licensing Act.

G. Authority to control under this section does not extend to distilled spirits, wine, malt beverages, tobacco or pesticides as defined in the Pesticide Control Act [76-4-1 through 76-4-39 NMSA 1978].

**History: Laws 1989, ch. 177, § 4; 2004, ch. 9, § 3; 2004, ch. 12, § 3.**

**The 2004 amendment,** effective July 1, 2004, designated the first paragraph of this section as Subsection A; added a new Subsection B; and redesignated former Subsections A through E as Subsections C through G.

Laws 2004, ch. 9, § 3, effective July 1, 2004, enacted identical amendments to this section. The section was set out as amended by Laws 2004, ch. 12, § 3. *See* 12-1-8 NMSA 1978.

## 30-31B-5. Nomenclature.

The drug precursors listed in Section 3 [30-31B-3 NMSA 1978] of the Drug Precursor Act are included by whatever official, common, usual, chemical or trade name designated.

**History: Laws 1989, ch. 177, § 5.**

## 30-31B-6. Regulations.

A. The board may promulgate regulations and charge reasonable fees relating to the licensing and control of the manufacture, possession, transfer and transportation of drug precursors. The fees shall not be more than two hundred fifty dollars ($250) per license for a wholesaler's license, a distributor's license or a manufacturer's license. The fees shall not be more than fifty dollars ($50.00) per license for a retail distributor's license, when the retail distributor has ten or more employees. The fees shall not be more than twenty-five dollars ($25.00) per license for a retail distributor's license, when the retail distributor has fewer than ten employees.

B. Every person who manufactures, possesses, transfers or transports any drug precursor or who proposes to engage in the manufacture, possession, transfer or transportation of any drug precursor shall obtain, annually, a license issued by the board.

C. Persons licensed by the board to manufacture, possess, transfer or transport drug precursors may manufacture, possess, transfer or transport those substances to the extent authorized by their license and in conformity with the other provisions of the Drug Precursor Act.

D. The following persons need not be licensed under the Drug Precursor Act and may lawfully possess drug precursors:



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(1) physicians;

(2) an agent of any licensed manufacturer of any drug precursor if he is acting in the usual course of his principal's business or employment;

(3) an employee of a licensed common or contract carrier or licensed warehouseman whose possession of any drug precursor is in the usual course of the licensed common or contract carrier or licensed warehouseman's business;

(4) a student enrolled in a chemistry class for credit; provided, however, that the student's use of the drug precursor is for a bona fide educational purpose and that the chemistry department of the educational institution otherwise possesses all the necessary licenses required by the board;

(5) a consumer who uses a drug precursor for its intended purpose and who does not use the drug precursor to manufacture a substance controlled under the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978];

(6) a pharmacy, an agent or employee of a pharmacy or a contractor for a pharmacy;

(7) a pharmacist, an agent or employee of a pharmacist or a contractor for a pharmacist; or

(8) an agent or employee of a licensed retail establishment or a contractor for a licensed retail establishment.

E. The board may waive by regulation the requirement for licensing of certain manufacturers if it is consistent with the public health and safety.

F. The board may inspect the establishment of a licensee or applicant for license in accordance with the board's regulations.

**History: Laws 1989, ch. 177, § 6; 2004, ch. 9, § 4; 2004, ch. 12, § 4.**

**The 2004 amendment,** effective July 1, 2004, designated the first paragraph of this section as Subsection A and redesignated former Subsections A through E as Subsections B through F; in Subsection A, provided a new $50.00 fee for a retail distributor's license; and in Subsection D, added new Pargraphs (5) through (8).

Laws 2004, ch. 9, § 4, effective July 1, 2004, enacted identical amendments to this section. The section was set out as amended by Laws 2004, ch. 12, § 4. *See* 12-1-8 NMSA 1978.

## 30-31B-7. Licenses.

A. The board shall license an applicant to manufacture, possess, transfer or transport drug precursors unless it determines that the issuance of that license would be inconsistent with the public interest. In determining the public interest, the board shall consider the following factors:

(1) maintenance of effective controls against diversion of drug precursors into other than legitimate medical, scientific or industrial channels;

(2) compliance with applicable state and local law;

(3) any conviction of the applicant under federal or state laws relating to any controlled substance or drug precursor;

(4) past experience in the manufacture, possession, transfer or transportation of drug precursors and the existence in the applicant's establishment of effective controls against diversion;

(5) furnishing by the applicant of false or fraudulent material in any application filed under the Drug Precursor Act or the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978];

(6) suspension or revocation of the applicant's federal registration to manufacture, distribute or dispense controlled substances or drug precursors as authorized by federal law; and

(7) any other factors relevant to and consistent with the public health and safety.

B. Licensing under this section does not entitle a licensee to manufacture, possess, transfer or transport drug precursors other than those allowed in the license.

**History: Laws 1989, ch. 177, § 7.**



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## 30-31B-8. Revocation and suspension of license.

A. A license to manufacture, possess, transfer or transport a drug precursor under Section 7 [30-31B-7 NMSA 1978] of the Drug Precursor Act may be suspended or revoked upon a finding that the registrant has:

(1) furnished false or fraudulent material information in any application filed with the board;

(2) been convicted of a felony under any state or federal law relating to a controlled substance or drug precursor;

(3) had his federal registration to manufacture, distribute or dispense controlled substances or drug precursors suspended or revoked; or

(4) violated any rule or regulation of the board with regard to drug precursors or controlled substances or any provision of the Drug Precursor Act or the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978].

B. A hearing to revoke or suspend a license shall be held by a special hearing panel consisting of the board and two additional persons designated by the board to sit on the hearing panel.

C. The special hearing panel may limit revocation or suspension of a license to the particular drug precursor if grounds for revocation or suspension exist.

D. If the special hearing panel suspends or revokes a license, all drug precursors owned or possessed by the licensee at the time of suspension or the effective date of the revocation may be placed under seal. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded, unless a court, upon application, orders the sale or destruction of perishable or dangerous substances and the deposit of the proceeds of any sale with the court.

E. Upon a revocation order becoming final, the board may apply to the court for an order to sell or destroy all drug precursors under seal. The court shall order the sale or destruction of such drug precursors under such terms and conditions that the court deems appropriate.

F. The board shall promptly notify the bureau of all orders suspending or revoking licenses.

G. The standard of proof necessary to revoke or suspend a license under this section shall be a preponderance of the evidence. The rules of evidence are not strictly applicable to a hearing under this section and all evidentiary matters are to be finally determined by the special hearing panel.

**History: Laws 1989, ch. 177, § 8.**

## 30-31B-9. Order to show cause.

A. Before denying, suspending or revoking a license or refusing a renewal of the license, the board shall serve upon the applicant or licensee an order to show cause why the license should not be denied, revoked or suspended or why the renewal should not be refused. The order to show cause shall contain a statement of the basis of the order and shall require the applicant or registrant to appear before the board not less than thirty days after the date of service of the order, but in the case of a denial of renewal of the license, the order shall be served not later than thirty days before the expiration of the license unless the proceedings relate to suspension or revocation of a license. These proceedings shall be conducted in accordance with the Uniform Licensing Act [61-1-1 NMSA 1978] without regard to any criminal prosecution or other proceeding. Proceedings to suspend or revoke a license or to refuse renewal of a license shall not abate the existing license which shall remain in effect pending the outcome of the proceeding.

B. The board may suspend, without an order to show cause, any license simultaneously with the institution of proceedings to revoke or suspend a registration under Section 30-31-14 NMSA 1978 or where renewal of the license is refused if it finds that there is such a substantial and imminent danger to the public health or safety which warrants this action. The suspension shall continue in effect until the conclusion of the proceedings, including judicial review, unless sooner withdrawn by the board or dissolved by a court of competent jurisdiction.

**History: Laws 1989, ch. 177, § 9.**



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## 30-31B-10. Records of licensees.

Every licensee under the Drug Precursor Act manufacturing, possessing, transferring or transporting a drug precursor shall maintain, on a current basis, a complete and accurate record of each substance manufactured, possessed, transferred or transported by the licensee in accordance with regulations of the board.

**History: Laws 1989, ch. 177, § 10.**

## 30-31B-11. Distribution by manufacturers.

A licensed manufacturer or transferer may transfer drug precursors to a licensed manufacturer, licensed possessor or licensed transporter.

**History: Laws 1989, ch. 177, § 11.**

## 30-31B-12. Drug precursors; prohibited acts; penalties.

A. It is unlawful for any person:

(1) to transfer drug precursors except to an authorized licensee;

(2) to intentionally use in the course of the manufacture or transfer of a drug precursor a license number which is fictitious, revoked, suspended or issued to another person;

(3) to intentionally acquire or obtain, or attempt to acquire or obtain, possession of a drug precursor by misrepresentation, fraud, forgery, deception or subterfuge;

(4) to intentionally furnish false or fraudulent material information in, or omit any material information from, any application, report or other document required to be kept or filed under the Drug Precursor Act or any record required to be kept by that act;

(5) who is a licensee to intentionally manufacture a drug precursor not authorized by his license or to intentionally transfer a drug precursor not authorized by his license to another licensee or authorized person;

(6) to intentionally refuse or fail to make, keep or furnish any record, notification, order form, statement, invoice or information required under the Drug Precursor Act;

(7) to intentionally refuse an entry into any premises for any inspection authorized by the Drug Precursor Act; or

(8) to manufacture, possess, transfer or transport a drug precursor without the appropriate license or in violation of any rule or regulation of the board.

B. Any person who violates any provision of this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. When a person owns or operates a retail establishment where drug precursors are sold by an employee in violation of the provisions of this section, it is an affirmative defense to a prosecution of that owner or operator if he furnishes documentation that he provided the employee with a training program regarding state and federal laws and regulations regarding drug precursors; provided that, if the owner or operator knew or should have known of the employee's violation, the owner or operator shall also be in violation of the provisions of this section.

D. When drug precursors are sold by an employee of a retail establishment in violation of the provisions of this section, it is an affirmative defense to a prosecution of that employee that he did not receive training from his employer regarding state and federal laws and regulations regarding drug precursors.

**History: Laws 1989, ch. 177, § 12; 2004, ch. 9, § 5; 2004, ch. 12, § 5.**

**The 2004 amendment,** effective July 1, 2004, in Subsection B, increased the penalty from a misdemeanor to a fourth degree felony and deleted the enhancement provisions for second and subsequent offenses; and added new Subsections C and D.

Laws 2004, ch. 9, § 5, effective July 1, 2004, enacted identical amendments to this section. The section was set out as enacted by Laws 2004, ch. 12, § 5. *See* 12-1-8 NMSA 1978.



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## 30-31B-13. Powers of enforcement personnel.

Any law enforcement officer:

A. serve search warrants, arrest warrants and administrative inspection warrants;

B. make arrests without a warrant for any offense under the Drug Precursor Act committed in his presence, or if he has probable cause to believe that the person to be arrested has committed or is committing a violation of the Drug Precursor Act which may constitute a felony; and

C. make seizures of property pursuant to the Drug Precursor Act.

**History: Laws 1989, ch. 177, § 13.**

## 30-31B-14. Administrative inspection warrants.

A. Issuance and execution of administrative inspection warrants shall be as follows:

(1) a magistrate, within his jurisdiction and upon proper oath or affirmation showing probable cause, may issue warrants for the purpose of conducting administrative inspections and seizures of property authorized by the Drug Precursor Act. For purposes of the issuance of administrative inspection warrants, probable cause exists upon showing a valid public interest in the effective enforcement of the Drug Precursor Act sufficient to justify administrative inspection of the area, premises, building or conveyance in the circumstances specified in the application for the warrant; and

(2) a warrant shall be issued only upon an affidavit of a law enforcement officer or employee of the board having actual knowledge of the alleged facts, sworn to before the magistrate and establishing the grounds for issuing the warrant. If the magistrate is satisfied that grounds for the warrant exist, he shall issue a warrant identifying the area, premises, building or conveyance to be inspected, the purpose of the inspection and, if appropriate, the type of property to be inspected, if any.

B. The warrant shall:

(1) state the grounds for its issuance and the name of the affiant;

(2) be directed to a person authorized by this section to serve and carry out the warrant;

(3) command the person to whom it is directed to inspect the area, premises, building or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(4) identify the items or types of property to be seized, if any;

(5) allow the sale or destruction of perishable or dangerous substances or equipment and deposit the proceeds of any sale with the court; and

(6) direct that it be served during normal business hours or other hours designated by the magistrate and designate the magistrate to whom it shall be returned.

C. A warrant issued pursuant to this section must be served and returned within five days of its date of issue unless, upon a showing of a need for additional time, the court orders otherwise. If property is seized pursuant to a warrant, a copy of the warrant shall be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken. The return of the warrant shall be made promptly, accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person serving the warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one credible person other than the person serving the warrant. A copy of the inventory shall be delivered to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

D. The magistrate who has issued a warrant shall attach a copy of the return and all papers returnable in connection with it and file them with the clerk of the magistrate court.

**History: Laws 1989, ch. 177, § 14.**



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## 30-31B-15. Administrative inspections.

A. When authorized by an administrative inspection warrant issued pursuant to the Drug Precursor Act, a law enforcement officer or employee of the board, upon presenting the warrant and appropriate credentials to the owner, operator or agent in charge, may enter the controlled premises for the purpose of conducting an administrative inspection.

B. When authorized by an administrative inspection warrant, a law enforcement officer or employee of the board may:

(1) inspect and copy records required to be kept by the Drug Precursor Act;

(2) inspect and sample, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, containers and labeling found therein, and, except as provided in Subsection D of this section, all other things bearing on violation of the Drug Precursor Act, including records, files, papers, processes, controls and facilities; and

(3) inventory any stock of any drug precursor and obtain samples.

C. This section does not prevent entries and administrative inspections, including seizures of property, without a warrant:

(1) if the owner, operator or agent in charge of the controlled premises consents;

(2) in situations presenting substantial imminent danger to health or safety; or

(3) in all other situations in which a warrant is not constitutionally required.

D. An inspection authorized by this section shall not extend to financial data, sales data other than shipment data or pricing data unless the owner, operator or agent in charge of the controlled premises consents in writing.

E. When perishable or dangerous substances or equipment are seized pursuant to Subsection C of this section, the law enforcement officer or employee of the board may apply to the district court for an order to sell or destroy said property and deposit the proceeds of any sale with the court.

F. For purposes of this section "controlled premises" means:

(1) places where persons licensed or exempted from license requirements under the Drug Precursor Act are required to keep records; and

(2) places, including factories, warehouses, establishments and conveyances in which persons licensed or exempted from license requirements under the Drug Precursor Act are permitted to hold, manufacture, compound, process, sell, deliver or otherwise dispose of any drug precursor.

**History: Laws 1989, ch. 177, § 15.**

## 30-31B-16. Injunctions.

A. The district courts may exercise jurisdiction to restrain or enjoin violations of the Drug Precursor Act.

B. The defendant may demand trial by jury for an alleged violation of an injunction or restraining order under this section.

**History: Laws 1989, ch. 177, § 16.**

## 30-31B-17. Summary forfeiture.

A. Drug precursors that are manufactured in violation of the Drug Precursor Act are contraband and shall be seized and summarily forfeited to the state.

B. Drug precursors which are seized or come into the possession of the state, the owners of which are unknown, are contraband and shall be summarily forfeited to the state.

**History: Laws 1989, ch. 177, § 17.**



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## 30-31B-18. Burden of proof.

It is not necessary for the state to negate any exemption or exception in the Drug Precursor Act in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under the Drug Precursor Act. The burden of proof of any exception or exemption is upon the person claiming it.

**History: Laws 1989, ch. 177, § 18.**

# ARTICLE 32

# Forest Fires

Sec.
30-32-1. Fires extinguished by officers; responsibility for costs.
30-32-2. Repealed.
30-32-3. Arrest for violations.
30-32-4. Damages to person injured.

## 30-32-1. Fires extinguished by officers; responsibility for costs.

A. As used in this section, "forest fire" means a fire burning uncontrolled on lands covered wholly or in part by timber, brush, grass, grain or other inflammable vegetation.

B. A person who willfully or recklessly sets a forest fire or causes a forest fire to be set for which efforts to control or extinguish the fire are exerted by the forestry division of the energy, minerals and natural resources department; an agency under agreement with the energy, minerals and natural resources department; a county or municipality; or any fire protection agency of the United States may be liable for the costs incurred, including expenses for fighting the fire and costs of investigation.

**History: Laws 1921, ch. 33, § 4; C.S. 1929, § 35-1409; 1941 Comp., § 14-1804; 1953 Comp., § 40-18-4; Laws 1967, ch. 136, § 1; 2007, ch. 332, § 1.**

**Compiler's notes.** — Section 68-2-3 NMSA 1978 makes the director of the forestry division of the minerals and natural resources department the "state forester".

**Cross references.** — For public nuisances, *see* 30-8-1 NMSA 1978.

For offenses of improper handling of fire and negligent arson, *see* 30-17-1 and 30-17-5 NMSA 1978, respectively.

**The 2007 amendment,** effective June 15, 2007, deleted Subsections B and C and added a new Subsection B.

### ANNOTATIONS

**Law reviews.** — For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

## 30-32-2. Repealed.

**Repeals.** — Laws 2007, ch. 332, § 3 repealed 30-32-2 NMSA 1978, as enacted by Laws 1921, ch. 33, § 5, relating to appointment of voluntary fire wardens, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 30-32-3. Arrest for violations.

All peace officers of the state, including department of game and fish conservation officers, have the power to make arrests on warrant issued by any magistrate of the state for violation of any of the state forest fire laws, including Chapter 68, Article 2 NMSA 1978, rules implementing Chapter 68, Article 2 NMSA 1978 or fire restrictions issued pursuant to such rules, or without warrant for violations of those laws committed in their presence, and shall not be liable to civil action for trespass for acts done in the discharge of their duties.

**History: Laws 1921, ch. 33, § 6; C.S. 1929, § 35-1411; 1941 Comp., § 41-1806; 1953 Comp., § 40-18-6; 2007, ch. 332, § 2.**

**Cross references.** — For issuance of arrest warrants by the magistrate court, *see* Rules 6-204 and 6-206 NMRA.

**The 2007 amendment,** effective June 15, 2007, eliminated voluntary forest fire wardens; changed "deputy



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game and fish wardens" to "department of game and fish conservation officers"; and provided that officers have the power to arrest for violation of Chapter 68, Article 2 NMSA 1978, rules implementing Chapter 68, Article 2 NMSA 1978 or fire restrictions issued pursuant to such rules.

## 30-32-4. Damages to person injured.

If a person sets on fire any woods, marshes or prairies, whether the person's own or not, so as thereby to occasion damage to another person or that person's property, the person shall make satisfaction in double damages to the party injured to be recovered by civil action, unless the person is conducting a prescribed burn pursuant to the Prescribed Burning Act [68-5-1 to 68-5-8 NMSA 1978].

**History: Laws 1882, ch. 61, § 7; C.L. 1884, § 2314; C.L. 1897, § 3222; Code 1915, § 1518; C.S. 1929, § 35-1412; 1941 Comp., § 41-1807; 1953 Comp., § 40-18-7; 2021, ch. 13, § 9.**

**The 2021 amendment,** effective June 18, 2021, provided an exception for prescribed burns pursuant to the Prescribed Burning Act, and made technical amendments; added the section heading "Damages to person injured"; and after "another person", added "or that person's property", and after "civil action", added "unless the person is conducting a prescribed burn pursuant to the Prescribed Burning Act".

### ANNOTATIONS

**Law reviews.** — For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Liability for spread of fire intentionally set for legitimate purpose, 25 A.L.R.5th 391.

# ARTICLE 33

# Fraud and False Dealing

Sec.
30-33-1. Sale of Indian-made articles as genuine.
30-33-2. Repealed.
30-33-3. Indian Arts and Crafts Sales Act; short title.
30-33-4. Definitions.
30-33-5. Purpose of act.
30-33-6. Inquiry as to producer; duty of inquiry; election to label authentic Indian arts and crafts.
30-33-7. Unlawful acts.
30-33-8. Enforcement by attorney general or district attorney.
30-33-9. Violation of act; penalties.
30-33-10. Private right of action; damages.
30-33-11. Administrative regulations.
30-33-12. Obtaining telecommunications service with intent to defraud; definitions.
30-33-13. Crime to procure or to attempt to procure telecommunications service without paying charge; crime to make, possess, sell, give or transfer certain devices for certain purposes; penalty.
30-33-14. Venue.

## 30-33-1. Sale of Indian-made articles as genuine.

It is unlawful to barter, trade, sell or offer for sale or trade any article represented as produced by an Indian unless the article is produced, designed or created by the labor or workmanship of an Indian.

**History: Laws 1929, ch. 33, § 1; C.S. 1929, § 35-1925; 1941 Comp., § 41-2123; 1953 Comp., § 40-21-24; Laws 1957, ch. 93, § 1; 1991, ch. 90, § 1.**

**The 1991 amendment,** effective June 14, 1991, substituted "Indian-made" for "American-Indian" in the catchline; substituted "produced by an Indian unless the article is produced, designed or created by the labor or workmanship of an Indian" for "handicrafted by American Indian unless the basic article be handicraft wholly by American Indian labor or workmanship"; and deleted provisions following "workmanship" which read "provided that all such articles purporting to be of silver shall be made of coin silver or sterling silver, and provided further that 'handicraft' means the production of such articles wholly by hand tools with the exception of buffing or polishing the same and with the exception of the findings used upon such article."

## 30-33-2. Repealed.

**Repeals.** — Laws 1991, ch. 90, § 12 repealed 30-33-2 NMSA 1978, as enacted by Laws 1929, ch. 33, § 2, relating to penalty for falsely selling American Indian items as genuine, effective June 14, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 30-33-9 NMSA 1978.



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## 30-33-3. Indian Arts and Crafts Sales Act; short title.

Sections 30-33-1 through 30-33-11 NMSA 1978 may be cited as the "Indian Arts and Crafts Sales Act".

**History: 1953 Comp., § 40-21-25.1, enacted by Laws 1973, ch. 163, § 1; 1975, ch. 261, § 1; 1991, ch. 90, § 2.**

**Repeals and reenactments.** — Laws 1973, ch. 163, § 1, repealed 40-21-25.1, 1953 Comp., relating to the short title of the Indian Arts and Crafts Sales Act, and enacted a new section.

**The 1991 amendment,** effective June 14, 1991, substituted "30-33-1 through 30-33-11 NMSA 1978" for "40-21-25.1 through 40-21-25.7 NMSA 1953."

**Law reviews.** — For note and comment, "Advancing the Arts Community in New Mexico through Moral Rights and Droit de Suite: The International Impacts and Implications of Preemption Analysis," see 36 N.M. L. Rev. 713 (2006).

For note, "Criminal Procedure – Civil Forfeiture and Double Jeopardy: State v. Nunez," see 31 N.M. L. Rev. 401 (2001).

## 30-33-4. Definitions.

As used in the Indian Arts and Crafts Sales Act [30-33-1 through 30-33-11 NMSA 1978]:

A. "Indian tribe" means:

(1) any tribe, band, nation, Alaska native village or other organized group or community that is eligible for the special programs and services provided by the United States government to Indians because of their status as Indians; or

(2) any tribe that has been formally recognized as an Indian tribe by a state legislature;

B. "Indian" means:

(1) any person who is an enrolled member of an Indian tribe as evidenced by a tribal enrollment card or certified tribal records; or

(2) any person who can meet the minimum qualifications for services offered by the United States government to Indians because of their special status as Indians as evidenced by a certificate of degree of Indian blood card;

C. "authentic Indian arts and crafts" means any product, including traditional or contemporary Indian arts, that:

(1) are Indian handmade; and

(2) are not made by machine;

D. "person" means any individual, firm, association, corporation, partnership or any other legal entity;

E. "made by machine" means the producing or reproducing of a product in mass production by mechanically stamping, blanking, weaving or offset printing;

F. "Indian handmade" means any product in which the entire shaping and forming of the product from raw materials and its finishing and decoration were accomplished by Indian hand labor and manually controlled methods that permit the maker to control and vary the construction, shape, design or finish of each part of each individual product, but does not exclude the use of findings, hand tools and equipment for buffing, polishing, grinding, drilling, sawing or sewing and other processes approved by regulations adopted under the Indian Arts and Crafts Sales Act;

G. "Indian crafted" means any item that is made by an Indian when it is not entirely Indian handmade or is at least in part made by machine, including Indian-assembled and Indian-decorated items and other items consistent with this definition and approved by regulations adopted under the Indian Arts and Crafts Sales Act;

H. "findings" means an ingredient part of the product that adapts the product for wearing or display, including silver beads used in jewelry containing Indian handmade adornments in addition to beads, leather backing, binding material, bolo tie clips, tie bar clips, tie-tac pins, earring pins, earring clips, earring screw backs, cuff link toggles, money clips, pin stems, combs and chains;

I. "product" means the finished tangible arts or crafts;

J. "raw materials" means any material that can be converted by manufacture, processing or a combination of manufacture and processing into a new and useful product, and includes:

(1) "naturally occurring material", which means any material created and produced by nature;



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(2) "natural material", which means any material created and produced by nature that is only altered in shape, form, finish or color as long as the color change is the result of finishing or polishing agents used that do not penetrate the surface of the material by more than one millimeter, or as further defined consistent with this definition in regulations adopted under the Indian Arts and Crafts Sales Act;

(3) "treated material", which means any material created and produced by nature that has been altered by man-made processes that leave the material in its original shape and size after processing, but alter the color, hardness or character of the material, which may be formed, shaped or finished after treating, or as further defined consistent with this definition in regulations adopted under the Indian Arts and Crafts Sales Act; and

(4) "reconstructed material", which means any material created and produced in nature that has been altered by man-made processes that change the color, hardness, shape or character of the material, provided that more than fifty percent of the original naturally occurring material is contained in the product after processing, or as further defined consistent with this definition in regulations adopted under the Indian Arts and Crafts Sales Act but excludes synthetic material; and

K. "synthetic material" means any material that imitates natural materials and is man-made or contains fifty percent or less of the original naturally occurring materials, or as further defined consistent with this definition in regulations adopted under the Indian Arts and Crafts Sales Act.

**History: 1953 Comp., § 40-21-25.2, enacted by Laws 1973, ch. 163, § 2; 1975, ch. 261, § 2; 1977, ch. 334, § 1; 1991, ch. 90, § 3.**

**Repeals and reenactments.** — Laws 1973, ch. 163, § 2, repealed 40-21-25.2, 1953 Comp., defining various terms, and enacted a new section.

**The 1991 amendment,** effective June 14, 1991, rewrote this section.

## 30-33-5. Purpose of act.

The purpose of the Indian Arts and Crafts Sales Act [30-33-1 through 30-33-11 NMSA 1978] is to protect the public and the Indian craftsman under the police powers of the state from false representation in the sale, trade, purchase or offering for sale of Indian arts and crafts.

**History: 1953 Comp., § 40-21-25.3, enacted by Laws 1959, ch. 133, § 3; 1973, ch. 163, § 3; 1975, ch. 261, § 3; 1977, ch. 334, § 2; 1991, ch. 90, § 4.**

**The 1991 amendment,** effective June 14, 1991, deleted "or of turquoise" at the end of the section.

## 30-33-6. Inquiry as to producer; duty of inquiry; election to label authentic Indian arts and crafts.

A. It is the duty of every person selling or offering for sale a product that is represented to be authentic Indian arts or crafts to make due inquiry of his suppliers concerning the true nature of the materials, product design and process of manufacture to determine whether the product may be lawfully represented as authentic Indian arts or crafts.

B. Each person may elect to label or otherwise clearly and conspicuously disclose as authentic Indian arts and crafts all articles that are authentic Indian arts and crafts in accordance with the Indian Arts and Crafts Sales Act [30-33-1 through 30-33-11 NMSA 1978] and regulations adopted pursuant to that act.

C. Consistent with the purposes of the Indian Arts and Crafts Sales Act, regulations adopted under that act may specify designations other than "authentic Indian arts and crafts", including a designation such as "Indian crafted", for authorized labeling as Indian arts and crafts.

**History: 1953 Comp., § 40-21-25.4, enacted by Laws 1959, ch. 133, § 4; 1973, ch. 163, § 4; 1975, ch. 261, § 4; 1977, ch. 334, § 3; 1991, ch. 90, § 5.**

**The 1991 amendment,** effective June 14, 1991, added "Duty of inquiry; election to label authentic Indian arts and crafts" in the catchline; deleted former Subsection A, relating to a duty of persons selling Indian arts and crafts to make due inquiry concerning methods used in production and to determine authenticity; designated former Subsection B as Subsection A and rewrote the subsection which read "It is the duty of every person selling or offering for sale natural or unnatural turquoise, or both to make due inquiry of their suppliers concerning the true nature of the turquoise and to determine whether such



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turquoise is natural, stabilized, treated, reconstituted or imitation"; and added Subsections B and C.

## 30-33-7. Unlawful acts.

It is unlawful for any person to:

A. sell or offer for sale any products represented to be Indian handmade or authentic Indian arts and crafts unless such products are in fact Indian handmade or authentic Indian arts and crafts;

B. sell or offer for sale any products represented to be Indian crafted unless such products are in fact Indian crafted;

C. represent that any Indian arts and crafts product is made of a material, including natural material, unless it is made of that material;

D. fail to disclose in writing that any Indian arts and crafts product is made of treated material, reconstructed material or synthetic material;

E. solicit or buy for resale as authentic Indian arts and crafts any products that are known in fact not to be authentic; or

F. prepare, disseminate or otherwise engage in any unfair or deceptive trade practice, including any false, misleading or deceptive advertising, or any unconscionable trade practice, regarding Indian arts or crafts. For the purpose of this subsection, "unfair or deceptive trade practice" and "unconscionable trade practice" mean "unfair or deceptive trade practice" and "unconscionable trade practice" as those terms are defined in Section 57-12-2 NMSA 1978.

**History: 1953 Comp., § 40-21-25.5, enacted by Laws 1973, ch. 163, § 5; 1975, ch. 261, § 5; 1977, ch. 334, § 4; 1991, ch. 90, § 6.**

**Repeals and reenactments.** — Laws 1973, ch. 163, § 5, repealed former 40-21-25.5, 1953 Comp., relating to labeling imitation Indian arts and crafts, and enacted a new 40-21-25.5, 1953 Comp.

**The 1991 amendment,** effective June 14, 1991, rewrote this section.

## 30-33-8. Enforcement by attorney general or district attorney.

The attorney general or a district attorney with jurisdiction over a matter shall enforce the provisions of the Indian Arts and Crafts Sales Act [30-33-1 through 30-33-11 NMSA 1978]. The New Mexico office of Indian affairs [Indian affairs department] and an authorized tribal prosecutor may assist the office of the attorney general or the district attorney in determining whether the provisions of the Indian Arts and Crafts Sales Act have been or are being violated. Either the attorney general or a district attorney with jurisdiction over a matter may take action to enforce the provisions of the Indian Arts and Crafts Sales Act.

**History: 1953 Comp., § 40-21-25.7, enacted by Laws 1973, ch. 163, § 6; 1977, ch. 334, § 5; 1991, ch. 90, § 7.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 2004, ch. 24, § 17 provided that statutory references to the "New Mexico office of Indian affairs" be changed to the "Indian affairs department" pursuant to an executive order issued in accordance with Laws 2003, Chapter 403.

**The 1991 amendment,** effective June 14, 1991, added "or district attorney" in the catchline; inserted "or a district attorney with jurisdiction over a matter" in the first sentence; rewrote the second sentence which read "The New Mexico commission of Indian affairs shall assist the office of the attorney general in the determining whether the provisions of the Indian Arts and Crafts Sales Act have been violated"; and added the final sentence.

## 30-33-9. Violation of act; penalties.

A. In an action brought by the attorney general or a district attorney for a violation under the provisions of the Indian Arts and Crafts Sales Act [30-33-1 through 30-33-11 NMSA 1978], the district court may order temporary or permanent injunctive relief. The district court shall order restitution and such other relief as may be necessary to redress injury to any person resulting from the violation.

B. In any action brought under this section, if the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by the Indian Arts and Crafts



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Sales Act, the attorney general or district attorney, upon petition to the court, may recover, on behalf of the state of New Mexico, a civil penalty not to exceed five thousand dollars ($5,000) per violation.

C. Any person willfully and knowingly violating the provisions of the Indian Arts and Crafts Sales Act where the violation involves property valued at two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

D. Any person willfully and knowingly violating the provisions of the Indian Arts and Crafts Sales Act where the violation involves property valued in excess of two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

E. Any person willfully and knowingly violating the provisions of the Indian Arts and Crafts Sales Act where the violation involves property valued in excess of five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

F. Any person willfully and knowingly violating the provisions of the Indian Arts and Crafts Sales Act where the violation involves property valued in excess of two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

G. Any person willfully and knowingly violating the provisions of the Indian Arts and Crafts Sales Act where the violation involves property valued in excess of twenty thousand dollars ($20,000) is guilty of a second degree felony.

**History: 1953 Comp., § 40-21-25.8, enacted by Laws 1977, ch. 334, § 6; 1991, ch. 90, § 8; 2010, ch. 35, § 1.**

**Cross references.** — For issuance of injunctions, *see* Rules 1-065 and 1-066 NMRA.

**The 2010 amendment,** effective July 1, 2010, in Subsection B, after "a civil penalty not to exceed", deleted "five hundred dollars ($500)" and added "five thousand dollars ($5,000)"; in Subsection C, after "Indian Arts and Crafts Sales Act", deleted "is guilty of a petty misdemeanor when" and added "where"; after "involves property valued at", deleted "less than two thousand five-hundred dollars ($2,500) and shall be punished by a fine of not less that one hundred dollars ($100) per violation per day, up to a maximum fine of five hundred dollars ($500), or imprisonment in the county jail for a definite term not to exceed six months, or both" and added the reminder of the sentence; in Subsection D, after "Indian Arts and Crafts Sales Act", deleted "is guilty of a misdemeanor when" and added "where"; after "involves property valued", deleted "at or"; after "in excess of", deleted "two thousand five-hundred dollars ($2,500) and less than twenty thousand ($20,000) and shall be punished by a fine of not less than one hundred dollars ($100) per violation per day, up to a maximum fine of one thousand dollars ($1,000), or imprisonment in the county jail for not more than one year, or both" and added the reminder of the sentence; in Subsection E, after "Indian Arts and Crafts Sales Act", deleted "is guilty of a fourth degree felony when" and added "where"; after "involves property valued", deleted "at or"; after "in excess of", deleted "twenty thousand dollars ($20,000) and shall be punished by a fine of not less than one hundred dollars ($100) per violation per day, up to a maximum fine of five thousand dollars ($5,000), or up to eighteen months imprisonment in the county jail, or both" and added the reminder of the sentence; and added Subsections F and G.

**The 1991 amendment,** effective June 14, 1991, substituted "penalties" for "remedies" in the catchline; designated the formerly undesignated provision as Subsection A; in Subsection A, inserted "or a district attorney" in the first sentence, deleted "civil penalties not to exceed five thousand dollars ($5,000) per violation" following "restitution" in the second sentence and made a minor stylistic change; and added Subsections B to E.

## 30-33-10. Private right of action; damages.

Any person who suffers financial injury or damages by reason of any conduct declared in violation of the provisions of the Indian Arts and Crafts Sales Act [30-33-1 through 30-33-11 NMSA 1978] may sue in district court. Upon a showing that that act is being violated, the court may award damages and order injunctive relief and shall award the cost of the suit, including reasonable attorneys' fees. Where the court finds that the party charged with violating the Indian Arts and Crafts Sales Act has willfully violated that act, the court may award treble damages to the party complaining of the violation.

**History: 1953 Comp., § 40-21-25.9, enacted by Laws 1977, ch. 334, § 7; 1991, ch. 90, § 9.**

**The 1991 amendment,** effective June 14, 1991, rewrote this section which read "Any person who suffers financial injury or damages by reason of any conduct declared in violation of the Indian Arts and Crafts Sales Act may sue in district court and may recover actual damages sustained and the cost of the suit, including reasonable attorneys' fees."



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## 30-33-11. Administrative regulations.

The attorney general and the New Mexico office of Indian affairs [Indian affairs department] are authorized jointly to promulgate necessary regulations, pursuant to the Administrative Procedures Act [12-8-1 through 12-8-25 NMSA 1978], to further the purpose and implement the provisions of the Indian Arts and Crafts Sales Act [30-33-1 through 30-33-11 NMSA 1978].

**History: 1953 Comp., § 40-21-25.10, enacted by Laws 1977, ch. 334, § 8; 1991, ch. 90, § 10.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 2004, ch. 24, § 17 provided that statutory references to the "New Mexico office of Indian affairs" be changed to the "Indian affairs department" pursuant to an executive order issued in accordance with Laws 2003, Chapter 403.

**The 1991 amendment,** effective June 14, 1991, rewrote this section which read "The attorney general is authorized to promulgate necessary regulations, pursuant to the Administrative Procedures Act, to further the purpose of the Indian Arts and Crafts Sales Act as set forth in Section 40-21-25.3 NMSA 1953."

**Severability.** — Laws 1991, ch. 90, § 11 provides for the severability of the act if any part or application thereof is held invalid.

## 30-33-12. Obtaining telecommunications service with intent to defraud; definitions.

For the purposes of Sections 30-33-12 through 30-33-14 NMSA 1978:

A. "credit card" means an identification card or plate issued to a person, firm or corporation by any person, firm or corporation engaged in the furnishing of telecommunications service, which permits the person, firm or corporation to whom the card has been issued to obtain telecommunications service on credit;

B. "credit card number" means the card number appearing in a credit card; and

C. "telecommunication service" means service furnished by a public utility, including a telephone company, by which there is accomplished, or may be accomplished, the sending or receiving of information, data, messages, writing, signs, signals, pictures and sound of all kinds, by aid of wire, cable, radio or other means or apparatus.

**History: 1953 Comp., § 40-21-49, enacted by Laws 1963, ch. 49, § 1; 1967, ch. 134, § 1.**

## 30-33-13. Crime to procure or to attempt to procure telecommunications service without paying charge; crime to make, possess, sell, give or transfer certain devices for certain purposes; penalty.

A. It is unlawful for a person, with intent to defraud a person, firm or corporation, to obtain or to attempt to obtain any telecommunications service without paying the lawful charge, in whole or in part, by any of the following means:

(1) charging the service to an existing telephone number or credit card number without the authority of the subscriber or the legitimate holder;

(2) charging the service to a nonexistent, false, fictitious or counterfeit telephone number or credit card number or to a suspended, terminated, expired, canceled or revoked telephone number or credit card number;

(3) rearranging, tampering with or making electrical, acoustical, induction or other connection with any facilities or equipment;

(4) using a code, prearranged scheme or other strategem or device whereby the person in effect sends or receives information; or

(5) using any other contrivance, device or means to avoid payment of the lawful charges, in whole or in part, for the service.

B. This section shall apply when the telecommunications service either originates or terminates, or both, in this state or when charges for the service would have been billable in normal course by the public utility providing the service in this state but for the fact that the service was obtained or attempted to be obtained by one or more of the means set forth in this section.



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C. Whoever violates this section when the charges for the telecommunications service obtained or attempted to be obtained are two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

D. Whoever violates this section when the charges for the telecommunications service obtained or attempted to be obtained are more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

E. Whoever violates this section when the charges for the telecommunications service obtained or attempted to be obtained are more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of fourth degree felony.

F. Whoever violates this section when the charges for the telecommunications service obtained or attempted to be obtained are more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

G. Whoever violates this section when the charges for the telecommunications service obtained or attempted to be obtained exceed twenty thousand dollars ($20,000) is guilty of a second degree felony.

H. It is unlawful for a person under circumstances evidencing an intent to use or employ any instrument, apparatus, equipment or device described in Paragraph (1) of this subsection or to allow the same to be used or employed for the purpose described in Paragraph (1) of this subsection or knowing or having reason to believe that the same is intended to be so used or that the plans and instructions described in Paragraph (2) of this subsection are intended to be used for making or assembling the instrument, apparatus, equipment or device:

(1) to make or possess any instrument, apparatus, equipment or device designed, adapted or that can be used either:

(a) to obtain telecommunications service in violation of this section; or

(b) to conceal or to assist another to conceal from any supplier of telecommunications service or from any lawful authority the existence or place of origin or of destination of any telecommunications service; or

(2) to sell, give or otherwise transfer to another or to offer or advertise for sale any instrument, apparatus, equipment or device described in Paragraph (1) of this subsection or plans or instructions for making or assembling the same.

I. Whoever violates Subsection H of this section is guilty of a misdemeanor, unless the person has previously been convicted of the crime or of an offense under the laws of another state or of the United States that would have been an offense under Subsection H of this section if committed in this state, in which case the person is guilty of a fourth degree felony.

**History: 1953 Comp., § 40-21-50, enacted by Laws 1963, ch. 49, § 2; 1967, ch. 134, § 2; 1987, ch. 121, § 11; 2006, ch. 29, § 17.**

**Cross references.** — For crime of fraud, *see* 30-16-6 NMSA 1978.

**The 2006 amendment,** effective July 1, 2006, increased the value of the services in Subsection C from $100 to $250; increased the value of the services in Subsection D from more than $100, but not more than $250, and to more than $250, but not more than $500; and increased the value of the services in Subsection E from more than $250 to more than $500.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — State civil actions by subscription television business for use, or providing technical means of use, of transmissions by nonsubscribers, 46 A.L.R.4th 811.

Offense of obtaining telephone services by unauthorized use of another's telephone - state cases, 61 A.L.R.4th 1197.

Federal legal problems arising from subscription television or "pay TV" broadcast over the air, 61 A.L.R. Fed. 809.

## 30-33-14. Venue.

Venue is in the county in this state where the telecommunication service giving rise to the prosecution was solicited or initiated, or attempted to be solicited or initiated, or where the service was received or was attempted to be received, or was billable in the normal course of business.

**History: 1953 Comp., § 40-21-51, enacted by Laws 1963, ch. 49, § 3; 1967, ch. 134, § 3.**



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# ARTICLE 33A

# Telecommunications Service Theft

Sec.
30-33A-1. Short title.
30-33A-2. Definitions.
30-33A-3. Illegal service; prohibited acts; penalties.
30-33A-4. Illegal devices; prohibited acts; penalties.
30-33A-5. Private remedies.

## 30-33A-1. Short title.

This act [30-33A-1 through 30-33A-5 NMSA 1978] may be cited as the "Telecommunications Service Theft Act".

**History: Laws 1997, ch. 50, § 1.**

**Effective dates.** — Laws 1997, ch. 50 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, the Telecommunications Service Theft Act is effective June 20, 1997, 90 days after adjournment of the legislature.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 74 Am. Jur. 2d Telecommunications § 184.

Criminal liability for unauthorized interference with or reception of radio or television transmission, 43 A.L.R.4th 991.

## 30-33A-2. Definitions.

As used in the Telecommunications Service Theft Act:

A. "provider" means a person that offers telecommunications service for lawful compensation; and

B. "telecommunications service" means any audio, video, data or programming offered for a fee or other consideration to facilitate the origination, transmission, emission or reception of signs, signals, data, writings, images, sounds or intelligence of any nature delivered by telephone or telephone service, cable television service, including cellular or other wireless telephones, wire, radio, electromagnetic, photoelectronic or photo-optical equipment, coaxial or fiber optic cable, terrestrial microwave, television broadcast or satellite transmission.

**History: Laws 1997, ch. 50, § 2.**

**Effective dates.** — Laws 1997, ch. 50 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, the Telecommunications Service Theft Act is effective June 20, 1997, 90 days after adjournment of the legislature.

## 30-33A-3. Illegal service; prohibited acts; penalties.

A. It is unlawful for any person to:

(1) obtain or attempt to obtain telecommunications service by trick, artifice, deception, use of an illegal device or decoder or other fraudulent means without authorization of the provider;

(2) assist or instruct any person to obtain or attempt to obtain any telecommunications service without authorization of the provider;

(3) make or attempt to make or assist any person to make or maintain a telecommunications service connection, whether physical, electrical, mechanical, acoustical or by other means, with any cables, wires, components or other devices used for the distribution of telecommunications service without authorization of the provider; or

(4) make or maintain any modification or alteration to any device that was installed with the authorization of the provider for the purpose of intercepting or receiving any telecommunications service without authorization of the provider.

B. Any person who violates this section is guilty of a misdemeanor upon conviction for a first offense and shall be punished by a fine of up to five hundred dollars ($500); and upon conviction for a second or subsequent offense, is guilty of a misdemeanor and shall be punished by either a fine of not less than five hundred dollars ($500) or more than one thousand dollars ($1,000), by imprisonment for a definite term not to exceed thirty days, or both.



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**History: Laws 1997, ch. 50, § 3.**
**Effective dates.** — Laws 1997, ch. 50 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, the Telecommunications Service Theft Act is effective June 20, 1997, 90 days after adjournment of the legislature.

## 30-33A-4. Illegal devices; prohibited acts; penalties.

A. It is unlawful for any person to:

(1) own or possess any device, including a printed circuit board, designed to receive or permit reception of any telecommunications service, regardless of whether that service is encoded, filtered, scrambled or otherwise made unintelligible, with the intent to distribute such device for the purpose of permitting reception or use of telecommunications service without authorization by the provider;

(2) publish or advertise for sale or lease any kit or plan for a device designed in whole or in part to receive without authorization of the provider any telecommunications service, regardless of whether that service is encoded, filtered, scrambled or otherwise made unintelligible;

(3) advertise for sale or lease any device or printed circuit or kit for a device or printed circuit designed in whole or in part to receive any telecommunications service without authorization of the provider, regardless of whether the service is encoded, filtered, scrambled or otherwise made unintelligible; or

(4) manufacture, import into New Mexico, distribute, sell, lease or offer for sale or lease any device, printed circuit or any plan or kit for a device or for a printed circuit, designed in whole or in part to receive any telecommunications service, regardless of whether the service is encoded, filtered, scrambled or otherwise made unintelligible, that can be used to receive that service without the authorization of the provider.

B. Any person who violates this section is guilty of a misdemeanor upon conviction for a first offense and shall be punished by either a fine of not less than one thousand dollars ($1,000), imprisonment for a definite term of not less than thirty days, or both; and upon conviction for a second or subsequent offense, is guilty of a fourth degree felony and shall be punished as provided in Section 31-18-15 NMSA 1978.

**History: Laws 1997, ch. 50, § 4.**
**Effective dates.** — Laws 1997, ch. 50 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, the Telecommunications Service Theft Act is effective June 20, 1997, 90 days after adjournment of the legislature.

## 30-33A-5. Private remedies.

A. A person damaged by a violation of Section 3 or 4 [30-33A-3 or 30-33A-4 NMSA 1978] of the Telecommunications Service Theft Act may be granted an injunction under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of revenue or intent to deceive and take unfair advantage of any person is not required.

B. The relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other New Mexico statutes.

**History: Laws 1997, ch. 50, § 5.**
**Effective dates.** — Laws 1997, ch. 50 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, the Telecommunications Service Theft Act is effective June 20, 1997, 90 days after adjournment of the legislature.
**Severability.** — Laws 1997, ch. 50, § 7 provides for the severability of the act if any part or application thereof is held invalid.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — State civil actions by subscription television business for use, or providing technical means of use, of transmissions by non-subscribers, 46 A.L.R.4th 811.



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# ARTICLE 34

# Libel and Slander

Sec.
30-34-1 to 30-34-6. Transferred.

## 30-34-1 to 30-34-6. Transferred.

**Compiler's notes.** — Former 30-34-1 to 30-34-6 NMSA 1978, concerning tort actions for libel and slander, have been transferred to 41-7-1 to 41-7-6 NMSA 1978.

# ARTICLE 35

# Public Utilities

Sec.
30-35-1. Failure to relinquish telephone party line for emergency call.
30-35-2. Penalty.

## 30-35-1. [Failure to relinquish telephone party line for emergency call.]

It is unlawful for any person:

A. wilfully [willfully] to refuse to yield, or wilfully [willfully] to impede, the use of a telephone party line in time of emergency, by which he is not affected and of which he has been apprised, when he has been requested so to yield; or

B. to request another to yield the use of a telephone party line because of an emergency, which in fact does not exist.

**History: 1953 Comp., § 40-37-6, enacted by Laws 1963, ch. 320, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 30-35-2. Penalty.

Any person:

A. who fails to yield a telephone party line or impedes its use, and any person who falsely asserts an emergency as basis for a request of another to yield a telephone party line, as provided in the preceding section [30-35-1 NMSA 1978], is liable to the person aggrieved by his act for triple the amount of damages proximately caused by his act;

B. who violates any provision of this act [30-35-1, 30-35-2 NMSA 1978] is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars ($500) nor less than twenty-five dollars ($25.00).

**History: 1953 Comp., § 40-37-7, enacted by Laws 1963, ch. 320, § 2.**

# ARTICLE 36

# Worthless Checks

Sec.
30-36-1. Short title.
30-36-2. Definitions.
30-36-3. Purpose.
30-36-4. Unlawful to issue.
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## 30-36-1. Short title.

This act [30-36-1 through 30-36-9 NMSA 1978] may be cited as the "Worthless Check Act".

**History: 1953 Comp., § 40-49-1, enacted by Laws 1963, ch. 315, § 1.**

ANNOTATIONS

**Relation to general fraud statute.** — The general fraud statute (Section 30-16-6 NMSA 1978) and this act prohibit different offenses, and it is inappropriate to view this act as an exception to the fraud statute. *State v. Higgins*, 1988-NMCA-072, 107 N.M. 617, 762 P.2d 904.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Construction and effect of "bad check" statute with respect to check in payment of preexisting debt, 59 A.L.R.2d 1159.

Constitutionality of "bad check" statute, 16 A.L.R.4th 631.

## 30-36-2. Definitions.

As used in the Worthless Check Act:

A. "check" means any check, draft or written order for money;

B. "person" means any person, firm or corporation;

C. "draw" means the making, drawing, uttering or delivering a check;

D. "thing of value" includes money, property, services, goods and wares; and lodging;

E. "credit" means an arrangement or understanding with the drawer for the payment of the check.

**History: 1953 Comp., § 40-49-2, enacted by Laws 1963, ch. 315, § 2.**

## 30-36-3. Purpose.

It is the purpose of the Worthless Check Act to remedy the evil of giving checks on a bank without first providing funds in or credit with the depository on which they are made or drawn to pay or satisfy the same, which tends to create the circulation of worthless checks on banks, bad banking, check kiting and mischief to trade and commerce.

**History: 1953 Comp., § 40-49-3, enacted by Laws 1963, ch. 315, § 3.**

ANNOTATIONS

**"Issue" and "giving" same.** — The term "issue" in Section 30-36-4 NMSA 1978 is used in the same sense as "giving" a check in this section, and "giving" a worthless check constitutes a representation that the drawer has credit with the drawee bank for the amount involved. *State v. Libero*, 1978-NMCA-055, 91 N.M. 780, 581 P.2d 873, cert. denied, 92 N.M. 180, 585 P.2d 324.

## 30-36-4. Unlawful to issue.

It is unlawful for a person to issue in exchange for anything of value, with intent to defraud, any check, draft or order for payment of money upon any bank or other depository, knowing at the time of the issuing that the offender has insufficient funds in or credit with the bank or depository for the payment of such check, draft or order in full upon its presentation.

**History: 1953 Comp., § 40-49-4, enacted by Laws 1963, ch. 315, § 4.**

**Cross references.** — For fraud, *see* 30-16-6 NMSA 1978.

For offense of falsely obtaining services or accommodations, *see* 30-16-16 NMSA 1978.

ANNOTATIONS

**The antecedent or preexisting debt exception does not apply to criminal prosecutions under the Worthless Check Act.** *State v. Cruz*, 2011-NMSC-038, 150 N.M. 548, 263 P.3d 890, *rev'g* 2010-NMCA-011, 147 N.M. 753, 228 P.3d 1173.

A violation of the Worthless Check Act does not require a contemporaneous transaction. *State v. Cruz*, 2011-NMSC-038, 150 N.M. 548, 263 P.3d 890, *rev'g* 2010-NMCA-011, 147 N.M. 753, 228 P.3d 1173.

**Check issued to pay earned wages.** — Where defendant issued payroll checks to pay workers one week after the end of the pay period and the checks were issued with insufficient funds to cover the checks, defendant violated Section 30-36-4 NMSA 1978. *State v. Cruz*, 2011-NMSC-038, 150 N.M. 548, 263 P.3d 890, *rev'g* 2010-NMCA-011, 147 N.M. 753, 228 P.3d 1173.

**Checks issued to members of an Indian tribe.** — Where defendant issued checks to pay the wages of three members of an Indian tribe for performing work on a



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construction project that was located on Indian land; the checks were delivered to the payees on Indian land; the checks were signed by defendant outside Indian land; defendant gave the checks to an employee of defendant's construction company at a meeting place that was located outside Indian land for delivery to the payees; the payees cashed the checks at a store that was located outside Indian land; and defendant's bank dishonored the checks for insufficient funds, New Mexico had jurisdiction to prosecute defendant for issuing worthless checks. *State v. Cruz*, 2010-NMCA-011, 147 N.M. 753, 228 P.3d 1173, *rev'd*, 2011-NMSC-038, 150 N.M. 548, 263 P.3d 890.

**A check issued in payment of wages earned** is payment of a pre-existing debt and is not encompassed within the Worthless Check Act. *State v. Cruz*, 2010-NMCA-011, 147 N.M. 753, 228 P.3d 1173, *rev'd*, 2011-NMSC-038, 150 N.M. 548, 263 P.3d 890.

**Check issued to pay earned wages.** — Where defendant issued checks to pay the wages of the payees for performing work on a construction project; the payees were paid every Friday for work they performed during the week ending the previous Friday; and defendant did not receive anything of value in exchange for issuing the checks and the payees performed the work in exchange for a promise to pay, not for the checks themselves, the checks were issued in satisfaction of a debt already owed to the payees by virtue of their work and were not encompassed within the Worthless Check Act. *State v. Cruz*, 2010-NMCA-011, 147 N.M. 753, 228 P.3d 1173, *rev'd*, 2011-NMSC-038, 150 N.M. 548, 263 P.3d 890.

**Section not void for vagueness.** — This section gives one notice of the prohibited act; it is not void for vagueness. *State v. Libero*, 1978-NMCA-055, 91 N.M. 780, 581 P.2d 873, cert. denied, 92 N.M. 180, 585 P.2d 324.

**"Issue" and "giving" same.** — The term "issue" in this section is used in the same sense as "giving" a check in 30-36-3 NMSA 1978, and "giving" a worthless check constitutes a representation that the drawer has credit with the drawee bank for the amount involved. *State v. Libero*, 1978-NMCA-055, 91 N.M. 780, 581 P.2d 873, cert. denied, 92 N.M. 180, 585 P.2d 324.

**"Issue" and "give" mean delivery to holder with passing of interest** from one to another. To violate this section, one must issue the check in exchange for value, with the requisite intent and knowledge. *State v. Libero*, 1978-NMCA-055, 91 N.M. 780, 581 P.2d 873, cert. denied, 92 N.M. 180, 585 P.2d 324.

**Timing of delivery of goods/services and issuance of checks.** — The fact that the goods and services were delivered before the check was issued did not signify that an exchange did not occur within the meaning of this section. A worthless check is given for something of value if the worthless check is issued as part of a contemporaneous transaction between the parties in which something of value is exchanged for the check, without regard to whether the thing of value is delivered before or after the worthless check is issued. *State v. Platt*, 1992-NMCA-110, 114 N.M. 721, 845 P.2d 815, cert. denied, 114 N.M. 501, 841 P.2d 549.

**Section inapplicable to postdated checks.** — Where neither evidence nor inference contradicts testimony that a check was postdated, defendant's motion to dismiss the charge as to the check should be sustained as the Worthless Check Act does not apply to postdated checks. *State v. Downing*, 1971-NMCA-122, 83 N.M. 62, 488 P.2d 112.

**False pretenses.** — Giving a worthless check constitutes a representation that the drawer has credit with the drawee bank for the amount involved, and such representation relates to an existing fact, so that under former law a prosecution for obtaining money by false pretenses could be maintained. *State v. Tanner*, 1917-NMSC-017, 22 N.M. 493, 164 P. 821.

**Finding of intent to defraud was supported by evidence** where defendant cashed a $20.00 check on a bank in which he had no account, the next day cashed a $75.00 check on another bank with which he had just opened an account and made a $25.00 deposit, and on the following morning before leaving town without checking out of motel cashed a $35.00 check on that bank. *State v. McKay*, 1969-NMCA-009, 79 N.M. 797, 450 P.2d 435.

**Intent lacking.** — To issue a check in payment of an outstanding account, where credit was not given on the strength of check so issued, was not a violation of the statute, because there was no intent to defraud which is the gist of the offense. *State v. Davis*, 1921-NMSC-003, 26 N.M. 523, 194 P. 882.

**Sufficient bank credit.** — Conviction for issuance of a fraudulent check was reversed upon evidence showing an arrangement with the bank whereby defendant was to deposit drafts drawn on various commission houses, and the bank was to honor checks drawn by defendant, and that at the time the check was presented, defendant's credit with the bank was sufficient, according to the bank's own records, to cover it. *State v. Thompson*, 1933-NMSC-021, 37 N.M. 229, 20 P.2d 1030.

**Compulsion as defense.** — Where defendant claimed that an individual who was "bigger and tougher" than he forced him to write and cash a bad check under threat of bodily harm, and that this person was present in the store when he cashed the check, but store employees testified that defendant came into the store alone, defense of compulsion failed. *State v. Lee*, 1967-NMCA-017, 78 N.M. 421, 432 P.2d 265.

**Knowledge of motel clerk.** — Whether motel clerk knew, had been expressly notified or had reason to believe that defendant did not have sufficient funds on deposit in the bank to insure payment on presentation of the check was for the jury to decide. *State v. McKay*, 1969-NMCA-009, 79 N.M. 797, 450 P.2d 435.

**Information sufficient.** — Where information charged defendant with issuing worthless checks contrary to this section and 30-36-5B NMSA 1978, reference to the latter section was surplusage, since the information was sufficient without reference to the penalty. *State v. Ferris*, 1969-NMCA-093, 80 N.M. 663, 459 P.2d 462.

**Malicious prosecution action not maintainable.** — One charged with having issued a fraudulent check or draft cannot maintain a malicious prosecution action where he has obtained dismissal of charge by voluntarily paying the claim and costs of prosecution. *Marchbanks v. Young*, 1943-NMSC-024, 47 N.M. 213, 139 P.2d 594.

**Court inquiry into defendant's consideration of bankruptcy might constitute reversible error.** — In a trial for issuing worthless checks, the court's inquiry into defendant's consideration of bankruptcy might well have detracted from the presumption of innocence to which defendant was entitled, and constituted reversible error, because his answers may have tainted the opinion of the jury in deciding whether or not defendant's disavowals of intent to deceive or knowledge of insufficient funds should be believed in view of his past history as a debtor. *State v. Caputo*, 1980-NMCA-032, 94 N.M. 190, 608 P.2d 166.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 32 Am. Jur. 2d False Pretenses § 65 et seq.

False pretense or confidence game through means of worthless check or draft, 35 A.L.R. 344, 174 A.L.R. 173.

Criminal liability of corporate officer who issues worthless check in corporate name, 68 A.L.R.2d 1269.

Reasonable expectation of payment as affecting offense under "worthless check" statutes, 9 A.L.R.3d 719.

Constitutionality of "bad check" statute, 16 A.L.R.4th 631.

35 C.J.S. False Pretenses § 21.



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## 30-36-5. Penalty.

Any person violating Section 30-36-4 NMSA 1978 shall be punished as follows:

A. when the amount of the check, draft or order, or the total amount of the checks, drafts or orders, are for more than one dollar ($1.00) but less than twenty-five dollars ($25.00), imprisonment in the county jail for a term of not more than thirty days or a fine of not more than one hundred dollars ($100), or both such imprisonment and fine;

B. when the amount of the check, draft or order, or the total amount of the checks, drafts or orders, are for twenty-five dollars ($25.00) or more, imprisonment in the penitentiary for a term of not less than one year nor more than three years or the payment of a fine of not more than one thousand dollars ($1,000) or both such imprisonment and fine.

**History: 1953 Comp., § 40-49-5, enacted by Laws 1965, ch. 114, § 1.**

**Repeals and reenactments.** — Laws 1965, ch. 114, § 1, repealed 40-49-5, 1953 Comp., relating to penalties for the writing of bad checks, and enacted a new section.

ANNOTATIONS

**Totaling provisions unconstitutional.** — The provisions of this section, concerning the "totaling" of amounts of worthless checks, are so vague that they offend due process and are void. *State v. Ferris*, 1969-NMCA-093, 80 N.M. 663, 459 P.2d 462.

**Totaling provisions severable.** — While the "totaling" provisions of this section are void, they may be severed from this section, leaving the remaining portion thereof consistent with 30-36-4 NMSA 1978, which makes an offense out of each worthless check issued. *State v. Ferris*, 1969-NMCA-093, 80 N.M. 663, 459 P.2d 462.

**Frivolous to infer rest of statute unconstitutionally vague.** — An inference that because the totaling provision of this section was held unconstitutionally vague, other parts of the Worthless Check Act (30-36-1 to 30-36-9 NMSA 1978) are also unconstitutionally vague was frivolous. *State v. Libero*, 1978-NMCA-055, 91 N.M. 780, 581 P.2d 873, cert. denied, 92 N.M. 180, 585 P.2d 324.

**Quashing of information unwarranted.** — The trial court correctly held that defendant could not be punished under Subsection B of this section by "totaling" two checks, but erred in quashing the information, since defendant could still be punished for each worthless check that he had issued. *State v. Conners*, 1969-NMCA-096, 80 N.M. 662, 459 P.2d 461.

Since defendant was convicted of issuing four worthless checks, he could have been sentenced for each offense under the portion of this section remaining after severance of the provisions on totaling; therefore, the trial court erred in dismissing the information. *State v. Ferris*, 1969-NMCA-093, 80 N.M. 663, 459 P.2d 462.

**Reinstatement of charges not double jeopardy.** — Dismissal of the information before the entering of a plea because of the unconstitutional vagueness of the "totaling" provision of this section did not place defendant in jeopardy, and, therefore, reinstatement of the information did not subject him to double jeopardy. *State v. Ferris*, 1969-NMCA-093, 80 N.M. 663, 459 P.2d 462.

**Felony degree for violation of Subsection B.** — The offense of issuing a worthless check over $25.00 is a "felony" but could not constitute a "fourth degree felony" because the minimum sentence imposed for issuing worthless checks is less than the stated sentence for fourth degree felonies. *State v. Muzio*, 1987-NMCA-006, 105 N.M. 352, 732 P.2d 879.

**Sentence not severable.** — A sentence of six to eight years for utterance of fraudulent checks by habitual criminal could not be considered a sentence of five years for uttering fraudulent checks since judgment was not severable. *Jordan v. Swope*, 1932-NMSC-015, 36 N.M. 84, 8 P.2d 788.

**Totaling provisions vague.** — The cumulative provisions in this section relating to penalties are vague, indefinite and uncertain. 1966 Op. Att'y Gen. No. 66-80.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 C.J.S. False Pretenses § 56.

## 30-36-6. Exceptions.

The Worthless Check Act does not apply to:

A. any check where the payee or holder knows or has been expressly notified prior to the drawing of the check or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment on its presentation; or

B. any post-dated check.

**History: 1953 Comp., § 40-49-6, enacted by Laws 1963, ch. 315, § 6.**

**Cross references.** — For effect of postdating a negotiable instrument, *see* 55-3-113 NMSA 1978.

ANNOTATIONS

**Knowledge of payee as jury question.** — Whether motel clerk knew, had been expressly notified or had reason to believe that defendant did not have sufficient funds on deposit in the bank to insure payment on presentation of the check was for the jury to decide. *State v. McKay*, 1969-NMCA-009, 79 N.M. 797, 450 P.2d 435.

**Act inapplicable to postdated check.** — Where neither evidence nor inference contradicts testimony that a check was postdated, defendant's motion to dismiss the charge as to the check should be sustained as the Worthless Check Act does not apply to postdated checks. *State v. Downing*, 1971-NMCA-122, 83 N.M. 62, 488 P.2d 112.

**Check postdated.** — Where it was stipulated that the hay sold to defendant was weighed on June 25, and the payee testified that the check was accepted on the date of weighing, while the check was dated June 30, the defendant's motion to dismiss should have been sustained.



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*State v. Downing*, 1971-NMCA-122, 83 N.M. 62, 488 P.2d 112.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Application of "bad check" statute with respect to post dated checks, 52 A.L.R.3d 464.

## 30-36-7. Intent to defraud; how established.

In the prosecution of offenses under the Worthless Check Act, the following rules of evidence shall govern:

A. if the maker or drawer of a check, payment of which is refused by the bank or depository upon which it is drawn because of no account in the name of the maker or drawer in the bank, proof of the fact that the maker or drawer had no account in the bank or depository upon which the check is drawn shall be prima facie evidence of an intent to defraud and of knowledge of insufficient funds in or credit with the bank or depository with which to pay the draft;

B. if the maker or drawer of a check, payment of which is refused by the bank or depository upon which it is drawn because of insufficient funds or credit in the account of the maker or drawer in the bank or depository, fails, within three business days after notice to him that the check was not honored by the bank or depository, to pay the check in full, together with any protest fees or costs thereon, such failure shall constitute prima facie evidence of a knowledge of the insufficiency of funds in the bank or depository at the time of the making or drawing of the check and of an intent to defraud.

**History: 1953 Comp., § 40-49-7, enacted by Laws 1965, ch. 114, § 2; 1979, ch. 8, § 1.**

**Cross references.** — For evidentiary rule regarding the use of presumptions in criminal cases, *see* Rule 11-302 NMRA.

**Repeals and reenactments.** — Laws 1965, ch. 114, § 2, repealed 40-49-7, 1953 Comp., relating to establishing intent to defraud, and enacted a new section.

ANNOTATIONS

**Notice is not condition precedent to maintaining criminal action.** — One who had been given a fraudulent check was not required to give notice provided for by former statute before filing his complaint to have the drawer prosecuted. *Marchbanks v. Young*, 1943-NMSC-024, 47 N.M. 213, 139 P.2d 594.

**Prima facie presumption inapplicable without notice.** — Where although defendant unquestionably had insufficient funds in his account with a bank to cover a $35.00 check, the state failed to prove that defendant had received notice of dishonor at least 10 days (now 3 days) before trial, the state could not rely on the prima facie evidence rule as to intent to defraud set forth in Subsection B of this section. *State v. McKay*, 1969-NMCA-009, 79 N.M. 797, 450 P.2d 435.

**Prima facie intent to defraud.** — Where the only evidence relative to the dishonor of a $20.00 check was that it was dishonored because defendant had no account in the bank on which it was drawn, there was prima facie intent to defraud under Subsection A. *State v. McKay*, 1969-NMCA-009, 79 N.M. 797, 450 P.2d 435.

**Intent to defraud.** — Evidence that defendant entered store and after furnishing identification cashed $25.00 check drawn on a Texas bank with which he had no account or credit was prima facie evidence of an intent to defraud under this section. *State v. Lee*, 1967-NMCA-017, 78 N.M. 421, 432 P.2d 265.

**Effect of discharge in bankruptcy.** — On its face, this act addresses the passing of worthless checks with the intent to defraud, and a defendant's prosecution for violation of such law is not precluded by filing for or obtaining a discharge in bankruptcy. *State v. Muzio*, 1987-NMCA-006, 105 N.M. 352, 732 P.2d 879.

**Purpose of notice.** — Under the language of the Worthless Check Act the purpose of notice and of the 10-day period (now 3 business days) is to make it easier for the state, upon prosecution, to prove necessary knowledge and intent; such knowledge and intent can, however, be proved without use of the statutory act if desired. 1965-66 Op. Att'y Gen. No. 65-197.

**Notice is not condition precedent to maintaining criminal action.** 1965-66 Op. Att'y Gen. No. 65-197.

**Failure to respond to notice merely creates presumption** of knowledge and fraudulent intent if a criminal proceeding is instituted. 1965-66 Op. Att'y Gen. No. 65-197.

**Threat of prosecution not authorized.** — The specific language of Section 30-22-6 NMSA 1978, relating to compounding a crime, controls over the more general language of the Worthless Check Act by making it a crime to include in the notice of dishonor a threat to institute criminal proceedings unless payment is made within 10 days (now 3 business days). 1965-66 Op. Att'y Gen. No. 65-197.

## 30-36-8. Notice.

Notice as used in the Worthless Check Act shall consist of either notice given to the person entitled thereto in person or notice given to such person in writing. The notice in writing is presumed to have been given when deposited as certified matter in the United States mail, addressed to the person at his address as it appears on the check.

**History: 1953 Comp., § 40-49-8, enacted by Laws 1963, ch. 315, § 8; 1979, ch. 8, § 2.**



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## 30-36-9. Citizen's complaint; costs.

Where prosecutions are initiated under the Worthless Check Act before any committing magistrate, the party applying for the warrant is liable for costs accruing in the event the case is dismissed at his request or for his failure to prosecute.

**History: 1953 Comp., § 40-49-9, enacted by Laws 1963, ch. 315, § 9.**

**ANNOTATIONS**

**Law reviews.** — For article, "Automatic Stay Provisions of the Bankruptcy Act of 1978," see 13 N.M.L. Rev. 599 (1983).

## 30-36-10. District attorney; processing fee.

A. A district attorney is authorized to assess a processing fee against any person who is convicted of violating Section 30-36-4 NMSA 1978 and against any person who acknowledges violation of that section but for whom prosecution is waived by the district attorney. The processing fee assessed pursuant to this section shall not exceed:

(1) five dollars ($5.00) if the amount of the check, draft or order is less than twenty-five dollars ($25.00);

(2) ten dollars ($10.00) if the amount of the check, draft or order is twenty-five dollars ($25.00) or more but less than one hundred dollars ($100);

(3) thirty dollars ($30.00) if the amount of the check, draft or order is one hundred dollars ($100) or more but less than three hundred dollars ($300);

(4) fifty dollars ($50.00) if the amount of the check, draft or order is three hundred dollars ($300) or more but less than five hundred dollars ($500); and

(5) seventy-five dollars ($75.00) if the amount of the check, draft or order is five hundred dollars ($500) or more.

B. All processing fees collected by a district attorney pursuant to this section shall be transmitted to the administrative office of the district attorneys for credit to the district attorney fund.

**History: Laws 1984, ch. 110, § 4.**

# ARTICLE 37

# Sexually Oriented Material Harmful to Minors

Sec.
30-37-1. Definitions.
30-37-2. Offenses; books; pictures.
30-37-2.1. Offenses; retail display.
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30-37-3.1. Outdoor theaters; offenses.
30-37-3.2. Child solicitation by electronic communication device.
30-37-3.3. Criminal sexual communication with a child; penalty.
30-37-4. Notice; prosecution.
30-37-5. Exclusions; defenses.
30-37-6. Offenses by minor.
30-37-7. Penalties.
30-37-8. Uniform application.
30-37-9. Legislative findings and purpose.
30-37-10. Offenses; certain tie-in arrangements unlawful.

## 30-37-1. Definitions.

As used in this act:

A. "minor" means any unmarried person who has not reached his eighteenth birthday;

B. "nudity" means the showing of the male or female genitals, pubic area or buttocks with less than a full opaque covering, or the depiction of covered male genitals in a discernibly turgid state;

C. "sexual conduct" means acts of masturbation, homosexuality, sodomy, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be female, breast;



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D. "sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal;

E. "sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained;

F. "harmful to minors" means that quality of any description of representation, in whatever form, of nudity, sexual conduct, sexual excitement or sado-masochistic abuse, when it:

(1) predominantly appeals to the prurient, shameful or morbid interest of minors; and

(2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(3) is utterly without redeeming social importance for minors; and

G. "knowingly" means having general knowledge of, or reason to know, or a belief or reasonable ground for belief which warrants further inspection or inquiry or both, of:

(1) the character and content of any material described herein, which is reasonably susceptible of examination by the defendant;

(2) the age of the minor.

**History: 1953 Comp., § 40-50-1, enacted by Laws 1973, ch. 257, § 1.**

**Cross references.** — For provisions regarding other sexual offenses, *see* 30-9-10 to 30-9-17 NMSA 1978.

**Compiler's notes.** — The term "this act" means Laws 1973, Chapter 257, which appears as 30-37-1, 30-37-2, 30-37-3, 30-37-4 to 30-37-8 NMSA 1978.

ANNOTATIONS

**General/specific rule did not apply.** — Where defendant, who was convicted of contributing to the delinquency of a minor when defendant wrote a sexually explicit letter to the victim, claimed that under the general/specific rule, the State was required to charge defendant under the sexually oriented materials statute, Section 30-37-2 NMSA 1978, rather than under Section 30-6-3 NMSA 1978; the general/specific rule states that if one statute deals with a subject in general and comprehensive terms and another statute addresses part of the same subject matter in a more specific manner, the latter controls; the contributing to the delinquency of a minor statute requires that the material encourage delinquency; and the sexually oriented materials statute only requires the knowing delivery of harmful materials to a minor, the general/specific rule did not apply because the statutory elements of the statutes were not the same and defendant's conviction did not violate the general/specific rule. *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, cert. granted, 2012-NMCERT-012.

**Validity of separate classifications for minors and adults** for purposes of legislative control has been explicitly recognized. 1973-74 Op. Att'y Gen. No. 73-54.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction and effect of statutes or ordinances prohibiting the sale of obscene materials to minors, 93 A.L.R.3d 297.

Gesture as punishable obscenity, 99 A.L.R.3d 762.

Obscenity prosecutions: statutory exemption based on dissemination to persons or entities having scientific, educational, or similar justification for possession of such materials, 13 A.L.R.5th 567.

## 30-37-2. Offenses; books; pictures.

It is unlawful for a person to knowingly sell, deliver, distribute, display for sale or provide to a minor, or knowingly to possess with intent to sell, deliver, distribute, display for sale or provide to a minor:

A. any picture, photograph, drawing, sculpture, motion picture film or similar visual representation or image of a person or portion of the human body, or any replica, article or device having the appearance of either male or female genitals which depicts nudity, sexual conduct, sexual excitement or sado-masochistic abuse and which is harmful to minors; or

B. any book, pamphlet, magazine, printed matter however produced or sound recording which contains any matter enumerated in Subsection A of this section or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

**History: 1953 Comp., § 40-50-2, enacted by Laws 1973, ch. 257, § 2.**

ANNOTATIONS

**Standing to challenge constitutionality.** — Trade association, wholesalers and retailers of books and periodicals had standing to challenge the constitutionality of Section 30-37-2 NMSA 1978 even though no district attorney has made a determination under Section 30-37-4 NMSA 1978 that specific material is harmful to minors and the plaintiffs had not received actual or constructive notice of the district attorney's determination. *Am. Booksellers Ass'n v. Schiff*, 868 F.2d 1199 (10th Cir. 1989).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor,



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photographer, publisher, distributor or other party whose acts were performed outside the state, 16 A.L.R.4th 1318.

Validity and application of statute exempting nonmanagerial, nonfinancially interested employees from obscenity prosecution, 35 A.L.R.4th 1237.

Musical sound recording as punishable obscenity, 30 A.L.R.5th 718.

Constitutionality of state statutes banning distribution of sexual devices, 94 A.L.R.5th 497.

## 30-37-2.1. Offenses; retail display.

A. It is unlawful for any person, offering for sale in a retail establishment open to the general public any book, magazine or other printed material the cover of which depicts nudity, sado-masochistic [sadomasochistic] abuse, sexual conduct or sexual excitement and which is harmful to minors, to knowingly exhibit that book, magazine or material in that establishment in such a way that it is on open display to, or within the convenient reach of, minors who may frequent the retail establishment. Such books, magazines or printed materials may be displayed behind an opaque covering which conceals the depiction of nudity, sado-masochistic [sadomasochistic] abuse, sexual conduct or sexual excitement, provided that those books, magazines or printed materials are not within the convenient reach of minors who may frequent the retail establishment.

B. It is unlawful for any person, offering for sale in a retail establishment open to the general public any book, magazine or other printed material the content of which exploits, is devoted to or is principally made up of descriptions or depictions of nudity, sado-masochistic [sadomasochistic] abuse, sexual conduct or sexual excitement and which are harmful to minors, to knowingly exhibit that book, magazine or material in that establishment in such a way that it is within the convenient reach of minors who may frequent the retail establishment.

**History: Laws 1985, ch. 13, § 1.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

ANNOTATIONS

**Standing to challenge constitutionality.** — Trade association, wholesalers and retailers of books and periodicals had standing to challenge the constitutionality of Section 30-37-2 NMSA 1978 even though no district attorney has made a determination under Section 30-37-4 NMSA 1978 that specific material is harmful to minors and the plaintiffs had not received actual or constructive notice of the district attorney's determination. *Am. Booksellers Ass'n v. Schiff*, 868 F.2d 1199 (10th Cir. 1989).

## 30-37-3. Offenses; motion pictures; plays.

It is unlawful for any person knowingly to exhibit to a minor or knowingly to provide to a minor an admission ticket or pass or knowingly to admit a minor to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

**History: 1953 Comp., § 40-50-3, enacted by Laws 1973, ch. 257, § 3.**

ANNOTATIONS

**Lack of essential element in jury instruction resulted in fundamental error.** — Where defendant was charged with unlawful exhibition of motion pictures to a minor pursuant to the Sexually Oriented Material Harmful to Minors Act (Act), in which the State was required to prove that defendant knowingly exhibited a motion picture, the exhibition was to a minor, the motion picture depicts, in whole or in part, nudity, sexual conduct or sado-masochistic abuse, and the motion picture is harmful to minors, but where the state failed to include "harmful to minors" as a separate element of the offense and failed to provide to the jury the definitions of "nudity" or "harmful to minors" as defined in the Act, a rational jury could not find that the motion picture was harmful to minors, an essential element of the offense. The district court therefore fundamentally erred in instructing the jury on the charge of unlawful exhibition of motion pictures to a minor. *State v. Luna*, 2018-NMCA-025, cert. denied.

**No bar to retrying defendant where there was sufficient evidence of unlawful exhibition of motion pictures to a minor.** — Where defendant was tried and convicted on the charge of unlawful exhibition of motion pictures to a minor pursuant to the Sexually Oriented Material Harmful to Minors Act (Act), but where the district court erred in instructing the jury on the charged offense, the state was not barred from retrying defendant on that count, because there was sufficient evidence of the charged offense based on evidence that defendant showed the nine-year-old child a movie that depicted female nudity, material which lay jurors may consider harmful to minors. *State v. Luna*, 2018-NMCA-025, cert. denied.



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## 30-37-3.1. Outdoor theaters; offenses.

A. It is unlawful for the owner or operator of an outdoor motion picture theater to show or exhibit any motion picture which in whole or in part depicts unclothed sexual conduct in an outdoor theater unless the exhibitor can prove that the outdoor screen on which the picture is to be shown cannot be seen by any minor who has not taken extraordinary measures to view the screen or who is not within the area provided for those persons who have been admitted by a ticket or pass.

B. As used in this section, "unclothed sexual conduct" means an act of masturbation, homosexuality, sodomy, sexual intercourse or physical contact with a person's unclothed genitals, pubic area or buttocks.

C. The notice provisions of Section 30-37-4 NMSA 1978 shall not apply to this section.

**History: Laws 1983, ch. 152, § 2.**

## 30-37-3.2. Child solicitation by electronic communication device.

A. Child solicitation by electronic communication device consists of a person knowingly and intentionally soliciting a child under sixteen years of age, by means of an electronic communication device, to engage in sexual intercourse, sexual contact or in a sexual or obscene performance, or to engage in any other sexual conduct when the perpetrator is at least four years older than the child.

B. Whoever commits child solicitation by electronic communication device is guilty of a:

(1) fourth degree felony if the child is at least thirteen but under sixteen years of age; or

(2) third degree felony if the child is under thirteen years of age.

C. Whoever commits child solicitation by electronic communication device and also appears for, attends or is present at a meeting that the person arranged pursuant to the solicitation is guilty of a:

(1) third degree felony if the child is at least thirteen but under sixteen years of age; or

(2) second degree felony if the child is under thirteen years of age.

D. In a prosecution for child solicitation by electronic communication device, it is not a defense that the intended victim of the defendant was a peace officer posing as a child under sixteen years of age.

E. For purposes of determining jurisdiction, child solicitation by electronic communication device is committed in this state if an electronic communication device transmission either originates or is received in this state.

F. As used in this section, "electronic communication device" means a computer, video recorder, digital camera, fax machine, telephone, cellular telephone, pager, audio equipment or any other device that can produce an electronically generated image, message or signal.

**History: Laws 1998, ch. 64, § 1; 2005, ch. 295, § 1; 2007, ch. 68, § 3.**

**The 2007 amendment,** effective July 1, 2007, defined the crime of child solicitation by electronic communication device; prescribed penalties for child solicitation by electronic communication device; added a new Subsection C to provide penalties for persons who commit child solicitation by electronic communication device and who attends or is present at a meeting that the offender arranged pursuant to the solicitation; and defined "electronic communication device".

**The 2005 amendment,** effective July 1, 2005, deleted the former provision of Subsection A which defined the crime of dissemination of material that is harmful to a minor by computer; created the crime of child solicitation by computer and designated the crime as a fourth degree felony in Subsection A; deleted former Subsection C which provided defenses to the crime of dissemination of material that is harmful to a minor by computer; deleted former Subsection D which provided that it is not a violation of this section for a person to provide access or connection to or from a facility or system or network not under the person's control; deleted former Subsection E which provided that limitation of former Subsection D does not apply to a conspirator with an entity that creates or disseminates indecent material by computer or advertises the availability of indecent material by computer or apply to a person who provides access or connection to a facility, system or network that disseminates indecent material by computer owned or controlled by the person; added Subsection B to provide that in a prosecution for child solicitation by computer it is not a defense that the victim was a peace officer; and added Subsection C to provide that child solicitation by computer is committed in New Mexico if a computer transmission originates or is received in New Mexico.

**ANNOTATIONS**

**Not unconstitutional under the first amendment.** — Section 30-37-3.2 NMSA 1978, which prohibits the solicitation of children to engage in sexual conduct, is narrowly tailored to the compelling interest of protecting children from online sexual predators and is not unconstitutional under the first amendment. *State v. Ebert*, 2011-NMCA-098, 150 N.M. 576, 263 P.3d 918.

**Not unconstitutionally overbroad.** — The failure of Section 30-37-3.2 NMSA 1978 to include an "unlawful" element of the crime of child solicitation by computer does



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not render the statute unconstitutionally overbroad. *State v. Ebert*, 2011-NMCA-098, 150 N.M. 576, 263 P.3d 918.

**Not unconstitutionally vague as applied.** — Where defendant was communicating by computer with a person whom defendant believed to be a twelve-year-old child and defendant requested the "child" to masturbate, Section 30-37-3.2 NMSA 1978 clearly applied to defendant's conduct and was not unconstitutionally vague. *State v. Ebert*, 2011-NMCA-098, 150 N.M. 576, 263 P.3d 918.

**Child solicitation by electronic communication device statute is not void for vagueness.** — Where defendant was charged with two counts of child solicitation by electronic communication device, and where defendant argued that § 30-37-3.2 NMSA 1978 should be declared void for vagueness because the statute does not provide clear notice of what is prohibited or there are no clear standards as to what is prohibited and, as such, violates his due process rights, defendant's constitutional rights were not violated because the conduct prohibited by the statute, solicitation of minors through electronic communications, is straightforward such that a person of ordinary intelligence using common sense would understand that § 30-37-3.2 prohibits an individual from using an electronic device to knowingly and intentionally solicit a child under sixteen years of age, to engage in the identified sexual acts, and when the individual is at least four years older than the child. As applied in this case, § 30-37-3.2 provided fair warning that defendant's conduct of sending the undercover officer, whom he believed to be a fourteen-year-old girl, messages with instructions on how to masturbate and making arrangements to meet with the child in order to engage in specific sexual acts, was prohibited. *State v. Julg*, 2021-NMCA-058, cert. denied.

**Not unconstitutional under the commerce clause.** — Section 30-37-3.2 NMSA 1978 does not violate the commerce clause, because it applies evenhandedly to both in- and out-of-state actors; applies only to communications that originate or are received in New Mexico; addresses behavior relevant to its local purpose of preventing the sexual exploitation of children; and does not impose any burden on legitimate interstate commerce. *State v. Ebert*, 2011-NMCA-098, 150 N.M. 576, 263 P.3d 918.

**Injunction against enforcement.** — Because plaintiffs, a broad array of internet content providers, were likely to prevail in their challenge to this section on grounds that it violated the first, fifth and fourteenth amendments to the United States constitution, and the commerce clause thereof, they were entitled to a preliminary injunction enjoining its enforcement. *ACLU v. Johnson*, 4 F. Supp. 2d 1029 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999).

**Defense of entrapment rejected.** — Under the subjective approach to the defense of entrapment, the focus is on the defendant's intent or predisposition to commit the crime, with the prosecution bearing the burden of proving to the fact-finder that the defendant was predisposed to commit the crime; where the prosecution proves that the defendant was predisposed to commit the crime and the police merely provided an opportunity to commit a crime that is free of police inducement and overreach, and the defendant avails himself of the opportunity, the subjective entrapment defense must fail. *State v. Schaublin*, 2015-NMCA-024, cert. denied, 2015-NMCERT-002.

Where defendant was convicted of child solicitation by electronic communication device; and where the state presented evidence that the police presented an opportunity, via a "women seeking men" Craigslist posting in which the online profile immediately represented herself as a fifteen-year-old girl, and where defendant availed himself of the opportunity presented by the police when he continued to communicate with the "fifteen-year-old," even after having learned her age, and where defendant introduced sexuality into the communications and arranged to meet the fifteen-year-old, defendant's willingness to engage in sexually explicit conversations with the online profile, which was not the product of police overreach or improper inducement, was sufficient evidence of defendant's predisposition to commit the crime of child solicitation by electronic device to support the jury's rejection of his subjective entrapment defense. *State v. Schaublin*, 2015-NMCA-024, cert. denied, 2015-NMCERT-002.

**Entrapment as a matter of law.** — Entrapment as a matter of law exists when there is undisputed testimony which shows conclusively and unmistakably that an otherwise innocent person was induced to commit the act or when the district court determines that as a matter of law the police conduct exceeded the standards of proper investigation. *State v. Mendoza*, 2016-NMCA-002.

Where defendant was convicted of child solicitation by electronic device, evidence that law enforcement posted an ad in an adults-only section of a website and used an age-regressed photo of an adult to accompany the false persona of a fifteen-year-old child, who purportedly placed the ad, was insufficient to support defendant's claim that he was entrapped as a matter of law, when the evidence showed that defendant was made aware at the outset that he was conversing with a fifteen-year-old child, that defendant first introduced the subject of sex in his conversations with the fifteen-year-old child, and where the record was void of any evidence that the police practices exceeded the standards of proper investigation or were unconscionable. *State v. Mendoza*, 2016-NMCA-002.

**Notice requirements of § 30-37-4 NMSA 1978 do not apply to child solicitation by electronic communication device.** — Where defendant was charged with two counts of child solicitation by electronic communication device, and where, prior to trial, defendant filed a motion to dismiss in which he asserted that the "notice" requirement in § 30-37-4 NMSA 1978 was an essential element of the offense of child solicitation by electronic communication device, and that the state was required, but failed, to make a determination that the acts underlying defendant's charges were harmful to minors and without such a determination, he could not have received actual or constructive notice as required under § 30-37-4, and where the district court denied defendant's motion, finding that the notice requirement in § 30-37-4 does not apply to this section and defendant had constructive notice of the criminality of his actions from the clear language of the child solicitation by electronic communication device statute, the district court did not err in denying defendant's motion to dismiss because an examination of § 30-37-4 reveals that solicitation of minors through electronic communications, as prohibited by this section, are not "matters" or "performances" subject to the notice requirements of § 30-37-4. *State v. Julg*, 2021-NMCA-058, cert. denied.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity of state statutes and administrative regulations regulating internet communications under commerce clause and First Amendment of federal constitution, 98 A.L.R.5th 167.

## 30-37-3.3. Criminal sexual communication with a child; penalty.

A. Criminal sexual communication with a child consists of a person knowingly and intentionally communicating directly with a specific child under sixteen years of age by sending the child



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obscene images of the person's intimate parts by means of an electronic communication device when the perpetrator is at least four years older than the child.

B. Whoever commits sexual communication with a child is guilty of a fourth degree felony.

C. As used in this section:

(1) "electronic communication device" means a computer, video recorder, digital camera, fax machine, telephone, pager or any other device that can produce an electronically generated image; and

(2) "intimate parts" means the primary genital area, groin, buttocks, anus or breast.

**History: Laws 2007, ch. 67, § 1.**

**Effective dates.** — Laws 2007, ch. 67, § 2, made the section effective July 1, 2007.

ANNOTATIONS

**Criminal sexual communication with a child may be committed by delivering the electronic communication device directly to the child.** — This section requires a person to knowingly and intelligently communicate directly with a specific child; the element of communicating directly with a child by means of an electronic communication device may occur through a third-party carrier such as social media, internet forums and message boards, online file-sharing services, text message, or email, and it may also occur by delivering the electronic communication device containing the obscene images directly to the child, so where defendant recorded himself nude and masturbating, saved the files to a digital memory card, placed the memory card in a cell phone which he handed directly to the child victim, claiming that there was a surprise for her on the phone, defendant's actions constituted the crime of criminal sexual communication with a child. *State v. Tufts*, 2016-NMSC-020, *rev'g* 2015-NMCA-075, 355 P.3d 32.

**Hand-delivery of obscene images not covered by statute.** — Where defendant transferred obscene images of his intimate parts onto a digital memory card and then physically placed the memory card in the child-victim's cell phone, and where the obscene images were never transferred through the cell phone network or transmitted electronically, defendant was wrongly charged and convicted of 30-37-3.3 NMSA 1978, because defendant's conduct did not constitute "sending" by means of an electronic communication device. *State v. Tufts*, 2015-NMCA-075, cert. granted, 2015-NMCERT-006.

## 30-37-4. Notice; prosecution.

A. No prosecution based under this act shall be commenced unless the district attorney of the county in which the offense occurs shall have previously determined that the matter or performance is harmful to minors and the defendant shall have received actual or constructive notice of such determination. Persons shall be presumed to have constructive notice of such determination on the fifth business day following publication of a notice of such determination in a newspaper of general circulation in the county in which the prosecution takes place.

B. Any person adversely affected by such determination may, at any time within thirty days after such notice is given, seek a judicial determination of its correctness. The court shall, unless otherwise agreed by the parties, render judgment not later than two court days following trial. Filing of an action under this section shall stay prosecution until a judicial determination is rendered, but no appeal shall have such effect unless so ordered by the trial court.

C. No criminal action shall be commenced in any other judicial district within this state during the pendency of the civil action authorized by Subsection B of Section 4 [this section] regarding the same matter, exhibition or performance.

**History: 1953 Comp., § 40-50-4, enacted by Laws 1973, ch. 257, § 4.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Compiler's notes.** — The term "this act" means Laws 1973, Chapter 257, which appears as 30-37-1, 30-37-2, 30-37-3, 30-37-4 to 30-37-8 NMSA 1978.

ANNOTATIONS

**Constitutionality.** — The threat of a determination of harmfulness – apart from the possibility of prosecution - was substantial enough to establish standing, insofar as the case and controversy requirement of Article III of the federal constitution was concerned, for publishers, distributors and sellers of printed materials in their action to challenge the constitutionality of this article. *Am. Booksellers Ass'n v. Schiff*, 868 F.2d 1199 (10th Cir. 1989).

**Burden of proof.** — Once the district attorney determines that certain material is harmful to minors, the statute places upon the distributor or retail establishment marketing such material the burden of establishing that the material is not harmful to minors. *Am. Booksellers Ass'n v. Schiff*, 868 F.2d 1199 (10th Cir. 1989).

**Notice requirements do not apply to child solicitation by electronic communication device.** — Where defendant was charged with two counts of child solicitation by electronic communication device, § 30-37-3.2 NMSA 1978, and where, prior to trial, defendant filed a motion to dismiss in which he asserted that the "notice" requirement in this section was an essential element of the offense of child solicitation by electronic communication device, and that the state was required, but failed, to make a determination that the acts underlying defendant's charges were harmful to minors and without such a determination, he could not have received actual or constructive notice as required under this section, and where the district court denied defendant's motion, finding that the notice requirement in this section does not apply to



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child solicitation by electronic communication device and defendant had constructive notice of the criminality of his actions from the clear language of the child solicitation by electronic communication device statute, the district court did not err in denying defendant's motion to dismiss because an examination of this section reveals that solicitation of minors through electronic communications, as prohibited by § 30-37-3.2, are not "matters" or "performances" subject to the notice requirements of this section. *State v. Julg*, 2021-NMCA-058, cert. denied.

## 30-37-5. Exclusions; defenses.

No person shall be guilty of violating the provisions of this act:

A. where such person had reasonable cause to believe that the minor involved had reached his eighteenth birthday, and such minor exhibited to such person a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor had reached his eighteenth birthday; or

B. if the minor was accompanied by his parent or guardian, or the parent or guardian has in writing waived the application of this act either generally or with reference to the particular transaction; or

C. where such person had reasonable cause to believe that the person was the parent or guardian of the minor; or

D. where such person is a bona fide school, museum or public library, or is acting in his capacity as an employee of such organization, or as a retail outlet affiliated with and serving the educational purposes of such organization.

**History: 1953 Comp., § 40-50-5, enacted by Laws 1973, ch. 257, § 5.**

**Compiler's notes.** — The term "this act" means Laws 1973, Chapter 257, which appears as 30-37-1, 30-37-2, 30-37-3, 30-37-4 to 30-37-8 NMSA 1978.

## 30-37-6. Offenses by minor.

A. It is unlawful for any minor to falsely represent to any person mentioned in Section 2 or Section 3 [30-37-2 or 30-37-3 NMSA 1978] of this act, or to his agent, that such minor has reached his eighteenth birthday, with the intent to procure any material set forth in Section 2 of this act, or with the intent to procure such minor's admission to any motion picture, show or other presentation, as set forth in Section 3 of this act.

B. It is unlawful for any person to knowingly make a false representation to any person mentioned in Section 2 or Section 3 of this act, or to his agent, that he is the parent or guardian of any minor, or that any minor has reached his eighteenth birthday, with the intent to procure any material set forth in Section 2 of this act, or with the intent to procure such minor's admission to any motion picture, show or other presentation, as set forth in Section 3 of this act.

**History: 1953 Comp., § 40-50-6, enacted by Laws 1973, ch. 257, § 6.**

## 30-37-7. Penalties.

A. A person violating Section 30-37-2, 30-37-2.1, 30-37-3 or 30-37-3.1 NMSA 1978 is guilty of a misdemeanor.

B. Any person violating the provisions of Section 30-37-6 NMSA 1978 shall be guilty of a petty misdemeanor.

**History: 1953 Comp., § 40-50-7, enacted by Laws 1973, ch. 257, § 7; 1983, ch. 152, § 3; 1985, ch. 13, § 2.**

**Cross references.** — For sentencing for misdemeanors, *see* 31-19-1 NMSA 1978.

## 30-37-8. Uniform application.

In order to provide for the uniform application of this act to all minors within this state, it is intended that the sole and only regulation of the sale, distribution or provision of any matter described in Section 2 [30-37-2 NMSA 1978], or admission to, or exhibition of, any performance



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described in Section 3 [30-37-3 NMSA 1978], shall be under this act, and no municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the sale, distribution or provision of any matter described in Section 2, or admission to any performance described in Section 3, including but not limited to criminal offenses, classification of suitable matter or performances for minors, or licenses or taxes respecting the sale, distribution, exhibition or provision of matter regulated under this act. All such laws, ordinances, regulations, taxes or licenses, whether enacted before or after this act, shall be or become void, unenforceable and of no effect upon the effective date of this act.

**History: 1953 Comp., § 40-50-8, enacted by Laws 1973, ch. 257, § 8.**

**Compiler's notes.** — The term "this act" means Laws 1973, Chapter 257, which appears as 30-37-1, 30-37-2, 30-37-3, 30-37-4 to 30-37-8 NMSA 1978.

**"Effective date of this act".** — The phrase "effective date of this act", referred to at the end of this section, means June 15, 1973, the effective date of Laws 1978, Chapter 257.

**ANNOTATIONS**

**Preemption by state.** — So that there will be uniform application of the state plan regulating sexually oriented material harmful to minors, the state has preempted county and municipal regulation of the field. *Am. Booksellers Ass'n v. Schiff*, 649 F. Supp. 1009 (D.N.M. 1986), *rev'd on other grounds*, 868 F.2d 1199 (10th Cir. 1989).

The state has preempted this field as far as it pertains to minors, and no county or municipality may enact ordinances on this subject matter. 1973-74 Op. Att'y Gen. No. 73-54.

Sections 30-37-2 and 30-37-3 NMSA 1978 so fully cover the field that it is not conceivable that a county or municipal ordinance could be drafted that would not offend the prohibitions of this section. 1973-74 Op. Att'y Gen. No. 73-54.

**Powers retained by localities.** — In enacting Laws 1973, ch. 257, the legislature intended for counties and municipalities to retain any grant of power they have to make ordinances in the obscenity field not inconsistent with the provisions of this section. 1973-74 Op. Att'y Gen. No. 73-54.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Motion pictures: exhibition of obscene motion pictures as nuisance, 50 A.L.R.3d 969.

Validity of statutes or ordinances requiring sex-oriented businesses to obtain operating licenses, 8 A.L.R.4th 130.

## 30-37-9. Legislative findings and purpose.

The legislature finds that children do not have the judgment necessary to protect themselves from harm and that the legislature has the inherent power to control commercial conduct within this state for the protection of minors in a manner that reaches beyond the scope of its authority to protect adults. The legislature also finds that regulation of content at outdoor theaters does not deprive adults from viewing that content at indoor theaters.

**History: Laws 1983, ch. 152, § 1.**

## 30-37-10. Offenses; certain tie-in arrangements unlawful.

A. It is unlawful for any person offering for sale, selling or distributing books, magazines or other printed material to require, as a condition for any such sale or delivery, that the purchaser or receiver of the delivery purchase or accept the delivery of any other book, magazine or other printed matter which contains sexually oriented material harmful to minors as defined in Subsection F of Section 30-37-1 NMSA 1978. Nothing in this subsection prohibits the sale or purchase on a voluntary basis of books, magazines or other printed material containing sexually oriented material.

B. Any person violating the provisions of Subsection A of this section shall be guilty of a misdemeanor.

**History: Laws 1985, ch. 134, § 1.**

**Cross references.** — For sentencing for petty misdemeanors, *see* 31-19-1 NMSA 1978.

# ARTICLE 37A

# Unauthorized Distribution of Sensitive Images

Sec.
30-37A-1. Unauthorized distribution of sensitive images; penalties.



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## 30-37A-1. Unauthorized distribution of sensitive images; penalties.

A. Unauthorized distribution of sensitive images consists of distributing, publishing or otherwise making available, by an electronic communications device or other means, sensitive images of a person, with or without information identifying that person, without that person's consent:

(1) with the intent to:

(a) harass, humiliate or intimidate that person;

(b) incite another to harass, humiliate or intimidate that person;

(c) cause that person to reasonably fear for that person's own or family members' safety;

(d) cause that person to suffer unwanted physical contact or injury; or

(e) cause that person to suffer substantial emotional distress; and

(2) where the conduct is such that it would cause a reasonable person to suffer substantial emotional distress.

B. For the purpose of this section:

(1) "electronic communications device" means a computer, an internet web site or page, a video recorder, a digital camera, a fax machine, a telephone, a cellular telephone, a pager or any other device that can produce an electronically generated image, message or signal;

(2) "information service" means a service offering the capability of generating, acquiring, storing, transforming, processing, publishing, retrieving, utilizing or making available information;

(3) "interactive computer service" means any information service, system or access software provider that provides or enables computer access by multiple users;

(4) "intimate act" has the same meaning as "sexual act", as that term is defined in Section 30-9-2 NMSA 1978;

(5) "sensitive images" means images, photographs, videos or other likenesses depicting or simulating an intimate act or depicting any portion of a person's genitals, or of a woman's breast below the top of the areola, that is either uncovered or visible through less-than-fully opaque clothing, which images may reasonably be considered to be private, intimate or inappropriate for distribution or publication without that person's consent; and

(6) "telecommunications provider" has the same meaning as set forth in Section 63-7-23 NMSA 1978.

C. Whoever commits unauthorized distribution of sensitive images is guilty of a misdemeanor. Upon a second or subsequent conviction, the offender is guilty of a fourth degree felony.

D. Nothing in this section shall be construed to impose liability on:

(1) an interactive computer service, an information service or a telecommunications provider for content provided by another person; or

(2) a person who reproduces, distributes, exhibits, publishes, transmits or otherwise disseminates content in furtherance of a legitimate public purpose, including the compilation or dissemination of news by newspapers and licensed broadcasters.

**History: Laws 2015, ch. 42, § 1.**

**Effective dates.** — Laws 2015, ch. 42, § 2 made Laws 2015, ch. 42, § 1 effective July 1, 2015.

# ARTICLE 38

# Exhibiting Obscene Films Outdoors

Sec.
30-38-1. Outdoor motion picture theatres; prohibited from showing obscene films.
Sec.
30-38-2. Applicability.

## 30-38-1. Outdoor motion picture theatres; prohibited from showing obscene films.

A. It is unlawful for the owner or operator of an outdoor motion picture theatre to exhibit any obscene film in an outdoor theatre.



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B. For purposes of this section, "obscene film" means a film that:

(1) the average person applying contemporary community standards would find that, when considered or taken as a whole, appeals to the prurient interests;

(2) the material depicts or describes sexual conduct in a patently offensive way by representations of ultimate sexual acts, normal or perverted, actual or simulated; masturbation, excretory functions or lewd exhibitions of the genitals of oneself or another; tactile stimulation of the genitals of oneself or another; and

(3) the work when considered or taken as a whole lacks serious literary, artistic, political or scientific value.

C. It is unlawful for any person to violate the provisions of Subsection A of this section. In the event a person violates the provisions of Subsection A of this section any representative of the local government involved may, upon notice to the offending person, seek an injunction in the district court to enjoin the showing of the offending film.

**History: 1953 Comp., § 49-5-23, enacted by Laws 1977, ch. 241, § 1.**

**Cross references.** — For issuance of injunctions, *see* Rules 1-065 and 1-066 NMRA.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity and application of statute authorizing forfeiture of use or closure of real property from which obscene materials have been disseminated or exhibited, 25 A.L.R.4th 395.

## 30-38-2. Applicability.

The provisions of Section 1 [30-38-1 NMSA 1978] of this act shall only be enforced in those political subdivisions that have adopted by ordinance the provisions of Section 1 of this act. Any ordinance that has been adopted by a political subdivision that is in conflict with the provisions of Section 1 of this act shall be void. In the event a county adopts by ordinance the provisions of Section 1 of this act, those provisions shall not be enforceable by the county within the territorial boundaries of any incorporated municipality located in the county.

**History: 1953 Comp., § 49-5-24, enacted by Laws 1977, ch. 241, § 2.**

# ARTICLE 39

# False Reporting

Sec.
30-39-1. False report; penalty.

## 30-39-1. False report; penalty.

It is unlawful for any person to intentionally make a report to a law enforcement agency or official, which report he knows to be false at the time of making it, alleging a violation by another person of the provisions of the Criminal Code [30-1-1 NMSA 1978]. Any person violating the provisions of this section is guilty of a misdemeanor.

**History: Laws 1979, ch. 145, § 1.**

**ANNOTATIONS**

**Intent.** — Section 30-39-1 NMSA 1978 refers to a false accusation of another. The purpose for making a false report is immaterial. The act alone is unlawful, and it is a misdemeanor offense. But when a false report is given which not only interrupts or hinders official investigation or activity, but is done with the opprobrious intention of aiding an offender to escape the criminal process, that intentional conduct rises to the magnitude of a felony. *State v. Rogers*, 1980-NMCA-059, 94 N.M. 527, 612 P.2d 1338, cert. denied, 94 N.M. 629, 614 P.2d 546.

**Applicability.** — By its plain language, this section applies only if a person falsely alleges a criminal violation by someone other than the person making the allegation. The statute does not apply to situations where an individual falsely assumes the responsibility for a criminal offense. *State v. Gardner*, 1991-NMCA-058, 112 N.M. 280, 814 P.2d 458, cert. denied, 112 N.M. 235, 814 P.2d 103.



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# ARTICLE 40

# Public Assistance

Sec.
30-40-1. Failing to disclose facts or change of circumstances to obtain public assistance.
30-40-2. Unlawful use of food stamp identification card or medical identification card.
30-40-3. Misappropriating public assistance.
30-40-4. Making or permitting a false claim for reimbursement for public assistance services.
30-40-5. Unlawful seeking [of] payment from public assistance recipients.
30-40-6. Failure to reimburse the human services department upon receipt of third party payment.
30-40-7. Failure to notify the department of receipt of anything of value from public assistance recipient.

## 30-40-1. Failing to disclose facts or change of circumstances to obtain public assistance.

A. Failing to disclose facts or change of circumstances to obtain public assistance consists of a person knowingly failing to disclose a material fact known to be necessary to determine eligibility for public assistance or knowingly failing to disclose a change in circumstances for the purpose of obtaining or continuing to receive public assistance to which the person is not entitled or in amounts greater than that to which the person is entitled.

B. Whoever commits failing to disclose facts or change of circumstances to obtain public assistance when the value of the assistance wrongfully received is two hundred fifty dollars ($250) or less in any twelve consecutive months is guilty of a petty misdemeanor.

C. Whoever commits failing to disclose facts or change of circumstances to obtain public assistance when the value of the assistance wrongfully received is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) in any twelve consecutive months is guilty of a misdemeanor.

D. Whoever commits failing to disclose facts or change of circumstances to obtain public assistance when the value of the assistance wrongfully received is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) in any twelve consecutive months is guilty of a fourth degree felony.

E. Whoever commits failing to disclose facts or change of circumstances to obtain public assistance when the value of the assistance wrongfully received is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) in any twelve consecutive months is guilty of a third degree felony.

F. Whoever commits failing to disclose facts or change of circumstances to obtain public assistance when the value of the assistance wrongfully received exceeds twenty thousand dollars ($20,000) in any twelve consecutive months is guilty of a second degree felony.

**History: Laws 1979, ch. 170, § 1; 1987, ch. 121, § 12; 2006, ch. 29, § 18.**

**The 2006 amendment,** effective July 1, 2006, increased the value of the assistance in Subsection B from $100 to $250; increased the value of the assistance in Subsection C from more than $100, but not more than $250, and to more than $250, but not more than $500; increased the value of the assistance in Subsection D from more than $250 to more than $500; and provided in Subsections E and F that the value of the assistance is measured in a twelve consecutive month period.

ANNOTATIONS

**This section is not unconstitutionally vague.** *State v. Fleming*, 2006-NMCA-149, 140 N.M. 797, 149 P.3d 113, cert. denied, 2006-NMCERT-012, 141 N.M. 104, 151 P.3d 65.

**The term "public assistance"** includes public housing benefits. *State v. Fleming*, 2006-NMCA-149, 140 N.M. 797, 149 P.3d 113, cert. denied, 2006-NMCERT-012, 141 N.M. 104, 151 P.3d 65.

## 30-40-2. Unlawful use of food stamp identification card or medical identification card.

A. Unlawful use of food stamp identification card or medical identification card consists of the use of a food stamp or medical identification card by a person to whom it has not been issued, or



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who is not an authorized representative of the person to whom it has been issued, for a food stamp allotment.

B. Whoever commits unlawful use of food stamp identification card or medical identification card when the value of the food stamps or medical services wrongfully received is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits unlawful use of food stamp identification card or medical identification card when the value of the food stamps or medical services wrongfully received is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits unlawful use of food stamp identification card or medical identification card when the value of the food stamps or medical services wrongfully received is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits unlawful use of food stamp identification card or medical identification card when the value of the food stamps or medical services wrongfully received is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. Whoever commits unlawful use of food stamp identification card or medical identification card when the value of the food stamps or medical services wrongfully received exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

G. For the purpose of this section, the value of the medical assistance received is the amount paid by the human services department for medical services received through use of the medical identification card.

**History: Laws 1979, ch. 170, § 2; 1987, ch. 121, § 13; 2006, ch. 29, § 19.**

**The 2006 amendment,** effective July 1, 2006, increased the value of the stamps or services in Subsection B from $100 to $250; increased the value of the stamps or services in Subsection C from more than $100 but not more than $250 to more than $250 but not more than $500; and increased the value of the stamps or services in Subsection D from more than $250 to more than $500.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Liability of state or federal government for losses associated with distribution of food stamps, 116 A.L.R. Fed. 457.

## 30-40-3. Misappropriating public assistance.

A. Misappropriating public assistance consists of a public officer or public employee fraudulently misappropriating, attempting to misappropriate or aiding and abetting in the misappropriation of food stamp coupons, WIC checks pertaining to the special supplemental food program for women, infants and children administered by the human services department, food stamp or medical identification cards, public assistance benefits or funds received in exchange for food stamp coupons.

B. Whoever commits misappropriating public assistance when the value of the thing misappropriated is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits misappropriating public assistance when the value of the thing misappropriated is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits misappropriating public assistance when the value of the thing misappropriated is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits misappropriating public assistance when the value of the thing misappropriated is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. Whoever commits misappropriating public assistance when the value of the thing misappropriated exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

G. Whoever commits misappropriating public assistance when the item misappropriated is a food stamp or medical identification card is guilty of a fourth degree felony.



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**History: Laws 1979, ch. 170, § 3; 1987, ch. 121, § 14; 2006, ch. 29, § 20.**

**The 2006 amendment,** effective July 1, 2006, increased the value of the thing misappropriated in Subsection B from $100 to $250; increased the value of the thing misappropriated in Subsection C from more than $100, but not more than $250, and to more than $250, but not more than $500; and increased the value of the thing misappropriated in Subsection D from more than $250 to more than $500.

ANNOTATIONS

**"Public employee" construed.** — Defendant, a workfare participant placed with a public agency, was not a "public employee" for purposes of this section. *State v. Dartez*, 1998-NMCA-009, 124 N.M. 455, 952 P.2d 450, cert. denied, 124 N.M. 311, 950 P.2d 284.

## 30-40-4. Making or permitting a false claim for reimbursement for public assistance services.

A. Making or permitting a false claim for reimbursement of public assistance services consists of knowingly making, causing to be made or permitting to be made a claim for reimbursement for services provided to a recipient of public assistance for services not rendered or making a false material statement or forged signature upon any claim for services, with intent that the claim shall be relied upon for the expenditure of public money.

B. Whoever commits making or permitting a false claim for reimbursement for public assistance services is guilty of a fourth degree felony.

**History: Laws 1979, ch. 170, § 4.**

ANNOTATIONS

**Effect of conviction.** — When a dentist was convicted of four counts of making or permitting a false claim for reimbursement for public assistance services, a conviction itself, as distinguished from the underlying conduct, is a sufficient basis for revoking a dental license. *Weiss v. New Mexico Bd. of Dentistry*, 1990-NMSC-077, 110 N.M. 574, 798 P.2d 175.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — When does statute of limitations begin to run in action under False Claims Act (31 USCS §§ 3729-3733), 139 A.L.R. Fed. 645.

## 30-40-5. Unlawful seeking [of] payment from public assistance recipients.

A. Unlawful seeking [of] payment from public assistance recipients consists of knowingly seeking payment from recipients or their families for any unpaid portion of a bill for which reimbursement has been or will be received from the human services department or for claims or services denied by the human services department because of provider [the provider's] administrative error.

B. Whoever commits unlawful seeking [of] payment from [a] public assistance recipient is guilty of a misdemeanor.

**History: Laws 1979, ch. 170, § 5.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not a part of the law.

## 30-40-6. Failure to reimburse the human services department upon receipt of third party payment.

A. Failure to reimburse the human services department upon receipt of third party payment consists of knowing failure by a medicaid provider to reimburse the human services department or the department's fiscal agent the amount of payment received from the department for services when the provider receives payment for the same services from a third party.

B. A medicaid provider who commits failure to reimburse the human services department upon receipt of third party payment when the value of the payment made by the department is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. A medicaid provider who commits failure to reimburse the human services department upon receipt of third party payment when the value of the payment made by the department is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. A medicaid provider who commits failure to reimburse the human services department upon receipt of third party payment when the value of the payment made by the department



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is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. A medicaid provider who commits failure to reimburse the human services department upon receipt of third party payment when the value of the payment made by the department is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. A medicaid provider who commits failure to reimburse the human services department upon receipt of third party payment when the value of the payment made by the department exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

**History: Laws 1979, ch. 170, § 6; 1987, ch 121, § 15; 2006, ch. 29, § 21.**

**The 2006 amendment,** effective July 1, 2006, increased the value of the payment in Subsection B from $100 to $250; increased the value of the payment in Subsection C from more than $100, but not more than $250, and to more than $250, but not more than $500; and increased the value of the payment in Subsection D from more than $250 to more than $500.

## 30-40-7. Failure to notify the department of receipt of anything of value from public assistance recipient.

Any employee of the human services department who knowingly receives anything of value, other than as provided by law, from either a recipient of public assistance or from the family of a public assistance recipient shall notify the department within ten days after such receipt on a form provided by the department. Whoever fails to so notify the department within ten days is guilty of a petty misdemeanor.

**History: Laws 1979, ch. 170, § 7.**

# ARTICLE 41

# Kickback, Bribe or Rebate

Sec.
30-41-1. Soliciting or receiving illegal kickback.
30-41-2. Offering or paying illegal kickback.
30-41-3. Exceptions.

## 30-41-1. Soliciting or receiving illegal kickback.

Whoever knowingly solicits or receives any remuneration in the form of any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind from a person:

A. in return for referring an individual to that person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part with public money; or

B. in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any goods, facilities, services, or items for which payment may be made in whole or in part with public money, shall be guilty of a fourth degree felony.

**History: Laws 1979, ch. 384, § 1.**

**Cross references.** — For civil penalties for kickbacks or bribes, *see* 13-1-198 NMSA 1978.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Construction and application of § 2C1.1 of United States Sentencing Guidelines (18 USCS APPX § 2C1.1) pertaining to offenses involving public officials offering, giving, soliciting, or receiving bribes, or extortion under color of official right, 144 A.L.R. Fed. 615.



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## 30-41-2. Offering or paying illegal kickback.

Whoever knowingly offers or pays any remuneration in the form of any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person:

A. to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part with public money; or

B. to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any goods, facilities, services, or items for which payment may be made in whole or in part with public money, shall be guilty of a fourth degree felony.

**History: Laws 1979, ch. 384, § 2.**

**Cross references.** — For civil penalties for kickbacks or bribes, *see* 13-1-198 NMSA 1978.

## 30-41-3. Exceptions.

This act [30-41-1 through 30-41-3 NMSA 1978] shall not apply to:

A. a discount or other reduction in price obtained by a provider of services or other entity if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity; or

B. any amount paid by an employer to an employee who has a bona fide employment relationship with such employer for employment in the provision of covered items or services.

**History: Laws 1979, ch. 384, § 3.**

**Cross references.** — For civil penalties for kickbacks or bribes, *see* 13-1-198 NMSA 1978.

# ARTICLE 42

# Racketeering

Sec.
30-42-1. Short title.
30-42-2. Purpose.
30-42-3. Definitions.
30-42-4. Prohibited activities; penalties.
30-42-5. Enforcement authority.
30-42-6. Racketeering; civil remedies.

## 30-42-1. Short title.

This act [30-42-1 through 30-42-6 NMSA 1978] may be cited as the "Racketeering Act".

**History: Laws 1980, ch. 40, § 1.**

**ANNOTATIONS**

**Law reviews.** — For note, "Criminal Procedure - New Mexico Denies Fifth Amendment Protection to Corporations: *John Doe and Five Unnamed Corporations v. State ex rel. Governor's Organized Crime Prevention Commission*," see 23 N.M.L. Rev. 315 (1993).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and application of Racketeer Influenced and Corrupt Organization Act, 18 U.S.C.A. § 1961 et seq. - supreme court cases, 171 A.L.R. Fed. 1

## 30-42-2. Purpose.

The purpose of the Racketeering Act is to eliminate the infiltration and illegal acquisition of legitimate economic enterprise by racketeering practices and the use of legal and illegal enterprises to further criminal activities.

**History: Laws 1980, ch. 40, § 2.**



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## 30-42-3. Definitions.

As used in the Racketeering Act:

A. "racketeering" means any act that is chargeable or indictable under the laws of New Mexico and punishable by imprisonment for more than one year, involving any of the following cited offenses:

(1) murder, as provided in Section 30-2-1 NMSA 1978;

(2) robbery, as provided in Section 30-16-2 NMSA 1978;

(3) kidnapping, as provided in Section 30-4-1 NMSA 1978;

(4) forgery, as provided in Section 30-16-10 NMSA 1978;

(5) larceny, as provided in Section 30-16-1 NMSA 1978;

(6) fraud, as provided in Section 30-16-6 NMSA 1978;

(7) embezzlement, as provided in Section 30-16-8 NMSA 1978;

(8) receiving stolen property, as provided in Section 30-16-11 NMSA 1978;

(9) bribery, as provided in Sections 30-24-1 through 30-24-3.1 NMSA 1978;

(10) gambling, as provided in Sections 30-19-3, 30-19-13 and 30-19-15 NMSA 1978;

(11) illegal kickbacks, as provided in Sections 30-41-1 and 30-41-2 NMSA 1978;

(12) extortion, as provided in Section 30-16-9 NMSA 1978;

(13) trafficking in controlled substances, as provided in Section 30-31-20 NMSA 1978;

(14) arson and aggravated arson, as provided in Subsection A of Section 30-17-5 and Section 30-17-6 NMSA 1978;

(15) promoting prostitution, as provided in Section 30-9-4 NMSA 1978;

(16) criminal solicitation, as provided in Section 30-28-3 NMSA 1978;

(17) fraudulent securities practices, as provided in the New Mexico Securities Act of 1986 [New Mexico Uniform Securities Act, Chapter 58, Article 13C NMSA 1978];

(18) loan sharking, as provided in Sections 30-43-1 through 30-43-5 NMSA 1978;

(19) distribution of controlled substances or controlled substance analogues, as provided in Sections 30-31-21 and 30-31-22 NMSA 1978;

(20) a violation of the provisions of Section 30-51-4 NMSA 1978;

(21) unlawful taking of a vehicle or motor vehicle, as provided in Section 30-16D-1 NMSA 1978;

(22) embezzlement of a vehicle or motor vehicle, as provided in Section 30-16D-2 NMSA 1978;

(23) fraudulently obtaining a vehicle or motor vehicle, as provided in Section 30-16D-3 NMSA 1978;

(24) receiving or transferring stolen vehicles or motor vehicles, as provided in Section 30-16D-4 NMSA 1978; and

(25) altering or changing the serial number, engine number, decal or other numbers or marks of a vehicle or motor vehicle, as provided in Section 30-16D-6 NMSA 1978;

B. "person" means an individual or entity capable of holding a legal or beneficial interest in property;

C. "enterprise" means a sole proprietorship, partnership, corporation, business, labor union, association or other legal entity or a group of individuals associated in fact although not a legal entity and includes illicit as well as licit entities; and

D. "pattern of racketeering activity" means engaging in at least two incidents of racketeering with the intent of accomplishing any of the prohibited activities set forth in Subsections A through D of Section 30-42-4 NMSA 1978; provided at least one of the incidents occurred after February 28, 1980 and the last incident occurred within five years after the commission of a prior incident of racketeering.

**History: Laws 1980, ch. 40, § 3; 1988, ch. 14, § 4; 1998, ch. 113, § 6; 2009, ch. 253, § 7; 2009, ch. 261, § 7.**

**Compiler's notes.** — Laws 2009, ch. 82, § 703 repealed the New Mexico Securities Act of 1986, referenced in Subsection A(17), effective January 1, 2010.

**The 2009 amendment,** effective July 1, 2009, in Paragraph (9) of Subsection A, changed "Section 30-24-3 NMSA 1978" to "Section 30-24-3.1 NMSA 1978" and added Paragraphs (21) through (25) of Subsection A.



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Laws 2009, ch. 253, § 7 enacted identical amendments to this section. The section was set out as amended by Laws 2009, ch. 261, § 7. *See* 12-1-8 NMSA 1978.

**The 1998 amendment,** effective July 1, 1998, substituted "that" for "which" in Subsection A; added Paragraph A(20); substituted "means an" for "includes any" near the beginning of Subsection B; substituted "incident" for "which" near the end of Subsection D; and made minor stylistic changes throughout the section.

**The 1988 amendment,** effective July 1, 1988, substituted "the New Mexico Securities Act of 1986" for "Sections 58-13-39 and 58-13-40 NMSA 1978; and" in Subsection A(17), made a minor stylistic change in Subsection A(18), and added Subsection A(19).

ANNOTATIONS

**Intent to perform only predicate acts.** — The legislature intended the Racketeering Act to have a broad application, so that it covers situations in which a group of individuals associate only to perform predicate criminal acts. *State v. Hughes*, 1988-NMCA-108, 108 N.M. 143, 767 P.2d 382, cert. denied, 108 N.M. 115, 767 P.2d 354.

**Intent requirement.** — With respect to the intent requirement, the definition of a "pattern of racketeering activity" is hardly a model of clarity. Where the requested finding and the adopted finding both concern only the intent to commit those acts of fraud that could constitute predicate offenses for a pattern of racketeering activity, such intent is not enough to establish a racketeering claim. The intent component of the definition of "pattern of racketeering activity" would be useless if it encompassed nothing more than the intent necessary to commit each of the two incidents of racketeering required by definition. *Naranjo v. Paull*, 1990-NMCA-111, 111 N.M. 165, 803 P.2d 254.

**"Enterprise".** — An "enterprise" as used in the racketeering statute may exist when there is no association above and beyond the acts which form the pattern of racketeering activity. *State v. Wynne*, 1988-NMCA-106, 108 N.M. 134, 767 P.2d 373, cert. denied, 108 N.M. 115, 767 P.2d 354.

The factors to be considered in determining the existence of an enterprise include the identity of the individuals involved, their knowledge of the relevant activities, the amount of planning required to carry out the predicate acts, the frequency of the acts, the time span between each act, and the existence of an identifiable structure within the association or entity. *State v. Hughes*, 1988-NMCA-108, 108 N.M. 143, 767 P.2d 382, cert. denied, 108 N.M. 115, 767 P.2d 354.

Governmental agencies may be considered "enterprises" for the purposes of the Racketeering Act. *State v. Armijo*, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

**"Association" necessary for "enterprise".** — While proof of an association is essential to establishing the elements of an enterprise, the purpose of the association may be as simple as earning money from repeated illegal acts. *State v. Hughes*, 1988-NMCA-108, 108 N.M. 143, 767 P.2d 382, cert. denied, 108 N.M. 115, 767 P.2d 354.

**Failure to state two underlying activities.** — Complaint alleging racketeering activity was properly dismissed where plaintiffs conceded that dismissed defendants had not committed fraud, and where plaintiffs failed to state two activities underlying their claim as required by Subsection D. *Maxwell v. Wilson*, 1988-NMSC-096, 108 N.M. 65, 766 P.2d 909.

**Distinct, independent proof of elements not necessary.** — Although the state must prove both the existence of an "enterprise" and a "pattern of racketeering activity," proof of these elements need not be, and often will not be, distinct and independent. *State v. Hughes*, 1988-NMCA-108, 108 N.M. 143, 767 P.2d 382, cert. denied, 108 N.M. 115, 767 P.2d 354.

**Effect of acquittal on some predicate charges.** — Petit jury verdicts of guilty on each fraud count returned by them against defendants constituted a basis to uphold the racketeering verdicts and provided assurance that the jury found defendants guilty of at least two of the predicate acts of fraud as charged in the indictment. Simply because defendants were acquitted of some charges and others were dismissed does not require the racketeering charges to be set aside where the jury returned guilty verdicts on other predicate counts. *State v. Crews*, 1989-NMCA-088, 110 N.M. 723, 799 P.2d 592, cert. denied, 109 N.M. 232, 784 P.2d 419.

**Law reviews.** — For note, "Criminal Procedure — New Mexico Denies Fifth Amendment Protection to Corporations: John Doe and Five Unnamed Corporations v. State ex rel. Governor's Organized Crime Prevention Commission," see 23 N.M. L. Rev. 315 (1993).

## 30-42-4. Prohibited activities; penalties.

A. It is unlawful for a person who has received proceeds derived, directly or indirectly, from a pattern of racketeering activity in which the person has participated, to use or invest, directly or indirectly, any part of the proceeds or the proceeds derived from the investment or use in the acquisition of an interest in, or the establishment or operation of, an enterprise. Whoever violates this subsection is guilty of a second degree felony.

B. It is unlawful for a person to engage in a pattern of racketeering activity in order to acquire or maintain, directly or indirectly, an interest in or control of an enterprise. Whoever violates this subsection is guilty of a second degree felony.

C. It is unlawful for a person employed by or associated with an enterprise to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs by engaging in a pattern of racketeering activity. Whoever violates this subsection is guilty of a second degree felony.

D. It is unlawful for a person to conspire to violate the provisions of Subsections A through C of this section. Whoever violates this subsection is guilty of a third degree felony.

E. Whoever is convicted of a violation of Subsection A, B, C or D of this section in addition to the prescribed penalties shall forfeit to the state of New Mexico:

(1) any interest acquired or maintained in violation of the Racketeering Act; and



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(2) any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over an enterprise that the person has established, operated, controlled, conducted or participated in the conduct of in violation of the Racketeering Act.

F. The provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of property described in Subsection E of this section.

**History: Laws 1980, ch. 40, § 4; 2002, ch. 4, § 17; 2015, ch. 152, § 20.**

**The 2015 amendment,** effective July 1, 2015, made technical amendments to the section; in Subsection A, after "unlawful for", deleted "any" and added "a", after "received", deleted "any", after "investment or use", deleted "thereof", after "acquisition of", deleted "any" and added "an", and after "operation of,", deleted "any" and added "an"; in Subsection B, after "unlawful for", deleted "any" and added "a", after "indirectly", deleted "any" and added "an", after "control of", deleted "any" and added "an"; in Subsection C, after "unlawful for", deleted "any" and added "a", after "associated with", deleted "any" and added "an"; in Subsection D, after "unlawful for", deleted "any" and added "a", and after "violate", deleted "any of"; in Subsection E, after "Whoever", deleted "violates" and added "is convicted of a violation of"; and in Paragraph (2) of Subsection E, after "influence over", deleted "any" and added "an", and after "enterprise that", deleted "he" and added "the person".

**The 2002 amendment,** effective July 1, 2002, deleted former Subsection F, which pertained to jurisdiction of the district court in forfeiture actions; deleted former Subsection G, which contained procedures for the forfeiture of property subject to forfeiture and disposal under the Racketeering Act; and added present Subsection F.

## ANNOTATIONS

**Proof of enterprise.** — An enterprise is more than an individual who conducts his own affairs through a pattern of racketeering. The state must prove the existence of an enterprise by establishing a common purpose among the participants, organization and continuity. *State v. Rivera*, 2009-NMCA-132, 147 N.M. 406, 223 P.3d 951, cert. denied, 2009-NMCERT-011, 147 N.M. 463, 225 P.3d 793.

**Evidence failed to establish an enterprise.** — Where defendant obtained a pool of capital from investors to buy investment properties from the Resolution Trust Corporation; defendant gave each investor a promissory note pursuant to which defendant would repay the principal with interest; the notes were prepared on documents containing either the letterhead of Building for the Future or the letterhead of Henry A. Rivera; the notes were made by Henry A. Rivera Enterprises and signed by Henry A. Rivera; the state alleged that defendant was associated with an undescribed sole proprietorship which on occasion acted in association with undescribed entities identified as "Henry A. Rivera Enterprises" and "Building for the Future" or that the sole proprietor was one of the entities identified as "Henry A. Rivera Enterprises" or "Building for the Future"; and the state provided no evidence to prove the existence of "Henry A. Rivera Enterprises" or "Building for the Future", that they constituted legal entities or a group of individuals associated with a common purpose and constituted ongoing organizations, or that they had employees, the state failed to prove the existence of an enterprise that existed independent of defendant or that defendant was employed or associated with an enterprise. *State v. Rivera*, 2009-NMCA-132, 147 N.M. 406, 223 P.3d 951, cert. denied, 2009-NMCERT-011, 147 N.M. 463, 225 P.3d 793.

**Racketeering Act is not unconstitutionally vague** in proscribing clearly enumerated criminal activities which are perpetrated either through legitimate business or illegitimate business activities. *State v. Johnson*, 1986-NMCA-084, 105 N.M. 63, 728 P.2d 473, cert denied, 104 N.M. 702, 726 P.2d 856, and cert. denied, 481 U.S. 1051, 107 S. Ct. 2185, 95 L. Ed. 2d 841 (1987).

**Crime of racketeering constitutes separate and distinct offense apart from enumerated predicate crimes.** Thus, a separately imposed punishment for racketeering, apart from the sentences levied for the predicate offenses, does not constitute double jeopardy. *State v. Johnson*, 1986-NMCA-084, 105 N.M. 63, 728 P.2d 473, cert denied, 104 N.M. 702, 726 P.2d 856, and cert. denied, 481 U.S. 1051, 107 S. Ct. 2185, 95 L. Ed. 2d 841 (1987).

**Double jeopardy does not foreclose prosecution for predicate offenses following racketeering conviction.** — Where defendant was charged with and convicted of racketeering and conspiracy to commit racketeering for conduct spanning from 2007 to 2012 based on at least two of the predicate offenses of first-degree murder, arson, and bribery of a public officer, and where defendant was subsequently charged with the same crimes that served as the predicate offenses in the racketeering case, the district court did not err in denying defendant's claim that his right to be free from double jeopardy was violated, because the legislature intended for predicate offenses to be separate from substantive racketeering offenses and therefore double jeopardy protections do not present a bar to defendant's prosecution for the predicate offenses on which his racketeering convictions were based. *State v. Loza*, 2018-NMSC-034.

**Inapplicability of 11-404(B) NMRA to charges of racketeering and conspiracy to commit racketeering.** — In defendant's trial for racketeering and conspiracy to commit racketeering, where defendant claimed that the district court improperly admitted evidence of uncharged crimes, wrongs, or other acts in violation of 11-404 NMRA, the district court did not abuse its discretion in admitting the evidence because New Mexico's racketeering statute defines violations by reference to predicate offenses which are essential components of a racketeering offense and 11-404(B) NMRA is inapplicable to evidence admitted to demonstrate predicate offenses. *State v. Loza*, 2016-NMCA-088, cert. denied.

**Joinder of fraud, bribery and racketeering counts.** — The trial court did not err in denying defendant's motion to sever counts of fraud and receiving a bribe from other counts where there was no evidence the multiplicity of charges confused the jury, the multiplicity of charges were not cumulative, and the counts were predicate offenses for a racketeering charge. *State v. Armijo*, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

**Engaging in "pattern of racketeering activity" is separate element of offense of racketeering,** distinct from the existence of the enterprise and the participation of the individual therein. *State v. Johnson*, 1986-NMCA-084, 105 N.M. 63, 728 P.2d 473, cert. denied, 104 N.M. 702, 726 P.2d 856, and cert. denied, 481 U.S. 1051, 107 S. Ct. 2185, 95 L. Ed. 2d 841 (1987).

**Jury instructions to prove pattern of racketeering.** — To convict a defendant of racketeering under 30-42-4(C) NMSA 1978, the jury must find that the defendant committed at least two predicate acts, and to do so it is necessary that the jury is instructed on the essential elements of the alleged predicate acts upon which racketeering is based. *State v. Catt*, 2019-NMCA-013, cert. denied.



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Where defendant was charged with a pattern of racketeering, involving trafficking in controlled substances, the district court did not err in vacating the racketeering convictions where the jury instructions for those counts were erroneous; the racketeering instruction failed to define the elements of each predicate offense that must be proved at trial, and the conspiracy to commit racketeering instruction omitted any elements pertaining to an enterprise or a pattern of racketeering. *State v. Catt*, 2019-NMCA-013, cert. denied.

**"Proceeds".** — "Proceeds," as used in the Racketeering Act, includes nonmonetary proceeds. *State v. Hughes*, 1988-NMCA-108, 108 N.M. 143, 767 P.2d 382, cert. denied, 108 N.M. 115, 767 P.2d 354.

**Sufficiency of indictment.** — Although a corporate defendant may be charged and convicted of the offense of racketeering, it was error to submit the racketeering charge against the corporate defendant to the jury because the corporate defendant was not specifically charged with commission of such crime in the indictment. *State v. Crews*, 1989-NMCA-088, 110 N.M. 723, 799 P.2d 592, cert. denied, 109 N.M. 232, 784 P.2d 419.

**Merger with charge of conspiracy to traffic by manufacturer.** — In order for the jury to have convicted defendant of conspiracy to racketeer pursuant to the court's instruction, it was also necessary for the state to prove, and the jury to find, that she and another conspired to traffic by manufacture. Thus, the two offenses for which defendant was convicted merged under the facts and circumstances of the case. *State v. Wynne*, 1988-NMCA-106, 108 N.M. 134, 767 P.2d 373, cert. denied, 108 N.M. 115, 767 P.2d 354 (1989).

**Distinct, independent proof of elements not necessary.** — Although the state must prove both the existence of an "enterprise" and a "pattern of racketeering activity," proof of these elements need not be, and often will not be, distinct and independent. *State v. Hughes*, 1988-NMCA-108, 108 N.M. 143, 767 P.2d 382, cert. denied, 108 N.M. 115, 767 P.2d 354 (1989).

**Evidence held sufficient.** — Evidence was sufficient to support conviction for conspiracy to commit racketeering. The record indicates substantial evidence to support the jury's determination that defendant agreed to participate with others in an enterprise to traffic by manufacture of a controlled substance and also that there was substantial evidence indicating the existence of an "enterprise" as required under the Racketeering Act. *State v. Wynne*, 1988-NMCA-106, 108 N.M. 134, 767 P.2d 373, cert. denied, 108 N.M. 115, 767 P.2d 354.

There was sufficient proof that defendant used the nonmonetary proceeds of his act of receiving stolen property, i.e., the stolen property itself, in his methamphetamine manufacturing business. *State v. Hughes*, 1988-NMCA-108, 108 N.M. 143, 767 P.2d 382, cert. denied, 108 N.M. 115, 767 P.2d 354 (1989).

Evidence that defendant, as executive director of the Insurance Board, committed two acts of felony fraud victimizing the Insurance Authority was sufficient to support his conviction for racketeering. *State v. Armijo*, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

**Evidence held insufficient.** — Evidence that defendant exchanged drugs for work on his house and that he advised an undercover agent that he (the undercover agent) could make money cutting cocaine he (the undercover agent) bought from defendant was insufficient to prove all the elements of racketeering. *State v. Rael*, 1999-NMCA-068, 127 N.M. 347, 981 P.2d 280, cert. denied, 127 N.M. 390, 981 P.2d 1208.

**Failure to state claim of pattern of racketeering activity.** — Complaint alleging that lenders and realtors, in concert with home builder, had injured plaintiffs by representing homes as well built and performing only "windshield inspection", failed to state a claim that lenders and realtors had engaged in a pattern of racketeering activity. *Maxwell v. Wilson*, 1988-NMSC-096, 108 N.M. 65, 766 P.2d 909.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Criminal prosecutions under state RICO statutes for engaging in organized criminal activity, 89 A.L.R.5th 629.

Commencement of limitation period for criminal prosecution under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USCS §§ 1961-1968, 89 A.L.R. Fed. 887.

## 30-42-5. Enforcement authority.

The attorney general and the district attorneys of New Mexico shall each have authority to enforce the criminal provisions of the Racketeering Act by initiating investigations, assisting grand juries, obtaining indictments, filing informations and complaints and prosecuting criminal cases.

**History: Laws 1980, ch. 40, § 5.**

## 30-42-6. Racketeering; civil remedies.

A. A person who sustains injury to his person, business or property by a pattern of racketeering activity may file an action in the district court for the recovery of three times the actual damages proved and the costs of the suit, including reasonable attorney's fees.

B. The state may file an action on behalf of those persons injured or to prevent, restrain or remedy racketeering as defined by the Racketeering Act.

C. The district court has jurisdiction to prevent, restrain and remedy racketeering as defined in Subsection A of Section 30-42-3 NMSA 1978 after making provision for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders. Prior to a determination of liability, such orders may include but are not limited to entering restraining orders or prohibitions or taking such other actions, including the acceptance of



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satisfactory performance bonds, in connection with any property or other interest subject to damages, forfeiture or other restraints pursuant to this section as it deems proper.

D. Following a determination of liability, such orders may include but are not limited to:

(1) ordering any person to divest himself of any interest, direct or indirect, in any enterprise;

(2) imposing reasonable restrictions on the future activities or investments of any person;

(3) ordering dissolution or reorganization of any enterprise;

(4) ordering the payment of three times the damages proved to those persons injured by racketeering; and

(5) ordering the payment of all costs and expenses of the prosecution and investigation of any offense included in the definition of racketeering incurred by the state to be paid to the general fund of New Mexico.

**History: 1978 Comp., § 30-42-6, enacted by Laws 1980, ch. 40, § 6.**

**ANNOTATIONS**

**Plaintiff must show actual injury.** — To state a claim under this section, plaintiff must allege an actual injury; mere conclusory allegations that a prison warden jeopardized safety of employees and inmates by failing to enforce provisions of a food service contract did not meet the "actual injury" requirement. *Peterson v. Shanks*, 149 F.3d 1140 (10th Cir. 1998).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Civil action for damages under state Racketeer Influenced and Corrupt Organizations Act (RICO) for losses from racketeering activity, 62 A.L.R.4th 654.

Civil action for damages under 18 USCS § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO, 18 USCS §§ 1961 et seq.) for injuries sustained by reason of racketeering activity, 70 A.L.R. Fed. 538.

Recovery of damages for personal injuries in civil action for damages under Racketeer Influenced and Corrupt Organizations Act (18 USCS § 1964(c)), 96 A.L.R. Fed. 881.

Liability, under Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USCS §§ 1961-1968), for retaliation against employee for disclosing or refusing to commit wrongful act, 100 A.L.R. Fed. 657.

# ARTICLE 43

# Loan Sharking

Sec.
30-43-1. Short title.
30-43-2. Definitions.
30-43-3. Making extortionate extensions of credit.
30-43-4. Financing extortionate extensions of credit.
30-43-5. Collection of extensions of credit by extortionate means.

## 30-43-1. Short title.

This act [30-43-1 through 30-43-5 NMSA 1978] may be cited as the "Loan Sharking Act".

**History: Laws 1980, ch. 39, § 1.**

## 30-43-2. Definitions.

As used in the Loan Sharking Act:

A. "creditor" means any person making an extension of credit or any person claiming by, under or through any person making an extension of credit;

B. "debtor" means any person to whom an extension of credit is made or any person who guarantees the repayment of an extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom an extension is made to repay the same;

C. "extortionate extension of credit" means any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal acts other than petty misdemeanors to cause harm to the person, reputation or property of any person;



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D. "extortionate means" means the use, or an express or implicit threat of use, of violence or other criminal acts other than petty misdemeanors to cause harm to the person, reputation or property of any person;

E. "to collect an extension of credit" means to induce in any way any person to make repayment of one extension of credit;

F. "to extend credit" means to make or renew any loan or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid and however arising, may or shall be deferred; and

G. "repayment of any extension of credit" means the repayment, satisfaction or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

**History: Laws 1980, ch. 39, § 2.**

## 30-43-3. Making extortionate extensions of credit.

A. Any person who makes or conspires or attempts to make an extortionate extension of credit is guilty of a third degree felony.

B. In any prosecution pursuant to this section, if it is shown that all of the following factors were present in connection with the extension of credit, there is prima facie evidence that the extension of credit was extortionate:

(1) the extension of credit was made at a rate of interest in excess of an annual rate of forty-five percent calculated according to the actuarial method of allocating payments on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal;

(2) at the time the extension of credit was made, the debtor reasonably believed either of the following:

(a) one or more extensions of credit by the creditor had been collected by extortionate means or the nonrepayment had been punished by extortionate means; or

(b) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof; and

(3) upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded one hundred dollars ($100).

C. In any prosecution pursuant to this section, if evidence has been introduced tending to show the existence of the circumstances described in Paragraph (1) of Subsection B of this section and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may, pursuant to the New Mexico rules of evidence, in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

D. Nothing contained in Paragraphs (1) through (3) of Subsection B of this section shall be construed as a requirement for the proof of the existence of an extortionate extension of credit.

**History: Laws 1980, ch. 39, § 3.**

## 30-43-4. Financing extortionate extensions of credit.

A person who knowingly advances money or property, whether as a gift, loan or investment, to any person with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced, directly or indirectly, for the purpose of making extortionate extensions of credit is guilty of a third degree felony.

**History: Laws 1980, ch. 39, § 4.**



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## 30-43-5. Collection of extensions of credit by extortionate means.

A. A person who knowingly participates or conspires or attempts to participate in the use of any extortionate means to collect any extensions of credit or to cause harm to the person, reputation or property of any person for the nonpayment thereof is guilty of a third degree felony.

B. In any prosecution pursuant to this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonpayment resulted in the use of extortionate means.

C. In any prosecution pursuant to this section, if evidence has been introduced tending to show the existence at the time the extension of credit in question was made of the circumstances described in Paragraph (1) of Subsection B of Section 30-43-3 NMSA 1978 and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication shown to have been employed as a means of collection in fact carried an express or implicit threat, the court may, pursuant to the New Mexico rules of evidence, in its discretion, allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

**History: Laws 1980, ch. 39, § 5.**

# ARTICLE 44

# Medicaid Fraud

Sec.
30-44-1. Short title.
30-44-2. Definitions.
30-44-3. Power to investigate and enforce civil remedies and prosecute criminal actions.
30-44-4. Falsification of documents; defined; penalties.
30-44-5. Failure to retain records; defined; penalties.
Sec.
30-44-6. Obstruction of investigation; defined; penalty.
30-44-7. Medicaid fraud; defined; investigation; penalties.
30-44-8. Civil penalties; created; enumerated; presumption; limitation of action.

## 30-44-1. Short title.

Chapter 30, Article 44 NMSA 1978 may be cited as the "Medicaid Fraud Act".

**History: Laws 1989, ch. 286, § 1; 1997, ch. 98, § 1.**

**Cross references.** — For provisions relating to medicaid, *see* 27-2-12 NMSA 1978 et seq.

**The 1997 amendment,** effective June 20, 1997, substituted "Chapter 30, Article 44 NMSA 1978" for "This act".

## 30-44-2. Definitions.

As used in the Medicaid Fraud Act:

A. "benefit" means money, treatment, services, goods or anything of value authorized under the program;

B. "claim" means any communication, whether oral, written, electronic or magnetic, that identifies a treatment, good or service as reimbursable under the program;

C. "cost document" means any cost report or similar document that states income or expenses and is used to determine a cost reimbursement based rate of payment for a provider under the program;

D. "covered person" means an individual who is entitled to receive health care benefits from a managed health care plan;

E. "department" means the human services department;



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F. "entity" means a person other than an individual and includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof and nonprofit organizations;

G. "great physical harm" means physical harm of a type that causes physical loss of a bodily member or organ or functional loss of a bodily member or organ for a prolonged period of time;

H. "great psychological harm" means psychological harm that causes mental or emotional incapacitation for a prolonged period of time or that causes extreme behavioral change or severe physical symptoms or that requires psychological or psychiatric care;

I. "health care official" means:

(1) an administrator, officer, trustee, fiduciary, custodian, counsel, agent or employee of a managed care health plan;

(2) an officer, counsel, agent or employee of an organization that provides, proposes to or contracts to provide services to a managed health care plan; or

(3) an official, employee or agent of a state or federal agency with regulatory or administrative authority over a managed health care plan;

J. "managed health care plan" means a government-sponsored health benefit plan that requires a covered person to use, or creates incentives, including financial incentives, for a covered person to use health care providers managed, owned, under contract with or employed by a health care insurer or provider service network. A "managed health care plan" includes the health care services offered by a health maintenance organization, preferred provider organization, health care insurer, provider service network, entity or person that contracts to provide or provides goods or services that are reimbursed by or are a required benefit of a state or federally funded health benefit program, or any person or entity who contracts to provide goods or services to the program;

K. "person" includes individuals, corporations, partnerships and other associations;

L. "physical harm" means an injury to the body that causes pain or incapacitation;

M. "program" means the medical assistance program authorized under Title XIX of the federal Social Security Act, 42 U.S.C. 1396, et seq. and implemented under Section 27-2-12 NMSA 1978;

N. "provider" means any person who has applied to participate or who participates in the program as a supplier of treatment, services or goods;

O. "psychological harm" means emotional or psychological damage of such a nature as to cause fear, humiliation or distress or to impair a person's ability to enjoy the normal process of his life;

P. "recipient" means any individual who receives or requests benefits under the program;

Q. "records" means any medical or business documentation, however recorded, relating to the treatment or care of any recipient, to services or goods provided to any recipient or to reimbursement for treatment, services or goods, including any documentation required to be retained by regulations of the program; and

R. "unit" means the medicaid fraud control unit or any other agency with power to investigate or prosecute fraud and abuse of the program.

**History: Laws 1989, ch. 286, § 2; 1997, ch. 98, § 2.**

**The 1997 amendment,** effective June 20, 1997, added Subsections D, F, I, and J, and redesignated the remaining subsections accordingly; deleted "providers" following "medicaid" in Subsection R; and made stylistic changes throughout the section.

## 30-44-3. Power to investigate and enforce civil remedies and prosecute criminal actions.

A. The attorney general, the district attorneys, the unit and the department have the power and authority to investigate violations of the Medicaid Fraud Act and bring actions to enforce the civil remedies established in the Medicaid Fraud Act.

B. The attorney general, the district attorneys and those attorneys who are employees of the unit to whom the attorney general or a district attorney has, by appointment made through a joint powers agreement or other agreement for that purpose, delegated criminal prosecutorial responsibility, shall have the power and authority to prosecute persons for the violation of criminal provisions of the Medicaid Fraud Act and for criminal offenses that are not defined in the Medicaid



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Fraud Act, but that involve or are directly related to the use of medicaid program funds or services provided through medicaid programs.

**History: Laws 1989, ch. 286, § 3; 1991, ch. 79, § 1.** **The 1991 amendment,** effective June 14, 1991, rewrote Subsection B which read "The attorney general, the district attorneys and those persons in the unit who have criminal prosecutorial authority under general law have the power and authority to prosecute persons for the violation of criminal provisions of the Medicaid Fraud Act."

## 30-44-4. Falsification of documents; defined; penalties.

A. Falsification of documents consists of:

(1) knowingly making or causing to be made a misrepresentation of a material fact required to be furnished under the program or knowingly failing or causing the failure to include a material fact required to be furnished under the program in any record required to be retained in connection with the program pursuant to the Medicaid Fraud Act or regulations issued by the department for the administration of the program, or both; or

(2) knowingly submitting or causing to be submitted false or incomplete information for the purpose of receiving benefits or qualifying as a provider.

B. Whoever commits the crime of falsification of documents is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: Laws 1989, ch. 286, § 4.**

## 30-44-5. Failure to retain records; defined; penalties.

A. Whoever receives payment for treatment, services or goods under the program shall retain all medical and business records relating to:

(1) the treatment or care of any recipient;

(2) services or goods provided to any recipient;

(3) rates paid by the department under the program on behalf of any recipient; and

(4) any records required to be maintained by regulation of the department for administration of the program.

B. Failure to retain records consists of intentionally failing to retain the records specified in Subsection A of this section for a period of at least five years from the date payment was received or knowingly destroying or causing those records to be destroyed within five years from the date payment was received.

C. Whoever commits the crime of failure to retain records:

(1) is guilty of a misdemeanor if the treatment, services or goods for which records were not retained amounts to not more than one thousand dollars ($1,000) and shall be sentenced pursuant to Section 31-19-1 NMSA 1978;

(2) is guilty of a fourth degree felony if the value of the treatment, services or goods for which records were not retained is more than one thousand dollars ($1,000) and shall be sentenced pursuant to the provisions of Section 13-18-15 [31-18-15] NMSA 1978; and

(3) is guilty of a misdemeanor if the records not retained were used in whole or in part to determine a rate of payment under the program and shall be sentenced pursuant to Section 31-19-1 NMSA 1978.

**History: Laws 1989, ch. 286, § 5.**

**Bracketed material.** — The bracketed material was inserted by the compiler to correct a typographical error, and is not part of the law.

## 30-44-6. Obstruction of investigation; defined; penalty.

A. Obstruction of investigation consists of:

(1) knowingly providing false information to, or knowingly withholding information from, any person authorized under the Medicaid Fraud Act to investigate violations of that act or to



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enforce the criminal or civil remedies of that act where that information is material to the investigation or enforcement; or

(2) knowingly altering any document or record required to be retained pursuant to the Medicaid Fraud Act or any regulation issued by the department, or both, when the alteration is intended to mislead an investigation and concerns information material to that investigation.

B. Whoever commits obstruction of investigation is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: Laws 1989, ch. 286, § 6.**

## 30-44-7. Medicaid fraud; defined; investigation; penalties.

A. Medicaid fraud consists of:

(1) paying, soliciting, offering or receiving:

(a) a kickback or bribe in connection with the furnishing of treatment, services or goods for which payment is or may be made in whole or in part under the program, including an offer or promise to, or a solicitation or acceptance by, a health care official of anything of value with intent to influence a decision or commit a fraud affecting a state or federally funded or mandated managed health care plan;

(b) a rebate of a fee or charge made to a provider for referring a recipient to a provider;

(c) anything of value, intending to retain it and knowing it to be in excess of amounts authorized under the program, as a precondition of providing treatment, care, services or goods or as a requirement for continued provision of treatment, care, services or goods; or

(d) anything of value, intending to retain it and knowing it to be in excess of the rates established under the program for the provision of treatment, services or goods;

(2) providing with intent that a claim be relied upon for the expenditure of public money:

(a) treatment, services or goods that have not been ordered by a treating physician;

(b) treatment that is substantially inadequate when compared to generally recognized standards within the discipline or industry; or

(c) merchandise that has been adulterated, debased or mislabeled or is outdated;

(3) presenting or causing to be presented for allowance or payment with intent that a claim be relied upon for the expenditure of public money any false, fraudulent, excessive, multiple or incomplete claim for furnishing treatment, services or goods; or

(4) executing or conspiring to execute a plan or action to:

(a) defraud a state or federally funded or mandated managed health care plan in connection with the delivery of or payment for health care benefits, including engaging in any intentionally deceptive marketing practice in connection with proposing, offering, selling, soliciting or providing any health care service in a state or federally funded or mandated managed health care plan; or

(b) obtain by means of false or fraudulent representation or promise anything of value in connection with the delivery of or payment for health care benefits that are in whole or in part paid for or reimbursed or subsidized by a state or federally funded or mandated managed health care plan. This includes representations or statements of financial information, enrollment claims, demographic statistics, encounter data, health services available or rendered and the qualifications of persons rendering health care or ancillary services.

B. Except as otherwise provided for in this section regarding the payment of fines by an entity, whoever commits medicaid fraud as described in Paragraph (1) or (3) of Subsection A of this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Except as otherwise provided for in this section regarding the payment of fines by an entity, whoever commits medicaid fraud as described in Paragraph (2) or (4) of Subsection A of this section when the value of the benefit, treatment, services or goods improperly provided is:

(1) not more than one hundred dollars ($100) is guilty of a petty misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978;



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(2) more than one hundred dollars ($100) but not more than two hundred fifty dollars ($250) is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978;

(3) more than two hundred fifty dollars ($250) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(4) more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) shall be guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(5) more than twenty thousand dollars ($20,000) shall be guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

D. Except as otherwise provided for in this section regarding the payment of fines by an entity, whoever commits medicaid fraud when the fraud results in physical harm or psychological harm to a recipient is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

E. Except as otherwise provided for in this section regarding the payment of fines by an entity, whoever commits medicaid fraud when the fraud results in great physical harm or great psychological harm to a recipient is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

F. Except as otherwise provided for in this section regarding the payment of fines by an entity, whoever commits medicaid fraud when the fraud results in death to a recipient is guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

G. If the person who commits medicaid fraud is an entity rather than an individual, the entity shall be subject to a fine of not more than fifty thousand dollars ($50,000) for each misdemeanor and not more than two hundred fifty thousand dollars ($250,000) for each felony.

H. The unit shall coordinate with the human services department, department of health and children, youth and families department to develop a joint protocol establishing responsibilities and procedures, including prompt and appropriate referrals and necessary action regarding allegations of program fraud, to ensure prompt investigation of suspected fraud upon the medicaid program by any provider. These departments shall participate in the joint protocol and enter into a memorandum of understanding defining procedures for coordination of investigations of fraud by medicaid providers to eliminate duplication and fragmentation of resources. The memorandum of understanding shall further provide procedures for reporting to the legislative finance committee the results of all investigations every calendar quarter. The unit shall report to the legislative finance committee a detailed disposition of recoveries and distribution of proceeds every calendar quarter.

**History: Laws 1989, ch. 286, § 7; 1997, ch. 98, § 3; 2003, ch. 291, § 1.**

**Cross references.** — For the children, youth and families department, *see* 9-2A-1 NMSA 1978 et seq.

For the legislative finance committee, *see* 2-5-1 NMSA 1978.

**The 2003 amendment,** effective July 1, 2003, added Subsection H.

**The 1997 amendment,** effective June 20, 1997, in Subsection A, added the language beginning "including an offer or promise to" at the end of Subparagraph (1)(a), added Paragraph (4), and made related stylistic changes throughout the subsection; added "Except as otherwise provided for in this section regarding the payment of fines by an entity" at the beginning of Subsection B; in Subsection C, added "Except as otherwise provided for in this section regarding the payment of fines by an entity" at the beginning of the introductory language, added the language beginning "and shall be sentenced" at the end of Paragraph (1), inserted "dollars" in Paragraph (2), and substituted "Section 31-18-15 NMSA 1978" for "Section 31-19-1 NMSA 1978" in Paragraph (3); added "Except as otherwise provided for in this section regarding the payment of fines by an entity" at the beginning of Subsections D and E; and added Subsections F and G.

**ANNOTATIONS**

**Materiality element of Medicaid fraud.** — Section 30-44-7(A)(3) imposes a materiality element, which requires that the false or fraudulent certification be integral to the government's payment decision; regulatory deficiencies that are not material to government payment do not support a cause of action of Medicaid fraud under the Medicaid Fraud Act. *State ex rel. King v. Behavioral Home Care, Inc.*, 2015-NMCA-035, cert. granted, 2014-NMCERT-008.

Where Medicaid provider failed to comply with criminal history screening requirements of its caregivers, the state could not allege that the government could withhold payment solely because the unscreened caregivers had disqualifying criminal convictions in their histories, and therefore the fact that the Medicaid provider violated the statutory hiring requirements does not create a violation of a condition of Medicaid payment that supports a Medicaid fraud cause of action under the Medicaid Fraud Act. *State ex rel. King v. Behavioral Home Care, Inc.*, 2015-NMCA-035, cert. granted, 2014-NMCERT-008.

**Medicaid fraud not a lesser included offense of tampering with public records.** — Defendant



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charged with tampering with public records based on his sale of medicaid cards to undercover agents was not entitled to an instruction on medicaid fraud as a lesser included offense. *State v. Dartez*, 1998-NMCA-009, 124 N.M. 455, 952 P.2d 450, cert. denied, 124 N.M. 311, 950 P.2d 284.

## 30-44-8. Civil penalties; created; enumerated; presumption; limitation of action.

A. Any person who receives payment for furnishing treatment, services or goods under the program, which payment the person is not entitled to receive by reason of a violation of the Medicaid Fraud Act, shall, in addition to any other penalties or amounts provided by law, be liable for:

(1) payment of interest on the amount of the excess payments at the maximum legal rate in effect on the date the payment was made, for the period from the date payment was made to the date of repayment to the state;

(2) a civil penalty in an amount of up to three times the amount of excess payments;

(3) payment of a civil penalty of up to ten thousand dollars ($10,000) for each false or fraudulent claim submitted or representation made for providing treatment, services or goods; and

(4) payment of legal fees and costs of investigation and enforcement of civil remedies.

B. Interest amounts, legal fees and costs of enforcement of civil remedies assessed under this section shall be remitted to the state treasurer for deposit in the general fund.

C. Any penalties and costs of investigation recovered on behalf of the state shall be remitted to the state treasurer for deposit in the general fund except an amount not to exceed two hundred fifty thousand dollars ($250,000) in fiscal year 2004, one hundred twenty-five thousand dollars ($125,000) in fiscal year 2005 and seventy-five thousand dollars ($75,000) in fiscal year 2006 may be retained by the unit and expended, consistent with federal regulations and state law, for the purpose of carrying out the unit's duties.

D. A criminal action need not be brought against a person as a condition precedent to enforcement of civil liability under the Medicaid Fraud Act.

E. The remedies under this section are separate from and cumulative to any other administrative and civil remedies available under federal or state law or regulation.

F. The department may adopt regulations for the administration of the civil penalties contained in this section.

G. No action under this section shall be brought after the expiration of five years from the date the action accrues.

**History: 1989, ch. 286, § 8; 1997, ch. 98, § 4; 2004, ch. 54, § 1.**

**The 2004 amendment,** effective March 3, 2004, amended Subsection B to delete "Penalties and" and insert "legal fees and costs of enforcement of civil remedies" and amended Subsection C to delete "legal fees" and "and costs of enforcement of civil remedies" and inserted at the end of the Subsection C "except an amount not to exceed two hundred fifty thousand dollars ($250,000) in fiscal year 2004, one hundred twenty-five thousand dollars ($125,000) in fiscal year 2005 and seventy-five thousand dollars ($75,000) in fiscal year 2006 may be retained by the unit and expended, consistent with federal regulations and state law, for the purpose of carrying out the unit's duties.".

**The 1997 amendment,** effective June 20, 1997, in Paragraph A(3), substituted "up to ten thousand dollars ($10,000)" for "five hundred dollars ($500)" and inserted "or representation made"; and deleted "paid into the health care trust fund established in the Health Care Trust Fund Act if that act is in effect, and if it is not, then those amounts shall be" preceding "remitted" in Subsection B.

# ARTICLE 45

# Computer Crimes

Sec.
30-45-1. Short title.
30-45-2. Definitions.
30-45-3. Computer access with intent to defraud or embezzle.
30-45-4. Computer abuse.
30-45-5. Unauthorized computer use.
30-45-6. Prosecution.
30-45-7. Forfeiture of property.



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## 30-45-1. Short title.

This act [30-45-1 through 30-45-7 NMSA 1978] may be cited as the "Computer Crimes Act".

**History: Laws 1989, ch. 215, § 1.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Computer fraud, 70 A.L.R.5th 647.

## 30-45-2. Definitions.

As used in the Computer Crimes Act:

A. "access" means to program, execute programs on, intercept, instruct, communicate with, store data in, retrieve data from or otherwise make use of any computer resources, including data or programs of a computer, computer system, computer network or database;

B. "computer" includes an electronic, magnetic, optical or other high-speed data processing device or system performing logical, arithmetic or storage functions and includes any property, data storage facility or communications facility directly related to or operating in conjunction with such device or system. The term does not include an automated typewriter or typesetter or a single display machine in and of itself, designed and used solely within itself for word processing, or a portable hand-held calculator, or any other device which might contain components similar to those in computers but in which the components have the sole function of controlling the device for the single purpose for which the device is intended;

C. "computer network" means the interconnection of communication lines and circuits with a computer or a complex consisting of two or more interconnected computers;

D. "computer program" means a series of instructions or statements, in a form acceptable to a computer, which permits the functioning of a computer system in a manner designed to provide appropriate products from a computer system;

E. "computer property" includes a financial instrument, data, databases, computer software, computer programs, documents associated with computer systems and computer programs, or copies, whether tangible or intangible, and data while in transit;

F. "computer service" includes computer time, the use of the computer system, computer network, computer programs or data prepared for computer use, data contained within a computer network and data processing and other functions performed, in whole or in part, by the use of computers, computer systems, computer networks or computer software;

G. "computer software" means a set of computer programs, procedures and associated documentation concerned with the operation and function of a computer system;

H. "computer system" means a set of related or interconnected computer equipment, devices and software;

I. "data" means a representation of information, knowledge, facts, concepts or instructions which are prepared and are intended for use in a computer, computer system or computer network;

J. "database" means any data or other information classified, processed, transmitted, received, retrieved, originated, switched, stored, manifested, measured, detected, recorded, reproduced, handled or utilized by a computer, computer system, computer network or computer software; and

K. "financial instrument" includes any check, draft, warrant, money order, note, certificate of deposit, letter of credit, bill of exchange, credit or debit card, transaction, authorization mechanism, marketable security or any other computerized representation thereof.

**History: Laws 1989, ch. 215, § 2.**

**ANNOTATIONS**

**Accessing of computer.** — The use of a telephone network consisting in part of computerized switches to make a long distance call does not constitute "accessing" of a "computer" within the meaning of the computer fraud statute. *State v. Rowell*, 1995-NMSC-079, 121 N.M. 111, 908 P.2d 1379, 70 A.L.R. 5th 819 (1995), *rev'g* 1995-NMCA-029, 119 N.M. 710, 895 P.2d 232.



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## 30-45-3. Computer access with intent to defraud or embezzle.

A person who knowingly and willfully accesses or causes to be accessed a computer, computer system, computer network or any part thereof with the intent to obtain, by means of embezzlement or false or fraudulent pretenses, representations or promises, money, property or anything of value, when the:

A. money, property or other thing has a value of two hundred fifty dollars ($250) or less, is guilty of a petty misdemeanor;

B. money, property or other thing has a value of more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500), is guilty of a misdemeanor;

C. money, property or other thing has a value of more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500), is guilty of a fourth degree felony;

D. money, property or other thing has a value of more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000), is guilty of a third degree felony; or

E. money, property or other thing has a value of more than twenty thousand dollars ($20,000), is guilty of a second degree felony.

**History: Laws 1989, ch. 215, § 3; 2006, ch. 29, § 22.**

**The 2006 amendment,** effective July 1, 2006, increased the value in Subsection A from $100 to $250; increased the value in Subsection B from more than $100, but not more than $250, and to more than $250, but not more than $500; increased the value in Subsection C from more than $250 to more than $500; and deleted the reference to sentencing pursuant to Section 31-18-15 NMSA 1978 in Subsections B through E.

### ANNOTATIONS

**"Accessing" construed.** — The use of a telephone network consisting in part of computerized switches to make a long-distance call does not constitute the "accessing" of a "computer" within the meaning of this article. *State v. Rowell*, 1995-NMSC-079, 121 N.M. 111, 908 P.2d 1379.

**Using a computer as a passive conduit not covered by statute.** — The Computer Crimes Act, 30-45-1 NMSA 1978 et seq., was intended by the legislature to deter and punish crimes committed through the abuse of computer sophistication and to protect against the introduction of fraudulent data into a computer system, the unauthorized use of computer facilities, the alteration or destruction of computerized information or files, and the stealing of financial information data or other assets, but was not intended to apply to the use of a computer as a passive conduit through which the defendant's criminal activity passed. *State v. Garcia*, 2015-NMCA-094, *rev'd on other grounds*, 2016-NMSC-034.

**Insufficient evidence of computer access with intent to defraud.** — Where defendant, with the victim's permission, used a computer to access victim's bank accounts and transfer funds to defendant's own bank accounts for personal use, the evidence was insufficient to convict defendant of computer access with intent to defraud because defendant did not introduce fraudulent data into a computer system, use computer facilities without authorization, alter or destroy computerized information or files, nor did she steal financial information, data or other assets, but merely used the computer as a passive conduit to access accounts and transfer funds, just as any banking customer would. *State v. Garcia*, 2015-NMCA-094, *rev'd on other grounds*, 2016-NMSC-034.

**Law reviews.** — For note, "Criminal Law: Applying the General/Specific Statute Rule in New Mexico - State v. Santillanes," see 32 N.M. L. Rev. 313 (2002).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Computer fraud, 70 A.L.R.5th 647.

## 30-45-4. Computer abuse.

A person who knowingly, willfully and without authorization, or having obtained authorization, uses the opportunity the authorization provides for purposes to which the authorization does not extend:

A. directly or indirectly alters, changes, damages, disrupts or destroys any computer, computer network, computer property, computer service or computer system, when the:

(1) damage to the computer property or computer service has a value of two hundred fifty dollars ($250) or less, is guilty of a petty misdemeanor;

(2) damage to the computer property or computer service has a value of more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500), is guilty of a misdemeanor;

(3) damage to the computer property or computer service has a value of more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500), is guilty of a fourth degree felony;

(4) damage to the computer property or computer service has a value of more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000), is guilty of a third degree felony; or



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(5) damage to the computer property or computer service has a value of more than twenty thousand dollars ($20,000), is guilty of a second degree felony; or

B. directly or indirectly introduces or causes to be introduced data that the person knows to be false into a computer, computer system, computer network, computer software, computer program, database or any part thereof with the intent of harming the property or financial interests or rights of another person is guilty of a fourth degree felony.

**History: Laws 1989, ch. 215, § 4; 2006, ch. 29, § 23.**

**The 2006 amendment,** effective July 1, 2006, provided that a person who uses the opportunity the authorization provides for purposes to which the authorization does not extend is guilty of computer abuse; increased the damage in Paragraph (1) of Subsection A from $100 to $250; increased the damage in Paragraph (2) of Subsection A from more than $100, but not more than $250, and to more than $250, but not more than $500; increased the damage in Paragraph (3) of Subsection A from more than $250 to more than $500; deleted the reference to sentencing pursuant to Section 31-19-1 NMSA 1978 in Paragraph (2) of Subsection A; and deleted the reference to sentencing pursuant to Section 31-18-15 NMSA 1978 in Paragraphs (3) through (5) of Subsection A and in Subsection B.

## 30-45-5. Unauthorized computer use.

A person who knowingly, willfully and without authorization, or having obtained authorization, uses the opportunity the authorization provides for purposes to which the authorization does not extend, directly or indirectly accesses, uses, takes, transfers, conceals, obtains, copies or retains possession of any computer, computer network, computer property, computer service, computer system or any part thereof, when the:

A. damage to the computer property or computer service has a value of two hundred fifty dollars ($250) or less, is guilty of a petty misdemeanor;

B. damage to the computer property or computer service has a value of more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500), is guilty of a misdemeanor;

C. damage to the computer property or computer service has a value of more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500), is guilty of a fourth degree felony;

D. damage to the computer property or computer service has a value of more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000), is guilty of a third degree felony; or

E. damage to the computer property or computer service has a value of more than twenty thousand dollars ($20,000), is guilty of a second degree felony.

**History: Laws 1989, ch. 215, § 5; 2006, ch. 29, § 24.**

**The 2006 amendment,** effective July 1, 2006, increased the value in Subsection A from $100 to $250; increased the value in Subsection B from more than $100 but not more than $250 to more than $250 but not more than $500; increased the value in Subsection C from more than $250 to more than $500; deleted the reference to sentencing pursuant to Section 31-19-1 NMSA 1978 in Subsection B; and deleted the reference to sentencing pursuant Section 31-18-15 NMSA 1978 in Subsections C through E.

## 30-45-6. Prosecution.

A. Prosecution pursuant to the Computer Crimes Act shall not prevent any prosecutions pursuant to any other provisions of the law where such conduct also constitutes a violation of that other provision.

B. A person found guilty of violating any provision of the Computer Crimes Act shall, in addition to any other punishment, be ordered to make restitution for any financial loss sustained by anyone injured as the direct result of the commission of the crime. Restitution shall be imposed in addition to incarceration, forfeiture or fine, and not in lieu thereof, and may be made a condition of probation. The defendant's present and future ability to make such restitution shall be considered. In an extraordinary case, the court may determine that the interests of those injured and justice would not be served by ordering restitution. In such a case, the court shall make and enter specific written findings on the record substantiating the extraordinary circumstance presented upon which the court determined not to order restitution. In all other cases, the court shall determine the amount and method of restitution.

**History: Laws 1989, ch. 215, § 6.**



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## 30-45-7. Forfeiture of property.

A. The following are subject to forfeiture:

(1) all computer property, equipment or products of any kind that have been used, manufactured, acquired or distributed in violation of the Computer Crimes Act;

(2) all materials, products and equipment of any kind that are used or intended for use in manufacturing, using, accessing, altering, disrupting, copying, concealing, destroying, transferring, delivering, importing or exporting any computer property or computer service in violation of the Computer Crimes Act;

(3) all books, records and research products and materials involving formulas, microfilm, tapes and data that are used or intended for use in violation of the Computer Crimes Act;

(4) all conveyances, including aircraft, vehicles or vessels, that are used or intended for use to transport or in any manner to facilitate the transportation of property described in this subsection for the purpose of violating the Computer Crimes Act;

(5) all property, real, personal or mixed, that has been used or intended for use, maintained or acquired in violation of the Computer Crimes Act; and

(6) all money or proceeds that constitute an instrumentality or derive from a violation of the Computer Crimes Act.

B. The provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of property subject to forfeiture pursuant to Subsection A of this section.

**History: Laws 1989, ch. 215, § 7; 2002, ch. 4, § 18.**

**The 2002 amendment,** effective July 1, 2002, in Paragraph A(4), substituted "this section" for "A, B or C of this section"; deleted former Subsections B through H, which contained standards and procedures for the forfeiture of property subject to forfeiture and disposal under the Computer Crimes Act; and added present Subsection B.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Forfeiture of homestead based on criminal activity conducted on premises - state cases, 16 A.L.R.5th 855.

# ARTICLE 46

# Ticket Scalping

Sec.
30-46-1. Ticket scalping.

## 30-46-1. Ticket scalping.

A. Ticket scalping consists of selling, offering for sale or attempting to sell any ticket, privilege, license, admission or pass to any college athletic event at a price greater than the price charged at the place of admission or printed on the ticket.

B. The sale of each ticket, privilege, license, admission or pass in violation of this section shall constitute a separate offense.

C. Nothing in this section shall prohibit charging a fee for services rendered in connection with the sale of a ticket privilege, license, admission or pass to an event if the fee is permitted pursuant to a contract between the ticket seller and the sponsor or promoter of the event.

D. Whoever commits ticket scalping is guilty of a misdemeanor and upon conviction shall be punished by a fine up to five hundred dollars ($500) or by imprisonment for a definite term of less than one year, or both.

**History: Laws 1989, ch. 142, § 1.**



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# ARTICLE 47

## Resident Abuse and Neglect

Sec.
30-47-1. Short title.
30-47-2. Purpose.
30-47-3. Definitions.
30-47-4. Abuse of a resident; criminal penalties.
30-47-5. Neglect of a resident; criminal penalties.
30-47-6. Exploitation; criminal penalties.
30-47-7. Religious practitioners; exception.
30-47-8. Treatment in compliance with the Uniform Health-Care Decisions Act.
30-47-9. Reporting requirements; failure to report; crime created; criminal penalty; discrimination or retaliation for filing a report prohibited.
30-47-10. Regulatory authority.

### 30-47-1. Short title.

This act [30-47-1 through 30-47-10 NMSA 1978] may be cited as the "Resident Abuse and Neglect Act".

**History: Laws 1990, ch. 55, § 1.**

ANNOTATIONS

**Constitutional.** — The Residents Abuse and Neglect Act is not unconstitutionally vague. *State v. Greenwood*, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

### 30-47-2. Purpose.

The purpose of the Resident Abuse and Neglect Act is to provide meaningful deterrents and remedies for the abuse, neglect or exploitation of care facility residents and to provide an effective system for reporting instances of abuse, neglect or exploitation.

**History: Laws 1990, ch. 55, § 2.**

ANNOTATIONS

**Application of the act.** — The Residents Abuse and Neglect Act applies to persons who take on the responsibility of continual, steadfast and faithful watch and care of someone who cannot care for himself or herself, and who are grossly negligent in carrying out that responsibility by failing to take any responsible precaution to prevent damage to health. *State v. Greenwood*, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

### 30-47-3. Definitions.

As used in the Resident Abuse and Neglect Act:

A. "abuse" means any act or failure to act performed intentionally, knowingly or recklessly that causes or is likely to cause harm to a resident, including:

(1) physical contact that harms or is likely to harm a resident of a care facility;

(2) inappropriate use of a physical restraint, isolation or medication that harms or is likely to harm a resident;

(3) inappropriate use of a physical or chemical restraint, medication or isolation as punishment or in conflict with a physician's order;

(4) medically inappropriate conduct that causes or is likely to cause physical harm to a resident;

(5) medically inappropriate conduct that causes or is likely to cause great psychological harm to a resident; or

(6) an unlawful act, a threat or menacing conduct directed toward a resident that results and might reasonably be expected to result in fear or emotional or mental distress to a resident;

B. "care facility" means a hospital; skilled nursing facility; intermediate care facility; care facility for the mentally retarded; psychiatric facility; rehabilitation facility; kidney disease treatment center; home health agency; ambulatory surgical or outpatient facility; home for the aged or disabled; group home; adult foster care home; private residence that provides personal care, sheltered



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care or nursing care for one or more persons; a resident's or care provider's home in which personal care, sheltered care or nursing care is provided; adult day care center; boarding home; adult residential shelter care home; and any other health or resident care related facility or home, but does not include a care facility located at or performing services for any correctional facility;

C. "department" means the human services department or its successor, contractor, employee or designee;

D. "great psychological harm" means psychological harm that causes mental or emotional incapacitation for a prolonged period of time or that causes extreme behavioral change or severe physical symptoms that require psychological or psychiatric care;

E. "great physical harm" means physical harm of a type that causes physical loss of a bodily member or organ or functional loss of a bodily member or organ for a prolonged period of time;

F. "neglect" means, subject to the resident's right to refuse treatment and subject to the caregiver's right to exercise sound medical discretion, the grossly negligent:

(1) failure to provide any treatment, service, care, medication or item that is necessary to maintain the health or safety of a resident;

(2) failure to take any reasonable precaution that is necessary to prevent damage to the health or safety of a resident; or

(3) failure to carry out a duty to supervise properly or control the provision of any treatment, care, good, service or medication necessary to maintain the health or safety of a resident;

G. "person" means any individual, corporation, partnership, unincorporated association or other governmental or business entity;

H. "physical harm" means an injury to the body that causes substantial pain or incapacitation; and

I. "resident" means any person who resides in a care facility or who receives treatment from a care facility.

**History: Laws 1990, ch. 55, § 3; 2010, ch. 93, § 1.**

**Cross references.** — For criminal records screening for caregivers employed by care providers, *see* 29-17-2 to 29-17-5 NMSA 1978.

**The 2010 amendment,** effective May 19, 2010, in Subsection A(5), at the end of the sentence, added "or"; and in Subsection B, after "nursing care for one or more persons", added "a resident's or care provider's home in which personal care, sheltered care or nursing care is provided".

**ANNOTATIONS**

**Standard of negligence.** — Criminal negligence is the standard applicable to 30-47-3(F) NMSA 1978 which requires an actual or imputed foreseeability of danger directed toward the victim who might be injured as a result of the defendant's acts and a risk of harm that is substantial and unjustifiable. *State v. Muraida*, 2014-NMCA-060, cert. denied, 2014-NMCERT-005.

**"Care facility".** — Evidence was sufficient to prove that defendant, who was legal custodian of eighty-year-old man, housed the man at his mother's residence, and provided other services for him, was acting as a "care facility" for the man and was, therefore, subject to the provisions of this article. *State v. Davis*, 1998-NMCA-148, 126 N.M. 297, 968 P.2d 808.

The Resident Abuse and Neglect Act applies to persons in a private residence setting who take on the responsibility as caregivers to care for severely developmentally disabled and other similarly incapacitated adults, including the aged, who are in need of frequent, if not daily, personal assistance and care to stave off harm. *State v. Greenwood*, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

**Resident of a care facility.** — Where the victim, who was a profoundly developmentally disabled adult, resided in defendant's home; defendant was the victim's parent; defendant was not treating or caring for the victim under any contract with a care facility, care provider or other entity; the victim was totally dependent on defendant for the victim's life; and defendant accepted full responsibility for the victim's care, defendant's home was a "care facility" and the victim was a "resident". *State v. Greenwood*, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

## 30-47-4. Abuse of a resident; criminal penalties.

A. Whoever commits abuse of a care facility resident that results in no harm to the resident is guilty of a petty misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Subsection B of Section 31-19-1 NMSA 1978.

B. Whoever commits abuse of a resident that results in physical harm or great psychological harm to the resident is guilty of a fourth degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Whoever commits abuse of a resident that results in great physical harm to the resident is guilty of a third degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.



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D. Whoever commits abuse of a resident that results in the death of the resident is guilty of a second degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: Laws 1990, ch. 55, § 4.**

**ANNOTATIONS**

**Complaint stated sufficient facts to support a conviction.** — Where the state's complaint alleged that defendant was the attending physician of the decedent who had had a heart attack; the decedent had been receiving the anticoagulant drug Coumadin before the decedent was transferred to defendant's care; defendant increased the decedent's dosage of Coumadin; defendant failed to monitor the effect of the prescribed dosage by daily testing the decedent's blood, failed to consider and monitor the decedent's blood pressure medication, failed to act in response to the decedent's worsening symptoms, failed to order proper care upon discovery of blood in the decedent's stool, ordered a colonoscopy rather than determine whether the symptom was due to the Coumadin, and ordered the colonoscopy on a non-emergent basis despite the fact that the decedent required drastic and urgent treatment; and the decedent died due to blood loss from the excessively prescribed quantity of Coumadin, the state's complaint alleged sufficient facts to support a conviction under 30-47-4 NMSA 1978. *State v. Muraida*, 2014-NMCA-060, cert. denied, 2014-NMCERT-005.

## 30-47-5. Neglect of a resident; criminal penalties.

A. Whoever commits neglect of a resident that results in no harm to the resident is guilty of a petty misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Subsection B of Section 31-19-1 NMSA 1978.

B. Whoever commits neglect of a resident that results in physical harm or great psychological harm to the resident is guilty of a fourth degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Whoever commits neglect of a resident that results in great physical harm to the resident is guilty of a third degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

D. Whoever commits neglect of a resident that results in the death of the resident is guilty of a second degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

**History: Laws 1990, ch. 55, § 5.**

**ANNOTATIONS**

**Standard of negligence is criminal negligence.** — Criminal negligence is the standard applicable to 30-47-3(F) NMSA 1978 which requires an actual or imputed foreseeability of danger directed toward the victim who might be injured as a result of the defendant's acts and a risk of harm that is substantial and unjustifiable. *State v. Muraida*, 2014-NMCA-060, cert. denied, 2014-NMCERT-005.

**Complaint stated sufficient facts to support a conviction.** — Where the state's complaint alleged that defendant was the attending physician of the decedent who had had a heart attack; the decedent had been receiving the anticoagulant drug Coumadin before the decedent was transferred to defendant's care; defendant increased the decedent's dosage of Coumadin; defendant failed to monitor the effect of the prescribed dosage by daily testing the decedent's blood, failed to consider and monitor the decedent's blood pressure medication, failed to act in response to the decedent's worsening symptoms, failed to order proper care upon discovery of blood in the decedent's stool, ordered a colonoscopy rather than determine whether the symptom was due to the Coumadin, and ordered the colonoscopy on a non-emergent basis despite the fact that the decedent required drastic and urgent treatment; and the decedent died due to blood loss from the excessively prescribe quantity of Coumadin, the state's complaint alleged sufficient facts to support a conviction under 30-47-5 NMSA 1978. *State v. Muraida*, 2014-NMCA-060, cert. denied, 2014-NMCERT-005.

**"Care facility".** — Evidence was sufficient to prove that defendant, who was legal custodian of eighty-year-old man, housed the man at his mother's residence, and provided other services for him, was acting as a "care facility" for the man and was, therefore, subject to the provisions of this article. *State v. Davis*, 1998-NMCA-148, 126 N.M. 297, 968 P.2d 808.

The Resident Abuse and Neglect Act applies to persons in a private residence setting who take on the responsibility as caregivers to care for severely developmentally disabled and other similarly incapacitated adults, including the aged, who are in need of frequent, if not daily, personal assistance and care to stave off harm. *State v. Greenwood*, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

**Contract between care facility and an individual caregiver is not required.** — For criminal liability for neglect, the Residents Abuse and Neglect Act does not require any contractual, employment or financial arrangement between a care facility, care provider or particular entity, on the one hand, and an individual caregiver who has the hands-on and immediate responsibility of care and of taking responsible precautions necessary to prevent damage to a resident's health or safety. *State v. Greenwood*, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

**Sufficient evidence.** — Where the victim resided in defendant's home; defendant was the victim's parent; the victim was a profoundly developmentally disabled adult who was totally dependent on defendant for the victim's life; defendant was not treating or caring for the victim under any contract with a care facility, care provider or other entity; defendant accepted full responsibility for the victim's care; at the time of the victim's death, the home was covered with fecal matter and trash; the victim's



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death was caused by sepsis which was caused by extensive, server pressure ulcers that covered the victim's body, some of which were so deep as to expose bone and that had become infected due to the filthy conditions in which the victim lived; the ulcers had developed over an extended period of time; and defendant administered over-the-counter medications to the victim and postponed a decision to seek medical care for the victim, there was sufficient evidence to support the jury's findings that defendant's home was a care facility and that defendant was grossly negligent in failing to take reasonable precaution necessary to prevent damage to the victim's health. *State v. Greenwood*, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

## 30-47-6. Exploitation; criminal penalties.

A. Exploitation of a resident's property consists of the act or process, performed intentionally, knowingly or recklessly, of using a resident's property for another person's profit, advantage or benefit without legal entitlement to do so.

B. Whoever commits exploitation of a resident's property when the value of the property exploited is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits exploitation of a resident's property when the value of the property exploited is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits exploitation of a resident's property when the value of the property exploited is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits exploitation of a resident's property when the value of the property exploited is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. Whoever commits exploitation of a resident's property when the value of the property exploited is over twenty thousand dollars ($20,000) is guilty of a second degree felony.

**History: Laws 1990, ch. 55, § 6; 2006, ch. 29, § 25.**

**The 2006 amendment,** effective July 1, 2006, increases the value of the property in Subsection B from $100 to $250; increases the value of the property in Subsection C from more than $100, but not more than $250, and to more than $250, but not more than $500; increases the value of the property in Subsection D from more than $250 to more than $500; deletes the reference to sentencing pursuant to Section 31-19-1 NMSA 1978 in Subsections B and C; and deletes the reference to sentencing pursuant to Section 31-18-15 NMSA 1978 in Subsections D through F.

## 30-47-7. Religious practitioners; exception.

No resident who is being treated by a duly accredited religious practitioner shall be considered for that reason alone, abused or neglected.

**History: Laws 1990, ch. 55, § 7.**

## 30-47-8. Treatment in compliance with the Uniform Health-Care Decisions Act.

A. Nothing in the Resident Abuse and Neglect Act shall be construed to preclude health care in accordance with the Uniform Health-Care Decisions Act [Chapter 24, Article 7A NMSA 1978], and it shall be an affirmative defense to any charge brought under the Resident Abuse and Neglect Act that the acts complained of were in accordance with the Uniform Health-Care Decisions Act.

B. To establish an affirmative defense under Subsection A of this section, the person shall show substantial compliance with the provisions of the Uniform Health-Care Decisions Act.

**History: Laws 1990, ch. 55, § 8; 1997, ch. 168, § 11.**

**The 1997 amendment,** effective July 1, 1997, substituted "Uniform Health-Care Decisions Act" for "Right to Die Act" in the section heading and throughout the section and substituted "health care" for "withholding or withdrawing treatment" in Subsection A.



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## 30-47-9. Reporting requirements; failure to report; crime created; criminal penalty; discrimination or retaliation for filing a report prohibited.

A. Any person paid in whole or part for providing to a resident any treatment, care, good, service or medication who has reasonable cause to believe that the resident has been abused, neglected or exploited shall report the abuse, neglect or exploitation in accordance with the provisions of Section 27-7-30 NMSA 1978.

B. Any person required to make a report pursuant to Subsection A of this section who fails to do so is guilty of a misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Subsection A of Section 31-19-1 NMSA 1978.

C. In addition to those persons required to report pursuant to Subsection A of this section, any other person shall make a report if the person has reasonable cause to believe that a patient or resident of a facility has been abused, neglected or exploited.

D. Any person making a report pursuant to Subsection C of this section shall not be liable in any civil or criminal action based on the report if it was made in good faith.

E. No facility shall, without just cause, discharge or in any manner discriminate or retaliate against any person who in good faith makes a report required or permitted by the Resident Abuse and Neglect Act, or testifies, or is about to testify, in any proceeding about the abuse, neglect or exploitation of a resident in that facility. For the purposes of this section, "retaliate" includes transferring to another facility, without just cause, over the objection of the resident or the resident's guardian, any resident who has reported an incident pursuant to this section.

**History: Laws 1990, ch. 55, § 9.**

## 30-47-10. Regulatory authority.

The department shall issue rules and regulations as necessary to implement the reporting provisions of the Resident Abuse and Neglect Act.

**History: Laws 1990, ch. 55, § 10.**

**Severability.** — Laws 1990, ch. 55, § 11 provides for the severability of the Resident Abuse and Neglect Act if any part or application thereof is held invalid.

# ARTICLE 48

# Smokeless Tobacco Products

Sec.
30-48-1. Repealed.
30-48-2. Repealed.
30-48-3. Repealed.
30-48-4. Repealed.
30-48-5. Repealed.
30-48-6. Repealed.
30-48-7. Repealed.

## 30-48-1. Repealed.

**Repeals.** — Laws 1993, ch. 244, § 13 repealed 30-48-1 NMSA 1978, as enacted by Laws 1991, ch. 210, § 1, relating to sale of smokeless tobacco products, effective July 1, 1993. For present comparable provisions, *see* 30-49-1 NMSA 1978 et seq.

## 30-48-2. Repealed.

**Repeals.** — Laws 1993, ch. 244, § 13 repealed 30-48-2 NMSA 1978, as enacted by Laws 1991, ch. 210, § 2, relating to purchase of smokeless tobacco products, effective July 1, 1993. For present comparable provisions, *see* 30-49-1 NMSA 1978 et seq.



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## 30-48-3. Repealed.

**Repeals.** — Laws 1993, ch. 244, § 13 repealed 30-48-3 NMSA 1978, as enacted by Laws 1991, ch. 210, § 3, relating to point of sale signs, effective July 1, 1993. For present comparable provisions, *see* 30-49-1 NMSA 1978 et seq.

## 30-48-4. Repealed.

**Repeals.** — Laws 1993, ch. 244, § 13 repealed 30-48-4 NMSA 1978, as enacted by Laws 1991, ch. 210, § 4, relating to proof of age, effective July 1, 1993. For present comparable provisions, *see* 30-49-1 NMSA 1978 et seq.

## 30-48-5. Repealed.

**Repeals.** — Laws 1993, ch. 244, § 13 repealed 30-48-5 NMSA 1978, as enacted by Laws 1991, ch. 210, §5, relating to vending machines, effective July 1, 1993. For present comparable provisions, *see* 30-49-1 NMSA 1978 et seq.

## 30-48-6. Repealed.

**Repeals.** — Laws 1993, ch. 244, § 13 repealed 30-48-6 NMSA 1978, as enacted by Laws 1991, ch. 210, § 6, relating to local governments, tobacco sales regulations, effective July 1, 1993. For present comparable provisions, *see* 30-49-1 NMSA 1978 et seq.

## 30-48-7. Repealed.

**Repeals.** — Laws 1993, ch. 244, § 13 repealed 30-48-7 NMSA 1978, as enacted by Laws 1991, ch. 210, § 7, relating to penalties, effective July 1, 1993. For present comparable provisions, *see* 30-49-1 NMSA 1978 et seq.

# ARTICLE 49

# Tobacco Products, E-Cigarettes and Nicotine Liquid Containers

Sec.
30-49-1. Repealed.
30-49-2. Repealed.
30-49-3. Repealed.
30-49-4. Repealed.
30-49-5. Repealed.
30-49-6. Repealed.
30-49-7. Repealed.
30-49-8. Repealed.
30-49-9. Repealed.
30-49-10. Repealed.
30-49-11. Repealed.
30-49-12. Repealed.
30-49-13. Repealed.

## 30-49-1. Repealed.

**Repeals.** — Laws 2020, ch. 46, § 26 repealed 30-49-1 NMSA 1978, relating to the short title of the Tobacco Products, E-Cigarette and Nicotine Liquid Container Act, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

## 30-49-2. Repealed.

**Repeals.** — Laws 2020, ch. 46, § 26 repealed 30-49-2 NMSA 1978, relating to definitions, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

## 30-49-3. Repealed.

**Repeals.** — Laws 2020, ch. 46, § 26 repealed 30-49-3 NMSA 1978, relating to tobacco products, e-cigarettes and nicotine liquid containers, prohibited sales, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.



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## 30-49-4. Repealed.

**Repeals.** — Laws 2020, ch. 46, § 26 repealed 30-49-4 NMSA 1978, relating to documentary evidence of age and identity, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

## 30-49-5. Repealed.

**Repeals.** — Laws 2020, ch. 46, § 26 repealed 30-49-5 NMSA 1978, relating to refusal to sell tobacco products, e-cigarettes or nicotine liquid containers to person unable to produce identity card, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

## 30-49-6. Repealed.

**Repeals.** — Laws 2020, ch. 46, § 26 repealed 30-49-6 NMSA 1978, relating to presenting false evidence of age or identity, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

## 30-49-7. Repealed.

**Repeals.** — Laws 2020, ch. 46, § 26 repealed 30-49-7 NMSA 1978, relating to vending machines, restrictions on sales of tobacco products, e-cigarettes and nicotine liquid containers, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

## 30-49-8. Repealed.

**Repeals.** — Laws 2020, ch. 46, § 26 repealed 30-49-8 NMSA 1978, relating to distribution of tobacco products, e-cigarettes or nicotine liquid containers as free samples prohibited, exception, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

## 30-49-9. Repealed.

**Repeals.** — Laws 2020, ch. 46, § 26 repealed 30-49-9 NMSA 1978, relating to signs, point of sale, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

## 30-49-10. Repealed.

**Repeals.** — Laws 2020, ch. 46, § 26 repealed 30-49-10 NMSA 1978, relating to monitored compliance, inspections, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

## 30-49-11. Repealed.

**Repeals.** — Laws 2020, ch. 46, § 26 repealed 30-49-11 NMSA 1978, relating to preemption, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

## 30-49-12. Repealed.

**Repeals.** — Laws 2020, ch. 46, § 26 repealed 30-49-12 NMSA 1978, relating to penalty, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

## 30-49-13. Repealed.

**Repeals.** — Laws 2020, ch. 46, § 26 repealed 30-49-13 NMSA 1978, relating to applicability, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.



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# ARTICLE 50

# Fraudulent Telemarketing

Sec.
30-50-1. Short title.
30-50-2. Purpose.
30-50-3. Definitions.
30-50-4. Fraudulent telemarketing; penalties.

## 30-50-1. Short title.

This act [30-50-1 through 30-50-4 NMSA 1978] may be cited as the "Fraudulent Telemarketing Act".

**History: Laws 1995, ch. 37, § 1.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and application of state statute or law pertaining to telephone solicitation, 44 A.L.R.5th 619.

## 30-50-2. Purpose.

The purpose of the Fraudulent Telemarketing Act is to protect consumers from fraudulent telemarketing.

**History: Laws 1995, ch. 37, § 2.**

## 30-50-3. Definitions.

As used in the Fraudulent Telemarketing Act:

A. "telemarketing" means:

(1) being employed by or associating with any company, organization, sole proprietorship or economic venture that uses the telephone on a regular basis as a primary instrument to obtain money from the people to whom information is transmitted by telephone communication; or

(2) representing oneself to a person from whom money is requested as being associated with any company, organization, sole proprietorship or economic venture that can be reasonably understood as using the telephone on a regular basis as a primary instrument to obtain money from the people to whom information is transmitted by telephone communication; and

B. "telephone communication" means any communication by words, fax, computer modem, video or other type of transmission that is carried in whole or in part through the local, long distance or cellular telephone network.

**History: Laws 1995, ch. 37, § 3.**

## 30-50-4. Fraudulent telemarketing; penalties.

A person who knowingly and willfully engages in telemarketing to or from a telephone located in New Mexico with the intent to embezzle or to obtain money, property or any thing of value by fraudulent pretenses, representations or promises in the course of a telephone communication, when the:

A. money, property or thing has a value of two hundred fifty dollars ($250) or less, is guilty of a petty misdemeanor;

B. money, property or thing has a value of more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500), is guilty of a misdemeanor;

C. money, property or thing has a value of more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500), is guilty of a fourth degree felony;



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D. money, property or thing has a value of more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000), is guilty of a third degree felony; or

E. money, property or thing has a value of more than twenty thousand dollars ($20,000), is guilty of a second degree felony.

**History: Laws 1995, ch. 37, § 4; 2006, ch. 29, § 26.**

**The 2006 amendment,** effective July 1, 2006, in Subsection A, changed the value from less than $250 to $250 or less and changed the crime from a misdemeanor to a petty misdemeanor; in Subsection B, changed the damage from $250 or more, but not more than $2,500, and to more than $250, but not more than $500 and changed the crime from a fourth degree felony to a misdemeanor; added Subsection C to provide that if the value is more than $500, but less than $2,500, the crime is a fourth degree felony; provided in Subsection D (formerly Subsection C) that the value is more than $2,500, but not more than $20,000; deleted the reference to sentencing pursuant to Section 31-19-1 NMSA 1978 in Subsection A; and deleted the reference to sentencing pursuant to Section 31-18-15 NMSA 1978 in Subsections B, D (formerly Subsection C) and E (formerly Subsection D).

# ARTICLE 51

# Money Laundering

Sec.
30-51-1. Short title.
30-51-2. Definitions.
30-51-3. Reports filed with the department of public safety; criminal penalties.
30-51-4. Prohibited activity; criminal penalties; civil penalties.
30-51-5. Attorney fees; exception.

## 30-51-1. Short title.

Sections 1 through 5 [30-51-1 through 30-51-5 NMSA 1978] of this act may be cited as the "Money Laundering Act".

**History: Laws 1998, ch. 113, § 1.**

**Effective dates.** — Laws 1998, ch. 113, § 8, makes the Money Laundering Act effective on July 1, 1998.

## 30-51-2. Definitions.

As used in the Money Laundering Act:

A. "financial institution" means:

(1) a bank, credit union, trust company or thrift institution or an agency or branch thereof;

(2) a broker or dealer in securities or commodities;

(3) an investment banker;

(4) an investment company;

(5) an issuer, redeemer or cashier of traveler's checks, checks, money orders or similar instruments;

(6) an operator of a credit card system;

(7) an insurance company;

(8) a dealer in precious metals, stones or jewels;

(9) a pawnbroker;

(10) a loan or finance company;

(11) a travel agency;

(12) a licensed sender of money;

(13) a telegraph company;

(14) a business engaged in vehicle sales, including automobile, airplane and boat sales;

(15) a currency exchange;

(16) a person involved in real estate closings and settlements; or

(17) an agency or authority of a state or local government carrying out a duty or power of a business described in this subsection;



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B. "financial transaction" means a purchase, sale, loan, pledge, gift, transfer, delivery or other disposition of any monetary instrument or the movement of funds by wire or other means;

C. "monetary instrument" means coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, investment securities in bearer form or in such other form that title passes upon delivery of the security and negotiable instruments in bearer form or in such other form that title passes upon delivery of the instrument;

D. "person" means an individual, corporation, partnership, trust or estate, joint stock company, association, syndicate, joint venture, unincorporated organization or group or other entity;

E. "proceeds" means property that is acquired, delivered, produced or realized, whether directly or indirectly, by an act or omission;

F. "property" means anything of value, including real, personal, tangible or intangible property; and

G. "specified unlawful activity" means an act or omission, including any initiatory, preparatory or completed offense or omission, committed for financial gain that is punishable as a felony under the laws of New Mexico or, if the act occurred outside New Mexico, would be punishable as a felony under the laws of the state in which it occurred and under the laws of New Mexico.

**History: Laws 1998, ch. 113, § 2.** **Effective dates.** — Laws 1998, ch. 113, § 8, makes the Money Laundering Act effective on July 1, 1998.

## 30-51-3. Reports filed with the department of public safety; criminal penalties.

A. A financial institution in New Mexico that is required to file a report regarding a financial transaction under the provisions of the federal Currency and Foreign Transactions Reporting Act and the regulations promulgated pursuant to that act shall file a duplicate of that report with the department of public safety; provided, a financial institution that makes a timely filing with an appropriate federal agency shall be deemed to have satisfied the reporting requirements of this subsection.

B. A person engaged in a trade or business in New Mexico who, in the course of the trade or business, receives more than ten thousand dollars ($10,000) in cash in one financial transaction or two or more related financial transactions, and is required to file a report under the provisions of 26 U.S.C. Section 6050I and regulations promulgated pursuant to that section, shall file a duplicate of that report with the department of public safety; provided, a person who makes a timely filing with an appropriate federal agency shall be deemed to have satisfied the reporting requirements of this subsection.

C. A financial institution, a person engaged in a trade or business or an officer, employee or agent of either who files or keeps a record pursuant to the provisions of this section or who communicates or discloses information or records pursuant to the provisions of this section shall not be liable to its customer or to any person for any loss or damage caused in whole or in part by the making, filing or governmental use of the report or information contained in the report.

D. Any person who releases information received pursuant to the provisions of this section, except in the proper discharge of his official duties, is guilty of a misdemeanor.

E. A person who knowingly:

(1) fails to file a report with the department of public safety required pursuant to the provisions of this section is subject to a fine of not more than ten percent of the value of the financial transaction required to be reported or five thousand dollars ($5,000), whichever is greater; or

(2) provides any false or inaccurate information or knowingly conceals any material fact in a report required pursuant to Subsections A and B of this section is guilty of a fourth degree felony.



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F. Notwithstanding any other provision of law, a violation of this section constitutes a separate, punishable offense for each transaction or exemption.

G. Any report, record, information, analysis or request obtained by the department of public safety or other agency pursuant to the provisions of this section is not a public record as defined in Section 14-3-2 NMSA 1978 and is not subject to disclosure pursuant to the provisions of Section 14-2-1 NMSA 1978.

H. A financial institution or person required to file a report pursuant to the provisions of Subsection A or B of this section shall, at the request of the department of public safety, provide the department with access to a copy of the report during the period of time that the financial institution or person is required to maintain the report.

**History: Laws 1998, ch. 113, § 3.**

**Effective dates.** — Laws 1998, ch. 113, § 8, makes the Money Laundering Act effective on July 1, 1998.

**Compiler's notes.** — The federal Currency and Foreign Transactions Reporting Act, referred in Subsection A, was repealed in the general revision of Title 31 USC. Similar provisions now appear as 31 USC § 5311 et seq.

## 30-51-4. Prohibited activity; criminal penalties; civil penalties.

A. It is unlawful for a person who knows that the property involved in a financial transaction is, or was represented to be, the proceeds of a specified unlawful activity to:

(1) conduct, structure, engage in or participate in a financial transaction that involves the property, knowing that the financial transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the property or to avoid a transaction reporting requirement under state or federal law;

(2) conduct, structure, engage in or participate in a financial transaction that involves the property for the purpose of committing or furthering the commission of any other specified unlawful activity;

(3) transport the property with the intent to further a specified unlawful activity, knowing that the transport is designed, in whole or in part, to conceal or disguise the nature, location, source, ownership or control of the monetary instrument or to avoid a transaction reporting requirement under state or federal law; or

(4) make the property available to another person by means of a financial transaction or by transporting the property, when he knows that the property is intended for use by the other person to commit or further the commission of a specified unlawful activity.

B. A person who violates any provision of Subsection A of this section is guilty of a:

(1) second degree felony if the illegal financial transaction involves more than one hundred thousand dollars ($100,000);

(2) third degree felony if the illegal financial transaction involves over fifty thousand dollars ($50,000) but not more than one hundred thousand dollars ($100,000);

(3) fourth degree felony if the illegal financial transaction involves over ten thousand dollars ($10,000) but not more than fifty thousand dollars ($50,000); or

(4) misdemeanor if the illegal financial transaction involves ten thousand dollars ($10,000) or less.

C. In addition to any criminal penalty, a person who violates any provision of Subsection A of this section is subject to a civil penalty of three times the value of the property involved in the transaction.

D. Nothing contained in the Money Laundering Act precludes civil or criminal remedies provided by the Racketeering Act [30-42-1 through 30-42-6 NMSA 1978] or the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978] or by any other New Mexico law. Those remedies are in addition to and not in lieu of remedies provided in the Money Laundering Act.

**History: Laws 1998, ch. 113, § 4.**

**Effective dates.** — Laws 1998, ch. 113, § 8, makes the Money Laundering Act effective on July 1, 1998.



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## 30-51-5. Attorney fees; exception.

No provision of the Money Laundering Act shall apply to a financial transaction involving the bona fide fees an attorney accepts for representing a client in a criminal investigation or a proceeding arising from a criminal investigation.

**History: Laws 1998, ch. 113, § 5.**

**Effective dates.** — Laws 1998, ch. 113, § 8, makes the Money Laundering Act effective on July 1, 1998.

# ARTICLE 52

# Human Trafficking

Sec.
30-52-1. Human trafficking.
30-52-1.1. Human trafficking; civil remedy for human trafficking victims.
30-52-1.2. Sealing of records of human trafficking victims.
30-52-2. Human trafficking; benefits and services for human trafficking victims.
30-52-2.1. Posting information about the national human trafficking resource center hotline.
30-52-3. Terminated.

## 30-52-1. Human trafficking.

A. Human trafficking consists of a person knowingly:

(1) recruiting, soliciting, enticing, transporting or obtaining by any means another person with the intent or knowledge that force, fraud or coercion will be used to subject the person to labor, services or commercial sexual activity;

(2) recruiting, soliciting, enticing, transporting or obtaining by any means a person under the age of eighteen years with the intent or knowledge that the person will be caused to engage in commercial sexual activity; or

(3) benefiting, financially or by receiving anything of value, from the labor, services or commercial sexual activity of another person with the knowledge that force, fraud or coercion was used to obtain the labor, services or commercial sexual activity.

B. The attorney general and the district attorney in the county of jurisdiction have concurrent jurisdiction to enforce the provisions of this section.

C. Whoever commits human trafficking is guilty of a third degree felony; except if the victim is under the age of:

(1) sixteen, the person is guilty of a second degree felony; or

(2) thirteen, the person is guilty of a first degree felony.

D. Prosecution pursuant to this section shall not prevent prosecution pursuant to any other provision of the law when the conduct also constitutes a violation of that other provision.

E. In a prosecution pursuant to this section, a human trafficking victim shall not be charged with accessory to the crime of human trafficking.

F. A person convicted of human trafficking shall, in addition to any other punishment, be ordered to make restitution to the victim for the gross income or value of the victim's labor or services and any other actual damages in accordance with Section 31-17-1 NMSA 1978.

G. As used in this section:

(1) "coercion" means:

(a) causing or threatening to cause harm to any person;

(b) using or threatening to use physical force against any person;

(c) abusing or threatening to abuse the law or legal process;

(d) threatening to report the immigration status of any person to governmental authorities; or

(e) knowingly destroying, concealing, removing, confiscating or retaining any actual or purported government document of any person; and



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(2) "commercial sexual activity" means any sexual act or sexually explicit exhibition for which anything of value is given, promised to or received by any person.

**History: Laws 2008, ch. 17, § 1.**

**Effective dates.** — Laws 2008, ch. 17, § 4 made this section effective July 1, 2008.

ANNOTATIONS

**Knowledge of victim's age is not an element of human trafficking.** — Where defendant was convicted of human trafficking, promoting prostitution, accepting earnings from a prostitute, contributing to the delinquency of a minor, and conspiracy, and where defendant argued that to convict him, a jury must find that he knew the victim was under the age of eighteen when the acts giving rise to the human trafficking conviction occurred, the state was not required to prove the defendant knew the victim's age as an element of the offense of human trafficking, because common usage and generally accepted principles of grammar, as well as the structure and language of the statute, indicate the legislature intended that a jury determine whether "recruiting, soliciting, enticing, transporting, or obtaining" was done knowingly rather than whether the defendant knew the age of the person being recruited, solicited, enticed, transported, or obtained. *State v. Jackson*, 2018-NMCA-066, cert. denied.

**Knowledge of the victim's age is not an element of the offense of human trafficking of a minor.** — Where defendant was convicted of human trafficking of a person under the age of eighteen years, and where the relevant jury instruction did not require the jury to find, as an element of the offense, that defendant knew the victim was under the age of eighteen years, there was no instructional error because "knowingly", in Subsection A of this section describes the action of recruiting, soliciting, enticing, transporting or obtaining, not the age requirement. The state was not required to prove that defendant knew the victim's age as an element of the offense. *State v. Carson*, 2020-NMCA-015, cert. denied.

**Sufficient evidence to support human trafficking conviction.** — Where defendant was convicted of human trafficking, promoting prostitution, accepting earnings from a prostitute, contributing to the delinquency of a minor, and conspiracy, defendant's conviction for human trafficking was supported by substantial evidence where the evidence presented at trial established that defendant created an advertisement for the victim on a website commonly used to advertise prostitution services, that defendant took the victim to a gas station and dropped her off there intending for her to exchange sex for money, and that the victim was seventeen years old at the time. *State v. Jackson*, 2018-NMCA-066, cert. denied.

**Sufficient evidence of conspiracy to commit human trafficking.** — Where defendant was convicted of human trafficking, promoting prostitution, accepting earnings from a prostitute, contributing to the delinquency of a minor, and conspiracy, defendant's conviction for conspiracy to commit human trafficking was supported by substantial evidence where the evidence presented at trial established that defendant instructed his co-conspirator to create an advertisement for the victim on a website commonly used to advertise prostitution services and that the co-conspirator agreed to do. *State v. Jackson*, 2018-NMCA-066, cert. denied.

## 30-52-1.1. Human trafficking; civil remedy for human trafficking victims.

A. A human trafficking victim may bring a civil action in any court of competent jurisdiction against an alleged human trafficker for actual damages, compensatory damages, punitive damages, injunctive relief or any other appropriate relief. Where the court finds that a defendant's actions were willful and malicious, the court may award treble damages to the plaintiff. A prevailing plaintiff is also entitled to recover reasonable attorney fees and costs.

B. A civil action pursuant to this section shall be forever barred unless the action is filed within ten years from the date on which:

(1) the defendant's human trafficking actions occurred; or

(2) the victim attains eighteen years of age if the victim was a minor when the defendant's actions occurred.

**History: Laws 2013, ch. 200, § 1.**

**Effective dates.** — Laws 2013, ch. 200, § 5 made Laws 2013, ch. 200, § 1 effective July 1, 2013.

## 30-52-1.2. Sealing of records of human trafficking victims.

A. On petition to the district court, a person who is a victim of human trafficking who has been charged with crimes arising out of the actions of someone charged with human trafficking may have all legal and law enforcement records of the charges and convictions in the person's case sealed. The court may issue an order sealing records and files if the court finds:

(1) the petitioner is a victim of human trafficking;

(2) the charge or conviction is for a non-homicide crime; and

(3) the petitioner's involvement in the offense was due to duress, coercion, use of force, threat to or fraud committed against the petitioner by a person who has committed human trafficking involving the petitioner.



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B. Reasonable notice of the petition shall be given to the district attorney or prosecutor who filed the original case and to the law enforcement agency that has custody of the law enforcement files and records for the case.

C. Upon the entry of the sealing order, the proceedings in the case shall be treated as if they never occurred and all index references shall be deleted. The court, law enforcement agencies and the petitioner shall respond to an inquiry that no record exists with respect to the petitioner for the referenced case. Copies of the sealed order shall be sent by the court to the district attorney or prosecutor who filed the original case, and each law enforcement agency shall be named in the order.

D. Inspection of files and records or release of information in the records included in the sealing order may be permitted by the court only upon subsequent order of the court on a showing of good cause after notice to all parties to the original petition.

**History: Laws 2013, ch. 200, § 2.** **Effective dates.** — Laws 2013, ch. 200, § 5 made Laws 2013, ch. 200, § 2 effective July 1, 2013.

## 30-52-2. Human trafficking; benefits and services for human trafficking victims.

A. Human trafficking victims found in the state shall be eligible for benefits and services from the state until the victim qualifies for benefits and services authorized by the federal Victims of Trafficking and Violence Protection Act of 2000; provided that the victim cooperates in the investigation or prosecution of the person charged with the crime of human trafficking. Benefits and services shall be provided to eligible human trafficking victims as quickly as can reasonably be arranged regardless of immigration status and shall include, when appropriate to a particular case:

(1) case management;

(2) emergency temporary housing;

(3) health care;

(4) mental health counseling;

(5) drug addiction screening and treatment;

(6) language interpretation, translation services and English language instruction;

(7) job training, job placement assistance and post-employment services for job retention;

(8) child care;

(9) advocacy services;

(10) state-funded cash assistance;

(11) food assistance;

(12) services to assist the victim and the victim's family members; and

(13) other general assistance services and benefits as determined by the children, youth and families department or the human services department.

B. A human trafficking victim advocate shall be provided immediately upon identification by law enforcement of a human trafficking victim.

C. Before providing benefits and services pursuant to Subsection A of this section, law enforcement shall certify to the human services department and the children, youth and families department that a person is:

(1) a victim of human trafficking; and

(2) cooperating in the investigation or prosecution of the person charged with the crime of human trafficking.

D. A victim's ability to cooperate shall be determined by the court, if that issue is raised by a human trafficking victim advocate. The victim is not required to cooperate if the court determines that the victim is unable to cooperate due to physical or psychological trauma. Benefits and services shall continue unless the court rejects the victim's claim regarding inability to cooperate. A victim who is younger than eighteen years of age is eligible for benefits and services without a finding by the court. Any court proceeding regarding the victim's ability to cooperate shall be held in camera. The human trafficking victim advocate shall be allowed to attend the proceeding. The record of any such proceeding shall be sealed.



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E. The attorney general shall coordinate plans developed by state and local law enforcement agencies to provide a human trafficking victim or the victim's family members protection from retaliatory action immediately upon identifying the presence in the state of a victim who offers state or local law enforcement agencies information regarding a perpetrator of human trafficking.

F. The prosecuting authority shall take all reasonable steps within its authority to provide a human trafficking victim with:

(1) all necessary documentation required pursuant to federal law for an adjustment of immigration status that applies to that victim; and

(2) assistance in accessing civil legal services providers who are able to petition for adjustment of immigration status on behalf of the victim.

G. As used in this section:

(1) "human trafficking victim" means a person subjected to human trafficking; and

(2) "human trafficking victim advocate" means a person provided by a state or nonprofit agency with experience in providing services for victims of crime.

**History: Laws 2008, ch. 17, § 2; 2013, ch. 200, § 3.**

**The 2013 amendment,** effective July 1, 2013, provided additional services and benefits for human trafficking victims; in Subsection A, in the second sentence of the introductory paragraph, after "trafficking victims", added "as quickly as can reasonably be arranged", after "immigration status and", deleted "may" and added "shall", and after "shall include", added "when appropriate to a particular case"; added Paragraphs (8) through (11) of Subsection A; in Paragraph (13) of Subsection A, after "families department" added "or the human services department"; added Subsections B through F; in Paragraph (1) of Subsection G, after "human trafficking", deleted "by a person charged in New Mexico with the crime of human trafficking"; and added Paragraph (2) of Subsection G.

## 30-52-2.1. Posting information about the national human trafficking resource center hotline.

A. An employer subject to the Minimum Wage Act [50-4-19 through 50-4-30 NMSA 1978], a person licensed pursuant to Sections 60-6A-2 through 60-6A-5 NMSA 1978, a health facility licensed pursuant to the Public Health Act [Chapter 24, Article 1 NMSA 1978] and a state or local government agency that manages a transportation facility, including a highway rest area, shall post a sign containing the following notice in English and in Spanish and in any other written language where ten percent or more of the workers or users of a covered facility speak that language:

"NOTICE ON HUMAN TRAFFICKING: OBTAINING FORCED LABOR OR SERVICES IS A CRIME UNDER NEW MEXICO AND FEDERAL LAW. IF YOU OR SOMEONE YOU KNOW IS A VICTIM OF THIS CRIME, CONTACT THE FOLLOWING: IN NEW MEXICO, CALL OR TEXT 505-GET-FREE (505-438-3733); OR CALL THE NATIONAL HUMAN TRAFFICKING RESOURCE CENTER HOTLINE TOLL-FREE AT 1-888-373-7888 FOR HELP. YOU MAY ALSO SEND THE TEXT "HELP" OR "INFO" TO BEFREE ("233733"). YOU MAY REMAIN ANONYMOUS, AND YOUR CALL OR TEXT IS CONFIDENTIAL.".

B. The sign shall be at least eight and one-half inches high and eleven inches wide. It shall be displayed in a conspicuous manner in the employer's business facility, in the licensees' licensed facilities or in the transportation facility clearly visible to the public and employees of the employer or licensees. The English language and Spanish language portions and any other written language portions of the sign shall be equal in size.

C. The director of the labor relations division of the workforce solutions department shall provide employers under the Minimum Wage Act with information about the notice required by this section and shall provide a version of the notice on its public access internet web site for employers to download or print.

D. The regulation and licensing department; the children, youth and families department; and the department of health shall each provide their respective licensees with information about the notice required by this section and shall provide a version of the notice on their respective public access internet web sites for licensees to download or print.

E. When necessary, a department shall update the relevant telephone and texting numbers provided in the version of the notice posted on its public access internet web site.



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**History: Laws 2014, ch. 75, § 1.**

**Effective dates.** — Laws 2014, ch. 75, § 2 made Laws 2014, ch. 75, § 1 effective July 1, 2014.

## 30-52-3. Terminated.

**Compiler's notes.** — Pursuant to Subsection F of Section 30-52-3 NMSA 1978, the task force to combat human trafficking, enacted by Laws 2008, ch. 17, § 3, was terminated on July 1, 2016. For provisions of former section, *see* the 2015 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 53

# Disruption of Communication and Utility Services

Sec.
30-53-1. Creation of a safety hazard or disruption of communications and utilities services by theft or intentional damage.

## 30-53-1. Creation of a safety hazard or disruption of communications and utilities services by theft or intentional damage.

A. Any person who by the theft of, or by intentionally damaging, communications or public utility equipment, whether customer - or utility-owned, creates a public safety hazard or causes a disruption of communications services or public utility services to ten or more households, customers or subscribers or causes monetary damage equal to or greater than one thousand dollars ($1,000) in value of equipment shall be guilty of a:

(1) misdemeanor for a first and second offense, punishable pursuant to Section 31-19-1 NMSA 1978; or

(2) fourth degree felony for third and subsequent offenses, punishable pursuant to Section 31-18-15 NMSA 1978.

B. As used in this section, "equipment" means utility system materials, including communications towers and associated material, telephone lines, railroad and other industrial safety communication devices or systems, electric towers, electric transformers, metering equipment, electric grounding wires and electric and natural gas transmission and distribution facilities.

**History: Laws 2014, ch. 30, § 1.**

**Effective dates.** — Laws 2014, ch. 30 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 21, 2014, 90 days after the adjournment of the legislature.



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# CHAPTER 31

# Criminal Procedure

Art.


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# ARTICLE 1

## Issuance of Process and Warrants

Sec.


31-1-1. Short title.
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## 31-1-1. Short title.

Sections 31-1-1 through 31-3-9 NMSA 1978 may be referred to as the "Criminal Procedure Act".

**History: 1953 Comp., § 41-1-1, enacted by Laws 1972, ch. 71, § 4; 1973, ch. 73, § 1.**

**Repeals and reenactments.** — Laws 1972, ch. 71, § 4, repealed 41-1-1, 1953 Comp., relating to complaints, examination of complainants and witnesses, warrants and enacted a new 31-1-1 NMSA 1978.

ANNOTATIONS

**Law reviews.** — For article, "Survey of New Mexico Law, 1982-83: Criminal Procedure," see 14 N.M.L. Rev. 109 (1984).

For comment, "Survey of New Mexico Law: Criminal Procedure," see 15 N.M.L. Rev. 263 (1985).

## 31-1-2. Definitions.

Unless a specific meaning is given, as used in the Criminal Procedure Act:

A. "accused" means any person charged with the violation of any law of this state imposing a criminal penalty;

B. "bail bond" is a contract between surety and the state to the effect that the accused and the surety will appear in court when required and will comply with all conditions of the bond;

C. "defendant" means any person accused of a violation of any law of this state imposing a criminal penalty;

D. "felony" means any crime so designated by law or if upon conviction thereof a sentence of death or of imprisonment for a term of one year or more is authorized;

E. "person", unless a contrary intention appears, means any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, joint venture, syndicate or other entity;

F. "police officer", "law enforcement officer", "peace officer" or "officer" means any full-time salaried or certified part-time salaried officer who by virtue of office or public employment is vested by law with the duty to maintain the public peace;

G. "recognizance" means any obligation of record entered into before a court requiring the accused to appear at all appropriate times or forfeit any bail and be subject to criminal penalty for failure to appear;

H. "release on personal recognizance" or "release on own recognizance" means the release of a defendant without bail, bail bond or sureties upon the defendant's promise to appear at all appropriate times;

I. "rules of civil procedure" means rules of civil procedure for the district courts of the state of New Mexico, as may be amended from time to time;

J. "rules of criminal procedure" means rules of criminal procedure for the district courts, magistrate courts and municipal courts adopted by the New Mexico supreme court, as may be amended from time to time;

K. "misdemeanor" means any offense for which the authorized penalty upon conviction is imprisonment in excess of six months but less than one year; and

L. "petty misdemeanor" means any offense so designated by law or if upon conviction a sentence of imprisonment for six months or less is authorized.

**History: 1953 Comp., § 41-1-2, enacted by Laws 1972, ch. 71, § 5; 1973, ch. 73, § 2; 1979, ch. 123, § 1; 2009, ch. 249, § 1.**

**Repeals and reenactments.** — Laws 1972, ch. 71, § 5, repealed 41-1-2, 1953 Comp., relating to warrants and affidavits of information and belief, and enacted a new 31-1-2 NMSA 1978.

**The 2009 amendment,** effective June 19, 2009, in Subsection F, after "full-time salaried", added "or certified part-time salaried".

ANNOTATIONS

**No "accused" prior to commencement of criminal proceedings.** — Where no complaint, information or indictment has been filed which names the accused, and no criminal prosecution has been commenced, the defendant is not an "accused" nor a "defendant." *Sanchez v. Attorney Gen.*, 1979-NMCA-081, 93 N.M. 210, 598 P.2d 1170.

**Petty misdemeanor does not include violations of city ordinances** in this penalty range, since such a violation is not a misdemeanor. 1973 Op. Att'y Gen. No. 73-46.



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## 31-1-3. Method of prosecution.

A criminal prosecution shall be commenced, conducted and terminated in accordance with Rules of Criminal Procedure. All pleadings, practice and procedure shall be governed by such rules.

**History: 1953 Comp., § 41-1-3, enacted by Laws 1972, ch. 71, § 6.**

**Repeals and reenactments.** — Laws 1972, ch. 71, § 6, repealed 41-1-3, 1953 Comp., relating to unlawful arrests and enacted a new section.

**Cross references.** — For Rules of Criminal Procedure, *see* Rules 5-101 NMRA et seq.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information, 44 A.L.R.4th 401.

**No obligation for sheriff or warden to schedule arraignment.** — Where detainees filed a federal civil rights action against county officials, including the county sheriff and the county jail warden, alleging that the detainees' arraignment delays in county jail violated their due process rights, and where the district court granted defendants' motion to dismiss for failure to state a valid claim, the district court did not err in granting defendants' motion because compliance with the requirement to arraign detainees within fifteen days lay solely with the court, because an arraignment is a court proceeding that takes place only when scheduled by the court. Rule 5-303 NMRA does not impose any duties on the sheriff or warden to bring an arrestee to court in the absence of a scheduled arraignment. *Moya v. Garcia*, 895 F.3d 1229 (10th Cir. 2018).

## 31-1-4. Criminal actions; docketing action; service; return.

A. Upon filing of the complaint of a law enforcement officer, the court shall docket the action. Upon the filing of the complaint of any other person, the court shall collect the docket fee from the person before docketing the action.

B. Upon the docketing of any criminal action, the court may issue a summons directing the defendant to appear before the court at a time stated in the summons.

C. When a warrant is issued in a criminal action, it shall be directed to a law enforcement officer, and the defendant named in the warrant shall, upon arrest, be brought by the officer before the court without unnecessary delay.

D. It shall be the duty of the clerk of the district court to issue process in criminal cases filed in the district court. It shall be the duty of the clerk of the magistrate court or the magistrate, if there is no clerk, to issue process in criminal cases filed in the magistrate court. It shall be the duty of the law enforcement officer to whom process is directed to execute process and return the same to the clerk of the court from which process is issued or, if there is no clerk of the court, to the judge thereof.

E. Except for criminal actions filed in municipal court, all police officers authorized to serve process issued in any criminal action have jurisdiction to serve such process in any county of this state.

**History: 1953 Comp., § 41-1-4, enacted by Laws 1972, ch. 71, § 7; 1975, ch. 242, § 11.**

**Repeals and reenactments.** — Laws 1972, ch. 71, § 7, repealed 41-1-4, 1953 Comp., relating to officers empowered to issue warrants, and enacted a new 31-1-4 NMSA 1978.

**Cross references.** — For method of arrest for gambling, *see* 30-19-12 NMSA 1978.

For arrest under forest-fire laws, *see* 30-32-3 NMSA 1978.

For arrests for traffic offenses, *see* 66-8-122 NMSA 1978 et seq.

For issuance of summons or warrant, *see* Rule 5-208 NMRA.

ANNOTATIONS

**Compiler's notes.** — Some of the following annotations are from cases and opinions which were decided under former law.

**Constitutional provision and statute in pari materia.** — Constitutional provisions relative to arrests, searches and seizures (art. II, § 10) and former statute were to be considered in pari materia, their general purpose being preservation of personal security and liberty of individual, by forbidding issuance of a warrant except upon probable cause shown under oath, and by preventing as far as possible the institution of baseless and unfounded prosecution. *State v. Trujillo*, 1928-NMSC-016, 33 N.M. 370, 266 P. 922.

**Complaint subscribed by sheriff was insufficient to invoke jurisdiction** of district court where crimes charged therein, burglary and grand larceny, purported in each case to be a felony. *State v. Chacon*, 1957-NMSC-030, 62 N.M. 291, 309 P.2d 230.

**Validity of complaint insignificant.** — Where appellant was arrested by drugstore owner who apprehended appellant outside his store in early morning, then appellant was properly arrested without warrant on probable cause, and appellant was properly before the justice of the peace (now magistrate court) regardless of validity of final complaint of the store owner. *State v. Hudson*, 1967-NMSC-164, 78 N.M. 228, 430 P.2d 386.

**Purpose of warrant** is to acquire jurisdiction over the person of the accused - to bring him before the court. *State v. Barreras*, 1958-NMSC-085, 64 N.M. 300, 328 P.2d 74.



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**Section read with common-law rule.** — This section (former 41-3-1, 1953 Comp.) was to be read in connection with the common-law rule that an officer may arrest, without a warrant, a person whom he has probable cause to believe guilty of a felony. *State v. Barreras*, 1958-NMSC-085, 64 N.M. 300, 328 P.2d 74.

**Definition of warrant.** — A warrant is a writ or precept issued by a magistrate, justice or other competent authority, addressed to a sheriff, constable or other officer, requiring him to arrest the body of a person therein named, and bring him before the magistrate court, to answer, or be examined, touching some offense which he is charged with having committed. *State v. Barreras*, 1958-NMSC-085, 64 N.M. 300, 328 P.2d 74.

**Warrant valid.** — A warrant based upon a detective's information and belief affidavit and approved in writing by the assistant district attorney was valid. *State v. Slicker*, 1968-NMCA-085, 79 N.M. 677, 448 P.2d 478.

**When no warrant required.** — Under former 41-3-8, 1953 Comp., the issuance of a warrant was not necessary to confer jurisdiction over the person of an accused who had already been arrested with probable cause and who was under confinement. *State v. Barreras*, 1958-NMSC-085, 64 N.M. 300, 328 P.2d 74.

**Arrest of both defendant and party named in warrant upheld.** — Arrest was proper where defendant was in company of party for whom arresting officer had warrant and officer had been advised that party for whom he had warrant was accompanied by man answering defendant's description when alleged acts were committed. *State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 432 P.2d 258.

**"Process" defined.** — The term "process," as used in Subsections D and E, is meant to be generic, including, summons, writs, warrants, and orders. *State v. Gutierrez*, 1985-NMCA-034, 102 N.M. 726, 699 P.2d 1078, cert. denied, 102 N.M. 734, 700 P.2d 197.

**Warrants in criminal cases may issue on Sunday.** — Setting and accepting appearance bonds are ministerial acts that may be performed on Sunday in felony cases as well as misdemeanor cases. 1961-62 Op. Att'y Gen. 61-56.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 5 Am. Jur. 2d Arrest § 10 et seq.; 21 Am. Jur. 2d Criminal Law §§ 408, 409.

Constitutionality of statute or ordinance authorizing arrest, 1 A.L.R. 585.

Advice or order from superior officers as defense to a police officer for making an unlawful arrest, 3 A.L.R. 647.

Liability for loss of property left unprotected when owner was wrongfully arrested, 5 A.L.R. 362.

Effect of defects or informalities as to appearance or return day in summons or notice of commencement of action, 6 A.L.R. 841, 97 A.L.R. 746.

Time at which an arrest is made as affecting its legality or liability for making it, 9 A.L.R. 1350.

Who may take affidavit as basis for warrant of arrest, 16 A.L.R. 923.

Necessity of showing warrant upon making arrest under warrant, 40 A.L.R. 62.

Liability for false imprisonment, of officer executing warrant for arrest as affected by its being returnable to wrong court, 40 A.L.R. 290.

Power of private person to whom warrant of arrest is directed to deputize another to make the arrest or to delegate his power in that respect, 47 A.L.R. 1089.

Territorial extent of power to arrest under a warrant, 61 A.L.R. 377.

Unlawfulness of arrest as affecting jurisdiction or power of court to proceed in criminal case, 96 A.L.R. 982.

Civil liability of officer making arrest under warrant as affected by his failure to exhibit warrant, or to state fact of, or substance of, warrant, 100 A.L.R. 188.

Prohibition as remedy in case of defective indictment, information or complaint, 102 A.L.R. 298.

Error in naming the offense covered by allegations of specific facts in complaint, indictment or information, 121 A.L.R. 1088.

Summons as amendable to cure error or omission in naming or describing court or judge, or place of court's convening, 154 A.L.R. 1019.

Immunity of nonresident defendant in criminal case from service of process, 20 A.L.R.2d 163.

Omission of signature of issuing officer on civil process or summons as affecting jurisdiction of the person, 37 A.L.R.2d 928.

Private citizen's right to institute mandamus to compel a magistrate or other appropriate official to issue a warrant, or the like, for an arrest, 49 A.L.R.2d 1285.

Privilege of party, witness or attorney, while going to, attending or returning from court as extending to privilege from arrest for crime, 74 A.L.R.2d 592.

Delay between filing of complaint or other charge and arrest of accused as violation of right to speedy trial, 85 A.L.R.2d 980.

Mistake or error in middle initial or middle name of party as vitiating or invalidating civil process, summons, or the like, 6 A.L.R.3d 1179.

Criminal liability for obstructing process as affected by invalidity or irregularity of the process, 10 A.L.R.3d 1146.

Civil liability of one making false or fraudulent return of process, 31 A.L.R.3d 1393.

Modern status of rules as to right to forcefully resist illegal arrest, 44 A.L.R.3d 1078.

Right to resist excessive force used in accomplishing lawful arrest, 77 A.L.R.3d 281.

Individual's right to present complaint or evidence of criminal offense to grand jury, 24 A.L.R.4th 316.

Liability for false arrest or imprisonment under warrant as affected by mistake as to identity of person arrested, 39 A.L.R.4th 705.

Validity of arrest made in reliance upon uncorrected or outdated warrant list or similar police records, 45 A.L.R.4th 550.

Media's dissemination of material in violation of injunction or restraining order as contempt - federal cases, 91 A.L.R. Fed. 270.

6A C.J.S. Arrest §§ 43 to 60; 22 C.J.S. Criminal Law §§ 324 to 338.

## 31-1-5. Procedures on arrest; reports.

A. Following arrest, any person accused of a crime is entitled to have reasonable opportunity to make three telephone calls beginning not later than twenty minutes after the time of arrival at a police station, sheriff's office or other place of detention. Nothing in this subsection limits any right to make telephone calls at any time later than twenty minutes after the time of arrival at the police station.



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B. Every accused shall be brought before a court having jurisdiction to release the accused without unnecessary delay.

C. Within eighteen hours after the arrest of any person accused with having committed a misdemeanor or a felony, the arresting law enforcement agency shall notify the district attorney of:

(1) the name of the accused; and

(2) the offense charged.

**History: 1953 Comp., § 41-1-5, enacted by Laws 1973, ch. 73, § 3.**

**Repeals.** — Laws 1972, ch. 71, § 18, repealed former 41-1-5, 1953 Comp., relating to issuance of warrants for fugitives.

**ANNOTATIONS**

**Jury instruction on right to make telephone calls.** — Where defendant claimed that defendant had not been informed that defendant could make three telephone calls after arrest, the trial court did not abuse its discretion when the court refused defendant's request to instruct the jury on the requirements of Section 31-1-5 NMSA 1978, because the statute neither provides a defendant with a right to make three calls nor addresses an officer's duty to inform a defendant of the defendant's entitlement to make the calls. *State v. Coleman*, 2011-NMCA-087, 150 N.M. 622, 264 P.3d 523, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

**Effect of denial to accused to make calls.** — Absent prejudice, no basis for release is established by denial of use of a telephone after arrest. *State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 432 P.2d 258.

**Burden of proof.** — Once a defendant proves that he has been denied access to a telephone for an extended period of time, the state bears the burden of proving a reasonable basis for the denial. *State v. Bearly*, 1991-NMCA-022, 112 N.M. 50, 811 P.2d 83.

## 31-1-6. Citation in lieu of arrest without a warrant.

A. A law enforcement officer who arrests a person without a warrant for a petty misdemeanor or any offense under Chapter 17 NMSA 1978 may offer the person arrested the option of accepting a citation to appear in lieu of taking the person to jail.

B. A citation issued pursuant to this section shall contain the name and address of the cited person, the offense charged and the time and place to appear. The citation may be a paper citation or an electronic version of a paper citation. Unless the person requests an earlier date, the time specified in the citation shall be at least three days after issuance of the citation. The law enforcement officer shall explain the person's rights not to sign a citation, the effect of not signing the citation, the effect of signing the citation and the effect of failing to appear at the time and place stated on the citation.

C. The person's signature on the citation constitutes a promise to appear at the time and place stated in the citation. One copy of the citation to appear shall be delivered to the person cited, and the law enforcement officer shall keep a duplicate copy for filing with the court as soon as practicable.

D. A law enforcement officer who prepares a citation pursuant to this section may use a paper citation form or an electronic citation form to record the information required by this section. Regardless of the form of citation used, a physical copy of the citation shall be delivered to the person cited as required by this section. An electronic citation may be signed electronically and the law enforcement officer's copy of a citation may be filed with the court electronically.

E. A citation issued pursuant to this section is a valid complaint if the person receives and signs the citation in paper or electronic form.

F. It is a petty misdemeanor for a person signing a citation not to appear at the time and place stated in the citation regardless of the disposition of the offense for which the citation was issued. A written promise to appear may be complied with by appearance of counsel.

**History: 1953 Comp., § 41-1-6, enacted by Laws 1973, ch. 73, § 4; 1987, ch. 114, § 1; 2013, ch. 197, § 1.**

**Repeals.** — Laws 1972, ch. 71, § 18, repealed former 41-1-6, 1953 Comp., relating to process issued to the sheriff.

**The 2013 amendment,** effective July 1, 2013, provided for the use of electronic citations; in Subsection B, added the second sentence; added Subsection D; and in Subsection E, after "if the person", deleted "receiving it appears in court" and added the remainder of the sentence.

**Temporary provisions.** — Laws 2013, ch. 197, § 5 provided that the department of public safety and the motor vehicle division of the taxation and revenue department shall develop procedures to carry out the provisions of Laws 2013, ch. 197, §§ 1 to 4.

**The 1987 amendment,** effective June 19, 1987, in Subsection A, inserted "or any offense under Chapter 17 NMSA 1978" following "without a warrant a petty misdemeanor".



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ANNOTATIONS

**No right to counsel upon issuance of citation.** — A person issued a citation and placed under custodial arrest for driving while under the influence of intoxicating liquor does not have a constitutional right to counsel immediately following a breath alcohol test since it did not amount to initiation of judicial criminal proceedings or prosecutorial commitment, nor was the period following administration of the test a critical stage. *State v. Sandoval*, 1984-NMCA-053, 101 N.M. 399, 683 P.2d 516.

**Legislative intent.** — This statute is not mandatory, but the apparent legislative intent is that citations should be issued in most petty misdemeanor cases. 1973 Op. Att'y Gen. No. 73-46.

**Law reviews.** — For annual survey of New Mexico criminal procedure, see 16 N.M.L. Rev. 25 (1986).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 5 Am. Jur. 2d Arrest § 37 et seq.

22 C.J.S. Criminal Law § 334.

## 31-1-7. Arrest without warrant; liability.

A. Notwithstanding the provisions of any other law to the contrary, a peace officer may arrest a person and take that person into custody without a warrant when the officer is at the scene of a domestic disturbance and has probable cause to believe that the person has committed an assault or a battery upon a household member. As used in this section, "household member" means a spouse, former spouse, family member, including a relative, parent, present or former step-parent, present or former in-law, child or co-parent of a child, or a person with whom the victim has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member for purposes of this section.

B. No peace officer shall be held criminally or civilly liable for making an arrest pursuant to this section, provided he acts in good faith and without malice.

C. Whether or not an arrest is made pursuant to this section, a peace officer may remain with the victim and assist the victim in getting to a shelter or receiving proper medical attention.

**History: Laws 1979, ch. 178, § 1; 1995, ch. 23, § 2.**

**Cross references.** — For Tort Claims Act, *see* 41-4-1 NMSA 1978 et seq.

**The 1995 amendment,** effective June 16, 1995, in Subsection A, deleted "family or" preceding "household member" at the end of the first sentence, rewrote the second sentence which read "As used in this section, 'family or household members' means spouses, former spouses or persons residing with each other", and added the third sentence.

ANNOTATIONS

**Meaning of the phrase "at the scene".** — The phrase "at the scene" as used in Section 31-1-7(A) NMSA 1978 must be read broadly to enable a police officer to make a warrantless arrest within a reasonable time and distance from when and where a domestic disturbance occurred. *State v. Almanzar*, 2014-NMSC-001, *rev'g* 2012-NMCA-111, 288 P.3d 238.

Where defendant and the victim began quarreling in a parking lot; defendant kicked the victim; and the police arrested defendant for domestic violence at a store across the street from the parking lot within minutes after the victim called 911, defendant's warrantless arrest was lawful under Section 31-1-7(A) NMSA 1978 because the arrest was make in close proximity to when and where the incident occurred. *State v. Almanzar*, 2014-NMSC-001, *rev'g* 2012-NMCA-111, 288 P.3d 238.

**Warrantless arrest is authorized only at the scene of a domestic disturbance.** — An officer may not arrest a suspect for domestic battery under Subsection A of Section 31-1-7 NMSA 1978 without a warrant unless the officer is conducting the arrest at the scene where the domestic disturbance occurred. *State v. Almanzar*, 2012-NMCA-111, 228 P.3d 238, *rev'd*, 2014-NMSC-001.

Where police officers responded to a domestic violence incident that had occurred in a parking lot between defendant and defendant's live-in friend; after the incident, defendant and defendant's friend had both left the parking lot and had gone to two separate locations away from the parking lot; the officers found defendant at a convenience store that was near the parking lot; and the officers conducted a pat-down search of defendant and discovered cocaine in defendant's pants pocket, the district court erred in holding that the evidence would have been inevitably discovered during a search incident to a legal arrest for misdemeanor domestic battery because an arrest could only have been effectuated at the parking lot where the domestic battery had occurred. *State v. Almanzar*, 2012-NMCA-111, 228 P.3d 238, *rev'd*, 2014-NMSC-001.

**Law reviews.** — For article, "Survey of New Mexico Law, 1979-80: Domestic Relations and Juvenile Law," see 11 N.M.L. Rev. 134 (1981).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, in state criminal trial, of arrest without warrant by identified peace officer outside of jurisdiction, when not in fresh pursuit, 34 A.L.R.4th 328.

Validity of arrest made in reliance upon uncorrected or outdated warrant list or similar police records, 45 A.L.R.4th 550.

Burden of proof in civil action for using unreasonable force in making arrest as to reasonableness of force used, 82 A.L.R.4th 598.

## 31-1-8. Identification of minor or dependent children upon arrest; required inquiry; guidelines.

A. A state or local law enforcement officer who arrests a person shall, at the time of the arrest, inquire whether the person is a parent or guardian of minor or dependent children who may be at



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risk as a result of the arrest. The officer shall make reasonable efforts to ensure the safety of minor or dependent children at risk as a result of an arrest in accordance with guidelines established by the department of public safety.

B. The department of public safety, in consultation with the children, youth and families department, shall establish guidelines and a training program for law enforcement officers for ensuring child safety upon the arrest of a parent or guardian. The guidelines and training program shall include:

(1) procedures to ensure that law enforcement officers inquire whether arrestees have minor or dependent children who may be present or at another location at the time of the arrest;

(2) procedures for the proper arrangement of temporary care for children to ensure their safety and well-being; and

(3) education on how the effects of witnessing a violent crime or other event causes emotional harm to children and how law enforcement can assist in mitigating the long-term effects of the trauma.

**History: Laws 2007, ch. 89, § 2.**

**Effective dates.** — Laws 2007, ch. 89, contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

# ARTICLE 1A

# DNA Evidence

Sec.
31-1A-1. Repealed.
31-1A-2. Procedures for post-conviction consideration of DNA evidence; requirements.

## 31-1A-1. Repealed.

**Repeals.** — Laws 2003 ch. 27, § 2 repealed 31-1A-1 NMSA 1978, as enacted by Laws 2001, ch. 29, § 1, relating to procedures for consideration of DNA evidence, effective July 1, 2003. For provisions of former section, *see* the 2002 NMSA 1978 on *NMOneSource.com*. For post-conviction consideration of DNA evidence, *see* 31-1A-2 NMSA 1978.

## 31-1A-2. Procedures for post-conviction consideration of DNA evidence; requirements.

A. A person convicted of a felony, who claims that DNA evidence will establish the person's innocence, may petition the district court of the judicial district in which the person was convicted to order the disclosure, preservation, production and testing of evidence that can be subjected to DNA testing. A copy of the petition shall be served on the district attorney for the judicial district in which the district court is located. A petitioner shall be granted full, fair and prompt proceedings upon filing a petition.

B. As a condition to the district court's acceptance of the person's petition, the petitioner shall:

(1) submit to DNA testing ordered by the district court; and

(2) authorize the district attorney's use of the DNA test results to investigate all aspects of the case that the petitioner is seeking to reopen.

C. DNA samples obtained pursuant to Subsection B of this section shall be submitted for DNA testing according to the procedures in the DNA Identification Act, and the DNA record shall be entered into the federal bureau of investigation's national DNA index system for storage and exchange of DNA records submitted by forensic DNA laboratories.

D. The petitioner shall show, by a preponderance of the evidence, that:

(1) the petitioner was convicted of a felony;

(2) evidence exists that can be subjected to DNA testing;

(3) the evidence to be subjected to DNA testing:



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(a) has not previously been subjected to DNA testing;

(b) has not previously been subjected to the type of DNA testing that is now being requested; or

(c) was previously subjected to DNA testing, but was tested incorrectly or interpreted incorrectly;

(4) the DNA testing the petitioner is requesting will be likely to produce admissible evidence; and

(5) identity was an issue in the petitioner's case or that if the DNA testing the petitioner is requesting had been performed prior to the petitioner's conviction and the results had been exculpatory, there is a reasonable probability that the petitioner would not have pled guilty or been found guilty.

E. If the petitioner satisfies the requirements set forth in Subsection D of this section, the district court shall appoint counsel for the petitioner, unless the petitioner waives counsel or retains the petitioner's own counsel.

F. After reviewing a petition, the district court may dismiss the petition, order a response by the district attorney or issue an order for DNA testing.

G. The district court shall order all evidence secured that is related to the petitioner's case and that could be subjected to DNA testing. The evidence shall be preserved during the pendency of the proceeding. The district court may impose appropriate sanctions, including dismissal of the petitioner's conviction or criminal contempt, if the court determines that evidence was intentionally destroyed after issuance of the court's order to secure evidence.

H. The district court shall order DNA testing if the petitioner satisfies the requirements set forth in Subsections B and D of this section.

I. If the results of the DNA testing are exculpatory, the district court may set aside the petitioner's judgment and sentence, may dismiss the charges against the petitioner with prejudice, may grant the petitioner a new trial or may order other appropriate relief.

J. The cost of DNA testing ordered pursuant to this section shall be borne by the state or the petitioner, as the district court may order in the interest of justice. Provided, that a petitioner shall not be denied DNA testing because of the petitioner's inability to pay for the cost of DNA testing. Testing under this provision shall only be performed by a laboratory that meets the minimum standards of the national DNA index system.

K. The provisions of this section shall not be interpreted to limit:

(1) other circumstances under which a person may obtain DNA testing; or

(2) post-conviction relief a petitioner may seek pursuant to other provisions of law.

L. The petitioner shall have the right to appeal a district court's denial of the requested DNA testing, a district court's final order on a petition or a district court's decision regarding relief for the petitioner. The state shall have the right to appeal any final order issued by the district court. An appeal shall be filed by a party within thirty days to the court of appeals.

M. The state shall preserve all evidence that is secured in relation to an investigation or prosecution of a crime and that could be subjected to DNA testing, for not less than the period of time that a person remains subject to incarceration or on probation or parole in connection with the investigation or prosecution.

N. The state may dispose of evidence before the expiration of the time period set forth in Subsection M of this section if:

(1) no other law, regulation or court order requires that the evidence be preserved;

(2) the evidence must be returned to its rightful owner;

(3) preservation of the evidence is impractical due to the size, bulk or physical characteristics of the evidence; and

(4) the state takes reasonable measures to remove and preserve portions of the evidence sufficient to permit future DNA testing.

O. In proceedings under this section, the Rules of Evidence and the Rules of Civil Procedure for the District Courts shall apply.

P. As used in this section, "DNA" means deoxyribonucleic acid.



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**History: Laws 2003, ch. 27, § 1; 2019, ch. 211, § 4.**

**Compiler's notes.** — Laws 2005, ch. 28, § 1 repealed Laws 2003, ch. 27, § 3, which would have repealed this section, effective July 1, 2006.

**The 2019 amendment,** effective July 1, 2019, revised the procedures for post-conviction consideration of DNA evidence by mandating a petitioner has prompt proceedings, that DNA samples shall be tested according to the DNA Identification Act and that the results of the testing shall be entered in the FBI national DNA index system, and mandated that the Rules of Evidence and Rules of Civil Procedures for the district courts shall apply to proceedings; in Subsection A, after "court is located.", added "A petitioner shall be granted full, fair and prompt proceedings upon filing a petition."; added new Subsection C and redesignated former Subsections C through M as Subsections D through N, respectively; in Subsection M, after "incarceration or", deleted "supervision" and added "on probation or parole"; added new Subsection O and redesignated former Subsection N as Subsection P.

ANNOTATIONS

**Standard for granting relief.** — DNA evidence is exculpatory, that is it reasonably tends to negate the petitioner's guilt, when it is material to the petitioner's innocence, is not merely cumulative, is not merely impeaching or contradictory, and raises a reasonable probability that the petitioner would not have pled guilty or been found guilty had the DNA testing been performed prior to the conviction. *State v. Hobbs,* 2020-NMCA-044, cert. granted.

# ARTICLE 2

# Fresh Pursuit

Sec.
31-2-1. Officer of another state entering this state in fresh pursuit; power to arrest and hold fugitive.
31-2-2. Arrested person taken before magistrate; hearing; commitment or discharge.
31-2-3. Construction of act; power to arrest not limited.
31-2-4. "State" includes District of Columbia.
31-2-5. "Fresh pursuit" defined.
31-2-6. Certified copies of law to be distributed.
31-2-7. Citation of act.
31-2-8. Authority to arrest misdemeanant; fresh pursuit.

## 31-2-1. [Officer of another state entering this state in fresh pursuit; power to arrest and hold fugitive.]

Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state.

**History: Laws 1937, ch. 12, § 1; 1941 Comp., § 42-201; 1953 Comp., § 41-2-1.**

**Compiler's notes.** — A few states have adopted a Uniform Law on Close Pursuit. Others have adopted a Uniform Law on Fresh Pursuit. However, the Commissioners on Uniform State Laws have not as yet promulgated or approved uniform laws on the subject.

ANNOTATIONS

**Section grants same right to New Mexico officer.** — An officer of the New Mexico state police, while in hot pursuit of a person who has committed a felony in New Mexico, may enter the state of Colorado, arrest such a person there and return him to New Mexico without obtaining extradition. 1959-60 Op. Att'y Gen. No. 60-66.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 5 Am. Jur. 2d Arrest § 72.

Validity, in state criminal trial, of arrest without warrant by identified peace officer outside of jurisdiction, when not in fresh pursuit, 34 A.L.R.4th 328.

6A C.J.S. Arrest § 18.

## 31-2-2. [Arrested person taken before magistrate; hearing; commitment or discharge.]

If an arrest is made in this state by an officer of another state in accordance with the provisions of Section 1 [31-2-1 NMSA 1978] of this act he shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful he shall commit the person arrested to await for a reasonable time the



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issuance of an extradition warrant by the governor of this state. If the magistrate determines that the arrest was unlawful he shall discharge the person arrested.

**History: Laws 1937, ch. 12, § 2; 1941 Comp., § 42-202; 1953 Comp., § 41-2-2.**

**Cross references.** — For extradition, *see* 31-4-1 NMSA 1978 et seq.

## 31-2-3. [Construction of act; power to arrest not limited.]

Section 1 [31-2-1 NMSA 1978] of this act shall not be construed so as to make unlawful any arrest in this state which would otherwise be lawful.

**History: Laws 1937, ch. 12, § 3; 1941 Comp., § 42-203; 1953 Comp., § 41-2-3.**

## 31-2-4. ["State" includes District of Columbia.]

For the purpose of this act [31-2-1 to 31-2-7 NMSA 1978] the word "state" shall include the District of Columbia.

**History: Laws 1937, ch. 12, § 4; 1941 Comp., § 42-204; 1953 Comp., § 41-2-4.**

## 31-2-5. ["Fresh pursuit" defined.]

The term "fresh pursuit" as used in this act [31-2-1 to 31-2-7 NMSA 1978] shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

**History: Laws 1937, ch. 12, § 5; 1941 Comp., § 42-205; 1953 Comp., § 41-2-5.**

## 31-2-6. [Certified copies of law to be distributed.]

Upon the passage and approval by the governor of this act [31-2-1 to 31-2-7 NMSA 1978] it shall be the duty of the secretary of state (or other officer) to certify a copy of this act to the executive department of each of the states of the United States.

**History: Laws 1937, ch. 12, § 6; 1941 Comp., § 42-206; 1953 Comp., § 41-2-6.**

## 31-2-7. [Citation of act.]

This act [31-2-1 to 31-2-7 NMSA 1978] may be cited as the Uniform Act on Fresh Pursuit.

**History: Laws 1937, ch. 12, § 8; 1941 Comp., § 42-207; 1953 Comp., § 41-2-7.**

**Compiler's notes.** — A few states have adopted a Uniform Law on Close Pursuit. Others have adopted a Uniform Law on Fresh Pursuit. However, the Commissioners on Uniform State Laws have not as yet promulgated or approved uniform laws on the subject.



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## 31-2-8. Authority to arrest misdemeanant; fresh pursuit.

A. Any county sheriff or municipal police officer who leaves his jurisdictional boundary while in fresh pursuit of a misdemeanant whom he would otherwise have authority to arrest shall have the authority to arrest that misdemeanant anywhere within this state and return him to the jurisdiction in which the fresh pursuit began without further judicial process.

B. For purposes of this section, "fresh pursuit of a misdemeanant" means the pursuit of a person who has committed a misdemeanor in the presence of the pursuing officer. Fresh pursuit shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

**History: Laws 1981, ch. 102, § 1.**

ANNOTATIONS

**The authority to arrest is not limited to custodial arrest,** but includes an investigative detention to issue a citation for a traffic violation. *State v. Marquez*, 2008-NMSC-055, 145 N.M. 1, 193 P.3d 548, *rev'g* 2007-NMCA-151, 143 N.M. 79, 173 P.3d 1.

**Arrestable misdemeanor.** — A municipal police officer is authorized to pursue a suspect outside the officer's territorial jurisdiction only if the officer has reason to believe that he or she has observed a violation of an arrestable offense. *State v. Marquez*, 2007-NMCA-151, 143 N.M. 79, 173 P.3d 1, cert. granted, 2007-NMCERT-011, 143 N.M. 155, 173 P.3d 762, *rev'd*, 2008-NMSC-055, 145 N.M. 1, 19 P.3d 548.

**Commission of petty misdemeanor.** — This section authorizes pursuit of a suspect into another county, whether the pursuing officer has reasonable cause to believe the suspect guilty of a misdemeanor or only of a petty misdemeanor. *County of Los Alamos v. Tapia*, 1990-NMSC-038, 109 N.M. 736, 790 P.2d 1017.

**Extraterritorial arrest for D.W.I.** — This section authorizes a municipal police officer to make an extraterritorial arrest for DWI. *Incorporated Cnty. of Los Alamos v. Johnson*, 1989-NMSC-045, 108 N.M. 633, 776 P.2d 1252.

**Arrest on Indian reservation.** — An arrest of a Navajo citizen on the Navajo Reservation by a city police officer following a car chase that started off the reservation was illegal since the officer failed to follow tribal extradition procedures; the misdemeanor fresh pursuit law did not affect the legality of the arrest. *City of Farmington v. Benally*, 1995-NMCA-019, 119 N.M. 496, 892 P.2d 629.

# ARTICLE 3

# Bail

Sec.
31-3-1. Designee to accept bail.
31-3-1.1. Review of youthful offender records.
31-3-2. Failure to appear; forfeiture of bail bonds.
31-3-3. Surrender of principal by surety.
31-3-4. Paid sureties.
31-3-5. Approval of bond.
31-3-6. Change of venue.
31-3-7. Bail for witness.
31-3-8. Defects in bail or bail bond; effect.
31-3-9. Failure to appear; penalty.
31-3-10. Termination of liability.
31-3-11. Release of individuals who are pregnant or lactating.
31-3-12. Availability of global positioning system data on defendants on pretrial release.

## 31-3-1. Designee to accept bail.

Any statutory provision or rule of court governing the release of an accused may be carried out by a responsible person designated by the court.

**History: 1953 Comp., § 41-3-1, enacted by Laws 1972, ch. 71, § 8.**

**Repeals and reenactments.** — Laws 1972, ch. 71, § 8, repealed 41-3-1, 1953 Comp., relating to the magistrate informing the defendant of the charge and his rights, and enacted a new section.

**Cross references.** — For right to bail, prevention of infliction of cruel and unusual punishment, *see* N.M. Const., art. II, § 13.

For bail proceedings, authorization of habeas corpus, *see* 44-1-23 NMSA 1978.

For certiorari to committing magistrate, *see* 44-1-24 NMSA 1978.

For Bail Bondsmen Licensing Law, *see* 59A-51-1 NMSA 1978 et seq.

For right to bail under the Rules of Criminal Procedure, *see* Rule 5-401 NMRA.

For justification of compensated sureties, *see* Rule 5-401B NMRA.

For bail, release provisions in magistrate court, *see* Rule 6-401 NMRA.

For appearance of defendant, *see* Rule 6-501 NMRA.

ANNOTATIONS

**Generally.** — Provisions with regard to admitting to bail in criminal cases are based upon the idea that a person accused of a crime shall be admitted to bail until adjudged guilty by the court of last resort to him; however, this right is not absolute under all circumstances. *Tijerina v. Baker*, 1968-NMSC-009, 78 N.M. 770, 438 P.2d 514.

**Bail within judge's discretion.** — Former section did not make it compulsory for judge to grant bail, but vested in such judge a discretion. *Ex parte Towndrow*, 1915-NMSC-073, 20 N.M. 631, 151 P. 761.



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**Law reviews.** — For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M.L. Rev. 247 (1974).

For article, "The Constitutionality of Pretrial Detention Without Bail in New Mexico," see 12 N.M.L. Rev. 685 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 8A Am. Jur. 2d Bail and Recognizance § 1 et seq.

Constitutional right to bail pending appeal from conviction, 19 A.L.R. 807, 77 A.L.R. 1235.

Acknowledgment of bail bond in open court, necessity of, 38 A.L.R. 1108.

Bail pending appeal from conviction, 45 A.L.R. 458.

Amount of bail required in criminal action, 53 A.L.R. 399.

Lien or encumbrance on his real property as affecting qualifications of surety on bail bond, 56 A.L.R. 1097.

Arresting one who has been released on bail, 62 A.L.R. 462.

Factors in fixing amount of bail in criminal cases, 72 A.L.R. 801.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 79 A.L.R. 13.

Disciplinary power of court in respect of suretyship in judicial proceedings, 91 A.L.R. 889.

Specific crime, necessity of reference to, in bail bond, 103 A.L.R. 535.

Rape as bailable offense, 118 A.L.R. 1115.

Mandamus to compel judge or other officer to grant accused bail or to accept proffered sureties, 23 A.L.R.2d 803.

Statutes relating to sexual psychopaths, 24 A.L.R.2d 350.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 98 A.L.R.2d 966, 3 A.L.R.4th 1057.

Funds deposited in court in lieu of bail as subject of garnishment, 1 A.L.R.3d 936.

Insanity of accused as affecting right to bail in criminal case, 11 A.L.R.3d 1385.

Validity, construction, and application of statutes regulating bail bond business, 13 A.L.R.3d 618.

Pretrial preventive detention by state court, 75 A.L.R.3d 956.

Application of state statutes establishing pretrial release of accused on personal recognizance as presumptive form of release, 78 A.L.R.3d 780.

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus - modern cases, 26 A.L.R.4th 455.

Liability of surety on bail bond taken without authority, 27 A.L.R.4th 246.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 4 to 9, 14, 15, 17 to 30, 33 to 41, 43 to 58, 62, 64, 66, 67, 69 to 75, 81.

## 31-3-1.1. Review of youthful offender records.

Notwithstanding any other provision of law, when considering the setting of bail or other conditions of release of a person charged with a felony, the juvenile disposition of a youthful offender and any evidence given in a hearing in court for a youthful offender may be considered. The juvenile disposition and evidence used pursuant to this section may be considered only if the person is thirty years old or younger. If a judge considers the juvenile disposition of a youthful offender or evidence given in a hearing for the youthful offender pursuant to this section, the disposition and evidence shall be considered confidential and shall be reviewed or discussed in camera. All evidence, motions or other documents or evidence pertaining to the juvenile disposition shall be sealed, unless otherwise considered not to be confidential by law.

**History: Laws 2016, ch. 9, § 1.**

**Effective dates.** — Laws 2016, ch. 9 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 18, 2016, 90 days after the adjournment of the legislature.

## 31-3-2. Failure to appear; forfeiture of bail bonds.

A. Whenever any person fails to appear at the time and place fixed by the terms of recognizance, the court may issue a warrant for his arrest.

B. Whenever a person fails to appear at the time and place fixed by the terms of his bail bond, the court:

(1) may issue a warrant for his arrest; and

(2) may declare a forfeiture of the bail. If the court declares a forfeiture, it shall:

(a) declare such forfeiture at the time of nonappearance;

(b) give written notice thereof to the surety within four working days of declaration; and

(c) issue a bench warrant for the person's arrest.

C. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

D. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default, and execution may issue thereon. By entering into a bail bond, the obligors submit to the



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jurisdiction of the court and irrevocably appoint the clerk of the court as their agent upon whom papers affecting their liability may be served. Liability of the surety may be enforced on motion without the necessity of an independent action.

E. Notice of the motion to enter a judgment of default may be served pursuant to the rules of criminal procedure or may be served on the clerk of the court, who shall forthwith mail copies to the obligors at their last known address. The notice shall require the sureties to appear on or before a given date and show cause why judgment shall not be entered against them for the amount of the bail bond or recognizance. If good cause is not shown, the court may then enter judgment against the obligors on the recognizance, for such sum as it sees fit, not exceeding the penalty fixed by the bail bond or recognizance.

F. When a judgment has been rendered against the defendant or surety for the whole or part of the penalty of a forfeited recognizance, the court rendering such judgment shall remit the amount thereof when, after such rendition, the accused has been arrested and surrendered to the proper court to be tried on such charge or to answer the judgment of the court, provided that the apprehension of the accused in some way was aided by the surety's efforts or by information supplied by the surety.

G. If any amount remains unpaid ten days after entry of judgment, the court may issue execution for satisfaction of judgment.

H. In the event that an obligor does not possess property in this state sufficient to satisfy a judgment against it for the whole or part of the penalty of a forfeited recognizance, the court entering judgment against the obligor on the recognizance shall send written notification to the superintendent of insurance. Immediately upon receipt of such written notification and pursuant to Section 46-6-4 NMSA 1978, the superintendent of insurance shall inform the obligor that unless the judgment is paid or an appeal, writ of error or supersedeas is taken within thirty days of the rendition of the judgment or decree, such obligor shall forfeit all right to do business in this state. If timely appeal, writ of error or supersedeas is not taken, the superintendent of insurance shall immediately take whatever steps necessary to revoke the right of the obligor to do business in this state.

**History: 1953 Comp., § 41-3-2, enacted by Laws 1972, ch. 71, § 9; 1973, ch. 215, § 1; 1987, ch. 228, § 1; 1993, ch. 159, § 1.**

**Repeals and reenactments.** — Laws 1972, ch. 71, § 9, repealed 41-3-2, 1953 Comp., relating to defendant being permitted to send for counsel, and enacted a new 31-3-2 NMSA 1978.

**The 1987 amendment,** effective June 19, 1987, added all of the language following "bail" in Subsection A(2), made minor stylistic changes in Subsection D, and substituted "shall remit" for "may in its discretion remit or reduce" in Subsection E while adding the proviso at the end of that subsection.

**The 1993 amendment,** effective June 18, 1993, rewrote former Subsection A as present Subsections A and B and redesignated former Subsections B through G accordingly.

## ANNOTATIONS

**Notices required when bond forfeited.** — If the district court decides that a bail bond is subject to forfeiture, then the district court must serve the surety with two notices: a notice of the declaration of forfeiture of the bond and another notice of a hearing to show cause why judgment should not be entered for the amount of the bond, *State v. Pacheco*, 2008-NMCA-055, 143 N.M. 851, 182 P.3d 834.

**Four day notice of forfeiture.** — Where the district court issued a notice of forfeiture of a bail bond on Thursday, December 8 and ordered the surety to appear and show cause on Tuesday, December 13 why judgment should not be entered on the bond, and the surety received the notice of forfeiture on Wednesday December 14, the district court provided the surety with notice of forfeiture within the required four day period. *State v. Pacheco*, 2008-NMCA-055, 143 N.M. 851, 182 P.3d 834.

**A bail bond may not be forfeited** for violations of conditions of release other than failure to appear. A statute controls over a bail bond form. *State v. Romero*, 2007-NMSC-030, 141 N.M. 733, 160 P.3d 914.

**Compiler's notes.** — Many of the following annotations are from cases which were decided under former law.

**Purpose of bail is to secure defendant's attendance** to submit to the punishment to be imposed by the court. *State v. Cotton Belt Ins. Co.*, 1981-NMSC-129, 97 N.M. 152, 637 P.2d 834.

**Bail is subject to forfeiture until** such time as the defendant surrenders himself to the authorities to serve his sentence. *State v. Cotton Belt Ins. Co.*, 1981-NMSC-129, 97 N.M. 152, 637 P.2d 834.

**Court's discretion in ordering forfeiture.** — The court must exercise its discretion in determining whether to order forfeiture of the entire amount of the bond. *State v. Amador*, 1982-NMSC-083, 98 N.M. 270, 648 P.2d 309.

**Proper forfeiture of bond.** — Where defendant was charged with the felony offense of driving while under the influence of intoxicating liquor, released on bail by the magistrate court in the amount of $5,000 subject to certain conditions, fled to Arkansas after his initial bond hearing, and where appellant bond company, over a year later, took defendant into custody in Arkansas and returned him to New Mexico, the district court did not err in affirming the forfeiture of the bond by the magistrate court where the evidence established that appellant did not take any action in Arkansas prior to the forfeiture hearing in the magistrate court and did not appear at the forfeiture hearing to show "good cause" why the defendant failed to appear at his preliminary hearing, that defendant was not



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in custody in Arkansas, and that Arkansas did not thwart the efforts of appellant to apprehend defendant; appellant failed to sustain its burden of showing an impediment to defendant's appearance or that defendant was taken into custody prior to the entry of the magistrate court judgment. *State v. Naegle*, 2017-NMCA-017.

**Order forfeiting bond must include finding that defendant failed to appear.** — The order forfeiting bond was fatally defective because of the failure to include therein a finding that the defendant (principal on the bond) failed to appear. *State v. Barboa*, 1958-NMSC-030, 64 N.M. 5, 322 P.2d 337.

**And no bail discharge because principal imprisoned in another state.** — If the performance of a recognizance is rendered impossible by the imprisonment of the principal in another state, it is not such an act of law as will discharge bail. *State v. United Bonding Ins. Co.*, 1970-NMSC-017, 81 N.M. 154, 464 P.2d 884.

**Surety's responsibilities begin upon prisoner's release.** — A prisoner released on bail is regarded as being transferred from the custody of the public officials charged with his confinement to that of the sureties on his bail bond or recognizance. The sureties are then charged with the duty of producing him to answer the charges against him at the proper time and are liable for a failure to do so, unless the failure is excused for reasons which the courts regard as adequate. *State v. United Bonding Ins. Co.*, 1970-NMSC-017, 81 N.M. 154, 464 P.2d 884.

**Principal must fail to respond before surety found in default.** — There must be a finding of a failure of the principal to answer or appear upon the calling of his case for trial or other court action, or otherwise to fail to respond to the court before any default on the undertaking of the surety can be ordered by the court. *State v. United Bonding Ins. Co.*, 1970-NMSC-017, 81 N.M. 154, 464 P.2d 884.

**Ceremonial calling dispensed with in principal's absence.** — Notice to the surety on a bail bond is sufficient notice to the principal and to require a ceremonial calling out of the principal's name when his absence is obvious and that fact acknowledged in open court by the bail would be useless. Thus the court's order to forfeit the bond was valid. *State v. Hathaway*, 1970-NMSC-006, 81 N.M. 159, 464 P.2d 889.

**Obligation of surety is to suffer forfeiture** if the principal does not, after notice to him or the surety, respond to the judgment and sentence and final commitment of the court. *State v. United Bonding Ins. Co.*, 1970-NMSC-017, 81 N.M. 154, 464 P.2d 884.

**Authority of magistrate court to set aside forfeiture judgment.** — Subsection F is an exception to the "continuing jurisdiction" rule. The language of the subsection clearly indicates that the legislature intended to affirmatively grant magistrate courts the discretion to set aside a forfeiture judgment and remit all or part of the penalty. *State v. Ramirez*, 1981-NMSC-125, 97 N.M. 125, 637 P.2d 556.

**No mitigation of judgment until principal surrenders.** — Once judgment of forfeiture is entered and the amount fixed, the court has no occasion to mitigate the amount of the judgment it has previously entered, unless the principal is "surrendered to proper court to be tried on such charges, or to answer the judgment of said court." *State v. United Bonding Ins. Co.*, 1970-NMSC-017, 81 N.M. 154, 464 P.2d 884.

**Relief in the form of remittitur is discretionary** and will be reviewed only for abuse of discretion. *State v. Cotton Belt Ins. Co.*, 1981-NMSC-129, 97 N.M. 152, 637 P.2d 834.

**Action on recognizance civil in nature.** — Actions on recognizances, though normally pursued in the criminal causes of action, are actually independent civil proceedings brought by the state against appellants pursuant to statute. *State v. United Bonding Ins. Co.*, 1970-NMSC-017, 81 N.M. 154, 464 P.2d 884.

**Effect of prosecution of bond liability.** — Where a bond has been declared forfeited on nonappearance of the principal in a criminal case, and the enforcement of the bond liability is prosecuted in a civil action, transfer of the criminal case to another court will not affect the jurisdiction of the first court to determine the enforcement of the forfeiture. *State v. United Bonding Ins. Co.*, 1970-NMSC-017, 81 N.M. 154, 464 P.2d 884.

**Security for restitution disallowed.** — There is no authorization under this section for requiring security for restitution as a condition of bail pending appeal. *State v. Montoya*, 1993-NMCA-097, 116 N.M. 297, 861 P.2d 978.

**Bondsman thwarted by actions of another jurisdiction.** — Considering the purposes of bail and the policy to encourage bondsmen to enter into bail contracts, it is unjust to enrich the state treasury when a bondsman has been diligent in his efforts to apprehend and bring back for trial a defendant but has been thwarted by the actions of another sovereign jurisdiction. *State v. Amador*, 1982-NMSC-083, 98 N.M. 270, 648 P.2d 309.

**Refund of forfeited bond.** — Despite the conflict between Rule 7-406 NMRA and Subsection F of this section, a metropolitan court judge may refund a forfeited bond to a bondsman who is able to apprehend a defendant and bring her back to court, as the conflict concerns substantive law over which the statute controls. 1989 Op. Att'y Gen. No. 89-12.

**Law reviews.** — For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 8 Am. Jur. 2d Bail and Recognizance § 109 et seq.

Insanity of principal as relieving bail for his nonappearance, 7 A.L.R. 394.

Induction of principal into military or naval service as exonerating his bail for his nonappearance, 8 A.L.R. 371, 147 A.L.R. 1428, 151 A.L.R. 1462, 153 A.L.R. 1431.

Variance between name in bail bond and in judgment of forfeiture, 20 A.L.R. 411.

Constitutionality of statute relieving against forfeiture of bail or recognizance, 43 A.L.R. 1233.

Escape of principal during his detention on separate charge as affecting liability of bail, 45 A.L.R. 1037.

Right of bail to relief from forfeiture of bond or recognizance in event of subsequent surrender or production of principal, 84 A.L.R. 420.

Relief from forfeiture, excuse for failure of accused to appear which will entitle surety to, 84 A.L.R. 440.

Arraignment and plea, failure of judgment or order forfeiting bail, or deposit in lieu thereof, to recite, 90 A.L.R. 298.

Failure to appear, and the like, resulting in forfeiture or conditional forfeiture of bail, as affecting right to second admission to bail in same noncapital criminal case, 29 A.L.R.2d 945.

Bail jumping after conviction, failure to surrender or appear for sentencing and the like, as contempt, 34 A.L.R.2d 1100.

Death of principal as exoneration of sureties on bail or appearance bond, 63 A.L.R.2d 830.

Limitation of actions, enforceability of bail bond or recognizance against surety where, at time it was filed, prosecution of principal was barred by, 75 A.L.R.2d 1431.

Governor's authority to remit forfeited bail bond, 77 A.L.R.2d 988.

Appealability of order relating to forfeiture of bail, 78 A.L.R.2d 1180.

Funds deposited in court in lieu of bail as subject of garnishment, 1 A.L.R.3d 936.

Dismissal or vacation of indictment as terminating liability or obligation of surety on bail bond, 18 A.L.R.3d 1354.



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Liability of surety on bail bond taken without authority, 27 A.L.R.4th 246.

Bail: duration of surety's liability on pretrial bond, 32 A.L.R.4th 504.

Bail: duration of surety's liability on posttrial bail bond, 32 A.L.R.4th 575.

Bail: effect on surety's liability under bail bond of principal's incarceration in other jurisdiction, 33 A.L.R.4th 663.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction, 35 A.L.R.4th 1192.

State statutes making default on bail a separate criminal offense, 63 A.L.R.4th 1064.

Forfeiture of bail for breach of conditions of release other than that of appearance, 68 A.L.R.4th 1082.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 118 to 190.

## 31-3-3. Surrender of principal by surety.

A. When a surety desires to be discharged from the obligation of its bail bond, the surety may arrest the accused and deliver him to the sheriff of the county in which the action against the accused is pending.

B. The surety shall, at the time of surrendering the accused, deliver to the sheriff a certified copy of the order admitting the accused to bail and a certified copy of the bail bond. Delivery of these documents shall be sufficient authority for the sheriff to receive and retain the accused until he is otherwise bailed or discharged.

C. Upon the delivery of the accused as provided in this section, the surety may apply to the court for an order discharging him from liability as surety; and upon satisfactory proof being made that this section has been complied with, the court shall enter an order discharging the surety from liability.

D. This section shall not apply to a paid surety as defined by Section 31-3-4 NMSA 1978.

**History: 1953 Comp., § 41-3-3, enacted by Laws 1972, ch. 71, § 10.**

**Repeals and reenactments.** — Laws 1972, ch. 71, § 10, repealed 41-3-3, 1953 Comp., relating to examination of case by magistrate, and enacted a new section.

ANNOTATIONS

**Obligation terminates upon delivery to sheriff.** — By statute, the bail has power to take and deliver the principal at any time to the sheriff and thus be relieved of its obligation. *State v. United Bonding Ins. Co.*, 1970-NMSC-017, 81 N.M. 154, 464 P.2d 884.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 8 Am. Jur. 2d Bail and Recognizance § 80 et seq.

Surrender of principal by sureties on bail bond, 3 A.L.R. 180, 73 A.L.R. 1369.

Right of bail to relief from forfeiture of bond or recognizance in event of subsequent surrender or production of principal, 84 A.L.R. 420.

Dismissal or vacation of indictment as terminating liability or obligation of surety on bail bond, 18 A.L.R.3d 1354.

Bail: duration of surety's liability on pretrial bond, 32 A.L.R.4th 504.

Bail: duration of surety's liability on posttrial bail bond, 32 A.L.R.4th 575.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial, 32 A.L.R.4th 600.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction, 35 A.L.R.4th 1192.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 136 to 139.

## 31-3-4. Paid sureties.

A. A "paid surety" is a surety that has taken money, property or other consideration to act as a surety for the accused.

B. When a paid surety desires to be discharged from the obligation of its bond, it may arrest the accused and deliver him to the sheriff of the county in which the action against the accused is pending.

C. The paid surety shall, at the time of surrendering the accused, deliver to the sheriff a certified copy of the order admitting the accused to bail and a certified copy of the bail bond. Delivery of these documents shall be sufficient authority for the sheriff to receive and retain the accused until he may be brought before the court.

D. A paid surety may be released from the obligation of its bond only by an order of the court.

E. The court shall order the discharge of a paid surety if:

(1) there has been a final disposition of all charges against the accused;

(2) the accused is dead;

(3) circumstances have arisen which the surety could not have foreseen at the time it became a paid surety for the accused; or

(4) the contractual agreement between the surety, the principal and the state has terminated.



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**History: 1953 Comp., § 41-3-4, enacted by Laws 1972, ch. 71, § 11.**

**Repeals and reenactments.** — Laws 1972, ch. 71, § 11, repealed 41-3-4, 1953 Comp., relating to adjournment of the magistrate's examination of the defendant, and enacted a new section.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 8 Am. Jur. 2d Bail and Recognizance § 80 et seq.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 136 to 139.

## 31-3-5. Approval of bond.

No bond shall be accepted from a paid surety, as defined in Section 31-3-4 NMSA 1978, by a magistrate court or a district court unless executed on a form which has been approved by the supreme court.

**History: 1953 Comp., § 41-3-4.1, enacted by Laws 1973, ch. 73, § 5.**

## 31-3-6. Change of venue.

If the defendant is released pending trial and thereafter a change of venue is granted, the defendant shall be bound to appear according to the change of venue and otherwise in accordance with the terms of his recognizance. The sureties on a bail bond shall be bound to deliver the defendant in accordance with the change of venue without the necessity of giving a new bail bond.

**History: 1953 Comp., § 41-3-5, enacted by Laws 1972, ch. 71, § 12.**

**Repeals and reenactments.** — Laws 1972, ch. 71, § 12, repealed 41-3-5, 1953 Comp., relating to disposition of defendant, by the magistrate, in case of an adjournment, and enacted a new section.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 8 Am. Jur. 2d Bail and Recognizance § 117.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 40, 41, 43 to 49, 140, 141, 143 to 155, 183.

## 31-3-7. Bail for witness.

If it appears by affidavit that the testimony of a person is material in any felony criminal proceeding and that it may become impracticable to secure his presence by subpoena, the judge may require such person to give bail pursuant to Rules of Criminal Procedure for his appearance as a witness. If the witness fails to give bail pursuant to Rules of Criminal Procedure, the witness may be committed to the custody of the sheriff for a period not to exceed five days within which time his deposition shall be taken as provided by Rules of Criminal Procedure. The court upon good cause shown may extend the time for taking such depositions for a period not exceeding five days. In no case except a first or second degree felony shall any surety be required for the bail of such witness.

**History: 1953 Comp., § 41-3-6, enacted by Laws 1972, ch. 71, § 13.**

**Repeals and reenactments.** — Laws 1972, ch. 71, § 13, repealed 41-3-6, 1953 Comp., relating to commitment forms to be used by the magistrate, and enacted a new section.

ANNOTATIONS

**Arrest of material witness.** — This section does not authorize an arrest of a material witness at the scene of a crime, where there is no evidence that the witness would avoid a subpoena or be unwilling to testify in a subsequent trial. *Perkins v. Click*, 148 F. Supp. 2d 1177 (D.N.M. 2001).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 81 Am. Jur. 2d Witnesses § 4.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 56 to 58, 170 to 174.

## 31-3-8. Defects in bail or bail bond; effect.

No recognizance, undertaking or bond taken in any criminal proceeding shall be void, nor shall the principal or surety be discharged, from liability thereon for want of form or substance or for omission of any recital or condition or because the same was entered into on Sunday.

**History: 1953 Comp., § 41-3-7, enacted by Laws 1972, ch. 71, § 14.**

**Repeals and reenactments.** — Laws 1972, ch. 71, § 14, repealed 41-3-7, 1953 Comp., relating to the magistrate



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reading the complaint to the defendant and issuing subpoenas for any required witnesses, and enacted a new section.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 8 Am. Jur. 2d Bail and Recognizance § 51 et seq; §§ 153, 160 to 162.

Variance between name in bail bond and in judgment of forfeiture, 20 A.L.R. 411.

Necessity of reference in bail bond to specific crime, 103 A.L.R. 535.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 93 to 106.

## 31-3-9. Failure to appear; penalty.

A person released pending any proceeding related to the prosecution or appeal of a criminal offense or a probation revocation proceeding who willfully fails to appear before any court or judicial officer as required:

A. is guilty of a fourth degree felony, if he was released in connection with a felony proceeding; or

B. is guilty of a petty misdemeanor, if he was released in connection with a misdemeanor or a petty misdemeanor proceeding.

**History: 1953 Comp., § 41-3-8, enacted by Laws 1973, ch. 73, § 6; 1999, ch. 150, § 1.**

**Repeals.** — Laws 1972, ch. 71, § 18, repealed former 41-3-8, 1953 Comp., relating to procedures in the magistrate court after defendant's arrest.

**The 1999 amendment,** effective July 1, 1999, substituted "A" for "Any" and "any proceeding related to the prosecution or appeal of a criminal offense or a probation revocation proceeding" for "trial or appeal in any criminal action" in the first paragraph, substituted "proceeding" for "charge" in Subsection A, and deleted "charge of a" following "in connection with" and added "proceeding" in Subsection B.

ANNOTATIONS

**This section is not unconstitutionally vague.** *State v. Aranda*, 1980-NMCA-130, 94 N.M. 784, 617 P.2d 173.

**Only general intent required.** — Failure to appear is not a specific intent crime; therefore, rejection of defendant's tendered instruction defining "willfulness" as requiring specific intent to abscond or thwart legal process was not erroneous. *State v. Elliott*, 2001-NMCA-108, 131 N.M. 390, 37 P.3d 107, cert. quashed, 132 N.M. 288, 47 P.3d 447 (2002).

**Sentencing proceedings included.** — Failure to appear at sentencing is encompassed by this section, since the word "trial", which formerly appeared in this section, could be construed as including all those proceedings within the district court's jurisdiction, at least through sentencing. *State v. Peppers*, 1990-NMCA-057, 110 N.M. 393, 796 P.2d 614, cert. denied, 110 N.M. 260, 794 P.2d 734.

**Attorneys lack authority to compel appearance of individuals.** — Although attorneys are officers of the court, there is no authority under which attorneys can require the appearance of an individual before a court unless authorized to do so by court process, court rule or enabling legislation. Where no such authorization appeared in the record, defendant who willfully failed to appear in district court after making oral promise to assistant district attorney that he would do so to complete plea bargaining agreement on drug charge was not required to appear for purposes of this section, and could not be convicted under Subsection A. *State v. Easterling*, 1976-NMCA-078, 89 N.M. 486, 553 P.2d 1293.

**No requirement of proving express notice to defendant.** — The presence or absence of notice to the defendant may have a bearing at trial on the question of willfulness, depending upon the other facts of the case, but express notice to the defendant is not an independent element, apart from the determination of willfulness, which the state must prove at either the preliminary hearing or at trial. *State v. Masters*, 1982-NMCA-166, 99 N.M. 58, 653 P.2d 889.

**Willful failure to appear is question of fact.** — The word "willfully," as used in this section, concerns the defendant's state of mind and is a factual question. *State v. Masters*, 1982-NMCA-166, 99 N.M. 58, 653 P.2d 889.

**Court order failed to compel appearance.** — Facts as charged and as elicited at trial simply did not constitute a violation of this section when "strictly construed" against the State because: (1) the trial court's order violated due process in that it was unclear whether or not the defendant was required to appear on the date in question; and (2) courts would not extend punishment to cases that were not plainly within the statutory language used. *State v. Hicks*, 2002-NMCA-038, 132 N.M. 68, 43 P.3d 1078, cert. denied, 132 N.M. 83, 44 P.3d 529.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Failure to appear, and the like, resulting in forfeiture or conditional forfeiture of bail, as affecting right to second admission to bail in same noncapital criminal case, 29 A.L.R.2d 945.

State statutes making default on bail a separate criminal offense, 63 A.L.R.4th 1064.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 70 to 75.

## 31-3-10. Termination of liability.

All recognizances secured by the execution of a bail bond shall be null and void upon the finding that the accused person is guilty, and all bond liability shall thereupon terminate.

**History: 1978 Comp., § 31-3-10, enacted by Laws 1987, ch. 228, § 2.**

ANNOTATIONS

**Purpose of bail bond.** — A bail bond is a type of bond to obtain the release of a person from imprisonment and to secure his appearance before the court. *State v. Valles*, 2004-NMCA-118, 136 N.M. 429, 99 P.3d 1164.

**Statute governs.** — Because the bail bond form which the supreme court requires sureties to sign when posting bail for a criminal defendant and a statute conflict on when the surety's obligation under the bond terminates, the statute governs. *State v. Valles*, 2004-NMCA-118, 136 N.M. 429, 99 P.3d 1164.

**Surety discharged when defendant found guilty.** — With the 1987 enactment of this section, the legislature



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established that the contractual agreement between surety, the principal and the state was terminated when defendant was found guilty, and the court is therefore required to order the discharge of the surety under 31-3-4 E(4) NMSA 1978. *State v. Valles*, 2004-NMCA-118, 136 N.M. 429, 99 P.3d 1164.

## 31-3-11. Release of individuals who are pregnant or lactating.

A. The court shall consider an individual's pregnancy or lactation status when determining whether the individual is eligible for release or bond and in the computation of good time credit. A presumption shall be made in favor of release for an individual who is pregnant or lactating. An individual released pursuant to this section shall be placed on the least restrictive conditions of release necessary to ensure return to custody.

B. As used in this section, "release" means:

(1) custodial release, which is release under such court-imposed restrictions as to satisfy the court that the person remains in custody while released; and

(2) noncustodial release, which is release under such conditions that are not considered custodial.

**History: Laws 2019, ch. 73, § 1.**

**Effective dates.** — Laws 2019, ch. 73, § 2 made Laws 2019, ch. 73, § 1 effective July 1, 2019.

## 31-3-12. Availability of global positioning system data on defendants on pretrial release.

Any public entity that possesses or controls global positioning system data with respect to a defendant on pretrial release shall make that data available without a warrant to a law enforcement officer pursuant to an ongoing and pending criminal investigation for which there is reasonable suspicion to believe the data will be probative. Any data provided to the law enforcement officer shall be limited to data that relates to the criminal investigation and is not more than one year old. The data shall not be made a part of any public record unless admitted as evidence during a criminal trial. The law enforcement officer may request immediate access to the data if it involves an investigation of:

A. any of the following serious violent felony offenses:

(1) murder in the first degree;

(2) first or second degree felony human trafficking of a child;

(3) first degree felony abuse of a child;

(4) sexual exploitation of a child constituting at least a second degree felony; or

(5) a serious violent felony offense as provided in Subparagraphs (a) through (n) of Paragraph (4) of Subsection L of Section 33-2-34 NMSA 1978;

B. a felony offense during which a firearm was brandished pursuant to Section 31-18-16 NMSA 1978 or during which a firearm was discharged; or

C. a felony offense during which great bodily harm was inflicted as defined in Section 30-1-12 NMSA 1978 or that caused the death of a person.

**History: Laws 2022, ch. 56, § 28.**

**Effective dates.** — Laws 2022, ch. 56, § 28 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

# ARTICLE 3A

# Witness Immunity

Sec.

31-3A-1. Recompiled.

## 31-3A-1. Recompiled.

**Recompilations.** — Section 31-3A-1 NMSA 1978 was recompiled as 31-6-15 NMSA 1978 by direction of the compilation commission.



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# ARTICLE 4

# Extradition

Sec.
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## 31-4-1. Definitions.

Where appearing in this act [31-4-1 to 31-4-30 NMSA 1978], the term "governor" includes any person performing the functions of governor by authority of the law of this state. The term "executive authority" includes the governor, and any person performing the functions of governor in a state other than this state. The term "state", referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America. The term "prosecuting attorney" includes the various district attorneys of this state and their duly appointed, qualified and acting assistants, the attorney general and his duly appointed, qualified and acting assistants.

**History: Laws 1937, ch. 65, § 1; 1941 Comp., § 42-1901; 1953 Comp., § 41-19-1.**

ANNOTATIONS

**Uniform Criminal Extradition Act is constitutional.** *Ex parte Dalton*, 1952-NMSC-049, 56 N.M. 407, 244 P.2d 790.

**Extradition not required.** — The state was not required to extradite defendant from Arizona so as to prevent his classification as a fugitive under 31-21-15 NMSA 1978 and the consequent revocation of probation. *State v. McDonald*, 1991-NMCA-132, 113 N.M. 305, 825 P.2d 238, cert. denied, 113 N.M. 44, 822 P.2d 1127 (1992).

**Law reviews.** — For comment, "Tribal Control of Extradition from Reservations," see 10 Nat. Resources J. 626 (1970).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition § 1 et seq.

Right to delay of one arrested on extradition warrant to enable him to present evidence that he is not subject to extradition, 11 A.L.R. 1410.

Meaning of word "similar" in statute as to evidence in extradition proceeding, 17 A.L.R. 102.

Right to try one for an offense other than that named in extradition proceedings, 21 A.L.R. 1405.

One charged with desertion or failure to support wife or child as fugitive from justice, subject to extradition, 32 A.L.R. 1167, 54 A.L.R. 281.

Right to prove alibi or absence from demanding state, 51 A.L.R. 797, 61 A.L.R. 715.

Extradition of juveniles, 73 A.L.R.3d 700.

Application of doctrine of specialty to federal criminal prosecution of accused extradited from foreign country, 112 A.L.R. Fed. 473.

Test of "dual criminality" where extradition to or from foreign nation is sought, 132 A.L.R. Fed. 525.

35 C.J.S. Extradition § 2 et seq.

## 31-4-2. Fugitives from justice; duty of governor.

Subject to the provisions of this act [31-4-1 to 31-4-30 NMSA 1978], the provisions of the constitution of the United States controlling and any and all acts of congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony or other crime, who has fled from justice and is found in this state.



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**History: Laws 1937, ch. 65, § 2; 1941 Comp., § 42-1902; 1953 Comp., § 41-19-2.**

ANNOTATIONS

**Expenses incurred for jailing fugitive.** — County had no right to sue a state to recover expenses for detaining and extraditing a fugitive. It was the governor of the state of New Mexico who empowered Colfax county through the aegis of his extradition warrant. Without that warrant, the county and its officers were powerless to assert jurisdiction over the fugitive and make the fugitive answerable to the New Hampshire charges. In actuality, Colfax county acted as an agent of the governor of New Mexico, and any powers the county exercised flowed directly from the New Mexico executive. *Colfax Cnty. Bd. of Cnty. Comm'rs v. State of N.H.*, 16 F.3d 1107 (10th Cir. 1994)

**Purpose of extradition clause of federal constitution,** U.S. Const., art. IV, § 2, is to preclude any state from becoming a sanctuary for fugitives from the justice of another state and thus "balkanize" the administration of criminal justice among the several states. *Bazaldua v. Hanrahan*, 1979-NMSC-025, 92 N.M. 596, 592 P.2d 512.

The intent of the extradition clause to the United States constitution is to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense occurred. The purpose of the clause is to prevent any state from becoming a sanctuary for fugitives from justice of another state. *State ex rel. Schiff v. Brennan*, 1983-NMSC-042, 99 N.M. 641, 662 P.2d 642.

**Governor's grant of extradition prima facie evidence** that constitutional and statutory requirements have been met. Thereafter, the burden shifts to the accused to prove beyond a reasonable doubt in the asylum state that he is not a fugitive from the demanding state. *Bazaldua v. Hanrahan*, 1979-NMSC-025, 92 N.M. 596, 592 P.2d 512.

**Courts of asylum state bound by demanding state's judicial determination.** — Under U.S. Const., art. IV, § 2, the courts of the asylum state are bound to accept the demanding state's judicial determination of probable cause for arrest since the proceedings of the demanding state are clothed with the traditional presumption of regularity. *Bazaldua v. Hanrahan*, 1979-NMSC-025, 92 N.M. 596, 592 P.2d 512.

**Court may not discharge accused arrested under governor's warrant where** there is merely contradictory evidence on the subject of his presence in or absence from the demanding state at the time of the alleged crime, as habeas corpus is not the proper proceeding to try the question of alibi or any question as to the guilt or innocence of the accused. *Bazaldua v. Hanrahan*, 1979-NMSC-025, 92 N.M. 596, 592 P.2d 512.

**However, no further judicial inquiries, once governor acts on extradition.** — Once the governor of an asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state. *Bazaldua v. Hanrahan*, 1979-NMSC-025, 92 N.M. 596, 592 P.2d 512.

**Review of requisition for extradition.** — Once a governor has granted extradition, a court in the asylum state considering release on habeas corpus can do no more than decide: (1) whether the extradition documents on their face are in order; (2) whether the petitioner has been charged with a crime in the demanding state; (3) whether the petitioner is the person named in the request for extradition; and (4) whether the petitioner is a fugitive. *Bazaldua v. Hanrahan*, 1979-NMSC-025, 92 N.M. 596, 592 P.2d 512.

**Extradition of juveniles.** 1973 Op. Att'y Gen. No. 73-14 (rendered under prior law, now see Section 32A-10-1 NMSA 1978).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 31A Am. Jur. 2d Extradition §§ 22 to 26, 30, 95.

One charged with desertion or failure to support wife or child as fugitive from justice, subject to extradition, 32 A.L.R. 1167, 54 A.L.R. 281.

Extradition of fugitive in custody under charge in asylum state, 42 A.L.R. 585.

One who left demanding state by official permission as a fugitive from justice for purposes of extradition, 67 A.L.R. 1480.

Extradition of escaped or paroled convict, or one at liberty on bail, 78 A.L.R. 419.

Once removed from demanding state or country as a fugitive from justice within contemplation of extradition laws, 85 A.L.R. 118.

One not in demanding state at time of offense, but who afterward entered and left state, as fugitive from justice within extradition law, 91 A.L.R. 1262.

35 C.J.S. Extradition § 7 et seq.

## 31-4-3. Form of demand.

No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing, alleging, except in cases arising under Section 6 [31-4-6 NMSA 1978], that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the cpoy [copy] of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand.

**History: Laws 1937, ch. 65, § 3; 1941 Comp., § 42-1903; 1953 Comp., § 41-19-3.**



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ANNOTATIONS

**District court not authorized to review issues beyond scope of demanding documents.** — Language in this section requiring the indictment, information or affidavit to "substantially charge the person demanded with having committed a crime" does not authorize the district court to go beyond the charging documents and review issues that should be litigated in the state demanding extradition. *Hopper v. State ex rel. Schiff*, 1984-NMSC-034, 101 N.M. 71, 678 P.2d 699.

**Error held harmless where documentation eventually provided.** — In a proceeding for a writ of habeas corpus challenging the petitioner's extradition to Ohio, there was no harm in the fact that the parties may have been served with incomplete documentation since the missing documents were eventually provided. *Reed v. State ex rel. Ortiz*, 1997-NMSC-055, 124 N.M. 129, 947 P.2d 86, *rev'd on other grounds*, 524 U.S. 151, 118 S. Ct. 1860, 141 L. Ed. 2d 131 (1998).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition §§ 67 to 89.

Extradition of one who violates parole, 78 A.L.R. 419.

Recitals in rendition warrant as to copy of indictment or affidavit, sufficiency of, 89 A.L.R. 595.

Allegation or proof of presence of accused in demanding state at time of commission of alleged crime or that accused is a fugitive, sufficiency of statements in demanding papers as to, 135 A.L.R. 973.

Statute authorizing extradition of one who commits an act within the state or a third state resulting in a crime in the demanding state, constitutionality, construction and application of, 151 A.L.R. 239.

Modern status of rule relating to jurisdiction of state court to try criminal defendant brought within jurisdiction illegal or as result of fraud or mistake, 25 A.L.R.4th 157.

35 C.J.S. Extradition § 16 et seq.

## 31-4-4. Governor may investigate case.

When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

**History: Laws 1937, ch. 65, § 4; 1941 Comp., § 42-1904; 1953 Comp., § 41-19-4.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition § 96.

Mission or motive of defendant in going to asylum state as affecting right to extradite him, 13 A.L.R. 415.

Bar of limitations as proper subject of investigation in extradition proceedings, 77 A.L.R. 902.

Determination in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged, 81 A.L.R. 552, 40 A.L.R.2d 1151.

Motive or ulterior purpose of officials demanding or granting extradition as proper subject of inquiry, 94 A.L.R. 1493.

Sanity or insanity or pendency of lunacy proceedings as matters for consideration in extradition proceedings, 114 A.L.R. 693.

35 C.J.S. Extradition §§ 30 to 33.

## 31-4-5. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.

When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

The governor of this state may also surrender on demand of the executive authority of any other state any person in this state who is charged in the manner provided in Section 23 [31-4-25 NMSA 1978] of this act with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily.

**History: Laws 1937, ch. 65, § 5; 1941 Comp., § 42-1905; 1953 Comp., § 41-19-5.**

**Cross references.** — For surrendering to another state a person detained in this state under prosecution or conviction in this state, *see* 31-4-19 NMSA 1978.

ANNOTATIONS

**Asylum state has no discretion.** — Where New Mexico courts held that respondent was not a fugitive from justice, but a refugee from injustice because respondent fled Ohio because of fear that respondent's parole would be revoked without due process and that respondent would be returned to prison where respondent faced the threat of bodily injury, the New Mexico courts went beyond the permissible inquiry in an extradition case and permitted litigation of issues not open in the asylum state. The extradition clause of the United States constitution is mandatory and affords no discretion to the executive



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officers of the courts of the asylum state. *N.M. ex rel. Ortiz v. Reed*, 118 S.Ct. 1860, 524 U.S. 151, 141 L. Ed. 2d 131 (1998), *rev'g Reed v. State ex. rel. Ortiz*, 1997-NMSC-055, 124 N.M. 129, 947 P.2d 86.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition § 152.

Extradition of fugitive in custody under charge in asylum state, 42 A.L.R. 585.

Extradition, as a fugitive from justice, of one who left the demanding state by official permission, 67 A.L.R. 1480.

Determination whether crime is charged, 40 A.L.R.2d 1151.

35 C.J.S. Extradition § 15.

**Law Reviews.** — For Article, "Developing a State Constitutional Law Strategy in New Mexico Criminal Prosecutions," see 39 N.M.L. Rev. 407 (2009).

## 31-4-6. Extradition of persons not present in demanding state at time of commission of crime.

The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in Section 3 [31-4-3 NMSA 1978] with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this act [31-4-1 to 31-4-30 NMSA 1978] not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.

**History: Laws 1937, ch. 65, § 6; 1941 Comp., § 42-1906; 1953 Comp., § 41-19-6.**

ANNOTATIONS

**Proper request by demanding state must be honored.** — Extradition demanded by another state for the crime of non-support, properly requested under this section, should be honored by New Mexico if the demanding state has a law making it a crime to fail to support a wife or child when the accused is outside the demanding state at the time of failure to support occurs. 1953-54 Op. Att'y Gen. No. 53-5713.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition § 28, 29.

One not in demanding state at time of offense, but who afterward entered and left state, as fugitive from justice within extradition law, 91 A.L.R. 1262.

Constitutionality, construction and application of statute authorizing extradition of one who commits an act within the state or a third state resulting in a crime in the demanding state, 151 A.L.R. 239.

35 C.J.S. Extradition § 11.

## 31-4-7. Issue of governor's warrant of arrest; its recitals.

If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

**History: Laws 1937, ch. 65, § 7; 1941 Comp., § 42-1907; 1953 Comp., § 41-19-7.**

ANNOTATIONS

**Prisoner is not entitled to bail after governor's extradition warrant has been served.** *State ex rel. Schiff v. Brennan*, 1983-NMSC-042, 99 N.M. 641, 662 P.2d 642.

**Enumeration of rights not required.** — A warrant issued in accordance with this section is not required to enumerate the rights contained in Section 31-4-10 NMSA 1978. *Johnson v. Shuler*, 2001-NMSC-009, 130 N.M. 144, 20 P.3d 126.

**County cannot recover expenses incurred for jailing fugitive.** — Where a fugitive from New Hampshire was detained in the Colfax County jail while awaiting extradition to New Hampshire; the governors of New Mexico and New Hampshire played the exclusive roles in the extradition process such that neither New Hampshire nor its governor made any demand on Colfax County or directed Colfax County to act on their behalf; the extradition warrant issued by the governor of New Mexico granted Colfax County jurisdiction to hold the fugitive and Colfax County acted as the New Mexico governor's agent in the extradition process; and New Hampshire had no contact with Colfax County, Colfax County was barred from demanding payment of state expenses incurred for jailing the fugitive. *Colfax Cnty. Bd. of Cnty. Comm'r v. State of N.H.*, 16 F.3d 1107 (10th Cir. 1994).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition § 117 to 119.

Sufficiency of recitals in rendition warrant in extradition as regards copy of indictment or affidavit, 89 A.L.R. 595.

35 C.J.S. Extradition §§ 35, 36.

## 31-4-8. Manner and place of execution.

Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state and to command the



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aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this act [31-4-1 to 31-4-30 NMSA 1978], to the duly authorized agent of the demanding state.

**History: Laws 1937, ch. 65, § 8; 1941 Comp., § 42-1908; 1953 Comp., § 41-19-8.**

## 31-4-9. Authority of arresting officer.

Every such peace officer or other person empowered to make the arrest shall have the same authority, in arresting the accused, to command assistance therein, as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

**History: Laws 1937, ch. 65, § 9; 1941 Comp., § 42-1909; 1953 Comp., § 41-19-9.**

## 31-4-10. Rights of accused person; application for writ of habeas corpus.

No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

**History: Laws 1937, ch. 65, § 10; 1941 Comp., § 42-1910; 1953 Comp., § 41-19-10.**

**Cross references.** — For habeas corpus, *see* 44-1-1 to 44-1-37 NMSA 1978.

### ANNOTATIONS

**Violations of the extradition act.** — The New Mexico constitution does not provide greater due process rights than the federal constitution for violations of the state extradition act and the metropolitan court was not deprived of personal jurisdiction over a defendant because of his illegal extradition. *State v. Nysus*, 2001-NMCA-023, 130 N.M. 431, 25 P.3d 270, cert.denied, 130 N.M. 254, 23 P3d 929.

**Jurisdiction occurs upon arrest on out-of-state charges.** — Under this section, the district court does not obtain jurisdiction over the person until after an arrest on the out-of-state charge has been made, so, where there was never an arrest, and the defendant has not suffered any damage, subsequent statutory proceedings for extradition are not precluded by a court's earlier actions without jurisdiction. *State v. Nicolini*, 1978-NMSC-021, 91 N.M. 484, 576 P.2d 290.

**Application for writ.** — If a fugitive desires to test the legality of his arrest, the judge of the court of record determines a reasonable time within which he is to apply for the writ of habeas corpus. This provision of the extradition act helps assure that a fugitive will not remain incarcerated in the asylum state for an unduly long period of time after arrest under a governor's warrant. 1974 Op. Att'y Gen. No. 74-38.

**Law reviews.** — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition §§ 123 to 143.

Right to appeal from order releasing one in extradition proceedings, 5 A.L.R. 1156.

Right of one arrested on extradition warrant to delay to enable him to present evidence that he is not subject to extradition, 11 A.L.R. 1410.

Motive or mission of defendant in going to asylum state as affecting right to extradite him, 13 A.L.R. 415.

Right to try one for offense other than that named in extradition proceedings, 21 A.L.R. 1405.

Right to prove absence from demanding state or alibi on habeas corpus in extradition proceedings, 51 A.L.R. 797, 61 A.L.R. 715.

Bar of limitations as proper subject of investigation in extradition proceedings or in habeas corpus proceedings for release of one sought to be extradited, 77 A.L.R. 902.

Determination in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged, 81 A.L.R. 552, 40 A.L.R.2d 1151.

Bond to indemnify public against expense of extradition or other criminal proceedings in event they are unsuccessful as contrary to public policy, 94 A.L.R. 355.

Motive or ulterior purpose of officials demanding or granting extradition as proper subject of inquiry, 94 A.L.R. 1493.

Sanity or insanity or pendency of lunacy proceedings as matters for consideration in extradition proceedings, 114 A.L.R. 693.



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Discharge on habeas corpus of one held in extradition proceedings as precluding subsequent extradition proceedings, 33 A.L.R.3d 1443.

35 C.J.S. Extradition § 34.

## 31-4-11. Penalty for noncompliance with preceding section.

Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in willful disobedience to the last section [31-4-10 NMSA 1978], shall be guilty of a misdemeanor and, on conviction, shall be fined (not more than $1,000.00 or be imprisoned not more than six months, or both).

**History: Laws 1937, ch. 65, § 11; 1941 Comp., § 42-1911; 1953 Comp., § 41-19-11.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Necessity that demanding state show probable cause to arrest fugitive in extradition proceedings, 90 A.L.R.3d 1074.

## 31-4-12. Confinement in jail when necessary.

The officer or persons executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered, may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping; provided, however, that such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state.

**History: Laws 1937, ch. 65, § 12; 1941 Comp., § 42-1912; 1953 Comp., § 41-19-12.**

ANNOTATIONS

**Identification of officer required before he can accept prisoners.** — Under the provisions of the Uniform Criminal Extradition Act, 31-4-1 to 31-4-30 NMSA 1978, there is no requirement that guards, as such, be designated by name. It is certain, however, that the sheriff or other designated officer who represents the executive authority of the requisitioning state and is the agent of that state for receipt of prisoners, has to be named and duly accredited as the demanding state's agent before prisoners will be delivered to him. 1961-62 Op. Att'y Gen. No. 61-9.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition § 58 to 62.

35 C.J.S. Extradition § 67.

## 31-4-13. Arrest prior to requisition.

Whenever any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state and, except in cases arising under Section 6 [31-4-6 NMSA 1978] with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under Section 6, has



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fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

**History: Laws 1937, ch. 65, § 13; 1941 Comp., § 42-1913; 1953 Comp., § 41-19-13.**

**ANNOTATIONS**

**Prisoner is not entitled to bail after governor's extradition warrant has been served.** *State ex rel. Schiff v. Brennan*, 1983-NMSC-042, 99 N.M. 641, 662 P.2d 642.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition § 58 to 62.

35 C.J.S. Extradition § 67.

## 31-4-14. Arrest without a warrant.

The arrest of a person may be lawfully made also by any peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section [31-4-13 NMSA 1978]; and thereafter his answer shall be heard as if he had been arrested on a warrant.

**History: Laws 1937, ch. 65, § 14; 1941 Comp., § 42-1914; 1953 Comp., § 41-19-14.**

**ANNOTATIONS**

**Bondsman arresting third party.** — Neither the common-law nor statutory authority of a bondsman to make a warrantless arrest of his principal absolves a bondsman of criminal responsibility ensuing from the armed, unauthorized, and forcible entry into the residence of a third party. *State v. Lopez*, 1986-NMCA-094, 105 N.M. 538, 734 P.2d 778, cert. quashed, 105 N.M. 521, 734 P.2d 761, and cert. denied, 479 U.S. 1092, 107 S. Ct. 1305, 94 L. Ed. 2d 160 (1987).

A foreign bondsman must comply with this article in seeking the rearrest of his principal. *State v. Lopez*, 1986-NMCA-094, 105 N.M. 538, 734 P.2d 778, cert. quashed, 105 N.M. 521, 734 P.2d 761, and cert. denied, 479 U.S. 1092, 107 S. Ct. 1305, 94 L. Ed. 2d 160 (1987); *Lopez v. McCotter*, 875 F.2d 273 (10th Cir.), cert. denied, 493 U.S. 996, 110 S. Ct. 549, 107 L. Ed. 2d 546 (1989).

**Retroactive application of State v. Lopez.** — The decision of the court of appeals in *State v. Lopez*, 1986-NMCA-094, 105 N.M. 538, 734 P.2d 778, holding that a foreign bondsman must comply with this article in seeking the rearrest of his principal was so "unexpected" under preexisting law as to prevent its application retroactively. *Lopez v. McCotter*, 875 F.2d 273 (10th Cir.), cert. denied, 493 U.S. 996, 110 S. Ct. 549, 107 L. Ed. 2d 546 (1989).

## 31-4-15. Commitment to await requisition; bail.

If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under Section 6 [31-4-6 NMSA 1978], that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time not exceeding thirty days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section [31-4-16 NMSA 1978], or until he shall be legally discharged.

**History: Laws 1937, ch. 65, § 15; 1941 Comp., § 42-1915; 1953 Comp., § 41-19-15.**

**ANNOTATIONS**

**Constitutional basis for extradition not contingent upon right to speedy trial.** — United States Const., art. IV, § 2, the basis for extradition, by its terms, is not made contingent upon a sixth amendment right to a speedy trial. *State v. Sandoval*, 1980-NMSC-139, 95 N.M. 254, 620 P.2d 1279.

**Concepts of res judicata, double jeopardy and estoppel do not apply** to extradition proceedings and are not within the purview of inquiry in an extradition proceeding. *State v. Sandoval*, 1980-NMSC-139, 95 N.M. 254, 620 P.2d 1279.



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**No bail for parole violators under interstate compact.** — The extradition statutes, this section and Section 31-4-16 NMSA 1978, provide for bail in certain instances. These provisions for bail, however, would not apply in the case where the parole board is investigating a parolee being held in jail for parole violation under the terms of the interstate compact. 1957-58 Op. Att'y Gen. No. 57-33.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition § 58 to 62.

35 C.J.S. Extradition § 67.

## 31-4-16. Bail; in what cases; conditions of bond.

Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, and for his surrender, to be arrested upon the warrant of the governor of this state.

**History: Laws 1937, ch. 65, § 16; 1941 Comp., § 42-1916; 1953 Comp., § 41-19-16.**

ANNOTATIONS

**Prisoner is not entitled to bail after governor's extradition warrant has been served.** *State ex rel. Schiff v. Brennan*, 1983-NMSC-042, 99 N.M. 641, 662 P.2d 642.

**No bail for parole violators under interstate compact.** — The extradition statutes, this section and Section 31-4-15 NMSA 1978, provide for bail in certain instances. These provisions for bail, however, would not apply in the case where the parole board is investigating a parolee being held in jail for parole violation under the terms of the interstate compact. 1957-58 Op. Att'y Gen. No. 57-33.

**But otherwise for parolees not under compact.** — It may be that an out-of-state parolee not under the parole board's supervision under the terms of the interstate compact may be entitled to bail under the extradition provisions. 1957-58 Op. Att'y Gen. No. 57-33.

**When right to bail governed by laws of sister state.** — New Mexico Const., art. II, § 13, affords the right to bail to all persons charged with or convicted of crime under the laws of the state of New Mexico. A fugitive from justice is charged with or convicted of crime under the laws of a sister state; therefore, it is the constitution and laws of that state which should dictate whether the right to bail exists and in what form. 1974 Op. Att'y Gen. No. 74-38.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition § 63, 66, 121.

Bond to indemnify public against expense of extradition or other criminal proceedings in event they are unsuccessful as contrary to public policy, 94 A.L.R. 355.

Right of extraditee to bail after issuance of governor's warrant and pending final disposition of habeas corpus claim, 13 A.L.R.5th 118.

35 C.J.S. Extradition § 18.

## 31-4-17. Extension of time of commitment, adjournment.

If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed sixty days, or a judge or magistrate judge may again take bail for his appearance and surrender, as provided in Section 16 [31-4-16 NMSA 1978], but within a period not to exceed sixty days after the date of such new bond.

**History: Laws 1937, ch. 65, § 17; 1941 Comp., § 42-1917; 1953 Comp., § 41-19-17.**

ANNOTATIONS

**Constitutional basis for extradition not contingent upon right to speedy trial.** — United States Const., art. IV, § 2, the basis for extradition, by its terms, is not made contingent upon a sixth amendment right to a speedy trial. *State v. Sandoval*, 1980-NMSC-139, 95 N.M. 254, 620 P.2d 1279.

**Concepts of res judicata, double jeopardy and estoppel do not apply** to extradition proceedings and are not within the purview of inquiry in an extradition proceeding. *State v. Sandoval*, 1980-NMSC-139, 95 N.M. 254, 620 P.2d 1279.

## 31-4-18. Forfeiture of bail.

If the prisoner is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate, by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within this state. Recovery may be had on such bond in the name of the state as in the case of other bonds given by the accused in criminal proceedings within this state.

**History: Laws 1937, ch. 65, § 18; 1941 Comp., § 42-1918; 1953 Comp., § 41-19-18.**



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## 31-4-19. Persons under criminal prosecution in this state at time of requisition.

If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.

**History: Laws 1937, ch. 65, § 19; 1941 Comp., § 42-1919; 1953 Comp., § 41-19-19.**

**Cross references.** — For obtaining a person detained in another state, under prosecution or conviction, *see* 31-4-5 NMSA 1978.

For nonwaiver by New Mexico, *see* 31-4-23 NMSA 1978.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 C.J.S. Extradition § 15.

## 31-4-20. Guilt or innocence of accused, when inquired into.

The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.

**History: Laws 1937, ch. 65, § 20; 1941 Comp., § 42-1920; 1953 Comp., § 41-19-20.**

ANNOTATIONS

**Defendant's guilt or innocence reserved for courts of demanding state.** — Questions relating to the guilt or innocence of the defendant for the crime charged in the demanding state, logically, are reserved for the courts of the demanding state and may not be inquired into by the courts of the asylum state except for the identity of the person held as being the person charged with the crime. *State v. Sandoval*, 1980-NMSC-139, 95 N.M. 254, 620 P.2d 1279.

**Asylum state may not adjudicate defendant's right to speedy trial.** — An asylum state, in extradition proceedings, is without authority to adjudicate the defendant's right to a speedy trial in the demanding state upon charges lodged against him there. *State v. Sandoval*, 1980-NMSC-139, 95 N.M. 254, 620 P.2d 1279.

**Concepts of res judicata, double jeopardy and estoppel do not apply** to extradition proceedings and are not within the purview of inquiry in an extradition proceeding. *State v. Sandoval*, 1980-NMSC-139, 95 N.M. 254, 620 P.2d 1279.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition §§ 127 to 143.

Necessity and sufficiency of identification of accused as the person charged, to warrant extradition, 93 A.L.R.2d 912.

Necessity that demanding state show probable cause to arrest fugitive in extradition proceedings, 90 A.L.R.3d 1074.

Modern status of rule relating to jurisidictional of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake, 25 A.L.R.4th 157.

35 C.J.S. Extradition § 29.

## 31-4-21. Governor may recall warrant or issue alias.

The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

**History: Laws 1937, ch. 65, § 21; 1941 Comp., § 42-1921; 1953 Comp., § 41-19-21.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition § 122.

## 31-4-22. Written waiver of extradition proceedings.

Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in Sections 31-4-7 and 31-4-8 NMSA 1978 and all other procedure incidental to extradition proceedings by executing or subscribing in the presence of a magistrate or a judge of a magistrate court or of any court of record within this state a writing which states that he consents to return to the demanding state; provided, however, that before such waiver shall be executed or subscribed by such



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person it shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in Section 31-4-10 NMSA 1978.

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent; provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this state.

**History: Laws 1937, ch. 65, § 25a; 1941 Comp., § 42-1922; 1953 Comp., § 41-19-22; 1981, ch. 258, § 1.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition § 54, 55, 57.

## 31-4-23. Nonwaiver by this state.

Nothing in this act [31-4-1 to 31-4-30 NMSA 1978] contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for crime committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this state, nor shall any proceedings had under this act which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdiction in any way whatsoever.

**History: Laws 1937, ch. 65, § 25b; 1941 Comp., § 42-1923; 1953 Comp., § 41-19-23.**

**Cross references.** — For criminal prosecution pending in this state, *see* 31-4-19 NMSA 1978.

ANNOTATIONS

**Prosecution continues upon defendant's return.** — Jurisdiction to prosecute on forgery charge was not waived when defendant, prior to trial for the charge, was extradited under this section and subsequently returned to the state. *State v. Blankenship*, 1968-NMCA-026, 79 N.M. 178, 441 P.2d 218.

## 31-4-24. Fugitives from this state; duty of governors.

Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state, from the executive authority of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

**History: Laws 1937, ch. 65, § 22; 1941 Comp., § 42-1924; 1953 Comp., § 41-19-24.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition §§ 95 to 103, 114 to 122.
35 C.J.S. Extradition §§ 35, 36.

## 31-4-25. Application for issuance of requisition; by whom made; contents.

A. When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for



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the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein, at the time the application is made and certifying that, in the opinion of the said prosecuting attorney, the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

B. When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

C. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition.

**History: Laws 1937, ch. 65, § 23; 1941 Comp., § 42-1925; 1953 Comp., § 41-19-25.**

## 31-4-26. Costs and expenses.

When the punishment of the crime shall be the confinement of the criminal in the penitentiary, the expenses shall be paid out of the state treasury, on the certificate of the governor and warrant of the auditor; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed.

**History: Laws 1937, ch. 65, § 24; 1941 Comp., § 42-1926; 1953 Comp., § 41-19-26.**

**ANNOTATIONS**

**Includes extradition of juveniles.** — The costs of extraditing a juvenile from another state who stands charged in New Mexico with the commission of a crime, are governed by this section. 1973 Op. Att'y Gen. No. 73-14 (rendered under prior law, now *see* Section 32A-10-1 NMSA 1978).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 35 C.J.S. Extradition § 20.

## 31-4-27. Immunity from service of process in certain civil actions.

A person brought into this state by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings for which he is being or has been returned, until he has been convicted in the criminal proceedings, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

**History: Laws 1937, ch. 65, § 25; 1941 Comp., § 42-1927; 1953 Comp., § 41-19-27; Laws 1975, ch. 69, § 1.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 31A Am. Jur. 2d Extradition § 159.

Immunity of nonresident defendant in criminal case from service of process, 20 A.L.R.2d 163.



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## 31-4-28. No right of asylum; no immunity from other criminal prosecutions while in this state.

After a person has been brought back to this state by, or after waiver of, extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition.

**History: Laws 1937, ch. 65, § 26; 1941 Comp., § 42-1928; 1953 Comp., § 41-19-28.**

ANNOTATIONS

**Due process clause of federal constitution is not violated** by this section. 1953-54 Op. Att'y Gen. No. 53-5767.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 31A Am. Jur. 2d Extradition § 153, 157.

Right to try one for an offense other than that named in extradition proceedings, 21 A.L.R. 1405.

## 31-4-29. Interpretation.

The provisions of this act [31-4-1 to 31-4-30 NMSA 1978] shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it.

**History: Laws 1937, ch. 65, § 27; 1941 Comp., § 42-1929; 1953 Comp., § 41-19-29.**

## 31-4-30. Short title.

This act [31-4-1 to 31-4-30 NMSA 1978] may be cited as the Uniform Criminal Extradition Act.

**History: Laws 1937, ch. 65, § 30; 1941 Comp., § 42-1930; 1953 Comp., § 41-19-30.**

## 31-4-31. Transfer under treaty; governor.

When a treaty is in effect between the United States and a foreign country providing for the transfer of convicted criminal offenders who are citizens or nationals of foreign countries to the foreign countries of which they are citizens or nationals, the governor is authorized, subject to the terms of such treaty, to act on behalf of the state of New Mexico and to consent to the transfer of the convicted criminal offender.

**History: 1978 Comp., § 31-4-31, enacted by Laws 1978, ch. 156, § 1.**

# ARTICLE 5

# Interstate Compacts

Sec.
31-5-1 to 31-5-3. Repealed.
31-5-4. Western Interstate Corrections Compact; form.
31-5-5. Inmate commitment or transfer.
31-5-6. Enforcement of compact; submission of reports.
31-5-7. Board of parole; hearings within and outside state.
31-5-8. Contracts of governor; approval by board of finance.
31-5-9. Release of inmate from institution outside state; transportation to home or place of employment.
31-5-10. Interstate Compact on Mentally Disordered Offenders.
31-5-11. Compact authority.
31-5-12. Agreement on Detainers.
31-5-13. Definition.
31-5-14. Cooperation.
31-5-15. Habitual offenders.
31-5-16. Transfers.
31-5-17. Interstate Corrections Compact.
31-5-18. Secretary of corrections; powers.
31-5-19. Convicted offenders; contracts with United States attorney general.
31-5-20. Interstate Compact for Adult Offender Supervision.



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## 31-5-1 to 31-5-3. Repealed.

**Repeals.** — Laws 2001, ch. 322, art XV, repealed 31-5-1 through 31-5-3 NMSA 1978, as enacted by Laws 1937, ch. 10, §§ 1 and 2, and Laws 1959, ch. 34, § 1, regarding Uniform Act for Out-of-State Parolee Supervision, effective June 15, 2001. For provisions of the former sections, *see* the 2000 NMSA 1978 on *NMOneSource.com*.

## 31-5-4. [Western Interstate Corrections Compact; form.]

The Western Interstate Corrections Compact is enacted into law and entered into on behalf of New Mexico with any and all other states legally joining therein in a form substantially as follows:

### WESTERN INTERSTATE CORRECTIONS COMPACT

#### Article I - Purpose and Policy

The party states, desiring by common action to improve their institutional facilities and provide programs of sufficiently high quality for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on a basis of cooperation with one another, thereby serving the best interests of such offenders and of society. The purpose of this compact is to provide for the development and execution of such programs of cooperation for the confinement, treatment and rehabilitation of offenders.

#### Article II - Definitions

As used in this compact, unless the context clearly requires otherwise:

A. "state" means a state of the United States, the territory of Hawaii, or, subject to the limitation contained in Article VII, Guam.

B. "sending state" means a state party to this compact in which conviction was had.

C. "receiving state" means a state party to this compact to which an inmate is sent for confinement other than a state in which conviction was had.

D. "inmate" means a male or female offender who is under sentence to or confined in a prison or other correctional institution.

E. "institution" means any prison, reformatory or other correctional facility, including but not limited to a facility for the mentally ill or mentally defective, in which inmates may lawfully be confined.

#### Article III - Contracts

A. Each party state may make one or more contracts with any one or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states. Any such contract shall provide for:

(1) its duration.

(2) payments to be made to the receiving state by the sending state for inmate maintenance; extraordinary medical and dental expenses, and any participation in or receipts by inmates of rehabilitative or correctional services, facilities, programs or treatment not reasonably included as part of normal maintenance.

(3) participation in programs of inmate employment, if any; the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any products resulting therefrom.

(4) delivery and retaking of inmates.

(5) such other matters as may be necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving states.

B. Prior to the construction or completion of construction of any institution or addition thereto by a party state, any other party state or states may contract therewith for the enlargement of the



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planned capacity of the institution or addition thereto, or for the inclusion therein of particular equipment or structures, and for the reservation of a specific percentum of the capacity of the institution to be kept available for use by inmates of the sending state or states so contracting. Any sending state so contracting may, to the extent that monies are legally available therefor, pay to the receiving state, a reasonable sum as consideration for such enlargement of capacity, or provision of equipment or structures, and reservation of capacity. Such payment may be in a lump sum or in installments as provided in the contract.

C. The terms and provisions of this compact shall be a part of any contract entered into by the authority of [this compact] or pursuant thereto, and nothing in any such contract shall be inconsistent therewith.

Article IV - Procedures and Rights

A. Whenever the duly constituted judicial or administrative authorities in a state party to this compact, and which has entered into a contract pursuant to Article III, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary in order to provide adequate quarters and care or desirable in order to provide an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

B. The appropriate officials of any state party to this compact shall have access, at all reasonable times, to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.

C. Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article III.

D. Each receiving state shall provide regular reports to each sending state on the inmates of that sending state in institutions pursuant to this compact including a conduct record of each inmate and certify said record to the official designated by the sending state, in order that each inmate may have the benefit of his or her record in determining and altering the disposition of said inmate in accordance with the law which may obtain in the sending state and in order that the same may be a source of information for the sending state.

E. All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be cared for and treated equally with such similar inmates of the receiving state as may be confined in the same institution. The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

F. Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state, or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearings [hearing] or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter



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except by the appropriate officials of the sending state. Costs of records made pursuant to this subdivision shall be borne by the sending state.

G. Any inmate confined pursuant to this compact shall be released within the territory of the sending state unless the inmate, and the sending and receiving states, shall agree upon release in some other place. The sending state shall bear the cost of such return to its territory.

H. Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state.

I. The parent, guardian, trustee or other person or persons entitled under the laws of the sending state to act for, advise or otherwise function with respect to any inmate shall not be deprived of or restricted in his exercise of any power in respect of any inmate confined pursuant to the terms of this compact.

### Article V - Acts Not Reviewable in Receiving State; Extradition

A. Any decision of the sending state in respect of any matter over which it retains jurisdiction pursuant to this compact shall be conclusive upon and not reviewable within the receiving state, but if at the time the sending state seeks to remove an inmate from an institution in the receiving state there is pending against the inmate within such state any criminal charge or if the inmate is suspected of having committed within such state a criminal offense, the inmate shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport inmates pursuant to this compact through any and all states party to this compact without interference.

B. An inmate who escapes from an institution in which he is confined pursuant to this compact shall be deemed a fugitive from the sending state and from the state in which the institution is situated. In the case of an escape to a jurisdiction other than the sending or receiving state, the responsibility for institution of extradition proceedings shall be that of the sending state, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

### Article VI - Federal Aid

Any state party to this compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this compact or any contract pursuant hereto and any inmate in a receiving state pursuant to this compact may participate in any such federally aided program or activity for which the sending and receiving states have made contractual provision provided that if such program or activity is not part of the customary correctional regimen the express consent of the appropriate official of the sending state shall be required therefor.

### Article VII - Entry into Force

This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two contiguous states from among the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. For the purposes of this article, Alaska and Hawaii shall be deemed contiguous to each other; to any and all of the states of California, Oregon and Washington; and to Guam. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states, or any other state contiguous to at least one party state upon similar action by such state. Guam may become party to this compact by taking action similar to that provided for joinder by any other eligible party state and upon the consent of congress to such joinder. For the purposes of this article, Guam shall be deemed contiguous to Alaska, Hawaii, California, Oregon and Washington.



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Article VIII - Withdrawal and Termination

This compact shall continue in force and remain binding upon a party state until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal shall not take effect until two years after the notices provided in said statute have been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this compact.

Article IX - Other Arrangements Unaffected

Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the confinement, rehabilitation or treatment of inmates nor to repeal any other laws of a party state authorizing the making of cooperative institutional arrangements.

Article X - Construction and Severability

The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

**History: 1953 Comp., § 41-20-11, enacted by Laws 1959, ch. 112, § 1.**

**Cross references.** — For filing interstate compacts with supreme court librarian, *see* 14-3-20 NMSA 1978.

ANNOTATIONS

**Interstate compacts are specifically treated in Section 14-3-20 NMSA 1978 (interstate compacts).** *State v. Ellis*, 95 N.M. 427, 1980-NMCA-187, 622 P.2d 1047, cert. denied, 95 N.M. 426, 622 P.2d 1046.

**Scope of court's authority to order transfer.** — New Mexico courts do not have the authority under the western interstate corrections compact and accompanying statutes to order the transfer of a prisoner from New Mexico to a neighboring state when that prisoner has not alleged any constitutional violations and instead seeks transfer due to a desire to be near his parents and an unproven fear of other prisoners. *State v. Tarver*, 2005-NMCA-030, 137 N.M. 115, 108 P.3d 1.

**State Rules Act, Section 14-4-1 NMSA 1978, et seq.,** is inapplicable to interstate agreements. *State v. Ellis*, 1980-NMCA-187, 95 N.M. 427, 622 P.2d 1047 (Ct. App.), cert. denied, 95 N.M. 426, 622 P.2d 1046.

**State does not have valid transfer agreement within Arizona.** — Due to the fact that an exhaustive search of the supreme court library found only one contract for a term from April 24, 1973, to June 30, 1974, and a renewal for July 1, 1975, to June 30, 1976, New Mexico does not have a valid agreement with Arizona concerning transfers of prisoners. *State v. Ellis*, 1980-NMCA-187, 95 N.M. 427, 622 P.2d 1047, cert. denied, 95 N.M. 426, 622 P.2d 1046.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 60 Am. Jur. 2d Penal and Correctional Institutions §§ 148 to 152.

Right of state or federal prisoner to credit for time served in another jurisdiction before delivery to state or federal authorities, 18 A.L.R.2d 511, 90 A.L.R.3d 408.

## 31-5-5. Inmate commitment or transfer.

The secretary of corrections may commit or transfer an inmate to any institution in or outside New Mexico if New Mexico has entered into a contract or contracts for the confinement of inmates in the institution pursuant to Article III of the Western Interstate Corrections Compact [31-5-4 NMSA 1978].

**History: 1953 Comp., § 41-20-12, enacted by Laws 1959, ch. 112, § 2; 1985, ch. 119, § 1.**

**The 1985 amendment,** effective April 2, 1985, added the catchline, substituted "The secretary of corrections" for "Any court or other agency or officer of this state



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having power to commit or transfer an inmate (as defined in Article II(d) of the Western Interstate Corrections Compact) to any institution for confinement" at the beginning of the section and substituted "an inmate" for "the inmate" following "transfer."

## 31-5-6. [Enforcement of compact; submission of reports.]

The courts, departments, agencies and officers of New Mexico and its subdivisions shall enforce this compact [31-5-4 NMSA 1978] and do all things appropriate to the effectuation of its purposes and intent which may be within their respective jurisdictions including but not limited to the making and submission of reports required by the compact.

**History: 1953 Comp., § 41-20-13, enacted by Laws 1959, ch. 112, § 3.**

## 31-5-7. [Board of parole; hearings within and outside state.]

The New Mexico board of parole is authorized to hold hearings within and outside New Mexico pursuant to Article IV (F) of the Western Interstate Corrections Compact [31-5-4 NMSA 1978].

**History: 1953 Comp., § 41-20-14, enacted by Laws 1959, ch. 112, § 4.**

**Cross references.** — For state board of probation and parole referring to corrections division of the criminal justice department, *see* 33-1-7 NMSA 1978.

## 31-5-8. [Contracts of governor; approval by board of finance.]

The governor may enter into contracts on behalf of New Mexico to implement the participation of this state in the Western Interstate Corrections Compact pursuant to Article III of the compact [31-5-4 NMSA 1978], provided that any contract entered into by the governor must be approved by the state board of finance before the same shall be binding.

**History: 1953 Comp., § 41-20-15, enacted by Laws 1959, ch. 112, § 5.**

## 31-5-9. [Release of inmate from institution outside state; transportation to home or place of employment.]

If an inmate is released from an institution outside of New Mexico, pursuant to Article IV (G) of the compact [31-5-4 NMSA 1978], the superintendent of the penitentiary shall provide him with transportation to either his home or place of employment if in New Mexico, or if neither of these is applicable to any point in New Mexico selected by the inmate.

**History: 1953 Comp., § 41-20-16, enacted by Laws 1959, ch. 112, § 6.**

**Severability.** — Laws 1959, ch. 112, § 7, provided for the severability of the act if any part or application thereof is held invalid.

## 31-5-10. Interstate Compact on Mentally Disordered Offenders.

The Interstate Compact on Mentally Disordered Offenders is entered into with all other jurisdictions legally joining therein in a form substantially as follows:

INTERSTATE COMPACT ON MENTALLY DISORDERED OFFENDERS

Article 1 - Purpose and Policy

A. The party states, desiring by common action to improve their programs for the care and treatment of mentally disordered offenders, declare that it is the policy of each of the party states to:



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(1) strengthen their own programs and laws for the care and treatment of the mentally disordered offender;

(2) encourage and provide for such care and treatment in the most appropriate locations, giving due recognition to the need to achieve adequacy of diagnosis, care, treatment, aftercare and auxiliary services and facilities and, to every extent practicable, to do so in geographic locations convenient for providing a therapeutic environment;

(3) authorize cooperation among the party states in providing services and facilities, when it is found that cooperative programs can be more effective and efficient than programs separately pursued;

(4) place such mentally disordered offender in a legal status which will facilitate his care, treatment and rehabilitation;

(5) authorize research and training of personnel on a cooperative basis in order to improve the quality or quantity of personnel available for the proper staffing of programs, services and facilities for mentally disordered offenders; and

(6) care for and treat mentally disordered offenders under conditions which will improve the public safety.

B. Within the policies set forth in this article, it is the purpose of this compact to:

(1) authorize negotiation, entry into and operations under contractual arrangements among any two or more of the party states for the establishment and maintenance of cooperative programs in any one or more of the fields for which specific provision is made in the several articles of this compact;

(2) set the limits within which such contracts may operate, so as to assure protection of the civil rights of mentally disordered offenders and protection of the rights and obligations of the public and of the party states; and

(3) facilitate the proper disposition of criminal charges pending against mentally disordered offenders, so that programs for their care, treatment and rehabilitation may be carried on efficiently.

Article 2 - Definitions

As used in this compact:

A. "mentally disordered offender" means a person who has been determined, by adjudication or other method legally sufficient for the purpose in the party state where the determination is made, to be mentally ill and:

(1) is under sentence for the commission of crime; or

(2) who is confined or committed on account of the commission of an offense for which, in the absence of mental illness, the person would be subject to incarceration in a penal or correctional facility;

B. "patient" means a mentally disordered offender who is cared for, treated or transferred pursuant to this compact;

C. "sending state" means a state party to this compact in which the mentally disordered offender was convicted; or the state in which he would be subject to trial on or conviction of an offense except for his mental condition; or, within the meaning of Article 5 of this compact, the state whose authorities have filed a petition in connection with an untried indictment, information or complaint; and

D. "receiving state" means a state party to this compact to which a mentally disordered offender is sent for care, aftercare, treatment or rehabilitation, or within the meaning of Article 5 of this compact, the state in which a petition in connection with an untried indictment, information or complaint has been filed.

Article 3 - Contracts

A. Each party state may make one or more contracts with any one or more of the other party states for the care and treatment of mentally disordered offenders on behalf of a sending state in facilities situated in receiving states, or for the participation of mentally disordered offenders in programs of aftercare on conditional release administered by the receiving state. Any such contract shall provide for:



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(1) its duration;

(2) payments to be made to the receiving state by the sending state for patient care, treatment and extraordinary services, if any;

(3) determination of responsibility for ordering or permitting the furnishing of extraordinary services, if any;

(4) participation in compensated activities, if any, available to patients, the disposition or crediting of any payment received by patients on account thereof and the crediting of proceeds from or disposal of any products resulting therefrom;

(5) delivery and retaking of mentally disordered offenders; and

(6) other matters as necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving states.

B. Prior to the construction or completion of construction of any facility for mentally disordered offenders or addition to such facility by a party state, any other party state or states may contract therewith for the enlargement of the planned capacity of the facility or addition thereto, or for the inclusion therein of particular equipment or structures, and for the reservation of a specific percentage of the capacity of the facility to be kept available for use by patients of the sending state or states so contracting. Any sending state so contracting may, to the extent that money is legally available therefor, pay to the receiving state a reasonable sum as consideration for such enlargement of capacity or provision of equipment or structures and reservation of capacity. The payment may be in a lump sum or in installments as provided in the contract.

C. A party state may contract with any one or more other party states for the training of professional or other personnel whose services, by reason of such training, would become available for or be improved in respect of ability to participate in the care and treatment of mentally disordered offenders. Such contracts may provide for such training to take place at any facility being operated or to be operated for the care and treatment of mentally disordered offenders, at any institution or facility having resources suitable for the offering of such training or may provide for the separate establishment of training facilities, provided that no separate establishment shall be undertaken unless it is determined that an appropriate existing facility or institution cannot be found at which to conduct the contemplated program. Any contract entered into pursuant to this subarticle shall provide for:

(1) the administration, financing and precise nature of the program;

(2) the status and employment or other rights of the trainees; and

(3) all other necessary matters.

D. No contract entered into pursuant to this compact shall be inconsistent with any provision thereof.

## Article 4 - Procedures and Rights

A. Whenever the duly constituted judicial or administrative authorities in a state party to this compact, and which has entered into a contract pursuant to Article 3, decide that custody, care and treatment in, or transfer of a patient to, a facility within the territory of another party state, or conditional release for aftercare in another party state is necessary in order to provide adequate care and treatment or is desirable in order to provide an appropriate program of therapy or other treatment, or is desirable for clinical reasons, said officials may direct that the custody, care and treatment be within a facility or in a program of aftercare within the territory of the other party state, the receiving state to act in that regard solely as agent for the sending state.

B. The appropriate officials of any state party to this compact shall have access at all reasonable times to any facility in which it has a contractual right to secure care or treatment of patients for the purpose of inspection and visiting such of its patients as may be in the facility or served by it.

C. Except as otherwise provided in Article 6, patients in a facility pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed for transfer to a facility within the sending state, for transfer to another facility in which the sending state may have a contractual or other right to secure care and treatment of patients, for release on aftercare or other conditional status, for discharge or for any other purpose permitted by the laws of the sending state, provided that the sending state shall continue to be obligated



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to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article 3.

D. Each receiving state shall provide regular reports to each sending state on the patients of that sending state in facilities pursuant to this compact, including a psychiatric and behavioral record of each patient, and certify the record to the official designated by the sending state in order that each patient may have the benefit of his or her record in determining and altering the disposition of the patient in accordance with the law which may obtain in the sending state and in order that the record may be a source of information for the sending state.

E. All patients who may be in a facility or receiving aftercare from a facility pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be cared for, treated and supervised in accordance with the standards pertaining to the program administered at the facility. The fact of presence in a receiving state shall not deprive any patient of any legal rights which the patient would have had if in custody or receiving care, treatment or supervision as appropriate in the sending state.

F. Any hearing or hearings to which a patient present in a receiving state pursuant to this compact may be entitled by the laws of the sending state shall be had before the appropriate authorities of the sending state, or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. The record, together with any recommendations of the hearing officials, shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In all proceedings pursuant to the provisions of this subarticle, the officials of the receiving state shall act solely as agents of the sending state, and no final determination shall be made in any matter except by the appropriate officials of the sending state. Costs of records made pursuant to this subarticle shall be borne by the sending state.

G. Any patient confined pursuant to this compact shall be released within the territory of the sending state unless the patient and the sending and receiving states agree upon release in some other place. The sending state shall bear the cost of such return to its territory.

H. Any patient pursuant to the terms of this compact shall be subject to civil process and shall have all rights to sue, be sued and participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if in any appropriate facility of the sending state or being supervised therefrom, as the case may be, located within such state.

I. The parent, guardian, trustee or other person or persons entitled under the laws of the sending state to act for, advise or otherwise function with respect to any patient shall not be deprived of, or restricted in his exercise of, any power in respect of any patient pursuant to the terms of this compact.

### Article 5 - Disposition of Charges

A. Whenever the authorities responsible for the care and treatment of a mentally disordered offender, whether convicted or adjudicated in the state or subject to care, aftercare, treatment or rehabilitation pursuant to a contract, are of the opinion that charges based on untried indictments, informations or complaints in another party state present obstacles to the proper care and treatment of a mentally disordered offender or to the planning or execution of a suitable program for him, such authorities may petition the appropriate court in the state where the untried indictment, information or complaint is pending for prompt disposition thereof. If the mentally disordered offender is a patient in a receiving state, the appropriate authorities of the sending state, upon recommendation of the appropriate authorities in the receiving state, shall, if they concur in the recommendation, file the petition contemplated by this subarticle.

B. The court shall hold a hearing on the petition within thirty days of the filing thereof. The hearing shall be only to determine whether the proper safeguarding and advancement of the public interest, the condition of the mentally disordered offender and the prospects for more satisfactory



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care, treatment and rehabilitation of him warrant disposition of the untried indictment, information or complaint prior to termination of the defendant's status as a mentally disordered offender in the sending state. The prosecuting officer of the jurisdiction from which the untried indictment, information or complaint is pending, the petitioning authorities and such other persons as the court may determine shall be entitled to be heard.

C. Upon any hearing pursuant to this article, the court may order such adjournments or continuances as may be necessary for the examination or observation of the mentally disordered offender or for the securing of necessary evidence. In granting or denying any such adjournment or continuance, the court shall give primary consideration to the purposes of this compact, and more particularly to the need for expeditious determination of the legal and mental status of a mentally disordered offender so that his care, treatment and discharge to the community only under conditions which will be consonant with the public safety may be implemented.

D. The presence of a mentally disordered offender within a state wherein a petition is pending or being heard pursuant to this article, or his presence within any other state through which he is being transported in connection with such petition or hearing, shall be only for the purposes of this compact, and no court, agency or person shall have or obtain jurisdiction over the mentally disordered offender for any other purpose by reason of his presence pursuant to this article. The mentally disordered offender shall, at all times, remain in the custody of the sending state. Any acts of officers, employees or agencies of the receiving state in providing or facilitating detention, housing or transportation for the mentally disordered offender shall be only as agents for the sending state.

E. Promptly upon conclusion of the hearing, the court shall dismiss the untried indictment, information or complaint, if it finds that the purposes enumerated in Subarticle B of this article would be served thereby. Otherwise, the court shall make such order with respect to the petition and the untried indictment, information or complaint as may be appropriate in the circumstances and consistent with the status of the defendant as a mentally disordered offender in the custody of, and subject to the jurisdiction of, the sending state.

F. No fact or other matter established or adjudicated at any hearing pursuant to this article or in connection therewith shall be deemed established or adjudicated, nor shall the same be admitted in evidence, in any subsequent prosecution of the untried indictment, information or complaint concerned in a petition filed pursuant to this article unless:

(1) the defendant or his duly empowered legal representative requested or expressly acquiesced in the making of the petition, and was afforded an opportunity to participate in person in the hearing; or

(2) the defendant himself offers or consents to the introduction of the determination or adjudication at such subsequent proceedings.

### Article 6 - Acts Not Reviewable in Receiving State; Return

A. Any decision of the sending state in respect of any matter over which it retains jurisdiction pursuant to this compact shall be conclusive upon, and not reviewable within, the receiving state, but, if at the time the sending state seeks to remove a patient from the receiving state, there is pending against the patient within such state any criminal charge, or if the patient is suspected of having committed within such state a criminal offense, the patient shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport patients pursuant to this compact through all states party to this compact without interference.

B. A patient who escapes while receiving care and treatment, or who violates provisions of aftercare by leaving the jurisdiction, or while being detained or transported pursuant to this compact, shall be deemed an escapee from the sending state and from the state in which the facility is situated or the aftercare was being provided. In the case of an escape to a jurisdiction other than the sending or receiving state, the responsibility for return shall be that of the sending state, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.



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### Article 7 - Federal Aid

Any state party to this compact may accept federal aid for use in connection with any facility or program, the use of which is or may be affected by this compact or any contract pursuant thereto, and any patient in a receiving state pursuant to this compact may participate in any such federally aided program or activity for which the sending and receiving states have made contractual provision, provided that, if such program or activity is not part of the customary regimen of the facility or program, the express consent of the appropriate official of the sending state shall be required therefor.

### Article 8 - Entry into Force

This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two states from among the states of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota and Wisconsin. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states, or any other state, upon similar action by such state.

### Article 9 - Withdrawal and Termination

This compact shall continue in force and remain binding upon a party state until it has enacted a statute repealing the compact and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal shall not take effect until two years after the notices provided in the statute have been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such patients as it may have in other party states pursuant to the provisions of this compact.

### Article 10 - Other Arrangements Unaffected

Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the custody, care, treatment, rehabilitation or aftercare of patients, nor to repeal any other laws of a party state authorizing the making of cooperative arrangements.

### Article 11 - Construction and Severability

The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, or sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States, or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact is held contrary to the constitution of any state participating therein, the compact shall remain in effect as to the remaining states and in effect as to the state affected as to all severable matters.

**History: 1953 Comp., § 41-20-17, enacted by Laws 1967, ch. 201, § 1.**

**Cross references.** — For filing interstate compacts with supreme court librarian, *see* 14-3-20 NMSA 1978.

**ANNOTATIONS**

**Rights not created.** — Provisions relating to mechanisms by which corrections officials can arrange to transfer inmates needing psychiatric care to an appropriate facility were not meant to create rights enforceable by inmates against state officials; thus, this section did not create a liberty interest subject to due process protections. *Riddle v. Mondragon*, 83 F.3d 1197 (10th Cir. 1996).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 53 Am. Jur. 2d Mentally Incompetent Persons § 1 et seq.

Extraterritorial effect and recognition of adjudication of competency or incompetency, sanity or insanity, 102 A.L.R. 444.

Prejudicial effect of argument or comment that accused, if acquitted on ground of insanity, would be released from institution to which committed, 44 A.L.R.2d 978.

Right, without judicial proceeding, to arrest and detain one who is, or is suspected of being, mentally deranged, 92 A.L.R.2d 570.

Release of one committed to institution as consequence of acquittal of crime on ground of insanity, 95 A.L.R.2d 54.



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Instructions in criminal case in which defendant pleads insanity as to his hospital confinement in the event of acquittal, 11 A.L.R.3d 737, 81 A.L.R.4th 659.

Appealability of orders or rulings, prior to final judgment in criminal case, as to accused's mental competency, 16 A.L.R.3d 714.

Validity of statutory provision for commitment to mental institution of one acquitted of crime on ground of insanity without formal determination of mental condition at time of acquittal, 50 A.L.R.3d 144.

Validity of statutes authorizing asexualization or sterilization of criminals or mental defectives, 53 A.L.R.3d 960.

Jurisdiction of court to permit sterilization of mentally defective person in absence of specific statutory authority, 74 A.L.R.3d 1210.

Right to relief under Federal Civil Rights Act of 1871 (42 U.S.C. § 1983) for alleged wrongful commitment to or confinement in mental hospital, 16 A.L.R. Fed. 440.

## 31-5-11. Compact authority.

The governor may negotiate and enter into contracts on behalf of this state pursuant to Article 3 of the Interstate Compact on Mentally Disordered Offenders [31-5-10 NMSA 1978] and may perform the contracts. No funds, personnel, facilities, equipment, supplies or materials shall be pledged for, committed or used on account of any such contract unless legally available therefor.

**History: 1953 Comp., § 41-20-18, enacted by Laws 1967, ch. 201, § 2.**

## 31-5-12. Agreement on Detainers.

The Agreement on Detainers is entered into with all other jurisdictions legally joining therein in a form substantially as follows:

AGREEMENT ON DETAINERS

Article 1 - Findings

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article 2 - Definitions

As used in this agreement:

A. "state" means a state of the United States, the United States, a territory or possession of the United States, the District of Columbia or the commonwealth of Puerto Rico;

B. "sending state" means a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article 3 of this agreement or at the time that a request for custody or availability is initiated pursuant to Article 4 of this agreement; and

C. "receiving state" means the state in which trial is to be had on an indictment, information or complaint pursuant to Article 3 or Article 4 of this agreement.

Article 3 - Prisoner's Request for Final Disposition

A. Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he has caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment



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and his request for a final disposition to be made of the indictment, information or complaint, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner and any decisions of the state parole agency relating to the prisoner.

B. The written notice and request for final disposition referred to in Subarticle A shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

C. The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

D. Any request for final disposition made by a prisoner pursuant to Subarticle A shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this subarticle shall be accompanied by copies of the prisoner's written notice, request and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

E. Any request for final disposition made by a prisoner pursuant to Subarticle A shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of Subarticle D, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this subarticle shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

F. Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in Subarticle A shall void the request.

Article 4 - Prosecutor's Request for Final Disposition

A. The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending is entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article 5 A of this agreement upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated, but the court having jurisdiction of the indictment, information or complaint shall have duly approved, recorded and transmitted the request, and there shall be a period of thirty days after receipt by the appropriate authorities before the request is honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

B. Upon receipt of the officer's written request as provided in Subarticle A, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time



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remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

C. In respect of any proceeding made possible by this article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

D. Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in Subarticle A, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

E. If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article 5 E of this agreement, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Article 5 - Transfer of Custody

A. In response to a request made under Article 3 or Article 4 of this agreement, the appropriate authority in a sending state shall offer to deliver temporary custody of the prisoner to the appropriate authority in the state where the indictment, information or complaint is pending against the person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article 3 of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

B. The officer or other representative of a state accepting an offer of temporary custody shall present upon demand:

(1) proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given; and

(2) a certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

C. If the appropriate authority refuses or fails to accept temporary custody of the person, or if an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article 3 or Article 4 of this agreement, the appropriate court of the jurisdiction where the indictment, information or complaint had been pending shall enter an order dismissing it with prejudice, and any detainer based thereon shall cease to be of any force or effect.

D. The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

E. At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

F. During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.



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G. For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

H. From the time that a party state receives custody of a prisoner pursuant to this agreement until the prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this subarticle govern unless the states concerned have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of an [and] in the government of a party state or between a party state and its subdivisions as to the payment of costs or responsibilities therefor.

### Article 6 - Application

A. In determining the duration and expiration dates of the time periods provided in Articles 3 and 4 of this agreement, the running of the time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

B. No provision of this agreement and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

### Article 7 - Compact Administrator

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

### Article 8 - Party States

This agreement shall enter into full force and effect as to a party state when such state has enacted the agreement into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing this agreement. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time the withdrawal takes effect, nor shall it affect their rights in respect thereof.

### Article 9 - Construction

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable, and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

**History: 1953 Comp., § 41-20-19, enacted by Laws 1971, ch. 270, § 1.**

**Cross references.** — For filing interstate compacts with supreme court librarian, *see* 14-3-20 NMSA 1978.

**ANNOTATIONS**

**Not applicable to parolees.** — The interstate agreement on detainers does not apply to parolees. *State v. Frohnhofer*, 2011-NMCA-109, 150 N.M. 643, 267 P.3d 78, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

Where the state of New Mexico lodged a detainer against defendant; defendant requested a final disposition of the detainer; prior to the 180-day deadline, defendant was paroled in Colorado; and defendant's trial did not commence before the 180-deadline, the district court properly denied defendant's motion to dismiss, because the interstate agreement on detainers did not apply to defendant who



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was a parolee. *State v. Frohnhofer*, 2011-NMCA-109, 150 N.M. 643, 267 P.3d 78, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

**Applicability.** — The Interstate Agreement on Detainers Act is an agreement between the governments of member states. The federal government also subscribes to the act and, for purposes of it, is considered a single state. It applies to transfers between states, not transfers within a state. Hence, it has no application if a prisoner in federal custody in one federal judicial district faces another federal indictment in a different federal judicial district. *U.S. v. Walling*, 974 F.2d 140 (10th Cir. 1992).

**Applicability.** — The provisions of the Interstate Agreement on Detainers Act do not apply to pretrial detainees. *U.S. v. Muniz*, 1 F.3d 1018 (10th Cir. 1993)

**Agreement not applicable where detainer for sentencing only.** — A request for the disposition of an outstanding sentencing is not cognizable under the Interstate Agreement on Detainers; the 180-day requirement of Paragraph A of Article 3 applies only where a detainer for "trial" is present, not where the detainer is only for sentencing. *State v. Sparks*, 1986-NMCA-010, 104 N.M. 62, 716 P.2d 253, cert. denied, 103 N.M. 798, 715 P.2d 71.

**Probation and parole proceedings.** — This section does not apply to probation revocation proceedings. *State v. McDonald*, 1991-NMCA-132, 113 N.M. 305, 825 P.2d 238, cert. denied, 113 N.M. 44, 822 P.2d 1127 (1992).

**Probation and parole proceedings.** — The Interstate Agreement on Detainers Act applies only to detainers lodged on untried criminal charges and has no applicability to probation or parole revocation detainers. *McDonald v. N.M. Parole Bd.*, 955 F.2d 631 (10th Cir. 1991), cert. denied, 504 U.S. 920, 112 S. Ct. 1968, 118 L. Ed. 2d 568 (1992).

**Prisoner's burden of substantial compliance.** — Where a prisoner bypasses the statutory procedure and attempts to communicate directly with the receiving state, absent actual notice by the receiving state, he or she has the burden of complying substantially with the requirements of the Interstate Agreement on Detainers Act. *State v. Tarango*, 1987-NMCA-027, 105 N.M. 592, 734 P.2d 1275, cert. denied, 105 N.M. 521, 734 P.2d 761, *overruled on other grounds by Zurla v. State*, 1990-NMSC-011, 109 N.M. 640, 789 P.2d 588.

**Substantial compliance.** — Substantial compliance for purposes of the Interstate Agreement on Detainers Act means the prisoner must file the proper documents, including the certificate of status, with the proper prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction, using registered or certified mail, return receipt requested. *State v. Tarango*, 1987-NMCA-027, 105 N.M. 592, 734 P.2d 1275, cert. denied, 105 N.M. 521, 734 P.2d 761, *overruled on other grounds by Zurla v. State*, 1990-NMSC-011, 109 N.M. 640, 789 P.2d 588.

The defendant failed to meet the requirements of this section since his petition for a writ of habeas corpus requesting revocation of the Arizona arrest warrant and removal of detainer did not constitute a request for final disposition of detainer, and there was no evidence that he gave actual notice to Arizona, or otherwise substantially complied with the statutory requirements. *Palmer v. Williams*, 1995-NMSC-040, 120 N.M. 63, 897 P.2d 1111.

The defendant's letter to the district attorney's office stating, "Were you to file a detainer . . . , I could request final disposition" was inadequate to activate his rights under the Interstate Agreement for Detainers Act. *State v. Morawe*, 1996-NMCA-110, 122 N.M. 489, 927 P.2d 44.

**Actual notice of critical information required.** — While the defendant did not have to furnish the certificate required by Paragraph A of Article 3 to give the prosecutor and the district court actual notice, he did have an obligation to furnish the information that would be contained therein. Since the county prosecutor and the district court did not have actual notice of critical information, such as the fact that the defendant was presently incarcerated in the Texas penal complex, the defendant was not relieved of his burden of substantially complying with the requirements of this agreement. *State v. Smith*, 1993-NMCA-070, 115 N.M. 749, 858 P.2d 416, cert. denied, 115 N.M. 795, 858 P.2d 1274.

**Invocation of protections.** — Writs of habeas corpus ad prosequendum will not, by themselves, invoke the protections of the Interstate Agreement on Detainers. *State v. Montoya*, 1994-NMCA-155, 119 N.M. 95, 888 P.2d 977, cert. denied, 119 N.M. 168, 889 P.2d 203 (1995).

**Expiration of 180-day period on Sunday.** — Where the 180-day limitation period of Paragraph A of Article 3 expires on a Sunday, a trial is timely if held the next day. *State v. Alderete*, 1980-NMCA-084, 95 N.M. 691, 625 P.2d 1208, cert. denied, 94 N.M. 674, 615 P.2d 991.

**Time limitation tolled only when prisoner unable to stand trial or on continuance for good cause.** — The time limitations of the Interstate Agreement on Detainers Act (Section 31-5-12 NMSA 1978) are intended to permit sufficient time and opportunity for the disposition of all pretrial proceedings and the commencement of trial before the time limitations expire. Time is tolled only when the prisoner is "unable to stand trial"; in all other circumstances, the mechanism for reasonably or necessarily extending the time limits is by a request for continuance "for good cause shown." *State v. Shaw*, 1982-NMCA-133, 98 N.M. 580, 651 P.2d 115.

**Evidence of "for good cause shown".** — Continuances because of the unavailability of a trial judge, where the assigned judge was elected to the supreme court and the other judges in the district had a full complement of cases, and because of a local rule which required the assignment of all cases involving a single defendant to one judge were "for good cause shown," pursuant to Paragraph A of Article 3 of this section. *State v. Aaron*, 1984-NMCA-124, 102 N.M. 187, 692 P.2d 1336.

**Good cause for continuance.** — The state had good cause to request a continuation beyond the 120-day limit for commencement of the defendant's trial based on its discovery that the grand jury that indicted the defendant included an unsworn juror, a deficiency that required additional time to correct. *State v. Livernois*, 1997-NMSC-019, 123 N.M. 128, 934 P.2d 1057.

**Continuation of trial date does not violate 180-day period.** — Where a trial has in fact been continued although there is no formal order continuing the trial date, the 180-day limitation period of Paragraph A of Article 3 is not violated. *State v. Alderete*, 1980-NMCA-084, 95 N.M. 691, 625 P.2d 1208, cert. denied, 94 N.M. 674, 615 P.2d 991.

**The timing of defendant's trial did not violate the Interstate Agreement on Detainers.** — Where defendant was charged with murder, tampering with evidence and conspiracy to commit tampering with evidence, and where defendant moved to dismiss all charges with prejudice because his trial occurred outside of the 180-day time period generally prescribed by the Interstate Agreement on Detainers (IAD) and because there was not good cause for a continuance, the district court acted within its discretion by concluding that the complexity of the case and the volume of discovery amounted to good cause for a continuance. *State v. Chavez*, 2022-NMCA-007, cert. granted.

**State's representation that it will reindict is not a de facto continuance** under Paragraph A of Article 3. *State v. Shaw*, 1982-NMCA-133, 98 N.M. 580, 651 P.2d 115.

**Time period does not commence anew upon refiling of indictment.** — A second indictment on the identical charges for which a defendant was previously returned to New Mexico for pretrial and trial proceedings cannot avoid the time restrictions of Paragraph A of Article 3 on



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the theory that the time commences anew from the filing of the second indictment. *State v. Shaw*, 1982-NMCA-133, 98 N.M. 580, 651 P.2d 115.

**When defendant's request for final disposition does not trigger 180-day rule.** — Where the defendant wrote the district attorney in Albuquerque to request a final disposition of pending Arizona charges on the same day that he pleaded guilty to California felony charges, he had not entered upon "term of imprisonment" within this section; therefore, his request did not trigger section's requirement of trial within 180 days after request for disposition of the charge. *State v. Duncan*, 1980-NMCA-162, 95 N.M. 215, 619 P.2d 1259.

**Triggering the 180-day provision.** — The Interstate Agreement for Detainers Act becomes effective only when a detainer is filed, and a letter sent by the defendant to the district attorney's office before issuance of the detainer was insufficient to trigger the 180-day trial provision. *State v. Morawe*, 1996-NMCA-110, 122 N.M. 489, 927 P.2d 44.

**Not applicable to sentencing.** — Because the Interstate Agreement on Detainers Act does not apply to sentencing and because a habitual offender proceeding addresses sentence enhancement, a defendant held in prison in another state does not have a right to a final disposition of habitual offender status within 180 days of serving a request for a final disposition. *State v. Padilla*, 2006-NMCA-070, 139 N.M. 700, 137 P.3d 640, cert. denied, 2006-NMCERT-006, 140 N.M. 224, 141 P.3d 1278.

**Waiver of time limits.** — Although the defendant did not specifically request a waiver of the Interstate Agreement on Detainers Act time limitations, such a waiver was implied from the defendant's waiver of all speedy trial time limitations. *State v. Montoya*, 1994-NMCA-155, 119 N.M. 95, 888 P.2d 977, cert. denied, 119 N.M. 168, 889 P.2d 203 (1995).

**Agreement not pertinent following absolute release of prisoner.** — When a sending state absolutely releases a prisoner within 120 days of his arrival in the receiving state, provisions of the Interstate Agreement on Detainers Act cease to be pertinent. *State v. Quiroz*, 1980-NMCA-039, 94 N.M. 517, 612 P.2d 1328, cert. denied, 94 N.M. 675, 615 P.2d 992.

**Law reviews.** — For annual survey of New Mexico criminal procedure, see 16 N.M.L. Rev. 25 (1986).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and application of interstate agreement on detainers, 98 A.L.R.3d 160.

Availability of postconviction relief under 28 USCS § 2254 based on alleged governmental violation of Interstate Agreement on Detainers Act (18 USCS Appx), 63 A.L.R. Fed. 155.

## 31-5-13. Definition.

As used in the Agreement on Detainers [31-5-12 NMSA 1978] with reference to the courts of this state, the phrase "appropriate court" means the district court.

**History: 1953 Comp., § 41-20-20, enacted by Laws 1971, ch. 270, § 2.**

## 31-5-14. Cooperation.

All courts, departments, agencies, officers and employees of this state and its political subdivisions are hereby directed to enforce the Agreement on Detainers [31-5-12 NMSA 1978] and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose.

**History: 1953 Comp., § 41-20-21, enacted by Laws 1971, ch. 270, § 3.**

## 31-5-15. Habitual offenders.

Nothing in this act [31-5-12 to 31-5-16 NMSA 1978] or in the Agreement on Detainers [31-5-12 NMSA 1978] shall be construed to require the application of the habitual offenders laws to any person on account of any conviction had in a proceeding brought to final disposition by reason of the use of that agreement.

**History: 1953 Comp., § 41-20-22, enacted by Laws 1971, ch. 270, § 4.**

## 31-5-16. Transfers.

The corrections department shall give over the person of any inmate whenever required by the operation of the Agreement on Detainers [31-5-12 NMSA 1978].

**History: 1953 Comp., § 41-20-23, enacted by Laws 1971, ch. 270, § 5.**

**Cross references.** — For reorganization of the corrections department, *see* 9-3-3 NMSA 1978 and notes thereto.



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## 31-5-17. Interstate Corrections Compact.

The Interstate Corrections Compact is enacted into law and entered into by New Mexico with any other states legally joining therein in the form substantially as follows:

### Article 1. Purpose and Policy

The party states, desiring by common action to fully utilize and improve their institutional facilities and provide adequate programs for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on a basis of cooperation with one another, thereby serving the best interests of such offenders and of society and effecting economies in capital expenditures and operational costs. The purpose of this compact is to provide for the mutual development and execution of such programs of cooperation for the confinement, treatment and rehabilitation of offenders with the most economical use of human and material resources.

### Article 2. Definitions

As used in this compact, unless the context clearly requires otherwise:

A. "state" means a state of the United States, the United States of America, a territory or possession of the United States, the District of Columbia or the commonwealth of Puerto Rico;

B. "sending state" means a state party to this compact in which conviction or court commitment was had;

C. "receiving state" means a state party to this compact to which an inmate is sent for confinement other than a state in which conviction or court commitment was had;

D. "inmate" means a male or female offender who is committed under sentence to or confined in a penal or correctional institution; and

E. "institution" means any penal or correctional facility, including but not limited to a facility for the mentally ill or mentally defective, in which inmates may lawfully be confined.

### Article 3. Contracts

A. Each party state may make one or more contracts with any one or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states. Any such contract shall provide for:

(1) its duration;

(2) payments to be made to the receiving state by the sending state for inmate maintenance, extraordinary medical and dental expenses, and any participation in or receipt by inmates of rehabilitative or correctional services, facilities, programs or treatment not reasonably included as part of normal maintenance;

(3) participation in programs of inmate employment, if any; the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any products resulting therefrom;

(4) delivery and retaking of inmates; and

(5) such other matters as may be necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving states.

B. The terms and provisions of this compact shall be a part of any contract entered into by the authority of or pursuant thereto, and nothing in any such contract shall be inconsistent therewith.

### Article 4. Procedures and Rights

A. Whenever the duly constituted authorities in a state party to this compact, and which has entered into a contract pursuant to Article 3, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary or desirable in order to provide adequate quarters and care or an appropriate program of rehabilitation or treatment,



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said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

B. The appropriate officials of any state party to this compact shall have access, at all reasonable times, to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.

C. Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article 3.

D. Each receiving state shall provide regular reports to each sending state on the inmates of that sending state in institutions pursuant to this compact including a conduct record of each inmate and certify said record to the official designated by the sending state, in order that each inmate may have official review of his or her record in determining and altering the disposition of said inmate in accordance with the law which may obtain in the sending state and in order that the same may be a source of information for the sending state.

E. All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be treated equally with such similar inmates of the receiving state as may be confined in the same institution. The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

F. Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state, or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter except by the appropriate officials of the sending state.

G. Any inmate confined pursuant to this compact shall be released within the territory of the sending state unless the inmate, and the sending and receiving states, shall agree upon release in some other place. The sending state shall bear the cost of such return to its territory.

H. Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state.

I. The parent, guardian, trustee or other person or persons entitled under the laws of the sending state to act for, advise or otherwise function with respect to any inmate shall not be deprived of or restricted in his exercise of any power in respect of any inmate confined pursuant to the terms of this compact.

### Article 5. Acts Not Reviewable in Receiving State: Extradition

A. Any decision of the sending state in respect of any matter over which it retains jurisdiction pursuant to this compact shall be conclusive upon and not reviewable within the receiving state, but if at the time the sending state seeks to remove an inmate from an institution in the receiving state there is pending against the inmate within such state any criminal charge or if the inmate is formally accused of having committed within such state a criminal offense, the inmate shall not



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be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport inmates pursuant to this compact through any and all states party to this compact without interference.

B. An inmate who escapes from an institution in which he is confined pursuant to this compact shall be deemed a fugitive from the sending state and from the state in which the institution is situated. In the case of an escape to a jurisdiction other than the sending or receiving state, the responsibility for institution of extradition or rendition proceedings shall be that of the sending state, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

### Article 6. Federal Aid

Any state party to this compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this compact or any contract pursuant hereto and any inmate in a receiving state pursuant to this compact may participate in any such federally aided program or activity for which the sending and receiving states have made contractual provision, provided that if such program or activity is not part of the customary correctional regimen, the express consent of the appropriate official of the sending state shall be required therefor.

### Article 7. Entry into Force

This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two states. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states upon similar action by such state.

### Article 8. Withdrawal and Termination

This compact shall continue in force and remain binding upon a party state until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal shall not take effect until one year after the notices provided in said statute have been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this compact.

### Article 9. Other Arrangements Unaffected

Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the confinement, rehabilitation or treatment of inmates nor to repeal any other laws of a party state authorizing the making of cooperative institutional arrangements.

### Article 10. Construction and Severability

The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

**History: Laws 1982, ch. 56, § 1.**



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## 31-5-18. Secretary of corrections; powers.

The secretary of corrections is authorized and directed to do all things necessary or incidental to the carrying out of the compact [31-5-17 NMSA 1978] in every particular, and he may in his discretion delegate this authority to another appropriate official.

**History: Laws 1982, ch. 56, § 2.**

## 31-5-19. Convicted offenders; contracts with United States attorney general.

The secretary of corrections is authorized to contract with the United States attorney general for the custody, care, housing, subsistence, education, treatment and training either of persons convicted of criminal offenses in the courts of New Mexico in order that they may be housed in United States prisons or correctional facilities for these purposes or of persons convicted of criminal offenses in the courts of the United States in order that they may be housed in New Mexico correctional facilities for such purposes.

**History: Laws 1982, ch. 54, § 1.**

## 31-5-20. [Interstate Compact for Adult Offender Supervision.]

The Interstate Compact for Adult Offender Supervision is enacted into law and entered into on behalf of New Mexico with any and all other states legally joining therein in a form substantially as follows:

INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION

ARTICLE I - Purpose

A. The compacting states to this interstate compact recognize that each state is responsible for the supervision of adult offenders in the community and is authorized pursuant to the bylaws and rules of this compact to travel across state lines both to and from each compacting state in such a manner as to track the location of offenders, transfer supervision authority in an orderly and efficient manner and, when necessary, return offenders to the originating jurisdictions. The compacting states also recognize that congress, by enacting the Crime Control Act, 4 U.S.C. Section 112, 1965, has authorized and encouraged compacts for cooperative efforts and mutual assistance in the prevention of crime.

B. It is the purpose of this compact and the interstate commission created hereunder, through means of joint and cooperative action among the compacting states:

(1) to provide the framework for the promotion of public safety and protection of the rights of victims in the community through the control and regulation of the interstate movement of offenders;

(2) to provide for the effective tracking, supervision and rehabilitation of these offenders by the sending and receiving states; and

(3) to equitably distribute the costs, benefits and obligations of the compact among the compacting states.

C. In addition, this compact will:

(1) create an interstate commission that will establish uniform procedures to manage the movement between states of adults placed under community supervision and released to the community under the jurisdiction of courts, paroling authorities, corrections or other criminal justice agencies and that will promulgate rules to achieve the purpose of this compact;

(2) ensure an opportunity for input and timely notice to victims and to jurisdictions as to where defined offenders are authorized to travel or to relocate across state lines;



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(3) establish a system of uniform data collection, access to information on active cases by authorized criminal justice officials and regular reporting of compact activities to heads of state councils, state executive, judicial and legislative branches and criminal justice administrators;

(4) monitor compliance with rules governing interstate movement of offenders and initiate interventions to address and correct noncompliance; and

(5) coordinate training and education regarding regulations of interstate movement of offenders for officials involved in such activity.

D. The compacting states recognize that there is no "right" of any offender to live in another state and that duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any offender under supervision subject to the provisions of this compact and bylaws and rules promulgated hereunder.

E. It is the policy of the compacting states that the activities conducted by the interstate commission created herein are the formation of public policies and are therefore public business.

ARTICLE II - Definitions

As used in this compact, unless the context clearly requires a different construction:

A. "adult" means both individuals legally classified as adults and juveniles treated as adults by court order, statute or operation of law;

B. "bylaws" mean those bylaws established by the interstate commission for its governance or for directing or controlling the interstate commission's actions or conduct;

C. "compact" means the Interstate Compact for Adult Offender Supervision;

D. "compact administrator" means the individual in each compacting state appointed pursuant to the terms of this compact responsible for the administration and management of the state's supervision and transfer of offenders subject to the terms of this compact, the rules adopted by the interstate commission and policies adopted by the state council under this compact;

E. "compacting state" means any state that has enacted the enabling legislation for this compact;

F. "commissioner" means the voting representative of each compacting state appointed pursuant to Article III of this compact;

G. "interstate commission" means the interstate commission for adult offender supervision established by this compact;

H. "member" means the commissioner of a compacting state or his designee, who shall be a person officially connected with the commissioner;

I. "non-compacting state" means any state that has not enacted the enabling legislation for this compact;

J. "offender" means an adult placed under or subject to supervision as the result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections or other criminal justice agencies;

K. "person" means any individual, corporation, business enterprise or other legal entity, either public or private;

L. "rules" means acts of the interstate commission, duly promulgated pursuant to Article VIII of this compact, substantially affecting interested parties in addition to the interstate commission, which shall have the force and effect of law in the compacting states;

M. "state" means a state of the United States, the District of Columbia and any other territorial possessions of the United States; and

N. "state council" means the resident members of the state council for interstate adult offender supervision created by each compacting state under Article IV of this compact.

ARTICLE III - The Compact Commission

A. The compacting states hereby create the "interstate commission for adult offender supervision". The interstate commission shall be a body corporate and joint agency of the compacting states. The interstate commission shall have all the responsibilities, powers and duties set forth herein, including the power to sue and be sued and such additional powers as may be conferred



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upon it by subsequent action of the respective legislatures of the compacting states in accordance with the terms of this compact. The interstate commission shall consist of commissioners selected and appointed by resident members of a state council for interstate adult offender supervision for each state. In addition to the commissioners who are the voting representatives of each state, the interstate commission shall include individuals who are not commissioners but who are members of interested organizations; such non-commissioner members must include a member of the national organizations of governors, legislators, state chief justices, attorneys general and crime victims. All non-commissioner members of the interstate commission shall be ex-officio, nonvoting members. The interstate commission may provide in its bylaws for such additional, ex-officio, nonvoting members as it deems necessary.

B. Each compacting state represented at any meeting of the interstate commission is entitled to one vote. A majority of the compacting states shall constitute a quorum for the transaction of business, unless a larger quorum is required by the bylaws of the interstate commission. The interstate commission shall meet at least once each calendar year. The chairperson may call additional meetings and, upon the request of twenty-seven or more compacting states, shall call additional meetings. Public notice shall be given of all meetings and meetings shall be open to the public.

C. The interstate commission shall establish an executive committee that shall include commission officers, members and others as shall be determined by the bylaws. The executive committee shall have the power to act on behalf of the interstate commission during periods when the interstate commission is not in session, with the exception of rulemaking and amendment to the compact. The executive committee shall oversee the day-to-day activities managed by the executive director and interstate commission staff, administer enforcement and compliance with the provisions of the compact and its bylaws as directed by the interstate commission and perform other duties as directed by the interstate commission or set forth in the bylaws.

ARTICLE IV - The State Council

Each compacting state shall create a "state council for interstate adult offender supervision" that shall be responsible for the appointment of the commissioner who shall serve on the interstate commission from that state. Each state council shall appoint as its commissioner the compact administrator from that state to serve on the interstate commission in such capacity under or pursuant to applicable law of the compacting state. While each compacting state may determine the membership of its own state council, its membership must include at least one representative from the legislative, judicial and executive branches of government and victims groups and its compact administrator. Each compacting state retains the right to determine the qualifications of the compact administrator who shall be appointed by the state council or by the governor in consultation with the legislature and the judiciary. In addition to appointment of its commissioner to the interstate commission, each state council shall exercise oversight and advocacy concerning its participation in interstate commission activities and other duties as may be determined by each compacting state, including development of policy concerning operations and procedures of the compact within that state.

ARTICLE V - Powers and Duties of the Interstate Commission

The interstate commission shall have the following powers:

A. to adopt a seal and suitable bylaws governing the management and operation of the interstate commission;

B. to promulgate rules that shall have the force and effect of statutory law and shall be binding in the compacting states to the extent and in the manner provided in this compact;

C. to oversee, supervise and coordinate the interstate movement of offenders subject to the terms of this compact and any bylaws adopted and rules promulgated by the interstate commission;

D. to enforce compliance with compact provisions and interstate commission rules and bylaws, using all necessary and proper means, including the use of judicial process;

E. to establish and maintain offices;



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F. to purchase and maintain insurance and bonds;

G. to borrow, accept or contract for services of personnel, including members and their staffs;

H. to establish and appoint committees and hire staff that it deems necessary for the carrying out of its functions, including an executive committee as required by Article III that shall have the power to act on behalf of the interstate commission in carrying out its powers and duties hereunder;

I. to elect or appoint such officers, attorneys, employees, agents or consultants and to fix their compensation, define their duties and determine their qualifications; and to establish the interstate commission's personnel policies and programs relating to, among other things, conflicts of interest, rates of compensation and qualifications of personnel;

J. to accept any and all donations and grants of money, equipment, supplies, materials and services and to receive, utilize and dispose of same;

K. to lease, purchase, accept contributions or donations of, or otherwise to own, hold, improve or use any property, real, personal or mixed;

L. to sell, convey, mortgage, pledge, lease, exchange, abandon or otherwise dispose of any property, real, personal or mixed;

M. to establish a budget and make expenditures and levy dues as provided in Article X of this compact;

N. to sue and be sued;

O. to provide for dispute resolution among compacting states;

P. to perform such functions as may be necessary or appropriate to achieve the purposes of this compact;

Q. to report annually to the legislatures, governors, judiciary and state councils of the compacting states concerning the activities of the interstate commission during the preceding year. The reports shall also include any recommendations that may have been adopted by the interstate commission;

R. to coordinate education, training and public awareness regarding the interstate movement of offenders for officials involved in such activity; and

S. to establish uniform standards for the reporting, collecting and exchanging of data.

ARTICLE VI - Organization and Operation of the Interstate Commission

A. The interstate commission shall, by a majority of the members, within twelve months of the first interstate commission meeting, adopt bylaws to govern its conduct as may be necessary or appropriate to carry out the purposes of the compact, including:

(1) establishing the fiscal year of the interstate commission;

(2) establishing an executive committee and such other committees as may be necessary;

(3) providing reasonable standards and procedures:

(a) for the establishment of committees; and

(b) for any general or specific delegation of any authority or function of the interstate commission;

(4) providing reasonable procedures for calling and conducting meetings of the interstate commission and ensuring reasonable notice of each such meeting;

(5) establishing the titles and responsibilities of the officers of the interstate commission;

(6) providing reasonable standards and procedures for the establishment of the personnel policies and programs of the interstate commission. Notwithstanding any civil service or other similar laws of any compacting state, the bylaws shall exclusively govern the personnel policies and programs of the interstate commission;

(7) providing a mechanism for winding-up the operations of the interstate commission and for the equitable return of any surplus funds that may exist upon the termination of the compact after the payment and reserving of all of its debts and obligations;

(8) providing transition rules for "start-up" administration of the compact; and

(9) establishing standards and procedures for compliance and technical assistance in carrying out the compact.



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B. The interstate commission shall, by a majority of the members, elect from among its members a chairperson and a vice chairperson, each of whom shall have such authorities and duties as may be specified in the bylaws. The chairperson or, in his absence or disability, the vice chairperson, shall preside at all meetings of the interstate commission. The officers so elected shall serve without compensation or remuneration from the interstate commission; provided that, subject to the availability of budgeted funds, the officers shall be reimbursed for any actual and necessary costs and expenses incurred by them in the performance of their duties and responsibilities as officers of the interstate commission. The interstate commission shall, through its executive committee, appoint or retain an executive director for such period, upon such terms and conditions and for such compensation as the interstate commission may deem appropriate. The executive director shall serve as secretary to the interstate commission, and hire and supervise such other staff as may be authorized by the interstate commission, but shall not be a member.

C. The interstate commission shall maintain its corporate books and records in accordance with the bylaws.

D. The members, officers, executive director and employees of the interstate commission shall be immune from suit and liability, either personally or in their official capacity, for any claim for damage to or loss of property or personal injury or other civil liability caused or arising out of any actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties or responsibilities; provided that nothing in this paragraph shall be construed to protect any such person from suit or liability for any damage, loss, injury or liability caused by the intentional or willful and wanton misconduct of any such person. The interstate commission shall defend the commissioner of a compacting state, or his representatives or employees or the interstate commission's representatives or employees, in any civil action seeking to impose liability, arising out of any actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties or responsibilities, or that the defendant had a reasonable basis for believing occurred within the scope of interstate commission employment, duties or responsibilities; provided that the actual or alleged act, error or omission did not result from intentional wrongdoing on the part of such person. The interstate commission shall indemnify and hold the commissioner of a compacting state, the appointed designee or employees or the interstate commission's representatives or employees, harmless in the amount of any settlement or judgment obtained against such persons arising out of any actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties or responsibilities, or that such persons had a reasonable basis for believing occurred within the scope of interstate commission employment, duties or responsibilities; provided that the actual or alleged act, error or omission did not result from gross negligence or intentional wrongdoing on the part of such person.

ARTICLE VII - Activities of the Interstate Commission

A. The interstate commission shall meet and take such actions as are consistent with the provisions of this compact.

B. Except as otherwise provided in this compact and unless a greater percentage is required by the bylaws, in order to constitute an act of the interstate commission such act shall have been taken at a meeting of the interstate commission and shall have received an affirmative vote of a majority of the members present.

C. Each member of the interstate commission shall have the right and power to cast a vote to which that compacting state is entitled and to participate in the business and affairs of the interstate commission. A member shall vote in person on behalf of the compacting state and shall not delegate a vote to another compacting state. However, a state council shall appoint another authorized representative, in the absence of the commissioner from that state, to cast a vote on behalf of the compacting state at a specified meeting. The bylaws may provide for members' participation in meetings by telephone or other means of telecommunication or electronic communication. Any voting conducted by telephone, or other means of telecommunication or electronic communication shall be subject to the same quorum requirements of meetings where members are present in person.



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D. The interstate commission shall meet at least once during each calendar year. The chairperson of the interstate commission may call additional meetings at any time and, upon the request of a majority of the members, shall call additional meetings.

E. The interstate commission's bylaws shall establish conditions and procedures under which the interstate commission shall make its information and official records available to the public for inspection or copying. The interstate commission may exempt from disclosure any information or official records to the extent they would adversely affect personal privacy rights or proprietary interests. In promulgating such rules, the interstate commission may make available to law enforcement agencies records and information otherwise exempt from disclosure, and may enter into agreements with law enforcement agencies to receive or exchange information or records subject to non-disclosure and confidentiality provisions.

F. Public notice shall be given of all meetings and all meetings shall be open to the public, except as set forth in the rules or as otherwise provided in the compact. The interstate commission shall promulgate rules consistent with the principles contained in the federal Government in the Sunshine Act, 5 U.S.C. Section 552(b), as may be amended. The interstate commission and any of its committees may close a meeting to the public where it determines by a two-thirds' vote that a meeting would be likely to:

(1) relate solely to the interstate commission's internal personnel practices and procedures;

(2) disclose matters specifically exempted from disclosure by statute;

(3) disclose trade secrets or commercial or financial information that is privileged or confidential;

(4) involve accusing any person of a crime, or formally censuring any person;

(5) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(6) disclose investigatory records compiled for law enforcement purposes;

(7) disclose information contained in or related to examination, operating or condition reports prepared by, or on behalf of or for the use of, the interstate commission with respect to a regulated entity for the purpose of regulation or supervision of such entity;

(8) disclose information, the premature disclosure of which would significantly endanger the life of a person or the stability of a regulated entity; or

(9) specifically relate to the interstate commission's issuance of a subpoena or its participation in a civil action or proceeding.

G. For every meeting closed pursuant to this provision, the interstate commission's chief legal officer shall publicly certify that, in his opinion, the meeting may be closed to the public, and shall reference each relevant exemptive provision. The interstate commission shall keep minutes that shall fully and clearly describe all matters discussed in any meeting and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any roll-call vote, reflected in the vote of each member on the question. All documents considered in connection with any action shall be identified in the minutes.

H. The interstate commission shall collect standardized data concerning the interstate movement of offenders as directed through its bylaws and rules, which shall specify the data to be collected, the means of collection and data exchange and reporting requirements.

ARTICLE VIII - Rulemaking Functions of the Interstate Commission

A. The interstate commission shall promulgate rules in order to effectively and efficiently achieve the purposes of the compact, including transition rules governing administration of the compact during the period in which it is being considered and enacted by the states. Rulemaking shall occur pursuant to the criteria set forth in this article and the bylaws and rules adopted pursuant thereto. Such rulemaking shall substantially conform to the principles of the federal Administrative Procedure Act, 5 U.S.C. Section 551 et seq., and the federal Advisory Committee Act, 5 U.S.C. Section 1 et seq., as may be amended. All rules and amendments shall become binding as of the date specified in each rule or amendment.



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B. If a majority of the legislatures of the compacting states rejects a rule, by enactment of a statute or resolution in the same manner used to adopt the compact, then such rule shall have no further force and effect in any compacting state.

C. When promulgating a rule, the interstate commission shall:

(1) publish the proposed rule stating with particularity the text of the rule that is proposed and the reason for the proposed rule;

(2) allow persons to submit written data, facts, opinions and arguments, which information shall be publicly available;

(3) provide an opportunity for an informal hearing; and

(4) promulgate a final rule and its effective date, if appropriate, based on the rulemaking record.

D. Not later than sixty days after a rule is promulgated, any interested person may file a petition in the United States district court for the District of Columbia or in the federal district court where the interstate commission's principal office is located for judicial review of such rule. If the court finds that the interstate commission's action is not supported by substantial evidence, as defined in the Administrative Procedure Act, in the rulemaking record, the court shall hold the rule unlawful and set it aside. Subjects to be addressed within twelve months after the first meeting must at a minimum include:

(1) notice to victims and opportunity to be heard;

(2) offender registration and compliance;

(3) violations or returns;

(4) transfer procedures and forms;

(5) eligibility for transfer;

(6) collection of restitution and fees from offenders;

(7) data collection and reporting;

(8) the level of supervision to be provided by the receiving state;

(9) transition rules governing the operation of the compact and the interstate commission during all or part of the period between the effective date of the compact and the date on which the last eligible state adopts the compact; and

(10) mediation, arbitration and dispute resolution.

E. The existing rules governing the operation of the previous compact superseded by this compact shall be null and void twelve months after the first meeting of the interstate commission created hereunder.

F. Upon determination by the interstate commission that an emergency exists, it may promulgate an emergency rule that shall become effective immediately upon adoption, provided that the usual rulemaking procedures provided hereunder shall be retroactively applied to said rule as soon as reasonably possible, in no event later than ninety days after the effective date of the rule.

ARTICLE IX - Oversight, Enforcement, and Dispute Resolution by the Interstate Commission

A. The interstate commission shall oversee the interstate movement of adult offenders in the compacting states and shall monitor such activities being administered in non-compacting states that may significantly affect compacting states. The courts and executive agencies in each compacting state shall enforce this compact and shall take all actions necessary and appropriate to effectuate the compact's purposes and intent. In any judicial or administrative proceeding in a compacting state pertaining to the subject matter of this compact that may affect the powers, responsibilities or actions of the interstate commission, the interstate commission shall be entitled to receive all service of process in any such proceeding and shall have standing to intervene in the proceeding for all purposes.

B. The compacting states shall report to the interstate commission on issues or activities of concern to them and cooperate with and support the interstate commission in the discharge of its duties and responsibilities. The interstate commission shall attempt to resolve any disputes or other issues that are subject to the compact and that may arise among compacting states and non-compacting states. The interstate commission shall enact a bylaw or promulgate a rule



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providing for both mediation and binding dispute resolution for disputes among the compacting states.

C. The interstate commission, in the reasonable exercise of its discretion, shall enforce the provisions of this compact using any or all means set forth in Section B of Article XII of this compact.

ARTICLE X - Finance

A. The interstate commission shall pay or provide for the payment of the reasonable expenses of its establishment, organization and ongoing activities.

B. The interstate commission shall levy on and collect an annual assessment from each compacting state to cover the cost of the internal operations and activities of the interstate commission and its staff that must be in a total amount sufficient to cover the interstate commission's annual budget as approved each year. The aggregate annual assessment amount shall be allocated based upon a formula to be determined by the interstate commission, taking into consideration the population of the compacting state and the volume of interstate movement of offenders in each compacting state and shall promulgate a rule binding upon all compacting states that governs said assessment.

C. The interstate commission shall not incur any obligations of any kind prior to securing the funds adequate to meet the same; nor shall the interstate commission pledge the credit of any of the compacting states, except by and with the authority of the compacting state.

D. The interstate commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the interstate commission shall be subject to the audit and accounting procedures established under its bylaws. However, all receipts and disbursements of funds handled by the interstate commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the interstate commission.

ARTICLE XI - Compacting States, Effective Date and Amendment

A. Any state is eligible to become a compacting state. The compact shall become effective and binding upon legislative enactment of the compact into law by no less than thirty-five of the states. The initial effective date shall be the later of July 1, 2001, or upon enactment into law by the thirty-fifth state. Thereafter it shall become effective and binding, as to any other compacting state, upon enactment of the compact into law by that state. The governors of non-compacting states or their designees will be invited to participate in interstate commission activities on a non-voting basis prior to adoption of the compact by all states and territories of the United States.

B. Amendments to the compact may be proposed by the interstate commission for enactment by the compacting states. No amendment shall become effective and binding upon the interstate commission and the compacting states unless and until it is enacted into law by unanimous consent of the compacting states.

ARTICLE XII - Withdrawal, Default, Termination and Judicial Enforcement

A. Once effective, the compact shall continue in force and remain binding upon each and every compacting state; provided that a compacting state may withdraw from the compact by enacting a statute specifically repealing the statute that enacted the compact into law. The effective date of withdrawal is the effective date of the repeal. The withdrawing state shall immediately notify the chairperson of the interstate commission in writing upon the introduction of legislation repealing this compact in the withdrawing state. The interstate commission shall notify the other compacting states of the withdrawing state's intent to withdraw within sixty days of its receipt thereof. The withdrawing state is responsible for all assessments, obligations and liabilities incurred through the effective date of withdrawal, including any obligations, the performance of which extend beyond the effective date of withdrawal. Reinstatement following withdrawal of any compacting state shall occur upon the withdrawing state reenacting the compact or upon such later date as determined by the interstate commission.



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B. If the interstate commission determines that any compacting state has at any time defaulted in the performance of any of its obligations or responsibilities under this compact, the bylaws or any duly promulgated rules, the interstate commission may impose any or all of the following penalties:

(1) fines, fees and costs in such amounts as are deemed to be reasonable as fixed by the interstate commission;

(2) remedial training and technical assistance as directed by the interstate commission; and

(3) suspension and termination of membership in the compact. Suspension shall be imposed only after all other reasonable means of securing compliance under the bylaws and rules have been exhausted. Immediate notice of suspension shall be given by the interstate commission to the governor, the chief justice or chief judicial officer of the state, the majority and minority leaders of the defaulting state's legislature and the state council.

The grounds for default include failure of a compacting state to perform such obligations or responsibilities imposed upon it by this compact, interstate commission bylaws or duly promulgated rules. The interstate commission shall immediately notify the defaulting state in writing of the penalty imposed by the interstate commission on the defaulting state pending a cure of the default. The interstate commission shall stipulate the conditions and the time period within which the defaulting state must cure its default. If the defaulting state fails to cure the default within the time period specified by the interstate commission, in addition to any other penalties imposed herein, the defaulting state may be terminated from the compact upon an affirmative vote of a majority of the compacting states, and all rights, privileges and benefits conferred by this compact shall be terminated from the effective date of suspension. Within sixty days of the effective date of termination of a defaulting state, the interstate commission shall notify the governor, the chief justice or chief judicial officer and the majority and minority leaders of the defaulting state's legislature and the state council of such termination. The defaulting state is responsible for all assessments, obligations and liabilities incurred through the effective date of termination, including any obligations, the performance of which extends beyond the effective date of termination. The interstate commission shall not bear any costs relating to the defaulting state unless otherwise mutually agreed upon between the interstate commission and the defaulting state. Reinstatement following termination of any compacting state requires both a re-enactment of the compact by the defaulting state and the approval of the interstate commission pursuant to the rules.

C. The interstate commission may, by majority vote of the members, initiate legal action in the United States district court for the District of Columbia or, at the discretion of the interstate commission, in the federal district where the interstate commission has its offices to enforce compliance with the provisions of the compact and its duly promulgated rules and bylaws against any compacting state in default. In the event judicial enforcement is necessary, the prevailing party shall be awarded all costs of such litigation, including reasonable attorney fees.

D. The compact dissolves effective upon the date of the withdrawal or default of the compacting state, which reduces membership in the compact to one compacting state. Upon the dissolution of this compact, the compact becomes null and void and shall be of no further force or effect, and the business and affairs of the interstate commission shall be wound-up and any surplus funds shall be distributed in accordance with the bylaws.

ARTICLE XIII - Severability and Construction

A. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision is deemed unenforceable, the remaining provisions of the compact shall be enforceable.

B. The provisions of this compact shall be liberally constructed to effectuate its purposes.

ARTICLE XIV - Binding Effect of Compact and Other Laws

A. Nothing herein prevents the enforcement of any other law of a compacting state that is not inconsistent with this compact. All compacting states' laws conflicting with this compact are superseded to the extent of the conflict.



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B. All lawful actions of the interstate commission, including all rules and bylaws promulgated by the interstate commission, are binding upon the compacting states. All agreements between the interstate commission and the compacting states are binding in accordance with their terms. Upon the request of a party to a conflict over meaning or interpretation of interstate commission actions, and upon a majority vote of the compacting states, the interstate commission may issue advisory opinions regarding such meaning or interpretation. In the event any provision of this compact exceeds the constitutional limits imposed on the legislature of any compacting state, the obligations, duties, powers or jurisdiction sought to be conferred by such provision upon the interstate commission shall be ineffective and such obligations, duties, powers or jurisdiction shall remain in the compacting state and shall be exercised by the agency thereof to which such obligations, duties, powers or jurisdiction are delegated by law in effect at the time this compact becomes effective.

**History: Laws 2001, ch. 322, § 1.**

**Compiler's notes.** — Laws 2001, ch. 322, art. XI provided that the compact becomes effective on the latter of July 1, 2001, or enactment of the compact into law by the thirty-fifth jurisdiction. As of June 19, 2002, 35 states had entered the compact.

# ARTICLE 6

# Grand Jury

Sec.
31-6-1. Grand jury panels; calling; qualifying.
31-6-2. Foreman of grand jury.
31-6-3. Challenge to grand jury.
31-6-4. Time and place for hearing; privacy of hearings; witnesses permitted to have attorney present.
31-6-5. Return of indictments.
31-6-6. Oaths; grand jurors; witnesses; officers; penalty.
31-6-7. Assistance for grand jury; report.
31-6-8. Record of testimony.
31-6-9. Charge to grand jury.
31-6-9.1. Abuse of grand jury procedures.
31-6-10. Requirement for indictment; number of jurors concurring.
31-6-11. Evidence before grand jury.
31-6-11.1. Renewed presentation of evidence forbidden.
31-6-12. Subpoena powers; notice to witnesses.
31-6-13. Compensation of jurors and witnesses.
31-6-14. Multiple representation.
31-6-15. Witness immunity; protection from harrassment [harassment] and unreasonable inconvenience.

## 31-6-1. Grand jury panels; calling; qualifying.

The district judge may convene one or more grand juries at any time, without regard to court terms. A grand jury shall serve for a period of no longer than three months. The district judge shall summon and qualify as a panel for grand jury service such number of jurors as he deems necessary. Each grand jury shall be composed of twelve regular jurors and a sufficient number of alternates to insure the continuity of the inquiry and the taking of testimony. All deliberations shall be conducted by any twelve jurors, comprised of regular jurors or substituted alternates. No more than twelve jurors may deliberate. No juror may vote on an indictment unless the juror has heard all evidence presented on the charge. The district judge may discharge or excuse members of a grand jury and substitute alternate grand jurors as necessary. The names of jurors summoned for grand jury service shall be drawn from the master jury wheel of the district court for the county.

**History: 1953 Comp., § 41-5-1, enacted by Laws 1969, ch. 276, § 1; 1981, ch. 262, § 1; 1983, ch. 62, § 1.**

**Repeals.** — Laws 1969, ch. 276, § 14, repealed former 41-5-1, 1953 Comp., relating to right to challenge grand jury.

**The 1983 amendment** inserted "regular" in the fourth sentence, added "and a sufficient number of alternates to insure the continuity of the inquiry and the taking of testimony" at the end of the fourth sentence and inserted the fifth and sixth sentences.

ANNOTATIONS

**Selection of a grand jury must be under the control of the district court.** — The district court is the constitutionally and statutorily designated neutral entity that is assigned the responsibility for determining which grand jurors sit in any particular case to decide the question of indictment. The district court may not delegate its core statutory responsibilities over grand jury proceedings. *De Leon v. Hartley*, 2014-NMSC-005.

Where, after the orientation and swearing of the grand jurors, the district court transferred the process of selecting and excusing jurors to the district attorney's office without further apparent involvement by the district court; the list of grand jurors used by the district attorney's office contained notations that suggested that someone in the district attorney's office excused several grand jurors; and the district court found that there was no fraud or prejudice to defendant in the conduct of the grand jury proceeding and denied defendant's pretrial



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motion to quash the indictment, the district court should have quashed the indictment irrespective of whether any actual fraud or prejudice was established when the improper involvement of the district attorney in the excusal of grand jurors was brought to the attention of the district court. *De Leon v. Hartley*, 2014-NMSC-005.

**Remedy for irregularities in the grand jury process.** — When undeniable irregularities in the grand jury process are brought to the court's attention in advance of trial, a grand jury indictment resulting from that process must be quashed. *De Leon v. Hartley*, 2014-NMSC-005.

**Indictment returned after the three-month term has expired does not deprive the court of jurisdiction.** — The number of days in the term of a grand jury, being merely a matter of statute, goes not to the jurisdiction of the court, but to the manner in which the power is to be exercised. *State v. Bent*, 2012-NMSC-038, 289 P.3d 1225, *rev'g* 2011-NMCA-093, 150 N.M. 561, 263 P.3d 903.

**Challenges to an indictment returned after the three-month term has expired.** — Statutory challenges to an indictment that is returned after the three-month period has expired must be adjudicated before trial and before a jury issues a verdict on the offenses charged in the indictment. *State v. Bent*, 2012-NMSC-038, 289 P.3d 1225, *rev'g* 2011-NMCA-093, 150 N.M. 561, 263 P.3d 903.

Where the grand jury returned an indictment against defendant long after the three-month period of the grand jury's term had expired; the trial court denied defendant's motions to quash the indictment and for an interlocutory appeal; defendant did not file a request with the supreme court for extraordinary relief; and a jury convicted defendant of the offenses charged in the indictment, there was no adequate remedy available for defendant. *State v. Bent*, 2012-NMSC-038, 289 P.3d 1225, *rev'g* 2011-NMCA-093, 150 N.M. 561, 263 P.3d 903.

**The three-month limitation on the term of a grand jury is a mandatory limitation on the grand jury's jurisdiction**, because it is central to the legal constitution and empanelment of the grand jury. *State v. Bent*, 2011-NMCA-093, 150 N.M. 561, 263 P.3d 903, cert. granted, 2011-NMCERT-009, 269 P.3d 903, *rev'd*, 2012-NMSC-038, 289 P.3d 1225.

**An indictment that is returned after the grand jury's three-month term has expired** is void ab initio and confers no jurisdiction to try the defendant. *State v. Bent*, 2011-NMCA-093, 150 N.M. 561, 263 P.3d 903, cert. granted, 2011-NMCERT-009, 269 P.3d 903, *rev'd*, 2012-NMSC-038, 289 P.3d 1225.

**An indictment returned after the grand jury's term has expired is void.** — Where a grand jury was convened in October 2007; grand jurors were summoned for service in November 2007; the district judge verbally extended the grand jury's term beyond the three-month term; and the grand jury returned an indictment against defendant when it was recalled in May 2008 to hear defendant's case, the indictment was void and the district court did not have jurisdiction to try defendant. *State v. Bent*, 2011-NMCA-093, 150 N.M. 561, 263 P.3d 903, cert. granted, 2011-NMCERT-009, 269 P.3d 903, *rev'd*, 2012-NMSC-038, 289 P.3d 1225.

**Report not a judgment.** — The report of a grand jury convened to consider petitions filed by plaintiff alleging crimes of which plaintiff was the victim is not a final, appealable order. *McKenzie v. Fifth Judicial Dist. Ct.*, 1988-NMCA-085, 107 N.M. 778, 765 P.2d 194, cert. denied, 107 N.M. 785, 765 P, 3d 758

**Directory nature of section.** — This section and 31-6-2 NMSA 1978 are merely directory, not mandatory. *State v. Apodaca*, 1987-NMCA-033, 105 N.M. 650, 735 P.2d 1156, cert. denied, 105 N.M. 618, 735 P.2d 535, *overruled on other grounds by State v. Garcia*, 1990-NMCA-065, 110 N.M. 419, 796 P.2d 1115, cert. denied, 110 N.M. 282, 795 P.2d 87.

**Substitution of grand jurors by the court clerk is proper** where he acts pursuant to a standing order of the district judge, so long as such an order does not amount to an abuse of discretion. *State v. Gilbert*, 1982-NMSC-095, 98 N.M. 530, 650 P.2d 814.

**Effect of grand jury no bill.** — A grand jury no bill does not prevent the district attorney from either resubmitting a matter to the grand jury or charging a defendant by information; this result is reached because of the absence of limitation upon the district attorney's authority as prosecutor. *State v. Chavez*, 1979-NMCA-075, 93 N.M. 270, 599 P.2d 1067, cert. denied, 93 N.M. 172, 598 P.2d 215.

**Length of session governed by court.** — The determination as to when grand jury had completed the business before them rested with the court. *State v. Raulie*, 1930-NMSC-074, 35 N.M. 135, 290 P. 789.

**When court may refuse to present matters to grand jury.** — A district court to which an otherwise valid citizen petition for grand jury is presented possesses the discretion to determine whether the matters stated in the petition are reasonably within the lawful scope of grand jury inquiry. Only where the petition clearly seeks to involve a grand jury in matters beyond its purview may the court refuse to present those matters to a grand jury or to convene a grand jury where no regularly sitting grand jury is available. 1982 Op. Att'y Gen. No. 82-14.

**Effect of saving clause's absence.** — The absence of a saving clause in either Laws 1969, ch. 222 or ch. 276 indicates the legislature did not intend the repealed law relative to jury selection to remain effective after July 1, 1969 and did intend that the provisions of both Laws 1969, ch. 222 and ch. 276 be complied with insofar as possible, after that date. 1969 Op. Att'y Gen. No. 69-98 (rendered under prior law).

**Law reviews.** — For article, "The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?" see 2 N.M.L. Rev. 141 (1972).

For comment, "The Use of an Information Following the Return of a Grand Jury No Bill: State v. Joe Nestor Chavez," see 10 N.M.L. Rev. 217 (1979-80).

For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38 Am. Jur. 2d Grand Jury § 7 et seq.

Misconduct of officers in selection or summoning of jurors or grand jurors as contempt of court, 7 A.L.R. 345.

Matters within investigating powers of grand jury, 22 A.L.R. 1356, 106 A.L.R. 1383, 120 A.L.R. 437.

Power of grand jury to contract, 26 A.L.R. 605.

Effect of, and remedies for, exclusion of eligible class or classes of persons from jury list in criminal case, 52 A.L.R. 919.

Constitutional or statutory changes affecting grand jury on substituting information for indictment as an ex post facto law, 53 A.L.R. 716.

Quo warranto to test right to serve as grand or petit juror, 91 A.L.R. 1009.

Communicating with grand jury or member thereof as a criminal offense, 112 A.L.R. 319.

Contemporaneous existence on functioning of two or more grand juries, 121 A.L.R. 814.

Eligibility of women as jurors, 157 A.L.R. 461.

Exclusion of women as violation of constitutional rights of accused or as ground for reversal of conviction, 9 A.L.R.2d 661.

Attorneys: exclusion from jury list in criminal cases, 32 A.L.R.2d 890.



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Jurisdiction or power of grand jury after expiration of term of court for which organized, 75 A.L.R.2d 544.

Accused's right to inspection of minutes of state grand jury, 20 A.L.R.3d 7.

Validity and construction of statute authorizing grand jury to submit report concerning public servant's non-criminal misconduct, 63 A.L.R.3d 586.

Law enforcement officers as qualified jurors in criminal cases, 72 A.L.R.3d 895.

Former law enforcement officers as qualified jurors in criminal cases, 72 A.L.R.3d 958.

Validity of enactment requiring juror to be an elector or voter or have qualifications thereof, 78 A.L.R.3d 1147.

Validity of indictment as affected by substitution or addition of grand jurors after commencement of investigation, 2 A.L.R.4th 980.

Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information, 44 A.L.R.4th 401.

Exclusion of women from grand or trial jury or jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction - state cases, 70 A.L.R.5th 587.

Purposeful inclusion of Negroes in grand or petit jury as unconstitutional discrimination, 4 A.L.R. Fed. 449.

Civil liability of witness in action under 42 USCS § 1983 for deprivation of civil rights, based on testimony given at pretrial criminal proceeding, 94 A.L.R. Fed. 892.

38A C.J.S. Grand Juries §§ 6, 7, 8, 11, 14 et seq., 20 et seq.

## 31-6-2. Foreman of grand jury.

The jurors shall select one of their number as foreman of the grand jury. The foreman shall preside over the sessions of the grand jury. The foreman shall administer oaths to witnesses. The foreman will sign all reports, indictments or other undertakings of the grand jury. The foreman may appoint one member of the grand jury as a clerk to aid in the keeping of notes or minutes and the tallying of votes during secret sessions when no persons other than grand jury members may be present. The foreman may recess the sessions of the grand jury and reconvene them. The foreman, for good cause, may request the court to excuse or discharge individual grand jurors and to replace them with alternate grand jurors as necessary to continue the work of the grand jury.

**History: 1953 Comp., § 41-5-2, enacted by Laws 1969, ch. 276, § 2; 1979, ch. 337, § 1.**

**Repeals.** — Laws 1969, ch. 276, § 14, repealed former 41-5-2, 1953 Comp., relating to challenges of the grand jury panel.

ANNOTATIONS

**Directory nature of section.** — Section 31-6-1 NMSA 1978 and this section are merely directory, not mandatory. *State v. Apodaca*, 1987-NMCA-033, 105 N.M. 650, 735 P.2d 1156; cert. denied, 105 N.M. 618, 735 P.2d 535, *overruled on other grounds by State v. Garcia*, 1990-NMCA-065, 110 N.M. 419, 796 P.2d 1115, cert. denied, 110 N.M. 282, 795 P.2d 87.

**Law reviews.** — For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38A C.J.S. Grand Juries §§ 54, 55.

## 31-6-3. Challenge to grand jury.

Any person held to answer for an offense by grand jury indictment, upon arraignment to the charge therein, by motion to quash the indictment stating with particularity the ground therefor, may challenge the validity of the grand jury. A failure to file such motion is a waiver of the challenge. Grounds that may be presented by such motion are limited to the following:

A. the grand jury was not selected in accordance with law;

B. a member of the grand jury returning the indictment was ineligible to serve as a juror;

C. a member of the grand jury returning the indictment was a witness or is likely to become a witness; or

D. a member of the grand jury returning the indictment was not qualified to serve due to a conflict of interest, bias, partiality or inability to follow the law.

**History: 1953 Comp., § 41-5-3, enacted by Laws 1969, ch. 276, § 3; 2003, ch. 363, § 1.**

**Repeals.** — Laws 1969, ch. 276, § 14, repealed former 41-5-3, 1953 Comp., relating to challenges to individual grand jurors.

**Cross references.** — For drawing and empaneling jurors, *see* 38-5-1 NMSA 1978.

**The 2003 amendment,** effective July 1, 2003, inserted "or is likely to become a witness; or" at the end of Subsection C and added Subsection D.

ANNOTATIONS

**The effect of this section** is to prohibit a grand juror from testifying before the grand jury of which he or she is a member. Defendant's contention that grand jurors were witnesses against him because the grand jury had returned two indictments against him prior to returning the present indictment, and had "witnessed" the actions of defendant which led to a subsequent contempt citation was without merit as it perverted the meaning of "witness"



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as used in the grand jury statutes. *State v. Hogervorst*, 1977-NMCA-057, 90 N.M. 580, 566 P.2d 828, cert. denied, 90 N.M. 636, 567 P.2d 485.

**Challenge is not to court's jurisdiction.** — An attack on the eligibility of one grand juror does not raise an issue as to the jurisdiction of the court, but goes only to the procedural requirements for returning an indictment. *State v. Velasquez*, 1982-NMCA-154, 99 N.M. 109, 654 P.2d 562, cert. denied, 99 N.M. 148, 655 P.2d 160.

**Juror's bias not ground for attack where indictment sufficient.** — Bias or prejudice on the part of an individual grand juror furnishes no ground of attack on an indictment that is sufficient on its face. *State v. Laskay*, 1986-NMCA-008, 103 N.M. 799, 715 P.2d 72, cert. denied, 103 N.M. 798, 715 P.2d 71.

**Unless prejudice caused indictment by malice or ill will.** — A challenge would not be precluded in the event that grand jurors were so prejudiced against a person that the jurors would be ineligible to serve because an indictment by jurors so prejudiced would violate their oath to indict no person through malice, hatred or ill will. *State v. Laskay*, 1986-NMCA-008, 103 N.M. 799, 715 P.2d 72, cert. denied, 103 N.M. 798, 715 P.2d 71.

**Residence as qualification for grand jury service is question of fact.** *State v. Watkins*, 1979-NMCA-003, 92 N.M. 470, 590 P.2d 169.

**Temporary absence of person from county of residence,** without the intention of abandoning that residence, will not destroy the person's qualification to serve as a grand juror. *State v. Watkins*, 1979-NMCA-003, 92 N.M. 470, 590 P.2d 169.

**Where grand jury which heard defendant's false testimony returned indictment for perjury based on that testimony,** such jurors are not witnesses under this section, nor are they presumed to be biased. *State v. Watkins*, 1979-NMCA-003, 92 N.M. 470, 590 P.2d 169.

**Accused not present during empaneling.** — It was never the practice to bring accused into court when empaneling the grand jury. *Territory v. Young*, 1881-NMSC-007, 2 N.M. 93.

**Objections raised before plea available.** — Any objections to legal qualifications of grand jurors were to be raised and presented in proper form to court before defendant entered his plea of not guilty and were not available on motion in arrest of judgment. *Territory v. Armijo*, 1894-NMSC-011, 7 N.M. 571, 37 P. 1117 (decided under former law).

**But not after plea.** — Objections to character of grand jury, or qualification of an individual member, came too late after plea to the merits. *Territory v. Romero*, 1883-NMSC-006, 2 N.M. 474 (decided under former law).

**Effect of saving clause's absence.** — The absence of a saving clause in either Laws 1969, ch. 222 or ch. 276 indicates the legislature did not intend the repealed law relative to jury selection to remain effective after July 1, 1969 and did intend that the provisions of both Laws 1969, ch. 222 and ch. 276 be complied with insofar as possible, after that date. 1969 Op. Att'y Gen. No. 69-98 (rendered under prior law).

**Law reviews.** — For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38 Am. Jur. 2d Grand Jury § 20 et seq.

Effect of, and remedies for, exclusion from grand jury list of eligible class or classes of persons, 52 A.L.R. 919.

Prejudice of member of grand jury against defendant as ground of attack on indictment, 88 A.L.R. 899.

Women as grand jurors, 157 A.L.R. 461.

Right to challenge personnel of grand jury, 169 A.L.R. 1169.

Women: exclusion of women from grand jury a violation of constitutional rights of accused or as ground for reversal of conviction, 9 A.L.R.2d 661.

Failure to swear or irregularity in swearing witnesses appearing before grand jury as ground for dismissal of indictment, 23 A.L.R.4th 154.

Presence of unauthorized persons during state grand jury proceedings as affecting indictment, 23 A.L.R.4th 397.

Age group underrepresentation in grand jury or petit jury venire, 62 A.L.R.4th 859.

Exclusion of women from grand or trial jury or jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction - state cases, 70 A.L.R.5th 587.

Standing of criminal defendant to challenge, on constitutional grounds, discriminatory composition of federal grand jury where defendant is not member of class allegedly excluded, 68 A.L.R. Fed. 175.

38A C.J.S. Grand Juries §§ 27, 59 et seq.

## 31-6-4. Time and place for hearing; privacy of hearings; witnesses permitted to have attorney present.

A. A grand jury shall conduct its hearing during the usual business hours of the court which convened it. Hearings and deliberations may be conducted at any place ordered by the convening judge and provided by the court. Inspections or grand jury views of places under inquiry may be made when directed by the foreman wherever deemed necessary within the county, but no oral testimony or other evidence may be received except during formal private sessions.

B. All deliberations shall be conducted in a private room outside the hearing or presence of any person other than the grand jury members. All taking of testimony shall be in private with no persons present other than the grand jury, the persons required or entitled to assist the grand jury and the attorney, if any, of the target.

C. Persons required or entitled to be present at the taking of testimony before the grand jury include the district attorney and the attorney general and their staffs, interpreters, court reporters, security officers, the witness and an attorney for the target. Security personnel may be present only with special leave of the district court and are neither potential witnesses nor otherwise interested parties in the matter being presented to the grand jury.

D. If a target has his attorney present, the attorney may be present only while the target witness is testifying and may advise the witness but may not speak so that he can be heard by the



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grand jurors or otherwise participate in the proceedings. At least twenty-four hours before grand jury proceedings begin, the target's attorney may submit proposed questions and exhibits to the district attorney or the attorney general.

**History: 1953 Comp., § 41-5-4, enacted by Laws 1969, ch. 276, § 4; 1979, ch. 337, § 2; 1981, ch. 262, § 2; 2003, ch. 363, § 2.**

**Repeals.** — Laws 1969, ch. 276, § 14, repealed former 41-5-4, 1953 Comp., relating to trial of challenges to the grand jury.

**The 2003 amendment,** effective July 1, 2003, deleted "witness" following "target" in Subsection B and present Subsection D; rewrote Subsection C; and added Subsection D.

## ANNOTATIONS

**Purpose of section is to maintain utmost secrecy;** therefore, it has been the practice for more than 200 years for the investigations of the grand jury to be in private, except that the district attorney and his assistant are present, since secrecy is the vital requisite of grand jury procedure. *State v. Hill*, 1975-NMCA-093, 88 N.M. 216, 539 P.2d 236.

**"Unusual business hours".** — Although the language of this section requires the grand jury to conduct its hearing during the usual business hours of the court, a distinction must be made between the business hours of the judge who convenes the grand jury and the business hours of the court. Because a particular judge is unavailable after 5:00 p.m. does not make access to the court impossible. *State v. Weiss*, 1986-NMCA-128, 105 N.M. 283, 731 P.2d 979, cert. denied, 105 N.M. 290, 731 P.2d 1334.

**Usual business hours.** — Where the grand jury was convened at 8:30 a.m. and returned a true bill at 2:12 a.m. on the following morning, this unusually extended session of the grand jury was not a substantial violation of defendants' rights, though it constituted a technical violation of this section. *State v. Weiss*, 1986-NMCA-128, 105 N.M. 283, 731 P.2d 979, cert. denied, 105 N.M. 290, 731 P.2d 1334.

**"Prejudice" is appropriate constitutional standard.** — Inasmuch as "prejudice" is an appropriate standard in considering the exercise of constitutional rights before a trial jury which determines guilt, there is no reason to apply a stricter standard in considering the exercise of constitutional rights before a grand jury which determines probable cause to accuse. *State v. Martinez*, 1982-NMCA-002, 97 N.M. 585, 642 P.2d 188, cert. denied, 98 N.M. 51, 644 P.2d 1040.

**No opportunity for improper influence on grand jury allowed.** — The law protects the fairness and impartiality of the grand jury hearing. Not only must there be no improper influence exercised, there must be no opportunity for improper influence on the grand jury. *State v. Hill*, 1975-NMCA-093, 88 N.M. 216, 539 P.2d 236.

**Presence of unauthorized persons in a grand jury proceeding** jeopardizes the basic purpose of the proceeding and opens the door to a number of potential abuses. *State v. Bigler*, 1982-NMCA-136, 98 N.M. 732, 652 P.2d 754, cert. denied, 98 N.M. 762, 652 P.2d 1213.

**Type of evidence presented not included within meaning of section.** — This section does not deal with the type of evidence which may be presented to a grand jury. *State v. Evans*, 1976-NMCA-113, 89 N.M. 765, 557 P.2d 1114, cert. denied, 90 N.M. 7, 558 P.2d 619.

**Unauthorized person's presence requires dismissal of indictment.** — The presence of an unauthorized person before the grand jury requires dismissal of the indictment without the necessity of showing prejudice. *Davis v. Traub*, 1977-NMSC-049, 90 N.M. 498, 565 P.2d 1015.

**Issuance of writ of prohibition.** — Writ of prohibition is properly issued when the indictment is dismissed because of the presence of an unauthorized person before the grand jury. *Davis v. Traub*, 1977-NMSC-049, 90 N.M. 498, 565 P.2d 1015.

**District attorney's presence during deliberations prohibited.** — The presence of the district attorney during deliberations of the grand jury is specifically and unequivocably prohibited by this section, which is clear and is not subject to construction. No one other than the grand jury members may be present during the time the grand jury is deliberating. Like other statutes governing grand jury proceedings, it is to be rigorously observed and strictly enforced. *Baird v. State*, 1977-NMSC-067, 90 N.M. 667, 568 P.2d 193.

**Impropriety of district attorney's presence may be waived.** — Notwithstanding the fact that district attorney violated this section by his presence during grand jury deliberations, defendant charged with murder waived her objections based upon such improprieties by entering into a plea and disposition agreement which was approved and accepted by the trial court through a plea of no contest to the charge of involuntary manslaughter. The defects of the grand jury proceedings were not so fundamental that they could not be waived. *Baird v. State*, 1977-NMSC-067, 90 N.M. 667, 568 P.2d 193.

**Actions of state or defense attorneys insufficient to invalidate indictment.** — The mere fact that assistant attorneys general disagree in the grand jury's presence, or that defense attorneys would have presented different legal advice to the grand jury, does not invalidate the indictment. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92. Sct. Olguin affirms app Olguin.

**Attorney not "present" merely because he took deposition testimony.** — Because the grand jury has the power to subpoena "records or other evidence relevant to its inquiry," the grand jury could properly consider deposition testimony, and the fact that the deposition was taken by attorney did not make attorney present, within the meaning of this section, when the deposition was read to the grand jury. *State v. Evans*, 1976-NMCA-113, 89 N.M. 765, 557 P.2d 1114, cert. denied, 90 N.M. 7, 558 P.2d 619.

**No statutory right to counsel.** — Neither the Grand Jury Act nor the Public Defender Act provides a target witness testifying before a grand jury with a right to counsel such that an indictment must be dismissed if counsel is not present and there is no express voluntary, knowing, and intelligent waiver of counsel's presence. *State v. Tisthammer*, 1998-NMCA-115, 126 N.M. 52, 966 P.2d 760, cert. denied, 126 N.M. 107, 967 P.2d 447.

**Postponement to obtain counsel.** — A target witness has no statutory right to counsel; therefore, the state was not required to postpone the grand jury proceedings to allow the witness time to obtain counsel. *State v. Tisthammer*, 1998-NMCA-115, 126 N.M. 52, 966 P.2d 760, cert. denied, 126 N.M. 107, 967 P.2d 447.

**When district attorney's assistant not permitted in grand jury room.** — It is highly improper for counsel employed to prosecute a case to be permitted to go into the grand jury room where the defendant cannot be heard and has no one to represent him. This duty should be performed alone by the proper officer of the law and assistant to the district attorney may not be present or



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participate in the grand jury hearing room. *State v. Hill*, 1975-NMCA-093, 88 N.M. 216, 539 P.2d 236.

**Prosecuting attorney assists grand jury, but not as partisan.** — While this statute contemplates that the prosecuting attorney will assist the grand jury, nevertheless the prosecuting attorney does not appear before the grand jury as a partisan, bent upon obtaining an indictment; the presence and participation of an attorney ordered by the trial judge to assist in the prosecution of a case, who was employed by the father-in-law of the deceased, in the grand jury hearing was unlawful and in violation of this section and invalidated the indictment. *State v. Hill*, 1975-NMCA-093, 88 N.M. 216, 539 P.2d 236.

**Conflict of interest precludes prosecutor's appearance.** — The prosecutor himself is unauthorized to appear before the grand jury if there is a conflict of interest (1) in which his own property is damaged by criminal mischief, or (2) arising from prior employment with the defendant; since the prosecutor is a public officer with duties quasi-judicial in nature, with an obligation to protect not only the public interest but also the rights of the accused, in the performance of his duties he must not only be disinterested and impartial but must also appear to be so, scrupulously refraining from words or conduct that may influence the decision of the grand jury and observing limits of essential fairness. *State v. Hill*, 1975-NMCA-093, 88 N.M. 216, 539 P.2d 236.

**Attorney general's investigator not "authorized person" to assist in hearing.** — Claim that an investigator for the attorney general was an "authorized person" and his presence in the grand jury room was not improper inasmuch as he had been appointed a grand jury aide pursuant to Section 31-6-7 NMSA 1978, had no merit because grand jury aides are not authorized by statute to be present in the grand jury room unless they fall within the categories specified in this section. *Davis v. Traub*, 1977-NMSC-049, 90 N.M. 498, 565 P.2d 1015.

**"Staff" construed.** — Attorney general's assertion that any member of his staff could properly be present during the grand jury hearings was an erroneous interpretation of this section and ignored the meaning of the words "persons required or entitled to assist the grand jury." Such persons are enumerated in the statute. Staff in this context refers to the legal staff of the district attorney or the attorney general's office, e.g. assistant district attorneys or assistant attorneys general. *Davis v. Traub*, 1977-NMSC-049, 90 N.M. 498, 565 P.2d 1015.

**Presence of person not officially listed as court reporter upheld.** — Person who was present during grand jury deliberations for purpose of monitoring an electronic device that recorded the grand jury testimony was within the definition of court reporter for purposes of this section. Defendant's claim that such person was not authorized to be present because he was not listed as official court reporter was frivolous, there being no contention that the operator's presence was not for the purpose of operating the recording device. *State v. Baird*, 1977-NMCA-041, 90 N.M. 678, 568 P.2d 204, *aff'd*, 1977-NMSC-067, 90 N.M. 667, 568 P.2d 193.

**"Target witness"**, referred to in Subsections B and C, is anyone who is the focus of a grand jury's investigation. *State v. Hall*, 1985-NMCA-075, 103 N.M. 207, 704 P.2d 461.

**Failure to notify of target status.** — Defendant was not entitled to notice that he was a target of the grand jury investigation when at the time the offense (perjury before the grand jury) had not yet been committed. *State v. Albin*, 1986-NMCA-046, 104 N.M. 315, 720 P.2d 1256, cert. denied, 104 N.M. 246, 719 P.2d 1267, *overruled on other grounds by State v. Benavidez*, 1999-NMCA-53, 127 N.M. 189, 979 P.2d 234.

**Simultaneous appearance of two witnesses violates statute.** — Since this section refers to "the witness" in the singular, incident which occurred during grand jury investigation wherein two witnesses appeared before the grand jury simultaneously clearly violated the terms of the statute. *Davis v. Traub*, 1977-NMSC-049, 90 N.M. 498, 565 P.2d 1015.

**Presumption of prejudice when indictment quashed.** — A showing of prejudice is not required when an unauthorized person is present at grand jury proceedings in order to have the indictment quashed. Prejudice is presumed. *State v. Hill*, 1975-NMCA-093, 88 N.M. 216, 539 P.2d 236.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38 Am. Jur. 2d Grand Jury § 30 et seq.

Communicating with grand jury as contempt, 29 A.L.R. 489.

Communicating with grand jury or member thereof as criminal offense, 112 A.L.R. 319.

Duty of secrecy on part of members of, or witnesses or other persons present before, grand jury, 127 A.L.R. 272.

Absence of grand jurors during hearing as affecting indictment, 156 A.L.R. 248.

Validity and construction of statutes permitting grand jury witnesses to be accompanied by counsel, 90 A.L.R.3d 1333.

Presence of unauthorized persons during state grand jury proceedings as affecting indictment, 23 A.L.R.4th 397.

Presence of persons not authorized by Rule 6(d) of Federal Rules of Criminal Procedure during session of grand jury as warranting dismissal of indictment, 68 A.L.R. Fed. 798.

38A C.J.S. Grand Juries §§ 68, 69, 70, 71, 73.

## 31-6-5. Return of indictments.

Indictments shall be returned by the grand jury within twenty-four hours following the day when the indictment is voted. Indictments shall not name persons as unindicted coconspirators. Indictments may be filed and prosecution and trial had thereon without regard to court terms. No-bills shall be sealed and filed with the district court clerk. Upon application to the court by the state for good cause shown, or upon request by the target, the court may release a sealed no-bill.

**History: 1953 Comp., § 41-5-5, enacted by Laws 1969, ch. 276, § 5; 1979, ch. 337, § 3; 2003, ch. 363, § 3.**

**Repeals.** — Laws 1969, ch. 276, § 14, repealed former 41-5-5, 1953 Comp., relating to the court's decision on the grand jury challenge and the duty of the clerk to record it.

**The 2003 amendment,** effective July 1, 2003, deleted "or the person named in the proposed indictment, the court may release a sealed no-bill" and inserted "or upon request by the target, the court may release a sealed no-bill" in the last sentence.

ANNOTATIONS

**"Returned by the grand jury" defined.** — "Returned by the grand jury" in this section means an indictment voted by the grand jury, signed by the foreman and filed either with the court clerk or the judge. Where these



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requirements were met, the fact that the entire grand jury was not present at the time of the "return" did not invalidate the indictment. *State v. Blakley*, 1977-NMCA-088, 90 N.M. 744, 568 P.2d 270.

**Filing regardless of whether court in session.** — This provision implies that an indictment may be filed without regard to whether court was in session when it was filed. *State v. Ellis*, 1976-NMCA-036, 89 N.M. 194, 548 P.2d 1212, cert. denied, 89 N.M. 206, 549 P.2d 284.

**Period could include weekends.** — The 24-hour period of this section does not include Saturdays and Sundays if the court which convened the grand jury was not in session on those days. Where the grand jury voted the indictment on Friday night, return of the indictment on the following Monday complied with this section. *State v. Blakley*, 1977-NMCA-088, 90 N.M. 744, 568 P.2d 270.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 41 Am. Jur. 2d Indictments and Informations § 31.

Power of grand jury to withdraw or alter indictment, or return of "not a true bill," 82 A.L.R. 1057.

42 C.J.S. Indictments and Informations § 23.

## 31-6-6. Oaths; grand jurors; witnesses; officers; penalty.

A. The following oaths shall be administered by the district judge to jurors, officers of the court or others assigned to assist the grand jury, and by the foreman to witnesses:

(1) JUROR OATH: "You, as members of this grand jury, do swear (or affirm) that you will diligently inquire and true indictment make, of all public offenses against the people of this state, committed or triable within this county, of which you shall receive legal evidence; that you shall indict no person through malice, hatred or ill will; nor have any not indicted through fear, favor or affection, or for any reward or the hope or promise thereof; but in all your indictments, reports or undertakings, you shall present the truth, according to the best of your skill and understanding, and further that you will forever keep secret whatever you or any other juror may have said or in what manner you or any other juror may have voted on any matter before you; and that you will keep secret the testimony of any witness heard by you unless ordered by the court to disclose the same in the trial or prosecution of the witness for perjury before the grand jury, so help you God.";

(2) OATH FOR OFFICER OR OTHER PERSON: "You do swear (or affirm) that you will keep secret all proceedings occurring in your presence or of which you may learn as a result of your service in aid of the grand jury, so help you God."; and

(3) OATH FOR WITNESS: "You do swear (or affirm) that the testimony which you are about to give will be the truth, so help you God."

B. Any person found to have violated the oath under Paragraph (1) or (2) of Subsection A of this section shall be guilty of a misdemeanor. This subsection shall not apply to communications by the prosecuting attorney to his staff or grand jury aides and in obtaining and presenting evidence, preparing indictments, reports and other undertakings of the grand jury and in preparation for trial.

**History: 1953 Comp., § 41-5-6, enacted by Laws 1969, ch. 276, § 6; 1979, ch. 337, § 4.**

**Repeals.** — Laws 1969, ch. 276, § 14, repealed former 41-5-6, 1953 Comp., relating to the effect of the challenge to the grand jury panel.

ANNOTATIONS

**Registration of oath not required.** — All that this section requires is that an oath be taken and while it is desirable that a signed oath be registered, registration is not an absolute requirement. *State v. Gilbert*, 1982-NMSC-095, 98 N.M. 530, 650 P.2d 814.

**Duty of juror was that of secrecy** forever concerning matters coming before him except as otherwise provided by statute. *In re Hittson*, 1915-NMSC-040, 20 N.M. 319, 150 P. 733.

**Impeachment of indictment by grand jury.** — Members of grand jury were not permitted to impeach an indictment duly found, returned in open court and filed as such, by testifying as to what was said by the prosecution officer while advising with them in his official capacity. *U.S. v. Tallmadge*, 1907-NMSC-032, 14 N.M. 293, 91 P. 729.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38 Am. Jur. 2d Grand Jury § 17.

Officer, member of grand jury as, within constitutional or statutory provision in relation to oath or affirmation, 118 A.L.R. 1098.

Duty of secrecy on part of members of, or witnesses or other persons present before, grand jury, 127 A.L.R. 272.

Accused's right to, and prosecution's privilege against, disclosure of identity of informer, 76 A.L.R.2d 262.

Failure to swear or irregularity in swearing witnesses appearing before grand jury as ground for dismissal of indictment, 23 A.L.R.4th 154.

38A C.J.S. Grand Juries § 56.

## 31-6-7. Assistance for grand jury; report.

A. The district court shall assign necessary personnel to aid the grand jury in carrying out its duties. The district attorney or his assistants shall attend the grand jury, examine witnesses and prepare indictments, reports and other undertakings of the grand jury.



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B. When engaged in the investigation of an offense over which he has jurisdiction, the attorney general or his assistants may attend a grand jury, examine witnesses and prepare indictments, reports and other undertakings of the grand jury.

C. When a grand jury is convened in response to a citizens' grand jury petition pursuant to Article 2, Section 14 of the constitution of New Mexico, the district attorney or his assistants, unless otherwise disqualified, shall attend and conduct the grand jury.

D. A prosecuting attorney attending a grand jury and all grand jurors shall conduct themselves in a fair and impartial manner at all times during grand jury proceedings.

E. A grand jury, in its discretion, may make a formal, written report as to the condition and operation of any public office or institution it has investigated. The report shall not charge any public officer or other person with willful misconduct, corruption or malfeasance unless an indictment or accusation for removal from public office is also returned by the grand jury. The right of every person to be properly charged, face his accusers and be heard in his defense in open court shall not be circumvented by the report.

**History: 1953 Comp., § 41-5-7, enacted by Laws 1969, ch. 276, § 7; 1979, ch. 337, § 5; 2001, ch. 98, § 1; 2003, ch. 363, § 4.**

**Repeals.** — Laws 1969, ch. 276, § 14, repealed former 41-5-7, 1953 Comp., relating to the effect of a challenge to an individual grand juror.

**The 2003 amendment,** effective July 1, 2003, inserted "and all grand jurors" following "grand jury" and substituted "during grand jury proceedings" for "when assisting the grand jury" in Subsection D.

**The 2001 amendment,** effective July 1, 2001, added the Subsection A designation; in present Subsection A, substituted "necessary personnel" for "court reporters, bailiffs, interpreters, clerks or other persons as required", deleted the former second sentence, which read "The attorney general, when requested by the district court, shall assist the grand jury", inserted "or his assistants" following "district attorney," deleted the former last sentence which read "The prosecuting attorney shall conduct himself in a fair and impartial manner at all times when assisting the grand jury"; and added Subsections B to E.

## ANNOTATIONS

**Duty of district court.** — It is for the district court, and the district court alone, to decide who shall serve as grand jurors. Section 31-6-7 NMSA 1978 does not allow the district court to delegate its supervisory role over the selection of the grand jury to the district attorney's office. *De Leon v. Hartley*, 2014-NMSC-005.

**Selection of a grand jury must be under the control of the district court.** — Where, after the orientation and swearing of the grand jurors, the district court transferred the process of selecting and excusing jurors to the district attorney's office without further apparent involvement by the district court; the list of grand jurors used by the district attorney's office contained notations that suggested that someone in the district attorney's office excused several grand jurors; and the district court found that there was no fraud or prejudice to defendant in the conduct of the grand jury proceeding and denied defendant's pretrial motion to quash the indictment, the district court should have quashed the indictment irrespective of whether any actual fraud or prejudice was established when the improper involvement of the district attorney in the excusal of grand jurors was brought to the attention of the district court. *De Leon v. Hartley*, 2014-NMSC-005.

**"Prejudice" is appropriate constitutional standard.** — Inasmuch as "prejudice" is an appropriate standard in considering the exercise of constitutional rights before a trial jury which determines guilt, there is no reason to apply a stricter standard in considering the exercise of constitutional rights before a grand jury which determines probable cause to accuse. *State v. Martinez*, 1982-NMCA-002, 97 N.M. 585, 642 P.2d 188, cert. quashed, 98 N.M. 51, 644 P.2d 1040.

**Burden of showing prejudice.** — When prosecutorial misconduct during the presentment of the case is claimed, the defendant has a burden to show demonstrable prejudice. *State v. Velasquez*, 1982-NMCA-154, 99 N.M. 109, 654 P.2d 562, cert. denied, 99 N.M. 148, 655 P.2d 160.

**Prejudice need not be shown where unauthorized person present.** — A defendant need not show prejudice where an unauthorized person is present during the proceedings, or where the district attorney is present during grand jury deliberations. *State v. Velasquez*, 1982-NMCA-154, 99 N.M. 109, 654 P.2d 562, cert. denied, 99 N.M. 148, 655 P.2d 160.

**Prosecutor to protect public interest and rights of accused.** — In dealing with the grand jury, the prosecutor's duty is to protect both the public's interest and the rights of the accused. *State v. Cruz*, 1983-NMSC-045, 99 N.M. 690, 662 P.2d 1357.

**Prosecutor conduct.** — Prosecutor must scrupulously refrain from words or conduct that may influence the decision of the grand jury. *State v. Augustin M.*, 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. quashed, 2004-NMCERT-002, 135 N.M. 170, 86 P.3d 48.

**Where prosecutor's conduct violative of section.** — Prosecutor's conduct of grand jury, where the total case was presented to the grand jury in less than nine minutes and all questioning was by leading questions, clearly violates this section. *State v. Sanchez*, 1980-NMCA-137, 95 N.M. 27, 618 P.2d 371, *overruled on other grounds by Buzbee v. Donnelly*, 1981-NMSC-097, 96 N.M. 692, 634 P.2d 1244.

**Prosecutor's jury instructions violated this section.** — Where petitioner was charged with second degree murder for the killing of petitioner's spouse; petitioner testified that the victim had physically abused petitioner and that petitioner had reported the abuse; and after giving the grand jury final jury instructions, the prosecutor told the grand jury that petitioner "was directly appealing to you to consider the consequences of your verdict. That is absolutely inappropriate", and that petitioner "was improperly seeking your sympathy", the prosecutor failed to act in a fair and impartial manner. *Herrera v. Sanchez*, 2014-NMSC-018.

**Statements explaining law or procedure.** — Prosecutor's statements explaining the law or procedure are proper so long as the statements are not in conflict with the charge given to the grand jury by the court and are not otherwise incorrect statements of the law or improper. *State v. Hewitt*, 1988-NMCA-053, 108 N.M. 179, 769 P.2d 92, cert. quashed, 107 N.M. 785, 765 P.2d 758.



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**Prosecutorial comments found not to violate this section.** — Prosecutor's comments explaining grand jury procedures concerning a target witness and the witness' attorney and the privilege against self-incrimination were not improper. *State v. Martinez*, 1982-NMCA-002, 97 N.M. 585, 642 P.2d 188, cert. denied, 98 N.M. 51, 644 P.2d 1040.

**Duty to advise grand jury of the elements of offense.** — The state's obligation to advise the grand jury of the elements of the offenses it presents to the grand jury is satisfied if the prosecutor specifically directs the grand jurors, on the record, to the portions of the grand jury manual containing the elements of common offenses where the appropriate elements of the offenses under consideration may be found, a copy of the elements of each offense considered is also made a part of the record, and the prosecutor is available to answer grand juror questions about the manual on the record. *State v. Ulibarri*, 1999-NMCA-142, 128 N.M. 546, 994 P.2d 1164, *aff'd*, 2000-NMSC-007, 128 N.M. 686, 997 P.2d 818.

**Failure to present evidence not directly negating guilt.** — The failure of the prosecutor to present evidence that did not directly negate guilt did not breach his duty to assist the grand jury fairly and impartially. *State v. Juarez*, 1990-NMCA-021, 109 N.M. 764, 790 P.2d 1045, cert. denied, 109 N.M. 751, 790 P.2d 1032.

**Section does not provide for judicial review** as to whether exculpatory evidence was withheld from the grand jury. *State v. McGill*, 1976-NMCA-100, 89 N.M. 631, 556 P.2d 39.

**Law reviews.** — For comment, "The Use of an Information Following the Return of a Grand Jury No Bill: State v. Joe Nestor Chavez," see 10 N.M.L. Rev. 217 (1979-80).

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38 Am. Jur. 2d Grand Jury § 33 et seq.

Presence of unauthorized persons during state grand jury proceedings as affecting indictment, 23 A.L.R.4th 397.

Duty of prosecutor to present exculpatory evidence to state grand jury, 49 A.L.R.5th 639.

Presence of persons not authorized by Rule 6(d) of Federal Rules of Criminal Procedure during session of grand jury as warranting dismissal of indictment, 68 A.L.R. Fed. 798.

38A C.J.S. Grand Juries §§ 74, 94 et seq., 102 et seq.

## 31-6-8. Record of testimony.

All proceedings in the grand jury room, with the exception of the deliberations of the grand jury, shall be reported verbatim and the notes or transcriptions thereof certified by the court reporter or stenographer making them, with the notes or transcriptions then deposited with the clerk or other officer of the district court as directed by the district judge. Upon order of the district court in cases where an indictment is returned, the notes may be caused to be transcribed and certified by the stenographer or court reporter who made them, if available, or by another person qualified and competent to transcribe them accurately. Copies of documentary evidence or a summary thereof if directed by the district court exhibited to the grand jury shall be made a part of the record. In cases where an indictment is not returned, the notes or transcriptions shall be destroyed unless ordered by the district judge to be preserved for good cause shown, including but not limited to the prosecution of a witness for perjury.

**History: 1953 Comp., § 41-5-8, enacted by Laws 1969, ch. 276, § 8; 1979, ch. 337, § 6; 1983, ch. 62, § 2.**

**Repeals.** — Laws 1969, ch. 276, § 14, repealed former 41-5-8, 1953 Comp., relating to the court's appointment of the foreman of the grand jury.

**The 1983 amendment** inserted "good cause shown, including but not limited to" in the last sentence.

ANNOTATIONS

**Purpose of recording requirement.** — The recording requirement of this section serves a number of purposes. The defendant has an opportunity to impeach the witness at trial if there is any inconsistency between grand jury testimony and trial testimony. Prosecutorial abuses of the grand jury system are restrained, and the prosecution can support its case at trial. *State v. Velasquez*, 1982-NMCA-154, 99 N.M. 109, 654 P.2d 562, cert. denied, 99 N.M. 148, 655 P.2d 160.

**Absent prejudice, failure to record not grounds for dismissal.** — In the absence of actual prejudice, there is no statutory nor constitutional ground for a dismissal of the indictment by virtue of a failure to record the grand jury proceeding. *State v. Bigler*, 1982-NMCA-136, 98 N.M. 732, 652 P.2d 754, cert. denied, 98 N.M. 762, 652 P.2d 1213.

**Advisement of elements of crime charged.** — The practice of simply providing the grand jury with a written manual containing uniform jury instructions, and not indicating on the record that the jury has been at least referred to the appropriate sections of the manual for each crime listed on the indictments, does not comply with Section 31-6-10 NMSA 1978, Rule 5-506B NMRA, or UJI 14-8001 NMRA. *State v. Ulibarri*, 1999-NMCA-142, 128 N.M. 546, 994 P.2d 1164, *aff'd*, 2000-NMSC-007, 128 N.M. 686, 997 P.2d 818.

**Defendant entitled to inspect record at time of trial.** — A defendant, at the trial of a criminal action, was entitled to inspect the grand jury testimony of the state's witness. *State v. Morgan*, 1960-NMSC-087, 67 N.M. 287, 354 P.2d 1002.

**Examine portion of testimony after trial.** — Once the witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness's grand jury testimony relating to the crime for which defendant is charged. The witness may be cross-examined concerning that testimony. If otherwise, an accused is denied the right to confront the witnesses against him. *State v. Sparks*, 1973-NMCA-108, 85 N.M. 429, 512 P.2d 1265.

**Not entitled to testimony in advance of trial.** — Accused was not entitled to transcript of testimony of all witnesses who testified before grand jury with respect to criminal charge out of which indictments against him arose, in advance of trial, in the absence of showing of any particularized need. *State v. Tackett*, 1967-NMSC-207, 78 N.M. 450, 432 P.2d 415, cert. denied, 390 U.S. 1026, 88 S. Ct. 1414, 20 L. Ed. 2d 283 (1968).

**Review of minutes by trial court harmless error.** — Reading and review of grand jury minutes by trial



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court, although improper, was harmless error since such review was not the basis for allegedly erroneous ruling. *State v. Elam*, 1974-NMCA-075, 86 N.M. 595, 526 P.2d 189, cert. denied, 86 N.M. 593, 526 P.2d 187.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38 Am. Jur. 2d Grand Jury § 35.

Libel and slander: proceedings, presentments, investigations, and reports of grand jury as privileged, 48 A.L.R.2d 716.

Accused's right to inspection of minutes of state grand jury, 20 A.L.R.3d 7.

Discovery, in civil proceeding, of records of criminal investigation by state grand jury, 69 A.L.R.4th 298.

38A C.J.S. Grand Juries §§ 111, 171 et seq.

## 31-6-9. Charge to grand jury.

The district judge convening a grand jury shall charge it with its duties and direct it as to any special inquiry into violations of law that he wishes it to make.

**History: 1953 Comp., § 41-5-9, enacted by Laws 1969, ch. 276, § 9; 1993, ch. 71, § 1.**

**Repeals.** — Laws 1969, ch. 276, § 14, repealed former 41-5-9, 1953 Comp., relating to the oath administered to the foreman of the grand jury.

**The 1993 amendment,** effective June 18, 1993, rewrote this section to the extent that a detailed comparison is impracticable.

ANNOTATIONS

**Limiting grand jury investigation.** — The district court does not possess discretion to limit the investigative prerogative of the grand jury. Once convened for a specific inquiry, a grand jury should be obliged likewise to inquire into other offenses of which it may have knowledge. *State ex rel. Deschamps v. Kase*, 1992-NMSC-040, 114 N.M. 38, 834 P.2d 415.

District courts may limit grand jury investigations to specific incidents identified in the petition. Therefore petition to convene a grand jury must contain sufficient information to enable the court to determine whether the petitioners seek a legitimate inquiry into alleged criminal conduct or malfeasance of a public official or whether petitioners seek nothing more than a witch hunt. *District Court v. McKenna*, 1994-NMSC-102, 118 N.M. 402, 881 P.2d 1387, cert. denied, 514 U.S. 1018, 115 S. Ct. 1361, 131 L. Ed. 2d 218.

**Indictment for perjury committed before grand jury.** — A grand jury may properly indict a defendant for perjury on the basis of defendant's false testimony before the grand jury since such an indictment is consistent with the juror's duty to inquire into public offenses. *State v. Watkins*, 1979-NMCA-003, 92 N.M. 470, 590 P.2d 169.

**Distinction between grand and petit juries.** — There was a wide distinction between a grand and a petit jury as to their functions and methods of procedure. The action of the former was simply preliminary; it was an inquiry by the grand inquest as to whether there was such probability for the statements made before them, which were usually ex parte, of the guilt of a certain person, that he ought to be placed on trial. *Territory v. Young*, 1881-NMSC-007, 2 N.M. 93.

**Duty to share knowledge of offenses committed with fellow jurors.** — It was not expected that in every instance each grand juror be free from all previous knowledge of the cases, or even of the precise circumstances of the cases coming before them for official action; on the contrary, it was stated in the statute as to their powers and duties, which was to be read to every grand jury as a part of the charge, that if a member knew of an offense committed, he was to declare the same to his fellow jurors. *Territory v. Young*, 1881-NMSC-007, 2 N.M. 93.

**Law reviews.** — For article, "Prisoners Are People," see 10 Nat. Resources J. 869 (1970).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38 Am. Jur. 2d Grand Jury § 18.

Matters within investigating powers of grand jury, 22 A.L.R. 1356, 106 A.L.R. 1383, 120 A.L.R. 437.

Erroneous instructions by court to grand jury as grounds for quashing indictment, 105 A.L.R. 575.

Contemporaneous existence or functioning of two or more grand juries, 121 A.L.R. 814.

Individual's right to present complaint or evidence of criminal offense, 24 A.L.R.4th 316.

38A C.J.S. Grand Juries §§ 74, 75.

## 31-6-9.1. Abuse of grand jury procedures.

The prosecuting attorney shall not use the grand jury solely for the purpose of obtaining additional evidence against an already indicted person on the charge or accusation for which the person was indicted.

**History: Laws 1979, ch. 337, § 12.**

ANNOTATIONS

**Misuse of protected information.** — A grand jury indictment will be dismissed only if the defendant can affirmatively demonstrate how he was prejudiced by the prosecutor's alleged misuse of the protected grand jury information. *State v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234, *rev'd on other grounds*, 1999-NMSC-041, 128 N.M. 261, 992 P.2d 274.

**Use of defendant's testimony at second grand jury hearing** for impeachment at trial did not affect the validity of the second indictment since the grand jury was ordered in response to the defendant's own motion. *State v. Martinez*, 1996-NMCA-109, 122 N.M. 476, 927 P.2d 31, cert. denied, 122 N.M. 578, 929 P.2d 269.

## 31-6-10. Requirement for indictment; number of jurors concurring.

Before the grand jury may vote an indictment charging an offense against the laws of the state, it must be satisfied from the lawful evidence before it that an offense against the laws has been



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committed and that there is probable cause to accuse by indictment the person named, of the commission of the offense so that he may be brought to trial therefor. In the absence of an indictment against a person holding public office or a presentment for the removal of a local elected officer, the grand jury shall not denigrate that person's moral fitness to hold public office. Eight jurors must concur to return an indictment.

**History: 1953 Comp., § 41-5-10, enacted by Laws 1969, ch. 276, § 10; 1979, ch. 337, § 7.**

**Repeals.** — Laws 1969, ch. 276, § 14, repealed former 41-5-10, 1953 Comp., relating to the oath administered to grand jurors.

**Cross references.** — For number of jurors necessary to concur in finding indictment, *see* N.M. Const., art. II, § 14.

ANNOTATIONS

**Withdrawal of charges from the grand jury.** — Where, during a grand jury proceeding, the prosecutor initially withdrew three charges of contributing to the delinquency of a minor against the defendant and later gave the grand jurors the option to consider any of those charges which resulted in the grand jury finding probable cause for all three charges, the inclusion of the three withdrawn charges in the indictment was proper. State v. Dietrich, 2009-NMCA-031, 145 N.M. 733, 204 P.3d 748, cert. denied, 2009-NMCERT-002, 145 N.M. 704, 204 P.3d 29, *overruled in part by State v. Marquez*, 2021-NMCA-046.

**Advisement of elements of crime charged.** — The practice of simply providing the grand jury with a written manual containing uniform jury instructions, and not indicating on the record that the jury has been at least referred to the appropriate sections of the manual for each crime listed on the indictments, does not comply with Section 31-6-8 NMSA 1978, Rule 5-506(B) NMRA, or UJI 14-8001 NMRA. *State v. Ulibarri*, 1999-NMCA-142, 128 N.M. 546, 994 P.2d 1164, *aff'd*, 2000-NMSC-007, 128 N.M. 686, 997 P.2d 818.

**But rule does not apply to defenses.** — The rule requiring instruction to the grand jury on the essential elements of the crime charged does not apply to defenses. *State v. Augustin M.*, 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. quashed, 2004-NMCERT-002, 135 N.M. 170, 86 P.3d 48.

**Sufficiency of evidence not subject to judicial review.** — The statutes concerning the evidence adduced before grand juries do not provide for judicial review of the sufficiency of the evidence considered by the grand jury. *State v. Paul*, 1971-NMCA-040, 82 N.M. 619, 485 P.2d 375, cert. denied, 82 N.M. 601, 485 P.2d 357.

**Evidence establishing probable cause not subject to review.** — The sufficiency of the evidence presented to a grand jury to establish probable cause for an indictment is not subject to judicial review. *State v. Elam*, 1974-NMCA-075, 86 N.M. 595, 526 P.2d 189, cert. denied, 86 N.M. 593, 526 P.2d 187.

**Massive amount of evidence found to support grand jury's finding of probable cause** to accuse. *State v. Ballinger*, 1983-NMCA-034, 99 N.M. 707, 663 P.2d 366, *rev'd on other grounds*, 1984-NMSC-003, 100 N.M. 583, 673 P.2d 1316.

**Law reviews.** — For comment, "The Use of an Information Following the Return of a Grand Jury No Bill: State v. Joe Nestor Chavez," see 10 N.M.L. Rev. 217 (1979-80).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 41 Am. Jur. 2d Indictments and Informations § 26 et seq.

What is "infamous" offense within constitutional or statutory provision in relation to presentment or indictment by grand jury, 24 A.L.R. 1002.

Quashing indictment for lack or insufficiency of evidence before grand jury, 59 A.L.R. 567.

Grand jury's failure or refusal to find indictment upon investigation as affecting right to file information, 120 A.L.R. 713.

Absence of grand jurors during hearing as affecting indictment, 156 A.L.R. 248.

Waiver: right to waive indictment, information, or other formal accusation, 56 A.L.R.2d 837.

Hearsay: admission of hearsay evidence incompetent at trial as affecting, in absence of statutory regulation, validity of indictment or conviction, 37 A.L.R.3d 612.

Incompetent witness, validity of indictment where grand jury heard, 39 A.L.R.3d 1064.

42 C.J.S. Indictments and Informations § 13 et seq.

## 31-6-11. Evidence before grand jury.

A. Evidence before the grand jury upon which it may find an indictment is that which is lawful, competent and relevant, including the oral testimony of witnesses under oath and any documentary or other physical evidence exhibited to the jurors. The Rules of Evidence shall not apply to a grand jury proceeding. The sufficiency of the evidence upon which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury.

B. It is the duty of the grand jury to weigh all the evidence submitted to it, and when it has reason to believe that other lawful, competent and relevant evidence is available that would disprove or reduce a charge or accusation or that would make an indictment unjustified, then it shall order the evidence produced. At least twenty-four hours before grand jury proceedings begin, the target or his counsel may alert the grand jury to the existence of evidence that would disprove or reduce an accusation or that would make an indictment unjustified, by notifying the prosecuting attorney who is assisting the grand jury in writing regarding the existence of that evidence.

C. A district attorney shall use reasonable diligence to notify a person in writing that the person is the target of a grand jury investigation. Unless the district judge presiding over the grand jury determines by clear and convincing evidence that providing notification may result in flight



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by the target, result in obstruction of justice or pose a danger to another person, the target of a grand jury investigation shall be notified in writing of the following information:

(1) that he is the target of an investigation;

(2) the nature of the alleged crime being investigated and the date of the alleged crime and any applicable statutory citations;

(3) the target's right to testify no earlier than four days after receiving the target notice if he is in custody, unless for good cause the presiding judge orders a different time period or the target agrees to testify sooner;

(4) the target's right to testify no earlier than ten days after receiving the target notice if he is not in custody, unless for good cause the presiding judge orders a different time period or the target agrees to testify sooner;

(5) the target's right to choose to remain silent; and

(6) the target's right to assistance of counsel during the grand jury investigation.

**History: 1953 Comp., § 41-5-11, enacted by Laws 1969, ch. 276, § 11; 1979, ch. 337, § 8; 1981, ch. 238, § 1; 2003, ch. 363, § 5.**

**Repeals.** — Laws 1969, ch. 276, § 14, repealed former 41-5-11, 1953 Comp., relating to the oath given to jurors subsequently admitted.

**The 2003 amendment,** effective July 1, 2003, inserted "that which is lawful, competent and relevant, including" in the first sentence, added the second sentence, and deleted "or competency" following "sufficiency" in Subsection A; inserted "lawful" following "other", "and relevant" following "competent" and "or reduce" following "disprove" in the first sentence and deleted the last three sentences, which read "The target shall be notified of his target status and be given an opportunity to testify, if he desires to do so, unless the prosecutor determines that notification may result in flight, endanger other persons, obstruct justice, or the prosecutor is unable with reasonable diligence to notify said person. A showing of reasonable diligence in notifying the target by the prosecutor is not required unless and until the target establishes actual and substantial prejudice as a result of an alleged failure by the prosecutor to exercise reasonable diligence in notifying the target of his target status before the grand jury. The prosecuting attorney assisting the grand jury shall present evidence that directly negates the guilt of the target where he is aware of such evidence" and added the present second sentence in Subsection B; and added Subsection C.

## ANNOTATIONS

I. GENERAL CONSIDERATION
II. EVIDENCE
III. TARGET OF INVESTIGATION

### I. GENERAL CONSIDERATION

**Courts are without power to review the sufficiency of the evidence upon which an indictment is returned absent a showing of bad faith.** — Where a grand jury indicted defendants for armed robbery based on information developed as a result of subpoenas that represented on their face that they were issued in the name of the eighth judicial district court, but were actually prepared by a deputy district attorney in the eighth judicial district at a time where there was no pending prosecution, court action, or grand jury proceeding, and where defendants moved to quash the indictments or alternatively to suppress all evidence obtained through the use of the contested subpoenas, the district court erred in granting the motion and quashing the indictments based on the unlawful subpoenas, because the sufficiency of the evidence upon which an indictment is returned is not subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury. *State v. Martinez*, 2018-NMSC-031.

**First-degree kidnapping.** — A prosecutor seeking to indict an accused for first-degree kidnapping must present to the grand jury both the primary elements found in UJI 14-403 NMRA and the special verdicts form found in UJI 14-6018 NMRA and establish probable cause for the same elements at the grand jury stage. *State v. Gallegos*, 2009-NMSC-017, 146 N.M. 88, 206 P.3d 993.

**"Prejudice" is appropriate constitutional standard.** — Inasmuch as "prejudice" is an appropriate standard in considering the exercise of constitutional rights before a trial jury which determines guilt, there is no reason to apply a stricter standard in considering the exercise of constitutional rights before a grand jury which determines probable cause to accuse. *State v. Martinez*, 1982-NMCA-002, 97 N.M. 585, 642 P.2d 188, cert. denied, 98 N.M. 51, 644 P.2d 1040.

**Subsection B "prejudice".** — The prejudice with which former Subsection B is concerned is prejudice in charging criminal conduct on the basis of probable cause. *State v. Penner*, 1983-NMCA-116, 100 N.M. 377, 671 P.2d 38 (decided under prior law).

**Prosecutor to impartially assist grand jury.** — Although, following the 1981 amendment of this section, a prosecutor is not limited to presenting evidence admissible at trial to the grand jury, he is still constrained by his duty to assist the grand jury in a fair and impartial manner. *Buzbee v. Donnelly*, 1981-NMSC-097, 96 N.M. 692, 634 P.2d 1244.

**Statements explaining law or procedure.** — Statements by a prosecutor to the grand jury explaining the law or procedure are proper so long as the statements are not in conflict with the charge given to the grand jury by the court or are not otherwise incorrect statements of the law or improper. *State v. Hewitt*, 1988-NMCA-053, 108 N.M. 179, 769 P.2d 92, cert. quashed, 107 N.M. 785, 765 P.2d 758.

**No requirement to instruct on defenses.** — The rule requiring instruction to the grand jury on the essential elements of the crime charged does not apply to defenses. *State v. Augustin M.*, 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. quashed, 2004-NMCERT-002, 135 N.M. 170, 86 P.3d 48.

In a prosecution for possession of marijuana in which the defendant argued that his possession and use of marijuana was a religious belief and sacrament, the prosecutor had no duty to instruct the grand jury on the defendant's "religious-use defense". *State v. Augustin M.*, 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. quashed, 2004-NMCERT-002, 135 N.M. 170, 86 P.3d 48.

**Causation in vehicular homicide case.** — Even though causation is an essential element of the charge



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of vehicular homicide, the prosecutor is not required to instruct the grand jury on causation, including the definitions of proximate cause. *State v. Augustin M.*, 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. quashed, 2004-NMCERT-002, 135 N.M. 170, 86 P.3d 48.

**Trial court abused its discretion in quashing an indictment,** where there was no indication that prosecutor's answers to jurors' questions improperly influenced the independent judgment of the jury so as to exclude or disregard the evidence urged to be considered by defendant. *State v. Hewitt*, 1988-NMCA-053, 108 N.M. 179, 769 P.2d 92, cert. quashed, 107 N.M. 785, 765 P.2d 758.

**Challenge to a grand jury indictment should be raised prior to trial.** — Where defendant was charged with first-degree murder, and where, prior to trial, defendant moved to dismiss the indictment arguing that he did not receive timely notice of the grand jury proceedings as required by 31-6-11 NMSA 1978, and where the district court found that defendant received timely notice and denied his motion, and where defendant was found guilty by a jury of willful, deliberate and premeditated murder, defendant's argument on appeal that the prosecution's failure to provide timely notice of the grand jury proceedings resulted in the violation of his right to testify before the grand jury was moot, because a challenge to a grand jury indictment should be raised before trial, because a jury's finding at trial of guilt beyond a reasonable doubt typically will moot any post-conviction challenges to the grand jury's determination of probable cause. *State v. Gutierrez*, 2021-NMSC-008.

## II. EVIDENCE

**Admissible evidence.** — Section 31-6-11A NMSA 1978 provides that all evidence presented to a grand jury must be such as would be "legally admissible" upon trial. Prosecuting attorneys must abide by the letter and spirit of the law, and this precludes their use of inadmissible evidence when obtaining indictments. *Maldonado v. State*, 1979-NMSC-102, 93 N.M. 670, 604 P.2d 363.

**Court prohibited from evaluating sufficiency of evidence behind an indictment.** — Where defendants were indicted for intentional or negligent child abuse resulting in great bodily harm with alternative theories that either or both inflicted the abuse or knew, or should have known, that such abuse was being inflicted; defendants were the parents of children who were determined to have been physically abused; defendants and their children lived with one of the defendants' parents; defendants each filed pretrial motions to dismiss the indictment alleging that the facts of the case were undisputed and that as a purely legal issue, there was a lack of substantial evidence that could prove the identity of the perpetrator who caused the injuries to the children; the district court held a hearing on the motions and after reviewing transcripts of witness interviews, granted the motions to dismiss; and there was no claim that the state acted improperly in any way, the district court violated Section 31-6-11 NMSA 1978. *State v. LaPietra*, 2010-NMCA-009, 147 N.M. 569, 226 P.3d 668, cert. denied, 2009-NMCERT-012, 147 N.M. 600, 227 P.3d 90.

**Hearsay evidence.** — In the absence of prosecutorial bad faith, there is not clear statutory authority for judicial review of the grand jury's determination of probable cause. *State v. Gallegos*, 2009-NMSC-017, 146 N.M. 88, 206 P.3d 993.

**Procedure to resolve pre-indictment evidentiary disputes.** — A letter from a target to the grand jury generally should focus on providing the grand jury with a factual and non-argumentative description of the nature of any tangible evidence and the substance of the potential testimony of any suggested witnesses, along with the names and contact information of the necessary witnesses who could provide the exculpatory information. The letter to the grand jury should be accompanied by a separate cover letter or memorandum to the prosecutor, which will not go to the grand jury, expressing any necessary contextual information, arguments as to the propriety or significance of the requested evidence, the proposed questions, and any other matters that may be helpful to communicate to the prosecutor or the grand jury judge. If the prosecutor does not want to alert the grand jury to the existence of the witnesses suggested by the target or does not want to elicit the information from the witnesses that the target deems worthy of submission to the grand jury, the prosecutor must file a motion with the grand jury judge, with notice to the target, seeking confirmation of the prosecutor's decision not to call the witnesses or not to inquire into the subject matter proposed by the target. In the motion, the prosecutor should provide the grand jury judge with the target's letter submitting the proposed evidence, and the prosecutor's motion should state why the prosecutor believes the grand jury should not be alerted to the existence of the target-offered evidence. The grand jury judge can then decide whether to ask for a written response from the target and whether to hold a hearing to allow the parties to argue the matter. The grand jury judge should resolve the matter quickly, by written order in the judge's discretion if needed to preserve the record, giving the parties clear direction on how to proceed before the grand jury. *Jones v. Murdoch*, 2009-NMSC-002, 145 N.M. 473, 200 P.3d 523.

**No post-indictment review.** — There is no statutory right to post-indictment review for compliance with the pre-indictment procedures for enforcing Subsection B of Section 31-6-11 NMSA 1978 absent a showing of prosecutorial bad faith. *State v. Yaw*, 2011-NMCA-023, 150 N.M. 279, 258 P.3d 1071, cert. denied, 2011-NMCERT-001.

Where defendant, who was arrested for child abuse, sent a letter to the prosecutor serving as grand jury aide requesting the prosecutor to allow the grand jury to hear testimony from the children; the prosecutor did not comply with the request; defendant moved the grand jury judge to order the prosecutor to present the evidence to the grand jury; the grand jury judge held a hearing and ruled that the prosecutor did not have to present the evidence to the grand jury; and defendant did not claim that there was prosecutorial misconduct, defendant did not have a right to post-indictment review of the evidence presented to the grand jury. *State v. Yaw*, 2011-NMCA-023, 150 N.M. 279, 258 P.3d 1071, cert. denied, 2011-NMCERT-001.

**Failure to disclose polygraph score.** — Where the prosecution specifically told grand jury that defendant passed polygraph test, but failed to tell the grand jury his actual score on the test, the trial court properly refused defendant's motion to dismiss. The defendant failed to show that he was prejudiced, that the evidence directly negated his guilt, or that the allegedly exculpatory evidence would have been admissible at trial. *State v. Blue*, 1998-NMCA-135, 125 N.M. 826, 965 P.2d 945, cert. quashed, 127 N.M. 392, 981 P.2d 1210.

**Evidence directly negating guilt does not require special instruction** to the grand jury to weigh and consider the impact of the potentially exculpatory evidence in making a probable cause determination. *State v. Augustin M.*, 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. quashed, 2004-NMCERT-002, 135 N.M. 170, 86 P.3d 48.

**Grand jury findings conclusive.** — The findings of a grand jury, when made by and through an indictment, duly returned into court, and regular upon its face, are conclusive, and the courts are without power or jurisdiction to inquire into the subject and review the testimony submitted to the grand jury to determine whether or not the required kind or degree of evidence was submitted. *State v. Stevens*, 1979-NMCA-058, 93 N.M. 434, 601 P.2d 67, cert. denied, 93 N.M. 683, 604 P.2d 821.



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**Statutes governing evidence directory.** — The statutes governing the kind, character and degree of evidence which should be produced before a grand jury in order to warrant the returning of an indictment are directory and are for the guidance of the grand jury. *State v. McGill*, 1976-NMCA-100, 89 N.M. 631, 556 P.2d 39.

**Sufficiency of evidence not subject to judicial review.** — The statutes concerning the evidence adduced before grand juries do not provide for judicial review of the sufficiency of the evidence considered by the grand jury. *State v. Paul*, 1971-NMCA-040, 82 N.M. 619, 485 P.2d 375, cert. denied, 82 N.M. 601, 485 P.2d 357.

**Courts powerless to review action of grand jury on indictments.** — Unless there is some clear statutory authority to do so, the courts are without power to review the action of the grand jury to determine whether or not it had sufficient or insufficient, legal or illegal, competent or incompetent evidence upon which to return an indictment. *State v. McGill*, 1976-NMCA-100, 89 N.M. 631, 556 P.2d 39; *Maldonado v. State*, 1979-NMSC-102, 93 N.M. 670, 604 P.2d 363.

**Courts powerless to review action of grand jury on indictments; exception.** — On a pretrial motion to dismiss charges alleging the sexual exploitation of children, the district court may dismiss the charges where, on the undisputed face of the materials before the court, a jury could not find beyond a reasonable doubt that the material meets the elements of the offense as defined by the Sexual Exploitation of Children Act, Section 30-6A-1 NMSA 1978, et seq. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668, *overruled on other grounds by State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105.

**Sufficiency of evidence supporting indictment.** — Sufficiency of evidence to support grand jury indictment is not subject to judicial review. *State v. Chance*, 1923-NMSC-042, 29 N.M. 34, 221 P. 183; *State v. Paul*, 1971-NMCA-040, 82 N.M. 619, 485 P.2d 375, cert. denied, 82 N.M. 601, 485 P.2d 357; *State v. Harge*, 1979-NMCA-120, 94 N.M. 11, 606 P.2d 1105, *overruled on other grounds by Buzbee v. Donnelly*, 1981-NMSC-097, 96 N.M. 692, 634 P.2d 1244.

An indictment duly returned into court and regular on its face cannot be challenged with respect to the kind and degree of evidence, *Buzbee v. Donnelly*, 1981-NMSC-097, 96 N.M. 692, 634 P.2d 1244.

**Review of whether exculpatory evidence withheld.** — Subsection B and Section 31-6-7 NMSA 1978 do not provide for judicial review as to whether exculpatory evidence was withheld from the grand jury. *State v. McGill*, 1976-NMCA-100, 89 N.M. 631, 556 P.2d 39.

**Withholding of exculpatory evidence may cause denial of due process.** — A defendant could be denied due process by a prosecutor withholding exculpatory evidence from the jury, since the grand jury has a duty to protect a citizen against unfounded accusation, and only specified persons are authorized by statute to present matters to the grand jury. *State v. McGill*, 1976-NMCA-100, 89 N.M. 631, 556 P.2d 39.

The withholding of exculpatory evidence from a grand jury by a prosecutor violates an accused's due process rights only when the withholding affects the outcome of the proceeding and prejudices the accused. *Buzbee v. Donnelly*, 1981-NMSC-097, 96 N.M. 692, 634 P.2d 1244.

**Exculpatory circumstantial evidence.** — There is no requirement that potentially exculpatory circumstantial evidence be considered by the grand jury in making a probable cause determination. *State v. Augustin M.*, 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. quashed, 2004-NMCERT-002, 135 N.M. 170, 86 P.3d 48.

**Prosecutor's broad discretion to present exculpatory evidence.** — Although a prosecutor is required to present direct exculpatory evidence to the grand jury, he is invested with wide discretion as to the selection and presentation of evidence. Mandamus will not lie where the effect of its issuance would be to improperly limit the scope of the state's prosecutorial discretion. *Kerpan v. Sandoval Cnty. Dist. Att'ys Office*, 1988-NMCA-007, 106 N.M. 764, 750 P.2d 464.

**Prosecutor cannot prevent grand jury from investigating the facts.** — Where petitioner was charged with second degree murder for the killing of petitioner's spouse; petitioner sent the prosecutor a letter requesting that the prosecutor alert the grand jury to evidence that petitioner had told a friend that the victim had physically abused petitioner; the letter also stated that the evidence would support a finding of self-defense; the grand jury judge ruled that the prosecutor did not have to alert the grand jury to petitioner's evidence because the letter contained legal arguments; during petitioner's testimony before the grand jury, one grand juror asked petitioner whether petitioner had ever told anyone that the victim had physically abused petitioner; and the prosecutor prevented petitioner from answering the question, the grand jury judge's ruling concerning the letter did not limit petitioner's testimony before the grand jury, the prosecutor lacked authority to preclude petitioner from answering direct questions from the grand jury, and the prosecutor interfered with the grand jury's independent duty to investigate the facts bearing on the issue of probable cause. *Herrera v. Sanchez*, 2014-NMSC-018.

**Leading questions by prosecutor did not amount to bad faith.** — Where the prosecutor submitted to the grand jury a proposed indictment charging defendant with numerous counts of criminal sexual contact of a minor, and where, during the grand jury proceedings, the prosecutor asked leading questions that merely summarized what was already testified to by the witness, the prosecutor's conduct did not amount to bad faith or structural error that would require dismissal of the indictment, because the prosecuting attorney merely restated certain aspects of the witness's testimony and suggested that this testimony established elements of the offenses charged in the indictment. *State v. Deignan*, 2016-NMCA-065.

**Erroneous instructions to the grand jury constitute structural error.** — Where the prosecutor submitted to the grand jury a proposed indictment charging defendant with numerous counts of criminal sexual contact of a minor (CSCM), attempted CSCM, and bribery of a witness, the prosecutor's erroneous instructions to the jury, including incorrectly telling the grand jury that the third-degree CSCM count had the same elements as the second-degree CSCM charge, failing to tell the grand jury what the underlying felony defendant was being charged with attempting to commit, and failing to instruct the grand jury as to the felony that the witness knew about when defendant intimidated her, constituted structural error and required dismissal of the charges. *State v. Deignan*, 2016-NMCA-065.

**Duty of prosecutor.** — This section is not violated simply because the prosecutor fails to produce evidence that is exculpatory, or through negligence fails to pursue an investigative lead that would produce directly exculpatory evidence. The prosecutor must know of the existence of the evidence and that it is exculpatory before the duty to produce it arises. *State v. Armijo*, 1994-NMCA-136, 118 N.M. 802, 887 P.2d 1269, cert. denied, 119 N.M. 20, 888 P.2d 466.

**Due process afforded where inadmissible evidence not admitted at trial.** — Where inadmissible evidence which has been presented to the grand jury is not admitted at trial, the indictment is not void and the defendant is afforded due process. *Maldonado v. State*, 1979-NMSC-102, 93 N.M. 670, 604 P.2d 363.

**Use of direct evidence negating accused's guilt.** — By the words "that directly negates the guilt," in the last sentence in Subsection B, the legislature intended to permit



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the use of direct evidence negating guilt of the accused and to prohibit the use of indirect, or circumstantial, evidence negating guilt. *Buzbee v. Donnelly*, 1981-NMSC-097, 96 N.M. 692, 634 P.2d 1244 (decided under prior law).

Subsection B requires a prosecutor to present to a grand jury only directly exculpatory evidence; he is not required to present evidence that does not directly negate guilt. *State v. Juarez*, 1990-NMCA-021, 109 N.M. 764, 790 P.2d 1045 (decided under prior law).

**Exclusion of testimony not negating defendant's guilt.** — Where testimony does not tend to negate defendant's guilt, its exclusion from the grand jury proceedings is no ground for dismissing the indictment. *State v. Gonzales*, 1981-NMCA-023, 95 N.M. 636, 624 P.2d 1033, *overruled on other grounds by Buzbee v. Donnelly*, 1981-NMSC-097, 96 N.M. 692, 634 P.2d 1244; *State v. Lara*, 1990-NMCA-075, 110 N.M. 507, 797 P.2d 296 (decided under prior law).

## III. TARGET OF INVESTIGATION

**Constitution does not give defendant right to cross-examine witnesses** appearing before the grand jury. *State v. Salazar*, 1970-NMCA-056, 81 N.M. 512, 469 P.2d 157.

**Application of target notification requirement.** — The target notification requirement under Subsection B (now Subsection C) applies to persons whom a grand jury investigates on its own initiative. *State v. Gonzales*, 1981-NMCA-079, 96 N.M. 513, 632 P.2d 748, cert. denied, 96 N.M. 543, 632 P.2d 1181.

**Whether statutory notice requirement has been met is question of fact.** *Rogers v. State*, 1980-NMCA-034, 94 N.M. 218, 608 P.2d 530.

**Four-days' notice to defendant of target status deemed sufficient.** — Four-days' notice of a grand jury investigation and of target status is certainly sufficient time for the defendant to exercise his right to testify. *State v. Cruz*, 1983-NMSC-045, 99 N.M. 690, 662 P.2d 1357.

**Any effective form of notice deemed sufficient.** — This section does not specify the method of giving notice; any method, written or oral, suffices so long as the method employed complies with the statutory intent that the target be given an opportunity to testify. *Rogers v. State*, 1980-NMCA-034, 94 N.M. 218, 608 P.2d 530.

**Notice to target's attorney may amount to compliance** with the notice requirement, depending on the facts of the case. *Rogers v. State*, 1980-NMCA-034, 94 N.M. 218, 608 P.2d 530.

**Failure to notify of target status.** — Defendant was not entitled to notice that he was a target of the grand jury investigation when at the time the offense (perjury before the grand jury) had not yet been committed. *State v. Albin*, 1986-NMCA-046, 104 N.M. 315, 720 P.2d 1256, cert. denied, 104 N.M. 246, 719 P.2d 1267, *overruled on other grounds by State v. Benavidez*, 1999-NMCA-53, 127 N.M. 189, 979 P.2d 234.

**Defect in required notice must be raised before trial.** — The issue of whether notice has been given to the target of a grand jury investigation as required by this section is a claimed defect in the initiation of the prosecution; it must be raised prior to trial and, when raised, is to be decided by the trial court inasmuch as it does not involve a trial on the merits. *Rogers v. State*, 1980-NMCA-034, 94 N.M. 218, 608 P.2d 530.

**Untimely motion to dismiss.** — Because defendant did not file his motion to dismiss for failure to provide target notice until eight months after his arraignment, and he did not show any cause below or on appeal to waive the time limit, the trial court correctly found the motion to be untimely. *State v. Vallejos*, 1998-NMCA-151, 126 N.M. 161, 967 P.2d 836, cert. denied, 126 N.M. 107, 967 P.2d 447.

**When notice requirement is issue, prosecutor has burden** of establishing either that the target was notified or that notification was excused under the "unless" clause, because the prosecutor is the party affirming that the grand jury indictment is proper. *Rogers v. State*, 1980-NMCA-034, 94 N.M. 218, 608 P.2d 530.

**Defendant assumed to have actual notice.** — When the prosecutor advised the trial court in the presence of the defendant and his counsel that the parties had stipulated that letters advising the defendant of grand jury proceedings against him had not been returned as undelivered, it may be assumed that the defendant had received actual notice. *State v. Garcia*, 1982-NMCA-086, 98 N.M. 186, 646 P.2d 1250, cert. denied, 98 N.M. 336, 648 P.2d 794.

**Grand jury target has a statutory right to testify before a grand jury.** — Where defendants were indicted on multiple counts of fraud, conspiracy to commit fraud, forgery, racketeering, and conspiracy to commit racketeering, and where, prior to the grand jury proceeding, defendants informed the prosecutor assisting the grand jury of their desire to testify and appeared for the grand jury investigation prepared to testify, and where the prosecutor informed the grand jury of defendants' presence and desire to testify, but failed to tell the grand jury that defendants had a right to testify, resulting in the grand jury informing the prosecutor that it did not wish to hear defendants' testimony and that it was ready to begin its deliberations, the district court did not err in quashing the indictment, because the prosecutor's failure to provide correct and complete advice to the grand jury resulted in defendants being deprived of their right to testify. *State v. Pareo*, 2018-NMCA-040.

**Failure to allow grand jury target to testify is a structural error in the grand jury process.** — Where defendants were indicted on multiple counts of fraud, conspiracy to commit fraud, forgery, racketeering, and conspiracy to commit racketeering, but were not permitted to exercise their right to testify, the district court did not err in quashing the indictment without requiring defendants to demonstrate prosecutorial bad faith or prejudice, because the failure to allow defendants to testify before the grand jury was a structural defect in the grand jury process that required no showing of prejudice or of prosecutorial bad faith. *State v. Pareo*, 2018-NMCA-040.

**Hearing on contention of juror bias.** — Petitioner deserved a full review on interlocutory appeal from an order denying his motion to dismiss the indictments against him, where his contentions that several grand jurors were biased against him and other targeted witnesses before presentation of any evidence, and that he was led to believe that he could not present his own statement or explanation of the allegations against him, raised, at the very least, the issue of demonstrable prejudice to him. *Anaya v. State*, 1986-NMSC-027, 104 N.M. 150, 717 P.2d 1119.

**Burden of showing prejudice.** — Because the prejudice involved in former Subsection B is prejudice to the defendant in the bringing of a criminal charge, defendant's burden is to establish that his missing testimony would have changed the vote of the grand jury on the issue of probable cause. *State v. Penner*, 1983-NMCA-116, 100 N.M. 377, 671 P.2d 38.

Trial court did not err by denying defendant's motion to dismiss an indictment for failure of the state to present certain statements where he did not establish demonstrable prejudice by showing a substantial probability of a different outcome. *State v. Lucero*, 1998-NMSC-044, 126 N.M. 552, 972 P.2d 1143.

Prejudice to a defendant will not be presented from a lack of target notice and a lack of a chance to testify during a grand jury hearing. The defendant still must demonstrate the vote of the grand jury on the issue of probable



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cause. *State v. Haynes*, 2000-NMCA-060, 129 N.M. 304, 6 P.3d 1026.

The trial court did not err in denying the defendant's motion to dismiss the indictment based on his inability to testify before the grand jury because he was incarcerated at the time. The defendant did not demonstrate that his missing testimony would have changed the vote of the grand jury on the issue of probable cause. *State v. Dominguez*, 1993-NMCA-042, 115 N.M. 445, 853 P.2d 147, cert. denied, 115 N.M. 409, 852 P.2d 682.

**Constitutional claim not supported.** — Allegation of due process claim that, while detained, appellant was denied his right to testify at a grand jury hearing, as required by Subsection C of this section, does not and cannot support a constitutional claim. *Hoffman v. Martinez*, 92 Fed.Appx. 628 (10th Cir. 2004).

**Law reviews.** — For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

For note, "Criminal Procedure - Grand Jury - Inadmissible Evidence, Due Process," see 11 N.M.L. Rev. 451 (1981).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38 Am. Jur. 2d Grand Jury § 37.

Indictment based on evidence illegally procured, 24 A.L.R. 1432.

Quashing indictment for lack or insufficiency of evidence before grand jury, 59 A.L.R. 567.

Admission of hearsay evidence incompetent at trial as affecting, in absence of statutory regulation, validity of indictment or conviction, 37 A.L.R.3d 612.

Incompetent witness, validity of indictment where grand jury heard, 39 A.L.R.3d 1064.

Individual's right to present complaint or evidence of criminal offense to grand jury, 24 A.L.R.4th 316.

Duty of prosecutor to present exculpatory evidence to state grand jury, 49 A.L.R.5th 639.

38A C.J.S. Grand Juries §§ 98, 101, 112 et seq., 171 et seq.

## 31-6-11.1. Renewed presentation of evidence forbidden.

After a grand jury acts on the merits of evidence presented to it and returns a no-bill, the same matter shall not be presented again to that jury or another grand jury on the same evidence.

**History: Laws 1979, ch. 337, § 11.**

**ANNOTATIONS**

**Subsequent indictment for more serious crime permitted.** — Where a defendant is originally indicted for second-degree murder, but later the district attorney reviews the case and decides the evidence supports first-degree murder, he may seek and obtain a second indictment, this time for first-degree murder. *State v. Sena*, 1983-NMSC-005, 99 N.M. 272, 657 P.2d 128.

**Subsequent information permitted after a no-bill.** — Neither the N.M. Const., art. II, § 14 nor this section limits the state's ability to proceed by information after a grand jury has returned a no-bill. *State v. Isaac M.*, 2001-NMCA-088, 131 N.M. 235, 34 P.3d 624, cert. denied, 131 N.M. 221, 34 P.3d 610 (2002).

**Law reviews.** — For comment, "The Use of an Information Following the Return of a Grand Jury No Bill: State v. Joe Nestor Chavez," see 10 N.M.L. Rev. 217 (1979-80).

For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

## 31-6-12. Subpoena powers; notice to witnesses.

A. The grand jury has power to order the attendance of witnesses before it, to cause the production of all public and private records or other evidence relevant to its inquiry and to enforce such power by subpoena issued on its own authority through the district court convening the grand jury and executed by any public officer charged with the execution of legal process of the district court; provided that all subpoenaed witnesses shall be given a minimum of thirty-six hours' notice unless a shorter period is specifically approved for each witness by a judge of the district court.

B. The target of the investigation shall not be subpoenaed except where it is found by the prosecuting attorney to be essential to the investigation. If the target and his attorney, if he has one, sign a document stating that the target will assert the fifth amendment, he shall be excused from testifying on those matters as to which the district judge determines he has a valid fifth-amendment privilege.

C. Subpoenas directed to witnesses shall be returnable only when the grand jury is sitting.

**History: 1953 Comp., § 41-5-12, enacted by Laws 1969, ch. 276, § 12; 1975, ch. 15, § 1; 1979, ch. 337, § 9.**

**Repeals.** — Laws 1969, ch. 276, § 14, repealed former 41-5-12, 1953 Comp., relating to the charge and instructions given to the grand jury by the court.

**ANNOTATIONS**

**Grand jury can issue subpoena, despite court's lack of jurisdiction.** — Where no statute confers jurisdiction upon the district court to order the production of handwriting exemplars, a grand jury could issue a subpoena for the exemplars and the district court could enforce the subpoena. *Sanchez v. Attorney Gen.*, 1979-NMCA-081, 93 N.M. 210, 598 P.2d 1170.

**Grand jury investigation satisfies the "pending judicial action" requirement.** — Where defendant was charged with traveling in interstate commerce for the purpose of engaging in illicit sexual conduct with a person



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under eighteen years of age, among other offenses, and where defendant filed a motion to suppress evidence, arguing that a grand jury subpoena duces tecum, issued to defendant's cell phone carrier requesting all known information relating to defendant's cell phone number, was unlawful under New Mexico law, it was held that although judicial subpoenas issued unilaterally by the deputy district attorney in the absence of a pending judicial action are unlawful, the subpoena in this case was issued by the grand jury after the presentment of evidence. A pending court case or grand jury investigation satisfies the "pending judicial action" requirement, and pre-indictment subpoenas are routinely issued in connection with grand jury proceedings under this section. *United States v. Streett*, 363 F. Supp.3d 1212 (D. N.M. 2018).

**Subdivision [Subparagraph] A applies to target.** — The provision of Subdivision [Subparagraph] A of this section, "that all subpoenaed witnesses shall be given a minimum of 36 hours' notice unless a shorter period is specifically approved for each witness by a judge of the district court," applies to a target, whether or not the target has been subpoenaed. *Rogers v. State*, 1980-NMCA-034, 94 N.M. 218, 608 P.2d 530.

**Target defendant.** — Defendant could not have been designated as a target defendant for a crime which had not yet been committed. *State v. Albin*, 1986-NMCA-046, 104 N.M. 315, 720 P.2d 1256, cert. denied, 104 N.M. 246, 719 P.2d 1267, *overruled on other grounds by State v. Benavidez*, 1999 NMCA 53, 127 N.M. 189, 979 P.2d 234.

**Law reviews.** — For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38A C.J.S. Grand Juries §§ 98, 101, 112 et seq.

## 31-6-13. Compensation of jurors and witnesses.

Grand jurors shall be paid by the district court a per diem allowance and mileage for their necessary travel for their attendance and service in the amounts provided by law for trial or petit jurors. Witnesses attending the grand jury under subpoena shall be paid by the district court a per diem allowance and mileage for their necessary travel in the amounts provided by law for witnesses attending trials.

**History: 1953 Comp., § 41-5-13, enacted by Laws 1969, ch. 276, § 13.**

**Repeals.** — Laws 1969, ch. 276, § 14, repealed former 41-5-13, 1953 Comp., relating to the retirement of the grand jury for their inquiry into the offenses.

**Cross references.** — For mileage and compensation for jurors and jury commissioners, *see* 38-5-15 NMSA 1978.

For per diem and mileage for witnesses, *see* 38-6-4 NMSA 1978.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38A C.J.S. Grand Juries § 12.

## 31-6-14. Multiple representation.

A lawyer or lawyers who are associated in practice shall not continue multiple representation of clients in a grand jury proceeding if the exercise of the lawyer's independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by his representation of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his own choosing.

**History: Laws 1979, ch. 337, § 13.**

## 31-6-15. Witness immunity; protection from harrassment [harassment] and unreasonable inconvenience.

A. If a witness is granted immunity in return for evidence, none of his testimony or any evidence obtained as a fruit of his testimony shall be used against him in any criminal prosecution except that such person may be prosecuted for any perjury committed in such testimony or in producing such evidence, or for contempt for failing to give an answer or produce evidence.

B. Witnesses shall not be harrassed [harassed] nor subjected to unreasonable repeated appearances by the grand jury or the prosecuting attorney assisting the grand jury.

**History: Laws 1979, ch. 337, § 10; 1978 Comp., § 31-3A-1, recompiled as 1978 Comp., § 31-6-15.**

**Bracketed material.** — The bracketed material in the catchline and in Subsection B was inserted by the compiler and it is not part of the law.

**Cross references.** — For witness immunity, *see* Rule 5-116.

**ANNOTATIONS**

**Applicability.** — Section 31-6-15 NMSA 1978 applies only to grand jury proceedings and not to court proceedings. *State v. Brown*, 1998-NMSC-037, 126 N.M. 338, 969 P.2d 313.

**Section applies only to immunity for testimony before grand juries** and not to immunity for testimony at



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trial. *State v. Summerall*, 1986-NMSC-080, 105 N.M. 82, 728 P.2d 833, *rev'g* 1986-NMCA-032, 105 N.M. 84, 728 P.2d 835.

**The very purpose of granting immunity is to reach the truth.** *State v. Boeglin*, 1983-NMSC-088, 100 N.M. 470, 672 P.2d 643.

**Witness must testify truthfully.** — Implicit in Subsection A is the fact that a witness must testify truthfully or be subject to being prosecuted: (1) for perjury committed in such testimony or in producing such evidence; or (2) for contempt for failure to give an answer or produce evidence. To hold otherwise would make this statute meaningless. *State v. Boeglin*, 1983-NMSC-088, 100 N.M. 470, 672 P.2d 643.

**Prosecutor applies for, court grants, use immunity.** — Taken together, Rule 5-116, Rule 11-412, and this section give the trial court the authority to grant use immunity when it is applied for by the prosecutor. *State v. Summerall*, 1986-NMCA-032, 105 N.M. 84, 728 P.2d 835, *rev'd*, 1986-NMSC-080, 105 N.M. 82, 728 P.2d 833.

**Limitations to derivative use immunity.** — This statute and its implementing rules, Rule 5-116 and Rule 11-412 NMRA, allow the government to compel a witness to testify and then prosecute the witness for the crimes mentioned in the compelled testimony, as long as neither the testimony itself nor any information directly or indirectly derived from the testimony is used in the prosecution. However, it is not enough for the prosecutor to simply assert that all evidence to be used at trial was obtained prior to the defendant's immunized testimony; instead, the state should have included testimony from key witnesses, along with testimony from the prosecutor and the investigators, that the witnesses had not had access or otherwise been exposed to the defendant's immunized testimony. *State v. Vallejos*, 1994-NMSC-107, 118 N.M. 572, 883 P.2d 1269.

**Law reviews.** — For note, "Criminal Procedure - The Fifth Amendment Privilege Against Self-Incrimination Applies to Juveniles in Court-Ordered Psychological Evaluations: State v. Christopher P.," see 23 N.M.L. Rev. 305 (1993).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Propriety of blanket or per se rule prohibiting federal grand jury from indicting witness who has previously testified before same grand jury under grant of use immunity, 139 A.L.R. Fed. 489.

# ARTICLE 7

# Indictments and Proof of Ownership for Offenses Concerning Domestic Animals

Sec.
31-7-1. Description of bovine animals; proof of brand; prima facie evidence of ownership.

## 31-7-1. [Description of bovine animals; proof of brand; prima facie evidence of ownership.]

In the prosecution of any offense arising under the laws of this state in regard to the unlawful taking, handling, killing, driving or other unlawful disposition of animals of the bovine kind, the description "neat cattle" in any indictment shall be deemed sufficient, and the proof of the brand by a certified copy of the registration thereof in the brand book, under the seal of the cattle sanitary board [livestock board], certified to by the secretary of said board, shall be sufficient to identify all horses, mules, asses or neat cattle, and shall be prima facie proof that the person owning the recorded brand is the owner of the animal branded with such brand.

**History: Laws 1895, ch. 6, § 6; C.L. 1897, § 67; Code 1915, § 122; C.S. 1929, § 4-1408; 1941 Comp., § 42-704; 1953 Comp., § 41-7-4.**

**Cross references.** — For certified copy of brand fee, *see* 77-2-7.4 NMSA 1978.

For recording of brands, *see* 77-9-5 NMSA 1978.

**Compiler's notes.** — Laws 1967, ch. 213, § 2, created the livestock board and transferred all the powers held by the cattle sanitary board to the livestock board, and Laws 1971, ch. 50, § 2 made the livestock board the sole board for the registration of brands and marks on horses, mules, asses, cattle and sheep. *See* 77-2-7.2 NMSA 1978.

### ANNOTATIONS

**Purpose of section.** — This section merely sets up a procedure that may be followed by state in prosecution involving the unlawful disposition of bovines and was not intended to be available to defendant. *State v. Reed*, 1951-NMSC-021, 55 N.M. 231, 230 P.2d 966, cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

**Use of statutory description "one neat cattle" is sufficient description** as commonly applied in the United States to describe a beast of the bovine genus. *Territory v. Christman*, 1899-NMSC-009, 9 N.M. 582, 58 P. 343.

**Description "cow" sufficient.** — Description in indictment of stolen animal as a cow was sufficient to support conviction under section making it an offense to steal any neat cattle. *Wilburn v. Territory*, 1900-NMSC-028, 10 N.M. 402, 62 P. 968.

**Certificate of record sufficient proof.** — Proof of brand by certificate of record, signed by secretary of cattle sanitary board, (now livestock board), is sufficient. *Territory v. Caldwell*, 1908-NMSC-027, 14 N.M. 535, 98 P. 167.

**Recorded brand under this section is sufficient to identify animals** classed therein. *Barnett v. Wedgewood*, 1922-NMSC-068, 28 N.M. 312, 211 P. 601.

**Title established by certificate of recorded brand.** — Where title to animals, the subject of larceny, is sought to be established by brand, a certificate of the recorded brand must be shown. *Territory v. Smith*,



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1904-NMSC-017, 12 N.M. 229, 78 P. 42; *Hancock v. Beasley*, 1907-NMSC-026, 14 N.M. 239, 91 P. 735.

**Introduction of certified copy of brand in evidence.** — It is only necessary to introduce a certified copy of recorded brand in evidence, where evidence of ownership depends upon brand on animal. *State v. Analla*, 1913-NMSC-073, 18 N.M. 294, 136 P. 600.

**Brand alone not sufficient evidence of ownership.** — Proof that calf bore defendant's brand in prosecution for stealing and branding the animal did not constitute prima facie evidence that defendants owned the animal, under provisions of this section. *State v. Reed*, 1951-NMSC-021, 55 N.M. 231, 230 P.2d 966, cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

**Prima facie proof of ownership.** — Recorded brand is prima facie proof that person owning recorded brand is owner of animal bearing such brand. *Barnett v. Wedgewood*, 1922-NMSC-068, 28 N.M. 312, 211 P. 601.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 4 Am. Jur. 2d Animals § 9; 41 Am. Jur. 2d Indictments and Informations § 149.

Stealing carcass as within statute making it larceny to steal cattle or livestock, 78 A.L.R.2d 1100.

3A C.J.S. Animals § 26; 42 C.J.S. Indictments and Informations § 108.

# ARTICLE 8

# Out-of-State Witnesses

Sec.
31-8-1. Attendance of witnesses from without a state; definitions.
31-8-2. Summoning witness in this state to testify in another state.
31-8-3. Witness from another state summoned to testify in this state.
31-8-4. Exemption from arrest and service of process.
31-8-5. Uniformity of interpretation.
31-8-6. Short title.

## 31-8-1. [Attendance of witnesses from without a state; definitions.]

"Witness," as used in this act [31-8-1 to 31-8-6 NMSA 1978], shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

The word "state" shall include any territory of the United States and District of Columbia.

The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness.

**History: Laws 1937, ch. 66, § 1; 1941 Comp., § 42-1213; 1953 Comp., § 41-12-13.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 81 Am. Jur. 2d Witnesses §§ 34, 35, 39.

Admissions to prevent continuance sought to secure testimony of absent witness in criminal case, 9 A.L.R.3d 1180.

Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of subpoena duces tecum, 7 A.L.R.4th 836.

Sufficiency of evidence to support or require finding that out-of-state witness in criminal case is "material witness" justifying certificate to secure attendances under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 12 A.L.R.4th 742.

Sufficiency of evidence to support or require finding that in-state witness in criminal case is "material and necessary" justifing issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 12 A.L.R.4th 771.

97 C.J.S. Witnesses § 17.

## 31-8-2. Summoning witness in this state to testify in another state.

If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state and that the laws of the state in which the prosecution



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is pending, or grand jury investigation has commenced or is about to commence (and of any other state through which the witness may be required to pass by ordinary course of travel), will give to him protection from arrest and the service of civil and criminal process in connection with any matters which arose before his entrance into this state under the summons, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of six cents [($.06)] a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and three dollars [($3.00)] for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

**History: Laws 1937, ch. 66, § 2; 1941 Comp., § 42-1214; 1953 Comp., § 41-12-14.**

ANNOTATIONS

**Applicability to witnesses from another state. —** The complex procedural requirements of this section apply to summoning witnesses from this state to appear in another state but do not apply to the converse situation. *State v. Hall*, 1987-NMCA-145, 107 N.M. 17, 751 P.2d 701, cert. denied, 107 N.M. 16, 751 P.2d 700.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 81 Am. Jur. 2d Witnesses §§ 34, 35, 39, 68 to 74.

Right of witness detained in custody for future appearance to fees for such detention, 50 A.L.R.2d 1439.

Allowance of mileage on witness fees with respect to witnesses who were not called to testify or not permitted to do so when called, 22 A.L.R.3d 675.

Sufficiency of evidence to support or require finding that in-state witness in criminal case is "material and necessary" justifying issuance of summons directly attendance of witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 12 A.L.R.4th 771.

97 C.J.S. Witnesses §§ 17, 35 to 48.

## 31-8-3. Witness from another state summoned to testify in this state.

If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of five cents [($.05)] a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and two dollars [($2.00)] for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state. Expenses as herein provided shall be paid from the fund from which all other witnesses are usually paid.



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**History: Laws 1937, ch. 66, § 3; 1941 Comp., § 42-1215; 1953 Comp., § 41-12-15.**

ANNOTATIONS

**Preliminary hearing testimony may be used after diligent attempt to obtain witness.** — Trial court did not abuse its discretion in admitting preliminary hearing testimony of absent state witness based on unavailability after prosecutor had exercised due diligence in obtaining the witness, even though prosecutor did not use a subpoena pursuant to this article to secure attendance of the witness from out of state until the witness had already become a fugitive, where the witness had made three previous voluntary appearances. *State v. Martinez*, 1984-NMCA-106, 102 N.M. 94, 691 P.2d 887, cert. denied, 102 N.M. 88, 691 P.2d 881.

**Party summoning witness must act diligently.** — Where no action was taken to require presence of out-of-state witness until some ten days before trial, no subpoena was issued for the witness and his presence at some future time appeared extremely doubtful, defendant had failed to show that diligence which the discretion of the court would be entitled to require. *State v. Fernandez*, 1952-NMSC-087, 56 N.M. 689, 248 P.2d 679.

In seeking a continuance to secure the appearance of an absent witness, a party must show that it has used due diligence to obtain the witness' testimony. *State v. Hall*, 1987-NMCA-145, 107 N.M. 17, 751 P.2d 701, cert. denied, 107 N.M. 16, 751 P.2d 700.

**Compliance with section deemed due diligence.** — If the state wanted to guarantee the witness' attendance once it had located him in Kentucky but was unable to contact him directly, it should have used the procedures outlined in this section. These steps would not have guaranteed the witness' attendance at the trial; however, on the day trial was to commence, if the state had been able to show that it had used this section, it could have made a stronger argument to the court to grant a continuance based on its due diligence and good faith efforts. Because the state could rely only on efforts that had no legal effect and did not constitute due diligence, resulting in its crucial witness being absent, the court did not err in denying the state's motion for continuance and in dismissing the action. *State v. Graham*, 1993-NMCA-054, 115 N.M. 745, 858 P.2d 412.

**Due diligence found.** — Where the court admitted the preliminary hearing testimony of a state witness at defendant's murder trial on that ground that the witness was unavailable; the New Mexico prosecution served the witness with a subpoena through the witness' Oklahoma parole officer; the witness had twice responded to similar subpoenas; the New Mexico prosecution purchased an airplane ticket to New Mexico and mailed the ticket to the witness; the New Mexico prosecution telephoned the witness twice and the witness confirmed that the witness would appear at defendant's trial; unknown to the New Mexico prosecution, the witness' criminal trial began in Oklahoma on the day the witness was scheduled to appear at defendant's trial; and when the New Mexico prosecution learned that the witness had disappeared during the witness' trial in Oklahoma, the New Mexico prosecution obtained a subpoena pursuant to Section 31-8-3 NMSA 1978 and sent the subpoena to Oklahoma, the New Mexico prosecution acted with due diligence in seeking to bring the witness to New Mexico and the trial court's admission of the witness' preliminary testimony did not violate defendant's sixth amendment rights. *Martinez v. Sullivan*, 881 F.2d 921 (10th Cir. 1989).

**Inability of witness to attend trial.** — Where what out-of-state witness would testify to was pure speculation but witness was offered money for transportation and expenses, his inability to attend on day of trial did not make denial of defendant's motion for continuance until such time as witness could be produced erroneous, since required statement of facts it was believed witness would prove, as is necessary to support motion for continuance made on first day of trial, was not produced. *State v. Fernandez*, 1952-NMSC-087, 56 N.M. 689, 248 P.2d 679.

**Refusal of appellate court to hold witness unavailable.** — The district attorney's statements that the state attempted to subpoena a material witness and that he was out-of-state were no more than bare recitals unsupported by factual elaboration. Since the record contained no evidence as to the circumstances of the state's alleged attempt and inability to subpoena the witness, the court of appeals refused to hold that the witness was unavailable for trial, and under Rule 11-804 NMRA his preliminary hearing testimony was not admissible in evidence. *State v. Mann*, 1975-NMCA-045, 87 N.M. 427, 535 P.2d 70.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 81 Am. Jur. 2d Witnesses §§ 34, 35, 39, 68 to 74.

Right of witness detained in custody for future appearance to fees for such detention, 50 A.L.R.2d 1439.

Allowance of mileage or witness fees with respect to witnesses who were not called to testify or not permitted to do so when called, 22 A.L.R.3d 675.

Sufficiency of evidence to support or require finding that out-of-state witness in criminal case is "material witness" justifying certificate to secure attendance under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 12 A.L.R.4th 742.

97 C.J.S. Witnesses §§ 2 to 48.

## 31-8-4. Exemption from arrest and service of process.

If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

**History: Laws 1937, ch. 66, § 4; 1941 Comp., § 42-1216; 1953 Comp., § 41-12-16.**



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**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 5 Am. Jur. 2d Arrest § 128 et seq.; 62B Am. Jur. 2d Process §§ 39-43.

Power of legislature to grant or authorize committee to grant immunity from criminal prosecution to witnesses summoned before legislative committee, 87 A.L.R. 435.

6A C.J.S. Arrest §§ 6, 80 to 85; 72 C.J.S. Process §§ 27, 28.

## 31-8-5. Uniformity of interpretation.

This act [31-8-1 to 31-8-6 NMSA 1978] shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

**History: Laws 1937, ch. 66, § 5; 1941 Comp., § 42-1217; 1953 Comp., § 41-12-17.**

## 31-8-6. Short title.

This act [31-8-1 to 31-8-6 NMSA 1978] may be cited as "Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings".

**History: Laws 1937, ch. 66, § 6; 1941 Comp., § 42-1218; 1953 Comp., § 41-12-18.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Permissibility of testimony by telephone in state trial, 85 A.L.R.4th 476.

# ARTICLE 9

# Mental Illness and Competency

Sec.
31-9-1. Determination of competency; raising the issue.
31-9-1.1. Determination of competency; evaluation and determination.
31-9-1.2. Determination of competency; commitment; report.
31-9-1.3. Determination of competency; ninety-day review; reports; continuing treatment.
31-9-1.4. Determination of competency; incompetent defendants.
31-9-1.5. Determination of competency; evidentiary hearing.
31-9-1.6. Hearing to determine mental retardation.
31-9-2. Mental examination.
31-9-3. Repealed.
31-9-4. Repealed.

## 31-9-1. Determination of competency; raising the issue.

Whenever it appears that there is a question as to the defendant's competency to proceed in a criminal case, any further proceeding in the cause shall be suspended until the issue is determined. Unless the case is dismissed upon motion of a party, when the question is raised in a court other than the district court or a metropolitan court, the proceeding shall be suspended and the cause transferred to the district court. If the question of a defendant's competency is raised in the metropolitan court and the court determines that the defendant is incompetent to proceed in a criminal case, the cause, if not dismissed upon motion of a party, shall be transferred to the district court.

**History: 1978 Comp., § 31-9-1, enacted by Laws 1988, ch. 107, § 1 and by 1988, ch. 108, § 1; 1989, ch. 94, § 1; 1993, ch. 240, § 1; 1993, ch. 249, § 1.**

**Repeals and reenactments.** — Laws 1988, ch. 108, § 1 and Laws 1988, ch. 107, § 1, both approved March 8, 1988, repealed former 31-9-1 NMSA 1978, as amended by Laws 1987, ch. 353, § 1, and enacted identical new sections designated 31-9-1 NMSA 1978, effective May 18, 1988.

**Cross references.** — For the interstate compact on mentally disordered offenders, *see* 31-5-10, 31-5-11 NMSA 1978.

For commitment of the mentally ill, *see* 43-1-2 to 43-1-23 NMSA 1978.

For rule of criminal procedure governing defenses of insanity, incompetency, and lack of capacity, *see* Rule 5-602 NMRA.

**1993 amendments.** — Identical amendments to this section were enacted by Laws 1993, ch. 240, § 1 and Laws 1993, ch. 249 § 1, both approved on April 6, 1993, and both effective June 18, 1993, which inserted "to proceed in a criminal case" in the first sentence, substituted "Unless the case is dismissed upon motion of a party, when" for "If" at the beginning of the second sentence and added the



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third sentence. The section is set out above as amended by Laws 1993, ch. 249, § 1. *See* 12-1-8 NMSA 1978.

**The 1989 amendment,** effective July 1, 1989, inserted "or a metropolitan court" in the second sentence.

## ANNOTATIONS

**Incompetency is distinct from insanity.** — A claim of incompetency to stand trial is distinct from the defense of insanity. The competency issue is whether a defendant understands the nature and significance of the proceedings, has a factual understanding of the charges, and is able to assist defense counsel in defendant's defense. The insanity defense concerns a defendant's mental state at the time the offense was committed. *State v. Najar*, 1986-NMCA-068, 104 N.M. 540, 724 P.2d 249, cert. denied, 104 N.M. 460, 722 P.2d 1182.

**Failure to determine competency.** — Where defense counsel raised the issue of defendant's competency at defendant's preliminary hearing in magistrate court; the case was then transferred to district court; the district court ordered a competency evaluation of defendant; based on the results of the evaluation, defense counsel was satisfied that defendant was competent to stand trial, and the court entered an order finding defendant competent to stand trial; defense counsel again raised the issue of defendant's competency on the day of trial, prior to the start of trial; the court took no action and proceeded to trial; during the trial, defendant made noises, talking to someone who was not present in the courtroom; the court admonished defendant not to disrupt the trial; defense counsel attempted, but the court refused, to allow defense counsel to raise the issue of defendant's competency; the jury returned a verdict of guilty; defense counsel again raised the issue of defendant's competency; the court then permitted defense counsel to fully raise the issue and instructed defense counsel to request a competency evaluation; based on the evaluation, the court found defendant to be incompetent, but declined to dismiss the charges and proceeded to sentence defendant, defendant was denied due process of law because the court erred when it refused to permit defense counsel to raise the issue of defendant's competency prior to and during trial, when it failed to stay the proceedings pending a determination of whether a reasonable doubt existed as to defendant's competency to stand trial, and after finding defendant incompetent. *State v. Montoya*, 2010-NMCA-067, 148 N.M. 495, 238 P.3d 369, cert. denied, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

**Requirements on court.** — Whenever a legitimate concern about the present ability of a defendant to consult and understand is brought to the court's attention, the court is required to consider whatever competency-related evidence is before the court and to determine whether there exists a reasonable doubt as to the defendant's competency to stand trial. If the court determines that there is reasonable doubt as to defendant's competency, the court must have defendant's competency professionally evaluated by a qualified professional who must submit a report to the court. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

**In considering whether reasonable doubt exists,** the court must keep in mind the requirement that defendant must have sufficient present ability to consult and understand as required under due process of law. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

**Constitutionality.** — This article did not deprive an incompetent criminal defendant of equal protection under the law, or of substantive or procedural due process. *State v. Rotherham*, 1996-NMSC-048, 122 N.M. 246, 923 P.2d 1131.

**Multi-step competency proceeding.** — The New Mexico statutory scheme provides for a multi-step competency proceeding when it appears that there is a question as to a defendant's competency. *State v. Webb*, 1990-NMCA-077, 111 N.M. 78, 801 P.2d 660, cert. quashed, 111 N.M. 164, 803 P.2d 253.

**Due process requires incompetent defendants to be treated differently.** The conviction of an accused person while that person is legally incompetent violates due process, and thus incompetent defendants cannot be brought to trial in the same manner as competent defendants. *State v. Gallegos*, 1990-NMCA-104, 111 N.M. 110, 802 P.2d 15, cert denied, 111 N.M. 77, 801 P.2d 659.

**Defendant cannot be validly tried while mentally incompetent** to stand trial. *State v. Tartaglia*, 1969-NMCA-110, 80 N.M. 788, 461 P.2d 921.

**Effect of false claim of lack of competency.** — Where the file and records conclusively establish that his claim of lack of competency to stand trial was false, defendant was not entitled to a hearing on the claim. *State v. Kenney*, 1970-NMCA-038, 81 N.M. 368, 467 P.2d 34.

**Section provides for questioning of competency prior to suspension.** — This section provides that there must be a "question" as to the mental competency of a defendant to stand trial, before the court is required to suspend proceedings in the cause until the issue as to defendant's competency is determined. *State v. Smith*, 1969-NMCA-101, 80 N.M. 742, 461 P.2d 157.

**Question of competency requires more than mere assertion.** — This section requires there to be a "question" as to the accused's capacity to stand trial. The "question" is not raised by an assertion of that issue, even though the assertion is in good faith. As in the similar federal statute, there must be a showing of reasonable cause for the belief that an accused is not competent to stand trial. *State v. Hollowell*, 1969-NMCA-105, 80 N.M. 756, 461 P.2d 238.

**Counsel's impressions of defendant's mental state insufficient.** — "Wondering" about defendant's mental capacity which is based solely on counsel's impression is not reasonable cause for a belief that defendant is incompetent to stand trial. *State v. Hovey*, 1969-NMCA-049, 80 N.M. 373, 456 P.2d 206.

**When court justified in proceeding without competency hearing.** — Defense counsel's representations to the trial court that the defendant was competent to plead guilty and responsible for his actions effectively removed any question of competency from the case and justified court in proceeding without competency hearing, despite previously ordered psychiatric examination of defendant. *State v. Bius*, 1973-NMCA-057, 85 N.M. 98, 509 P.2d 573.

**Motion must include grounds for belief of lack of capacity.** — A motion on behalf of an accused for a judicial determination of mental competency to stand trial shall set forth the ground for belief that such mental capacity is lacking. When the motion does not set forth grounds for reasonable cause to believe the defendant may be insane or mentally incompetent, the motion can be denied. "The statute requires such an examination only when it is shown that there is reasonable cause to believe that an accused may be presently insane or otherwise mentally incompetent." *State v. Hovey*, 1969-NMCA-049, 80 N.M. 373, 456 P.2d 206.

**Court not required to grant motion for examination.** — An examination is not necessary, nor is the court required to grant a motion seeking such examination unless there is a question as to the mental capacity of defendant. *State v. Morales*, 1970-NMCA-036, 81 N.M. 333, 466 P.2d 899, cert. denied, 81 N.M. 305, 466 P.2d 871, cert. denied, 400 U.S. 842, 91 S. Ct. 84, 27 L. Ed. 2d 77.

**Possible prejudicial statement of expert not grounds for error.** — Statement of medical expert that



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defendant had no mental disease either at the time of the commission of the criminal act or at the time of trial when the reason for testimony concerning defendant's mental condition at the time of trial was because the medical expert's examination had been primarily to determine defendant's present competency to stand trial found not to be error although possibly prejudicial. *State v. Lopez*, 1969-NMCA-057, 80 N.M. 599, 458 P.2d 851, cert. denied, 80 N.M. 607, 458 P.2d 859, cert. denied, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

**Trial court's failure to determine competency not error.** — Where defendant's claim is that the trial court erred in failing to judicially determine his mental competency and the context of this contention is that the motion was never called to the court's attention and no ruling was invoked; although, prior opinions indicate that an issue as to defendant's mental competency may still be litigated, still they do not support the view that a trial court errs in failing to decide an issue on which a ruling has not been invoked. *State v. Madrigal*, 1973-NMCA-116, 85 N.M. 496, 513 P.2d 1278, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**Initial orders were not final orders subject to appellate review.** — Where the trial court had made only the initial orders in a multi-part proceeding to determine defendant's competency to stand trial for murder, the orders finding defendant dangerous and incompetent to stand trial from which he appealed were not final orders subject to appellate review. *State v. Webb*, 1990-NMCA-077, 111 N.M. 78, 801 P.2d 660, cert. quashed, 111 N.M. 164, 803 P.2d 253.

**Competency of defendants in courts of limited jurisdiction.** — Except for metropolitan courts, courts of limited jurisdiction have no authority to hold competency hearings. 2003 Op. Att'y Gen. No. 03-04.

Courts of limited jurisdiction have no authority to commit defendants to a mental health facility. 2003 Op. Att'y Gen. No. 03-04.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 79 et seq.

Presumption of continuing insanity as applied to accused in criminal case, 27 A.L.R.2d 121.

Constitutional right to jury trial in proceeding for adjudication of incompetency or insanity, 33 A.L.R.2d 1145.

Unanimity of verdict in proceedings to determine sanity of one accused of crime, 42 A.L.R.2d 1468.

Right to counsel in insanity or incompetency adjudication proceedings, 87 A.L.R.2d 950.

Appealability of orders or rulings, prior to final judgment in criminal case, as to accused's mental competency, 16 A.L.R.3d 714.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 A.L.R.3d 146.

Admissibility on issue of sanity of expert opinion based partly on a medical, psychological or hospital report, 55 A.L.R.3d 551.

Adequacy of defense counsel's representation of criminal client regarding incompetency, insanity, and related issues, 17 A.L.R.4th 575.

Competency to stand trial of criminal defendant diagnosed as "mentally retarded" - modern cases, 23 A.L.R.4th 493.

Malpractice liability based on prior treatment of mental disorder alleged to relate to patient's conviction of crime, 28 A.L.R.4th 712.

Competency to stand trial of criminal defendant diagnosed as "schizophrenic" - modern state cases, 33 A.L.R.4th 1062.

Admissibility of results of computer analysis of defendant's mental state, 37 A.L.R.4th 510.

Pyromania and the criminal law, 51 A.L.R.4th 1243.

Probation revocation: insanity as defense, 56 A.L.R.4th 1178.

Adequacy of defense counsel's representation of criminal client - issues of incompetency, 70 A.L.R.5th 1.

Adequacy of defense counsel's representation of criminal client - pretrial conduct or conduct at unspecified time regarding issues of insanity, 72 A.L.R.5th 109.

Incompetency at time of offense or trial as ground for vacating or setting aside sentence under 28 U.S.C. § 2255, 7 A.L.R. Fed. 565.

Notice to government of defense based upon defendant's mental condition at time of alleged crime, and court-ordered psychiatric examination thereon, under Rule 12.2, Federal Rules of Criminal Procedure, 63 A.L.R. Fed. 552.

Competency to stand trial of criminal defendant diagnosed as "schizophrenic" - modern federal cases, 63 A.L.R. Fed. 696.

Pathological gambling as basis of defense of insanity in federal criminal case, 76 A.L.R. Fed. 749.

## 31-9-1.1. Determination of competency; evaluation and determination.

The defendant's competency shall be professionally evaluated by a psychologist or psychiatrist or other qualified professional recognized by the district court as an expert and a report shall be submitted as ordered by the court. A hearing on the issue of the competency of an incarcerated defendant charged with a felony shall be held by the district court within a reasonable time, but in no event later than thirty days after notification to the court of completion of the diagnostic evaluation. In the case of an incarcerated defendant not charged with a felony, the court shall hold a hearing and determine his competency within ten days of notification to the court of completion of the diagnostic evaluation.

**History: 1978 Comp., § 31-9-1.1, enacted by Laws 1988, ch. 107, § 2 and by Laws 1988, ch. 108, § 2; 1993, ch. 240, § 2; 1993, ch. 249, § 2.**

**Cross references.** — For rule of criminal procedure governing defenses of insanity, incompetency, and lack of capacity, *see* Rule 5-602 NMRA.

**The 1993 amendment,** rewrote the section to the extent that a detailed comparison was impracticable. The section was also amended by Laws 1993, ch. 240, § 2, effective June 18, 1993. The section was set out as amended by Laws 1993, ch. 249, § 2. *See* 12-1-8 NMSA 1978.

**ANNOTATIONS**

**Standard for competency.** — The standard for competency is met if "defendant understands the nature and significance of the proceedings, has a factual understanding of the charges, and is able to assist his attorney in his defense". *State v. Najar*, 1986-NMCA-068, 104 N.M. 540, 724 P.2d 249, cert. denied, 104 N.M. 460, 722 P.2d 1182; *State v. Duarte*, 1996-NMCA-038, 121 N.M. 553, 915 P.2d 309, cert. denied, 121 N.M. 444, 913 P.2d 251.



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**Five year delay between arraignment and competency hearing.** — The defendant was not denied due process when there was a five year delay between his arraignment and his competency hearing where much of the delay occurred awaiting a determination of the defendant's competency by a qualified professional; the district court ordered the defendant's attorney to request a competency hearing when the attorney received the report of the mental evaluation; no mental evaluation was submitted to the district court despite repeated court-ordered evaluations; and the defendant did not oppose his continued commitment. *State v. Demongey*, 2008-NMCA-066, 144 N.M. 333, 187 P.3d 679, cert. quashed, 2011-NMCERT-001, 150 N.M. 560, 263 P.3d 902.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist, 85 A.L.R.4th 19.

Qualification of nonmedical psychologist to testify as to mental condition or competency, 72 A.L.R.5th 529.

## 31-9-1.2. Determination of competency; commitment; report.

A. When, after hearing, a court determines that a defendant is not competent to proceed in a criminal case and the court does not find that the defendant is dangerous, the court may dismiss the criminal case without prejudice in the interests of justice. Upon dismissal, the court may advise the district attorney to consider initiation of proceedings under the Mental Health and Developmental Disabilities Code [43-1-1 NMSA 1978] and order the defendant confined for a maximum of seven days to facilitate preparation and initiation of a petition pursuant to that code.

B. When a district court determines that a defendant charged with a felony is incompetent to proceed in the criminal case, but does not dismiss the criminal case, and the district court at that time makes a specific finding that the defendant is dangerous, the district court may commit the defendant as provided in this section for treatment to attain competency to proceed in a criminal case. The court shall enter an appropriate transport order that also provides for return of the defendant to the local facilities of the court upon completion of the treatment. The defendant so committed shall be provided with treatment available to involuntarily committed persons, and:

(1) the defendant shall be detained by the department of health in a secure, locked facility; and

(2) the defendant, during the period of commitment, shall not be released from that secure facility except pursuant to an order of the district court that committed him.

C. Within thirty days of receipt of the court's order of commitment of an incompetent defendant and of the necessary and available documents reasonably required for admission pursuant to written policies adopted by the secretary of health or his designee, the defendant shall be admitted to a facility designated for the treatment of defendants who are incompetent to stand trial and dangerous. If, after conducting an investigation, the secretary determines that the department of health does not have the ability to meet the medical needs of a defendant ordered committed to a facility, the secretary or his designee may refuse admission to the defendant upon written certification to the committing court and the parties of the lack of ability to meet the medical needs of the defendant. The certification must be made within fourteen days of the receipt of the court's order of commitment and necessary and available documents reasonably required for admission pursuant to written policies adopted by the secretary or his designee. Within ten days of filing of the certification the court shall conduct a hearing for further disposition of the criminal case.

D. As used in Sections 31-9-1 through 31-9-1.5 NMSA 1978, "dangerous" means that, if released, the defendant presents a serious threat of inflicting great bodily harm on another or of violating Section 30-9-11 or 30-9-13 NMSA 1978.

E. Within thirty days of an incompetent defendant's admission to a facility to undergo treatment to attain competency to proceed in a criminal case, the person supervising the defendant's treatment shall file with the district court, the state and the defense an initial assessment and treatment plan and a report on the defendant's amenability to treatment to render him competent to proceed in a criminal case, an assessment of the facility's or program's capacity to provide appropriate treatment for the defendant and an opinion as to the probability of the defendant's attaining competency within a period of nine months from the date of the original finding of incompetency to proceed in a criminal case.

**History: 1978 Comp., § 31-9-1.2, enacted by Laws 1988, ch. 107, § 3 and by Laws 1988, ch. 108, § 3; 1993, ch. 240, § 3; 1993, ch. 249, § 3; 1999, ch. 149, § 1.**

**Cross references.** — For rule of criminal procedure governing defenses of insanity, incompetency, and lack of capacity, *see* Rule 5-602 NMRA.



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**The 1999 amendment,** effective June 18, 1999, added "and order the defendant confined for a maximum of seven days to facilitate preparation and initiation of a petition pursuant to that code" at the end of Subsection A; in Subsection B, inserted "charged with a felony" following "a defendant", substituted "proceed in the criminal case" for "stand trial", substituted "commit the defendant as provided in this section for" for "order", and deleted "for a period not to exceed one year" following "in a criminal case" in the first sentence; added Subsection C and redesignated the remaining subsections accordingly; and substituted "nine months" for "one year" in Subsection E.

**The 1993 amendment,** effective June 18, 1993, rewrote the section to the extent that a detailed comparison was impracticable. This section was also amended by Laws 1993, ch. 240, § 3, effective June 18, 1993. The section was set out as amended by Laws 1993, ch. 249, § 3. *See* 12-1-8 NMSA 1978.

ANNOTATIONS

**In considering whether reasonable doubt exists,** the court must keep in mind the requirement that a defendant must have sufficient present ability to consult and understand as required under due process of law. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

**Defense counsel's observations and opinions.** — A court may consider defense counsel's observations and opinions, but those observations and opinions alone cannot trigger reasonable doubts about defendant's competency. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

**Finding of dangerousness as prerequisite to detention.** — In the context of the competency statutes, the finding of dangerousness is a prerequisite to the applicability of the portions of the statute allowing defendant to be detained for a longer period of time. Thus, the court must make a finding of dangerousness prior to the detention authorized by Section 31-9-1.5 NMSA 1978, but it need not have made such a finding at a prior hearing. *State v. Gallegos*, 1990-NMCA-104, 111 N.M. 110, 802 P.2d 15, cert. denied, 111 N.M. 77, 801 P.2d 659.

## 31-9-1.3. Determination of competency; ninety-day review; reports; continuing treatment.

A. Within ninety days of the entry of the order committing an incompetent defendant to undergo treatment, the district court, sitting without a jury, shall conduct a hearing, unless waived by the defense, and shall determine:

(1) whether the defendant is competent to proceed in the criminal case; and, if not,

(2) whether the defendant is making progress under treatment toward attainment of competency within nine months from the date of the original finding of incompetency; and

(3) whether the defendant remains dangerous as that term is defined in Section 31-9-1.2 NMSA 1978.

B. At least seven days prior to the review hearing, the treatment supervisor shall submit a written progress report to the court, the state and the defense indicating:

(1) the clinical findings of the treatment supervisor and the facts upon which the findings are based;

(2) the opinion of the treatment supervisor as to whether the defendant has attained competency or as to whether the defendant is making progress under treatment toward attaining competency within nine months from the date of the original finding of incompetency and whether there is a substantial probability that the defendant will attain competency within nine months from the date of the original finding of incompetency;

(3) whether the defendant is dangerous as that term is defined in Section 31-9-1.2 NMSA 1978 or whether the defendant satisfies the criteria for involuntary commitment contained in the Mental Health and Developmental Disabilities Code [43-1-2 NMSA 1978]; and

(4) if the defendant is receiving medication, information from the prescribing physician indicating the type, the dosage and the effect of the medication on the defendant's appearance, actions and demeanor.

C. If the district court finds the defendant to be competent, the district court shall set the matter for trial, provided that if the defendant is in need of continued care or treatment and the supervisor of the defendant's treatment agrees to continue to provide it, the district court may enter any order it deems appropriate for the continued care or treatment of the defendant by the facility or program pending the conclusion of the criminal proceedings.

D. If the district court finds that the defendant is still not competent to proceed in a criminal case but that he is making progress toward attaining competency, the district court may continue or modify its original treatment order entered pursuant to Section 31-9-1.2 NMSA 1978, provided that:

(1) the question of the defendant's competency shall be reviewed again not later than nine months from the original determination of incompetency to proceed in a criminal case; and



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(2) the treatment supervisor shall submit a written progress report as specified in Subsection B of this section at least seven days prior to such hearing.

E. If the district court finds that the defendant is still not competent, that he is not making progress toward attaining competency and that there is not a substantial probability that he will attain competency within nine months from the date of the original finding of incompetency, the district court shall proceed pursuant to Section 31-9-1.4 NMSA 1978. However, if the defendant is in need of continued care and treatment and the supervisor of the defendant's treatment agrees to continue to provide it, the district court may enter any order it deems appropriate for the continued care or treatment by the facility or program pending the conclusion of the proceedings.

**History: 1978 Comp., § 31-9-1.3, enacted by Laws 1988, ch. 107, § 4 and by Laws 1988, ch. 108, § 4; 1993, ch. 240, § 4; 1993, ch. 249, § 4; 1999, ch. 149, § 2.**

**Cross references.** — For rule of criminal procedure governing defenses of insanity, incompetency, and lack of capacity, *see* Rule 5-602 NMRA.

**The 1999 amendment,** effective June 18, 1999, substituted "nine months" for "one year" throughout the section; substituted "proceed in the criminal case" for "stand trial or to plead" in Subsection A(1); added Subsection A(3); added "whether there is a substantial probability that the defendant will attain competency within nine months from the date of the original finding of incompetency" in Subsection B(2); and added Subsection B(3), redesignating the remaining subsections accordingly.

**The 1993 amendment,** effective June 18, 1993, inserted "district" preceding "court" throughout the section; inserted "to proceed in a criminal case" in the introductory paragraph of Subsection D, and substituted "original determination of incompetency to proceed in a criminal case" for "first review hearing" in Subsection D(1). This section was also amended by Laws 1993, ch. 240, § 4, effective June 18, 1993. The section was set out as amended by Laws 1993, ch. 249, § 4. *See* 12-1-8 NMSA 1978.

## 31-9-1.4. Determination of competency; incompetent defendants.

If at any time the district court determines that there is not a substantial probability that the defendant will become competent to proceed in a criminal case within a reasonable period of time not to exceed nine months from the date of the original finding of incompetency, the district court may:

A. hear the matter pursuant to Section 31-9-1.5 NMSA 1978 within three months if the defendant is charged with a felony that involves the infliction of great bodily harm on another person; a felony that involves the use of a firearm; aggravated arson, as provided in Section 30-17-6 NMSA 1978; criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978; or criminal sexual contact of a minor, as provided in Section 30-9-13 NMSA 1978;

B. release the defendant from custody and dismiss with prejudice the charges against him; or

C. dismiss the criminal case without prejudice in the interest of justice. If the treatment supervisor has issued a report finding that the defendant satisfies the criteria for involuntary commitment contained in the Mental Health and Developmental Disabilities Code [43-1-2 NMSA 1978], the department of health shall commence proceedings pursuant to Chapter 43, Article 1 NMSA 1978, and the court may order the defendant confined for a maximum of seven days to facilitate preparation and initiation of a petition pursuant to the Mental Health and Developmental Disabilities Code. The district court may refer the defendant to the district attorney for possible initiation of proceedings under the Mental Health and Developmental Disabilities Code.

**History: 1978 Comp., § 31-9-1.4, enacted by Laws 1988, ch. 107, § 5 and by Laws 1988, ch. 108, § 5; 1993, ch. 240, § 5; 1993, ch. 249, § 5; 1999, ch. 149, § 3.**

**Cross references.** — For rule of criminal procedure governing defenses of insanity, incompetency, and lack of capacity, *see* Rule 5-602 NMRA.

**The 1999 amendment,** effective June 18, 1999, substituted "nine months" for "one year" in the introductory paragraph, rewrote Subsection A which read: "set the matter for hearing pursuant to Section 31-9-1.5 NMSA 1978", and added the second sentence in Subsection C.

**The 1993 amendment,** effective June 18, 1993, rewrote the section to the extent that a detailed comparison is impracticable. This section was also amended by Laws 1993, ch. 240, § 5, effective June 18, 1993. The section was set out as amended by Laws 1993, ch. 249, § 5. *See* 12-1-8 NMSA 1978.

## 31-9-1.5. Determination of competency; evidentiary hearing.

A. As provided for in Subsection A of Section 31-9-1.4 NMSA 1978, a hearing to determine the sufficiency of the evidence shall be held if the case is not dismissed and if the defendant is charged with a felony that involves the infliction of great bodily harm on another person; a felony that



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involves the use of a firearm; aggravated arson, as provided in Section 30-17-6 NMSA 1978; criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978; or criminal sexual contact of a minor, as provided in Section 30-9-13 NMSA 1978. Such hearing shall be conducted by the district court without a jury. The state and the defendant may introduce evidence relevant to the question of the defendant's guilt of the crime charged. The district court may admit hearsay or affidavit evidence on secondary matters such as testimony to establish the chain of possession of physical evidence, laboratory reports, authentication of transcripts taken by official reporters, district court and business records and public documents.

B. If the evidence does not establish by clear and convincing evidence that the defendant committed a felony that involves the infliction of great bodily harm on another person; a felony that involves the use of a firearm; aggravated arson, as provided in Section 30-17-6 NMSA 1978; criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978; or criminal sexual contact of a minor, as provided in Section 30-9-13 NMSA 1978, the district court shall dismiss the criminal case with prejudice; however, nothing in this section shall prevent the state from initiating proceedings under the provisions of the Mental Health and Developmental Disabilities Code [43-1-2 NMSA 1978], and the court may order the defendant confined for a maximum of seven days to facilitate preparation and initiation of a petition pursuant to that code.

C. If the district court finds by clear and convincing evidence that the defendant committed a crime and has not made a finding of dangerousness, pursuant to Section 31-9-1.2 NMSA 1978, the district court shall dismiss the charges without prejudice. The state may initiate proceedings pursuant to the provisions of the Mental Health and Developmental Disabilities Code and the court may order the defendant confined for a maximum of seven days to facilitate preparation and initiation of a petition pursuant to that code.

D. If the district court finds by clear and convincing evidence that the defendant committed a felony that involves the infliction of great bodily harm on another person; a felony that involves the use of a firearm; aggravated arson, as provided in Section 30-17-6 NMSA 1978; criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978; or criminal sexual contact of a minor, as provided in Section 30-9-13 NMSA 1978 and enters a finding that the defendant remains incompetent to proceed and remains dangerous pursuant to Section 31-9-1.2 NMSA 1978:

(1) the defendant shall be detained by the department of health in a secure, locked facility;

(2) the defendant shall not be released from that secure facility except pursuant to an order of the district court which committed him or upon expiration of the period of time equal to the maximum sentence to which the defendant would have been subject had the defendant been convicted in a criminal proceeding;

(3) significant changes in the defendant's condition, including but not limited to trial competency and dangerousness, shall be reported in writing to the district court, state and defense; and

(4) at least every two years, the district court shall conduct a hearing upon notice to the parties and the department of health charged with detaining the defendant. At the hearing, the court shall enter findings on the issues of trial competency and dangerousness:

(a) upon a finding that the defendant is competent to proceed in a criminal case, the court shall continue with the criminal proceeding;

(b) if the defendant continues to be incompetent to proceed in a criminal case and dangerous pursuant to Section 31-9-1.2 NMSA 1978, the court shall review the defendant's competency and dangerousness every two years until expiration of the period of commitment equal to the maximum sentence to which the defendant would have been subject had he or she been convicted in a criminal proceeding; provided, that if the treatment supervisor recommends that the defendant be committed pursuant to the Mental Health and Developmental Disabilities Code, the court may at any time proceed pursuant to Subsection C of Section 31-9-1.4 NMSA 1978; and

(c) if the defendant is not committed pursuant to Sections 31-9-1 through 31-9-1.5 NMSA 1978 or if the court finds upon its two-year review hearing that the defendant is no longer dangerous, as defined in Section 31-9-1.2 NMSA 1978, the defendant shall be released.



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**History: 1978 Comp., § 31-9-1.5, enacted by Laws 1988, ch. 107, § 6 and by 1988, ch. 108, § 6; 1993, ch. 240, § 6; 1993, ch. 249, § 6; 1999, ch. 149, § 4.**

**Cross references.** — For rule of criminal procedure governing defenses of insanity, incompetency, and lack of capacity, *see* Rule 5-602 NMRA.

**The 1999 amendment,** effective June 18, 1999, inserted "if the case is not dismissed and if the defendant is charged with a felony that involves the infliction of great bodily harm on another person; a felony that involves the use of a firearm; aggravated arson, as provided in Section 30-17-6 NMSA 1978; criminal sexual penetration, as provided in Section 30-19-11 NMSA 1978; or criminal sexual contact of a minor, as provided in Section 30-9-13 NMSA 1978" in Subsection A; in Subsections B and D substituted "a felony that involves the infliction of great bodily harm on another person; a felony that involves the use of a firearm; aggravated arson, as provided in Section 30-17-6 NMSA 1978; criminal sexual penetration, as provided in Section 30-19-11 NMSA 1978; or criminal sexual contact of a minor, as provided in Section 30-9-13 NMSA 1978" for "a crime"; inserted "and the court may order the defendant confined for a maximum of seven days to facilitate preparation and initiation of a petition pursuant to that code" in Subsections C and D; substituted "Section 31-9-1.2" for "Subsections B and C of Section 39-1-1.2" in Subsection C; substituted "enters" for "has previously made" and "remains incompetent to proceed and remains" for "is"; and deleted "Subsections B and C of" following "pursuant to" in Subsection D; inserted "and dangerous pursuant to Section 31-9-1.2 NMSA 1978", deleted "subject" following "convicted" and added the proviso in Subsection D(4)(b), and deleted "Subsection G of" following "defined in" in Subsection D(4)(c).

**The 1993 amendment,** effective June 18, 1993, rewrote the section to the extent that a detailed comparison is impracticable. This section was also amended by Laws 1993, ch. 240, § 6, effective June 18, 1993. The section was set out as amended by Laws 1993, ch. 249, § 6. *See* 12-1-8 NMSA 1978.

## ANNOTATIONS

**Felonies involving great bodily harm.** — Subsection D of Section 31-9-1.5 NMSA 1978 allows the criminal commitment of a defendant who commits a felony in a manner that results in great bodily harm to another person and is not limited only to felonies that contain the infliction of great bodily harm as an element necessary for conviction. *State v. Lopez*, 2011-NMCA-071, 150 N.M. 14, 256 P.3d 977, cert. denied, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

**Robbery.** — Where, at a commitment hearing, the parties stipulated that defendant approached an employee of a hotel in the hotel laundry room, struck the employee in the face with a closed fist, beat the employee over the head with a hard plastic tube, took the keys to the hotel office, and took money from the hotel cash drawer; and the court found that defendant had committed armed robbery that resulted in great bodily harm to the victim, the court did not err in ordering defendant's commitment. *State v. Lopez*, 2011-NMCA-071, 150 N.M. 14, 256 P.3d 977, cert. denied, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

**Standard of proof.** — The appropriate standards of proof for the initial determination as well as the redetermination of competency is a preponderance of the evidence. *State v. Chavez*, 2008-NMSC-001, 143 N.M. 205, 174 P.3d 988.

**Credit for presentence confinement.** — Presentence confinement credit should be credited to criminal commitment under Subsection D of Section 31-9-1.5 NMSA 1978 to the same extent the confinement would have been credited against a sentence for a criminal conviction. *State v. Lopez*, 2011-NMCA-071, 150 N.M. 14, 256 P.3d 977, cert. denied, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

Where, before trial, the court found that defendant was incompetent to proceed to trial and that defendant had committed robbery that resulted in great bodily harm to another person and the court committed defendant to twelve years, defendant was entitled to presentence confinement credit toward the commitment period. *State v. Lopez*, 2011-NMCA-071, 150 N.M. 14, 256 P.3d 977, cert. denied, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

**Credit for pre-conviction confinement.** — To the extent that defendant's pre-conviction confinement would have been credited against defendant's sentence had defendant been convicted of a crime, defendant's pre-conviction confinement must be credited against the term of defendant's criminal commitment. *State v. Lopez*, 2009-NMCA-112, 147 N.M. 279, 219 P.3d 1288, cert. denied, 2009-NMCERT-009, 147 N.M. 421, 224 P.3d 648.

Where defendant was committed for treatment to attain competency to stand trial for a period of two years and two months before defendant was committed for a third-degree felony offense of aggravated battery against a household member, the period of defendant's pre-conviction confinement should have been credited to the term of defendant's criminal commitment. *State v. Lopez*, 2009-NMCA-112, 147 N.M. 279, 219 P.3d 1288, cert. denied, 2009-NMCERT-009, 147 N.M. 421, 224 P.3d 648.

**This section does not violate any constitutional guarantee.** *State v. Adonis*, 2008-NMSC-059, 145 N.M. 102, 194 P.3d 717.

**Jurisdiction of an appeal of a lifetime criminal commitment lies with the supreme court.** — Where defendant was charged with an open count of murder, and where the district court found by clear and convincing evidence that defendant committed first-degree murder, determined that defendant was dangerous and not competent to stand trial, and ordered that defendant be detained for life by the New Mexico department of health pursuant to 31-9-1.5(D) NMSA 1978, jurisdiction of defendant's appeal properly lied in the New Mexico supreme court, because commitment pursuant to 31-9-1.5 NMSA 1978 results in a loss of liberty, and the deprivation of liberty resulting from a lifetime criminal commitment is equivalent to the deprivation of liberty under a lifetime criminal sentence, and N.M. Const. Art. VI, § 2 confers jurisdiction on the New Mexico supreme court for cases imposing a sentence of life imprisonment. *State v. Baca*, 2019-NMSC-014.

**Sufficient evidence of willful and deliberate murder.** — Where defendant was charged with an open count of murder for killing his father with a pickaxe, and where the district court found by clear and convincing evidence that defendant committed first-degree murder, determined that defendant was dangerous and not competent to stand trial, and ordered that defendant be detained for life by the New Mexico department of health pursuant to 31-9-1.5(D) NMSA 1978, and where defendant conceded that he killed his father, evidence that the killing involved a prolonged, sustained attack and defendant's statements and actions before, during, and after the killing, including arming himself with the pickaxe, was sufficient to establish that the murder was willful, deliberate, and premeditated. *State v. Baca*, 2019-NMSC-014.

**The basic sentences for misdemeanor crimes** cannot be used to calculate the term of commitment under Subsection D of this section. *State v. Demongey*, 2008-NMCA-066, 144 N.M. 333, 187 P.3d 679, cert. quashed, 2011-NMCERT-001, 150 N.M. 560, 263 P.3d 902.

**Redetermination of competency.** — The proper standard of proof for a redetermination of the competency of a defendant to stand trial, following a prior determination that the defendant is incompetent to stand trial, is a preponderance of the evidence. *State v. Chavez*, 2008-NMSC-001, 143 N.M. 205, 174 P.3d 988.



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**Generally.** — Commitment pursuant to this section is not punishment. *State v. Spriggs-Gore*, 2003-NMCA-046, 133 N.M. 479, 64 P.3d 506, cert. denied, 133 N.M. 539, 65 P.3d 1094.

**Constitutionality.** — This section does not unconstitutionally deprive defendants of due process. *State v. Spriggs-Gore*, 2003-NMCA-046, 133 N.M. 479, 64 P.3d 506, cert. denied, 133 N.M. 539, 65 P.3d 1094.

This section does not abrogate a defendant's constitutional rights. *State v. Spriggs-Gore*, 2003-NMCA-046, 133 N.M. 479, 64 P.3d 506, cert. denied, 133 N.M. 539, 65 P.3d 1094.

**Competency determinations implicate due process.** — Competency determinations implicate due process rights. A court violates a defendant's due process rights when it fails to inquire into competency after the defendant presents enough evidence to entitle him to a hearing on the issue. A hearing on the defendant's competency requires adequate notice, an adversarial hearing before an independent decision-maker, and a written statement from the fact finder clarifying the evidence relied upon and reasons for the decision. *State v. Gutierrez*, 2015-NMCA-082, cert. denied, 2015-NMCERT-008.

Where defendant was charged with numerous counts of attempted first-degree murder and other serious charges related to an incident where he trapped four adults and two children in a trailer and threatened them with firearms over several hours, the initial district judge, following a competency hearing, found that defendant was not competent to stand trial, that he was dangerous, and that he was not likely to become competent; defendant was then provided a hearing before a different district court judge for the sole purpose of determining whether defendant had mental retardation; the second district court judge found, on her own motion, without notice, and without any argument from the state, that defendant had been proved competent beyond a reasonable doubt; defendant was denied his procedural right to effective and timely notice and the opportunity to present arguments and evidence before having a decision rendered against him as to competency; moreover the district judge, in failing to examine the factors for determining competency, never provided defendant with any justification for the decision and subsequent actions. *State v. Gutierrez*, 2015-NMCA-082, cert. denied, 2015-NMCERT-008.

**The prosecution of a defendant who is incompetent to stand trial violates due process.** — Where defendant was tried and convicted of numerous counts of attempted first-degree murder and other serious charges related to an incident where he trapped four adults and two children in a trailer and threatened them with firearms over several hours, the initial district judge found, following a competency hearing prior to trial, that defendant was not competent to stand trial, that he was dangerous, and that he was not likely to become competent; defendant was later provided a hearing before a different district judge for the sole purpose of determining whether defendant had mental retardation; the second district court judge found that defendant had been proved competent beyond a reasonable doubt without making any findings as to whether defendant understood the nature and significance of the proceedings, whether defendant had a factual understanding of the charges or whether defendant was able to assist in his own defense, and, without any evidence presented regarding whether defendant had made or could make progress toward competency, disregarded the prior ruling made by the initial district judge that it was unlikely defendant would attain competency in the future; the evidence presented at the mental retardation hearing was insufficient to rebut the existing presumption that defendant was incompetent to stand trial. Defendant's trial violated due process. *State v. Gutierrez*, 2015-NMCA-082, cert. denied, 2015-NMCERT-008.

**Suppression.** — Suppression hearing is not a legal impossibility at a hearing pursuant to this section; the statute does not preclude a defendant's attorney from putting on a complete defense at such a hearing. *State v. Spriggs-Gore*, 2003-NMCA-046, 133 N.M. 479, 64 P.3d 506, cert. denied, 133 N.M. 539, 65 P.3d 1094.

Defendant, who was found incompetent to stand trial for first degree murder, was incompetent to knowingly and intelligently waive her constitutional rights; thus all of defendant's statements made after the first administration of her Miranda rights had to be suppressed. *State v. Spriggs-Gore*, 2003-NMCA-046, 133 N.M. 479, 64 P.3d 506, cert. denied, 133 N.M. 539, 65 P.3d 1094.

**Proof of state of mind required.** — In a case of first degree murder, the state has to prove a deliberate intention to kill, which "may be inferred from all of the facts and circumstances of the killing." At a hearing under this section, the defendant is equally entitled to marshal a factual case that disproves either direct or inferential evidence that he had formed, or had the opportunity to form, a deliberate intent to kill. *State v. Taylor*, 2000-NMCA-072, 129 N.M. 376, 8 P.3d 863, cert. quashed, 131 N.M. 64, 33 P.3d 284.

**Defenses not available at Subsection A hearing.** — The defenses of insanity and inability to form a specific intent are not available at a hearing conducted pursuant to Subsection A. *State v. Werner*, 1990-NMCA-019, 110 N.M. 389, 796 P.2d 610, cert. denied, 109 N.M. 704, 789 P.2d 1271.

**Trial court may draw inference as to dangerousness.** — When the trial court has found that a defendant has cruelly treated a two-year-old child by holding her foot in hot water for half a minute and has injured his brother with a knife in the course of a family argument, the trial court may properly draw an inference that defendant is dangerous. *State v. Gallegos*, 1990-NMCA-104, 111 N.M. 110, 802 P.2d 15, cert. denied, 111 N.M. 77, 801 P.2d 659.

**Finding of dangerousness as prerequisite to detention.** — In the context of the competency statutes, the finding of dangerousness is a prerequisite to the applicability of the portions of the statute allowing defendant to be detained for a longer period of time. Thus, the court must make a finding of dangerousness prior to the detention authorized by this section, but it need not have made such a finding at a prior hearing. *State v. Gallegos*, 1990-NMCA-104, 111 N.M. 110, 802 P.2d 15, cert. denied, 111 N.M. 77, 801 P.2d 659.

**Enhancement of commitment term must relate to dangerousness.** — A defendant cannot be criminally committed under a sentence enhancement unless the conduct invoking the enhancement is a specific marker of dangerousness as defined by statute. *State v. Chorney*, 2001-NMCA-050, 130 N.M. 638, 29 P.3d 538.

**A term of criminal commitment may be increased due to aggravating circumstances that relate to a defendant's dangerousness.** — A term of commitment under this section may be increased under NMSA 1978, § 31-18-15.1 due to aggravating circumstances that bear a direct relation to a defendant's dangerousness and that are supported by clear and convincing evidence. *State v. Quintana*, 2021-NMSC-013, *aff'g* 2019-NMCA-030, 446 P.3d 1168.

**District court did not err in enhancing defendant's term of criminal commitment.** — Where, following a criminal commitment hearing, the district court found that clear and convincing evidence existed to show that defendant committed the crime of second degree murder, and further found, following a subsequent evidentiary hearing, that the murder had been committed with extreme viciousness and brutality, including the near decapitation of the body, the removal of the genitals, the stabbing of the anus, as well as the numerous wounds to the decedent's head and torso, and that defendant



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represented a threat to community safety because if released without supervision, there was a danger that defendant would be medically non-compliant and that his psychosis would return, the district court did not err in enhancing defendant's sentence by five years for a total commitment of twenty years, representing the maximum time to which defendant would have been subject had defendant been convicted of the charged offense, because this section clearly indicates that determination of a term of criminal commitment should correspond to the maximum sentence that would have been reached under the Criminal Sentencing Act, including potential enhancement based on aggravating circumstances. *State v. Quintana*, 2021-NMSC-013, *aff'g* 2019-NMCA-030, 446 P.3d 1168.

**Commitment period may be enhanced based on aggravating circumstances.** — Where defendant was charged with an open count of murder, and where after a hearing on defendant's competency to proceed to trial, the parties stipulated that the evidence was clear and convincing that defendant had committed the crime of second-degree murder, the district court did not err in ordering defendant to be committed to the New Mexico Behavioral Health Institute for fifteen years plus five years for aggravating circumstances based in part on the extreme viciousness and brutality of defendant's conduct, because this section permits a commitment equal to the maximum sentence to which the defendant would have been subject had the defendant been convicted in a criminal proceeding, and the legislature has made clear that a sentence may consist of a basic sentence plus additional terms of imprisonment to be imposed after assessment of additional factors. *State v. Quintana*, 2019-NMCA-030, cert. granted.

**Habitual offender enhancement does not apply.** — The habitual offender enhancement (Section 31-18-17 NMSA 1978) does not apply to extend a defendant's criminal incompetency commitment. *State v. Chorney*, 2001-NMCA-050, 130 N.M. 638, 29 P.3d 538.

**Defendant's attorney may act as advocate.** — There is nothing in the statute on its face that precludes defendant's attorney from acting as an advocate at a hearing under this section. *State v. Gallegos*, 1990-NMCA-104, 111 N.M. 110, 802 P.2d 15, cert. denied, 111 N.M. 77, 801 P.2d 659.

## 31-9-1.6. Hearing to determine mental retardation.

A. Upon motion of the defense requesting a ruling, the court shall hold a hearing to determine whether the defendant has mental retardation as defined in Subsection E of this section.

B. If the court finds by a preponderance of the evidence that the defendant has mental retardation and that there is not a substantial probability that the defendant will become competent to proceed in a criminal case within a reasonable period of time not to exceed nine months from the date of the original finding of incompetency, then no later than sixty days from notification to the secretary of health or his designee of the court's findings the department of health shall perform an evaluation to determine whether the defendant presents a likelihood of serious harm to himself or a likelihood of serious harm to others.

C. If the department of health evaluation results in a finding that the defendant presents a likelihood of serious harm to himself or a likelihood of serious harm to others, within sixty days of the department's evaluation the department shall commence proceedings pursuant to Chapter 43, Article 1 NMSA 1978 if the defendant was charged with murder in the first degree, first degree criminal sexual penetration, criminal sexual contact of a minor or arson in the initial proceedings, and the court presiding over the initial proceedings shall enter a finding that the respondent presents a likelihood of harm to others.

D. The criminal charges shall be dismissed without prejudice after the hearing pursuant to Chapter 43, Article 1 NMSA 1978 or upon expiration of fourteen months from the court's initial determination that the defendant is incompetent to proceed in a criminal case.

E. As used in this section, "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.

**History: 1978 Comp., § 31-9-1.6, enacted by Laws 1997, ch. 153, § 1; 1999, ch. 149, § 5.**

**The 1999 amendment,** effective June 18, 1999, substituted "to determine whether the defendant has mental retardation as defined in Subsection E of this section" for "prior to one year after a defendant was determined to be incompetent to stand trial" in Subsection A; substituted "has mental retardation and that there is not a substantial probability that the defendant will become competent to proceed in a criminal case within a reasonable period of time not to exceed nine months from the date of the original finding of incompetency, then no later than sixty days from notification to the secretary of health or his designee of the court's findings" for "is mentally retarded, then no later than one year from the court's initial determination that the defendant is incompetent to stand trial" in Subsection B; in Subsection C, inserted "murder in the" following "charged with", and deleted "homicide" preceding "first degree", inserted "criminal" following "first degree", and deleted former Paragraph (2), which read, "may commence proceedings pursuant to Chapter 43, Article 1 NMSA 1978 if the defendant was charged with any crime other than first degree homicide, first degree sexual penetration, criminal sexual contact of a minor or arson in the initial proceeding from which he was



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referred pursuant to this section to the department"; substituted "proceed in a criminal case" for "stand trial" in Subsection D; and substituted "mental retardation" for "mentally retarded" in Subsection E.

## ANNOTATIONS

**Age of onset is irrelevant.** — Where the defendant had an extreme mental condition resulting from self-inflicted carbon monoxide poisoning that occurred when the defendant was twenty-six years of age, the district court's determination that the defendant had mental retardation was proper. *State v. Trujillo*, 2009-NMSC-012, 146 N.M. 14, 206 P.3d 125, *aff'g*, 2007-NMCA-056, 141 N.M. 668, 160 P.3d 577.

**Commitment of defendants who are accused of lesser crimes.** — Defendants with mental retardation who are dangerous, incompetent and without substantial probability of gaining competence and who are not charged with first degree murder, first degree criminal sexual penetration, criminal sexual contact of a minor or arson may not be criminally committed, though they may be civilly committed at the discretion of the district court and the district attorney. *State v. Trujillo*, 2009-NMSC-012, 146 N.M. 14, 206 P.3d 125, *aff'g*, 2007-NMCA-056, 141 N.M. 668, 160 P.3d 577.

Where the defendant was charged with attempted first degree murder, aggravated burglary, aggravated battery and tampering with evidence, and where the district court found that the defendant had mental retardation and was dangerous, incompetent, and without a substantial probability of gaining competence, the defendant may not be criminally committed, though the defendant may be civilly committed at the discretion of the district court and the district attorney. *State v. Trujillo*, 2009-NMSC-012, 146 N.M. 14, 206 P.3d 125, *aff'g*, 2007-NMCA-056, 141 N.M. 668, 160 P.3d 577.

**Age of the onset of mental retardation** is not an element of the definition of mental retardation and is irrelevant in a determination of mental retardation. *State v. Trujillo*, 2007-NMCA-056, 141 N.M. 668, 160 P.3d 577, *aff'd*, 2009-NMSC-012, 146 N.M. 14, 206 P.3d 125.

**Section 31-9-1.6 NMSA 1978 is the sole source of authority** to confine incompetent defendants with mental retardation who are dangerous. *State v. Trujillo*, 2007-NMCA-056, 141 N.M. 668, 160 P.3d 577, *aff'd*, 2009-NMSC-012, 146 N.M. 14, 206 P.3d 125.

**Statutory presumption of mental retardation.** — A reliably administered IQ test resulting in an IQ of seventy or below shall be presumptive evidence of mental retardation; therefore, an IQ test of seventy or below creates a statutory presumption that defendant possesses subaverage general intellectual functioning concurrently with deficits in adaptive behavior. *State v. Gutierrez*, 2015-NMCA-082, cert. denied, 2015-NMCERT-008.

Where defendant was charged with numerous counts of attempted first-degree murder and other serious charges related to an incident where he trapped four adults and two children in a trailer and threatened them with firearms over several hours, and where defendant consistently scored below seventy on all his intelligence assessments over the course of a year and a half, and where one doctor found that defendant had a full-scale IQ of sixty-two, and two other doctors found defendant to be in the "mild mental retardation" range with scores in the lowest percentile on verbal comprehension, the evidence demonstrated that defendant had mental retardation as a matter of law. *State v. Gutierrez*, 2015-NMCA-082, cert. denied, 2015-NMCERT-008.

**Defendant met the statutory presumption of mental retardation.** — Where defendant was arrested for aggravated battery after allegedly attacking his mother with a pair of garden shears, and where defendant moved for a hearing pursuant to this section to determine whether he was mentally retarded and therefore subject only to civil commitment and not criminal prosecution, the district court abused its discretion in determining that defendant failed to establish by a preponderance of the evidence that he was mentally retarded as defined by Subsection E of this section, because defendant met the statutory presumption of mental retardation by showing that he had an IQ of seventy or less and that the test used to determine that IQ was reliably administered. Once the presumption of mental retardation is established, the burden shifts to the state to prove by a preponderance of the evidence that defendant does not have mental retardation, either by establishing that defendant does not have significantly subaverage general intellectual functioning or that he does not have deficits in his adaptive behavior, or both. *State v. Jacob F.*, 2019-NMCA-042.

**Permitting court-appointed psychologist to attend independent evaluation of defendant was not an abuse of discretion.** — Where defendant was charged as a serious youthful offender with two alternative counts of first-degree felony murder, and where the state requested, and the district court allowed, an independent evaluation of defendant's alleged mental retardation following a court-appointed psychologist's recommendation that defendant be found incompetent to stand trial due to mental retardation, the district court did not abuse its discretion in granting a defense request permitting the court-appointed psychologist to attend the state's independent evaluation, because the district court's decision to order a second evaluation was entirely discretionary and, due to the unnecessary delay that had already occurred in the case, the court-appointed psychologist's attendance would ensure that the proceedings were expedited. *State v. Linares*, 2017-NMSC-014.

**District court did not abuse its discretion in finding defendant incompetent.** — Where defendant was charged as a serious youthful offender with two alternative counts of first-degree felony murder, the district court did not abuse its discretion in finding defendant incompetent to stand trial based on a court-appointed psychologist's testimony that defendant had an IQ of 68, that defendant had mental retardation, that the state failed to overcome the presumption that an accused with an IQ below 70 has mental retardation, and based on evidence adduced at the mental retardation hearing that defendant was incapable of consulting with her attorney with a reasonable degree of rational understanding, that she held a fundamentally incoherent view of the nature of the proceedings that were to be brought against her, and that she would not comprehend the reasons for punishment if she were convicted. *State v. Linares*, 2017-NMSC-014.

**Procedural requirements were met.** — Where defendant was charged as a serious youthful offender with two alternative counts of first-degree felony murder, the proceedings below complied with the mandates of this section where the district court found that defendant was incompetent to stand trial due to mental retardation, that there was not a substantial probability that defendant would become competent within a reasonable period of time not to exceed nine months, and that defendant was a danger to others, and where the district court directed the department of health (DOH) to commence civil commitment proceedings under 43-1-1 NMSA 1978, and where DOH filed a petition with the district court for the involuntary commitment of defendant prompting the district court to commit defendant to the DOH for a period of habilitation not to exceed six months. *State v. Linares*, 2017-NMSC-014.



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## 31-9-2. Mental examination.

Upon motion of any defendant, the court shall order a mental examination of the defendant before making any determination of competency under Sections 41-13-3 [NMSA 1953] or 31-9-1 NMSA 1978. Where the defendant is determined to be indigent, the court shall pay for the costs of the examination from funds available to the court.

**History: 1953 Comp., § 41-13-3.2, enacted by Laws 1967, ch. 231, § 3.**

**Compiler's notes.** — Laws 1972, ch. 71, § 18, repealed 41-13-3, 1953 Comp., referred to in this section.

ANNOTATIONS

**Requirements on court.** — Whenever a legitimate concern about the present ability of a defendant to consult and understand is brought to the court's attention, the court is required to consider whatever competency-related evidence is before the court and to determine whether there exists a reasonable doubt as the defendant's competency to stand trial. If the court determines that there is reasonable doubt as to defendant's competency, the court must have defendant's competency professionally evaluated by a qualified professional who must submit a report to the court. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

**In considering whether reasonable doubt exists,** the court must keep in mind the requirement that defendant must have sufficient present ability to consult and understand as required under due process of law. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

**Entire act (article 31-9) should be read and considered together** in arriving at a proper meaning or legislative intent. *State v. Morales*, 1970-NMCA-036, 81 N.M. 333, 466 P.2d 899, cert. denied, 81 N.M. 305, 466 P.2d 871, and cert. denied, 400 U.S. 842, 91 S. Ct. 84, 27 L. Ed. 2d 77.

**Examination depends upon raising of competency issue.** — The mental examination required by this section depends upon a "question" as to mental competency first being raised. A "question" on the issue of mental competency is raised only upon a showing of reasonable cause to believe that the defendant is not competent to stand trial. *State v. Smith*, 1969-NMCA-101, 80 N.M. 742, 461 P.2d 157.

**Defendant's motion makes examination mandatory.** — If a defendant moves for a mental examination, this section makes it mandatory for the trial court to order such an examination before determining defendant's competency and such an examination is not necessary unless " . . . there is a question as to the mental capacity of a defendant to stand trial. . . . " *State v. Hovey*, 1969-NMCA-049, 80 N.M. 373, 456 P.2d 206.

**Motion must include grounds for belief of lack of capacity.** — A motion on behalf of an accused for a judicial determination of mental competency to stand trial shall set forth the ground for belief that such mental capacity is lacking. When the motion does not set forth grounds for reasonable cause to believe the defendant may be insane or mentally incompetent, the motion can be denied. "The statute requires such an examination only when it is shown that there is reasonable cause to believe that an accused may be presently insane or otherwise mentally incompetent." *State v. Hovey*, 1969-NMCA-049, 80 N.M. 373, 456 P.2d 206.

**Otherwise, court not required to grant motion.** — An examination is not necessary, nor is the court required to grant a motion seeking such examination unless there is a question as to the mental capacity of defendant. *State v. Morales*, 1970-NMCA-036, 81 N.M. 333, 466 P.2d 899, cert. denied, 81 N.M. 305, 466 P.2d 871, and cert. denied, 400 U.S. 842, 91 S. Ct. 84, 27 L. Ed. 2d 77.

**Counsel's impressions of defendant's mental state insufficient.** — "Wondering" about defendant's mental capacity which is based solely on counsel's impression was not reasonable cause for a belief that defendant was incompetent to stand trial. *State v. Hovey*, 1969-NMCA-049, 80 N.M. 373, 456 P.2d 206.

**Medical records should be available to attorneys before trial.** — Where there was no showing from the record that the disclosure of a psychiatric report to the prosecuting attorney in any way constituted a violation of defendant's fifth amendment rights, the court will not assume facts not supported by the record. A commitment to a public institution by court order is for essentially a public purpose, no matter who commenced it, and the medical records thereof should be available in advance of trial to both prosecution and defense. *State v. Lopez*, 1969-NMCA-057, 80 N.M. 599, 458 P.2d 851, cert. denied, 80 N.M. 607, 458 P.2d 859, and cert. denied, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 109 et seq.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition, 32 A.L.R.2d 434.

Power of court, in absence of statute, to order psychiatric examination of accused for purpose of determining mental condition at time of alleged offense, 17 A.L.R.4th 1274.

Admissibility of results of computer analysis of defendant's mental state, 37 A.L.R.4th 510.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist, 85 A.L.R.4th 19.

Qualification of nonmedical psychologist to testify as to mental condition or competency, 72 A.L.R.5th 529.

## 31-9-3. Repealed.

**Repeals.** — Laws 2010, ch. 97, § 1 repealed 31-9-3 NMSA 1978, as enacted by Laws 1982, ch. 55, § 1, relating to the plea and verdict of guilty but mentally ill in criminal trials, effective May 19, 2010. For provisions of former section, *see* the 2009 NMSA 1978 on *NMOne Source.com*.

## 31-9-4. Repealed.

**Repeals.** — Laws 2010, ch. 97, § 1 repealed 31-9-4 NMSA 1978, as enacted by Laws 1982, ch. 55, § 2, relating to the sentence upon accepted plea or verdict of guilty but mentally ill, effective May 19, 2010. For provisions of former section, *see* the 2009 NMSA 1978 on *NMOne Source.com*.



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# ARTICLE 10

# Commission of Crimes by Indians

(Repealed by Laws 1995, ch. 40, § 1.)

## 31-10-1 to 31-10-3. Repealed.

**Repeals.** — Laws 1995, ch. 40, § 1 repealed 31-10-1 through 31-10-3 NMSA 1978, as enacted by Laws 1864-1865, ch. 21, §§ 1 and 2 and Laws 1889, ch. 140, § 1, relating to commission of crimes by Indians, effective April 5, 1995.

# ARTICLE 11

# Appeals and Post-Conviction Remedies

Sec.
31-11-1. Stay of execution; release.
31-11-2. Appeal granted; defendant to be committed or recognized.
31-11-3. Directions following review brought by defendant.
31-11-4. Directions following review brought by state.
31-11-5. New trial granted; procedure in district court.
31-11-6. Post-conviction remedy.

## 31-11-1. Stay of execution; release.

A. All appeals and writs of error in criminal cases have the effect of a stay of execution of the sentence of the district court until the decision of the supreme court or court of appeals.

B. If a defendant is convicted of a capital or violent offense and is sentenced to death or a term of imprisonment not suspended in whole, he shall not be entitled to release pending appeal.

C. If a defendant is convicted of a noncapital offense other than a violent offense and is sentenced to a term of imprisonment not suspended in whole, he shall not be entitled to release pending appeal unless the court finds:

(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released; and

(2) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

D. As used in Subsections B and C of this section, "violent offense" means:

(1) kidnaping;
(2) criminal sexual penetration in the first or second degree;
(3) armed robbery;
(4) murder in the second degree;
(5) aggravated burglary;
(6) aggravated arson; or
(7) assault with intent to commit violent felony upon peace officer.

E. In all parole and probation revocation proceedings, where the alleged violation by the parolee or probationer of the conditions of release poses a threat to himself or others, the defendant shall not be entitled to be released on bail pending the decision on revocation. In those instances where the state has failed to conduct a preliminary parole revocation hearing on a parolee held for parole violations within sixty days of arrest, the parolee shall be eligible for bail. In all cases, the final parole revocation hearing shall be scheduled for hearing within sixty days of the parolee's return to the penitentiary. In the case of probation violation, if the final probation revocation hearing is not brought before the court within sixty days, then the probationer shall be eligible for bail.



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**History: Laws 1917, ch. 43, § 58; 1927, ch. 93, § 10; C.S. 1929, § 105-2532; 1941 Comp., § 42-1502; 1953 Comp., § 41-15-2; Laws 1966, ch. 28, § 59; 1981, ch. 232, § 1; 1988, ch. 3, § 1.**

**Cross references.** — For rule of criminal procedure regarding release during trial, and release pending sentence, motion for new trial and appeal, *see* Rule 5-402 NMRA.

For similar appellate rule, *see* Rule 12-207 NMRA.

For writs of error, *see* Rule 12-503 NMRA.

**The 1988 amendment,** effective February 12, 1988, rewrote former Subsection B and redesignated it as Subsection E, and added present Subsections B, C and D.

**Applicability.** — Laws 1988, ch. 3, § 2, effective February 12, 1988, provides that the provisions of the act apply only to persons convicted for crimes committed on or after its effective date.

## ANNOTATIONS

**Rule 5-805 NMRA does not violate separation of powers.** — Subsection H of Rule 5-805 NMRA, which requires dismissal of a probation violation proceeding if the time limits to hold an adjudicatory hearing are not met, does not infringe upon the substantive rights granted by the legislature in Sections 31-11-1 and 31-21-15 NMSA 1978 and does not violate the separation of powers doctrine. *State v. Montoya*, 2011-NMCA-009, 149 N.M. 242, 247 P.3d 1127, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

**No federal constitutional violations by denial of waiver.** — Defendant's waiver of supersedeas was properly denied where he agreed to serve time on his sentence pending appeal because he was unable to make appeal bond, and denial was not a violation of defendant's constitutional rights under the due process and equal protection clauses of U.S. Const., amend. XIV. *State v. Ramirez*, 1966-NMSC-042, 76 N.M. 72, 412 P.2d 246.

**Effect of writs of error at common law.** — At common law, a writ of error was not a supersedeas so as to discharge custody, but in capital cases it operated to stay execution. *Borrego v. Territory*, 1896-NMSC-011, 8 N.M. 446, 46 P. 349.

**Defendant not obligated to make restitution during appeal.** — A defendant is under no legal duty, except moral, perhaps, to make any restitution during the pendency of his appeal. *State v. Cordova*, 1983-NMCA-144, 100 N.M. 643, 674 P.2d 533.

**Waiver of supersedeas.** — There is no provision under New Mexico law for a waiver of supersedeas. *State v. Ramirez*, 1966-NMSC-042, 76 N.M. 72, 412 P.2d 246.

**Pending appeal, safekeeping of prisoner sheriff's duty.** — Pending appeal, the judge has no power to order one under sentence to be committed to penitentiary for safekeeping. The power of removal is in the hands of the sheriff, who is charged with safekeeping the prisoner. *Parks v. Hughes*, 1918-NMSC-094, 24 N.M. 421, 174 P. 425.

**State solely responsible for cost of maintenance of convict.** — When convict under sentence of death is, under this statute, confined in state penitentiary, pending determination of his appeal, state has entire jurisdiction over such convict and cannot recover cost of his maintenance from county. *State v. Board of Comm'rs*, 1939-NMSC-059, 43 N.M. 521, 96 P.2d 290.

**District court abused its discretion in requiring corporate surety** to the exclusion of individual sureties on a property bond. *State v. Lucero*, 1970-NMCA-057, 81 N.M. 578, 469 P.2d 727.

**Filing notice of appeal does not divest district court of jurisdiction to hold probation revocation hearing or revoke probation.** *State v. Rivera*, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

**Probationer's sentence runs during pendency of appeal.** — Nowhere in this section has the legislature expressly prohibited a probationer's sentence from running during the pendency of his or her appeal; moreover, the primary goal of probation, defendant rehabilitation, could be defeated by delaying the commencement of a defendant's probationary sentence pending appeal. *State v. Rivera*, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

**Section intended to function as appellate bail bond statute.** — If the execution of a defendant's sentence was automatically stayed once he or she appealed, then the defendant would have had no need for a statutory right to post an appeal bond. State v. Rivera, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

If a defendant remains on probation during the pendency of his or her appeal, an appeal bond becomes unnecessary because the defendant is already submitting to the punishment that an appeal bond would be fashioned to prevent the defendant from attempting to evade; thus, one of the primary purposes of this section as a whole – preventing the defendant from avoiding the consequences of his or her conviction and sentence – is inapplicable once the defendant is placed on probation. *State v. Rivera*, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

**Subsection C(2) is constitutional.** — The appeal-bond statute does not unduly burden or interfere with the New Mexico's courts responsibilities, and thus, the statute is constitutional. *State v. House*, 1996-NMCA-052, 121 N.M. 784, 918 P.2d 370, cert. denied, 121 N.M. 676, 916 P.2d 1343.

**Release under this section is mandatory where defendants meet all of the requirements of Subsection C.** — When defendants satisfy the conditions of § 31-11-1(C) NMSA 1978, the plain language of the statute entitles them to release subject to the conditions of release imposed by the trial court. *State v. Taylor*, 2021-NMSC-023.

**Defendants, having met all required conditions, were entitled to release pending appeal.** — Where defendants, operators of a day care center, were convicted of two counts of child abuse after they failed to remove two children from a hot vehicle, which resulted in the death of one child and serious neurological injuries to the other child, and where, following trial, defendants established that they were not dangerous or a flight risk and raised substantial questions as to whether there was substantial evidence establishing beyond a reasonable doubt that they recklessly disregarded the risk that the children would suffer great bodily harm or death when they failed to remove the children from the vehicle and as to whether the jury instruction properly reflected the legal theories presented to allow the jury to make an informed and unanimous decision, the district court erred in denying defendants' petition for release pending the resolution of their appeal, because defendants satisfied all the required conditions of § 31-11-1(C) NMSA 1978. Both issues raised by the defendants constitute substantial questions that if resolved in their favor would result in reversal or an order for a new trial. *State v. Taylor*, 2021-NMSC-023.

**Meaning of "substantial question".** — A "substantial question" under Subsection C(2) is a question that is more than not frivolous. *State v. House*, 1996-NMCA-052, 121 N.M. 784, 918 P.2d 370, cert. denied, 121 N.M. 676, 916 P.2d 1343.

**Test for post-conviction bail.** — Bail pending appeal is appropriate if, assuming that the "substantial question" is determined favorably to defendant on appeal, that "substantial question" decision is likely to result in reversal or an order for a new trial on all counts on which imprisonment has been imposed. *State v. House*, 1996-NMCA-052, 121 N.M. 784, 918 P.2d 370.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 8 Am. Jur. 2d Bail and Recognizance § 15 et seq; 21 Am. Jur. 2d Criminal Law § 896 et seq.



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Bail pending appeal from conviction, 19 A.L.R. 807, 45 A.L.R. 458, 77 A.L.R. 1235.

Supersedeas, stay on bail upon appeal in habeas corpus, 63 A.L.R. 1460, 143 A.L.R. 1354.

Mandamus to compel judge or other officer to grant accused bail or accept proffered sureties, 23 A.L.R.2d 803.

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death-post-Furman decisions, 71 A.L.R.3d 453.

Right of defendant in state court to bail pending appeal from conviction - modern cases, 28 A.L.R.4th 227.

What is "a substantial question of law or fact likely to result in reversal or an order for a new trial" pursuant to 18 USCS § 3143(b)(2) respecting bail pending appeal, 79 A.L.R. Fed. 673.

Abatement effects of accused's death before appellate review of federal criminal conviction, 80 A.L.R. Fed. 446.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 9, 24 to 30, 33 to 38.

## 31-11-2. [Appeal granted; defendant to be committed or recognized.]

If an appeal be granted, the district court shall order the defendant to be committed or recognized and the commitment or recognizance shall be to the same effect as when the defendant himself is appellant.

**History: Laws 1917, ch. 43, § 51; C.S. 1929, § 105-2528; 1941 Comp., § 42-1504; 1953 Comp., § 41-15-4.**

**Cross references.** — For rules for appeals, *see* Rules 12-201 to 12-2-203 NMRA.

For supersedeas and stay, *see* Rule 12-207 NMRA.

For writs of error, *see* Rule 12-503 NMRA.

**Compiler's notes.** — "Appeal", as used in this section, apparently refers to an appeal by the state.

### ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 5 Am. Jur. 2d Appellate Review § 358 et seq.

## 31-11-3. Directions following review brought by defendant.

In any criminal case, if the supreme court or court of appeals affirms the judgment of the district court upon review brought by the defendant, it shall direct that the sentence pronounced be executed; and if the judgment is reversed, it shall direct a new trial or that the defendant be absolutely discharged according to the circumstances of the case.

**History: Laws 1917, ch. 43, § 55; 1927, ch. 93, § 8; C.S. 1929, § 105-2529; 1941 Comp., § 42-1505; 1953 Comp., § 41-15-5; Laws 1966, ch. 28, § 60.**

**Cross references.** — For similar appellate rule, *see* Rule 12-402 NMRA.

### ANNOTATIONS

**Supreme court's affirmance of execution not repealed by implication.** — Statute providing that on affirmance of conviction, supreme court shall direct execution was not repealed by implication as to capital cases by statute providing for order of execution by district court. *Woo Dak San v. State*, 1931-NMSC-056, 36 N.M. 53, 7 P.2d 940.

**When supreme court affirms decision without further investigation.** — Where brief for defendant upon appeal contained such an unwarranted attack upon the trial judge, his conduct, rulings, and instructions, as to amount to a scandalous and impertinent attack upon the judiciary, supreme court was warranted in striking the brief and argument from the files, and affirming the decision without further investigation. *Tomlinson v. Territory*, 1893-NMSC-017, 7 N.M. 195, 33 P. 950.

**Notice not required as condition precedent to commitment order.** — With the issuance of mandate by the appellate court, the district court is directed to issue a commitment order. Accordingly, the district court is not required to give notice to the defendant, his attorney, or his bondsmen as a condition precedent to the issuance of the commitment order. *In re Martinez*, 1982-NMSC-115, 99 N.M. 198, 656 P.2d 861.

**Remand for new sentence instead of new trial.** — Appellate courts have the authority to remand a case for entry of judgment on the lesser included offense and resentencing rather than retrial when the evidence does not support the offense for which the defendant was convicted but does support a lesser included offense. The rationale for this holding is that there is no need to retry a defendant for a lesser included offense when the elements of a lesser offense necessarily were proven to a jury beyond a reasonable doubt in the course of convicting the defendant of the greater offense. *State v. Haynie*, 1994-NMSC-001, 116 N.M. 746, 867 P.2d 416.

**Court of appeals lacks authority to modify contempt sentence.** *State v. Sanchez*, 1976-NMCA-104, 89 N.M. 673, 556 P.2d 359.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 5 Am. Jur. 2d Appellate Review § 591 et seq.

Knowledge by defendant or his attorney, before return of verdict in criminal case, of misconduct in connection with jury after their retirement as affecting right to reversal, 96 A.L.R. 530.

Appeal by state of order granting new trial in criminal case, 95 A.L.R.3d 596.

Judgment favorable to convicted criminal defendant in subsequent civil action arising out of same offense as ground for reversal of conviction, 96 A.L.R.3d 1174.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence - modern cases, 70 A.L.R.4th 664.

## 31-11-4. Directions following review brought by state.

In any criminal case, if the supreme court or court of appeals affirms the judgment of the district court upon review brought by the state, it shall direct that the defendant be discharged; and if the



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judgment is reversed, it shall direct the district court to enter judgment on the verdict rendered, or, when no judgment has been rendered, to proceed to trial on the indictment or information.

**History: Laws 1917, ch. 43, § 56; 1927, ch. 93, § 9; C.S. 1929, § 105-2530; 1941 Comp., § 42-1506; 1953 Comp., § 41-15-6; Laws 1966, ch. 28, § 61.**

**Cross references.** — For similar appellate rule, *see* Rule 12-402 NMRA.

**Severability.** — Laws 1966, ch. 28, § 66, provides for the severability of the act if any part or application thereof is held invalid.

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 5 Am. Jur. 2d Appellate Review § 591 et seq.

## 31-11-5. [New trial granted; procedure in district court.]

The district court to which any criminal cause shall be remanded for new trial shall proceed thereon in same manner as if said cause had not been theretofore tried.

**History: Laws 1917, ch. 43, § 57; C.S. 1929, § 105-2531; 1941 Comp., § 42-1507; 1953 Comp., § 41-15-7.**

**Cross references.** — For appellate rule, *see* Rule 12-402 NMRA.

ANNOTATIONS

**Definition of "new trial".** — The usual definition of a new trial, both common law and statutory, is that it is a reexamination of an issue of fact in the same court after a verdict by a jury. *State v. Nelson*, 1959-NMSC-023, 65 N.M. 403, 338 P.2d 301, cert. denied, 361 U.S. 877, 80 S. Ct. 142, 4 L. Ed. 2d 115.

**District court retries and reexamines all fact issues.** — Since a vast majority of judicial pronouncements relative to a new trial state that it is a reexamination of an issue of fact in the same court, the legislature, by enacting this section, did not intend to provide that the trial judge who had presided over the original trial without objection could be ousted of jurisdiction to retry the case. Nor does this statutory provision contemplate a new information or indictment, rearrest or a new preliminary hearing. This section simply means that the district court to which any case is remanded for a new trial shall reexamine and retry all issues of fact. *State v. Nelson*, 1959-NMSC-023, 65 N.M. 403, 338 P.2d 301, cert. denied, 361 U.S. 877, 80 S. Ct. 142, 4 L. Ed. 2d 115.

**Reexamination of fact not admissiblity of evidence.** — This section simply means that the district court to which any case is remanded for a new trial shall re-examine and re-try all issues of fact. Neither the wording nor the title of the act of which this section is a part suggests in any manner that it applies to the admissibility of evidence upon retrial. *State v. De Santos*, 1978-NMCA-012, 91 N.M. 428, 575 P.2d 612.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 58 Am. Jur. 2d New Trial §§ 587 to 590.

Right of indigent defendant in criminal case to aid of state as regards new trial, 55 A.L.R.2d 1072.

Conviction of lesser offense as bar to prosecution for greater offense on new trial, 61 A.L.R.2d 1141.

Propriety of increased punishment on new trial for same offense, 12 A.L.R.3d 978.

Appeal by state of order granting new trial in criminal case, 95 A.L.R.3d 596.

## 31-11-6. Post-conviction remedy.

A prisoner in custody under sentence of a court established by the laws of New Mexico claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution of the United States, or of the constitution or laws of New Mexico, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A. A motion for such relief may be made at any time.

B. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the district attorney of the judicial district in which such motion is pending, appoint local counsel if the prisoner is indigent, grant a prompt hearing therein, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law, or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him, or grant a new trial, or correct the sentence, as may appear appropriate.

C. A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.



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D. The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

E. An appeal may be taken from the order entered on the motion as from a final judgment in the manner and within the time provided in Section 21-2-1(5) New Mexico Statutes Annotated, 1953 Compilation.

F. An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained if it appears that the applicant has failed to apply for relief by motion to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention, or that a habeas corpus proceeding is pending at the effective date of this section.

G. This section shall not apply to municipal or justice of the peace courts [magistrate courts].

**History: 1953 Comp., § 41-15-8, enacted by Laws 1966, ch. 29, § 1.**

**Compiler's notes.** — Section 21-2-1(5), 1953 Comp., referred to in Subsection E, was Rule 5 of the "Supreme Court Rules." The "Supreme Court Rules" were superseded by rules adopted by the supreme court in 1973, 1974 and 1975. For present, similar provisions, *see* Rule 12-201 NMRA. Rule 1-093 NMRA was superseded by Rule 5-802 NMRA as to all motions for post-conviction relief filed on or after September 1, 1975.

The office of justice of the peace has been abolished, and the jurisdiction, powers and duties have been transferred to the magistrate court. *See* 35-1-38 NMSA 1978.

## ANNOTATIONS

**Habeas corpus.** — An inmate may not resort to this section when the relief sought can be obtained directly by writ of habeas corpus and a habeas corpus petitioner is not required to first seek relief by a post-conviction remedy motion before seeking a writ of habeas corpus. *Cummings v. State*, 2007-NMSC-048, 142 N.M. 656, 168 P.3d 1080.

**Preemption by Rule 5-802 NMRA.** — This section has been preempted by Rule 5-802 NMRA, which governs the procedure for filing a writ of habeas corpus. *State v. Peppers*, 1990-NMCA-057, 110 N.M. 393, 796 P.2d 614, cert. denied, 110 N.M. 260, 794 P.2d 734.

**Conflicts controlled by Rule 5-802 NMRA.** — This section does not provide a post-conviction remedy to the extent that it conflicts with N.M.R. Crim. P. 57 (now Rule 5-802 NMRA). *State v. Garcia*, 1984-NMCA-009, 101 N.M. 232, 680 P.2d 613, cert. quashed, 101 N.M. 189, 679 P.2d 1287.

**Generally.** — In a post-conviction proceeding, the issue is not the guilt or innocence of the prisoner; the issue is the validity of the conviction. *State v. Ramirez*, 1967-NMSC-210, 78 N.M. 418, 432 P.2d 262 (decided prior to adoption of Rule 5-802 NMRA).

**Sixth amendment right to counsel inapplicable.** — Right to counsel provided by the U.S. Const., amend. VI does not apply to post-conviction relief proceedings. *State v. Ramirez*, 1967-NMSC-210, 78 N.M. 418, 432 P.2d 262 (decided prior to adoption of Rule 5-802 NMRA).

**Absent constitutional requirement, appointment of counsel within court's discretion.** *State v. Ramirez*, 1967-NMSC-210, 78 N.M. 418, 432 P.2d 262 (decided prior to adoption of Rule 5-802 NMRA).

**Proceeding independent civil action before criminal procedure rules enacted.** — Prior to enactment of criminal procedural rules, a Rule 1-093 NMRA or proceeding under this section was an independent civil action, and, therefore, Rule 1-052 NMRA, requiring the making of findings of fact, applied to such proceedings. *State v. Hardy*, 1967-NMSC-203, 78 N.M. 374, 431 P.2d 752 (decided prior to adoption of Rule 5-802 NMRA).

**Definition of "conclusive".** — The term "conclusive" means "beyond question," "beyond dispute," or "so irrefutable as to end all uncertainty or question." *State v. Sanchez*, 1966-NMCA-002, 78 N.M. 25, 420 P.2d 786 (decided prior to adoption of Rule 5-802 NMRA).

**Claims for relief must be specific.** — Where defendant does not in any way specify or particularize claimed vital points, claimed errors or claimed discrepancies, a mere allegation of incompetence of attorney or inefficiency is not ground for relief. *State v. Crouch*, 1967-NMSC-093, 77 N.M. 657, 427 P.2d 19 (decided prior to adoption of Rule 5-802 NMRA).

**Defendant must allege some factual basis for relief sought.** — Vague conclusional charges do not raise an issue which demands an inquiry. *State v. Sexton*, 1968-NMCA-003, 78 N.M. 694, 437 P.2d 155; *State v. Williams*, 1967-NMSC-224, 78 N.M. 431, 432 P.2d 396 (decided prior to adoption of Rule 5-802 NMRA).

**Denial or absence of counsel is issue raisable on collateral attack.** *State v. Hardy*, 1967-NMSC-203, 78 N.M. 374, 431 P.2d 752 (decided prior to adoption of Rule 5–802 NMRA).

**Motion to vacate sentence.** — Motion to vacate sentence which raised no new grounds for relief not raised in previous habeas corpus proceeding was properly found to be repetitious, even though transcript of habeas corpus proceeding was never admitted into evidence. *Lott v. State*, 1967-NMSC-073, 77 N.M. 612, 426 P.2d 588 (decided prior to adoption of Rule 5-802 NMRA).

**What motion to vacate includes.** — A petitioner is not entitled upon a motion to vacate a sentence to have his case retried on the facts, and only rarely may he raise questions of law which could have been raised by appeal. *State v. Selgado*, 1967-NMSC-147, 78 N.M. 165, 429 P.2d 363 (decided prior to adoption of Rule 5-802 NMRA).

**No basis for relief where claim of entrapment.** — A claim of entrapment does not state a basis for post-conviction relief. *State v. Simien*, 1968-NMSC-025, 78 N.M. 709, 437 P.2d 708; *State v. Apodaca*, 1967-NMSC-218, 78 N.M. 412, 432 P.2d 256 (decided prior to adoption of Rule 5-802 NMRA).

**Or where mere allegation of perjury.** — A mere allegation of perjury does not entitle defendant to post-conviction relief. A charge of perjury, which neither names or identifies the witnesses who committed the perjury nor specifies the claimed false statements, is not sufficient basis for relief. *State v. Crouch*, 1967-NMSC-093, 77 N.M. 657, 427 P.2d 19 (decided prior to adoption of Rule 5-802 NMRA).

**Or conclusion that due process denied.** — A mere conclusion that due process was denied is not sufficient basis for relief. *State v. Crouch*, 1967-NMSC-093, 77 N.M. 657, 427 P.2d 19 (decided prior to adoption of Rule 5-802 NMRA).

**Or credibility of witness.** — Credibility of a witness does not provide a ground for post-conviction relief. *State v. Williams*, 1967-NMSC-224, 78 N.M. 431, 432 P.2d 396 (decided prior to adoption of Rule 5-802 NMRA).



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**Or general claim that attorney was pro forma** rather than zealous and active does not provide a basis for post-conviction relief. *State v. Apodaca*, 1967-NMSC-218, 78 N.M. 412, 432 P.2d 256 (decided prior to adoption of Rule 5-802 NMRA).

**Or where dissatisfaction with results obtained** through the efforts of attorney does not provide a basis for post-conviction relief. *State v. Apodaca*, 1967-NMSC-218, 78 N.M. 412, 432 P.2d 256 (decided prior to adoption of Rule 5-802 NMRA).

**Representation at preliminary hearing affords no basis for relief.** — Claim that defendant was entitled to counsel when he appeared before the magistrate states no basis for post-conviction relief where defendant was represented by counsel at preliminary hearing. *State v. Apodaca*, 1967-NMSC-218, 78 N.M. 412, 432 P.2d 256 (decided prior to adoption of Rule 5-802 NMRA).

**Or where record shows adequate representation.** — Claim that defendant is unlearned, has little education and "did not fully understand everything that made up his trial" does not set forth a basis for relief, where the record on the trial and the direct appeal shows that his attorneys protected his rights. *State v. Williams*, 1967-NMSC-224, 78 N.M. 431, 432 P.2d 396 (decided prior to adoption of Rule 5-802 NMRA).

**Or that counsel fails to advise defendant of potential appeal.** — Where defendant's motion does not assert that any official in New Mexico's system of justice rejected a request for counsel or failed to take steps toward appointment of counsel after having knowledge of defendant's indigency and desire for counsel on appeal, nor does the motion assert that defendant made any request to be furnished appellate counsel, the claim that counsel did not advise defendant that he could appeal as an indigent does not set forth a basis for post-conviction relief. *State v. Raines*, 1967-NMCA-026, 78 N.M. 579, 434 P.2d 698 (decided prior to adoption of Rule 5-802 NMRA).

**Or complaint with attorney's trial tactics.** — The petitioner is not entitled to post-conviction relief on the grounds that the result might have been different if different trial tactics and strategy had been employed as where the petitioner discussed a change of venue with his attorney because of certain publicity, and that after consideration, his counsel decided against seeking the change. He cannot now complain of that decision. *State v. Selgado*, 1967-NMSC-147, 78 N.M. 165, 429 P.2d 363 (decided prior to adoption of Rule 5-802 NMRA).

**Claims concerning procedure afford no basis for relief.** — Where, at the time defendant's suspended sentence was revoked, the statutory procedure was not followed, but the record shows that counsel was present with defendant at the time of the revocation, that neither the defendant nor his counsel had any objections to the procedure that was in fact followed and defendant, in response to the court's question, stated that he did not desire further hearing on the motion to revoke the suspended sentence, this is a claim concerning the conduct of the proceeding and how it was managed and it does not set forth a basis for relief. *State v. Raines*, 1967-NMCA-026, 78 N.M. 579, 434 P.2d 698 (decided prior to adoption of Rule 5-802 NMRA).

**No grounds for relief where factual questions already resolved.** — Whether defendant was properly tried for first-degree murder rather than voluntary manslaughter are factual questions which the jury resolved by its verdict and present no grounds for relief. *State v. Williams*, 1967-NMSC-224, 78 N.M. 431, 432 P.2d 396 (decided prior to adoption of Rule 5-802 NMRA).

**Time for appointing counsel.** — Once, however, the prisoner alleges some factual basis raising a substantial issue, counsel must be appointed. *State v. Ramirez*, 1967-NMSC-210, 78 N.M. 418, 432 P.2d 262 (decided prior to adoption of Rule 5-802 NMRA).

**No counsel appointed when motion groundless.** — Where a motion has been filed in a post-conviction proceeding, but is completely groundless, counsel need not be appointed to represent the defendant. *State v. Ramirez*, 1967-NMSC-210, 78 N.M. 418, 432 P.2d 262 (decided prior to adoption of Rule 5-802 NMRA).

**Or when prisoner explores possibility of motion.** — Where the conviction has been affirmed on direct review, the trial court is not required to appoint counsel to assist the prisoner in exploring the possibilities for post-conviction relief. *State v. Ramirez*, 1967-NMSC-210, 78 N.M. 418, 432 P.2d 262 (decided prior to adoption of Rule 5-802 NMRA).

**Not enough to show indigency hampered employment of counsel.** — For a petitioner to be entitled to post-conviction relief, it is not enough to show that indigency occasioned the petitioner's inability to employ counsel or to appeal; the petitioner must show that the state deprived him of his fourteenth amendment rights. State action is shown when a responsible official in the state's system of justice rejects a request for counsel or fails to take proper steps toward appointment of counsel for a convicted defendant when he has knowledge of the defendant's indigency and desire for appellate counsel. *State v. Raines*, 1967-NMCA-026, 78 N.M. 579, 434 P.2d 698 (decided prior to adoption of Rule 5-802 NMRA).

**Where motion groundless, court under no duty to appoint counsel.** — Where the motion for post-conviction relief is completely groundless, the trial court need not appoint counsel to represent defendant in connection with the motion and may determine the motion without the presence of defendant. *State v. Sanchez*, 1966-NMCA-002, 78 N.M. 25, 420 P.2d 786 (decided prior to adoption of Rule 5-802 NMRA).

**Waiver of prior defects bars post-conviction relief.** — Absent a showing of prejudice, the plea at arraignment waived prior defects in the proceedings. Here, while prejudice is claimed, it is not shown. Thus, defendant fails to set forth a basis for post-conviction relief. *State v. Robinson*, 1967-NMSC-220, 78 N.M. 420, 432 P.2d 264 (decided prior to adoption of Rule 5-802 NMRA).

**Illegal arrest not ground for attacking judgment.** — Claim of illegal arrest, in itself, is not a proper ground for attacking a judgment under post-conviction remedy. *State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 432 P.2d 258 (decided prior to adoption of Rule 5-802 NMRA).

**Successive motions.** — It is within the discretion of the trial court either to grant or deny successive motions. *Lott v. State*, 1967-NMSC-073, 77 N.M. 612, 426 P.2d 588 (decided prior to adoption of Rule 5–802 NMRA).

**Subsequent application.** — If doubts arise in particular cases as to whether the grounds in a subsequent application are different, they should be resolved in favor of the applicant. *State v. Canales*, 1967-NMSC-221, 78 N.M. 429, 432 P.2d 394 (decided prior to adoption of Rule 5-802 NMRA).

**Burden on applicant to show need for redetermination.** — The burden is on the applicant to show that, although the ground of the new application was determined against him on the merits of a prior application, the ends of justice would be served by a redetermination of the ground. *State v. Canales*, 1967-NMSC-221, 78 N.M. 429, 432 P.2d 394 (decided prior to adoption of Rule 5-802 NMRA).

**No redetermination of trial issues.** — Where the extent of defendant's drinking was an issue at the trial, it is not to be redetermined in a post-conviction proceeding. *State v. Williams*, 1967-NMSC-224, 78 N.M. 431, 432 P.2d 396 (decided prior to adoption of Rule 5-802 NMRA).

**Refusal of application.** — A second or successive application may be refused only if the prior denial rested on an adjudication of the merits of the ground presented in the subsequent application. This means that an evidentiary hearing must have been held in the prior application



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if factual issues were raised and it was not denied on the basis that the files and records conclusively resolved those issues. *State v. Canales*, 1967-NMSC-221, 78 N.M. 429, 432 P.2d 394 (decided prior to adoption of Rule 5-802 NMRA).

**Remedy not intended as substitute for appeal.** — Post-conviction proceedings are not intended for, or to be utilized as a substitute for appeal as a means of correcting errors occurring during the course of a trial, or to get reconsideration of matters considered on appeal. *State v. Williams*, 1967-NMSC-224, 78 N.M. 431, 432 P.2d 396 (decided prior to adoption of Rule 5-802 NMRA).

**Filing of notice of appeal jurisdictional.** — The timely filing of a notice of appeal is jurisdictional and if it has not been complied with, in the absence of excusable neglect, the court is bound to act on its own motion and dismiss the appeal for lack of jurisdiction, even though the parties do not raise the question of jurisdiction. *State v. Weddle*, 1967-NMSC-027, 77 N.M. 417, 423 P.2d 609 (decided prior to adoption of Rule 5-802 NMRA).

**Issues decided on appeal not relitigated.** — Issue concerning prior convictions and the state's use of an "F.B.I. rap sheet" was raised and decided on defendant's appeal and may not be relitigated in post-conviction proceedings. *State v. Williams*, 1967-NMSC-224, 78 N.M. 431, 432 P.2d 396 (decided prior to adoption of Rule 5-802 NMRA).

**Attack on district court's conclusion of law must fail.** — Where there is conflict in appellant's attack on the district court's conclusion of law, that appellant knowingly, intelligently and voluntarily, while being advised by competent counsel, entered a plea of guilty, must fail. *State v. Simien*, 1968-NMSC-025, 78 N.M. 709, 437 P.2d 708 (decided prior to adoption of Rule 5-802 NMRA).

**Law reviews.** — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

For article, "Jurisdiction as May Be Provided by Law: Some Issues of Appellate Jurisdiction in New Mexico," see 36 N.M.L. Rev. 215 (2006).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 18 Am. Jur. 2d Coram Nobis and Allied Statutory Remedies §§ 4, 5, 7, 17, 21, 44 to 48, 52 to 54, 56, 57, 59, 60.

Power of successor judge taking office during term-time to vacate, etc., judgment entered by his predecessor, 11 A.L.R.2d 1117.

Motion to vacate judgment on order as constituting general appearance, 31 A.L.R.2d 262.

Incompetency of counsel chosen by accused as affecting validity of conviction, 74 A.L.R.2d 1390, 34 A.L.R.3d 470, 2 A.L.R.4th 27, 2 A.L.R.4th 807, 13 A.L.R.4th 533, 15 A.L.R.4th 582, 18 A.L.R.4th 360, 26 A.L.R. Fed. 218, 53 A.L.R. Fed. 140.

Post-conviction procedure for raising contention that enforcement of penal statute or law is unconstitutionally discriminatory, 4 A.L.R.3d 404.

When criminal case becomes moot so as to preclude review of or attack on conviction or sentence, 9 A.L.R.3d 462.

Right to a jury trial on motion to vacate judgment, 75 A.L.R.3d 894.

Coram nobis on ground of other's confession to crime, 46 A.L.R.4th 468.

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747.

24 C.J.S. Criminal Law §§ 1610 to 1618, 1620 to 1629, 1633 to 1637, 1742.

# ARTICLE 12

# Fines, Fees and Costs

Sec.
31-12-1, 31-12-2. Repealed.
31-12-3. Paying fines, fees or costs in installments; community service option.
31-12-4, 31-12-5. Repealed.
31-12-6. Costs of conviction.
31-12-7. Motor vehicles; influence of intoxicating liquor or drugs; fee upon conviction.
31-12-8. Controlled substances; fee upon conviction; municipal ordinance requirement.
31-12-9. Crime laboratory fund created; appropriation.
31-12-10. Repealed.
31-12-11. Court fees; deposit in the domestic violence offender treatment or intervention fund.
31-12-12. Domestic violence offender treatment or intervention fund created; appropriation; program requirements.
31-12-13. Crime victims reparation fee.

## 31-12-1, 31-12-2. Repealed.

**Repeals.** — Laws 1983, ch. 51, § 1, repealed 31-12-1 and 31-12-2 NMSA 1978, relating to the reporting of fines by the county clerk and their credit to the state school fund, and the collection of fines by sheriff, respectively.

## 31-12-3. Paying fines, fees or costs in installments; community service option.

A. Any person sentenced to pay a fine or to pay fees and costs in any criminal proceeding against him, either in addition to or without a term of imprisonment, may in the discretion of the court be allowed to pay such fine, fees or costs in installments of such amounts, at such times and upon such conditions as the court may fix. The defendant may also be required to serve a period of time in labor to be known as "community service" in lieu of all or part of the fine. If unable to pay the fees or costs, he may be granted permission to perform community service in lieu of them as well. The labor shall be meaningful, shall not be suspended or deferred and shall be of a type



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that benefits the public at large or any public, charitable or educational entity or institution and is consistent with Article 9, Section 14 of the constitution of New Mexico. Any person performing community service pursuant to court order shall be immune from civil liability arising out of the community service other than for gross negligence, shall not be entitled to wages or considered an employee for any purpose and shall not be entitled to workers' compensation, unemployment or any other benefits otherwise provided by law. Instead, a person who performs community service shall receive credit toward the fine, fees or costs at the rate of the prevailing federal hourly minimum wage. Unless otherwise provided, however, the total fine, fees and costs shall be payable forthwith.

B. The court may at any time revise, modify, reduce or enlarge the amount of the installment or the time and conditions fixed for payment of it.

C. When a defendant sentenced to pay a fine in installments or ordered to pay fees or costs defaults in payment, the court, upon motion of the prosecutor or upon its own motion, may require the defendant to show cause why his default should not be treated as contumacious and may issue a summons or a warrant of arrest for his appearance. It shall be a defense that the defendant did not willfully refuse to obey the order of the court or that he made a good faith effort to obtain the funds required for the payment. If the defendant's default was contumacious, the court may order him committed until the fine or a specified part of it or the fees or costs are paid. The maximum term of imprisonment for such contumacious nonpayment shall be specified in the order of commitment.

D. If it appears that a defendant's default in the payment of a fine, fees or costs is not contumacious, the court may allow the defendant additional time for payment, reduce the amount of the fine or of each installment, revoke the fine or the unpaid portion in whole or in part or require the defendant to perform community service in lieu of the fine, fees or costs.

**History: 1953 Comp., § 41-21-8, enacted by Laws 1971, ch. 236, § 1; 1991, ch. 54, § 1; 1993, ch. 155, § 1.**

**The 1993 amendment,** effective July 1, 1993, substituted "shall be meaningful, shall not be suspended or deferred and shall" for "must" and changed the style of the constitutional reference in the fourth sentence of Subsection A.

**The 1991 amendment,** effective June 14, 1991, rewrote this section to the extent that a detailed comparison would be impracticable.

ANNOTATIONS

**Substantive limits on revocation of probation when unable to pay fine.** — This section must be read together with the ruling of the United States supreme court in *Bearden v. Georgia,* 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), which recognized substantive limits on the automatic revocation of probation where an indigent defendant is unable to pay a fine or restitution. Those substantive limits require that: (1) There must be an inquiry into the reasons for the failure to pay; (2) if the reasons for defendant's failure to pay are either not willful or indicate an inability to pay, the court must consider alternatives to incarceration; and (3) only if alternative measures do not meet the state's interests, then the court may order confinement. *State v. Parsons*, 1986-NMCA-027, 104 N.M. 123, 717 P.2d 99.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 944 et seq.

Indigency of offender as affecting validity of imprisonment as alternative to payment of fine, 31 A.L.R.3d 926.

Recovery under state law of attorney's fees by law pro se litigant, 14 A.L.R.5th 947.

36A C.J.S. Fines § 6.

## 31-12-4, 31-12-5. Repealed.

**Repeals.** — Laws 1983, ch. 51, § 1, repealed 31-12-4 and 31-12-5 NMSA 1978, relating to fees in criminal cases and the charging of illegal fees, respectively.

## 31-12-6. Costs of conviction.

In every case wherein there is a conviction, the costs may be adjudged against the defendant.

**History: Laws 1858-1859, p. 30; C.L. 1865, ch. 46, § 14; C.L. 1884, § 2506; C.L. 1897, § 3445; Code 1915, § 4450; C.S. 1929, § 105-2229; 1941 Comp., § 42-1304; 1953 Comp., § 41-13-4; Laws 1972, ch. 71, § 16.**

**Cross references.** — For payment of fine or costs in installments, *see* 31-12-3 NMSA 1978.

ANNOTATIONS

**Assessment of costs requires statutory authority.** — The assessment of costs in criminal cases was unknown at common law and therefore requires statutory authority. *State v. Valley Villa Nursing Ctr., Inc.*, 1981-NMCA-133, 97 N.M. 161, 637 P.2d 843; *State v. Hudson*, 2003-NMCA-139, 134 N.M. 564, 80 P.3d 501.



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**Statutes assessing costs must be strictly construed.** — Since statutes authorizing costs in criminal cases are penal in nature, they must be strictly construed. *State v. Valley Villa Nursing Ctr., Inc.*, 1981-NMCA-133, 97 N.M. 161, 637 P.2d 843.

**Assessment of costs against state not authorized.** – Neither this section nor any other statutory provision provides for the recovery of costs against the state in a criminal case; the legislature has made a conscious determination that only a convicted defendant will be liable for costs. *State v. Hudson*, 2003-NMCA-139, 134 N.M. 564, 80 P.3d 501.

**"Defendant" excludes defense counsel.** — Strict construction of the term "defendant" precludes requiring defendant's counsel from paying costs. *State v. Rivera*, 1998-NMSC-024, 125 N.M. 532, 964 P.2d 93.

**Specific provision in 31-20-6 NMSA 1978 controls over this section.** — Since the legislature made a specific provision for costs as a condition of probation in Section 31-20-6 NMSA 1978, that specific provision controls over the general provisions of this section. *State v. Ayala*, 1981-NMCA-008, 95 N.M. 464, 623 P.2d 584.

**Jury and bailiff costs not assessable against defendant.** — Jury and bailiff costs are part of the general expense of maintaining a system of courts and the administration of justice and may not be assessed against a defendant if they were assessed independently of any condition of probation. *State v. Ayala*, 1981-NMCA-008, 95 N.M. 464, 623 P.2d 584.

**Restitution may not be ordered as a cost of prosecution.** — Where defendant was ordered as part of her sentence, following a guilty plea to the offense of forgery, to pay restitution for the costs of her extradition from New York, the restitution order could not have been authorized by the district court pursuant to this section because extradition costs fall under the same category of expenses required to administer a system of justice, and it is settled law that costs assessed against a defendant cannot include the general expense of maintaining a system of courts and the administration of justice. *State v. George*, 2020-NMCA-039.

**No grand jury expenses.** — Although the expense of a grand jury investigation may be unusual and bears a direct relation to the defendant, this section does not authorize the assessment of grand jury expenses since they are costs incurred before a criminal case is commenced and not costs in a case wherein there is a conviction. *State v. Valley Villa Nursing Ctr., Inc.*, 1981-NMCA-133, 97 N.M. 161, 637 P.2d 843.

**"Costs" given broad coverage.** — Concerning jury fees, jury mileage, jury meals, bailiffs' mileage and sheriffs' costs, the word "costs," in this section, is broad enough to cover all costs. In the absence of a specific statute detailing what are proper items of cost in New Mexico or in the absence of a New Mexico supreme court case saying that jury fees, jury mileage, bailiffs' mileage and sheriffs' costs are not proper items of costs, same can continue to be charged as proper items of court costs. 1955-56 Op. Att'y Gen. No. 56-6554. *See State v. Ayala*, 1981-NMCA-008, 95 N.M. 464, 623 P.2d 584.

**Includes collection of incidental fees.** — Witness fees, witness mileage, docket fees and justice of the peace (now magistrate) fees are necessary and incidental costs that can be collected as court costs. 1955-56 Op. Att'y Gen. No. 56-6554. *See State v. Ayala*, 1981-NMCA-008, 95 N.M. 464, 623 P.2d 584.

**Word "costs" undoubtedly means incidental costs,** or those necessary costs spent by the state in the prosecution of the case. 1955-56 Op. Att'y Gen. No. 56-6554. *See State v. Ayala*, 1981-NMCA-008, 95 N.M. 464, 623 P.2d 584.

**Section permits assessment of costs against defendant upon deferred sentence.** — The authorization in this section that costs may be adjudged against the defendant, based on a conviction, permits assessment of costs against a defendant whose sentence is deferred. *State v. Ayala*, 1981-NMCA-008, 95 N.M. 464, 623 P.2d 584.

**Effect of juvenile's conviction.** — This section provides that costs may be assessed against a criminal defendant. If a juvenile were convicted of involuntary manslaughter, costs could be assessed against him, and if not paid he could be remanded to the custody of the county sheriff and be lodged in the county jail if he would not or could not pay the costs assessed against him. 1957-58 Op. Att'y Gen. No. 57-95.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 20 Am. Jur. 2d Costs § 105 et seq.

Defendant in criminal prosecution, costs as chargeable to, 65 A.L.R.2d 854.

Validity of requirement that, as condition of probation, indigent defendant reimburse defense costs, 79 A.L.R.3d 1025.

Abatement of state criminal case by accused's death pending appeal of conviction - modern cases, 80 A.L.R.4th 189.

Recovery under state law of attorney's fees by law pro se litigant, 14 A.L.R.5th 947.

20 C.J.S. Costs § 51.

## 31-12-7. Motor vehicles; influence of intoxicating liquor or drugs; fee upon conviction.

Notwithstanding the provisions of Section 66-8-102 NMSA 1978 or any municipal ordinance that prohibits driving while under the influence of intoxicating liquor or drugs, a person convicted of a violation of Section 66-8-102 NMSA 1978 or a violation of a municipal ordinance that prohibits driving while under the influence of intoxicating liquor or drugs shall be assessed by the court, in addition to any other fee or fine:

A. a fee of eighty-five dollars ($85.00) to defray the costs of chemical and other tests used to determine the influence of liquor or drugs; and

B. a fee of seventy-five dollars ($75.00) to fund comprehensive community programs for the prevention of driving while under the influence of intoxicating liquor or drugs and for other traffic safety purposes.

**History: Laws 1981, ch. 367, § 1; 1988, ch. 56, § 5; 1991, ch. 245, § 1; 1997, ch. 203, § 1; 2010, ch. 5, § 1.**



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**Cross references.** — For the traffic offense of being under the influence of intoxicating liquor, *see* 66-8-102 NMSA 1978.

**The 2010 amendment,** effective July 1, 2010, in Subsection A, increased the fee from sixty five dollars ($65.00) to eighty five dollars ($85.00).

**The 1997 amendment,** effective June 20, 1997, in Subsection A, substituted "sixty-five dollars ($65.00)" for "thirty-five dollars ($35.00)" and made a minor stylistic change.

**The 1991 amendment,** effective October 1, 1991, designated a formerly undesignated provision as Subsection A; added Subsection B; and made minor stylistic changes in the introductory paragraph.

**The 1988 amendment,** effective July 1, 1988, substituted "Section 66-8-102 NMSA 1978" for "Section 66-8-110 NMSA 1978" near the beginning of the section, inserted provisions following the two section references, regarding violation of a municipal ordinance prohibiting driving while under the influence of intoxicating liquor or drugs, inserted "by the court" near the end and substituted "thirty-five dollars ($35.00)" for "twenty-five dollars ($25.00)" also near the end.

## 31-12-8. Controlled substances; fee upon conviction; municipal ordinance requirement.

A. A person convicted of a violation of the provisions of the Controlled Substances Act [30-31-1 NMSA 1978] or a person convicted of distribution or possession of a controlled substance pursuant to municipal ordinance shall be assessed, in addition to any other fee or fine, a fee of seventy-five dollars ($75.00) to defray the costs of chemical and other analyses of controlled substances.

B. Every municipality which has enacted an ordinance making possession or distribution of a controlled substance unlawful shall enact an ordinance to require assessment of the fee pursuant to Subsection A of this section and to provide for transmittal of the money collected to the administrative office of the courts pursuant to Section 31-12-9 NMSA 1978, notwithstanding the provisions of Section 35-14-7 NMSA 1978. All fees collected under this section shall be subject to an audit by the state auditor.

**History: Laws 1981, ch. 367, § 2; 1984, ch. 82, § 1; 1988, ch. 14, § 5.**

**The 1988 amendment,** effective July 1, 1988, deleted "misdemeanor or a petty misdemeanor for a" preceding "violation" and substituted "seventy-five dollars ($75.00)" for "twenty-five dollars ($25.00)" in Subsection A.

**The 1984 amendment** added "municipal ordinance requirement" in the catchline, designated the previously undesignated provisions of the section as Subsection A, inserting "or a person convicted of distribution or possession of a controlled substance pursuant to municipal ordinance" therein, and added Subsection B.

ANNOTATIONS

**Conditional discharge dismissal not "conviction".** – A dismissal under the conditional discharge statute, Section 30-31-28 NMSA 1978, is not a "conviction" as contemplated by this section, or for any other purpose. *State v. Fairbanks*, 2004-NMCA-005, 134 N.M. 783, 82 P.3d 954.

**Crime lab fee cannot be imposed under conditional discharge.** – Although the crime lab fee would be authorized if the defendant had entered his guilty plea and received a deferred or suspended probated sentence or if he violated the terms of his probation under the conditional discharge, because he successfully completed his probation and charges were dismissed, the district court did not have authority to impose the fee. *State v. Fairbanks*, 2004-NMCA-005, 134 N.M. 783, 82 P.3d 954.

## 31-12-9. Crime laboratory fund created; appropriation.

There is created in the state treasury the "crime laboratory fund". All fees collected pursuant to the provisions of Sections 31-12-7 and 31-12-8 NMSA 1978 shall be transmitted monthly to the administrative office of the courts for credit to the crime laboratory fund. All balances in the crime laboratory fund of fees collected pursuant to the provisions of Subsection A of Section 31-12-7 NMSA 1978 are appropriated to the administrative office of the courts for payment upon invoice to the scientific laboratory division of the health and environment department [department of health], the New Mexico state police crime laboratory division and the Albuquerque police crime laboratory for costs related to chemical and other tests and analyses described in those sections and incurred by these laboratories and local law enforcement agencies. Payments out of the crime laboratory fund of fees collected pursuant to the provisions of Subsection A of Section 31-12-7 NMSA 1978 shall be made on vouchers issued and signed by the director of the administrative office of the courts upon warrants drawn by the department of finance and administration. All balances in the crime laboratory fund of fees collected pursuant to the provisions of Subsection B of Section 31-12-7 NMSA 1978 are appropriated to the traffic safety bureau of the transportation program division of the state highway and transportation department to provide funds to approved comprehensive community programs for the prevention of driving while under the



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influence of alcohol or drugs and for other traffic safety purposes. Payment out of the crime laboratory fund of fees collected pursuant to the provisions of Subsection B of Section 31-12-7 NMSA 1978 shall be made on vouchers issued and signed by the chief of the traffic safety bureau upon warrants drawn by the department of finance and administration.

**History: Laws 1981, ch. 367, § 3; 1989, ch. 324, § 22; 1991, ch. 245, § 2.**

**Bracketed material.** — The bracketed reference to the department of health was inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, and enacted a new 9-7-4 NMSA 1978, creating the department of health. The bracketed material is not part of the law.

**The 1991 amendment,** effective October 1, 1991, inserted "monthly" in the second sentence; inserted "of fees collected pursuant to the provisions of Subsection A of Section 31-12-7 NMSA 1978" in the third and fourth sentences; and added the final two sentences.

**The 1989 amendment,** effective April 7, 1989, substituted "Sections 31-12-7 and 31-12-8 NMSA 1978" for "Sections 1 and 2 of this act" in the second sentence, and "described in those sections" for "described in Sections 1 and 2 of this act" in the third sentence, and deleted the former last sentence which read "Any interest earned on the fund shall be credited to it".

## 31-12-10. Repealed.

**Repeals.** — Laws 1990, ch. 104, § 3 repealed 31-12-10 NMSA 1978, as amended by Laws, 1990, ch. 104, § 1, relating to DWI fund, effective July 1, 1991. For provisions of former section, *see* the 1989 NMSA 1978 on *NMOneSource.com*.

## 31-12-11. Court fees; deposit in the domestic violence offender treatment or intervention fund.

A. In addition to any other fees collected in the district court, metropolitan court and magistrate court, those courts shall assess and collect from a person convicted of a penalty assessment misdemeanor, traffic violation, petty misdemeanor, misdemeanor or felony offense a "domestic violence offender treatment fee" of five dollars ($5.00).

B. Domestic violence offender treatment fees shall be deposited in the domestic violence offender treatment or intervention fund.

**History: Laws 2003, ch. 387, § 1; 2008, ch. 7, § 1.**

**The 2008 amendment,** effective July 1, 2008, changed the name of the domestic violence offender treatment fund to the domestic violence offender treatment or intervention fund.

## 31-12-12. Domestic violence offender treatment or intervention fund created; appropriation; program requirements.

A. The "domestic violence offender treatment or intervention fund" is created in the state treasury. All fees collected pursuant to the provisions of Section 31-12-11 NMSA 1978 shall be transmitted monthly to the department of finance and administration for credit to the domestic violence offender treatment or intervention fund.

B. Balances in the domestic violence offender treatment or intervention fund are appropriated to the children, youth and families department to provide funds to domestic violence offender treatment or intervention programs to defray the cost of providing treatment or intervention to domestic violence offenders. Unexpended or unencumbered balances remaining in the fund at the end of any fiscal year shall not revert to the general fund.

C. Payment out of the domestic violence offender treatment or intervention fund shall be made on vouchers issued and signed by the secretary of children, youth and families upon warrants drawn by the department of finance and administration.

D. In order to be eligible for money from the domestic violence offender treatment or intervention fund, a domestic violence offender treatment or intervention program shall include the following components in its program:

(1) an initial assessment to determine if a domestic violence offender will benefit from participation in the program;

(2) a written contract, which must be signed by the domestic violence offender, that sets forth:



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(a) attendance and participation requirements;

(b) consequences for failure to attend or participate in the program; and

(c) a confidentiality clause that prohibits disclosure of information revealed during treatment or intervention sessions;

(3) strategies to hold domestic violence offenders accountable for their violent behavior;

(4) a requirement that group discussions are limited to members of the same gender;

(5) an education component that:

(a) defines physical, emotional, sexual, economic and verbal abuse and techniques for stopping those forms of abuse; and

(b) examines gender roles, socialization, the nature of violence, the dynamics of power and control and the effects of domestic violence on children;

(6) a requirement that a domestic violence offender not be under the influence of alcohol or drugs during a treatment or intervention session;

(7) a requirement, except with respect to a domestic violence offender who is a voluntary participant in the program, that the program provide monthly written reports to the presiding judge or the domestic violence offender's probation or parole officer regarding:

(a) proof of the domestic violence offender's enrollment in the program;

(b) progress reports that address the domestic violence offender's attendance, fee payments and compliance with other program requirements; and

(c) evaluations of progress made by the domestic violence offender and recommendations as to whether or not to require the offender's further participation in the program; and

(8) a requirement that the term of the program be at least fifty-two weeks.

E. Counseling for couples shall not be a component of a domestic violence offender treatment or intervention program.

F. As used in this section, "domestic violence offender" means a person:

(1) convicted for an offense pursuant to the provisions of the Crimes Against Household Members Act [30-3-10 NMSA 1978];

(2) convicted for violating an order of protection granted by a court pursuant to the provisions of the Family Violence Protection Act [40-13-1 NMSA 1978];

(3) referred to a domestic violence offender treatment or intervention program by a judge, a domestic violence special commissioner or the parole board; or

(4) who voluntarily participates in a domestic violence offender treatment or intervention program.

**History: Laws 2003, ch. 387, § 2; 2008, ch. 7, § 2.**

**The 2008 amendment,** effective July 1, 2008, changed the name of the domestic violence offender treatment fund to the domestic violence offender treatment or intervention fund and added Paragraphs (3) and (4) of Subsection F.

**Temporary provisions.** — Laws 2008, ch. 7, § 3, effective July 1, 2008, provided that all money, fees, appropriations, gifts, grants and donations in the domestic violence offender treatment fund are transferred to the domestic violence offender treatment or intervention fund.

## 31-12-13. Crime victims reparation fee.

A. In addition to any other fees or penalties collected in a district court, metropolitan court and magistrate court, those courts shall assess and collect from a person convicted of a misdemeanor or felony offense a mandatory crime victims reparation fee. The fee shall be levied at the time of sentencing in addition to any sentence required or permitted by law, in accordance with the following schedule:

(1) a person convicted of a felony shall pay a crime victims reparation fee of seventy-five dollars ($75.00); and

(2) a person convicted of a misdemeanor shall pay a crime victims reparation fee of fifty dollars ($50.00).

B. Crime victim reparation fees shall be deposited in the crime victims reparation fund.

**History: Laws 2015, ch. 10, § 3.**

**Effective dates.** — Laws 2015, ch. 10, § 4 made Laws 2015, ch. 10, § 3 effective July 1, 2015.



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# ARTICLE 13

# Civil Rights and Pardons

Sec.
31-13-1. Felony conviction; restoration of citizenship.

## 31-13-1. Felony conviction; restoration of citizenship.

A. A person who has been convicted of a felony shall not be permitted to vote in any statewide, county, municipal or district election held pursuant to the provisions of the Election Code [1-1-1 NMSA 1978], unless the person:

(1) has completed the terms of a suspended or deferred sentence imposed by a court;

(2) was unconditionally discharged from a correctional facility under the jurisdiction of the corrections department or was conditionally discharged from a correctional facility under the jurisdiction of the corrections department and has completed all conditions of probation or parole;

(3) was unconditionally discharged from a correctional facility under the jurisdiction of a federal corrections agency or was conditionally discharged from a correctional facility under the jurisdiction of a federal corrections agency and has completed all conditions of probation or parole; or

(4) has presented the governor with a certificate verifying the completion of the sentence and was granted a pardon or a certificate by the governor restoring the person's full rights of citizenship.

B. When a person has completed the terms of a suspended or deferred sentence imposed by a court for a felony conviction, the clerk of the district court shall notify the secretary of state. The secretary of state shall notify all county clerks that the person is eligible for registration.

C. A person who has served the entirety of a sentence imposed for a felony conviction, including a term of probation or parole shall be issued a certificate of completion by the corrections department. Upon issuance, the corrections department shall inform the person that the person is entitled to register to vote. The certificate of completion shall state that the person's voting rights are restored.

D. When the corrections department issues a person a certificate of completion, the corrections department shall notify the secretary of state that the person is entitled to register to vote. The secretary of state shall notify all county clerks that the person is eligible for registration. Additionally, a county clerk shall accept the following documents as proof that a person has served the entirety of the sentence for a felony conviction and is eligible for registration:

(1) a judgment and sentence from a court of this state, another state or the federal government, which shows on its face that the person has completed the entirety of the sentence;

(2) a certificate of completion from the corrections department; or

(3) a certificate of completion from another state or the federal government.

E. A person who has been convicted of a felony shall not be permitted to hold an office of public trust for the state, a county, a municipality or a district, unless the person has presented the governor with a certificate verifying the completion of the sentence and was granted a pardon or a certificate by the governor restoring the person's full rights of citizenship.

**History: 1953 Comp., § 40A-29-14, enacted by Laws 1963, ch. 303, § 29-14; and recompiled as 1953 Comp., § 40A-29-38, by Laws 1977, ch. 216, § 16; 2001, ch. 46, § 2.; 2005, ch. 116, § 2.**

**Recompilations.** — Laws 1977, ch. 216, § 16 recompiled 40A-29-14, 1953 Comp., as 40A-29-38, 1953 Comp. effective July 1, 1979.

**Cross references.** — For persons convicted of a felonious or infamous crime as not being qualified voters, *see* N.M. Const., art. VII, § 1 and 1-4-24 NMSA 1978.

For qualification of voters, *see* N.M. Const., art VII, § 1.

For governor's power to pardon, *see* N.M. Const., art V, § 6.

For registration following conviction, *see* 1-4-27.1 NMSA 1978.

**The 2005 amendment,** effective June 17, 2005, in Subsection B, provided that when a person has completed the terms of a suspended or deferred sentence, the clerk of the district court shall notify the secretary of state and the secretary of state shall notify all county clerks that the person is eligible for registration; in Subsection C,



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provided that upon the issuance of a certificate of completion of sentence, which shall state that the person's voting rights are restored, the corrections department shall inform the person that the person is entitled to vote; and in Subsection D, provided that when the corrections department issues a certificate of completion, the corrections department shall notify the secretary of state, the secretary of state shall notify all county clerks that the person is eligible for registration and county clerks shall accept the certificate of completion as proof that the person is eligible for registration.

**The 2001 amendment,** effective July 1, 2001, substituted "Felony conviction" for "Effect of criminal conviction upon civil rights; governor may pardon or grant" in the section heading; rewrote Subsections A and B adding alternatives to the gubernatorial restoration of voting rights following a felony conviction; and rewrote Subsection C to relate only to the holding of public office after a felony conviction.

## ANNOTATIONS

**Governor's pardon removes only state, not federal, disabilities for convicted felon.** — A pardon by the governor only removes the disabilities previously imposed on a convicted felon by this state, namely, the right to vote and to hold office, but does not remove any disabilities imposed by federal statute on the convicted felon, for example, the disability of not being allowed to receive a firearm involved in interstate commerce. *U.S. v. Larranaga*, 614 F.2d 239 (10th Cir. 1980).

**Eligibility for elective office.** — A convicted felon who was elected to the position of county commissioner became eligible to hold that office when, prior to taking the oath of office, she applied for and received a certificate of restoration of full rights of citizenship from the governor of New Mexico. *Lopez v. Kase*, 1999-NMSC-011, 126 N.M. 733, 975 P.2d 346.

**Dual pathways to restoration of civil rights.** — Section 31-13-1 NMSA 1978 provides dual pathways to restoring civil rights. Subsection A provides for the restoration of civil rights for convicted felons who receive deferred sentences and have no criminal sentences to complete. Subsections C and E provide for the restoration of civil rights for convicted felons who receive and complete criminal sentences. *United States of America v. Reese*, 2014-NMSC-013.

**Completion of deferred sentence.** — Upon the completion of all conditions for a deferred sentence and the resulting dismissal of all charges, a person's civil rights, including the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess firearms, are restored by operation of law without the necessity of a pardon or certificate from the governor. *United States of America v. Reese*, 2014-NMSC-013.

Where defendant pleaded no contest to one felony count of tampering with evidence; the district court deferred sentencing and placed defendant on probation; defendant completed the conditions of deferment and the district court dismissed the charge of tampering with evidence; a decade later, defendant was indicted for violation of a federal statute that prohibited felons from possessing firearms based on defendant's felony conviction for tampering with evidence; federal law excluded any conviction for which a person had their civil rights restored; and the parties agreed that New Mexico had restored defendant's right to vote, to serve on a jury and to possess firearms, but disagreed over whether New Mexico had restored defendant's right to hold public office because Subsection E, which addresses the right to hold public office, does not refer to deferred sentences, upon the completion of defendant's deferred sentence, all of defendant's civil rights were automatically restored, including the right to hold public office. *United States of America v. Reese*, 2014-NMSC-013.

**Definition of "pardon".** — A "pardon" is a declaration on record by the chief magistrate of a state or country that a person named is relieved from the legal consequences of a specific crime, or an act of grace proceeding from the power entrusted with execution of laws, which exempt the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. 1959-60 Op. Att'y Gen. No. 59-176.

**Certificate of pardon operates to cover all convictions and sentences.** 1970 Op. Att'y Gen. No. 70-85.

**Full pardon absolves one from all legal consequences of crime.** — It was formerly doubted whether a pardon could do more than take away the punishment, leaving the crime and its disabling consequences unremoved, but, with certain exceptions hereinafter noted, it is now the accepted general doctrine that a full pardon absolves one from all legal consequences of his crime. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction it removes the penalties and disabilities which ordinarily follow from conviction, and, generally speaking, restores the offender to all his civil rights. 1959-60 Op. Att'y Gen. No. 59-176.

**Restoration of citizenship rights.** — A full pardon automatically restores such citizenship rights as were lost by the conviction. 1959-60 Op. Att'y Gen. No. 59-176.

**But record not expunged.** — There is no law in this state authorizing the expunging from records the fact of a felony conviction for which pardoned. 1959-60 Op. Att'y Gen. No. 59-176.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21A Am. Jur. 2d Criminal Law § 1311 et seq.

Executive clemency to remove disqualification for office, resulting from conviction of crime, as applicable in case of conviction in federal court or court of another state, 135 A.L.R. 1493.

Pardon as restoring license or other special privilege or office forfeited by conviction, 143 A.L.R. 172, 70 A.L.R.2d 268.

Offense under federal law or law of another state or country, conviction as vacating accused's holding of state or local office or as ground for removal, 20 A.L.R.2d 732.

Propriety of conditioning probation on suspended sentence or defendant's refraining from political activity, protest, or the like, 45 A.L.R.3d 1022.

Pardon as restoring public office on license or eligibility therefor, 58 A.L.R.3d 1191.

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139.

State pardon as affecting "convicted" status of one accused of violations of Gun Control Act of 1968 (18 USCS §§ 921 et seq.), 44 A.L.R. Fed. 692.

State restoration of federal felon's civil rights as nullification of conviction under 18 USCS § 921(a)(20) which defines conviction for purposes of penalizing possession of weapon by convicted felon pursuant to 18 USCS § 922(g)(1), 117 A.L.R. Fed. 247.

18 C.J.S. Convicts § 3 et seq.



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# ARTICLE 14

## Execution of Death Sentence

Sec.
31-14-1. Repealed.
31-14-2. Repealed.
31-14-3. Repealed.
31-14-4. Repealed.
31-14-5. Repealed.
31-14-6. Repealed.
31-14-7. Repealed.
31-14-8. Repealed.
31-14-9. Repealed.
31-14-10. Repealed.
31-14-11. Repealed.
31-14-12. Repealed.
31-14-13. Repealed.
31-14-14. Repealed.
31-14-15. Repealed.
31-14-16. Repealed.

### 31-14-1. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-1 NMSA 1978, as enacted by Laws 1929, ch. 69, § 1, relating to the execution of death sentences, effective July 1, 2009.

For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

### 31-14-2. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-2 NMSA 1978, as enacted by Laws 1929, ch. 69, § 2, relating to the execution of death sentences, effective July 1, 2009.

For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

### 31-14-3. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-3 NMSA 1978, as enacted by Laws 1929, ch. 69, § 3, relating to the execution of death sentences, effective July 1, 2009.

For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

### 31-14-4. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-4 NMSA 1978, as enacted by Laws 1929, ch. 69, § 4, relating to the execution of death sentences, effective July 1, 2009.

For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

### 31-14-5. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-5 NMSA 1978, as enacted by Laws 1929, ch. 69, § 5, relating to the execution of death sentences, effective July 1, 2009.

For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

### 31-14-6. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-6 NMSA 1978, as enacted by Laws 1929, ch. 69, § 6, relating to the execution of death sentences, effective July 1, 2009.

For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

### 31-14-7. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-7 NMSA 1978, as enacted by Laws 1929, ch. 69, § 7, relating to the execution of death sentences, effective July 1, 2009.

For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

### 31-14-8. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-8 NMSA 1978, as enacted by Laws 1929, ch. 69, § 8, relating to the execution of death sentences, effective July 1, 2009.

For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.



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## 31-14-9. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-9 NMSA 1978, as enacted by Laws 1929, ch. 69, § 9, relating to the execution of death sentences, effective July 1, 2009.

For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

## 31-14-10. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-10 NMSA 1978, as enacted by Laws 1929, ch. 69, § 10, relating to the execution of death sentences, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

## 31-14-11. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-11 NMSA 1978, as enacted by Laws 1955, ch. 127, § 1, relating to the execution of death sentences, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

## 31-14-12. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-12 NMSA 1978, as enacted by Laws 1979, ch. 150, § 9, relating to the execution of death sentences, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

## 31-14-13. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-13 NMSA 1978, as enacted by Laws 1955, ch. 127, § 3, relating to the execution of death sentences, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

## 31-14-14. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-14 NMSA 1978, as enacted by Laws 1955, ch. 127, § 4, relating to the execution of death sentences, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

## 31-14-15. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-15 NMSA 1978, as enacted by Laws 1929, ch. 69, § 12, relating to the execution of death sentences, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

## 31-14-16. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-14-16 NMSA 1978, as enacted by Laws 1929, ch. 69, § 13, relating to the execution of death sentences, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 15

# Public Defenders

Sec.
31-15-1. Short title.
31-15-2. Definitions.
31-15-2.1. Public defender commission; membership; terms; removal.
31-15-2.2. Public defender commission; member qualifications.
31-15-2.3. Public defender commission; organization; meetings.
31-15-2.4. Public defender commission; powers and duties; restriction on individual member.
31-15-3. Repealed.
31-15-4. Chief public defender; appointment; qualifications; removal.



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Sec.
31-15-5. Public defender department; administration; finance.
31-15-5.1. Public defender automation fund created; administration; distribution.
31-15-6. Public defender department; powers.
31-15-7. Chief public defender; general duties and powers.
31-15-8. Duty of chief public defender to establish appellate division; duty of appellate division.
Sec.
31-15-9. Duty of chief public defender to establish district public defender office; appointment of district public defender.
31-15-10. Duties of district public defender.
31-15-11. Compensation; private practice of law by attorneys employed by the department prohibited.
31-15-12. Explanation of rights; waiver of counsel; application fee; indigency determination.

## 31-15-1. Short title.

Chapter 31, Article 15 NMSA 1978 may be cited as the "Public Defender Act".

**History: 1953 Comp., § 41-22A-1, enacted by Laws 1973, ch. 156, § 1; 2013, ch. 195, § 2.**

**Cross references.** — For Indigent Defense Act, *see* 31-16-1 NMSA 1978.

**The 2013 amendment,** effective June 14, 2013, added the NMSA chapter and article for the Public Defender Act; and at the beginning of the sentence, changed "This act" to "Chapter 31, Article 15 NMSA 1978".

ANNOTATIONS

**Multiple representation.** — While it is incontestable that a criminal defendant is entitled to representation, there is no support for the argument that more than one attorney must be appointed to represent an indigent defendant based merely on the claim that a case is complex and a conviction would carry serious consequences to the defendant. *State v. Chamberlain*, 1991-NMSC-094, 112 N.M. 723, 819 P.2d 673.

**Immunity extends to attorneys under contract to public defender.** — The Public Defender Act (this article) does not contain any language about immunity or lack of immunity, but reading the Public Defender Act and the Judgment Defense Act in pari materia, the legislature intended the immunity granted in this section to attorneys appointed under the Indigent Defense Act to apply also to those appointed because they are under contract to the public defender. *Herrera v. Sedillo*, 1987-NMCA-098, 106 N.M. 206, 740 P.2d 1190.

**Legal representation of juveniles.** — The public defender department has the responsibility of providing legal representation for indigent juveniles. 1973 Op. Att'y Gen. No. 73-58.

**Law reviews.** — For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Construction and effect of statutes providing for office of public defender, 36 A.L.R.3d 1403.

Public defender's immunity from liability for malpractice, 6 A.L.R.4th 774.

## 31-15-2. Definitions.

As used in the Public Defender Act:

A. "chief" means the chief public defender;

B. "commission" means the public defender commission;

C. "court" means the district, metropolitan and magistrate courts of this state;

D. "department" means the public defender department;

E. "district" means a public defender district; and

F. "judge" means a judge of the district or metropolitan court or a magistrate.

**History: 1953 Comp., § 41-22A-3, enacted by Laws 1973, ch. 156, § 2; 1985, ch. 32, § 1; 2013, ch. 195, § 3.**

**The 2013 amendment,** effective June 14, 2013, defined "chief" and "commission" to provide for the independent public defender department; added Subsections A and B; in Subsection C, after "district", deleted "courts" and added "metropolitan"; and deleted former Subsection E, which defined "chief" as the chief public defender.

**The 1985 amendment** deleted former Subsection A, defining "board," and redesignated former Subsections B, C, D, E, and F as present Subsections A, B, C, D, and E, respectively.

## 31-15-2.1. Public defender commission; membership; terms; removal.

A. The public defender commission, created pursuant to Article 6, Section 39 of the constitution of New Mexico, consists of eleven members. Members shall be appointed as follows:

(1) the governor shall appoint one member;

(2) the chief justice of the supreme court shall appoint three members;

(3) the dean of the university of New Mexico school of law shall appoint three members;

(4) the speaker of the house of representatives shall appoint one member;



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(5) the majority floor leaders of each chamber shall each appoint one member; and

(6) the president pro tempore of the senate shall appoint one member.

B. The appointments made by the chief justice of the supreme court and the dean of the university of New Mexico school of law shall follow the appointments made by the other appointing authorities and shall be made in such a manner so that each of the two largest major political parties, as defined in the Election Code, shall be equally divided on the commission.

C. Initial appointments to the commission shall be made by July 1, 2013. If a position remains vacant on July 1, 2013, the supreme court shall fill the vacancy. Initial terms of members appointed by the dean of the university of New Mexico school of law, the speaker of the house of representatives and the majority floor leader of the senate shall be for three years; and initial terms of members appointed by the governor and the chief justice of the supreme court shall be for two years.

D. Subsequent terms shall be for four years. A commission member shall not serve more than two consecutive terms. A commission member shall serve until the member's successor has been appointed and qualified. A vacancy on the commission shall be filled by the appointing authority for the remainder of the unexpired term.

E. A member may be removed by the commission for malfeasance, misfeasance or neglect of duty. If a member's professional status changes to render the member ineligible pursuant to the Public Defender Act, the member shall resign immediately.

F. Members of the commission are entitled to compensation pursuant to the provisions of the Per Diem and Mileage Act [10-8-1 through 10-8-8 NMSA 1978] and shall receive no other perquisite, compensation or allowance.

G. The commission is administratively attached to the department, and staff for the commission shall be provided by the department.

**History: Laws 2013, ch. 195, § 4.**
**Effective dates.** — Laws 2013, ch. 195 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

## 31-15-2.2. Public defender commission; member qualifications.

A. A person appointed to the commission shall have:

(1) significant experience in the legal defense of criminal or juvenile justice cases; or

(2) demonstrated a commitment to quality indigent defense representation or to working with and advocating for the population served by the department.

B. The following persons shall not be appointed to and shall not serve on the commission:

(1) current prosecutors, law enforcement officials or employees of prosecutors or law enforcement officials;

(2) current public defenders or other employees of the department;

(3) current judges, judicial officials or employees of judges or judicial officials;

(4) current elected officials or employees of elected officials; or

(5) persons who currently contract with or receive funding from the department or employees of such persons.

**History: Laws 2013, ch. 195, § 5.**
**Effective dates.** — Laws 2013, ch. 195 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

## 31-15-2.3. Public defender commission; organization; meetings.

A. The commission shall hold its first meeting by September 1, 2013 and shall organize and elect a chair at that meeting. Three subsequent meetings shall be held in 2013. Thereafter, the commission shall meet at least four times a year, as determined by a majority of commission members. Meetings shall be held at the call of the chair or the chief or at the request of four commission members.

B. The commission shall appoint the chief by October 15, 2013.



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C. A majority of commission members constitutes a quorum for the transaction of business, and an action by the commission is not valid unless six or more members concur.

D. The commission may adopt rules and shall keep a record of its proceedings.

E. A commission member may select a designee to serve in the member's stead only once per year.

**History: Laws 2013, ch. 195, § 6.**

**Effective dates.** — Laws 2013, ch. 195 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

## 31-15-2.4. Public defender commission; powers and duties; restriction on individual member.

A. The commission shall exercise independent oversight of the department, set representation standards for the department and provide guidance and support to the chief in the administration of the department and the representation of indigent persons pursuant to the Public Defender Act.

B. The commission shall develop fair and consistent standards for the operation of the department and the provision of services pursuant to the Public Defender Act, including standards relating to:

(1) the minimum experience, training and qualifications for appointed, contract and staff attorneys in both adult and juvenile cases in coordination with the state personnel office;

(2) monitoring and evaluating appointed, contract and staff attorneys;

(3) ethically responsible caseload and workload levels and workload monitoring protocols for staff attorneys, contract attorneys and district defender offices;

(4) the competent and efficient representation of clients whose cases present conflicts of interest;

(5) qualifications and performance of appointed, contract and staff attorneys in capital cases at the trial, appellate and post-conviction levels; and

(6) personnel policies and procedures, including the development of public defender personnel rules, to establish an independent system of personnel administration for the department; provided that no employee of the department, except the chief, assistant chief public defenders, appellate defender and district public defenders, shall have fewer rights than under the Personnel Act [Chapter 10, Article 9 NMSA 1978] and under administrative rules applicable to state employees on the effective date of this 2014 act.

C. An individual member of the commission shall not interfere with the discretion, professional judgment or advocacy of a public defender, a public defender office, a public defender contractor or an assigned counsel in the representation of a public defender client.

**History: Laws 2013, ch. 195, § 7; 2014, ch. 78, § 2.**

**Compiler's notes.** — The effective date "of this 2014 act", referred to in Subsection B (6), was May 21, 2014.

**The 2014 amendment,** effective May 21, 2014, mandated the minimum standard for a system of personnel administration for employees of the public defender department; and in Subsection B, added Paragraph (6).

## 31-15-3. Repealed.

**Repeals.** — Laws 1985, ch. 32, § 4 repealed 31-15-3 NMSA 1978, as enacted by Laws 1973, ch. 156, § 3, relating to the public defender board, effective June 14, 1985.

## 31-15-4. Chief public defender; appointment; qualifications; removal.

A. The chief shall be the administrative head of the department. The commission shall appoint a chief for a term of four years by approval of two-thirds of its members. The commission may reappoint a chief for subsequent terms. A vacancy in the office of the chief shall be filled by appointment by the commission.

B. The commission shall appoint as chief only a person with the following qualifications:



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(1) an attorney licensed to practice law in New Mexico or who will be so licensed within one year of appointment;

(2) an attorney whose practice of law has been active for at least five years immediately preceding the date of this appointment;

(3) an attorney whose practice of law has included a minimum of five years' experience in defense of persons accused of crime; and

(4) an attorney who has clearly demonstrated management or executive experience.

C. The chief may be removed by the commission; provided, however, that no removal shall be made without notice of hearing and an opportunity to be heard having been first given to the chief.

**History: 1953 Comp., § 41-22A-4, enacted by Laws 1973, ch. 156, § 4; 1977, ch. 257, § 58; 1985, ch. 32, § 2; 2013, ch. 195, § 8.**

**The 2013 amendment,** effective June 14, 2013, provided for the appointment and removal of the chief public defender; in the title, after "defender", added "appointment" and after "qualifications", added "removal"; in Subsection A, in the first sentence, after "The", deleted "governor shall appoint the", after "chief", deleted "who", added the second sentence, and in the fourth sentence, after appointment by the", deleted "governor" and added "commission"; in Subsection B, in the introductory sentence, after "The", deleted "governor" and added "commission"; in Paragraph (1) of Subsection B, after "practice law in", deleted "the highest court in this state" and added the remainder of the sentence; in Paragraph (2) of Subsection B, after "law has been" deleted "continuously"; in Paragraph (3) of Subsection B, after "practice of law has", deleted "clearly demonstrated" and added "included a minimum of five years'", after "defense", deleted "or prosecution", and after "crime", deleted "in this state"; added Paragraph (4) of Subsection B; and in Subsection C, after "The chief", deleted "shall serve at the pleasure of the governor" and added the remainder of the sentence.

**Temporary provisions.** — Laws 2013, ch. 195, § 12, provided that the chief public defender serving on the effective date of Laws 2013, ch. 195, June 14, 2013, shall continue serving until a chief public defender is appointed by the public defender commission, but shall not serve after January 1, 2014, and that nothing in the act prohibits the public defender commission from reappointing the chief public defender serving on the effective date of the act.

**The 1985 amendment** substituted the present catchline for "Duties of the public defender board" in the catchline and deleted former Subsection D, relating to the public defender board's advisory capacity.

## 31-15-5. Public defender department; administration; finance.

A. The headquarters of the department shall be maintained at Santa Fe.

B. All salaries and other expenses of the department shall be paid by warrants of the secretary of finance and administration, supported by vouchers signed by the chief or the chief's authorized representative and in accordance with budgets approved by the state budget division of the department of finance and administration.

**History: 1953 Comp., § 41-22A-5, enacted by Laws 1978, ch. 14, § 1; 2013, ch. 195, § 9.**

**Repeals and reenactments.** — Laws 1978, ch. 14, § 1, repealed 41-22A-5, 1953 Comp. (former 31-15-5 NMSA 1978), relating to the creation, administration and finance of the public defender department, and enacted the above section.

**Cross references.** — For administrative attachment to the criminal justice department, *see* 9-3-11 NMSA 1978.

**The 2013 amendment,** effective June 14, 2013, provided for the administration of the public defender department as an independent state agency; in the title, after "department", deleted "creation"; and in Subsection A, deleted the former first sentence, which created the public defender department; deleted the former third sentence, which provided that the chief was the administrative head of the department; and deleted the former fourth sentence, which provided that the department was administratively attached to the criminal justice department.

**Temporary provisions.** — Laws 2013, ch. 195, § 13, provided that existing contracts, agreements and other obligations in effect for the public defender department shall be binding on the public defender department on and after the effective date of Laws 2013, ch. 195, June 14, 2013.

## 31-15-5.1. Public defender automation fund created; administration; distribution.

A. The "public defender automation fund" is created in the state treasury. The fund shall be administered by the department. The department shall report on the status of the fund to the legislative finance committee during each legislative interim.

B. All balances in the public defender automation fund are appropriated to the department for the purchase and maintenance of automation systems for the department.



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C. Payments from the public defender automation fund shall be made pursuant to vouchers issued and signed by the chief upon warrants drawn by the secretary of finance and administration. Any purchase or lease-purchase agreement entered into pursuant to this section shall be entered into in accordance with the Procurement Code [13-1-28 through 13-1-199 NMSA 1978].

**History: Laws 1993, ch. 79, § 2; 2013, ch. 195, § 10.**

**The 2013 amendment,** effective June 14, 2013, changed terminology; changed "public defender department" to "department".

## 31-15-6. Public defender department; powers.

The department may receive on behalf of the state any gifts, grants-in-aid, donations or bequests from any source to be used in carrying out the purposes of the Public Defender Act [31-15-1 NMSA 1978].

**History: 1953 Comp., § 41-22A-6, enacted by Laws 1978, ch. 156, § 6.**

## 31-15-7. Chief public defender; general duties and powers.

A. The chief is responsible to the commission for the operation of the department. It is the chief's duty to manage all operations of the department and to:

(1) administer and carry out the provisions of the Public Defender Act with which the chief is charged;

(2) exercise authority over and provide general supervision of employees of the department; and

(3) represent and advocate for the department and its clients.

B. To perform the chief's duties, the chief has every power implied as necessary for that purpose, those powers expressly enumerated in the Public Defender Act or other laws and full power and authority to:

(1) exercise general supervisory authority over all employees of the department;

(2) delegate authority to subordinates as the chief deems necessary and appropriate;

(3) within the limitations of applicable appropriations and applicable laws, employ and fix the compensation of those persons necessary to discharge the chief's duties;

(4) organize the department into those units the chief deems necessary and appropriate to carry out the chief's duties;

(5) conduct research and studies that will improve the operation of the department and the administration of the Public Defender Act;

(6) provide courses of instruction and practical training for employees of the department that will improve the operation of the department and the administration of the Public Defender Act;

(7) purchase or lease personal property and lease real property for the use of the department;

(8) maintain records and statistical data that reflect the operation and administration of the department;

(9) submit an annual report and budget covering the operation of the department together with appropriate recommendations to the commission and, upon approval by the commission, to the legislature and the governor;

(10) serve as defense counsel under the Public Defender Act as necessary and appropriate;

(11) formulate a fee schedule for attorneys who are not employees of the department who serve as counsel for indigent persons under the Public Defender Act;

(12) adopt a standard to determine indigency;

(13) provide for the collection of reimbursement from each person who has received legal representation or another benefit under the Public Defender Act after a determination is made



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that the person was not indigent according to the standard for indigency adopted by the department. Any amounts recovered shall be paid to the state treasurer for credit to the general fund;

(14) require each person who desires legal representation or another benefit under the Public Defender Act to enter into a contract with the department agreeing to reimburse the department if a determination is made that the person was not indigent according to the standard for indigency adopted by the department; and

(15) certify contracts and expenditures for litigation expenses, including contracts and expenditures for professional and nonprofessional experts, investigators and witness fees, but not including attorney contracts, pursuant to the provisions of the Procurement Code [13-1-28 through 13-1-199 NMSA 1978].

**History: 1953 Comp., § 41-22A-7, enacted by Laws 1973, ch. 156, § 7; 1977, ch. 257, § 60; 1985, ch. 32, § 3; 1987, ch. 20, § 1; 2001, ch. 34, § 1; 2013, ch. 195, § 11; 2014, ch. 78, § 3.**

**Cross references.** — For defense of indigents, *see* 31-16-1 to 31-16-10 NMSA 1978.

**The 2014 amendment,** effective May 21, 2014, authorized the public defender to supervise department employees under personnel policies adopted by the public defender commission; and in Subsection B, Paragraph (1), after "department", deleted "subject to the Personnel Act".

**The 2013 amendment,** June 14, 2013, required the chief public defender to represent and advocate for the public defender department and its clients; in Subsection A, in the first sentence of the introductory paragraph, after "responsible to the", deleted "governor" and added "commission"; added Paragraph (3) of Subsection A; in Paragraph (9) of Subsection B, after "annual report", added "and budget", after "recommendations to the", deleted "governor, secretary of corrections" and added "commission", after "commission, and", added "upon approval by the commission, to the", and after "to the legislature", added "and the governor".

**The 2001 amendment,** effective July 1, 2001, inserted Paragraph B(15), which gives the chief the power to certify certain contracts and expenditures for litigation expenses.

**The 1987 amendment,** effective June 19, 1987, in Subsection B(9), substituted "corrections and" for "the criminal justice department and the" and added Subsections B(12) through (14).

**The 1985 amendment** deleted former Subsection A(3), relating to the chief's duty to advise the public defender board on matters relating to the administration of the department.

**ANNOTATIONS**

**Constitutionality of flat-fee arrangements for indigent defense contract counsel.** — Where the New Mexico legislature, in its 2015 general appropriation to the law office of the public defender (LOPD), specifically provided that the appropriations to the public defender department shall not be used to pay hourly reimbursement rates to contract attorneys, the district court erred in entering an order requiring the LOPD to pay contract counsel hourly rates and the state to provide additional funding, nullifying the legislature's prohibition of the payment of hourly rates to indigent defense contract counsel as violative of the federal and state constitutions, based on its conclusion that the flat-fee rates paid to contract counsel by the LOPD contravene the constitutional guarantee of effective assistance of counsel; an indigent criminal defendant who is represented by contract counsel who is compensated under a flat-fee arrangement does not necessarily receive ineffective assistance of counsel. *Kerr v. Parsons*, 2016-NMSC-028.

## 31-15-8. Duty of chief public defender to establish appellate division; duty of appellate division.

A. The chief shall establish within the department an appellate division. The appellate division shall be headed by the appellate defender.

B. The appellate division shall assist the chief and district public defenders by providing representation before the court of appeals and the supreme court in appellate, review and postconviction proceedings involving persons represented under the Public Defender Act.

C. The appellate division shall assist private counsel not employed under the Public Defender Act in any appellate, review or postconviction remedy proceeding by providing representation for persons entitled to representation under the Indigent Defense Act [31-16-1 through 31-16-10 NMSA 1978].

**History: 1953 Comp., § 41-22A-8, enacted by Laws 1973, ch. 156, § 8; 2014, ch. 78, § 4.**

**Compiler's notes.** — Laws 1973, ch. 156, § 13, provided for the chief public defender to establish an appellate division during the sixty-second fiscal year, to handle all appellate proceedings under the act.

**The 2014 amendment,** effective May 21, 2014, required that the appellate division be headed by the appellate defender; and in Subsection A, added the second sentence.



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## 31-15-9. Duty of chief public defender to establish district public defender office; appointment of district public defender.

A. The chief shall designate one or more public defender districts having boundaries coextensive with the boundaries of one or more judicial districts of this state. The chief shall consider the demand for legal services provided under the Public Defender Act [31-15-1 NMSA 1978], criminal case load statistics, population, geographical characteristics and any other relevant factor in the designation of public defender districts.

B. The chief may review the designation of districts at any time. The review shall be based on the same factors enumerated in Subsection A of this section. On the basis of the review the chief may change the designation of any district so long as the new designation has boundaries coextensive with the boundaries of one or more judicial districts of this state.

C. The chief shall appoint a district public defender in each district. The district public defender shall administer the operation of the district and shall serve at the pleasure of the chief. Each district public defender shall be an attorney licensed to practice law in the highest courts of this state and a resident of this state.

**History: 1953 Comp., § 41-22A-9, enacted by Laws 1973, ch. 156, § 9.**

**Temporary provisions.** — Laws 1973, ch. 156, § 13, provided for the limitation of the chief public defender to designated districts and to appoint district public defenders during the sixty-second fiscal year to establish pilot programs.

## 31-15-10. Duties of district public defender.

A. Under the supervision and control of the chief, each district public defender shall administer the operation of the department office within his district.

B. The district public defender or the chief may authorize the representation of a person who is without counsel and who is financially unable to obtain counsel when that person is under investigation for allegedly committing murder or any other felony criminal offense.

C. The district public defender shall represent every person without counsel who is financially unable to obtain counsel and who is charged in any court within the district with any crime that carries a possible sentence of imprisonment. The representation shall begin not later than the time of the initial appearance of the person before any court and shall continue throughout all stages of the proceedings against him, including any appeal, as directed by the chief.

D. The district public defender shall represent any person within the district who is without counsel and who is financially unable to obtain counsel in any state postconviction proceeding.

E. The district public defender shall notify the chief if, for any reason, he is unable to represent a person entitled to his representation, and the chief shall make provision for representation.

F. The district public defender may confer with any person who is not represented by counsel and who is being forcibly detained.

**History: 1953 Comp., § 41-22A-10, enacted by Laws 1973, ch. 156, § 10; 2001, ch. 34, § 2.**

**The 2001 amendment,** effective July 1, 2001, inserted Subsection B and redesignated the remaining subsections accordingly.

**ANNOTATIONS**

**No per se conflict of interest** exists when post conviction conflict division of public defender department represents individual arguing ineffective assistance of counsel by attorney from department's trial division, but each potential conflict must be reviewed on case-by-case basis, and individual may waive any such conflict by knowingly and intelligently signing waiver after proper advisement. *Morales v. Bridgforth*, 2004-NMSC-034, 136 N.M. 511, 100 P.3d 668.

**Construction with Indigent Defense Act.** — The legislature, understanding that courts determine indigence under the Indigent Defense Act (IDA), enacted this section of the Public Defender Act (PDA) intending "every person without counsel who is financially unable to obtain counsel" to include all persons who courts determine are "needy" under the IDA. Therefore, under the administrative system of the PDA and IDA, when a court determines that a defendant is "needy," the defendant is "financially unable to obtain counsel" under the PDA, and



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thedDepartment "shall represent" the defendant pursuant to this section, assuming the defendant is charged with a crime carrying a possible sentence of imprisonment. *State ex rel. Quintana v. Schnedar*, 1993-NMSC-033, 115 N.M. 573, 855 P.2d 562.

**Standards for determining indigency.** — The Indigent Defense Act and the Public Defender Act are consistent as amended: The IDA obligates courts to determine indigence, the PDA directs the department to adopt standards for determining indigence, and other statutes instruct courts to employ those standards. *State ex rel. Quintana v. Schnedar*, 1993-NMSC-033, 115 N.M. 573, 855 P.2d 562.

**Judicial procedure upon claim of conflict of interest by public defender.** — If a conflict of interest or other disqualification is claimed to exist under Subsection D (now Subsection E), the court shall: (1) determine whether a conflict of interest or other disqualification of the office of public defender in fact exists, (2) determine whether the conflict or disqualification is local or statewide, (3) if the conflict or disqualification is local, direct the chief public defender to provide a staff attorney or contract attorney from another county or district to represent the indigent, and (4) if the conflict or disqualification extends beyond the county or district, then the court may appoint counsel for the indigent defendant. *Richards v. Patton*, 1985-NMSC-059, 103 N.M. 14, 702 P.2d 4.

**No statutory right to counsel in grand jury proceedings.** — Neither the Grand Jury Act nor the Public Defender Act provides a target witness testifying before a grand jury with a right to counsel such that an indictment must be dismissed if counsel is not present and there is no express voluntary, knowing, and intelligent waiver of counsel's presence. *State v. Tisthammer*, 1998-NMCA-115, 126 N.M. 52, 966 P.2d 760, cert. denied, 126 N.M. 107, 967 P.2d 447.

**No blanket authorization to confer with all forcibly detained indigents.** — Subsection E (now Subsection F) is not a blanket authorization to confer with all indigent persons who are forcibly detained, but rather authorizes the public defender to confer with a person detained only (1) when that person has evinced a desire to consult with an attorney or have one present during questioning in response to Miranda warnings and law enforcement personnel have asked the defender to do so; (2) when the defender is conducting inquiries into whether the initial appearance has been unnecessarily delayed or attempting to have the person detained brought before the court for such an appearance, and the district court has authorized him to do so; (3) when authorized or directed in other circumstances by a district judge or (4) when defending a criminal charge following the initial appearance. *State v. Rascon*, 1976-NMSC-016, 89 N.M. 254, 550 P.2d 266.

**Information obtained by district public defender's staff must be imputed to him.** *State v. Valdez*, 1980-NMSC-098, 95 N.M. 70, 618 P.2d 1234.

**Municipality not required to provide representation.** — Although a defendant is entitled to be represented by counsel on the appeal of his conviction to the court of appeals, a municipality is not required to provide for such legal representation because the legislature has set forth a comprehensive plan to furnish counsel to qualified criminal defendants and municipal budgetary restrictions preclude expenditures for items not budgeted. 1981 Op. Att'y Gen. No. 81-04.

**Duty to represent indigents in metropolitan court.** — The public defender department's scope of representation is limited statutorily to the magistrate and district courts; the legislature has designated the Albuquerque metropolitan court as a magistrate court. Therefore, the public defender department is obligated to represent all indigents in the Albuquerque metropolitan court who are charged with any violation that carries a possible penalty of imprisonment, including city code violations. 1987 Op. Att'y Gen. No. 87-43.

**Children allowed counsel prior to court appearance.** — Subsection E (now Subsection F) can be used to provide children in detention with counsel at a stage prior to any court appearance and therefore before an attorney can be appointed. 1973 Op. Att'y Gen. No. 73-58.

**Law reviews.** — For annual survey of New Mexico law relating to evidence, see 12 N.M.L. Rev. 379 (1982).

## 31-15-11. Compensation; private practice of law by attorneys employed by the department prohibited.

A. For the purposes of the exempt salaries plan prepared pursuant to Section 10-9-5 NMSA 1978, each district public defender shall be considered an assistant in the offices of the chief.

B. All employees of the department other than the chief, assistant chief public defenders, appellate defender and district public defenders shall be subject to the provisions of the Personnel Act [Chapter 10, Article 9 NMSA 1978], unless the employees are exempted from the Personnel Act by the commission.

C. Before the commission may exempt the department from the Personnel Act, the commission shall develop and adopt personnel policies for the department; provided that no employee of the department, except the chief, assistant chief public defenders, appellate defender and district public defenders, shall have fewer rights under these policies than under the Personnel Act [and under administrative rules applicable to state employees on the effective date of this 2014 act.

D. No chief, assistant chief public defender, appellate defender, district public defender or attorney hired on a full-time basis as an assistant to the chief or to a district public defender, while holding that office or employed in that capacity, shall engage in the private practice of law. Attorneys who serve as counsel for indigent persons under contract with the department may engage in the private practice of law.



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**History: 1953 Comp., § 41-22A-11, enacted by Laws 1973, ch. 156, § 11; 1977, ch. 257, § 61; 2014, ch. 78, § 5.**

**The 2014 amendment,** effective May 21, 2014, required the public defender commission to develop and adopt personnel policies before it exempts the public defender department from the Personnel Act; in Subsection A, after "offices of the chief", deleted "public defender"; in Subsection B, after "other than the chief", deleted "public defender" and added "assistant chief public defenders, appellate defender", and after "Personnel Act", added the remainder of the sentence; added Subsection C; and in Subsection D, in the first sentence, after "No chief", added "assistant chief public defender, appellate defender".

## 31-15-12. Explanation of rights; waiver of counsel; application fee; indigency determination.

A. If any person charged with any crime or a delinquent act that carries a possible sentence of imprisonment appears in any court without counsel, the judge shall inform the person of the person's right:

(1) to confer with the district public defender; and

(2) if the person is financially unable to obtain counsel, to be represented by the district public defender at all stages of the proceedings against the person.

B. Following notification of any person under Subsection A of this section, the judge shall notify the district public defender and continue the proceedings until the person has applied with the district public defender.

C. A person shall pay a nonrefundable application fee of ten dollars ($10.00) at the time the person applies with the public defender for representation. The fee shall be deposited in the public defender automation fund. The public defender shall determine if the person is indigent and unable to pay the fee, subject to review by the court. When the person remains in custody and is unable to pay the fee, the court may waive payment of the fee. A child subject to the provisions of the Delinquency Act [Chapter 32A, Article 2 NMSA 1978] shall not be required to pay the application fee.

D. Peace officers shall notify the district public defender of any person not represented by counsel who is being forcibly detained and who is charged with, or under suspicion of, the commission of any crime that carries a possible sentence of imprisonment, unless the person has previously appeared in court upon that charge.

E. Any person entitled to representation by the district public defender may intelligently waive the right to representation. The waiver may be for all or any part of the proceedings. The waiver shall be in writing and countersigned by a district public defender.

**History: 1953 Comp., § 41-22A-12, enacted by Laws 1973, ch. 156, § 12; 1993, ch. 79, § 1; 2021, ch. 15, § 2.**

**Cross references.** — For explanation of rights, opportunity to call attorney, *see* Rule 6-501A NMRA.

**The 2021 amendment,** effective June 18, 2021, eliminated, for children subject to the provisions of the Delinquency Act, the application fee for applying for representation with the public defender, and made technical, nonsubstantive changes; and in Subsection C, after "the court may waive payment of the fee", added "A child subject to the provisions of the Delinquency Act shall not be required to pay the application fee."

**The 1993 amendment,** effective July 1, 1993, inserted "application fee; indigency determination" in the catchline; inserted "or a delinquent act" in the introductory paragraph of Subsection A; substituted "applied" for "conferred" near the end of Subsection B; added present Subsection C; redesignated former Subsections C and D as present Subsections D and E; and substituted "shall" for "must" in the second sentence of Subsection D.

### ANNOTATIONS

**Import of Subsection B.** — Inasmuch as the benefits of the Public Defender Act accrue only to those who are "financially unable to obtain counsel" and who are charged with certain crimes, obviously a determination of indigency is required. Inquiry into this feature is accomplished by the court, and the public defender is assigned to the case where indigency appears. *State v. Rascon*, 1976-NMSC-016, 89 N.M. 254, 550 P.2d 266.

**Defendant must make showing of indigence.** — Although trial court failed to advise pro se defendant of his rights under the public defender laws, such failure was harmless error where defendant made no showing of indigence, but instead chose to represent himself, even after trial judge notified him of his constitutional right to counsel. *Attorney General v. Montoya*, 1998-NMCA-149, 126 N.M. 273, 968 P.2d 784, cert. denied, 126 N.M. 532, 972 P.2d 351.

**Purpose of Subsection D.** — Subsection D does not expand upon or extend the constitutional rights of a person forcibly detained, under the constitutions of the United States or New Mexico. Rather, its prime purpose is to protect and implement the right of persons detained to be brought before a court without unnecessary delay. *State v. Rascon*, 1976-NMSC-016, 89 N.M. 254, 550 P.2d 266.

**Public defender to make inquiries about forcibly detained persons.** — Subsection D is intended to advise the public defender of the names and whereabouts of persons who are being forcibly detained so that if they are not brought before a court for an initial appearance without unnecessary delay, the public defender may make inquiries, with demands upon the state to bring forth the



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prisoner if appropriate and with application to a court if necessary. *State v. Rascon*, 1976-NMSC-016, 89 N.M. 254, 550 P.2d 266.

**Failure of police to comply with Subsection D** did not infringe upon defendant's rights against self-incrimination where defendant was advised of those rights both at time of arrest and booking, voluntarily acknowledged that he understood them and signed waiver of rights form. *State v. Rascon*, 1976-NMSC-016, 89 N.M. 254, 550 P.2d 266.

**Counsel need not be notified before defendant questioned about unrelated offense.** — Where an accused has been charged with one offense and is represented by counsel with respect to that offense, police need not notify that counsel before questioning defendant about another unrelated offense. *State v. Seward*, 1986-NMCA-062, 104 N.M. 548, 724 P.2d 756, cert. denied, 104 N.M. 522, 724 P.2d 231.

**Lack of a countersignature on defendant's waiver of counsel form** does not of itself make that waiver invalid for the purpose of enhancing later convictions. *State v. Pino*, 1997-NMCA-001, 122 N.M. 789, 932 P.2d 13, cert. denied, 122 N.M. 589, 929 P.2d 981.

**No waiver where defendant was unaware of possibility of jail.** — There was no voluntary, knowing, and intelligent waiver of counsel where the defendant, who pled guilty, was not advised, and was not aware, of the possibility of jail when he waived his right to an attorney. *Smith v. Maldonado*, 1985-NMSC-115, 103 N.M. 570, 711 P.2d 15.

**Lack of countersignature not considered on appeal.** — The fact that defendant's waiver form was not countersigned by a district public defender as required by Subsection E was not raised below nor briefed and supported by authority on appeal, and would not be considered by the appellate court. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds by City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087.

**Law reviews.** — For article, "Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings," see 14 N.M.L. Rev. 275 (1984).

# ARTICLE 16

# Defense of Indigents

Sec.
31-16-1. Short title.
31-16-2. Definitions.
31-16-3. Right to representation.
31-16-4. Notice of right to representation.
31-16-5. Determination of indigency.
31-16-6. Waiver of right to representation.
31-16-7. Recovery from defendant.
31-16-8. Payment of costs, expenses and attorney fees.
31-16-9. Contractual services of counsel.
31-16-10. Counsel not subject to liability.

## 31-16-1. Short title.

Sections 58 through 68 [31-16-1 to 31-16-10 NMSA 1978] of this act may be cited as the "Indigent Defense Act".

**History: 1953 Comp., § 41-22-1, enacted by Laws 1968, ch. 69, § 58.**

**Cross references.** — For public defender's duties relating to indigents, *see* 31-15-7 NMSA 1978.

For juvenile court indigency standard, fee schedule and reimbursement, *see* 32A-2-30 NMSA 1978.

For district court indigency standard, fee schedule and reimbursement, *see* 34-6-46 NMSA 1978.

For metropolitan court indigency standard, fee schedule and reimbursement, *see* 34-8A-11 NMSA 1978.

For magistrate court indigency standard, fee schedule and reimbursement, *see* 35-5-8 NMSA 1978.

### ANNOTATIONS

**Legislative intent.** — The legislature does not, in the Indigent Defense Act, provide that the state is to furnish free counsel for persons pursuing civil damage claims. *Orrs v. Rodriguez*, 1972-NMCA-148, 84 N.M. 355, 503 P.2d 335.

**Multiple representation.** — While it is incontestable that a criminal defendant is entitled to representation, there is no support for the argument that more than one attorney must be appointed to represent an indigent defendant based merely on the claim that a case is complex and a conviction would carry serious consequences to the defendant. *State v. Chamberlain*, 1991-NMSC-094, 112 N.M. 723, 819 P.2d 673.

**Counsel need not be notified before defendant questioned about unrelated offense.** — Where an accused has been charged with one offense and is represented by counsel with respect to that offense, police need not notify that counsel before questioning defendant about another unrelated offense. *State v. Seward*, 1986-NMCA-062, 104 N.M. 548, 724 P.2d 756, cert. denied, 104 N.M. 522, 724 P.2d 231.

**Where conflict in procedure, rule controls.** — If Rule 1-092 NMRA and the Indigent Defense Act are in conflict on a procedural matter, the rule must control. *State ex rel. Peters v. McIntosh*, 1969-NMSC-103, 80 N.M. 496, 458 P.2d 222.

**Law reviews.** — For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21A Am. Jur. 2d Criminal Law § 1197 et seq.

Ineffective assistance of counsel: misrepresentation, or failure to advise, of immigration consequences of guilty plea - state cases, 65 A.L.R.4th 719.

Right of indigent defendant in state criminal case to assistance of investigators, 81 A.L.R.4th 259.

22 C.J.S. Criminal Law §§ 277, 278, 292.



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## 31-16-2. Definitions.

As used in the Indigent Defense Act [31-16-1 NMSA 1978]:

A. "detain" means to have in custody or otherwise deprive of freedom of action;

B. "expenses", when used with reference to representation, includes the expenses of investigation, other preparation and trial;

C. "needy person" means a person who, at the time his need is determined by the court, is unable, without undue hardship, to provide for all or a part of the expenses of legal representation from available present income and assets; and

D. "serious crime" includes a felony and any misdemeanor or offense which carries a possible penalty of confinement for more than six months.

**History: 1953 Comp., § 41-22-2, enacted by Laws 1968, ch. 69, § 59; 1973, ch. 210, § 1.**

## 31-16-3. Right to representation.

A. A needy person who is being detained by a law enforcement officer, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled to be represented by an attorney to the same extent as a person having his own counsel and to be provided with the necessary services and facilities of representation, including investigation and other preparation. The attorney, services and facilities and expenses and court costs shall be provided at public expense for needy persons.

B. A needy person entitled to representation by an attorney under Subsection A is entitled to be:

(1) counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney;

(2) represented in any appeal or review proceedings; and

(3) represented in any other postconviction proceeding that the attorney or the needy person considers appropriate unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.

C. A needy person's right to a benefit under this section is unaffected by his having provided a similar benefit at his own expense, or by his having waived it, at an earlier stage.

**History: 1953 Comp., § 41-22-3, enacted by Laws 1968, ch. 69, § 60.**

ANNOTATIONS

**Legislative intent.** — The legislature did not intend current implementation of the Indigent Defense Act to come from any other source of funds than the public defender department. *State v. Brown*, 2004-NMCA-037, 135 N.M. 291, 87 P.3d 1073, cert. granted, 135 N.M. 321, 88 P.3d 263, *rev'd*, 2006-NMSC-023, 139 N.M. 466, 134 P.3d 753.

**Right to basic tools of an adequate defense.** — Funding for expert witnesses should extend to those indigent defendants represented by pro bono counsel, in addition to those represented by the public defender department. *State v. Brown*, 2006-NMSC-023, 139 N.M. 466, 134 P.3d 753, *rev'g* 2004-NMCA-037, 135 N.M. 291, 87 P.3d 1073.

**Constitution grants accused right to representation.** — New Mexico Const., art. II, § 14, gives the accused the right to be defended by counsel. When the offense with which the defendant is charged is punishable by imprisonment in the penitentiary, the court is required to assign counsel "if the prisoner has not the financial means to procure counsel." *State v. Anaya*, 1966-NMSC-144, 76 N.M. 572, 417 P.2d 58.

**Absent waiver, pauper charged with crime entitled to counsel.** — Absent competent and intelligent waiver, a person charged with crime in a state court who is a pauper and unable to employ counsel is entitled to have an attorney appointed to defend him. *State v. Dalrymple*, 1965-NMSC-124, 75 N.M. 514, 407 P.2d 356.

**Showing of indigency required.** — A showing of an accused's indigency is a prerequisite to the right of court-appointed counsel. *State v. Powers*, 1965-NMSC-046, 75 N.M. 141, 401 P.2d 775.

**Court entitled to make defendant show need.** — A showing of an accused's indigency is a prerequisite to the right of a court-appointed counsel and it is proper for the trial court to require the defendant to make a reasonable showing that he is unable to employ counsel. *State ex rel. Peters v. McIntosh*, 1969-NMSC-103, 80 N.M. 496, 458 P.2d 222.

**Court must make sufficient inquiry.** — When defendant makes a reasonable showing of indigency in support of his request for court-appointed counsel, the trial court has a duty to inquire into the facts claimed by defendant. This does not require an independent inquiry by the court. It does require sufficient questioning by the court to enable the court either to decide the question of indigency at that time or to direct that defendant is to report further to the court on the question of obtaining counsel. *State v. Anaya*, 1966-NMSC-144, 76 N.M. 572, 417 P.2d 58.

When a defendant makes a reasonable showing of indigency, the trial court has a duty to inquire into the facts relied



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upon by the defendant. *State v. Watchman*, 1991-NMCA-010, 111 N.M. 727, 809 P.2d 641, cert. denied, 111 N.M. 529, 807 P.2d 227, *overruled on other grounds by State v. Hosteen*, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

**Burden of proceeding rests first upon defendant.** — It is proper for the trial court to require defendant to make a reasonable showing that he is unable to employ counsel. Depending on the facts, more than one inquiry may be necessary. *State v. Anaya*, 1966-NMSC-144, 76 N.M. 572, 417 P.2d 58.

**Doubts resolved in accused's favor.** — Although the courts recognize the relative concepts of indigency and that this determination should be made at the trial court level, the opinions indicate that doubts as to indigency should be resolved in favor of the accused. *State ex rel. Peters v. McIntosh*, 1969-NMSC-103, 80 N.M. 496, 458 P.2d 222.

**Effect of refusal to fill out certificate of indigency.** — Defendant was not entitled to any appointed counsel because he refused to fill out, under oath, a certificate of indigency showing his income, and thus there was no showing that he was a needy person. *State v. Pina*, 1977-NMCA-020, 90 N.M. 181, 561 P.2d 43.

**No counsel provided prior to claim of indigency.** — Defendant does have a right to be represented by counsel, but the trial court has no obligation to provide defendant with counsel prior to any claim of indigency. *State v. Deats*, 1971-NMCA-089, 82 N.M. 711, 487 P.2d 139.

**Attorney provided before preliminary hearing.** — This section would provide an attorney for a needy person who is being detained by a law enforcement officer, and this could be before the preliminary hearing. *State ex rel. Peters v. McIntosh*, 1969-NMSC-103, 80 N.M. 496, 458 P.2d 222.

**Absent waiver, preliminary hearing without counsel present invalid.** — The determination of the question of indigency must often be made before the otherwise normal appearance of the accused before the district court. To hold a preliminary hearing without counsel present, unless the right to counsel has been competently, intelligently and voluntarily waived, vitiates the hearing. *State ex rel. Peters v. McIntosh*, 1969-NMSC-103, 80 N.M. 496, 458 P.2d 222.

**Claim of inadequate representation** by court-appointed counsel requires a showing that the proceedings leading to his conviction were a sham, farce or mockery. *State v. Salazar*, 1970-NMCA-056, 81 N.M. 512, 469 P.2d 157.

**Representation must be more than pro forma appearance.** — The representation to which a defendant is entitled is something more than a pro forma appearance. *State v. Dalrymple*, 1965-NMSC-124, 75 N.M. 514, 407 P.2d 356.

**Appointment of counsel lies within court's discretion.** — An indigent defendant may not compel the court to appoint such counsel as defendant may choose. Such appointment lies within the sound discretion of the trial court. Likewise, whether the dissatisfaction of an indigent accused with his court-appointed counsel warrants discharge of that counsel and appointment of new counsel is for the trial court, in its discretion, to decide. *State v. Salazar*, 1970-NMCA-056, 81 N.M. 512, 469 P.2d 157.

**Indigent Defense Act does not provide for payment of advances.** *State v. Frazier*, 1973-NMCA-127, 85 N.M. 545, 514 P.2d 302.

**Motion for advancement of funds for investigator properly denied.** — Defendant's motion for a prior advancement of funds for a professional investigator was properly denied as an expenditure is clearly not required in every case and need not be provided unless the necessity is shown. *State v. Frazier*, 1973-NMCA-127, 85 N.M. 545, 514 P.2d 302.

**Free polygraph examination refused to "indigent".** — Where defendant sought by motion an order committing the state to pay for a polygraph examination before the examination was conducted, alleging that defendant was indigent, thus presumably invoking the provisions of the Indigent Defense Act, but although trial counsel was court-appointed the only reference to indigency was in defendant's various motions, not in orders of the court, and also appearing in defendant's motions were allegations that defendant had employment and could return to that employment if released on bail, the record did not support the claim that defendant was indigent when he sought a free polygraph examination and thus this subsection did not apply. *State v. Carrillo*, 1975-NMCA-103, 88 N.M. 236, 539 P.2d 626.

**Uncontested motion for determination of indigency.** — When a defendant's motion for determination of indigency is uncontested, the better procedure in such cases is for the trial court to either grant the motion or to expressly indicate the basis for its denial. *State v. Watchman*, 1991-NMCA-010, 111 N.M. 727, 809 P.2d 641, cert. denied, 111 N.M. 529, 807 P.2d 227, *overruled on other grounds by State v. Hosteen*, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

**State must afford indigents record of proceedings.** — It is not a requirement that a certified copy of a court reporter's notes of the proceedings be always furnished but that the state must afford indigents a record of sufficient completeness to permit proper consideration of their claims and a tape recording of preliminary examination proceedings in a magistrate's court is sufficient. *State ex rel. Moreno v. Floyd*, 1973-NMSC-117, 85 N.M. 699, 516 P.2d 670.

**Appointment of additional attorneys.** — Where two or more defendants were jointly charged with a felony, the language of former 41-11-2, 1953 Comp., did not require any construction denying to a court the power to appoint attorneys for each jointly charged indigent defendant as the circumstances should appear. Indeed, if a prejudicial conflict of interest arose or if the number of defendants being represented and divergence in defenses would reduce the attorneys' effectiveness the court was required to appoint additional attorneys. 1966 Op. Att'y Gen. No. 66-27.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 7 Am. Jur. 2d Attorneys § 228; 20 Am. Jur. 2d Courts § 44 et seq.; 21A Am. Jur. 2d Criminal Law § 1197 et seq.

Constitutional guaranty of right to appear by counsel as applicable to misdemeanor case, 42 A.L.R. 1157.

Brevity of time between assignment of counsel and trial as affecting question whether accused is denied right to assistance of counsel, 84 A.L.R. 544.

Right of indigent defendant in criminal case to aid of state as regards new trial or appeal, 100 A.L.R. 321, 55 A.L.R.2d 1072.

Relief in habeas corpus for violation of accused's right to assistance of counsel, 146 A.L.R. 369.

Duty of court when appointing counsel for defendant to name attorney other than one employed by, or appointed for, a codefendant, 148 A.L.R. 183.

Plea of guilty without advice of counsel, 149 A.L.R. 1403.

Right of defendant in criminal case to discharge of, or substitution of other counsel for, attorney appointed by court to represent him, 157 A.L.R. 1225.

Right to aid of counsel in application or hearing for habeas corpus, 162 A.L.R. 922.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation, 29 A.L.R.2d 1074.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition, 32 A.L.R.2d 434.

New trial or appeal, right of indigent defendant in criminal case to aid of state as regards, 55 A.L.R.2d 1072.

Counsel's right in criminal prosecution to argue law or to read lawbooks to the jury, 67 A.L.R.2d 245.



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Psychiatrist, psychologist, hypnotist or similar practitioner, counsel's right, in consulting with accused as client, to be accompanied by, 72 A.L.R.2d 1120.

Calling accused's counsel as a prosecution witness as improper deprivation of right to counsel, 88 A.L.R.2d 796.

Constitutionally protected right of indigent accused to appointment of counsel in state court prosecution, 93 A.L.R.2d 747.

Accused's right to assistance of counsel at or prior to arraignment, 5 A.L.R.3d 1269.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney, 5 A.L.R.3d 1360.

Propriety and prejudicial effect of counsel's representing defendant in criminal case notwithstanding counsel's representation or former representation of prosecution witness, 27 A.L.R.3d 1431.

Circumstance giving rise to conflict of interest between or among criminal codefendants precluding representation by same counsel, 34 A.L.R.3d 470.

Attorney's refusal to accept appointment to defend indigent, or to proceed in such defense, as contempt, 36 A.L.R.3d 1221.

Right to assistance of counsel at proceedings to revoke probation, 44 A.L.R.3d 306.

Right to counsel in contempt proceedings, 52 A.L.R.3d 1002.

Accused's right to choose particular counsel appointed to assist him, 66 A.L.R.3d 996.

Right of indigent criminal defendant to polygraph test at public expense, 11 A.L.R.4th 733.

Relief available for violation of right to counsel at sentencing in state criminal trial, 65 A.L.R.4th 183.

Right of indigent defendant in state criminal case to assistance of ballistics experts, 71 A.L.R.4th 638.

Right of indigent defendant in state criminal case to assistance of fingerprint expert, 72 A.L.R.4th 874.

Right of indigent defendant in state criminal case to assistance of expert in social attitudes, 74 A.L.R.4th 330.

Right of indigent defendant in state criminal case to assistance of chemist, toxicologist, technician, narcotics expert, or similar nonmedical specialist in substance analysis, 74 A.L.R.4th 388.

Criminal defendant's representation by person not licensed to practice law as violation of right to counsel, 19 A.L.R.5th 351.

Right to appointment of counsel in contempt proceedings, 32 A.L.R.5th 31.

Right of indigent defendant in state criminal prosecution to ex parte in camera hearing on request for state-funded expert witness, 83 A.L.R.5th 541.

Accused's right, under 28 USCS § 1654, and similar predecessor statutes, to represent himself in federal criminal proceeding, 27 A.L.R. Fed. 485.

What constitutes assertion of right to counsel following Miranda warnings - federal cases, 80 A.L.R. Fed. 622.

22 C.J.S. Criminal Law §§ 277, 278, 292.

## 31-16-4. Notice of right to representation.

A. If a person who is being detained by a law enforcement officer, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is not represented by an attorney under conditions in which a person having his own counsel would be entitled to be so represented, the law enforcement officers concerned, upon commencement of detention, or the court, upon formal charge, as the case may be, shall clearly inform him of the right of a needy person to be represented by an attorney at public expense and, if the person detained or charged does not have an attorney, notify the district court concerned that he is not so represented.

B. Upon commencement of any later judicial proceeding relating to the same matter, the presiding officer shall clearly inform the person so detained or charged of the right of a needy person to be represented by an attorney at public expense.

C. If the district court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly assign an attorney who shall represent the person in accordance with the terms of his assignment.

**History: 1953 Comp., § 41-22-4, enacted by Laws 1968, ch. 69, § 61.**

**ANNOTATIONS**

**Legislative intent.** — The legislature did not, in the Indigent Defense Act, provide that the state was to furnish free counsel for persons pursuing civil damage claims. *Orrs v. Rodriguez*, 1972-NMCA-148, 84 N.M. 355, 503 P.2d 335.

**Act not violated.** — There being no claim of indigency at the trial level, this section was the only portion of the act applicable to defendant's contention that he was denied counsel at arraignment, and where the record at arraignment disclosed defendant after pleading not guilty was advised that if he could not employ counsel within a week the court would appoint counsel, the act (Indigent Defense Act) was not violated. *State v. Torres*, 1970-NMCA-017, 81 N.M. 521, 469 P.2d 166, cert. denied, 81 N.M. 506, 469 P.2d 151.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21A Am. Jur. 2d Criminal Law § 1197.

Duty to advise accused as to right to assistance of counsel, 3 A.L.R.2d 1003.

Duty of court to inform accused who is not represented by counsel of his right not to testify, 79 A.L.R.2d 643.

Right of motorist stopped by police officers for traffic offense to be informed at that time of his federal constitutional rights under *Miranda v. Arizona*, 25 A.L.R.3d 1076.

What constitutes "custodial interrogation" within rule of *Miranda v. Arizona* requiring that suspect be informed of his federal constitutional rights before custodial interrogation, 31 A.L.R.3d 565.

What constitutes assertion of right to counsel following Miranda warnings - federal cases, 80 A.L.R. Fed. 622.

What circumstances fall within public safety exception to general requirement, pursuant to or as aid in enforcement of federal Constitution's Fifth Amendment privilege against self-incrimination, to give Miranda warnings before conducting custodial interrogation - post-Quarles cases, 142 A.L.R. Fed. 229.



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## 31-16-5. Determination of indigency.

A. The determination of whether a person covered by Section 60 [31-16-3 NMSA 1978] of the Indigent Defense Act is a needy person shall be deferred until his first appearance in court or in a suit for payment or reimbursement under Section 66 [31-16-9 NMSA 1978] of the Indigent Defense Act, whichever occurs earlier. Thereafter, the court concerned shall determine, with respect to each proceeding, whether he is a needy person.

B. In determining whether a person is a needy person and the extent of his inability to pay, the court concerned may consider such factors as income, property owned, outstanding obligations and the number and ages of his dependents. Release on bail does not necessarily prevent him from being a needy person. In each case, the person shall, subject to the penalties for perjury, certify in writing or by other record material factors relating to his ability to pay as the court prescribes.

C. To the extent that a person covered by Section 60 of the Indigent Defense Act is able to provide for an attorney, the other necessary services and facilities of representation and court costs, the court may order him to provide for their payment.

**History: 1953 Comp., § 41-22-5, enacted by Laws 1968, ch. 69, § 62.**

**Cross references.** — For jury and witness fee fund, *see* 34-9-11 NMSA 1978.

ANNOTATIONS

**Determination fails to meet constitutional mandate.** — The limited determination of indigency under the standard of pauperism does not conform to constitutional mandate. *Anaya v. Baker*, 427 F.2d 73 (10th Cir. 1970).

**Proper to require defendant to make reasonable showing of indigency.** — A showing of an accused's indigency is a prerequisite to the right of a court-appointed counsel, and it is proper for the trial court to require the defendant to make a reasonable showing that he is unable to employ counsel. *State ex rel. Peters v. McIntosh*, 1969-NMSC-103, 80 N.M. 496, 458 P.2d 222.

**Doubts resolved in favor of accused.** — Although the courts recognize the relative concepts of indigency and that this determination should be made at the trial court level, doubts as to indigency should be resolved in favor of the accused. *State ex rel. Peters v. McIntosh*, 1969-NMSC-103, 80 N.M. 496, 458 P.2d 222.

**Right of district court to determine indigency.** — Although this rule makes it the duty of the district court to appoint counsel for the indigent person immediately upon receipt of a certificate of indigency from the committing magistrate, we do not construe this as depriving the district court of its right to determine whether such person is in fact indigent. *State ex rel. Peters v. McIntosh*, 1969-NMSC-103, 80 N.M. 496, 458 P.2d 222.

**Court must make adequate inquiry into whether person needy.** — Whether defendant has the financial means to procure counsel is a factual question. This factual question cannot be resolved without an adequate inquiry into the facts. *State v. Anaya*, 1966-NMSC-144, 76 N.M. 572, 417 P.2d 58.

When a defendant makes a reasonable showing of indigency, the trial court has a duty to inquire into the facts relied upon by the defendant. *State v. Watchman*, 1991-NMCA-010, 111 N.M. 727, 809 P.2d 641, cert. denied, 111 N.M. 529, 807 P.2d 227, *overruled in part on other grounds by State v. Hosteen*, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

**Determination must be made before district court appearance.** — The determination of the question of indigency must often be made before the otherwise normal appearance of the accused before the district court. To hold a preliminary hearing without counsel present, unless the right to counsel has been competently, intelligently and voluntarily waived, vitiates the hearing. *State ex rel. Peters v. McIntosh*, 1969-NMSC-103, 80 N.M. 496, 458 P.2d 222.

**Court determination obligates public defender.** — The legislature, understanding that courts determine indigence under the Indigent Defense Act (IDA), enacted 31-15-10 NMSA 1978 of the Public Defender Act (PDA) intending "every person without counsel who is financially unable to obtain counsel" to include all persons who courts determine are "needy" under the 31-16-5 NMSA 1978 of the IDA. Therefore, under the administrative system of the PDA and IDA, when a court determines that a defendant is "needy," the defendant is "financially unable to obtain counsel" under the PDA, and the department "shall represent" the defendant pursuant to 31-15-10 NMSA 1978, assuming the defendant is charged with a crime carrying a possible sentence of imprisonment. *State ex rel. Quintana v. Schnedar*, 1993-NMSC-033, 115 N.M. 573, 855 P.2d 562.

**Construction with Public Defender Act.** — The Indigent Defense Act and the Public Defender Act are consistent as amended: The IDA obligates courts to determine indigence, the PDA directs the department to adopt standards for determining indigence, and other statutes instruct courts to employ those standards. *State ex rel. Quintana v. Schnedar*, 1993-NMSC-033, 115 N.M. 573, 855 P.2d 562.

**Claim of indigency in letter form sufficient.** — If in fact defendant was indigent at time of filing notice of appeal, he was entitled to be represented by court-appointed counsel on his appeal; his letter stating he cannot pay costs is a sufficient claim of indigency. *Barela v. State*, 1970-NMCA-044, 81 N.M. 433, 467 P.2d 1005.

**Effect of refusal to fill out certificate of indigency.** — Defendant was not entitled to any appointed counsel because he refused to fill out, under oath, a certificate of indigency showing his income, and thus there was no showing that he was a needy person. *State v. Pina*, 1977-NMCA-020, 90 N.M. 181, 561 P.2d 43.

**Borrowing ability one factor in determining financial means.** — Neither the ability nor the inability to borrow money is the sole criterion. The question is whether defendant has the financial means to employ counsel. Borrowing ability is only one aspect of the defendant's "financial means." *State v. Anaya*, 1966-NMSC-144, 76 N.M. 572, 417 P.2d 58.

**As well as property interest and employment.** — The fact that defendant had an undefined interest in three items of property and the fact that he was employed prior to his arrest is insufficient to determine the question of defendant's financial ability to obtain counsel. *State v. Anaya*, 1966-NMSC-144, 76 N.M. 572, 417 P.2d 58.



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**Represented by employed counsel, but still indigent.** — A defendant may be represented by employed counsel and still be indigent in connection with other matters pertaining to defense of the case. *State v. Apodaca*, 1969-NMCA-038, 80 N.M. 244, 453 P.2d 764.

**Mandamus is not available to control judicial discretion** unless there is a clear abuse of that discretion, or unless such action would prevent the doing of useless things. *State ex rel. Peters v. McIntosh*, 1969-NMSC-103, 80 N.M. 496, 458 P.2d 222.

**Uncontested motion for determination of indigency.** — When a defendant's motion for determination of indigency is uncontested, the better procedure in such cases is for the trial court to either grant the motion or to expressly indicate the basis for its denial. *State v. Watchman*, 1991-NMCA-010, 111 N.M. 727, 809 P.2d 641, cert. denied, 111 N.M. 529, 807 P.2d 227, *overruled on other grounds by State v. Hosteen*, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21A Am. Jur. 2d Criminal Law § 1199 et seq.

Determination of indigency of accused entitling him to appointment of counsel, 51 A.L.R.3d 1108.

Determination of indigency entitling accused in state criminal case to appointment of counsel on appeal, 26 A.L.R.5th 765.

## 31-16-6. Waiver of right to representation.

A person who has been appropriately informed under Section 61 [31-16-4 NMSA 1978] of the Indigent Defense Act may waive in writing or by other record any right provided by the Indigent Defense Act if the court authorized to appoint counsel, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person's age, education and familiarity with English and the complexity of the crime involved.

**History: 1953 Comp., § 41-22-6, enacted by Laws 1968, ch. 69, § 63.**

ANNOTATIONS

**Failure to advise defendant of possible jail sentence.** — There was no voluntary knowing, and intelligent waiver of the right to an attorney where defendant was advised of the allowable penalty, but was not aware of the possibility of a jail sentence when defendant waived the right to an attorney. *Smith v. Maldonado*, 1985-NMSC-115, 103 N.M. 570, 711 P.2d 15.

**Effective waiver of right to counsel.** — Where both the justice of the peace and the district court advised defendant that, if indigent, counsel would be appointed to represent him, where defendant affirmatively waived counsel in both courts and where the district court questioned defendant extensively as to his understanding of the charges, the penalties if convicted, his various rights, including the right to counsel, to a jury trial and to an appeal if found guilty, then defendant's motion for post-conviction relief on the grounds of lack of counsel was denied, as defendant effectively waived his right to counsel. *State v. Martin*, 1969-NMCA-079, 80 N.M. 531, 458 P.2d 606.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21A Am. Jur. 2d Criminal Law § 1237 et seq.

Validity and efficacy of minor's waiver of right to counsel, 25 A.L.R.4th 1072.

22 C.J.S. Criminal Law § 292.

## 31-16-7. Recovery from defendant.

A. The district attorney may, on behalf of the state, recover payment or reimbursement, as the case may be, from each person who has received legal assistance or another benefit under the Indigent Defense Act [31-16-1 NMSA 1978]:

(1) to which he was not entitled;

(2) with respect to which he was not a needy person when he received it; or

(3) with respect to which he has failed to make the certificate required by Section 62 B [31-16-5 NMSA 1978] of the Indigent Defense Act and for which he refuses to pay. Suit must be brought within six years after the date on which the aid was received.

B. The district attorney may, on behalf of the state, recover payment or reimbursement, as the case may be, from each person other than a person covered by Subsection A who has received legal assistance under the Indigent Defense Act and who, on the date on which suit is brought, is financially able to pay or reimburse the state for it according to the standards of ability to pay applicable under the Indigent Defense Act but refuses to do so. Suit must be brought within three years after the date on which the benefit was received.

C. Amounts recovered under this section shall be paid to the state treasurer for credit to the state general fund.

**History: 1953 Comp., § 41-22-7, enacted by Laws 1968, ch. 69, § 64.**

**Cross references.** — For jury and witness fee fund, *see* 34-9-11 NMSA 1978.

ANNOTATIONS

**Legislative intent.** — The legislature did not, in the Indigent Defense Act, provide that the state was to furnish free counsel for persons pursuing civil damage



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claims. *Orrs v. Rodriguez*, 1972-NMCA-148, 84 N.M. 355, 503 P.2d 335.

**Defendant's financial means.** — In resolving the factual question as to defendant's financial means, the defendant's answers should be under oath. The factual question is not whether defendant ought to be able to employ counsel, but whether he is able to do so. *State v. Anaya*, 1966-NMSC-144, 76 N.M. 572, 417 P.2d 58.

## 31-16-8. Payment of costs, expenses and attorney fees.

A. Payments of costs, expenses and attorney fees under the Indigent Defense Act [31-16-1 NMSA 1978] shall be made from:

(1) funds appropriated to the supreme court with respect to habeas corpus matters initiated in that court; and

(2) funds appropriated to the district court with respect to all stages of proceedings initiated in the district court.

B. The court assigning counsel under the Indigent Defense Act shall pay costs, including the costs of transcripts where appropriate, shall reimburse counsel for direct expenses the court determines to have been properly incurred by him and shall pay to counsel fees:

(1) for services in magistrate courts and district courts where the proceedings are terminated prior to trial in the district court, a sum fixed by the court at not less than one dollar ($1.00) nor more than three hundred dollars ($300);

(2) for services in magistrate courts and district courts which include trial in the district court and, where appropriate, filing notice of appeal, a sum fixed by the court at not less than one dollar ($1.00) nor more than four hundred dollars ($400);

(3) for services in postconviction remedy proceedings in the district court, a sum fixed by the court at not less than one dollar ($1.00) nor more than one hundred fifty dollars ($150);

(4) for services in prosecuting any appeal or review in the court of appeals or the supreme court, a sum fixed by the court at not less than one dollar ($1.00) nor more than five hundred dollars ($500);

(5) for services in habeas corpus proceedings in the supreme court, a sum fixed by the court at not less than one dollar ($1.00) nor more than one hundred fifty dollars ($150); and

(6) for services in any case involving a capital offense, a sum fixed by the court.

**History: 1953 Comp., § 41-22-8, enacted by Laws 1968, ch. 69, § 65.**

**ANNOTATIONS**

**The district court has no authority to order the New Mexico Public Defender Department to pay expert witness fees** on behalf of an indigent defendant who is represented by pro bono private counsel. *Subin v. Ulmer*, 2001-NMCA-105, 131 N.M. 350, 36 P.3d 441.

**Statutory fee not violative of constitutional rights.** — Defendant's argument that the statutory attorney fee limitation of $400 in defense of indigent criminal cases was a denial of equal protection and due process was without merit where there was no claim that the defendant was poorly represented, nor were there any facts indicating how the statutory fee limitation so deprived the defendant. *State v. Silver*, 1971-NMCA-112, 83 N.M. 1, 487 P.2d 910.

**Constitutionality of flat-fee arrangements for indigent defense contract counsel.** — Where the New Mexico legislature, in its 2015 general appropriation to the law office of the public defender (LOPD), specifically provided that the appropriations to the public defender department shall not be used to pay hourly reimbursement rates to contract attorneys, the district court erred in entering an order requiring the LOPD to pay contract counsel hourly rates and the state to provide additional funding, nullifying the legislature's prohibition of the payment of hourly rates to indigent defense contract counsel as violative of the federal and state constitutions, based on its conclusion that the flat-fee rates paid to contract counsel by the LOPD contravene the constitutional guarantee of effective assistance of counsel; an indigent criminal defendant who is represented by contract counsel who is compensated under a flat-fee arrangement does not necessarily receive ineffective assistance of counsel. *Kerr v. Parsons*, 2016-NMSC-028.

**Legislature may appropriate additional funds.** — Language in Subsection A (2) providing that expenses under the Indigent Defense Act are to be paid from "funds appropriated to the district court with respect to all stages of proceedings initiated in the district court" does not prevent the legislature from appropriating additional funds for expenses in indigent cases. *State v. Duran*, 1977-NMCA-091, 91 N.M. 35, 570 P.2d 36, cert. denied, 91 N.M. 3, 569 P.2d 413, 435 U.S. 972, 98 S. Ct. 1615, 56 L. Ed. 2d 65 (1978).

**Indigent Defense Act does not provide for payment of advances.** *State v. Frazier*, 1973-NMCA-127, 85 N.M. 545, 514 P.2d 302.

**Motion for advancement of funds for investigator properly denied.** — Defendant's motion for a prior advancement of funds for a professional investigator was properly denied as an expenditure is clearly not required in every case and need not be provided unless the necessity is shown. *State v. Frazier*, 1973-NMCA-127, 85 N.M. 545, 514 P.2d 302.

**Indigent defendant represented by *pro bono* counsel** is constitutionally entitled to public funding for expert witness fees, provided that the expert witness meets all of the standards promulgated by the Public Defender Department. Constitutional right to be provided with basic tools of an adequate defense is not contingent upon the appointment of counsel by the Public Defender Department. *State v. Brown*, 2006-NMSC-023, 139 N.M. 466, 134 P.3d 753.



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**Attorney fees for jointly charged defendants.** — The court may pay the appointed attorney for the defense of each jointly charged defendant, jointly tried the same as though a severance had been effected and separate trials had. 1966 Op. Att'y Gen. No. 66-27.

**Transcript for habeas corpus petitioner.** — The laws of this state and the holdings of the supreme court of the United States do not require more being furnished than is necessary to effectively pursue the remedy sought, and one copy of the transcript, furnished to either the habeas corpus petitioner or his attorney, is adequate for this purpose. 1964 Op. Att'y Gen. No. 64-66.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Construction of state statutes providing for compensation of attorney for services under appointment by court in defending indigent accused, 18 A.L.R.3d 1074.

Right of attorney appointed by court for indigent accused to, and court's power to award, compensation by public, in absence of statute or court rule, 21 A.L.R.3d 819.

Validity and construction of state statute or court rule fixing maximum fees for attorney appointed to represent indigent, 3 A.L.R.4th 576.

Right of indigent criminal defendant to polygraph test at public expense, 11 A.L.R.4th 733.

## 31-16-9. Contractual services of counsel.

In order to facilitate representation in matters arising before appearance in any court in matters covered by the Indigent Defense Act [31-16-1 NMSA 1978], the director of the administrative office of the courts may, upon direction of the supreme court with respect to habeas corpus proceedings initiated in the supreme court, or upon request of a district court, enter into contracts with attorneys designated by these courts whereby the attorney shall undertake to perform the services of assigned counsel in all or any specified portion of the cases originating within the judicial district. All contracts shall be approved by the chief justice of the supreme court and all payments provided therein shall be made by the supreme court or in the appropriate district court requesting the contract, but in no instance shall contract payments exceed the maximums set out in Section 65 [31-16-8 NMSA 1978] of the Indigent Defense Act.

**History: 1953 Comp., § 41-22-9, enacted by Laws 1968, ch. 69, § 66.**

## 31-16-10. Counsel not subject to liability.

No attorney assigned or contracted with to perform services under the Indigent Defense Act [31-16-1 NMSA 1978] shall be held liable in any civil action respecting his performance or nonperformance of such services.

**History: 1953 Comp., § 41-22-10, enacted by Laws 1968, ch. 69, § 67.**

ANNOTATIONS

**Immunity extends to those under contract to public defender.** — The Public Defender Act (31-15-1 to 31-15-12) does not contain any language about immunity or lack of immunity, but reading the Public Defender Act and the Judgment Defense Act in pari materia, the legislature intended the immunity granted in this section to attorneys appointed under the Indigent Defense Act to apply also to those appointed because they are under contract to the public defender. *Herrera v. Sedillo*, 1987-NMCA-098, 106 N.M. 206, 740 P.2d 1190.

**Immunity not violation of equal protection.** — Public defenders, whether regular employees of the public defender's office or performing as contractors, are immune from malpractice claims, and statutes providing such immunity did not violate the equal protection rights of a former prisoner. *Coyazo v. State*, 1995-NMCA-056, 120 N.M. 47, 897 P.2d 234.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Incompetency, negligence, illness or the like of counsel as ground for new trial or reversal in criminal case, 24 A.L.R. 1025, 64 A.L.R. 436.

Attorney's refusal to accept appointment to defend indigent, or to proceed in such defense, as contempt, 36 A.L.R.3d 1221.

Court-appointed attorney as subject to liability under 42 U.S.C.S. § 1983, 36 A.L.R. Fed. 594.

# ARTICLE 16A

# Preprosecution Diversion

Sec.
31-16A-1. Short title.
31-16A-2. Purpose.
31-16A-3. Program establishment.
31-16A-4. Eligibility.
31-16A-5. Program functions and responsibilities.
31-16A-6. Waivers; suspension of criminal proceedings.
31-16A-7. Program participation; reasonable conditions; termination.
31-16A-8. Record keeping.



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## 31-16A-1. Short title.

This act [31-16A-1 to 31-16A-8 NMSA 1978] may be cited as the "Preprosecution Diversion Act".

**History: Laws 1981, ch. 33, § 1.**

## 31-16A-2. Purpose.

The purposes of the Preprosecution Diversion Act [31-16A-1 NMSA 1978] are to remove those persons from the criminal justice system who are most amenable to rehabilitation and least likely to commit future offenses, to provide those persons with services designed to assist them in avoiding future criminal activity, to conserve community and criminal justice resources, to provide standard guidelines and to evaluate preprosecution programs.

**History: Laws 1981, ch. 33, § 2.**

## 31-16A-3. Program establishment.

Each district attorney shall establish a preprosecution diversion program in his judicial district in accordance with the provisions of the Preprosecution Diversion Act [31-16A-1 NMSA 1978] to the extent public or private funds permit.

**History: Laws 1981, ch. 33, § 3.**

## 31-16A-4. Eligibility.

A. A defendant shall meet the following minimum criteria to be eligible for a preprosecution diversion program:

(1) the defendant shall have no prior felony convictions for a violent crime;

(2) the defendant is willing to participate in the program and submit to all program requirements;

(3) any additional criteria set by the district attorney.

B. A person who meets all of the criteria pursuant to Subsection A of this section may be entered into the preprosecution diversion program; provided that the district attorney may elect not to divert a person to the preprosecution diversion program even though that person meets the minimum criteria set forth in this section.

C. A decision by the district attorney not to divert a person to the preprosecution diversion program is not subject to appeal and shall not be raised as a defense to any prosecution or habitual offender proceeding.

**History: Laws 1981, ch. 33, § 4; 2019, ch. 211, § 5.**

**The 2019 amendment,** effective July 1, 2019, revised eligibility requirements for preprosecution diversion, requiring only that the defendant have no prior felony convictions for a violent crime and is willing to participate in the program and submit to program requirements while allowing the district attorney to set any additional requirements; in Subsection A, after "defendant", deleted "must" and added "shall", in Paragraph A(1), after "defendant", deleted "must" and added "shall", after "violent crime:", deleted "and no prior felony convictions for any crime for the previous ten years", deleted former Paragraphs A(2) through A(4) and redesignated former Paragraph A(5) as Paragraph A(2), deleted former Paragraphs A(6) and Paragraph A(7), and added new Paragraph A(3); in Subsection B, after "A", deleted "district attorney may set additional criteria" and added the remainder of the subsection; and added new Subsection C.

## 31-16A-5. Program functions and responsibilities.

The preprosecution diversion program in each judicial district shall include:

A. individual counseling and guidance for all participants;



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B. required victim restitution where applicable to the extent practical. In addition to monetary restitution, a program may require public service restitution; and

C. referral resources where clients may be sent for treatment and rehabilitation.

**History: Laws 1981, ch. 33, § 5.**

**ANNOTATIONS**

**Termination of preprosecution agreement by state.** — The state may terminate a preprosecution diversion agreement, even if the sole ground is the defendant's nonwilful failure to make restitution, but only if there are no adequate alternatives to termination which will meet the state's legitimate penological interests. *State v. Jimenez*, 1991-NMSC-041, 111 N.M. 782, 810 P.2d 801.

## 31-16A-6. Waivers; suspension of criminal proceedings.

A. A defendant must secure or be appointed defense counsel to be present at a preprosecution diversion screening interview prior to applying for acceptance into a preprosecution diversion program, and, upon applying, the defendant shall waive his constitutional right to a preliminary hearing as set forth in Rule 15(d) of the Rules of Criminal Procedure for the Magistrate Courts [Rule 6-202D NMRA].

B. If a defendant is certified eligible by the district attorney and by the preprosecution diversion program, the defendant shall also waive his constitutional right to a speedy trial and any rights as provided by Rule 37(b) of the Rules of Criminal Procedure for the District Court [Courts] [Rule 5-604B NMRA]. Upon entry of this waiver, the district attorney shall divert the defendant into the preprosecution diversion program and criminal proceedings against the defendant shall be suspended. Participating defendants shall also waive any confidentiality provided by the Arrest Record Information Act [29-10-1 NMSA 1978] to permit scrutiny of records; provided that the publication of the personal information, except the name of the defendant, gathered while a defendant is participating in a program shall not be a public record.

**History: Laws 1981, ch. 33, § 6.**

**Bracketed material.** — The bracketed material in this section was added by the compiler for clarity and it is not part of the law.

## 31-16A-7. Program participation; reasonable conditions; termination.

A. A defendant may be diverted to a preprosecution diversion program for no less than six months and no longer than two years. A district attorney may extend the diversion period for a defendant as a disciplinary measure or to allow adequate time for restitution; provided that the extension coupled with the original period does not exceed two years.

B. A district attorney may require as a program requirement that a defendant agree to such reasonable conditions as the district attorney deems necessary to ensure that the defendant will observe the laws of the United States and the various states and the ordinances of any municipality.

C. If a defendant does not comply with the terms, conditions and requirements of a preprosecution diversion program, the defendant's participation in the program may be terminated, and the district attorney may proceed with the suspended criminal prosecution of the defendant.

D. If the participation of a defendant in a preprosecution diversion program is terminated, the district attorney shall state in writing the specific reasons for the termination, which reasons shall be available for review by the defendant and the defendant's counsel.

**History: Laws 1981, ch. 33, § 7; 1984, ch. 110, § 5; 2019, ch. 211, § 6.**

**Cross references.** — For creation of district attorney fund, *see* 36-1-28 NMSA 1978.

**The 2019 amendment,** effective July 1, 2019, removed provisions related to the mandatory reimbursement of costs to participate in preprosecution diversion, and made it discretionary to remove a defendant from a preprosecution diversion program for failure to comply with requirements of a program; in the section heading, deleted "costs" and added "reasonable conditions"; added new subsection designation "B." and redesignated former Subsections B and C as Subsection C and D, respectively; in Subsection B, after "any municipality", deleted the remainder of the subsection, which required the defendant to reimburse the district attorney's office for the costs related to his participation in the preprosecution diversion program; and in Subsection C, after "participation in the program", deleted "shall" and added "may".



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**The 1984 amendment** added the third and fourth sentences in Subsection A.

**ANNOTATIONS**

**Time limit for refiling charges.** — The legislature did not intend to limit the state's ability to refile charges against a defendant for non-compliance with a preprosecution diversion program. *State v. Davis*, 2007-NMCA-022, 141 N.M. 205, 152 P.3d 848, cert. denied, 2007-NMCERT-002, 141 N.M. 339, 154 P.3d 1239.

**Prosecutor's unilateral termination limited.** — The prosecutor's authority to unilaterally terminate a diversion program is limited to a termination on the basis of defendant's noncompliance with the program. *State v. Trammel*, 1983-NMCA-139, 100 N.M. 543, 673 P.2d 827.

A trial court may require a prosecutor to keep his end of a diversion program agreement and may determine whether the prosecutor has terminated the preprosecution diversion agreement in violation of his statutory authority. *State v. Trammel*, 1983-NMCA-139, 100 N.M. 543, 673 P.2d 827.

**Termination of preprosecution agreement by state.** — The state may terminate a preprosecution diversion agreement, even if the sole ground is the defendant's nonwilful failure to make restitution, but only if there are no adequate alternatives to termination which will meet the state's legitimate penological interests. *State v. Jimenez*, 1991-NMSC-041, 111 N.M. 782, 810 P.2d 801.

**Court review of reasons for failure to pay.** — In proceedings to terminate a preprosecution diversion agreement for failure to pay restitution, the court reviewing the termination must first inquire into the reasons for the failure to pay. *State v. Jimenez*, 1991-NMSC-041, 111 N.M. 782, 810 P.2d 801.

If a defendant has wilfully refused to pay or has failed to make sufficient bona fide efforts legally to acquire the resources to pay, the state may revoke a preprosecution diversion agreement and begin prosecution of the alleged crime or crimes. If, however, the court determines that the defendant has not been at fault in failing to make restitution, then the court must consider whether there are alternatives to termination which will meet the state's legitimate penal interests. *State v. Jimenez*, 1991-NMSC-041, 111 N.M. 782, 810 P.2d 801.

Only if a court determines that alternative measures are not adequate to meet the state's interests may that court uphold termination of a preprosecution diversion agreement when the defendant has made sufficient bona fide efforts to pay. *State v. Jimenez*, 1991-NMSC-041, 111 N.M. 782, 810 P.2d 801.

**Wrongful termination of agreement as defense.** — A claim that a prosecutor has wrongly terminated a diversion agreement is a defense to the initiation of a criminal prosecution and must be raised prior to trial. *State v. Trammel*, 1983-NMCA-139, 100 N.M. 543, 673 P.2d 827.

**Six-month trial period starts when arraignment waived.** — Since the defendant was originally indicted for numerous offenses, was diverted into a preprosecution diversion program (PDP), after which the state dismissed the indictment, was later terminated from the program because she had violated the terms of PDP contract, was reindicted on the same charges for which she had previously been indicted, and waived her arraignment on the charges in the second indictment, the six-month time period for commencement of trial (Rule 5-604B NMRA) was calculated from the date the defendant waived arraignment on the second complaint, and not from the date the defendant was terminated from the PDP, where there was no evidence that the dismissal of the initial indictment and the defendant's later reindictment were carried out for purposes of delay or an attempt to circumvent Rule 5-604B(6) NMRA. *State v. Altherr*, 1994-NMCA-029, 117 N.M. 403, 872 P.2d 376, cert. denied, 117 N.M. 524, 873 P.2d 270.

## 31-16A-8. Record keeping.

A. Each district attorney shall maintain an accurate record of each individual accepted into a preprosecution diversion program for the purpose of complying with the requirements of Paragraph (4) of Subsection A of Section 4 [31-16A-4A(4) NMSA 1978] of the Preprosecution Diversion Act.

B. Each district attorney shall be required to forward to the state police accurate records of acceptance, successful termination or unsuccessful termination of each individual accepted into the program. The state police shall be required to maintain accurate records of all information forwarded to them by each respective district attorney concerning acceptance, successful termination or unsuccessful termination of all preprosecution diversion programs.

**History: Laws 1981, ch. 33, § 8.**

# ARTICLE 17

# Victim Restitution

Sec.

31-17-1. Victim restitution.

## 31-17-1. Victim restitution.

A. It is the policy of this state that restitution be made by each violator of the Criminal Code [30-1-1 NMSA 1978] to the victims of his criminal activities to the extent that the defendant is reasonably able to do so. This section shall be interpreted and administered to effectuate this policy. As used in this section, unless the context otherwise requires:



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(1) "victim" means any person who has suffered actual damages as a result of the defendant's criminal activities;

(2) "actual damages" means all damages which a victim could recover against the defendant in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish and loss of consortium. Without limitation, "actual damages" includes damages for wrongful death;

(3) "criminal activities" includes any crime for which there is a plea of guilty or verdict of guilty, upon which a judgment may be rendered and any other crime committed after July 1, 1977 which is admitted or not contested by the defendant; and

(4) "restitution" means full or partial payment of actual damages to a victim.

B. If the trial court exercises either of the sentencing options under Section 31-20-6 NMSA 1978, the court shall require as a condition of probation or parole that the defendant, in cooperation with the probation or parole officer assigned to the defendant, promptly prepare a plan of restitution, including a specific amount of restitution to each victim and a schedule of restitution payments. If the defendant is currently unable to make any restitution but there is a reasonable possibility that the defendant may be able to do so at some time during his probation or parole period, the plan of restitution shall also state the conditions under which or the event after which the defendant will make restitution. If the defendant believes that he will not be able to make any restitution, he shall so state and shall specify the reasons. If the defendant believes that no person suffered actual damages as a result of the defendant's criminal activities, he shall so state.

C. The defendant's plan of restitution and the recommendations of his probation or parole officer shall be submitted promptly to the court. The court shall promptly enter an order approving, disapproving or modifying the plan, taking into account the factors enumerated in Subsection D of this section. Compliance with the plan of restitution as approved or modified by the court shall be a condition of the defendant's probation or parole. Restitution payments shall be made to the clerk of the court unless otherwise directed by the court. The court thereafter may modify the plan at any time upon the defendant's request or upon the court's own motion. If the plan as approved or modified does not require full payment of actual damages to all victims or if the court determines that the defendant is not able and will not be able to make any restitution at any time during his probation or parole period or that no person suffered actual damages as a result of the defendant's criminal activities, the court shall file a specific written statement of its reasons for and the facts supporting its action or determination.

D. An order requiring an offender to pay restitution, validly entered pursuant to this section, constitutes a judgment and lien against all property of a defendant for the amount the defendant is obligated to pay under the order and may be recorded in any office for the filing of liens against real or personal property, or for garnishment. A judgment of restitution may be enforced by the state, a victim entitled under the order to receive restitution, a deceased victim's estate or any other beneficiary of the judgment in the same manner as a civil judgment. An order of restitution is enforceable, if valid, pursuant to this section, the Victims of Crime Act [31-26-1 NMSA 1978] or Article 2, Section 24 of the constitution of New Mexico. Nothing in this section shall be construed to limit the ability of a victim to pursue full civil legal remedies.

E. The probation or parole officer, when assisting the defendant in preparing the plan of restitution, and the court, before approving, disapproving or modifying the plan of restitution, shall consider the physical and mental health and condition of the defendant; the defendant's age, education, employment circumstances, potential for employment and vocational training, family circumstances and financial condition; the number of victims; the actual damages of each victim; what plan of restitution will most effectively aid the rehabilitation of the defendant; and such other factors as shall be appropriate. The probation or parole officer shall attempt to determine the name and address of each victim and the amount of pecuniary damages of each victim.

F. The clerk of the court shall mail to each known victim a copy of the court's order approving or modifying the plan of restitution, including the court's statement, if any, pursuant to the provisions of Subsection C of this section.



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G. At any time during the probation or parole period, the defendant or the victim may request and the court shall grant a hearing on any matter related to the plan of restitution.

H. Failure of the defendant to comply with Subsection B of this section or to comply with the plan of restitution as approved or modified by the court may constitute a violation of the conditions of probation or parole. Without limitation, the court may modify the plan of restitution or extend the period of time for restitution, but not beyond the maximum probation or parole period specified in Section 31-21-10 NMSA 1978.

I. This section and proceedings pursuant to this section shall not limit or impair the rights of victims to recover damages from the defendant in a civil action.

J. The rightful owner of any stolen property is the individual from whom the property was stolen. When recovering his property, the rightful owner of the stolen property shall not be civilly liable to any subsequent holder, possessor or retainer of the property for the purchase or sale price of the property or for any other costs or expenses associated with the property. Any subsequent holder, possessor or retainer of returned stolen property shall return the property to the rightful owner. The subsequent holder, possessor or retainer shall have a cause of action against the person from whom he obtained the property for actual damages.

**History: 1953 Comp., § 40A-29-18.1, enacted by Laws 1977, ch. 217, § 2; 1989, ch. 101, § 1; 1993, ch. 221, § 1; 2005, ch. 282, § 1.**

**The 2005 amendment,** effective June 17, 2005, added Subsection D to provide that an order requiring an offender to pay restitution is a judgment and lien against all property of the defendant and may be recorded in any office for the filing of liens against real or personal property or for garnishment and to provide for the enforcement of the order of restitution.

**The 1993 amendment,** effective June 18, 1993, deleted "of New Mexico" following "Criminal Code" in the first sentence of Subsection A; and deleted the former last two sentences of Subsection H, which provided for set off of restitution payments against certain judgments, and limited the admissibility as evidence of the fact that restitution was required or made, respectively.

**The 1989 amendment,** effective June 16, 1989, in Subsection B substituted "Section 31-20-6 NMSA 1978" for "Section 40A-29-18 NMSA 1953" in the first sentence and substituted "make" for "made" near the beginning of the second sentence; in Subsection G substituted "Section 31-21-10 NMSA 1978" for "section 41-17-24 NMSA 1953" in the second sentence; and added Subsection I.

## ANNOTATIONS

I. GENERAL CONSIDERATION.
II. PROCEDURAL MATTERS.
III. AMOUNT.

### I. GENERAL CONSIDERATION.

**Effect of bankruptcy.** — Criminal restitution may generally be imposed despite a previous discharge of the underlying debts in bankruptcy. *State v. Collins*, 2007-NMCA-106, 142 N.M. 419, 166 P.3d 480.

**Purpose of section.** — This section is declarative of the public policy to: (1) Make whole the victim of the crime to the extent possible; and (2) to remind the defendant of his wrongdoing and to require him to repay the costs society has incurred as a result of his misconduct. *State v. Taylor*, 1986-NMCA-011, 104 N.M. 88, 717 P.2d 64, cert. denied, 103 N.M. 798, 715 P.2d 71.

**Public policy to make crime victim whole.** — This section is declarative of public policy to make whole the victim of the crime to the extent possible. *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22, cert. denied, 98 N.M. 478, 649 P.2d 1391.

**Consecutive sentencing does not violate the public policy** of making the victim whole, even though it may prevent the defendant from earning the money necessary to compensate his or her victims, where such sentencing is imposed as part of a comprehensive rehabilitative plan necessary to instill in the defendant the wrongness of his or her actions. *State v. Jensen*, 1998-NMCA-034, 124 N.M. 726, 955 P.2d 195.

### II. PROCEDURAL MATTERS.

**Commencement of obligation.** — A defendant's obligation to make restitution may commence upon sentencing or incarceration and need not be delayed until the defendant is placed on probation or parole. *State v. Palmer*, 1998-NMCA-052, 125 N.M. 86, 957 P.2d 71, cert. denied, 125 N.M. 146, 958 P.2d 104.

**When restitution award is improper.** — Awarding restitution to the victim is improper where a defendant does not admit liability for the crime, was not convicted of the crime, or does not plead guilty to the crime. *State v. Madril*, 1987-NMCA-010, 105 N.M. 396, 733 P.2d 365.

**Restitution must have a direct, causal relationship to the crime committed.** — Where defendant was ordered as part of her sentence, following a guilty plea to the offense of forgery, to pay restitution for the costs of her extradition from New York, the district court erred in ordering defendant to pay the sheriff's department's extradition expenses, because there is no direct, causal relationship between the crime defendant pled guilty to and the damages sought by the department. *State v. George*, 2020-NMCA-039.

**Notice to defendant required.** — When the state intends to seek restitution based on charges that have been dismissed under a plea and disposition agreement, the defendant must be placed on notice that he will be subject to the payment of restitution, and should be advised at the time of the entry of his plea of the amount of restitution sought by the state. *State v. Lozano*, 1996-NMCA-075, 122 N.M. 120, 921 P.2d 316.

**Relationship necessary between criminal activity and damage to victim.** — A direct, causal relationship is required between the criminal activities of a defendant and the damages which the victim suffers. Restitution must be limited by and directly related to those criminal activities. *State v. Madril*, 1987-NMCA-010, 105 N.M. 396, 733 P.2d 365.

In determining whether a direct or causal relationship exists between a defendant's criminal activities and the damage suffered by a victim of those activities, an adequate evidentiary basis must be presented. Mere speculation or supposition as to that relationship will not suffice.



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*State v. Madril*, 1987-NMCA-010, 105 N.M. 396, 733 P.2d 365.

**Police department as "victim".** — In a prosecution involving the theft of drugs by an undercover narcotics officer, the police department was a "victim" for purposes of this section. *State v. Ellis*, 1995-NMCA-124, 120 N.M. 709, 905 P.2d 747, cert. denied, 120 N.M. 715, 905 P.2d 1119.

**Restitution for unlicensed work not required.** — Bad-check defendant was not required to make restitution for any amounts owed to interior design company for work done without the requisite New Mexico contractor's license. *State v. Platt*, 1992-NMCA-110, 114 N.M. 721, 845 P.2d 815, cert. denied, 114 N.M. 501, 841 P.2d 549.

**Victim restitution policy not limited to cases where sentence suspended or deferred.** — Subsection B contains no qualifying language limiting the application of the policy of victim restitution only to those cases in which a sentence is suspended or deferred. *State v. Gross*, 1982-NMCA-099, 98 N.M. 309, 648 P.2d 348, cert. denied, 98 N.M. 336, 648 P.2d 794.

**Mandatory probationary period may include restitution condition.** — Subsection B does not limit or restrict the application of restitution only to those cases in which sentence is suspended or deferred. A mandatory probationary period may be included in the defendant's sentence with the condition to make restitution to the victim. *State v. Ennis*, 1982-NMCA-157, 99 N.M. 117, 654 P.2d 570, cert. denied, 99 N.M. 148, 655 P.2d 160.

**Restitution mandatory where sentence suspended or deferred.** — Subsection B makes it mandatory to require victim restitution when a sentence is deferred or suspended; the court has no discretion in such instances. *State v. Gross*, 1982-NMCA-099, 98 N.M. 309, 648 P.2d 348, cert. denied, 98 N.M. 336, 648 P.2d 794.

Where a defendant agreed to plead guilty to nine counts of attempt to evade gross receipts tax, and the state and the defendant agreed that incarceration, if imposed, would not exceed nine years and that sentencing would be postponed to enable defendant to fulfill restitution requirements; and where the defendant, after 11 months failed to pay any restitution, it was not error for the trial court to impose a sentence of incarceration pursuant to the plea and disposition agreement. *State v. Bowie*, 1990-NMCA-068, 110 N.M. 283, 795 P.2d 88.

**Agreements not to prosecute in exchange for restitution.** — The practice by attorneys or their agents involving the payment of money as privately-negotiated restitution to an alleged victim in exchange for that person's execution of any sworn statement not to prosecute constitutes conduct prejudicial to the administration of justice in violation of Subsection D of Rule 16-804 NMRA, and adversely reflects on an attorney's fitness to practice law. *In re Steere*, 1990-NMSC-084, 110 N.M. 405, 796 P.2d 1101.

**Insurance company as victim.** — The trial court had the authority under this section to order the embezzling defendant to pay restitution to an insurance company that had paid a claim resulting from the defendant's criminal activities. *State v. Brooks*, 1993-NMCA-078, 116 N.M. 309, 862 P.2d 57, *rev'd on other grounds*, 1994-NMSC-062, 117 N.M. 751, 877 P.2d 557.

**Termination of preprosecution agreement by state.** — The state may terminate a preprosecution diversion agreement, even if the sole ground is the defendant's nonwilful failure to make restitution, but only if there are no adequate alternatives to termination which will meet the state's legitimate penological interests. *State v. Jimenez*, 1991-NMSC-041, 111 N.M. 782, 810 P.2d 801.

**Trial court must consider defendant's ability to pay restitution.** — In a fraud case, the district court's order regarding payment of restitution within thirty days was not a proper method of achieving the district court's legitimate objective of determining whether the fraudulently obtained funds were recoverable. The district court must consider defendant's ability to pay restitution within thirty days before conditioning a portion of his term of imprisonment on payment of restitution within that time frame. *State v. Whitaker*, 1990-NMCA-014, 110 N.M. 486, 797 P.2d 275, cert. denied, 109 N.M. 631, 788 P.2d 931.

**Full evidentiary hearing not contemplated.** — A full evidentiary hearing tantamount to a civil trial adjudicating liability is not contemplated as a prerequisite for a criminal trial judge to require restitution to the victim. *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22, cert. denied, 98 N.M. 478, 649 P.2d 1391.

**Notice to defendant, with opportunity to dispute amount of restitution, required.** — Implicit in the provisions of this section is the giving of notice to the defendant of the amount of restitution claimed, the opportunity to dispute the amount thereof and an inquiry into the defendant's ability to pay restitution. *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22, cert. denied, 98 N.M. 478, 649 P.2d 1391.

**Failure to prepare restitution plan not error where presentence report provides notice.** — Where no plan of restitution is ever prepared by the defendant in cooperation with the probation or parole officials as required by this section, the failure to comply with this requirement is not error where data is supplied by the defendant which supports the court's determination of the defendant's ability to pay restitution, the presentence report gives the defendant prior notice concerning the amounts of restitution detailed in the presentence report and he is adequately accorded an opportunity to contest the amounts ordered by the court. *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22, cert. denied, 98 N.M. 478, 649 P.2d 1391.

**Restitution order void where not condition of probation.** — The district court's order that defendant make restitution to the New Mexico state police contingency fund in the amount of $130 (the amount an undercover police officer spent to purchase cocaine from defendant) was void, where the court did not order the payment as a condition of probation; and, thus, it was not authorized by this section. *State v. Dean*, 1986-NMCA-093, 105 N.M. 5, 727 P.2d 944, cert. denied, 104 N.M. 702, 726 P.2d 856.

**Showing of actual damage insufficient to require victim restitution where no actual loss could be shown.** *State v. Griffin*, 1983-NMCA-072, 100 N.M. 75, 665 P.2d 1166.

**Lien on defendant's property not authorized.** — A lien ordered on defendant's property to the extent of restitution is not authorized. *State v. Steele*, 1983-NMCA-078, 100 N.M. 492, 672 P.2d 665.

## III. AMOUNT.

**Amount of restitution and time of payment must be set by the court** and may not be left to the discretion of probation authorities. *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22, cert. denied, 98 N.M. 478, 649 P.2d 1391; *State v. Carrasco*, 1997-NMCA-123, 124 N.M. 320, 950 P.2d 293.

**Trial court is to exercise discretion** in ordering the amount defendant is "reasonably able" to pay. *State v. Steele*, 1983-NMCA-078, 100 N.M. 492, 672 P.2d 665.

**Restitution for full value of stolen merchandise.** — The trial court did not err in ordering defendants to pay restitution for the full value of recovered stolen property that was donated to charity by the victim. *State v. Lucero*, 1999-NMCA-102, 127 N.M. 672, 986 P.2d 468, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Quantum of restitution need not be proven by a preponderance of the evidence** as though the sum were being established in a civil action for damages. *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22, cert. denied, 98 N.M. 478, 649 P.2d 1391.

**Earnings are properly includable within "actual damages" to be awarded crime victims,** as contemplated



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by Subsection A(2). *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22, cert. denied, 98 N.M. 478, 649 P.2d 1391.

**Payments for victim's counseling.** — An order requiring a defendant convicted of criminal sexual penetration, incest, and contributing to the delinquency of a minor to pay a monthly sum towards the cost of the victim's counseling was reasonably related to the defendant's rehabilitation and valid under this section. *State v. Palmer*, 1998-NMCA-052, 125 N.M. 86, 957 P.2d 71, cert. denied, 125 N.M. 146, 958 P.2d 104.

**Audit expenses properly included in restitution order.** — In a fraud case, an audit was an appropriate element of restitution. So long as the audit was a reasonable attempt to determine the nature and extent of losses caused by the wrongdoer, rather than an expense of trial preparation, the district court acted properly in including the expense of the audit as "actual damages" to be considered in ordering restitution. *State v. Whitaker*, 1990-NMCA-014, 110 N.M. 486, 797 P.2d 275, cert. denied, 109 N.M. 631, 788 P.2d 931.

**Losses qualifying as damages.** — In a prosecution involving the theft of drugs by an undercover narcotics officer, the police department's losses, including the officer's salary, expense money, and money spent for the purchase of drugs, qualified as damages under this section. *State v. Ellis*, 1995-NMCA-124, 120 N.M. 709, 905 P.2d 747, cert. denied, 120 N.M. 715, 905 P.2d 1119.

**Damages for conspiracy.** — The trial court, pursuant to this section, may order a defendant to make restitution to the victim of a criminal conspiracy for losses resulting from such conspiracy. *State v. Lozano*, 1996-NMCA-075, 122 N.M. 120, 921 P.2d 316.

**Magistrate court may order restitution.** — The magistrate court may, as part of its sentencing power, order a Criminal Code or Motor Vehicle Code violator to make restitution. 1979 Op. Att'y Gen. No. 79-18.

**Law reviews.** — For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For article, "Survey of New Mexico Law, 1982-83: Criminal Procedure," see 14 N.M.L. Rev. 109 (1984).

For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21A Am. Jur. 2d Criminal Law § 1321 et seq.; 79 Am. Jur. 2d Welfare Laws § 46.

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim, 79 A.L.R.3d 976.

Statutes providing for governmental compensation for victims of crime, 20 A.L.R.4th 63.

Jurisdiction or power of juvenile court to order parent of juvenile to make restitution for juvenile's offense, 66 A.L.R.4th 985.

Measure and elements of restitution to which victim is entitled under state criminal statute, 15 A.L.R.5th 391.

Apportionment of liability between landowners and assailants for injuries to crime victims, 54 A.L.R.5th 379.

Persons or entities entitled to restitution as "victim" under state criminal restitution statute, 92 A.L.R.5th 35.

Restitutional sentencing under Victim and Witness Protection Act § 5 (18 USCS §§ 3579, 3580), 79 A.L.R. Fed. 724, 108 A.L.R. Fed. 828.

Deductibility, as nonbusiness loss under 26 USC § 165(c)(2), of restitution payments made pursuant to sentencing order, 112 A.L.R. Fed. 289.

# ARTICLE 18

# Criminal Sentencing

Sec.
31-18-1 to 31-18-11. Repealed.
31-18-12. Short title.
31-18-13. Sentencing authority; all crimes.
31-18-14. Sentencing authority; capital felonies.
31-18-14.1. Repealed.
31-18-15. Sentencing authority; noncapital felonies; basic sentences and fines; parole authority; meritorious deductions.
31-18-15.1. Alteration of basic sentence; mitigating or aggravating circumstances; procedure.
31-18-15.2. Definitions.
31-18-15.3. Serious youthful offender; disposition.
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31-18-16. Use, brandishing or discharge of firearm; alteration of basic sentence; suspension and deferral limited.
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31-18-17. Habitual offenders; alteration of basic sentence.
31-18-18. Habitual offenders; duty of public officers to report.
31-18-19. Habitual offender; duty of district attorney to prosecute.
31-18-20. Habitual offenders; proceedings for prosecution.
31-18-21. Consecutive sentences; inmates and persons at large.
31-18-22. Special incarceration alternative program.
31-18-23. Three violent felony convictions; mandatory life imprisonment; exception.
31-18-24. Violent felony sentencing procedure.
31-18-25. Two violent sexual offense convictions; mandatory life imprisonment; exception.
31-18-26. Two violent sexual offense convictions; sentencing procedure.

## 31-18-1 to 31-18-11. Repealed.

**Repeals.** — Laws 1977, ch. 216, § 17, repealed 40A-29-1 to 40A-29-3.1, 40A-29-5 to 49A-29-11, 1953 Comp. (31-18-1 to 31-18-11 NMSA 1978), relating to sentencing of offenders.

## 31-18-12. Short title.

Chapter 31, Article 18 NMSA 1978 may be cited as the "Criminal Sentencing Act".



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**History: 1953 Comp., § 40A-29-26, enacted by Laws 1977, ch. 216, § 1; 1994, ch. 24, § 1.**

**The 1994 amendment,** effective July 1, 1994, substituted "Chapter 31, Article 18 NMSA 1978" for "The provisions of Sections 40A-29-26 through 40A-29-34 NMSA 1953".

**ANNOTATIONS**

**Law reviews.** — For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For article, "Survey of New Mexico Law, 1982-83: Criminal Law," see 14 N.M.L. Rev. 89 (1984).

## 31-18-13. Sentencing authority; all crimes.

A. Unless otherwise provided in this section, all persons convicted of a crime under the laws of New Mexico shall be sentenced in accordance with the provisions of the Criminal Sentencing Act; provided, that a person sentenced as a serious youthful offender or as a youthful offender may be sentenced to less than the basic or mandatory sentence prescribed by the Criminal Sentencing Act.

B. Whenever a defendant is convicted of a crime under the constitution of New Mexico, or a statute not contained in the Criminal Code [30-1-1 NMSA 1978], which specifies the penalty to be imposed on conviction, the court shall set as a definite term of imprisonment the minimum term prescribed by the statute or constitutional provision and may impose the fine prescribed by the statute or constitutional provision for the particular crime for which the person was convicted; provided, that a person sentenced as a serious youthful offender or as a youthful offender may be sentenced to less than the minimum term of imprisonment prescribed by the statute or the constitutional provision.

C. A crime declared to be a felony by the constitution or a statute not contained in the Criminal Code, without specification of the sentence or fine to be imposed on conviction, shall constitute a fourth degree felony as prescribed under the Criminal Code for the purpose of the sentence, and the defendant shall be so sentenced.

D. Any other crime for which the sentence to be imposed upon conviction is not specified shall constitute, for the purpose of the sentence, a petty misdemeanor.

**History: 1953 Comp., § 40A-29-27, enacted by Laws 1977, ch. 216, § 2; 1993, ch. 77, § 4.**

**The 1993 amendment,** effective July 1, 1993, added the provisos at the end of Subsections A and B, and made minor stylistic changes.

**ANNOTATIONS**

I. GENERAL CONSIDERATION.
II. JUDICIAL DISCRETION.
III. SPECIFIC SENTENCES.

I. GENERAL CONSIDERATION.

**Criminal sentences must be imposed as prescribed by statute.** *State v. Baros*, 1968-NMSC-001, 78 N.M. 623, 435 P.2d 1005.

**Plea agreements will be specifically enforced.** — Where defendant entered into three plea agreements in which the state agreed that defendant would serve zero to nine years of incarceration, supervised probation, treatment program or a combination thereof and that the sentences in each case would be served concurrently with each other; and the district court accepted the plea agreements and sentenced defendant to twenty-one years in prison, with sixteen years suspended, for an actual prison term of five year, plus five years of supervised probation, the sentence violated the terms of the plea agreements, because the suspended sentence allowed for the possibility that defendant could actually serve more than nine years in prison and defendant was entitled to specific performance of the plea agreements. *State v. Gomez*, 2011-NMCA-120, 267 P.3d 831.

**Plea agreement provided for a specific sentence.** — Where the plea agreement provided for a maximum sentence of forty years and the court accepted the plea, the plea agreement constituted a promise, not a recommendation, for a sentence within a particular range that the court was bound to enforce and the imposition of a forty-two year sentence, nine of which were suspended, violated the sentence cap in the plea agreement. *State v. Miller*, 2012-NMCA-051, 278 P.3d 561, cert. granted, 2012-NMCERT-005.

**Plea agreement for a maximum permissible sentence "at initial sentencing".** — Where the plea agreement provided for a maximum sentence of forty years "at initial sentencing", the phrase "at initial sentencing" did not transform the limit on sentencing into a limit on the initial period of incarceration because the sentence could not be increased at a later date and the court's sentence of forty-two years imprisonment, nine of which were suspended, violated the plea agreement. *State v. Miller*, 2012-NMCA-051, 278 P.3d 561, cert. granted, 2012-NMCERT-005.

**Sentence otherwise imposed void.** — Sentences must be imposed as prescribed by statute, and a sentence otherwise imposed was not merely irregular, but was null and void, and a void sentence may be vacated even though it has been partially served. *State v. Peters*, 1961-NMSC-160, 69 N.M. 302, 366 P.2d 148, cert. denied, 369 U.S. 831, 82 S. Ct. 849, 7 L. Ed. 2d 796 (1962).

**Sentences which are unauthorized by law are null and void.** *Sneed v. Cox*, 1964-NMSC-250, 74 N.M. 659, 397 P.2d 308.

**Fixing of penalties is legislative function,** and what constitutes an adequate punishment is a matter for legislative judgment, and the question of whether the punishment for a given crime is too severe and disproportionate to the offense is for the legislature to determine. *State v. Peters*, 1967-NMSC-171, 78 N.M. 224, 430 P.2d 382.



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**For crimes committed prior to July 1, 1979,** the sentencing provision in effect at the time of the commission of the crime controls. *State v. Hargrove*, 1989-NMSC-012, 108 N.M. 233, 771 P.2d 166.

**Subsection B controls over DWI statute.** — Section 66-8-102E NMSA 1978 (now Section 66-8-102F NMSA 1978) which provides that where the conviction is for a second or subsequent DWI, the offense is punishable by imprisonment for not less than ninety days or more than one year, does not control over Subsection B of this section which provides the method for establishing the applicable determinate sentence for offenses not contained in the Criminal Code. *State v. Greyeyes*, 1987-NMCA-022, 105 N.M. 549, 734 P.2d 789, cert. denied, 105 N.M. 521, 734 P.2d 761.

**Motor Vehicle Code violation petty misdemeanor.** — Section 66-8-7B NMSA 1978 (Motor Vehicle Code violation) is governed by the provisions of Subsection D of this section. The violation is not declared to be a felony. Since it is not declared to be a felony and is not punishable by a specified sentence, Subsection D applies. *State v. Mendoza*, 1993-NMCA-027, 115 N.M. 772, 858 P.2d 860, cert. denied, 115 N.M. 359, 851 P.2d 481.

**Section does not apply to contempt sentence.** — Contempt is not a "crime" under Section 34-1-2 NMSA 1978, and therefore, this section does not apply to a contempt sentence. *State v. Case*, 1985-NMCA-027, 103 N.M. 574, 711 P.2d 19, *rev'd on other grounds*, 103 N.M. 501, 709 P.2d 670.

**Effect of acquittal on one count of indictment.** — The mere fact that the jury saw fit to acquit the defendant on one count of the indictment cannot be construed as effectuating a determination of the factual issues under another count, even though the same evidence is offered in support of both counts of the indictment; as the reason for the acquittals is speculative, the acquittals, even though irreconcilable with the conviction, do not require the conviction to be set aside as a matter of law. *State v. Rogers*, 1969-NMCA-034, 80 N.M. 230, 453 P.2d 593.

**Effective date of resentence** is the date when the initial sentence commenced. *State v. Dalrymple*, 1966-NMSC-203, 77 N.M. 4, 419 P.2d 218.

**Effect of sentence in excess of that permitted by law.** — Where a court has jurisdiction of the person and the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion in excess open to question and attack. A sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and the offense, and only void as to the excess, when such excess is separable and may be dealt with without disturbing the valid portion of the sentence. *Sneed v. Cox*, 1964-NMSC-250, 74 N.M. 659, 397 P.2d 308.

**Legal or authorized portion valid.** — The imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion in excess open to attack, unless such portion is inseparable and cannot be dealt with without disturbing the valid portion of the sentence. *State v. Baros*, 1968-NMSC-001, 78 N.M. 623, 435 P.2d 1005.

**When probationary part of sentence void.** — Where the court ordered defendant placed on probation without deferring or suspending any of his sentences, this action is not within the bounds prescribed by law, and therefore, the probationary part of the defendant's sentence is void. *State v. Nolan*, 1979-NMCA-116, 93 N.M. 472, 601 P.2d 442, cert. denied, 93 N.M. 683, 604 P.2d 821.

## II. JUDICIAL DISCRETION.

**Sua sponte amendment of sentence.** — Where defendant was convicted of possession of child pornography; the court sentenced defendant to three years of imprisonment, suspended thirty-four and one-half years, followed by five years of supervised probation and on the following day, after reconsidering the court's reliance on the fact that defendant had no criminal history and the evidence in the case, the court revised the sentence to nine years of imprisonment, the court did not abuse its discretion. *State v. Ballard*, 2012-NMCA-043, 276 P.3d 976, cert. granted, 2012-NMCERT-005.

**Court may impose statutory sentence notwithstanding jury's recommendation for clemency.** — Trial court did not err in refusing to grant appellant's motion to vacate for the reason that, despite the jury's recommendation for clemency, minor was sentenced for armed robbery to the maximum term permitted by law. *State v. Henry*, 1967-NMSC-265, 78 N.M. 573, 434 P.2d 692.

**Statutory sentence notwithstanding recommendation in diagnostic report.** — Where the sentence was in accordance with law, an appellate court cannot say it was unjust or improper in the circumstances because recommendations in a diagnostic report for a more lenient sentence were not followed or because the statutory sentence is imposed on a 17-year old first offender. *State v. Madrigal*, 1973-NMCA-116, 85 N.M. 496, 513 P.2d 1278, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**Court need not impose identical sentences on joint defendants.** — There is no requirement in criminal procedure that a court impose identical sentences upon persons jointly guilty of a crime. *State v. Holly*, 1968-NMCA-075, 79 N.M. 516, 445 P.2d 393.

**Court statutorily limited in sentencing authority.** — The district court's authority to sentence is only that which has been provided by statute. *State v. Sparks*, 1985-NMCA-004, 102 N.M. 317, 694 P.2d 1382.

**Suspended or deferred sentence within discretion of trial court.** — Of the sentencing alternatives available, a suspended or deferred sentence is within the discretion of the trial court. *State v. Madrigal*, 1973-NMCA-116, 85 N.M. 496, 513 P.2d 1278, cert. denied, 85 N.M. 483, 513 P.2d 1265 (decided under former law).

**Sentencing judge has discretion in determining whether sentences are to run consecutively** or concurrently. His discretion in this area will not be interfered with unless he has violated one of the sentencing statutes. *State v. Deats*, 1971-NMCA-089, 82 N.M. 711, 487 P.2d 139.

**Court should not fix date when sentence to commence.** — It is improper for a trial court to fix a date when the sentence should commence. *Sneed v. Cox*, 1964-NMSC-250, 74 N.M. 659, 397 P.2d 308.

**Jurisdiction of trial court to sentence is not exhausted until sentence pronounced,** and will carry over from term to term. *Pavlich v. State*, 1968-NMSC-147, 79 N.M. 473, 444 P.2d 984.

**Sentences cannot be increased after first commitment** has begun. *Deats v. State*, 1972-NMCA-155, 84 N.M. 405, 503 P.2d 1183.

**Credit where prisoner has served part of void sentence.** — It is proper to allow credit where a prisoner is resentenced without a new trial after serving part of a void sentence. *Sneed v. Cox*, 1964-NMSC-250, 74 N.M. 659, 397 P.2d 308.

## III. SPECIFIC SENTENCES.

**Life sentence is not mandatory for a second conviction of trafficking in heroin** and the court has the authority to suspend or defer the sentence imposed. *State v. Sanchez*, 1982-NMSC-032, 97 N.M. 521, 641 P.2d 1068.

**Proper to enhance sentence under both habitual offender and firearm enhancement provisions.** — It is not improper to enhance a sentence under the general



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habitual offender statute if it has already been enhanced under the firearm enhancement statute. *State v. Reaves*, 1982-NMCA-169, 99 N.M. 73, 653 P.2d 904.

**Validity of consecutive sentences.** — Where 1969 sentences were expressly made consecutive to 1967 sentences, and eight sentences in 1969 were also expressly made consecutive, these nine consecutive sentences were validly imposed. *Deats v. State*, 1972-NMCA-155, 84 N.M. 405, 503 P.2d 1183.

**Special probation condition did not terminate parental rights.** — Where defendant pleaded guilty to eight counts of criminal sexual contact of a minor in the fourth degree, the charges stemming from a series of incidents that occurred over the course of several months between defendant and one of his adopted daughters, and after the sentencing hearing, the district court imposed nine conditions of probation, with one condition prohibiting defendant from having direct or indirect contact with all children under the age of 18, including the victim of his crimes, absent a court order, the specific condition did not amount to a "de facto" termination of parental rights, necessitating jurisdiction within the children's court. *State v. Garcia*, 2005-NMCA-065, 137 N.M. 583, 113 P.3d 406.

**Jurisdiction to revoke probation imposed under consecutive sentences.** — Where two consecutive sentences are imposed, as to the second sentence, the district court retained jurisdiction to revoke a defendant's probation when probation violations occurred before the defendant had begun serving the second sentence to which the probation is attached and as to the first sentence, which the defendant had completed serving, the district court did not have jurisdiction to revoke the probation that was attached to the first sentence. *State v. Lopez*, 2006-NMCA-079, 140 N.M. 1, 138 P.3d 534, *aff'd* 2007-NMSC-011, 141 N.M. 293, 154 P.3d 668.

**Magistrate court may order restitution.** — The magistrate court may, as part of its sentencing power, order a Criminal Code or Motor Vehicle Code violator to make restitution. 1979 Op. Att'y Gen. No. 79-18.

**Law reviews.** — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For article, "The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation," see 15 N.M.L. Rev. 41 (1985).

For annual survey of New Mexico criminal law, see 16 N.M.L. Rev. 9 (1986).

For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

For annual survey of New Mexico criminal law and procedure, see 19 N.M.L. Rev. 655 (1990).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

For note, "State v. Muniz: Authorizing Adult Sentencing of Juveniles Absent a Conviction that Authorizes an Adult Sentence," see 35 N.M.L. Rev. 229 (2005).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 825.

Right to credit on state sentence for time served under sentence of court of separate jurisdiction where state court fails to specify in that regard, 90 A.L.R.3d 408.

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

Power of state court, during same term, to increase severity of lawful sentence - modern status, 26 A.L.R.4th 905.

Power of court to increase severity of unlawful sentence - modern status, 28 A.L.R.4th 147.

Propriety of sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial, 34 A.L.R.4th 888.

Admissibility of expert testimony as to appropriate punishment for convicted defendant, 47 A.L.R.4th 1069.

When does delay in imposing sentence violate speedy trial provision, 86 A.L.R.4th 340.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 A.L.R.5th 628.

## 31-18-14. Sentencing authority; capital felonies.

When a defendant has been convicted of a capital felony, the defendant shall be sentenced to life imprisonment or life imprisonment without possibility of release or parole.

**History: 1978 Comp., § 31-18-14, enacted by Laws 1979, ch. 150, § 1; 1993, ch. 77, § 5; 2009, ch. 11, § 1.**

**Repeals and reenactments.** — Laws 1979, ch. 150, § 1, repealed former 31-18-14 NMSA 1978 (40A-29-27.1, 1953 Comp.), relating to life imprisonment for conviction of a capital felony, and enacted the above section.

**Cross references.** — For capital felony sentencing procedure, *see* 31-20A-2 and 31-20A-5 NMSA 1978.

**The 2009 amendment,** effective July 1, 2009, abolished the death penalty and provided for sentencing to life imprisonment without possibility of release or parole.

**The 1993 amendment,** effective July 1, 1993, substituted "may be sentenced" for "shall be sentenced" in the last sentence of Subsection A and added "but shall not be punished by death" at the end thereof.

**Applicability.** — Laws 2009, ch. 11, § 6 provided that the provisions of this section apply to crimes committed on or after July 1, 2009.

ANNOTATIONS

**Constitutionality.** — Where defendant pled guilty to one count of first-degree, willful and deliberate murder, and where, prior to sentencing, defendant filed a motion seeking the opportunity to present mitigating evidence which could eventually shorten his sentence, arguing that Section 31-18-14 NMSA 1978 is unconstitutional because it does not provide for the opportunity for capital felons to present evidence of mitigating circumstances at sentencing and Section 31-18-15.1 NMSA 1978 requires the district court to hold a sentencing hearing for lesser offenses, defendant's equal protection rights were not violated, because first-degree murderers are not similarly situated to lesser offenders, in that first-degree murderers are guilty of a categorically more serious offense. It is a lawful exercise of legislative authority to impose distinct sentencing schemes for first-degree murder and lesser offenses, and the language of Section 31-18-14 reflects an intent that those convicted of first-degree



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murder be treated differently from less serious offenders, regardless of the maximum possible penalty. *State v. Franklin*, 2018-NMSC-015.

**Life sentence for mentally ill offender constitutional.** — Mandatory life sentence for a capital crime committed by a defendant found to be guilty but mentally ill did not constitute cruel and unusual punishment in violation of the eighth amendment. *Neely v. Newton*, 149 F.3d 1074 (10th Cir. 1998), cert. denied, 525 U.S. 1107, 119 S. Ct. 877, 142 L. Ed. 2d 777 (1999).

**It is first degree murder that the legislature has designated as eligible for capital sentencing** when an aggravating circumstance is present. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516 (decided prior to 2009 repeal of death penalty).

**New Mexico's death penalty is unconstitutional,** and the penalty to be imposed for a conviction of first-degree murder is life imprisonment. *State v. Noble*, 1977-NMSC-031, 90 N.M. 360, 563 P.2d 1153 (decided prior to 2009 repeal of death penalty).

This section, which provided, upon conviction of a capital crime, for mandatory sentence of death, and leaves neither judge nor jury discretion to impose a lesser sentence, violates state and federal constitutional provisions against cruel and unusual punishment and is void. This action revives previous 40A-29-2, 1953 Comp., as it existed before its amendment in 1973, but that section was likewise unconstitutional and void in that it left recommendation of death or life imprisonment to the unbridled discretion of the jury. Therefore, maximum penalty available for defendants convicted of murder is life imprisonment. *State v. Rondeau*, 1976-NMSC-044, 89 N.M. 408, 553 P.2d 688 (decided prior to 2009 repeal of death penalty).

**Life imprisonment proper penalty for serious felonies.** — The imposition of the death penalty for felony-murder, rape, aggravated sodomy and kidnapping was unconstitutional; the proper penalty to be imposed was life imprisonment. *State v. Melton*, 1977-NMSC-014, 90 N.M. 188, 561 P.2d 461 (decided prior to 2009 repeal of death penalty).

**Mandatory nature of section.** — The court did not have discretion not to sentence the defendant, a minor, to a life term after a conviction of a first degree capital felony. *State v. Taylor*, 1988-NMSC-023, 107 N.M. 66, 752 P.2d 781 (decided prior to 1993 amendment) (decided prior to 2009 repeal of death penalty).

**Death qualification of a jury,** properly conducted, is not grounds for reversal. *State v. Gilbert*, 1983-NMSC-083, 100 N.M. 392, 671 P.2d 640, cert. denied, 465 U.S. 1073, 104 S. Ct. 1429, 79 L. Ed. 2d 753 (1984) (decided prior to 2009 repeal of death penalty).

**Law reviews.** — For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

For article, "The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation," see 15 N.M.L. Rev. 41 (1985).

For comment, "An Equal Protection Challenge to First Degree Depraved Mind Murder Under the New Mexico Constitution", see 19 N.M.L. Rev. 511 (1989).

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

For note on Imposing the Death Penalty upon Juvenile Offenders, see 21 N.M.L. Rev. 373 (1991).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 942 et seq.; 956 to 960, 965 to 970, 972, 973.

Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence, 8 A.L.R.4th 1028.

Application of death penalty to nonhomicide cases, 62 A.L.R.5th 121.

Propriety, under Federal Constitution, of evidence or argument concerning deterrent effect of death penalty, 78 A.L.R. Fed. 553.

24 C.J.S. Criminal Law §§ 1593, 1596, 1597, 1604, 1609.

## 31-18-14.1. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-18-14.1 NMSA 1978, as enacted by Laws 2001, ch. 128, § 1, relating to capital felony sentencing hearings and explanations by court to the jury, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

## 31-18-15. Sentencing authority; noncapital felonies; basic sentences and fines; parole authority; meritorious deductions.

A. As used in a statute that establishes a noncapital felony, the following defined felony classifications and associated basic sentences of imprisonment are as follows:

| FELONY CLASSIFICATION | BASIC SENTENCE |
|---|---|
| first degree felony resulting in the death of a child | life imprisonment |
| first degree felony for aggravated criminal sexual penetration | life imprisonment |
| first degree felony | eighteen years imprisonment |
| second degree felony resulting in the death of a human being | fifteen years imprisonment |



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| FELONY CLASSIFICATION | BASIC SENTENCE |
|---|---|
| second degree felony for a sexual offense against a child | fifteen years imprisonment |
| second degree felony for sexual exploitation of children | twelve years imprisonment |
| second degree felony | nine years imprisonment |
| third degree felony resulting in the death of a human being | six years imprisonment |
| third degree felony for a sexual offense against a child | six years imprisonment |
| third degree felony for sexual exploitation of children | eleven years imprisonment |
| third degree felony | three years imprisonment |
| fourth degree felony for sexual exploitation of children | ten years imprisonment |
| fourth degree felony | eighteen months imprisonment. |

B. The appropriate basic sentence of imprisonment shall be imposed upon a person convicted and sentenced pursuant to Subsection A of this section, unless the court alters the sentence pursuant to the provisions of the Criminal Sentencing Act.

C. A period of parole shall be imposed only for felony convictions wherein a person is sentenced to imprisonment of more than one year, unless the parties to a proceeding agree that a period of parole should be imposed. If a period of parole is imposed, the court shall include in the judgment and sentence of each person convicted and sentenced to imprisonment in a corrections facility designated by the corrections department authority for a period of parole to be served in accordance with the provisions of Section 31-21-10 NMSA 1978 after the completion of any actual time of imprisonment and authority to require, as a condition of parole, the payment of the costs of parole services and reimbursement to a law enforcement agency or local crime stopper program in accordance with the provisions of that section. If imposed, the period of parole shall be deemed to be part of the sentence of the convicted person in addition to the basic sentence imposed pursuant to Subsection A of this section together with alterations, if any, pursuant to the provisions of the Criminal Sentencing Act.

D. When a court imposes a sentence of imprisonment pursuant to the provisions of Section 31-18-15.1, 31-18-16 or 31-18-17 NMSA 1978 and suspends or defers the basic sentence of imprisonment provided pursuant to the provisions of Subsection A of this section, the period of parole shall be served in accordance with the provisions of Section 31-21-10 NMSA 1978 for the degree of felony for the basic sentence for which the inmate was convicted. For the purpose of designating a period of parole, a court shall not consider that the basic sentence of imprisonment was suspended or deferred and that the inmate served a period of imprisonment pursuant to the provisions of the Criminal Sentencing Act.

E. The court may, in addition to the imposition of a basic sentence of imprisonment, impose a fine not to exceed:

(1) for a first degree felony resulting in the death of a child, seventeen thousand five hundred dollars ($17,500);

(2) for a first degree felony for aggravated criminal sexual penetration, seventeen thousand five hundred dollars ($17,500);

(3) for a first degree felony, fifteen thousand dollars ($15,000);

(4) for a second degree felony resulting in the death of a human being, twelve thousand five hundred dollars ($12,500);

(5) for a second degree felony for a sexual offense against a child, twelve thousand five hundred dollars ($12,500);

(6) for a second degree felony for sexual exploitation of children, five thousand dollars ($5,000);

(7) for a second degree felony, ten thousand dollars ($10,000);



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(8) for a third degree felony resulting in the death of a human being, five thousand dollars ($5,000);

(9) for a third degree felony for a sexual offense against a child, five thousand dollars ($5,000);

(10) for a third degree felony for sexual exploitation of children, five thousand dollars ($5,000);

(11) for a third or fourth degree felony, five thousand dollars ($5,000); or

(12) for a fourth degree felony for sexual exploitation of children, five thousand dollars ($5,000).

F. When the court imposes a sentence of imprisonment for a felony offense, the court shall indicate whether or not the offense is a serious violent offense as defined in Section 33-2-34 NMSA 1978. The court shall inform an offender that the offender's sentence of imprisonment is subject to the provisions of Sections 33-2-34, 33-2-36, 33-2-37 and 33-2-38 NMSA 1978. If the court fails to inform an offender that the offender's sentence is subject to those provisions or if the court provides the offender with erroneous information regarding those provisions, the failure to inform or the error shall not provide a basis for a writ of habeas corpus.

G. No later than October 31 of each year, the New Mexico sentencing commission shall provide a written report to the secretary of corrections, all New Mexico criminal court judges, the administrative office of the district attorneys and the chief public defender. The report shall specify the average reduction in the sentence of imprisonment for serious violent offenses and nonviolent offenses, as defined in Section 33-2-34 NMSA 1978, due to meritorious deductions earned by prisoners during the previous fiscal year pursuant to the provisions of Sections 33-2-34, 33-2-36, 33-2-37 and 33-2-38 NMSA 1978. The corrections department shall allow the commission access to documents used by the department to determine earned meritorious deductions for prisoners.

**History: 1953 Comp., § 40A-29-28, enacted by Laws 1977, ch. 216, § 4; 1979, ch. 152, § 1; 1980, ch. 38, § 1; 1981, ch. 285, § 1; 1987, ch. 139, § 3; 1993, ch. 38, § 1; 1993, ch. 182, § 1; 1994, ch. 23, § 3; 1999, ch. 238, § 5; 2003, ch. 75, § 4; 2003 (1st S.S.), ch. 1, § 5; 2005, ch. 59, § 2; 2007, ch. 69, § 2; 2016, ch. 2, § 2; 2019, ch. 211, § 7; 2022, ch. 56, § 29.**

**The 2022 amendment,** effective May 18, 2022, clarified noncapital felony sentencing provisions; and in Subsection A, deleted "If a person is convicted of" and added "As used in a statute that establishes", and added "following defined felony classifications and associated", and after "basic", deleted "sentence" and added "sentences", and deleted Paragraphs A(1) through A(13) and added the remainder of the subsection.

**The 2019 amendment,** effective July 1, 2019, required that parole shall be imposed only for felony convictions where a person is sentenced to imprisonment for more than one year, unless the parties to a proceeding agree that a period of parole should be imposed; in Subsection C, after the subsection designation, added "A period of parole shall be imposed only for felony convictions wherein a person is sentenced to imprisonment of more than one year, unless the parties to a proceeding agree that a period of parole should be imposed. If a period of parole is imposed", and after the next period, added "If imposed".

**The 2016 amendment,** effective February 25, 2016, created a new basic sentence structure in the Criminal Sentencing Act for sexual exploitation of children offenses; in Subsection A, added new Paragraph (6) and redesignated former Paragraphs (6), (7) and (8) as Paragraphs (7), (8) and (9), respectively, added new Paragraph (10) and redesignated former Paragraph (9) as Paragraph (11), in Paragraph (11), after the semicolon, deleted "or", and added new Paragraph (12) and redesignated Paragraph (10) as Paragraph (13); and in Subsection D, after "31-18-16", deleted "31-18-16.1"; in Subsection E, added Paragraph (6) and redesignated former Paragraphs (6), (7) and (8) as Paragraphs (7), (8) and (9), respectively, in Paragraph (9), after the semicolon, deleted "or", added new Paragraph (10) and redesignated former Paragraph (9) as Paragraph (11), in Paragraph (11), after the semicolon, added "or", and added new Paragraph (12).

**The 2007 amendment,** effective July 1, 2007, imposed life imprisonment and a $17,500 fine for a first degree felony for aggravated criminal sexual penetration.

**The 2005 amendment,** effective June 17, 2005, added Subsection A(1) to impose a life sentence for the conviction of a first degree felony resulting in the death of a child and Subsection E(1) to impose a fine of seventeen thousand five hundred dollars for a first degree felony resulting in the death of a child.

**The 2003 (1st S.S.) amendment,** effective February 3, 2004, inserted present Paragraphs (3) and (6) and redesignated former Paragraphs (3) through (6) accordingly in Subsection A, substituted "and sentenced pursuant to Subsection A of this section, unless the court alters the" for "of a first, second, third or fourth degree felony or a second or third degree felony resulting in the death of a human being, unless the court alters such" in Subsection B, deleted "of a first, second, third or fourth degree felony or a second or third degree felony resulting in the death of a human being" following "convicted" near the beginning of the first sentence in Subsection C, and inserted present Paragraphs (3) and (6) and redesignated former Paragraphs (3) through (5) accordingly in Subsection E.

**The 2003 amendment,** effective July 1, 2003 in Subsection G substituted "New Mexico sentencing commission" for "criminal and juvenile justice coordinating council" near the beginning; and substituted "commission" for "coordinating council" near the end.

**The 1999 amendment,** effective July 1, 1999, added "meritorious deductions" to the section heading and added Subsections F and G.

**The 1994 amendment,** effective July 1, 1994, in Subsection A, inserted Paragraphs (2) and (4) and redesignated former Paragraphs (2) to (4) as Paragraphs (3), (5) and (6), and deleted "or" at the end of Paragraph (5);



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inserted "or a second, third or fourth degree felony resulting in the death of a human being" in Subsection B and in the first sentence in Subsection C; and, in Subsection E, inserted Paragraphs (2) and (4) and redesignated former Paragraphs (2) and (4) as Paragraphs (3) and (5).

**The 1993 amendment,** effective July 1, 1993, inserted Subsection D, and redesignated former Subsection D as Subsection E. This section was also amended by Laws 1993, ch. 38, § 1, effective July 1, 1993. The section was set out as amended by Laws 1993, ch. 182, § 1. *See* 12-1-8 NMSA 1978.

## ANNOTATIONS

I. GENERAL CONSIDERATION.
II. JUDICIAL DISCRETION.
III. SPECIFIC SENTENCES.

### I. GENERAL CONSIDERATION.

**The trial court has authority under Sections 31-18-15 and 31-18-15.1 NMSA 1978 to alter the basic sentence of life imprisonment** for noncapital felonies if the court finds any mitigating circumstances surrounding the offense or concerning the offender. *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

**Method for calculating one-third of a basic sentence of life imprisonment.** — The thirty-year term for parole eligibility is the proper numerical standard by which to measure the trial court's authority to alter a basic sentence of life imprisonment under Sections 31-18-15 and 31-18-15.1 NMSA 1978. Because the trial court's alteration cannot exceed one-third of the basic sentence, the trial court lacks authority to reduce a defendant's parole eligibility by more than ten years. *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

**A basic sentence of life imprisonment is subject to mitigation.** — Unlike a capital felony, a basic sentence of life imprisonment for a noncapital felony is not a mandatory life sentence and is subject to mitigation. *State v. Cabezuela*, 2015-NMSC-016.

Where defendant was convicted of intentional child abuse resulting in the death of a child under twelve, defendant was found guilty of a noncapital felony, and as a result, the life sentence was basic, not mandatory, and the district court was required to consider mitigation evidence before issuing a final sentence. *State v. Cabezuela*, 2015-NMSC-016.

**The trial court has authority to alter the basic sentence of all noncapital felonies.** — Sections 31-18-15 and 31-18-15.1 NMSA 1978 explicitly grant the trial court the authority to alter the basic sentence for all noncapital felonies, including those that carry a basic life sentence of life imprisonment. *State v. Montoya*, 2015-NMSC-010.

Where defendant was convicted of intentional child abuse resulting in the death of a child under twelve, which carried a basic sentence of life imprisonment, and where the district court believed that the law required a mandatory life sentence, the trial court abused its discretion when it misunderstood its authority and obligation to consider mitigating circumstances. *State v. Montoya*, 2015-NMSC-010.

**State v. Wilson, 2001-NMCA-032, 130 N.M. 319, 24 P.3d 351 can no longer be considered controlling authority** regarding sentencing enhancements of basic sentences. *State v. Frawley*, 2005-NMCA-017, 137 N.M. 18, 106 P.3d 580, *overruled by State v. Lopez*, 2005-NMSC-036, 138 N.M. 526, 123 P.3d 754, *overruled by State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

**Fixing of penalties is a legislative function.** *State v. Hovey*, 1975-NMCA-036, 87 N.M. 398, 534 P.2d 777; *State v. Crespin*, 1981-NMCA-095, 96 N.M. 640, 633 P.2d 1238.

The legislature establishes criminal penalties; the trial court's authority to sentence is that which has been provided by law. *State v. Wilson*, 1982-NMCA-019, 97 N.M. 534, 641 P.2d 1081, cert. denied, 98 N.M. 50, 644 P.2d 1039.

**Mandatory sentencing does not violate the doctrine of separation of powers** contained in N.M. Const., art. III, § 1. *State v. Mabry*, 1981-NMSC-067, 96 N.M. 317, 630 P.2d 269.

**Correction of omission of mandatory provision.** — Where a sentence lacks a statutorily-mandated provision, the trial court retains jurisdiction to correct the sentence by adding the omitted term. *State v. Abril*, 2003-NMCA-111, 134 N.M. 326, 76 P.3d 644, cert. denied, 134 N.M. 320, 76 P.3d 638.

**Factual finding of whether crime resulted "in the death of a human being"** is for the jury and not the judge to make, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *State v. McDonald*, 2003-NMCA-123, 134 N.M. 486, 79 P.3d 830, cert. granted, 2003-NMCERT-001, 134 N.M. 612, 81 P.3d 555 (decided under prior law).

**Conspiracy to commit murder.** — Conspiracy to commit murder is a felony "resulting in the death of a human being" within the meaning of this section. *State v. Shije*, 1998-NMCA-102, 125 N.M. 581, 964 P.2d 142 (decided under prior law).

**"Serious violent offense" finding mandatory.** — The omission of any finding does not satisfy the statutory requirement of Subsection F of this section of an affirmative finding as to whether or not the defendant committed a serious violent offense. *State v. Abril*, 2003-NMCA-111, 134 N.M. 326, 76 P.3d 644, cert. denied, 134 N.M. 320, 76 P.3d 638.

**Serious violent offense.** — Where victim of vehicular homicide was a teenager, defendant's breath alcohol level was three times the presumptive level of intoxication, defendant admitted to police that he should be arrested because he was drunk, defendant announced at the scene of the accident that he intended to drive away, and defendant was either too intoxicated to notice the headlights of victim's automobile or he was being untruthful by claiming that the headlights of victim's automobile were off, district court properly concluded that defendant acted with recklessness in the face of knowledge that his acts were reasonably likely to result in serious harm and designated defendant's crime as a serious violent offense. *State v. Worrick*, 2006-NMCA-035, 139 N.M. 247, 131 P.3d 97, cert. quashed, 2007-NMCERT-008, 142 N.M. 436, 166 P.3d 1090.

**Defendant must be afforded opportunity to speak before sentence pronounced.** — Section 31-18-15.1 NMSA 1978 extends the common-law doctrine of allocutus to noncapital felonies, as enumerated in this section, and the trial judge must give the defendant an opportunity to speak before he pronounces sentence; failure to do so renders the sentence invalid. *Tomlinson v. State*, 1982-NMSC-074, 98 N.M. 213, 647 P.2d 415.

**Victim restitution policy not limited to cases where sentences suspended or deferred.** — Section 31-17-1B NMSA 1978 contains no qualifying language limiting the application of the policy of victim restitution only to those cases in which a sentence is suspended or deferred. *State v. Gross*, 1982-NMCA-099, 98 N.M. 309, 648 P.2d 348, cert. denied, 98 N.M. 336, 648 P.2d 794.

**Mandatory probationary period may include restitution condition.** — Section 31-17-1B NMSA 1978 does not limit or restrict the application of restitution only to those cases in which sentence is suspended or deferred. A mandatory probationary period may be included in the defendant's sentence with the condition to make restitution to the victim. *State v. Ennis*, 1982-NMCA-157, 99 N.M. 117, 654 P.2d 570, cert. denied, 99 N.M. 148, 655 P.2d 160.



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**Restitution mandatory when sentence suspended or deferred.** — Section 31-17-1B NMSA 1978 makes it mandatory to require victim restitution when a sentence is deferred or suspended; the court has no discretion in such instances. *State v. Gross*, 1982-NMCA-099, 98 N.M. 309, 648 P.2d 348, cert. denied, 98 N.M. 336, 648 P.2d 794.

**A fine is a sentence.** *State v. Aragon*, 1979-NMCA-074, 93 N.M. 132, 597 P.2d 317.

**Defendant sentenced under statute existing when crime was committed.** — Where defendant committed voluntary manslaughter before Indeterminate Sentence Act was passed, but was convicted afterwards, defendant's sentencing under statute existing at time crime was committed was proper. *State v. Armstrong*, 1956-NMSC-053, 61 N.M. 258, 298 P.2d 941.

**Good behavior, indeterminate sentencing and parole laws are compatible** and are being administered right along together. *Owens v. Swope*, 1955-NMSC-079, 60 N.M. 71, 287 P.2d 605, cert. denied, 350 U.S. 954, 76 S. Ct. 343, 100 L. Ed. 830 (1956).

**No constitutional separation-of-powers infirmity in unrestricted period-of-parole sentencing authority.** — There is no constitutional separation-of-powers infirmity in the legislature's grant to the judiciary of an unrestricted period-of-parole sentencing authority, any more than there was in its grant to the parole board of the same power to set whatever period of parole the board chose to impose. *State v. Freeman*, 1980-NMCA-142, 95 N.M. 127, 619 P.2d 572, cert. denied, 95 N.M. 299, 621 P.2d 516.

**Application to youthful offenders.** — The basic sentences prescribed by this section are "mandatory" within the meaning of Section 32A-2-20D NMSA 1978, while the alterations in the basic sentences allowed by 31-18-15.1 NMSA 1978 are discretionary and, therefore, circumscribed by the Children's Code (Section 32A-1-1 NMSA 1978 et seq.); thus, the maximum sentence that may be imposed upon a youthful offender convicted of a non-capital felony is the basic sentence prescribed by this section, plus, if applicable, the enhancements prescribed by Sections 31-18-16 and 31-18-16.1 NMSA 1978 (repealed). *State v. Guerra*, 2001-NMCA-031, 130 N.M. 302, 24 P.3d 334, cert. denied *sub nom. State v. Ruby G.*, 130 N.M. 459, 26 P.3d 103 (2001).

**Applicability of parole to indeterminate sentencing.** — The parole provisions of this act apply to statutes such as Section 66-3-505 NMSA 1978 (now Section 30-16D-4 NMSA 1978) which prescribe an indeterminate period of imprisonment, and trial court did not lack authority to impose the statutory term of parole of one year in addition to discretionary two years confinement for transferring stolen vehicle. *State v. Baker*, 1993-NMCA-131, 116 N.M. 526, 864 P.2d 1277.

## II. JUDICIAL DISCRETION.

**Subsection B is mandatory.** — Subsection B of this section is mandatory and limits the judge's sentencing discretion. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, *overruled by State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

**Trial court did not abuse its discretion in sentencing defendant** pursuant to Subsection A of this section and in accordance with a plea agreement. *State v. Aker*, 2005-NMCA-063, 137 N.M. 561, 113 P.3d 384, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

**No entitlement to mitigation.** — Mitigation of a sentence depends solely on the discretion of the district court and on no entitlement derived from any qualities of the defendant. *State v. Cumpton*, 2000-NMCA-033, 129 N.M. 47, 1 P.3d 429, cert. denied, 128 N.M. 688, 997 P.2d 820.

**There is no obligation on the part of a judge to depart from the basic sentence.** — Following defendant's conviction for second-degree murder, the district court judge heard from nine witnesses on defendant's behalf, but declined to mitigate defendant's sentence. Defendant was entitled to no more than a sentence prescribed by law, and it was within the district court's discretion to decline to mitigate defendant's sentence. *State v. Suskiewich*, 2016-NMCA-004, cert. denied, 2015-NMCERT-011.

**This section does not prohibit consecutive sentencing** but leaves the issue to be resolved under the common law which gives the court the discretion to order that sentences be served concurrently or consecutively. *State v. Jensen*, 1998-NMCA-034, 124 N.M. 726, 955 P.2d 195.

**Trial court is without authority to fix lesser sentence than that provided** by statute. *State v. Beachum*, 1970-NMCA-119, 82 N.M. 204, 477 P.2d 1019.

**Imposition of sentence bars increased penalty.** — After imposition of a valid sentence, a court may not increase the penalty. *State v. Crespin*, 1981-NMCA-095, 96 N.M. 640, 633 P.2d 1238.

**Impermissible to increase sentence because state failed to include "mitigation" language in sentence.** — The use of the state's failure to include "mitigation" language in the judgment and sentence in order to later increase the defendant's sentence is impermissible. The proper remedy is to file an amended judgment and sentence containing the appropriate language. *State v. Sisneros*, 1981-NMCA-085, 98 N.M. 279, 648 P.2d 318, *aff'd*, 1984-NMSC-085, 101 N.M. 679, 687 P.2d 736, *overruled on other grounds by State v. Saavedra*, 1988-NMSC-100, 108 N.M. 38, 766 P.2d 298.

**Amendment of sentence to include mandatory parole period.** — Where defendant's initial sentence lacked a mandatory parole period, it was not an illegal enhancement of the sentence for the court to amend the sentence to include the parole period even after the defendant had been released from the penitentiary having served his basic sentence of imprisonment. *State v. Acuna*, 1985-NMCA-083, 103 N.M. 279, 705 P.2d 685.

**Credit toward parole for time served.** — The parole board, not the sentencing court, determines whether credit should be given toward a defendant's mandatory parole period for any time served. *State v. Martinez*, 1989-NMCA-036, 108 N.M. 604, 775 P.2d 1321, cert. denied, 108 N.M. 624, 776 P.2d 846.

**Execution of sentence bars imposition of additional punishment.** — Once a sentence is executed by the payment of a fine, the trial court lacks authority to impose additional punishment upon defendant. *State v. Aragon*, 1979-NMCA-074, 93 N.M. 132, 597 P.2d 317.

**Contradictory judgment renders sentence improper.** — Where the trial court deferred a sentence of imprisonment and imposed a sentence of a fine for the same offense, either the deferral or the fine is subject to being stricken as an improper sentence, and the execution of either part of the sentence renders the remaining part void. *State v. Aragon*, 1979-NMCA-074, 93 N.M. 132, 597 P.2d 317.

**Judges not authorized to limit eligibility for parole.** — The legislature has not authorized judges, in imposing sentence, to limit eligibility for parole, but rather has authorized the state board of probation and parole to grant paroles consistent with eligibility conditions established by the legislature; the judge may express his views concerning a prospective parole but the final decision on parole shall be of the board. *State v. Hovey*, 1975-NMCA-036, 87 N.M. 398, 534 P.2d 777.

A provision in the trial court's judgment that defendant who pleaded guilty of a fourth-degree felony was not to be considered for parole for a minimum of one year was beyond the court's sentencing authority, was not a valid part of defendant's sentence and did not limit the authority of the state board of probation and parole to consider



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defendant for parole. *State v. Hovey*, 1975-NMCA-036, 87 N.M. 398, 534 P.2d 777.

**Applicability of parole to indeterminate sentencing.** — The parole provisions of this act apply to statutes such as Section 66-3-505 NMSA 1978 (now Section 30-16D-4 NMSA 1978) which prescribe an indeterminate period of imprisonment, and trial court did not lack authority to impose the statutory term of parole of one year in addition to discretionary two years confinement for transferring stolen vehicle. *State v. Baker*, 1993-NMCA-131, 116 N.M. 526, 864 P.2d 1277.

**Refusal to grant leniency.** — The sentencing court's imposition of the basic sentence for a fourth-degree felony and failure to suspend the sentence on the basis that the defendant refused to name his drug source did not constitute an increase, enhancement, or aggravation of the sentence imposed. *State v. Sosa*, 1996-NMSC-057, 122 N.M. 446, 926 P.2d 299.

**Factors that Earned Meritorious Deduction Act** allows judge to find in order to limit credit under Section 33-2-34 L(4)(n) NMSA 1978 (now Section 33-2-34L(4)(o) NMSA 1978) do not have to be found by the jury beyond a reasonable doubt. *State v. Montoya*, 2005-NMCA-078, 137 N.M. 713, 114 P.3d 393, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229.

## III. SPECIFIC SENTENCES.

**Failure to instruct jury to find whether crimes resulted in death** was harmless error where overwhelming evidence was that defendant participated in armed robbery of victim, victim was beaten in head with metal pipe and suffered fractured skull, died soon thereafter of his injuries, and there was no evidence of another cause of death, nor did defendant dispute that armed robbery resulted in victim's death. *State v. McDonald*, 2004-NMSC-033, 136 N.M. 417, 99 P.3d 667.

**Sentences served concurrently unless trial court or legislature requires consecutive sentences.** — The trial court has discretion to require sentences to be served consecutively, but if this is not done, and there is no legislation covering the situation, the sentences are to be served concurrently. *State v. Mayberry*, 1982-NMCA-061, 97 N.M. 760, 643 P.2d 629.

**Proper to enhance sentence under both habitual offender and firearm enhancement provisions.** — It is not improper to enhance a sentence under the general habitual offender statute if it has already been enhanced under the firearm enhancement statute. *State v. Reaves*, 1982-NMCA-169, 99 N.M. 73, 653 P.2d 904.

**Multiple enhancements permitted.** — In the absence of the type of "dual use" (i.e., when the same fact is used both as an element of the crime and a subsequent enhancement or as the basis for two separate enhancements) discussed in *State v. Keith*, 1985-NMCA-012, 102 N.M. 462, 697 P.2d 145, cert. denied, 102 N.M. 492, 697 P.2d 492 and its progeny, the legislature has authorized both enhancements under the basic sentencing statute and on the finding of aggravating circumstances. *State v. McDonald*, 2003-NMCA-123, 134 N.M. 486, 79 P.3d 830, *aff'd in part, rev'd in part*, 2004-NMSC-033, 136 N.M. 417, 99 P.3d 667.

**Enhanced sentences cannot be served concurrently.** — An additional one-year sentence for the use of a firearm and an additional one-year sentence as an habitual offender cannot be served concurrently. *State v. Mayberry*, 1982-NMCA-061, 97 N.M. 760, 643 P.2d 629.

**Enhanced sentences invalidated.** — Where defendant's basic sentences imposed under this section were increased under Section 31-18-15.1 NMSA 1978 based on the district court's findings of aggravating circumstances, and not based on a jury's findings and under a burden of proof beyond a reasonable doubt, the enhancements are invalidated. *State v. Frawley*, 2005-NMCA-017, 137 N.M. 18, 106 P.3d 580, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73, *overruled by State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, *overruled by State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

**Proper aggravated battery sentence not made erroneous by superfluous reference to another offense.** — Having stated his reason for altering the basic sentence for felony aggravated battery, the altered sentence is not made erroneous by the court's superfluous reference to another offense. *State v. Wilson*, 1982-NMCA-019, 97 N.M. 534, 641 P.2d 1081, cert. denied, 98 N.M. 50, 644 P.2d 1039.

**The district court erred by failing to comply with the criminal sentencing act for a third-degree felony for a sexual offense against a child.** — Where defendant was convicted of attempt to commit second-degree criminal sexual contact of a minor (CSCM), a third degree felony, and where the district court imposed a basic sentence of three years, defendant's basic sentence was an illegal sentence, because the Criminal Sentencing Act mandates that a basic sentence for a third-degree felony shall be three years imprisonment, unless the third-degree felony is a sexual offense against a child, in which case the basic sentence shall be six years imprisonment. Defendant's crime, although incomplete, was a sexual offense against a child. *State v. Notah*, 2022-NMCA-005, cert. denied.

**Imprisonment for noncompliance with parole matters** is not a term of imprisonment which can be imposed by sentence, as such imprisonment results only after sentence has been imposed. *State v. Gonzales*, 1981-NMCA-086, 96 N.M. 556, 632 P.2d 1194.

**When multiple parole periods commence.** — The New Mexico Criminal Sentencing Act (Sections 31-18-12 to 31-18-21 NMSA 1978) requires that in the case of consecutive sentencing, the parole period of each offense commence immediately after the period of imprisonment for that offense, and such parole time will run concurrently with the running of any subsequent basic sentence then being served. *Brock v. Sullivan*, 1987-NMSC-013, 105 N.M. 412, 733 P.2d 860.

The defendant, convicted of a fourth-degree felony and a misdemeanor, was sentenced consecutively to 18 months imprisonment for the felony and 364 days for the misdemeanor. The court erred in requiring him to serve his parole period after the completion of the entire sentence, 18 months and 364 days, instead of allowing him to begin his parole after the term for the felony had expired and concurrently with the term for the misdemeanor. *Gillespie v. State*, 1988-NMSC-068, 107 N.M. 455, 760 P.2d 147.

**Where defendant was convicted of five counts of forgery in one case and seven felonies in a subsequent case,** and was sentenced to consecutive terms of imprisonment, the parole period for defendant's first sentence, since it is deemed part of the sentence, commenced immediately after the period of imprisonment for the first offense and ran concurrently with the running of the subsequent basic sentence being served which would also require a period of parole following the subsequent sentence. *State v. Ortiz*, 2015-NMCA-020, cert. denied, 2015-NMCERT-001.

**Lesser charge against codefendant provides no basis for relief.** — The fact that defendant was sentenced to the term authorized by law provides no basis for post-conviction relief where defendant asserts that "codefendants" were sentenced for a fourth-degree felony on the basis of "the same identical act," and that the state had reduced the charge to a fourth-degree felony on one codefendant. *State v. Follis*, 1970-NMCA-083, 81 N.M. 690, 472 P.2d 655.



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**Sentence upon two charges arising out of same transaction.** — Under former law, which required that the term of imprisonment "shall not exceed the maximum nor be less than the minimum fixed by law," where appellant was sentenced for both rape and assault with intent to commit rape, both charges arose out of the same transaction, were committed at the same time as part of a continuous act, and were inspired by the same criminal intent which was an essential element of each offense, and, accordingly, were susceptible of only one punishment. *State v. Blackwell*, 1966-NMSC-088, 76 N.M. 445, 415 P.2d 563.

**Consecutive and concurrent sentences.** — Where 1969 sentences were expressly made consecutive to 1967 sentences, and eight sentences in 1969 were also expressly made consecutive, these nine consecutive sentences were validly imposed. *Deats v. State*, 1972-NMCA-155, 84 N.M. 405, 503 P.2d 1183.

**Period of parole is to be in addition to basic sentence** and is considered a part of the sentence of the convicted person. *State v. Johnson*, 1980-NMCA-083, 94 N.M. 636, 614 P.2d 1085, cert. denied, 94 N.M. 674, 615 P.2d 991.

**There is no restriction placed upon period of parole** except that it be for a reasonable period of time consistent with the needs of the individual. *State v. Johnson*, 1980-NMCA-083, 94 N.M. 636, 614 P.2d 1085, cert. denied, 94 N.M. 674, 615 P.2d 991.

**Homicide by vehicle.** — Even though Section 66-8-101 NMSA 1978 does not include the language "resulting in the death of a human being," the crime of homicide by vehicle is subject to the six-year sentence authorized by Subsection A(4). *State v. Guerro*, 1999-NMCA-026, 126 N.M. 699, 974 P.2d 669, cert. denied, 126 N.M. 533, 972 P.2d 352.

**Issuing a worthless check over $25.00.** — The offense of issuing a worthless check over $25.00 is a "felony" but could not constitute a "fourth degree felony" because the minimum sentence imposed for issuing worthless checks is less than the stated sentence for fourth degree felonies. *State v. Muzio*, 1987-NMCA-006, 105 N.M. 352, 732 P.2d 879, cert. denied, 105 N.M. 358, 732 P.2d 1381.

**Voluntary manslaughter with firearm enhancement.** — Upon conviction of voluntary manslaughter, with firearm enhancement, imposition of a three-year sentence under 30-2-3 NMSA 1978, plus an additional three-year sentence under this section, and an additional one-year firearm enhancement, did not result in multiple punishments for the same offense in violation of double jeopardy. *State v. Alvarado*, 1997-NMCA-027, 123 N.M. 187, 936 P.2d 869, cert. denied, 123 N.M. 168, 936 P.2d 337.

**District judge may not alter judgment after issuance of commitment.** — In the absence of an adjudication by the supreme court to the contrary, it is the opinion that a district judge is without authority to change, alter or amend a judgment after issuance of commitment to the penitentiary. 1959-60 Op. Att'y Gen. No. 59-122.

**Law reviews.** — For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M.L. Rev. 247 (1974).

For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For comment, "The Constitution is Constitutional - A Reply to The Constitutionality of Pretrial Detention Without Bail in New Mexico," see 13 N.M.L. Rev. 145 (1983).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

For article, "Survey of New Mexico Law, 1982-83: Criminal Procedure," see 14 N.M.L. Rev. 109 (1984).

For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

For comment, "An Equal Protection Challenge to First Degree Depraved Mind Murder Under the New Mexico Constitution", see 19 N.M.L. Rev. 511 (1989).

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 825, 828, 944, 949.

Right to credit on state sentence for time served under sentence of court of separate jurisdiction where state court fails to specify in that regard, 90 A.L.R.3d 408.

Sentencing: permissibility of sentence to a fine only, under statutory provision for imprisonment or imprisonment and fine, 35 A.L.R.4th 192.

Validity, construction, and application of concurrent-sentence doctrine - state cases, 56 A.L.R.5th 385.

## 31-18-15.1. Alteration of basic sentence; mitigating or aggravating circumstances; procedure.

A. The court shall hold a sentencing hearing to determine if mitigating or aggravating circumstances exist and take whatever evidence or statements it deems will aid it in reaching a decision to alter a basic sentence. The judge may alter the basic sentence as prescribed in Section 31-18-15 NMSA 1978 upon:

(1) a finding by the judge of any mitigating circumstances surrounding the offense or concerning the offender; or

(2) a finding by a jury or by the judge beyond a reasonable doubt of any aggravating circumstances surrounding the offense or concerning the offender.

B. When the determination of guilt or innocence for the underlying offense is made by a jury, the original trial jury shall determine whether aggravating circumstances exist. If the offender waives a jury trial for the underlying offense, the offender retains the right to a jury determination of aggravating circumstances. If the offender waives a jury determination of aggravating circumstances, the basic sentence may be altered upon a finding by the judge beyond a reasonable doubt of any aggravating circumstances surrounding the offense or concerning the offender.



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C. For the purpose of this section, the following shall not be considered aggravating circumstances:

(1) the use of a firearm, as provided in Section 31-18-16 NMSA 1978;

(2) a prior felony conviction, as provided in Section 31-18-17 NMSA 1978;

(3) the commission of a crime motivated by hate, as provided in the Hate Crimes Act [31-18B-1 NMSA 1978]; or

(4) any evidence relating to the proof of an essential element of the offense.

D. Not less than five days prior to trial or a sentencing proceeding pursuant to a plea agreement, the state shall give notice that it intends to seek an increase to an offender's basic sentence based upon aggravating circumstances. The notice shall state the aggravating circumstances upon which the sentence increase is sought.

E. Presentation of evidence or statements regarding an alleged aggravating circumstance shall be made as soon as practicable following the determination of guilt or innocence.

F. If the judge determines to alter the basic sentence, the judge shall issue a brief statement of reasons for the alteration and incorporate that statement in the record of the case.

G. The amount of the alteration of the basic sentence for noncapital felonies shall be determined by the judge. However, in no case shall the alteration exceed one-third of the basic sentence; provided that when the offender is a serious youthful offender or a youthful offender, the judge may reduce the sentence by more than one-third of the basic sentence.

**History: 1978 Comp., § 31-18-15.1, enacted by Laws 1979, ch. 152, § 2; 1993, ch. 77, § 6; 2009, ch. 163, § 1.**

**The 2009 amendment,** effective July 1, 2009, in Subsection A, in the first sentence, after "reaching a decision", added "to alter a basic sentence"; in Paragraph (1) of Subsection A, after "any mitigating" deleted "or aggravating" and after "concerning the offender", deleted "If the court determines to alter the basic sentence, it shall issue a brief statement of reasons for the alteration and incorporate that statement in the record of the case"; added Paragraph (2) of Subsection A; deleted former Subsection B, which provided that the judge shall not consider the use of a firearm or prior felony convictions as aggravating circumstances; and added Subsections B through F.

**The 1993 amendment,** effective July 1, 1993, added the language beginning "provided, that" at the end of Subsection C.

## ANNOTATIONS

I. GENERAL CONSIDERATION.
II. PROCEDURAL MATTERS.
III. AGGRAVATING AND MITIGATING FACTORS.

### I. GENERAL CONSIDERATION.

**The trial court has authority under Sections 31-18-15 and 31-18-15.1 NMSA 1978 to alter the basic sentence of life imprisonment** for noncapital felonies if the court finds any mitigating circumstances surrounding the offense or concerning the offender. *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

**Method for calculating one-third of a basic sentence of life imprisonment.** — The thirty-year term for parole eligibility is the proper numerical standard by which to measure the trial court's authority to alter a basic sentence of life imprisonment under Sections 31-18-15 and 31-18-15.1 NMSA 1978. Because the trial court's alteration cannot exceed one-third of the basic sentence, the trial court lacks authority to reduce a defendant's parole eligibility by more than ten years. *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

**Consideration of mitigating circumstances in alteration of basic life sentence.** — Where defendant was convicted of child abuse resulting in the death of a child under twelve years of age which carried a basic sentence of life imprisonment, the trial court had authority to reduce defendant's parole eligibility by up to ten years, resulting in a sentence of twenty years of imprisonment before the possibility of parole, and the court improperly failed to consider mitigating evidence at defendant's sentencing hearing. *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

**The trial court has authority to alter the basic sentence of all noncapital felonies.** — Sections 31-18-15 and 31-18-15.1 NMSA 1978 explicitly grant the trial court the authority to alter the basic sentence for all noncapital felonies, including those that carry a basic life sentence of life imprisonment. *State v. Montoya*, 2015-NMSC-010.

Where defendant was convicted of intentional child abuse resulting in the death of a child under twelve, which carried a basic sentence of life imprisonment, and where the district court believed that the law required a mandatory life sentence, the trial court abused its discretion when it misunderstood its authority and obligation to consider mitigating circumstances. *State v. Montoya*, 2015-NMSC-010.

**A basic sentence of life imprisonment is subject to mitigation.** — Unlike a capital felony, a basic sentence of life imprisonment for a noncapital felony is not a mandatory life sentence and is subject to mitigation. *State v. Cabezuela*, 2015-NMSC-016.

Where defendant was convicted of intentional child abuse resulting in the death of a child under twelve, defendant was found guilty of a noncapital felony, and as a result, the life sentence was basic, not mandatory, and the district court was required to consider mitigation evidence before issuing a final sentence. *State v. Cabezuela*, 2015-NMSC-016.

**This section is facially unconstitutional.** *State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

**Duty to consider mitigating circumstances.** — The district court has a duty to consider mitigating factors in sentencing. Failure to do so, whether based on a misapprehension of the authority given by statute or a belief that a formal motion was required, is an abuse of discretion. *State v. Sotelo*, 2013-NMCA-028, 296 P.3d 1232, cert. denied, 2013-NMCERT-001.

Where defendant was convicted of kidnapping; at defendant's sentencing hearing, defense counsel argued that the district court had discretion to suspend a portion of defendant's sentence; the district court determined that under Section 31-20-3 NMSA 1978, the court did not have authority to suspend or defer sentences for first degree



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felonies; defense counsel failed to file a motion mitigating circumstances and informed the court that defense counsel agreed that the court did not have authority to suspend or defer sentences for first degree felonies; and the court did not consider any mitigating evidence before sentencing defendant, the court abused its discretion because the court had a duty to consider mitigating factors in sentencing. *State v. Sotelo*, 2013-NMCA-028, 296 P.3d 1232, cert. denied, 2013-NMCERT-001.

**A defendant has a right to a jury determination of the facts** that would support enhancement of this sentence. *State v. King*, 2007-NMCA-130, 142 N.M. 699, 168 P.3d 1123, cert. quashed, 2007-NMCERT-011, 143 N.M. 157, 173 P.3d 764.

**Waiver of right of jury trial.** — Where the defendant was not informed of acts that would constitute sufficient evidence of aggravating circumstances when he entered into a plea agreement, the defendant's waiver of his right to a jury trial in the plea agreement was not a voluntary and intelligent waiver of his right to a jury trial on the sentence enhancement factors. *State v. King*, 2007-NMCA-130, 142 N.M. 699, 168 P.3d 1123, cert. quashed, 2007-NMCERT-011, 143 N.M. 157, 173 P.3d 764.

**Sentence enhancement.** — The enhancement of defendant's basic sentence by the court pursuant to Section 31-18-15.1 NMSA 1978 violated defendant's right to an impartial jury because the enhancement should have been based on findings by a jury using the reasonable doubt standard. *State v. Bounds*, 2007-NMCA-062, 141 N.M. 651, 159 P.3d 1136, cert. quashed, 2008-NMCERT-001, 143 N.M. 399, 176 P.3d 1131.

**Section constitutional.** — This section does not violate the doctrine of separation of powers. *State v. Wilson*, 1982-NMCA-019, 97 N.M. 534, 641 P.2d 1081, cert. denied, 98 N.M. 50, 644 P.2d 1039.

**This section is constitutional.** *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, *overruled by* State v. Frawley, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

**This section is not unconstitutionally vague.** *State v. Segotta*, 1983-NMSC-092, 100 N.M. 498, 672 P.2d 1129.

There is no double jeopardy in considering the circumstances of both the felony and the offender in determining whether the basic sentence should be altered. *State v. Wilson*, 1982-NMCA-019, 97 N.M. 534, 641 P.2d 1081, cert. denied, 98 N.M. 50, 644 P.2d 1039.

The sentence enhancements under this section are constitutional in light of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004) and *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005). *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537.

**No due process concern where sentence not altered.** — Where the trial court did not alter the defendant's basic sentence upward or downward as a result of aggravating circumstances, there is no need to consider whether the defendant's sentencing invokes due process concerns relating to the presentation of those aggravating circumstances. *State v. Gardner*, 2003-NMCA-107, 134 N.M. 294, 76 P.3d 47, cert. denied, 134 N.M. 179, 74 P.3d 1071.

**Legislature establishes criminal penalties and determines court's sentencing authority.** — The legislature establishes criminal penalties; the trial court's authority to sentence is that which has been provided by law. *State v. Wilson*, 1982-NMCA-019, 97 N.M. 534, 641 P.2d 1081, cert. denied, 98 N.M. 50, 644 P.2d 1039.

**Legislative intent.** — The legislature did not intend to confer a right to a basic sentence but rather to limit the trial court's discretion to punish within a range by taking into consideration a wide range of circumstances, and to provide for meaningful appellate review. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, *overruled by State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

**Multiple enhancements permitted.** — In the absence of the type of "dual use" (i.e., when the same fact is used both as an element of the crime and a subsequent enhancement or as the basis for two separate enhancements) discussed in *State v. Keith*, 1985-NMCA-012, 102 N.M. 462, 697 P.2d 145, cert. denied, 102 N.M. 492, 697 P.2d 492 and its progeny, the legislature has authorized both enhancements under the basic sentencing statute and on the finding of aggravating circumstances. *State v. McDonald*, 2003-NMCA-123, 134 N.M. 486, 79 P.3d 830, *aff'd*, 2004-NMSC-033, 136 N.M. 417, 99 P.3d 667.

**State v. Wilson, 2001-NMCA-032, 130 N.M. 319, 24 P.3d 351 can no longer be considered controlling authority** regarding sentencing enhancements of basic sentences. *State v. Frawley*, 2005-NMCA-017, 137 N.M. 18, 106 P.3d 580, *overruled by State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, *overruled by* 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

**Section concerns sentences for felony convictions.** — This section concerns only the alteration of the basic sentences for felony convictions. There is no rule or statute in the district or magistrate courts specifically requiring the court to provide defendants in misdemeanor cases the right to speak before sentence is pronounced. *State v. Stenz*, 1990-NMSC-026, 109 N.M. 536, 787 P.2d 455, cert. denied, 109 N.M. 562, 787 P.2d 842.

**Application to youthful offenders.** — The basic sentences prescribed by Section 31-18-15 NMSA 1978 are "mandatory" within the meaning of Section 32A-2-20D NMSA 1978, while the alterations in the basic sentences allowed by this section are discretionary and, therefore, circumscribed by the Children's Code (Section 32A-1-1 NMSA 1978 et seq.); thus, the maximum sentence that may be imposed upon a youthful offender convicted of a non-capital felony is the basic sentence, plus, if applicable, the enhancements prescribed by Sections 31-18-16 and 31-18-16.1 NMSA 1978. *State v. Guerra*, 2001-NMCA-031, 130 N.M. 302, 24 P.3d 334, cert. denied *sub nom. State v. Ruby G.*, 130 N.M. 459, 26 P.3d 103.

**Offender not subject to both felony DWI provision and aggravation statute.** — The maximum sentence for felony DWI under Section 66-8-102(G) NMSA 1978 cannot be enhanced by the aggravation provisions of this section. *State v. Coyazo*, 2001-NMCA-018, 130 N.M. 428, 25 P.3d 267, cert. denied, 130 N.M. 254, 23 P.3d 929.

**Aggravated battery provision and this section not in conflict.** — Section 30-3-5 NMSA 1978 (aggravated battery) and this section do not provide punishment for the same offense, and these sections are not in conflict. *State v. Wilson*, 1982-NMCA-019, 97 N.M. 534, 641 P.2d 1081, cert. denied, 98 N.M. 50, 644 P.2d 1039.

**Relation to Section 31-18-16 NMSA 1978.** — The defendant was charged with the use of a firearm in the murder of a police officer, and the jury found that he did use a firearm in committing that crime. Section 31-18-16 NMSA 1978 provided a separate and distinct basis (use of a firearm) for further altering his basic sentence in addition to the alteration for aggravating circumstances permitted by this section: the language and requirements of each statute were totally independent of the other. *State v. Hall*, 1987-NMCA-145, 107 N.M. 17, 751 P.2d 701, cert. denied, 107 N.M. 16, 751 P.2d 700.

II. PROCEDURAL MATTERS.

**Failure to preserve issue.** — Where the district court altered defendant's sentence; during the pendency of defendant's appeal, the supreme court held that sentence alteration, based on a judge's finding, is unconstitutional; and defendant raised the constitutionality of the alteration of defendant's sentence for the first time on appeal, defendant failed to preserve the issue. *State v. Clements*, 2009-NMCA-085, 146 N.M. 745, 215 P.3d 54, cert. denied, 2009-NMCERT-007, 147 N.M. 362, 223 P.3d 359.



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**Submission of 192 supportive letters for victim had not rendered the sentencing proceeding unfair.** *State v. Aker*, 2005-NMCA-063, 137 N.M. 561, 113 P.3d 384, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

**Crime circumstances and offender background.** — This section provides for broad inquiry into the circumstances of the crime and the background of the offender. *Reyes v. Quintana*, 853 F.2d 784 (10th Cir. 1988).

**Increasing sentence based on consideration of element of offense.** — Where defendant noted that physical injury is an element of the crime of second degree criminal sexual penetration under Section 30-9-11B(2) NMSA 1978, and he contended the trial court's consideration of the physical injury suffered by the victim in increasing the basic sentence pursuant to this section exposed him to double jeopardy, the court's consideration of circumstances surrounding an element of the offense did not expose defendant to double jeopardy. *State v. Bernal*, 1987-NMCA-075, 106 N.M. 117, 739 P.2d 986, cert. denied, 106 N.M. 81, 738 P.2d 1326.

**Notice of state's intent to seek aggravation.** — A defendant must be given notice of the state's intention to seek aggravation and of the aggravating circumstances on which it intends to rely, unless the circumstance was itself an element of the underlying offense or a fact used to establish such an element. While the court may rely upon aggravating circumstances not urged by the state, the court should also provide notice to the defendant of those circumstances that were not established at trial under the foregoing exception. *Caristo v. Sullivan*, 1991-NMSC-088, 112 N.M. 623, 818 P.2d 401.

Defendant was not prejudiced by late filing of the state's written notice where it reserved its right to seek aggravation in a plea agreement and filed written notice of its intent to do so in open court during the sentencing hearing one month later, and where defendant was on notice of the aggravating factors because they were among the circumstances forming the basis of the charges on which he was indicted. *State v. Tortolito*, 1997-NMCA-128, 124 N.M. 368, 950 P.2d 811, cert. denied, 124 N.M. 311, 950 P.2d 284.

**Intent of writing requirement.** — The writing requirement of Subsection A of this section was intended to limit the judge's sentencing discretion by imposing a standard of reasonableness, rather than creating a right in defendants to be sentenced to the basic sentence. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, *overruled by* 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

**Statement of reasons for alteration.** — Appellate review would have been easier if the trial court had filed, as part of the court file, a written statement of its reasons for alteration of a basic sentence, but a taped statement preserved for review was part of the appellate record because it was included in the transcript. *State v. Bernal*, 1987-NMCA-075, 106 N.M. 117, 739 P.2d 986, cert. denied, 106 N.M. 81, 738 P.2d 1326.

The factors the trial judge stated were permissible considerations, and his statement was sufficient under subsection A, where the court, by its statement after evidence and argument, indicated that it considered: (1) testimony of a psychologist that defendant could be a "power" rapist, that defendant's drinking triggered violent and aggressive behavior, and that the court had no guarantee or expectation that his alcohol abuse could be controlled, and (2) evidence that defendant's action was "brutal" in nature, and the court emphasized it had a duty to protect society and that it could not risk defendant being unable to control alcohol abuse. *State v. Bernal*, 1987-NMCA-075, 106 N.M. 117, 739 P.2d 986, cert. denied, 106 N.M. 81, 738 P.2d 1326.

**Court must specify aggravating circumstances.** — Case was remanded for a new sentencing hearing on defendant's convictions for kidnapping, criminal sexual penetration, and robbery, where the trial court found the existence of aggravating circumstances, but did not specify what those circumstances were. *State v. McGuire*, 1990-NMSC-067, 110 N.M. 304, 795 P.2d 996.

The preferred practice is for a sentencing judge to note the factors argued in mitigation and indicate whether they are outweighed by any aggravating factors; however, a sentencing judge is not required to make detailed, exhaustive findings or cite every claim or nuance advanced. *State v. Watchman*, 1991-NMCA-010, 111 N.M. 727, 809 P.2d 641, cert. denied, 111 N.M. 529, 807 P.2d 227, *overruled in part on other grounds by State v. Hosteen*, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

**Presumption as to motive in imposing sentence.** — When a sentencing judge enhances a sentence based upon circumstances factually supported in the record, and those circumstances constitute proper factors to consider under the enhancement statute, this court will not presume improper motive in imposing sentence. *Reyes v. Quintana*, 853 F.2d 784 (10th Cir. 1988).

Judge's increase of the sentence of a defendant charged with first degree murder, based on defendant's pursuit of the victim, is not tantamount to basing the increase on a finding of deliberate intention to kill, an element of first degree murder, and is not violative of the double jeopardy clause. *Reyes v. Quintana*, 853 F.2d 784 (10th Cir. 1988).

**Circumstances surrounding each element of offense may be considered.** — The elements of an offense do no more than establish the offense. The circumstances surrounding the offense, including the circumstances surrounding each of the elements of the offense, may be considered under this section. *State v. Wilson*, 1982-NMCA-019, 97 N.M. 534, 641 P.2d 1081, cert. denied, 98 N.M. 50, 644 P.2d 1039.

**Sentencing hearing is mandatory.** *State v. Tomlinson*, 1982-NMCA-025, 98 N.M. 337, 648 P.2d 795, *aff'd*, 98 N.M. 213, 647 P.2d 415.

**The Criminal Sentencing Act does not require bifurcation.** — Where defendant was charged with two counts of criminal sexual penetration (CSP), and where defendant claimed that he was denied his right to a fair trial because the Criminal Sentencing Act requires a determination of a defendant's guilt or innocence before the jury can consider whether the crime included aggravating circumstances, and that a sentencing hearing is a separate and distinct proceeding from trial, requiring bifurcation, defendant was not denied a fair trial, because while a sentencing hearing is mandatory under the Criminal Sentencing Act, it does not necessarily require a separate proceeding as long as defendant is given the opportunity to present mitigating considerations and the district court is given the opportunity to hear whatever evidence or statements it deems will aid it in reaching a decision. *State v. Apodaca*, 2021-NMCA-001, cert. granted.

**Defendant must be given opportunity to speak before sentence pronounced.** — This section extends the common-law doctrine of allocutus to noncapital felonies, as enumerated in Secton 31-18-15 NMSA 1978, and the trial judge must give the defendant an opportunity to speak before he pronounces sentence; failure to do so renders the sentence invalid. *Tomlinson v. State*, 1982-NMSC-074, 98 N.M. 213, 647 P.2d 415.

The district judge must give a defendant an opportunity to speak before sentence is rendered. *State v. Pothier*, 1986-NMSC-039, 104 N.M. 363, 721 P.2d 1294.

**"Statement" before trial court for the purpose of this section is presentence report.** *State v. Wilson*, 1982-NMCA-019, 97 N.M. 534, 641 P.2d 1081, cert. denied, 98 N.M. 50, 644 P.2d 1039.

**Statutory compliance where evidence taken, reasoning articulated and defendant given chance to comment.** — Where, without the assistance of counsel, the trial court takes evidence it deems would aid it, articulates its reasoning and gives defense counsel a chance



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to comment, this section is complied with. *State v. Tomlinson*, 1982-NMCA-025, 98 N.M. 337, 648 P.2d 795, *aff'd*, 1982-NMSC-074, 98 N.M. 213, 647 P.2d 415.

**Defendant's right to allocution** was not denied when the trial court refused to grant a continuance for sentencing until her psychologist could testify; the court gave her the opportunity to make a proffer as to the expert's testimony, which she did, and she did not allege that the expert's testimony would be different from that given at trial. *State v. Setser*, 1997-NMSC-004, 122 N.M. 794, 932 P.2d 484.

**Denial of right to allocution rendered sentence invalid.** — Where defendant and the state entered into a plea and disposition agreement in which defendant agreed to plead guilty to possession of a controlled substance in two cases, and where the plea and disposition agreement contained no agreement as to sentencing, but where the state did not oppose the sentences in the two cases being suspended and running concurrently, and where, at the conclusion of the sentencing hearing, the district court sentenced defendant within the statutory maximum punishment, and where, on appeal, defendant claimed that his cases should be remanded for resentencing because the district court did not afford him the opportunity to allocute prior to sentencing, and where the state claimed that by entering into a plea and disposition agreement, defendant waived his right to raise the allocution violation on appeal, defendant's sentence was not authorized by statute, because the Criminal Sentencing Act plainly mandates that the opportunity for allocution be provided at every felony sentencing proceeding, and that a court's failure to afford this right renders the sentence unauthorized by statute, a jurisdictional defect that may be raised on appeal notwithstanding the entry of a valid guilty plea and appellate waiver. *State v. Wing*, 2022-NMCA-016, cert. denied.

**Impermissible to increase sentence if state failed to include "mitigation" language in sentence.** — The use of the state's failure to include "mitigation" language in the judgment and sentence in order to later increase the defendant's sentence is impermissible. The proper remedy is to file an amended judgment and sentence containing the appropriate language. *State v. Sisneros*, 1981-NMCA-085, 98 N.M. 279, 648 P.2d 318, *aff'd*, 1984-NMSC-085, 101 N.M. 679, 687 P.2d 736, *overruled on other grounds by State v. Saavedra*, 1988-NMSC-100, 108 N.M. 38, 766 P.2d 298.

**Proper aggravated battery sentence not made erroneous by superfluous reference to another offense.** — Having stated his reason for altering the basic sentence for felony aggravated battery, the altered sentence is not made erroneous by the court's superfluous reference to another offense. *State v. Wilson*, 1982-NMCA-019, 97 N.M. 534, 641 P.2d 1081, cert. denied, 98 N.M. 50, 644 P.2d 1039.

**Sentences served concurrently unless trial court or legislature requires consecutive sentences.** — The trial court has discretion to require sentences to be served consecutively, but if this is not done, and there is no legislation covering the situation, the sentences are to be served concurrently. *State v. Mayberry*, 1982-NMCA-061, 97 N.M. 760, 643 P.2d 629.

III. AGGRAVATING AND MITIGATING FACTORS.

**Enhanced sentences invalidated.** — Where defendant's basic sentences imposed under Section 31-18-15 NMSA 1978 were increased under this section based on the district court's findings of aggravating circumstances, and not based on a jury's findings and under a burden of proof beyond a reasonable doubt, the enhancements are invalidated. *State v. Frawley*, 2005-NMCA-017, 137 N.M. 18, 106 P.3d 580, *overruled by State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, *overruled by State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

**Use of contemporaneous crime.** — A trial court, in considering enhancement, cannot consider the elements of a separate but contemporaneous conviction as an aggravating factor; however, the trial court is free to consider the circumstances surrounding the offense, as long as the court does not rely solely on the elements of the statute necessary to define the crime. *State v. Fuentes*, 1994-NMCA-158, 119 N.M. 104, 888 P.2d 986, cert. denied, 119 N.M. 168, 889 P.2d 203 (1995).

**Use of firearm as permissible aggravating factor.** — Because Subsection B (now C) prohibits only the basic use of a firearm from being used as an aggravator, there was no error in the trial court's use of other circumstances involving the type of firearm with its potential for use to create generalized fear and indiscriminate harm. *State v. Roper*, 2001-NMCA-093, 131 N.M. 189, 34 P.3d 133, cert. quashed, 131 N.M. 619, 41 P.3d 345.

**Amount of time spent planning murder.** — Use, as an aggravating factor, of the amount of time that defendant spent planning the murder was not inappropriate on the basis that the court was, in substance, punishing him for having engaged in a conspiracy. *State v. Castillo-Sanchez*, 1999-NMCA-085, 127 N.M. 540, 984 P.2d 787, cert. denied, 127 N.M. 390, 981 P.2d 1208.

**Aggravating factors for fraud.** — Although several of the aggravating factors considered by the court in a fraud case were proper, consideration "that the money is apparently gone or has been spent", without more, was a neutral factor and, on remand for resentencing, should not be considered unless the court can spell out why this is an aggravating factor. *State v. Whitaker*, 1990-NMCA-014, 110 N.M. 486, 797 P.2d 275, cert. denied, 109 N.M. 631, 788 P.2d 931.

**Prolonged wait for victim, accusatory statement and deliberateness properly considered aggravating circumstances.** — The defendant's prolonged wait for the victim, her accusatory statement before she shot the victim and her deliberateness may properly be considered as aggravating and may properly add an additional year to the sentence for aggravated battery. *State v. Wilson*, 1982-NMCA-019, 97 N.M. 534, 641 P.2d 1081, cert. denied, 98 N.M. 50, 644 P.2d 1039.

**Consideration of false testimony.** — A trial judge at sentencing may consider whether the defendant's trial testimony contained willful and material falsehoods; however, the consideration of false testimony is justified only under circumstances guaranteeing its probative value to sentencing for the underlying offense and is subject to minimum safeguards required by due process. *State v. James*, 1989-NMCA-089, 109 N.M. 278, 784 P.2d 1021, cert. denied, 109 N.M. 262, 784 P.2d 1005.

**Age of child victim as aggravating factor.** — Where the defendant was charged with rape of a child, criminal sexual contact of a minor, and contributing to the delinquency of a minor, the court properly considered the minority of the victims as an aggravating circumstance even though it was an essential element of each crime. *State v. Cawley*, 1990-NMSC-088, 110 N.M. 705, 799 P.2d 574.

**Lack of remorse** arguably is a circumstance "concerning the offender," and, thus, is a permissible factor in sentencing. *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223.

Because the court did not express concern about suspected perjury, and because the court considered the defendant's lack of remorse over a long period of time in a variety of situations, the trial court did not err by using lack of remorse as an aggravating circumstance. *State v. Wilson*, 1993-NMCA-074, 117 N.M. 11, 868 P.2d 656, cert. quashed, 119 N.M. 311, 889 P.2d 1233 (1995).



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**Future dangerousness.** — Trial court had sufficient basis to aggravate defendant's sentence based on both his lack of remorse and future dangerousness to the victim and an eye witness as based on psychologist's report and testimony describing defendant's conduct. *State v. Fike*, 2002-NMCA-027, 131 N.M. 676, 41 P.3d 944, cert. denied, 131 N.M. 737, 42 P.3d 842, *overruled by State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

**Events surrounding crime and nature of defendant's threat to society.** — Findings that the defendant had numerous opportunities to avoid the auto collision and did not put on his brakes at all before striking the victim's car provided an adequate basis for aggravation of the defendant's sentences for vehicular homicide. *State v. Landgraf*, 1996-NMCA-024, 121 N.M. 445, 913 P.2d 252, cert. denied, 121 N.M. 375, 911 P.2d 883.

**Impermissible aggravating factor.** — While the victim's blood relationship to defendant arguably was a circumstance surrounding the offense of criminal sexual penetration, it was error for the court to consider such relationship as an aggravating factor at sentencing on a criminal sexual penetration count after defendant had also been convicted of incest. *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223.

This section does not by its own terms permit the trial judge to consider the elements of either the offense for which the defendant was sentenced or a separate, but contemporaneous, conviction as an aggravating factor. *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223.

**Harm to wife to force alibi testimony.** — There is no direct or circumstantial evidence that would support consideration of harm to the defendant's wife as an aggravating circumstance. The evidence in the record required speculation about the defendant's role in inducing the alibi and the exculpatory letters, and the evidence involved conduct not directly related to the defendant's dangerousness or candidacy for rehabilitation. *State v. Wilson*, 1993-NMCA-074, 117 N.M. 11, 868 P.2d 656, cert. quashed, 119 N.M. 311, 889 P.2d 1233 (1995).

**Defendant's cooperation with authorities.** — A sentencing judge may take into account as a mitigating factor a defendant's voluntary cooperation with authorities. However, a sentence may not be increased based upon a defendant's failure to cooperate. *State v. Callaway*, 1989-NMCA-094, 109 N.M. 564, 787 P.2d 1247, *rev'd on other grounds*, 1990-NMSC-010, 109 N.M. 416, 785 P.2d 1035, cert. denied, 496 U.S. 912, 110 S. Ct. 2603, 110 L. Ed. 2d 283 (1990).

Trial court's offer to cut defendant's sentence in half if he provided information pertaining to another individual involved in the crime was a permissible extension of an offer of leniency to the defendant. *State v. Callaway*, 1989-NMCA-094, 109 N.M. 564, 787 P.2d 1247, *rev'd on other grounds*, 1990-NMSC-010, 109 N.M. 416, 785 P.2d 1035, cert. denied, 496 U.S. 912, 110 S. Ct. 2603, 110 L. Ed. 2d 283 (1990).

**Law reviews.** — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

For article, "The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation," see 15 N.M.L. Rev. 41 (1985).

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Power of court to increase severity of unlawful sentence - modern status, 28 A.L.R.4th 147.

Computation of incarceration time under work-release or "hardship" sentences, 28 A.L.R.4th 1265.

Defendant's right to credit for time spent in halfway house, rehabilitation center or similar restrictive environment as a condition of pretrial release, 29 A.L.R.4th 240.

Admissibility of expert testimony as to appropriate punishment for convicted defendant, 47 A.L.R.4th 1069.

What constitutes unusually "vulnerable" victim under sentencing guideline § 3A1.1 permitting increase in offense level, 114 A.L.R. Fed. 355.

Downward departure from United States Sentencing Guidelines (USSG §§ 1A1.1 et seq.) based on extraordinary family circumstances, 145 A.L.R. Fed. 559.

Downward departure from United States Sentencing Guidelines (USSG §§ 1A1.1 et seq) based on vulnerability to abuse in prison, 155 A.L.R. Fed. 327.

Downward departure from United States Sentencing Guidelines (U.S.S.G. § 1A1.1 et seq.) based on aberrant behavior, 164 A.L.R. Fed. 61.

## 31-18-15.2. Definitions.

As used in the Criminal Sentencing Act:

A. "serious youthful offender" means an individual fifteen to eighteen years of age who is charged with and indicted or bound over for trial for first degree murder; and

B. "youthful offender" means a delinquent child subject to adult or juvenile sanctions who is:

(1) fourteen to eighteen years of age at the time of the offense and who is adjudicated for at least one of the following offenses:

(a) second degree murder, as provided in Section 30-2-1 NMSA 1978;

(b) assault with intent to commit a violent felony, as provided in Section 30-3-3 NMSA 1978;

(c) kidnapping, as provided in Section 30-4-1 NMSA 1978;

(d) aggravated battery, as provided in Subsection C of Section 30-3-5 NMSA 1978;

(e) aggravated battery upon a peace officer, as provided in Subsection C of Section 30-22-25 NMSA 1978;

(f) shooting at a dwelling or occupied building or shooting at or from a motor vehicle, as provided in Section 30-3-8 NMSA 1978;



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(g) dangerous use of explosives, as provided in Section 30-7-5 NMSA 1978;

(h) criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978;

(i) robbery, as provided in Section 30-16-2 NMSA 1978;

(j) aggravated burglary, as provided in Section 30-16-4 NMSA 1978;

(k) aggravated arson, as provided in Section 30-17-6 NMSA 1978; or

(l) abuse of a child that results in great bodily harm or death to the child, as provided in Section 30-6-1 NMSA 1978;

(2) fourteen to eighteen years of age at the time of the offense and adjudicated for any felony offense and who has had three prior, separate felony adjudications within a three-year time period immediately preceding the instant offense. The felony adjudications relied upon as prior adjudications shall not have arisen out of the same transaction or occurrence or series of events related in time and location. Successful completion of consent decrees is not considered a prior adjudication for the purposes of this paragraph; or

(3) fourteen years of age and adjudicated for first degree murder, as provided in Section 30-2-1 NMSA 1978.

**History: Laws 1993, ch. 77, § 1; 1994, ch. 18, § 2; 1995, ch. 205, § 1; 1996, ch. 85, § 1.**

**The 1996 amendment,** effective July 1, 1996, substituted "fifteen to eighteen" for "sixteen or seventeen" in Subsection A; substituted "fourteen" for "fifteen" at the beginning of Paragraphs B(1), (2) and (3); deleted "which results in great bodily harm to another person" in Subparagraph B(1)(f) preceding "as provided"; added Subparagraph b(1)(l); and substituted "three-year" for "two-year" in Paragraph B(2).

**The 1995 amendment,** effective June 16, 1995, inserted "Subsection C of" in Subdivision B(1)(d), and added Subdivision B(1)(e) and redesignated the remaining subdivisions accordingly.

**The 1994 amendment,** effective July 1, 1994, inserted Subparagraph B(1)(e), and redesignated former Subparagraphs B(1)(e) to B(1)(i) as Subparagraphs B(1)(f) to B(1)(j).

## 31-18-15.3. Serious youthful offender; disposition.

A. An alleged serious youthful offender may be detained in any of the following places, prior to arraignment in metropolitan, magistrate or district court:

(1) a detention facility for delinquent children, licensed by the children, youth and families department;

(2) any other suitable place, other than a facility for the care and rehabilitation of delinquent children, that meets standards for detention facilities, as set forth in the Children's Code [32A-1-1 NMSA 1978] and federal law; or

(3) a county jail, if a facility described in Paragraph (1) or (2) of this subsection is not appropriate.

B. When an alleged serious youthful offender is detained in a juvenile detention facility prior to trial, the time spent in the juvenile detention facility shall count towards completion of any sentence imposed.

C. At arraignment, when a metropolitan or district court judge or a magistrate determines that an alleged serious youthful offender should remain in custody, the alleged serious youthful offender may be detained in an adult or juvenile detention facility, subject to the facility's accreditation and the provisions of applicable federal law.

D. When an alleged serious youthful offender is found guilty of first degree murder, the court shall sentence the offender pursuant to the provisions of the Criminal Sentencing Act. The court may sentence the offender to less than, but not exceeding, the mandatory term for an adult. The determination of guilt becomes a conviction for purposes of the Criminal Sentencing Act.

E. Prior to the sentencing of an alleged serious youthful offender who is convicted of first degree murder, adult probation services shall prepare a presentence report and submit the report to the court and the parties five days prior to the sentencing hearing.

F. When the alleged serious youthful offender is convicted of a lesser offense than first degree murder, the court shall provide for disposition of the offender pursuant to the provisions of Section 32-2-19 or 32-2-20 NMSA 1978 [32A-2-19 or 32A-2-20 NMSA 1978]. When an offender is adjudicated as a delinquent child, the conviction shall not be used as a conviction for purposes of the Criminal Sentencing Act.



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**History: Laws 1993, ch. 77, § 3.**

**Compiler's notes.** — Sections 32-2-19 and 32-2-20 NMSA 1978, referred to in the first sentence in Subsection F, were recompiled as 32A-2-19 and 32A-2-20 NMSA 1978 in 1993. *See* Article 2 of Chapter 32A NMSA 1978 and notes thereto.

ANNOTATIONS

**Constitutionality of excluding serious youthful offenders convicted of first-degree felony murder from receiving an amenability hearing.** — Where defendant was charged and convicted of three counts of first-degree felony, murder and conspiracy to commit aggravated burglary, based on evidence that defendant, who was sixteen years old at the time, killed three members of a family with a pickaxe after he and two co-conspirators planned to burglarize the family in order to get money, and where, prior to sentencing, defendant filed a motion arguing that the constitutional prohibition against cruel and unusual punishment and the constitutional guarantee of equal protection require an amendability hearing in conjunction with the court's sentencing, defendant's constitutional rights were not violated by being sentenced without an amenability hearing, because cruel and unusual punishment jurisprudence does not guarantee an amenability hearing to juveniles simply because they are juveniles, and defendant failed to show that the legislature's statutory distinction is unsupported by a firm rationale or evidence in the record. *State v. Ortiz*, 2021-NMSC-029.

**Pre-sentence report is mandatory.** — The district court does not have jurisdiction to sentence a youthful offender who has been convicted of first degree murder until a pre-sentence report has been prepared by adult probation services and the report has been submitted to the district court and the parties five days prior to the sentencing hearing. *State v. Gutierrez*, 2011-NMSC-024, 150 N.M. 232, 258 P.3d 1024.

**Amenability to treatment.** — Subsection F of this section gives the district court the discretion to impose an adult sentence as indicated in Section 32A-2-20 NMSA 1978 based on a finding that a child is not amenable to treatment. If the district court finds the child is amenable to treatment, then the district court should impose a juvenile disposition in accordance with 32A-2-19 NMSA 1978. *State v. Muniz*, 2003-NMSC-021, 134 N.M. 152, 74 P.3d 86, *superceded by statute*, *State v. Jones*, 2010-NMSC-012, 148 N.M. 1, 229 P.3d 474.

**Children initially charged with first degree murder,** but found guilty of lesser crimes, may be sentenced as adults under Subsection F of this section if the district court finds that circumstances warrant such a sentence, even when those children are found guilty of crimes that would otherwise warrant only a juvenile disposition. *State v. Muniz*, 2003-NMSC-021, 134 N.M. 152, 74 P.3d 86, *superceded by statute*, *State v. Jones*, 2010-NMSC-012, 148 N.M. 1, 229 P.3d 474.

**Application to delinquent offenders.** — The presentence confinement credit provided for in Sections 31-18-15.3 and 31-20-12 NMSA 1978 applies only to serious youthful offenders sentenced as adults, and not to a child adjudicated as a delinquent offender for a lesser-included offense. *State v. Nanco*, 2012-NMCA-109, 288 P.3d 527, cert. granted, 2012-NMCERT-010.

**Presentence confinement credit does not apply to delinquent offenders.** — Where the child, who was fifteen years old, was charged with committing first degree murder and two counts of tampering with evidence, and the jury determined that the child had committed the delinquent acts of voluntary manslaughter and one count with tampering with evidence, the child was not entitled to presentence confinement credit for the twenty-five months the child was detained in a juvenile detention facility before the district court adjudicated the child a delinquent offender. *State v. Nanco*, 2012-NMCA-109, 288 P.3d 527, cert. granted, 2012-NMCERT-010.

**Law reviews.** — For note, "State v. Muniz: Authorizing Adult Sentencing of Juveniles Absent a Conviction that Authorizes an Adult Sentence", see 35 N.M.L. Rev. 229 (2005).

## 31-18-15.4. Felonies; public officials; enhancement of sentences.

A. When a separate finding of fact by the trier of fact shows beyond a reasonable doubt that an offender is a public official and that the felony conviction relates to, arises out of or is in connection with the offender's holding of an elected office, the basic sentence may be increased by an additional fine not to exceed the value of the salary and fringe benefits paid to the offender, by virtue of holding an elected public office, after the commission of the first act that was a basis for the felony conviction.

B. As used in this section, "public official" means a person elected to an office in an election covered by the Campaign Reporting Act [1-19-25 to 1-19-36 NMSA 1978] or a person appointed to an office that is subject to an election covered by that act.

**History: Laws 2012, ch. 3, § 1.**

**Effective dates.** — Laws 2012, ch. 3 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 16, 2012, 90 days after the adjournment of the legislature.

## 31-18-16. Use, brandishing or discharge of firearm; alteration of basic sentence; suspension and deferral limited.

A. When a separate finding of fact by the court or jury shows that a firearm was used in relation to a drug transaction or during the commission of aggravated burglary pursuant to Section 30-16-4 NMSA 1978 or a serious violent offense, the basic sentence of imprisonment prescribed for the offense in Section 31-18-15 NMSA 1978 shall be increased by one year, except that when the offender is a serious youthful offender or a youthful offender who received an adult sentence, the sentence imposed by this subsection may be increased by one year.



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B. When a separate finding of fact by the court or jury shows that a firearm was brandished in the commission of a noncapital felony, the basic sentence of imprisonment prescribed for the offense in Section 31-18-15 NMSA 1978 shall be increased by three years, except that when the offender is a serious youthful offender or a youthful offender that received an adult sentence, the sentence imposed by this subsection may be increased by one year.

C. When a separate finding of fact by the court or jury shows that a firearm was discharged in the commission of a noncapital felony, the basic sentence of imprisonment prescribed for the offense in Section 31-18-15 NMSA 1978 shall be increased by five years, except that when the offender is a serious youthful offender or a youthful offender who received an adult sentence, the sentence imposed by this subsection may be increased by three years.

D. For a second or subsequent offense, when a separate finding of fact by the court or jury shows that a firearm was used, brandished, or discharged in relation to a drug transaction or during the commission of aggravated burglary pursuant to Section 30-16-4 NMSA 1978 or a serious violent offense, the sentence shall be increased by five years, except that when the offender is a serious youthful offender or a youthful offender, the sentence imposed by this section may be increased by three years.

E. If the case is tried before a jury and if a prima facie case has been established showing that a firearm was used, brandished or discharged in relation to a drug transaction or during the commission of aggravated burglary pursuant to Section 30-16-4 NMSA 1978 or a serious violent offense, the court shall submit the issue to the jury by special interrogatory. If the case is tried by the court, the court shall decide the issue and shall make a separate finding of fact thereon.

F. When a separate finding of fact by the court or jury shows that a firearm was used, brandished or discharged in relation to a drug transaction or during the commission of aggravated burglary pursuant to Section 30-16-4 NMSA 1978 or a serious violent offense, the firearm is subject to seizure and forfeiture as an instrumentality pursuant to the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978].

G. As used in this section:

(1) "brandished" means displaying or making a firearm known to another person while the firearm is present on the person of the offending party with intent to intimidate or injure a person;

(2) "in relation to a drug transaction" means participating or attempting to participate in the trafficking of a controlled substance pursuant to Section 30-31-20 NMSA 1978, distribution of a controlled substance to a minor pursuant to Section 30-31-21 NMSA 1978 or distribution of a controlled or counterfeit substance pursuant to Section 30-31-22 NMSA 1978 as a seller, purported seller or as an accomplice; and

(3) "serious violent offense" means an offense enumerated in Subparagraphs (a) through (n) of Paragraph (4) of Subsection L of Section 33-2-34 NMSA 1978.

**History: 1953 Comp., § 40A-29-29, enacted by Laws 1977, ch. 216, § 5; 1979, ch. 152, § 3; 1993, ch. 77, § 7; 2020, ch. 54, § 3; 2022, ch. 56, § 30.**

**The 2022 amendment,** effective May 18, 2022, provided for a sentencing enhancement when a firearm is used during the commission of a drug transaction or serious violent offense, and provided that if a firearm is used during the commission of a drug transaction or serious violent offense, the firearm is subject to seizure; added a new Subsection A and redesignated former Subsection A as Subsection B; deleted former Subsection B, added new Subsections C and D and redesignated former Subsection C as Subsection E; in Subsection E, after "showing that a firearm was", added "used", after "brandished", deleted "in the commission of the offense" and added "or discharged in relation to a drug transaction or during the commission of aggravated burglary pursuant to Section 30-16-4 NMSA 1978 or a serious violent offense", and after "tried by the court", deleted "and if a prima facie case has been established showing that a firearm was brandished in the commission of the offense"; added a new Subsection F and redesignated former Subsection D as Subsection G; and in Subsection G, added Paragraphs G(2) and G(3).

**The 2020 amendment,** effective July 1, 2020, increased the sentence enhancements for brandishing of a firearm in the commission of a noncapital felony, and defined "brandished" as used in this section; in the section heading, and throughout the section, substituted "brandished" for "used"; in Subsection A, after "shall be increased by", deleted "one year and the sentence imposed by this subsection shall be the first served" and added "three years, except"; in Subsection B, after "shall be increased by", deleted "three" and added "five", and after "years", deleted "and the sentence imposed by this subsection shall be the first three years served, and shall not be suspended or deferred; provided" and added "except"; and added Subsection D.

**The 1993 amendment,** effective July 1, 1993, added the provisos at the end of Subsections A and B.

**ANNOTATIONS**

I. GENERAL CONSIDERATION.
II. PROCEDURAL MATTERS.
III. SENTENCES.
IV. SPECIFIC CASES.

I. GENERAL CONSIDERATION.

**Intent of statute** is to deter the use of firearms in committing felonies. *State v. Trujillo*, 1978-NMCA-041, 91 N.M. 641, 578 P.2d 342, cert. denied, 91 N.M. 751, 580 P.2d 972.



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**Section directed at sentencing only.** — This section is, by its own terms and in actual application, directed at sentencing only. *Cordova v. Romero*, 614 F.2d 1267 (10th Cir.), cert. denied, 449 U.S. 851, 101 S. Ct. 142, 66 L. Ed. 2d 63 (1980).

**This section does not create new class of crimes;** rather, it provides for additional consequences for felonies committed by use of a firearm. *Cordova v. Romero*, 614 F.2d 1267 (10th Cir.), cert. denied, 449 U.S. 851, 101 S. Ct. 142, 66 L. Ed. 2d 63 (1980).

**There is no repugnancy between 30-16-2 NMSA 1978 and this section.** — Subsection B of this section does not conflict with Section 30-16-2 NMSA 1978 when it provides that the first year of the statutory sentence shall not be suspended. The two statutes are in harmony; each expresses a separate legislative intent. *State v. Wilkins*, 1975-NMCA-069, 88 N.M. 116, 537 P.2d 1012, cert. denied, 88 N.M. 319, 540 P.2d 249.

**Combined use of sections creates no new crime.** — No new crime is created by the combined use of Section 30-16-2 NMSA 1978 and this section in an indictment. Section 30-16-2 NMSA 1978 defines robbery with a deadly weapon, the crime of which defendant was convicted. This section specifies various consequences for the defendant if a finding is made that the deadly weapon used in the robbery was, in fact, a firearm, and serves no other purpose in the indictment than to alert the defendant to the possible sentencing consequences following a conviction under Section 30-16-2 NMSA 1978. *State v. Sanchez*, 1974-NMCA-144, 87 N.M. 140, 530 P.2d 404.

**Section mandatory.** — The enhancement provisions of this section are mandatory. *State v. Kendall*, 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *rev'd on other grounds*, *Kendall v. State*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

**Sentence enhancement provisions for use of firearm mandatory.** *State v. Pendley*, 1979-NMCA-036, 92 N.M. 658, 593 P.2d 755.

The provisions of this section were mandatory in a robbery case where a special finding was made by the jury that a firearm was used. *State v. Wilkins*, 1975-NMCA-069, 88 N.M. 116, 537 P.2d 1012, cert. denied, 88 N.M. 319, 540 P.2d 249.

**Firearm enhancement statute authorizes multiple punishments for the commission of a noncapital felony with a firearm.** — Where defendant was convicted of two counts of aggravated assault with a deadly weapon, and where defendant's sentences on these counts were each enhanced by one year, defendant's right to be free from double jeopardy was not violated, because 31-18-16(A) NMSA 1978 authorizes multiple punishments for the commission of a noncapital felony with a firearm, and where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under Blockburger, a court may impose cumulative punishment under such statutes in a single trial. *State v. Baroz*, 2017-NMSC-030.

**Sentence enhancements for committing aggravated battery and aggravated assault with a firearm.** — Double jeopardy was not violated where the sentences for defendant's aggravated battery and aggravated assault convictions were each increased by the firearm enhancement, because the legislature intended to authorize greater punishment when a firearm is used in the commission of aggravated assault and aggravated battery. *State v. Comitz*, 2019-NMSC-011.

**Firearm enhancements to convictions for aggravated battery with a deadly weapon and aggravated assault with a deadly weapon do not violate double jeopardy.** — Where defendant was convicted of aggravated battery with a deadly weapon for shooting and injuring his son and aggravated assault with a deadly weapon because his wife was standing next to their son at the time of the shooting, defendant's double jeopardy rights were not violated when the district court enhanced defendant's sentence based on the use of a firearm during the commission of the crimes, because the legislature intended to authorize an enhanced punishment when a firearm is used in the commission of a noncapital felony. *State v. Branch*, 2018-NMCA-031, *replacing* 2016-NMCA-071, 387 P.3d 250, cert. denied.

**Firearm enhancements to convictions for aggravated battery with a deadly weapon and aggravated assault with a deadly weapon violate double jeopardy.** — Where defendant was convicted of aggravated battery with a deadly weapon for shooting and injuring his son and for aggravated assault with a deadly weapon for assaulting his wife, who was standing next to defendant's son when he was shot, double jeopardy was violated because the firearm enhancements are subsumed within the underlying offenses, and punishment cannot be had for both the enhancements and the enhanced offenses. *State v. Branch*, 2016-NMCA-071, 387 P.3d 250, *replaced by* 2018-NMCA-031, and cert. quashed.

**Application not prohibited by double jeopardy provisions.** — Neither the rules of statutory construction nor the federal and state constitutional provisions against double jeopardy prohibit the application of the firearm enhancement statute to a person convicted of aggravated battery with a deadly weapon when the weapon used was a firearm. *State v. Gonzales*, 1981-NMCA-023, 95 N.M. 636, 624 P.2d 1033, *overruled on other grounds by Buzbee v. Donnelly*, 1981-NMSC-097, 96 N.M. 692, 634 P.2d 1244.

**No double jeopardy in aggravated assault application.** — Double jeopardy did not prohibit the trial court from enhancing defendant's sentence for aggravated assault with a deadly weapon (Section 30-3-2A NMSA 1978), under this section, since each section contains an element or elements not included in the other and the phrase "a noncapital felony" means "any noncapital felony". *State v. Charlton*, 1992-NMCA-124, 115 N.M. 35, 846 P.2d 341, cert. denied, 114 N.M. 577, 844 P.2d 827.

**Judgment suspending firearm enhancement provision of original sentence void, and later resentencing constitutional.** — Since a judgment purporting to suspend a firearm enhancement provision of an original sentence is void, where the defendant is not sentenced to serve any time of official confinement, he cannot be said to have served any portion thereof and he cannot be held to have accrued a right to a credit against the enhanced portion of his sentence as later imposed. Double jeopardy does not attach, and a resentencing for the mandatory enhancement provision of this section must stand. *State v. Aguilar*, 1982-NMCA-116, 98 N.M. 510, 650 P.2d 32, cert. denied, 98 N.M. 478, 649 P.2d 1391.

**Relation to Section 31-18-15.1 NMSA 1978.** — The defendant was charged with the use of a firearm in the murder of a police officer, and the jury found that he did use a firearm in committing that crime. This section provided a separate and distinct basis (use of a firearm) for further altering his basic sentence in addition to the alteration for aggravating circumstances permitted by Section 31-18-15.1 NMSA 1978: the language and requirements of each statute were totally independent of the other. *State v. Hall*, 1987-NMCA-145, 107 N.M. 17, 751 P.2d 701, cert. denied, 107 N.M. 16, 751 P.2d 700.

**It is solely within province of legislature to establish penalties for criminal behavior.** *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22, cert. denied, 98 N.M. 478, 649 P.2d 1391.

## II. PROCEDURAL MATTERS.

**Punishment to be applied for each felony committed.** — If this section punishes for "use" of a firearm in



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committing a felony, the punishment is to be applied for each felony committed by using a firearm. *State v. Kendall*, 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *rev'd on other grounds*, *Kendall v. State*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

**Application to some, not all, of crimes charged.** — The trial court did not err in applying this section to two of the crimes which the defendant committed, rather than applying one firearm enhancement sentence to his entire series of crimes. *State v. Espinosa*, 1988-NMSC-050, 107 N.M. 293, 756 P.2d 573.

**Notification to defendant.** — Under this section, the prosecution does not have to formally notify a defendant in a charging instrument of either firearm use or that the state may seek a firearm enhanced sentence. *State v. Badoni*, 2003-NMCA-009, 133 N.M. 257, 62 P.3d 348, cert. denied, 133 N.M. 126, 61 P.3d 835.

**Section requires separate finding of fact that firearm was used.** — Where the jury did not make a separate finding of fact as to use of a firearm, the enhanced sentence under this section was not proper. *State v. Duran*, 1977-NMCA-091, 91 N.M. 35, 570 P.2d 39, cert. denied, 91 N.M. 3, 569 P.2d 413, cert. denied, 435 U.S. 972, 98 S. Ct. 1615, 56 L. Ed. 2d 65 (1978).

**Objection to absence of separate finding not waived.** — Defendant did not waive his objection to the absence of a separate finding of fact by failing to request that the special interrogatory be submitted to the jury, as it was not defendant's obligation to see that his sentence was enhanced. *State v. Duran*, 1977-NMCA-091, 91 N.M. 35, 570 P.2d 39, cert. denied, 91 N.M. 3, 569 P.2d 413, cert. denied, 435 U.S. 972, 98 S. Ct. 1615, 56 L. Ed. 2d 65 (1978).

**Use of firearm must be proved beyond reasonable doubt.** — Proof beyond a reasonable doubt is the traditional burden which our system of criminal justice deems essential, and the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged; this standard applies not only to factual determinations of guilt, but also to the factual determination that a firearm was used, because that fact is a predicate for enhancing defendant's sentence. *State v. Kendall*, 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *rev'd on other grounds*, *Kendall v. State*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

**Failure to instruct as to burden of proof.** — Where the burden of proof instruction, by its wording, was applied to a determination of guilt, no reference was made to use of a firearm, and after the guilty verdicts were returned, instructions were given submitting the use of a firearm issue to the jury without a burden of proof instruction, the jury was not instructed on the burden of proof concerning use of a firearm; however, defendant did not complain of the absence of an instruction, he acquiesced in submitting only use instructions after a guilty verdict was returned, the evidence was almost uncontradicted that a firearm was used as to each count, and, accordingly, there was no violation of federal due process because the jury was not instructed that the firearm use must be proved beyond a reasonable doubt. *State v. Kendall*, 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *rev'd on other grounds*, *Kendall v. State*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

**Prior conviction required.** — For there to be a second or subsequent felony within the terms of the statute, there must have been a conviction preceding the commission of the offense to which application of the statute is sought. *State v. Garcia*, 1978-NMSC-039, 91 N.M. 664, 579 P.2d 790.

**Proper to enhance sentences under both habitual offender and firearm enhancement provisions.** — It is not improper to enhance a sentence under the general habitual offender statute if it has already been enhanced under the firearm enhancement statute. *State v. Reaves*, 1982-NMCA-169, 99 N.M. 73, 653 P.2d 904.

**Failure to enhance felony sentences as required.** — Where the defendant was convicted of three counts, the trial court failed to follow the habitual offender statute when it enhanced defendant's total sentence by one year, because the habitual offender statute required the court to enhance each of defendant's current felony sentences by one year. *State v. Bachicha*, 1991-NMCA-014, 111 N.M. 601, 808 P.2d 51, cert. denied, 111 N.M. 529, 807 P.2d 227.

III. SENTENCES.

**Service of a mandatory sentence under house arrest.** — The mandatory firearm enhancement of a one-year term of imprisonment set forth in Subsection A of Section 31-18-16 NMSA 1978 may be served under house arrest by an electronic monitor under the supervision of state or local law enforcement or correctional officers if the defendant is subject to being punished for a crime of escape for an unauthorized departure from the place of confinement or other non-compliance with the sentencing court's order. *State v. Woods*, 2010-NMCA-017, 148 N.M. 89, 230 P.3d 836, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

**Sentence to house arrest.** — Where defendant, who was a state park ranger, fatally shot the victim during a confrontation, and defendant pleaded guilty to voluntary manslaughter resulting in the death of a human being with a mandatory firearm enhancement, the district court had authority to sentence defendant to house arrest by electronic monitor with global positioning system capability and work release to satisfy the mandatory sentence of imprisonment for one year. *State v. Woods*, 2010-NMCA-017, 148 N.M. 89, 230 P.3d 836, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

**Sentences served concurrently unless trial court or legislature requires consecutive sentences.** — The trial court has discretion to require sentences to be served consecutively, but if this is not done, and there is no legislation covering the situation, the sentences are to be served concurrently. *State v. Mayberry*, 1982-NMCA-061, 97 N.M. 760, 643 P.2d 629.

**Section does not negate enhanced sentence for accessory.** — This section is worded in terms of a finding of fact "that a firearm was used in the commission" of the crime, but the statutory wording does not limit the enhanced sentence to situations where the defendant was the user of the firearm. Thus, the statute does not negate an enhanced sentence for an accessory when a firearm was used by the principal. *State v. Roque*, 1977-NMCA-094, 91 N.M. 7, 569 P.2d 417, cert. denied, 91 N.M. 4, 569 P.2d 414; *State v. Burdex*, 1983-NMCA-087, 100 N.M. 197, 668 P.2d 313, cert. denied, 100 N.M. 192, 668 P.2d 308.

**Concurrent or consecutive sentences.** — The trial court has authority to order that a sentence be served concurrently or consecutively, and this section made no change in this authority. *State v. Kendall*, 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *rev'd on other grounds*, *Kendall v. State*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

The trial court has the discretion to order that sentences for different offenses be served concurrently or consecutively. *State v. Lopez*, 1983-NMCA-045, 99 N.M. 612, 661 P.2d 890.

**New consecutive sentence following remand allowable where less than maximum possible penalty.** — A new sentence imposed by the trial court following remand does not constitute a punishment for the defendant having previously exercised his rights to appeal where the term of incarceration ordered upon remand is less than the maximum penalty which can be imposed, despite the fact part of the new sentence is to be served consecutively, rather than concurrently. *State v. Lopez*, 1983-NMCA-045, 99 N.M. 612, 661 P.2d 890.



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**Sentences cannot be served concurrently.** — An additional one-year sentence for the use of a firearm and an additional one-year sentence as an habitual offender cannot be served concurrently. *State v. Mayberry*, 1982-NMCA-061, 97 N.M. 760, 643 P.2d 629.

IV. SPECIFIC CASES.

**Use of noncapital felonies to enhance a capital felony.** — Where defendant was convicted of first degree murder, a capital felony, the district court erred in enhancing defendant's sentence for the use of a firearm in the commission of the offense, because the enhancement for the use of a firearm applied only to noncapital felonies. *State v. Serna*, 2013-NMSC-033.

**"Use" of gun properly included within scope of statute.** — The display of a gun in a menacing manner as a means of accomplishing a robbery or the employment of the gun to strike or "pistol whip" the victim is certainly "use" of the gun in the commonly accepted definition of that term. Because either such "use," i.e., the menacing display of or striking the victim with the gun, carries the ever-dangerous potential of a discharge of firearm, both such "uses" are properly included within the scope of the statute. *State v. Trujillo*, 1978-NMCA-041, 91 N.M. 641, 578 P.2d 342, cert. denied, 91 N.M. 751, 580 P.2d 972.

**Shotgun used as club.** — Defendant "used" the firearm within the meaning of the statute when he used the shotgun as a club in committing aggravated battery. *State v. Trujillo*, 1978-NMCA-041, 91 N.M. 641, 578 P.2d 342, cert. denied, 91 N.M. 751, 580 P.2d 972.

**Possession of firearm not "use" of firearm.** — Possession of a firearm during the commission of a felony does not constitute "use" of a firearm under this section since the defendant never pulled the firearm or in any way threatened to use it. *State v. Chouinard*, 1979-NMCA-145, 93 N.M. 634, 603 P.2d 744.

**No enhancement for charge of negligent use of firearm.** — Under the facts of this case, the state was required to prove that the defendant negligently used a firearm to commit a noncapital felony and this conduct resulted in the death of a human being. Use of a firearm is thus the same conduct required to enhance defendant's sentence under Subsection A. Because the state would not be required to prove any additional facts in order to have the defendant's sentence enhanced, the firearm enhancement statute is subsumed within the offense of involuntary manslaughter by negligent use of a firearm. *State v. Franklin*, 1993-NMCA-135, 116 N.M. 565, 865 P.2d 1209.

**Conspiracy not susceptible to firearm enforcement.** — Since conspiracy is an initiatory crime which involves no physical act other than communication, it is not conceivable how a firearm could be used in the commission of that offense. Accordingly, the crime of conspiracy is not susceptible to firearm enhancement under this section. *State v. Padilla*, 1994-NMCA-067, 118 N.M. 189, 879 P.2d 1208.

**Law reviews.** — For survey, "Evidence: Prior Crimes and Prior Bad Acts Evidence," see 6 N.M.L. Rev. 405 (1976).

For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 926.

Validity of statutes prohibiting or restricting parole, probation, or suspension of sentence in cases of violent crimes, 100 A.L.R.3d 431.

Propriety of using single prior felony conviction as basis for offense of possessing weapon by convicted felon and to enhance sentence, 37 A.L.R.4th 1168.

## 31-18-16.1. Repealed.

**Repeals.** — Laws 2003, ch. 384, § 6 repealed 31-18-16.1 NMSA 1978, effective July 1, 2003, relating to noncapital felonies against persons sixty years of age or older or handicapped persons; alteration of basic sentence; suspension and deferral limited. For provisions of former section, *see* the 2002 NMSA 1978 on *NMOneSource.com*.

## 31-18-17. Habitual offenders; alteration of basic sentence.

A. A person convicted of a noncapital felony in this state whether within the Criminal Code [30-1-1 NMSA 1978] or the Controlled Substances Act [30-31-1 NMSA 1978] or not who has incurred one prior felony conviction that was part of a separate transaction or occurrence or conditional discharge under Section 31-20-13 NMSA 1978 is a habitual offender and his basic sentence shall be increased by one year. The sentence imposed pursuant to this subsection shall not be suspended or deferred, unless the court makes a specific finding that the prior felony conviction and the instant felony conviction are both for nonviolent felony offenses and that justice will not be served by imposing a mandatory sentence of imprisonment and that there are substantial and compelling reasons, stated on the record, for departing from the sentence imposed pursuant to this subsection.

B. A person convicted of a noncapital felony in this state whether within the Criminal Code or the Controlled Substances Act or not who has incurred two prior felony convictions that were parts of separate transactions or occurrences or conditional discharge under Section 31-20-13 NMSA 1978 is a habitual offender and his basic sentence shall be increased by four years. The sentence imposed by this subsection shall not be suspended or deferred.

C. A person convicted of a noncapital felony in this state whether within the Criminal Code or the Controlled Substances Act or not who has incurred three or more prior felony convictions that



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were parts of separate transactions or occurrences or conditional discharge under Section 31-20-13 NMSA 1978 is a habitual offender and his basic sentence shall be increased by eight years. The sentence imposed by this subsection shall not be suspended or deferred.

D. As used in this section, "prior felony conviction" means:

(1) a conviction, when less than ten years have passed prior to the instant felony conviction since the person completed serving his sentence or period of probation or parole for the prior felony, whichever is later, for a prior felony committed within New Mexico whether within the Criminal Code or not, but not including a conviction for a felony pursuant to the provisions of Section 66-8-102 NMSA 1978; or

(2) a prior felony, when less than ten years have passed prior to the instant felony conviction since the person completed serving his sentence or period of probation or parole for the prior felony, whichever is later, for which the person was convicted other than an offense triable by court martial if:

(a) the conviction was rendered by a court of another state, the United States, a territory of the United States or the commonwealth of Puerto Rico;

(b) the offense was punishable, at the time of conviction, by death or a maximum term of imprisonment of more than one year; or

(c) the offense would have been classified as a felony in this state at the time of conviction.

E. As used in this section, "nonviolent felony offense" means application of force, threatened use of force or a deadly weapon was not used by the offender in the commission of the offense.

**History: 1953 Comp., § 40A-29-30, enacted by Laws 1977, ch. 216, § 6; 1979, ch. 158, § 1; 1983, ch. 127, § 1; 1993, ch. 77, § 9; 1993, ch. 283, § 1; 2002, ch. 7, § 1; 2003, ch. 90, § 1.**

**Cross references.** — For procedure and sentencing, *see* 31-18-20 NMSA 1978.

For time period within which habitual criminal offender proceeding must be commenced, *see* Rule 5-604 NMRA.

**The 2003 amendment,** effective March 28, 2003, inserted "but not including a conviction for a felony pursuant to the provisions of Section 66-8-102 NMSA 1978" near the end of Paragraph D(1).

**The 2002 amendment,** effective July 1, 2002, deleted former Subsection A defining "prior felony conviction" and redesignated the following subsections accordingly; updated the internal references in Subsections A, B, and C; added the last sentence in present Subsection A; and added Subsections D and E.

**The 1993 amendment,** effective June 18, 1993, inserted "or conditional discharge under Section 31-20-7 NMSA 1978" in Subsections B through D. This section was also amended by Laws 1993, ch. 77, § 9, effective July 1, 1993. The section was set out as amended by Laws 1993, ch. 283, § 1. *See* 12-1-8 NMSA 1978. Section 31-20-7 was compiled as 31-20-13 to avoid confusion with the repealed 31-20-7 NMSA 1978.

**ANNOTATIONS**

I. GENERAL CONSIDERATION.
II. PRIOR FELONY CONVICTION.
III. PROCEDURAL MATTERS.

I. GENERAL CONSIDERATION.

**Use of noncapital felonies to enhance a capital felony.** — Where defendant was convicted of first degree murder, a capital felony, the district court erred in enhancing defendant's sentence for being a habitual offender, because the enhancement for being a habitual offender applied only to noncapital felonies. *State v. Serna*, 2013-NMSC-033.

**Enhancement based on parole violation.** — Pursuant to defendant's plea agreement, defendant was convicted of nine property offenses and received basic sentences that ran consecutively, two of the sentences were enhanced based on two prior felony convictions; defendant agreed that the remaining sentences would be subject to habitual offender enhancement upon a violation of law or a violation of a condition of parole or probation; defendant violated the conditions of parole for one of the offenses that had been fully enhanced under the plea agreement; the district court found that defendant was an habitual offender and enhanced each of the seven sentences that had not been enhanced under the plea agreement; and there was nothing in the plea agreement that provided that a parole violation applied only to the offense underlying the parole, the district court properly enhanced defendant's sentences for the seven convictions that had not been enhanced under the plea agreement based on the parole violation. *State v. Triggs*, 2012-NMCA-068, 281 P.3d 1256.

**Section 31-18-17 NMSA 1978 does not apply for a first degree murder conviction.** *State v. Paiz*, 2011-NMSC-008, 149 N.M. 412, 249 P.3d 1235.

**Proof of prior conviction.** — Where defendant raised the issue at the time of sentencing and the plea agreement did not satisfy the elements for a prior felony conviction, the state must make its prima facie showing that a prior conviction meets the definition of "prior felony conviction" under Section 31-18-17 NMSA 1978. The state has the burden of proving identity, conviction, and timing. *State v. Simmons*, 2006-NMSC-044, 140 N.M. 311, 142 P.3d 899.

**Ten year limitation.** — The ten-year limitation in Section 31-18-17D NMSA 1978 does not apply to the robbery statute. *State v. Torres*, 2006-NMCA-106, 140 N.M. 230, 141 P.3d 1284, cert. denied, 2006-NMCERT-008.

**Conviction beyond ten-year limitation.** — Where defendant was convicted of first-degree murder and attempted first-degree murder, the trial court erred in enhancing defendant's sentence pursuant to the habitual offender statute, because more than ten years had elapsed between defendant's discharge on his prior felony conviction and the date of actual conviction of the current offense. *State v. Torres*, 2018-NMSC-013.

**Allocution.** — The right of the defendant to say why sentence should not be pronounced on the defendant before the trial judge pronounces sentence applies to habitual



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offender sentencing. *State v. Leyba*, 2009-NMCA-030, 145 N.M. 712, 204 P.3d 37, cert. denied, 2009-NMCERT-002, 145 N.M. 704, 204 P.3d 29.

**The controlling date for calculating the ten-year period from which prior convictions can be used** to enhance the defendant's sentence is the date of the defendant's current felony conviction for which the sentence is being imposed. *State v. Tave*, 2007-NMCA-059, 141 N.M. 571, 158 P.3d 1014, cert. denied, 2007-NMCERT-005, 141 N.M. 762, 161 P.3d 259.

**Constitutional provision inapplicable.** — Because the Habitual Offender Act was not repealed, N.M. Const., art. IV, § 33, does not apply to the 2002 amendment to this section or to the interpretation of the amendment through 12-2A-16 NMSA 1978. *State v. Shay*, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. quashed, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

**Application of 2002 amendment.** — The date a sentence is imposed is the appropriate date to determine whether the 2002 amendment to this section applies to a given case. *State v. Shay*, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. quashed, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

The 2002 amendment to this section does not apply to defendant's sentence for a probation violation when the original sentence was imposed prior to the amendment's effective date under a plea agreement. *State v. Ortega*, 2004-NMCA-080, 135 N.M. 737, 93 P.3d 758, cert. denied, 2004-NMCERT-006, 135 N.M. 787, 93 P.3d 1292.

Where the district court accepted a plea agreement and entered sentence prior to July 1, 2002, and the sentence included a suspended sentence and probation, but after a probation violation, the district court ordered the basic sentence to be served as well as a habitual offender enhancement for a prior felony conviction that would not have been included for enhancement purposes under the 2002 amendment, because the district court had imposed sentence prior to July 1, 2002, based on the plea agreement, it properly applied this section. *State v. Ortega*, 2004-NMCA-080, 135 N.M. 737, 93 P.3d 758, cert. denied, 2004-NMCERT-006, 135 N.M. 787, 93 P.3d 1292.

**Effect of 2002 amendment constitutionally precluded.** — N.M. Const., art. IV, § 34 precludes the effect of the 2002 amendment to the habitual offender statute, when a supplemental criminal information is filed before, and defendant is sentenced after, the July 1, 2002 effective date of the amendment. *State v. Stanford*, 2004-NMCA-071, 136 N.M. 14, 94 P.3d 14.

**New rule applied retroactively disqualified prior burglary conviction from being used to enhance sentence.** — Where defendant was charged and convicted of felony burglary in 2010, and where, in 2015, defendant was again charged and convicted of numerous offenses, and where the state sought to enhance defendant's 2015 sentence pursuant to the Habitual Offender Act, § 31-18-17 NMSA 1978, relying on defendant's 2010 felony conviction, and where defendant claimed that his 2010 burglary conviction should not be used to enhance his 2015 sentence, based on the New Mexico supreme court's decision in *State v. Office of Public Defender ex rel. Muqqddin*, 2012-NMSC-029, which held for the first time that the act of penetrating a vehicle's gas tank and removing gas therefrom did not constitute burglary under § 30-16-3 NMSA 1978, the district court erred in determining defendant to be a habitual offender as alleged by the State and enhancing defendant's sentence in the 2015 case, because *Muqqddin* announced a new rule that altered the range of conduct or the class of persons that the law punishes, and should therefore be applied retroactively. *State v. Wood*, 2022-NMCA-009.

**It is solely within province of legislature to establish penalties for criminal behavior.** *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22, cert. denied, 98 N.M. 478, 649 P.2d 1391.

**Application to Controlled Substances Act.** — In 1983 the habitual offender statute was amended to include persons convicted of narcotics offenses, overruling that part of *State v. Lujan*, 1966-NMSC-051, 76 N.M. 111, 412 P.2d 405, which held that the Habitual Offender Act did not apply to persons convicted under the Controlled Substances Act (Section 30-31-1 NMSA 1978 et seq.). *Minner v. Kerby*, 30 F.3d 1311 (10th Cir. 1994).

Although the habitual offender statute applies to a prior felony conviction under the Controlled Substances Act, Sections 30-31-1 NMSA 1978 et seq., it does not apply if there is a conditional discharge under Section 30-31-28 NMSA 1978. *State v. Fairres*, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

**The Habitual Offender Act is applicable to convictions of felony battery against a household member.** — Where defendant pleaded guilty to battery against a household member after battering the mother of his child, and where this was defendant's third conviction of battery against a household member, and where the district court enhanced defendant's conviction to a fourth degree felony under § 30-3-17(A) NMSA 1978, and where defendant had previously been convicted of a separate felony, the district court enhanced defendant's sentence by one year under the Habitual Offender Act, § 31-18-17 NMSA 1978, the district court did not err in applying the Habitual Offender Act, because the plain language of § 30-3-17(A) NMSA 1978 and § 31-18-17 NMSA 1978 does not preclude their simultaneous application. *State v. Barela*, 2021-NMSC-001, *aff'g* 2019-NMCA-005, 458 P.3d 501.

**Application to felony battery against a household member.** — Where defendant, a three-time domestic violence offender, pleaded no contest to, and was convicted of, felony battery against a household member pursuant to 30-3-17 NMSA 1978, the district court did not err in enhancing defendant's sentence by one year, pursuant to 31-18-17(A) NMSA 1978, based on a prior conviction for false imprisonment, because contrary to defendant's argument, the felony battery against a household member statute is not self-enhancing, and based on the plain language of the statutes at issue, the one-year habitual offender enhancement of defendant's fourth degree felony battery on a household member sentence was proper as a matter of law. *State v. Barela*, 2019-NMCA-005, cert. granted.

**Intent of habitual criminal provisions.** — Object of habitual offender statute is to inhibit repetition of criminal acts by individuals against the peace and dignity of the state. It is designed to protect society against habitual offenders. *State v. Baldonado*, 1968-NMCA-025, 79 N.M. 175, 441 P.2d 215.

It is inherent in the habitual criminal statutes that, after punishment is imposed for the commission of a crime, the increased penalty is held in terrorem over the criminal for the purpose of effecting his reformation and preventing further and subsequent offenses by him, so that for the purpose of this section, each felony must have been committed after conviction for a preceding felony. *State v. Montoya*, 1979-NMCA-044, 92 N.M. 734, 594 P.2d 1190, *aff'd*, 1980-NMSC-093, 94 N.M. 704, 616 P.2d 417; *State v. Linam*, 1979-NMSC-004, 93 N.M. 307, 600 P.2d 253; *State v. Rogers*, 1979-NMSC-085, 93 N.M. 519, 602 P.2d 616.

The intent of habitual offender laws is to provide an increased penalty in order to deter commission of a subsequent offense. It is the opportunity to reform under threat of a more severe penalty which serves to deter. *State v. Linam*, 1979-NMSC-004, 93 N.M. 307, 600 P.2d 253, cert. denied, 444 U.S. 846, 100 S. Ct. 91, 62 L. Ed. 2d 59 (1979).

**This section is not an ex post facto law** since it is procedural in nature. It does not punish criminals



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for earlier offenses, but merely increases the penalty for the repetition of criminal conduct. *State v. Oglesby*, 1981-NMCA-070, 96 N.M. 352, 630 P.2d 304.

**Enhanced punishment not prohibited as double jeopardy.** — Since defendant's first conviction, standing alone, was not the cause of the enhanced sentence of which he complained, defendant's enhanced punishment was not prohibited as double jeopardy. *State v. Gonzales*, 1972-NMCA-130, 84 N.M. 275, 502 P.2d 300, cert. denied, 84 N.M. 271, 502 P.2d 296.

The contention that the habitual offender statute violates double jeopardy is without merit. *State v. Olivares*, 1980-NMCA-165, 95 N.M. 222, 620 P.2d 380.

Because the habitual offender proceeding is a sentencing procedure and not a trial of an offense, there is no double jeopardy. *State v. James*, 1980-NMSC-082, 94 N.M. 604, 614 P.2d 16.

Since the law in New Mexico is that an habitual proceeding only involves sentencing and not the trial of any crime, double jeopardy does not attach to proceedings under this section. *State v. Garcia*, 1980-NMSC-132, 95 N.M. 246, 620 P.2d 1271.

The imposition of an enhanced sentence after defendant has already begun serving his sentence on the underlying felony conviction is not violative of constitutional double jeopardy provisions. *State v. Oglesby*, 1981-NMCA-070, 96 N.M. 352, 630 P.2d 304.

Habitual offender enhancement of an escape conviction does not constitute double jeopardy. *State v. Najar*, 1994-NMCA-098, 118 N.M. 230, 880 P.2d 327, cert. denied, 118 N.M. 90, 879 P.2d 91.

New Mexico's habitual offender statute does not multiply punishments for a prior crime, but simply increases the punishment for a new crime. Because sentences enhanced under habitual offender statutes are not punishment for the prior offense, they do not normally raise double jeopardy issues. *Yparrea v. Dorsey*, 64 F.3d 577 (10th Cir. 1995).

When a defendant with two prior felonies was convicted of a third felony and, under a plea agreement, was sentenced as a second offender subject to resentencing as a third offender if he violated the terms of his probation, the enhancement of his sentence as a third offender when he was resentenced following his violation of probation did not violate double jeopardy. *State v. Freed*, 1996-NMCA-044, 121 N.M. 562, 915 P.2d 325, cert. denied, 121 N.M. 644, 916 P.2d 844.

Defendant, a three-time felony offender, had no reasonable expectation of finality in a three-year probationary sentence for a larceny conviction; therefore, it was not a violation of his double jeopardy rights for the state to seek a subsequent conviction of defendant, during the probationary period, under the habitual offender laws. *State v. Villalobos*, 1998-NMSC-036, 126 N.M. 255, 968 P.2d 766.

**No reasonable expectation of finality.** — Where defendant pleaded no contest to aggravated battery causing great bodily harm and aggravated assault with a deadly weapon, receiving a three-year sentence on the battery charge and a one and one-half-year sentence on the assault charge, and where the trial judge suspended three years of defendant's total sentence and ordered defendant to be placed on supervised probation for three years following release from custody, and where defendant, after being released from prison, violated the conditions of his probation, the district court did not err in enhancing defendant's aggravated battery conviction, because defendant did not have a reasonable expectation of finality as to the aggravated battery charge, because defendant would have expected to serve a three-year period of probation and be subject to additional enhancement of the sentence imposed for the aggravated battery during the entire period of probation. *State v. Yazzie*, 2018-NMCA-001, cert. denied.

**Habitual offender enhancement statute prior to 2002.** — Where defendant pleaded no contest and was sentenced for aggravated battery and aggravated assault prior to July 1, 2002, and where, under the judgment and sentence, an eight year habitual offender enhancement was held in abeyance only to be imposed upon a subsequent violation of probation, and where defendant violated his probation in 2013, the district court had continuing jurisdiction to impose the enhancement under the habitual offender statute when defendant violated probation in 2013 for prior convictions occurring in 1992 and earlier, because prior to 2002, the imposition of the habitual offender statute was mandatory in all cases in which there was a prior felony conviction, regardless of the date of the prior conviction. *State v. Yazzie*, 2018-NMCA-001, cert. denied.

**Insufficient evidence is not a bar to retrial of a defendant's habitual offender status.** — Following defendant's conviction for battery on a peace officer, where the state filed a supplemental criminal information alleging that defendant was a habitual offender and seeking enhancement of defendant's sentence, and where the state failed to introduce a certified copy of his fingerprint card from the current case, leading the district court to rule that the state's evidence was not sufficient to prove that defendant was the person convicted of the prior felonies as alleged in the supplemental criminal information and to deny the state's request for sentencing enhancement, but where the district court granted the state's request for a second sentencing hearing to address defendant's habitual offender status, during which the district court found that defendant was a habitual offender, the district court did not err in allowing the retrial of defendant's habitual offender status, because sentencing decisions favorable to the defendant cannot be analogized to an acquittal, and insufficient evidence is never a bar to the retrial of a defendant's status as a habitual offender. *State v. Salas*, 2017-NMCA-057, cert. denied.

**To enhance a defendant's sentence, due process is required.** — In order to subject a defendant to a statutory sentencing enhancement, due process requires that the defendant be given notice, that enhancement of sentence is sought by a pleading filed by the state, and an opportunity to be heard before an increased penalty can be imposed. *State v. Salas*, 2017-NMCA-057, cert. denied.

**Defendant was not denied due process in his sentence enhancement.** — Where defendant was convicted of battery on a peace officer and where the State filed a supplemental criminal information alleging that defendant was a habitual offender subject to sentence enhancement, requested a special setting for the purpose of conducting a habitual offender hearing, certifying service to defense counsel the same day, and where defendant's motion opposing retrial of his habitual offender status indicated that defendant had actual notice of a subsequent sentencing hearing, defendant was not deprived of an opportunity to be heard, and the state's procedural steps constituted adequate notice. *State v. Salas*, 2017-NMCA-057, cert. denied.

**Multiple uses of prior convictions do not violate double jeopardy.** — Where defendant's prior felony convictions were used to establish defendant's status as a habitual offender for sentencing for attempted murder and to serve as the predicate felony for defendant's conviction of felon in possession of a firearm, the double jeopardy clause was not violated. *State v. Tafoya*, 2012-NMSC-030, 285 P.3d 604.

**Delay in filing charge not, in itself, prejudicial.** — A due process issue based on a delay in filing a charge involves prejudice that deprives the defendant of a fair trial on the delayed charge. The delay, in itself, does not establish prejudice. *State v. Mayberry*, 1982-NMCA-061, 97 N.M. 760, 643 P.2d 629.



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**Supplemental habitual offender charge not dismissed where original sentence not completely served.** — Where, at the time a supplemental information is filed, the defendant has not completed serving his original sentence, the filing delay, in relation to time served, does not require a dismissal of an habitual offender charge. *State v. Mayberry*, 1982-NMCA-061, 97 N.M. 760, 643 P.2d 629.

**No dismissal for delay even where prosecutor originally knew of prior conviction.** — Where, before the defendant is convicted for a felony, the prosecutor knows of a prior felony conviction, this knowledge does not require the dismissal of a latter habitual offender charge because of a filing delay. *State v. Mayberry*, 1982-NMCA-061, 97 N.M. 760, 643 P.2d 629.

**Delay in enhancement sentencing constitutional.** — Even if the habitual offender proceeding in defendant's case was part of his burglary prosecution, delay of his enhancement sentencing for at least 15 months after he pleaded guilty did not violate his right to a speedy trial. *Perez v. Sullivan*, 793 F.2d 249 (10th Cir.), cert. denied, 479 U.S. 936, 107 S. Ct. 413, 93 L. Ed. 2d 364 (1986).

**Habitual criminal information does not charge a new offense.** — Defendant was not denied due process where, at defendant's sentencing for robbery, the state filed a supplemental habitual offender information charging defendant with a conviction for a petty larceny offense that had occurred more than three years prior to the sentencing for the robbery conviction. *Martinez v. Romero*, 626 F.2d 807 (10th Cir. 1980) (Decided under former law).

**Prosecutorial discretion.** — A certain measure of discretion is inevitable in the performance of the prosecutorial function and the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. *Martinez v. Romero*, 626 F.2d 807 (10th Cir. 1980).

**When sentence completely served, enhancement improper.** — Double jeopardy considerations preclude the enhancement of a defendant's sentence after the defendant has completely served that underlying sentence, no matter when the habitual proceedings were initiated. *State v. Gaddy*, 1990-NMCA-055, 110 N.M. 120, 792 P.2d 1163.

**Jurisdiction to enhance sentence prior to expiration of parole.** — A parole term is part of a sentence for purposes of a court's sentencing authority; thus, since the defendant had completely served an underlying sentence as of the date of an underlying enhancement proceeding but was still subject to a mandatory one-year parole, the trial court had jurisdiction to enhance his sentence as an habitual offender. *State v. Roybal*, 1995-NMCA-097, 120 N.M. 507, 903 P.2d 249, cert. denied, 120 N.M. 498, 903 P.2d 240.

**Not cruel and unusual punishment.** — Although the New Mexico supreme court has held that habitual criminality is a status rather than an offense, the defendant was not convicted of being an habitual criminal but of the commission of a criminal act; he was, therefore, appropriately punished for the commission of that crime by a substituted enhanced sentence as prescribed by statute, and his punishment was not cruel and unusual punishment. *State v. Gonzales*, 1972-NMCA-130, 84 N.M. 275, 502 P.2d 300, cert. denied, 84 N.M. 271, 502 P.2d 296.

**Specific term may be cruel and unusual punishment.** — In extremely limited circumstances, a trial court may determine that a mandatory prison term is constitutionally impermissible under U.S. Const., amend. VIII, and N.M. Const., art. II, § 13. *State v. Arrington*, 1993-NMCA-055, 115 N.M. 559, 855 P.2d 133.

Mandatory incarceration which would have been life-threatening to defendant because her serious medical needs would not have been handled adequately under customary prison practices and because there was no showing that the prison would make special provisions for defendant would have constituted cruel and unusual punishment, allowing the trial court to order defendant to serve the unsuspended portion of her sentence in the custody of her parents. *State v. Arrington*, 1993-NMCA-055, 115 N.M. 559, 855 P.2d 133.

**Uneven enforcement in actual practice does not make statute unconstitutional.** — That there may, in actual practice, be uneven enforcement of the habitual offender statute does not make the law unconstitutional. *State v. Sedillo*, 1971-NMCA-003, 82 N.M. 287, 480 P.2d 401.

The allegation of a "consistent and invariable administrative practice," in not enforcing the law with respect to habitual offenders uniformly, does not bring a case within the purview of the equal protection clause of the constitution. *State v. Baldonado*, 1968-NMCA-025, 79 N.M. 175, 441 P.2d 215.

**Construction of the phrase "substantial and compelling".** — A district court's justification for permitting a defendant to avoid an otherwise mandatory sentence of imprisonment must be weighty, and not ethereal, in order to be "substantial," and whether reasons are "compelling" depend upon the overall facts of a given case, including the particular criminal behavior the prosecution is designed to address, the history of a given defendant's efforts to comply with what is required of him or her in a law-abiding society, and the court's considerations of the factors in the defendant's life that lend themselves to a possibility of successful rehabilitation in a non-incarcerative environment. *State v. Lindsey*, 2017-NMCA-048.

**Court did not abuse its discretion in determining that there were substantial and compelling reasons for suspending defendant's sentence.** — Where defendant pled no contest to residential burglary and larceny, and where the district court imposed a five-year sentence of imprisonment, which included two mandatory one-year habitual offender enhancements, the district court did not abuse its discretion in determining that there were substantial and compelling reasons to suspend the mandatory habitual offender portion of defendant's sentence where evidence was presented that defendant had obtained steady employment, which would enable him to pay restitution according to the terms of his prior probation, that defendant was doing well on probation, as reported by his probation officer, and that defendant had demonstrated the existence of a supportive family and his commitment to it. *State v. Lindsey*, 2017-NMCA-048.

**Terms of habitual offender statute are mandatory,** and a district attorney or judge, or both, may not nullify the statutes by ignoring them. *State v. McCraw*, 1955-NMSC-050, 59 N.M. 348, 284 P.2d 670.

**Mandatory provisions.** — The provisions of the Habitual Offender Act are mandatory. *State v. Davis*, 1986-NMSC-031, 104 N.M. 229, 719 P.2d 807.

**Act must be interpreted narrowly.** — The habitual offender statute is highly penal in nature, and its application must be interpreted narrowly. *State v. Lujan*, 1966-NMSC-051, 76 N.M. 111, 412 P.2d 405.

**Habitual criminality is a status,** not an offense. *State v. Cruz*, 1971-NMCA-047, 82 N.M. 522, 484 P.2d 364, cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

**This section creates no new offense,** but merely provides a proceeding by which to determine the penalty to be imposed on one previously convicted in New Mexico of a felony. *Lott v. Cox*, 1966-NMSC-038, 76 N.M. 76, 412 P.2d 249.

**Increase in penalty not creation of new offense.** — The habitual offender statute does not make the conviction of prior felonies the subject of punishment, as such, as a separate offense. It only provides that proof of the conviction of prior felonies increases the penalty to be imposed upon conviction of a subsequent felony in New Mexico. The amount by which such penalty is required to be



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increased depends upon the number of prior convictions. *French v. Cox*, 1964-NMSC-236, 74 N.M. 593, 396 P.2d 423.

The filing of habitual criminal information does not create a new criminal case nor constitute a separate offense. Proof of the conviction of prior felonies merely increases the penalty to be imposed upon conviction of a subsequent felony. *Martinez v. Romero*, 626 F.2d 807 (10th Cir.), cert. denied, 449 U.S. 1019, 101 S. Ct. 585, 66 L. Ed. 2d 481 (1980).

**Filing of habitual criminal information does not create new criminal case** nor constitute a separate offense. Proof of the conviction of prior felonies merely increases the penalty to be imposed upon conviction of a subsequent felony in New Mexico. *State v. Knight*, 1965-NMSC-058, 75 N.M. 197, 402 P.2d 380.

**Federal felony convictions arising from the same transaction.** — Where defendant was convicted of possession of a firearm by a felon in violation of Section 31-18-17 NMSA 1978; defendant had a prior 2005 state felony conviction; and defendant had been convicted in 1991 of possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841, and carrying a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1), the district court did not err when it used one federal felony conviction to form the predicate felony for the felon in possession charge and the other federal conviction and the 2005 state felony conviction to form the basis for enhancement because the federal felony convictions were separate and distinct felony offenses. *State v. May*, 2010-NMCA-071, 148 N.M. 854, 242 P.3d 421, cert. denied, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

II. PRIOR FELONY CONVICTION.

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**Sufficient evidence of prior conviction.** — Where a Texas judgment and sentence report had no birth date, no social security number, no identifying information about the convicted person and stated only that the convicted person's name was "Jesse Charles Clements", as opposed to "Jesse Clements", as defendant was know in defendant's New Mexico convictions, the report was insufficient to identify defendant as the convicted person. *State v. Clements*, 2009-NMCA-085, 146 N.M. 745, 215 P.3d 54, cert. denied, 2009-NMCERT-007, 147 N.M. 362, 223 P.3d 359.

**Sufficient evidence to prove defendant was the person convicted of prior felonies.** — Following defendant's conviction for battery on a peace officer, where the district court admitted certified copies of three fingerprint cards, which corresponded to arrests in 2004, 2008, and 2011 and which contained defendant's name, birth date, and social security number, and where the district court also admitted certified copies of judgment and sentencing documents, which indicated that defendant had qualifying convictions, and took judicial notice of a defendant's current conviction, the admitted evidence was sufficient to support a finding that defendant was a habitual offender. *State v. Salas*, 2017-NMCA-057, cert. denied.

**Minor discrepancies in documents used to prove prior conviction.** — Minor discrepancies in copies of the judgment and sentence used to prove an earlier felony conviction do not require a finding of insufficiency of the evidence when the fact of the earlier conviction is not otherwise contested. *State v. Bailey*, 2008-NMCA-084, 144 N.M. 279, 186 P.3d 908, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

**A prior out-of-state misdemeanor conviction may be used** for the purposes of sentence enhancement when the conviction was either punishable by a maximum of more than one year imprisonment in the state in which it was committed or classified as a felony in New Mexico at the time of conviction. *State v. Young*, 2007-NMSC-058, 143 N.M. 1, 172 P.3d 138.

**Prior out-of-state misdemeanor convictions can be used** to enhance a sentence if the offense was either punishable by a maximum of more than one year imprisonment in the state in which it was committed or would have been classified as a felony in New Mexico at the time of conviction. *State v. Moya*, 2007-NMSC-027, 141 N.M. 817, 161 P.3d 862, *overruling State v. Moya*, 2006-NMCA-103, 140 N.M. 275, 142 P.3d 43.

**Mistaken identity.** — Where the district court inadvertently relied, in part, on the criminal record of defendant's brother to enhance defendant's sentence, the enhancement of defendant's sentence was not supported by substantial evidence. *State v. Contreras*, 2007-NMCA-045, 141 N.M. 434, 156 P.3d 725, cert. quashed, 2007-NMCERT-011, 143 N.MN. 157, 173 P.3d 764.

**Consecutive sentences.** — Where defendant was sentenced to serve consecutive sentences on two underlying felonies, defendant has a reasonable expectation of finality in the sentence imposed for each underlying felony and when defendant completed serving his sentence on the first felony, that sentence was not subject to being enhanced, although defendant remained incarcerated on the second felony. *State v. Lovato*, 2007-NMCA-049, 141 N.M. 508, 157 P.3d 73, cert. denied, 2007-NMCERT-004, 141 N.M. 568, 158 P.3d 458.

**Plea agreement silent on enhancement.** — Where defendant's plea agreement was silent on the issue of habitual-offender proceedings and notwithstanding numerous opportunities to do so, defendant failed to object to being charged as a habitual offender, the evidence showed that defendant never had any expectation of finality in his original sentence that was imposed pursuant to the plea agreement and defendant's enhanced sentence did not violate defendant's double jeopardy rights. *State v. Trujillo*, 2007-NMSC-017, 141 N.M. 451, 157 P.3d 16.

**Discretion of district court.** — In 2002, the legislature amended this section to allow the district court some discretion in imposing the habitual enhancement to cases in which there is one prior felony conviction. *State v. Shay*, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. quashed, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

**Legislature limited definition of "prior felony conviction"** in its 2003 amendment to the habitual offender statute. *State v. Shay*, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. quashed, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

Applying 12-2A-16C NMSA 1978 to the 2002 amendment to this section, the 2002 amendment effectively reduces the potential enhanced penalties for violating felony statutes by narrowing the definition of "prior felony conviction". *State v. Shay*, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. quashed, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

**Prior conviction must be separate transaction.** — Each prior felony conviction must be part of a "separate transaction or occurrence", *State v. Peppers*,



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1990-NMCA-057, 110 N.M. 393, 796 P.2d 614, 110 N.M. 260, 794 P.2d 734.

**Meaning of "convicted".** — "Convicted", as ordinarily used in legal phraseology as indicating a particular phase of a criminal prosecution, includes the establishing of guilt whether by accused's admission in open court by plea of guilty to the charges presented, or by a verdict or finding of a court or jury. *State v. Larranaga*, 1967-NMSC-047, 77 N.M. 528, 424 P.2d 804.

A plea of guilty constituted a legal conviction within the meaning of this section, even though the plea had not been reduced to a written judgment and sentence at the time the subsequent offense was committed. *State v. Castillo*, 1987-NMCA-036, 105 N.M. 623, 735 P.2d 540, cert. denied, 105 N.M. 618, 735 P.2d 535.

If defendant pleads guilty in criminal proceeding in another state where no adjudication of guilt entered, and if the courts of that state did not consider such an action to be a "conviction", then that proceeding may not be considered a conviction for the purposes of the Habitual Offender Act. *State v. Burk*, 1984-NMCA-043, 101 N.M. 263, 680 P.2d 980.

**"Conviction" does not include imposition of sentence.** — The "conviction" to which the habitual offender statute refers is simply a finding of guilt and does not include the imposition of a sentence. *State v. Larranaga*, 1967-NMSC-047, 77 N.M. 528, 424 P.2d 804.

The habitual offender statute did not make imposition of sentence upon the previous convictions a prerequisite to the enhancement of punishment upon the fourth conviction. The conviction is the finding of guilt. Sentence is not an element of the conviction but rather a declaration of its consequences. *State v. Larranaga*, 1967-NMSC-047, 77 N.M. 528, 424 P.2d 804.

**Deferred sentence for previous conviction of no consequence.** — Habitual offender proceedings are based by statute on prior felony convictions. Since it is not necessary to impose sentence in order to constitute a violation, a deferred sentence for a previous conviction is of no consequence. *Padilla v. State*, 1977-NMSC-063, 90 N.M. 664, 568 P.2d 190.

**A criminal sentence that was originally deferred** may be enhanced in a later habitual offender proceeding. *State v. Davis*, 1986-NMSC-031, 104 N.M. 229, 719 P.2d 807.

**Conviction, not sentence, is polestar.** — For purposes of enhancement "conviction" is the polestar, not the sentence imposed. *State v. Davis*, 1986-NMSC-031, 104 N.M. 229, 719 P.2d 807.

**Section contemplates valid convictions** which have not been vacated. *State v. Moser*, 1967-NMSC-163, 78 N.M. 212, 430 P.2d 106, *overruled on other grounds by State v. Orona*, 1982-NMSC-002, 97 N.M. 232, 638 P.2d 1077.

**Probation violation is not a crime** and does not trigger an enhancement as a habitual offender. *State v. Ortega*, 2004-NMCA-080, 135 N.M. 737, 93 P.3d 758, cert. denied, 2004-NMCERT-006, 135 N.M. 788, 93 P.3d 1292.

**Question of constitutionality of prior trial and conviction may be raised.** — Question of the adequacy of representation so as to meet the requirements of due process in a prior trial and conviction in another state may be raised as an issue under the habitual criminal statute. *State v. Dalrymple*, 1965-NMSC-124, 75 N.M. 514, 407 P.2d 356.

**Uncounseled convictions.** — A prior uncounseled misdemeanor conviction can be used to enhance a subsequent conviction if the prior conviction did not result in a sentence of imprisonment or, if it did result in a sentence of imprisonment, the right to counsel had been validly waived. *State v. Hosteen*, 1997-NMSC-063, 124 N.M. 402, 951 P.2d 619.

Defendant's assertion that two prior felony convictions could not be used against him in prosecution under habitual criminal statute because they were constitutionally defective due to the absence of counsel at his preliminary examination in both convictions was without merit where the record showed that in each of the two prior felony convictions defendant entered pleas of guilty, that in each of the guilty pleas defendant had the advice of counsel, and no claim was made that the pleas were involuntary, defendant's claimed defect was waived when he pleaded guilty in the two prior felony proceedings. *State v. Lopez*, 1973-NMCA-014, 84 N.M. 600, 506 P.2d 344.

**Prior conviction, not prior sentence, is dispositive for repeat offender status.** — Where defendant was convicted of drug charges in New Mexico; the New Mexico court deferred defendant's sentence for a two-year probationary period; the deferred sentence was a final judgment subject to appeal; and after defendant successfully completed the probation, defendant was entitled to have the New Mexico charges dismissed, the deferred sentence was a prior conviction for purposes of sentence enhancement. *United States v. Meraz*, 998 F.2d 182 (10th Cir. 1993).

**Collateral attack on prior conviction.** — A defendant may collaterally attack the validity of a prior conviction where the state seeks to utilize the prior conviction as a basis for sentence enhancement under this section. *State v. Valdez*, 1988-NMCA-074, 107 N.M. 642, 763 P.2d 76.

**Double use of prior felony.** — Where the defendants were convicted of the charge of felon in possession of a firearm contrary to Section 30-7-16 NMSA 1978, and the defendants were also sentenced as habitual offenders in accordance with this section, the trial court erred in sentencing the defendants as habitual offenders when the same prior felony convictions were relied upon to convict the defendants of the underlying offense of felon in possession of a firearm. *State v. Haddenham*, 1990-NMCA-048, 110 N.M. 149, 793 P.2d 279, cert. denied, 110 N.M. 183, 793 P.2d 865.

If a prior felony conviction is already taken into account in determining the punishment for the specific crime, the legislature did not intend that prior felony conviction also to be used in establishing that defendant was a habitual offender. *State v. Peppers*, 1990-NMCA-057, 110 N.M. 393, 796 P.2d 614, cert. denied, 110 N.M. 260, 794 P.2d 734.

Where defendant's prior convictions for cocaine trafficking and possession of marijuana with intent to distribute resulted from a single arrest, the court did not make an impermissible "double use" of the prior convictions by utilizing the prior cocaine trafficking conviction to enhance the defendant's present cocaine trafficking conviction to a first degree felony pursuant to Section 30-31-20B(2) NMSA 1978, and then using the other prior conviction for possession of marijuana to enhance defendant's sentence under the general habitual-offender statute, Section 31-18-17C NMSA 1978. *State v. Hubbard*, 1992-NMCA-014, 113 N.M. 538, 828 P.2d 971, cert. denied, 113 N.M. 352, 826 P.2d 573.

Where a trial court convicted defendant of one count of a second offense of trafficking a controlled substance and one count of conspiracy to commit that offense, and in sentencing defendant, the trial court used defendant's prior convictions twice to increase the punishment, the prior trafficking conviction could not be used to set defendant's underlying conspiracy to commit trafficking conviction as a second degree felony, and then be used to enhance defendant's sentence under the habitual offender statute. *State v. Lacey*, 2002-NMCA-032, 131 N.M. 684, 41 P.3d 952, cert. denied, 131 N.M. 737, 42 P.3d 842.

**Proper reading of Subsection D(2).** — Under the definition of "prior felony conviction", a prior felony conviction requires conformance with the provisions of Subsection A(2)(a) and (b) (now D(2)(a) and (b)) or conformance with Subsection A(2)(a) and (c) (now D(2)(a) and (c)) and should be read as though the word "and" was



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inserted between subparagraphs (a) and (b) of Subsection A(2) (now D(2)). *State v. Harris*, 1984-NMCA-003, 101 N.M. 12, 677 P.2d 625.

**Habitual criminal status not conviction, but enhanced sentence.** — The habitual criminal status is not a conviction of a distinct crime. Indeed, a conviction on the merits has occurred and the crime convicted of is unrelated to the habitual criminal provisions, which produce not a judgment of guilt of the offense, but rather an enhanced sentence. *Linam v. Griffin*, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1207, 75 L. Ed. 2d 447 (1983).

A habitual offender proceeding is a sentencing procedure and not a trial of an offense. *Perez v. Sullivan*, 793 F.2d 249 (10th Cir.), cert. denied, 479 U.S. 936, 107 S. Ct. 413, 93 L. Ed. 2d 364 (1986).

**Habitual offender sentence of five-time shoplifting felon proper.** — A sentence of eight years' imprisonment, imposed under the habitual offender statute against a defendant convicted for the fifth time on felony shoplifting charges, was not so disproportionate as to require reversal as cruel and unusual punishment under the New Mexico Constitution, notwithstanding facts that three of the convictions were over 15 years old, and the latest charge was only $3 over the minimum threshold for felony shoplifting. *State v. Rueda*, 1999-NMCA-033, 126 N.M. 738, 975 P.2d 351, cert. denied, 127 N.M. 391, 981 P.2d 1209.

**Felony must be committed subsequent to prior conviction.** — The felony for which a defendant is being punished must be one committed subsequent to the dates of the convictions relied on to effect an increase of the penalty. *State v. Linam*, 1979-NMSC-004, 93 N.M. 307, 600 P.2d 253, cert. denied, 444 U.S. 846, 100 S. Ct. 91, 62 L. Ed. 2d 59 (1979).

The repeal of former Section 31-18-5 NMSA 1978 and the enactment of this section do not affect the holding in *State v. Linam*, 1979-NMSC-004, 93 N.M. 307, 600 P.2d 253, cert. denied, 444 U.S. 846, 100 S. Ct. 91, 62 L. Ed. 2d 59, that, for purposes of an enhanced sentence, the felony for which a defendant is being sentenced must have been committed after conviction for a preceding felony. *Hernandez v. State*, 1981-NMSC-091, 96 N.M. 585, 633 P.2d 693.

**Remand following appeal allowed, to obtain evidence on date of prior crime.** — The double jeopardy clause of the fifth amendment does not bar a remand following an appeal, directed at obtaining evidence as to the dates of the prior commission of crimes in order to satisfy the interpretation of the New Mexico habitual criminal statute that there be proof that each felony was committed after a conviction for the preceding felony. *Linam v. Griffin*, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1207, 75 L. Ed. 2d 447 (1983).

**Sentence for each of multiple current convictions to be enhanced.** — The reference to "a" felony in this section does not change the requirement that the sentence for each of multiple current felony convictions be enhanced. *State v. Harris*, 1984-NMCA-003, 101 N.M. 12, 677 P.2d 625.

**Basic sentence.** — In choosing the term "basic sentence" the legislature referred to the sentence to be enhanced. If a person with a prior felony conviction is convicted of multiple felonies, then there are several basic sentences. Thus, there may be multiple enhancements. *State v. Howard*, 1989-NMCA-029, 108 N.M. 560, 775 P.2d 762, cert. denied, 108 N.M. 433, 773 P.2d 1240.

**Supplemental recidivist information not duplicitous.** — A supplemental information which gave defendant notice that his three prior felony convictions would provide the basis for enhancing his sentence was not a joinder of offenses and, therefore, not void for duplicity. *State v. Harris*, 1984-NMCA-003, 101 N.M. 12, 677 P.2d 625.

**Sentences served concurrently unless trial court or legislature requires consecutive sentences.** — The trial court has discretion to require sentences to be served consecutively, but if this is not done, and there is no legislation covering the situation, the sentences are to be served concurrently. *State v. Mayberry*, 1982-NMCA-061, 97 N.M. 760, 643 P.2d 629.

**The district court has discretion to order that enhanced sentences for multiple offenses be served concurrently.** *State v. Triggs*, 2012-NMCA-068, 281 P.3d 1256.

**Enhanced sentences for multiple offenses may be served concurrently.** — Pursuant to defendant's plea agreement, defendant was convicted of nine property offenses and received basic sentences that ran consecutively, two of the sentences were enhanced based on two prior felony convictions; defendant agreed that the remaining sentences would be subject to habitual offender enhancement upon a violation of law or a violation of a condition of parole or probation; defendant violated the conditions of parole for one of the offenses that had been fully enhanced under the plea agreement; the district court found that defendant was an habitual offender and enhanced each of the seven sentences that had not been enhanced under the plea agreement; and there was nothing in the plea agreement that required the district court to run the enhancements consecutively, the district court had the discretion to order that the enhanced sentences be served concurrently. *State v. Triggs*, 2012-NMCA-068, 281 P.3d 1256.

**Sentences under multiple enhancement provisions.** — It is not improper to enhance a sentence under the general habitual offender statute if it has already been enhanced under the firearm enhancement statute. *State v. Reaves*, 1982-NMCA-169, 99 N.M. 73, 653 P.2d 904.

The state was not prevented from using distinct felonies obtained in the same judgment and sentence for the separate purposes of enhancement under the felon in possession statute and the general habitual offender statute. *State v. Calvillo*, 1991-NMCA-038, 112 N.M. 140, 812 P.2d 794, cert. denied, 112 N.M. 77, 811 P.2d 575.

Prior fourth-degree-felony DWI conviction, pursuant to Subsection G of Section 66-8-102 NMSA 1978, could not be used to enhance the sentences, pursuant to this section, of defendants convicted of a non-DWI felony. *State v. Begay*, 2001-NMSC-002, 130 N.M. 61, 17 P.3d 434.

Defendants convicted of the offense of felony DWI under Subsection G of Section 66-8-102 NMSA 1978 are not subject to sentence enhancement under both the felony DWI provision and this section. *State v. Anaya*, 1997-NMSC-010, 123 N.M. 14, 933 P.2d 223; *State v. Gonzales*, 1997-NMSC-050, 124 N.M. 171, 947 P.2d 128.

A prior armed robbery conviction may not be considered for enhancement under both the armed robbery statute and the habitual offender provision; accordingly, in the case of a defendant who has one prior burglary, one prior armed robbery, and one current armed robbery, the sentence for the current offense, discounting any reduction for mitigating circumstances, should be that for a second armed robbery, under Section 30-16-2 NMSA 1978, plus a one-year enhancement for the prior burglary under the habitual offender provisions. *State v. Keith*, 1985-NMCA-012, 102 N.M. 462, 697 P.2d 145, cert. denied, 102 N.M. 492, 697 P.2d 492.

**Sentences cannot be served concurrently.** — An additional one-year sentence for the use of a firearm and an additional one-year sentence as an habitual offender cannot be served concurrently. *State v. Mayberry*, 1982-NMCA-061, 97 N.M. 760, 643 P.2d 629.

**Proper to enhance failure-to-appear charge.** — Defendant's conviction for vehicular homicide could be used to enhance his failure-to-appear sentence, because the two acts - failure to appear at sentencing and vehicular homicide - were far from contemporaneous, and



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the state did not have to prove vehicular homicide as an element of the failure-to-appear offense. *State v. Peppers*, 1990-NMCA-057, 110 N.M. 393, 796 P.2d 614, cert. denied, 110 N.M. 260, 794 P.2d 734.

**Multiple convictions at one trial.** — Where a conviction on two or more counts arising out of acts committed in the course of a single transaction has been entered, the convictions should count as one for the purpose of sentencing under an habitual offender statute. On the other hand, where multiple convictions are obtained for crimes unrelated to one another, no prohibition has been found to prevent counting each conviction separately in habitual offender proceedings. *State v. Sanchez*, 1975-NMCA-014, 87 N.M. 256, 531 P.2d 1229.

If, under this section, multiple prior convictions arose out of a unified course of events, the multiple convictions count as one conviction in the habitual offender proceedings; but, if the defendant had a prior felony conviction, the trial court could properly enhance each of three subsequent felony convictions as a second felony conviction. *State v. Baker*, 1977-NMCA-033, 90 N.M. 291, 562 P.2d 1145.

**Nature of punishment of prior conviction.** — Where 17-year-old defendant was convicted in South Carolina of burglary and larceny, because the court found him amenable to treatment and placed him on probation as a "youthful offender" whose sentence was rehabilitative in nature his prior conviction did not satisfy the provisions of this section. *State v. Smith*, 2000-NMCA-101, 129 N.M. 738, 13 P.3d 470.

**Conviction in another state.** — Defendant's conviction by a Texas court constituted a "prior felony conviction" for purposes of the New Mexico habitual-offender statute, even though defendant had been placed on probation after his conviction, the indictment was set aside by a Texas court after completion of probation, and the conviction could not be considered under the Texas habitual-offender statute. *State v. Edmondson*, 1991-NMCA-069, 112 N.M. 654, 818 P.2d 855, cert. quashed, 112 N.M. 641, 818 P.2d 419.

Where, contrary to defendant's assertion, the evidence does not indicate that Section 18-4-502, Colorado Statutes, was not a felony in Colorado either at the time defendant committed the offense or at the time of his conviction, Colorado conviction was a felony covered by this section. *State v. Sandoval*, 2004-NMCA-046, 135 N.M. 420, 89 P.3d 92, cert. denied, 2004-NMCERT-006, 135 N.M. 789, 93 P.3d 1292.

**Use of prior conviction that is not felony offense in New Mexico.** — Whether or not the Colorado felony is a felony in New Mexico, the felony conviction may be used if it was punishable by imprisonment of more than one year. *State v. Wilson*, 1993-NMCA-074, 117 N.M. 11, 868 P.2d 656, cert. quashed, 119 N.M. 311, 889 P.2d 1233 (1995).

**Prior convictions which are not felonies under laws of New Mexico will not support increased penalty** for a felony conviction in New Mexico. *State v. Knight*, 1965-NMSC-058, 75 N.M. 197, 402 P.2d 380; *State v. Silas*, 1979-NMSC-008, 92 N.M. 434, 589 P.2d 674; *State v. Montoya*, 1979-NMCA-044, 92 N.M. 734, 594 P.2d 1190, *aff'd*, 1980-NMSC-093, 94 N.M. 704, 616 P.2d 417.

**Prior federal felony convictions.** — Where prior federal convictions for transporting stolen automobiles across state lines were not felonies in New Mexico, an increased penalty for a forgery felony conviction in New Mexico as a habitual criminal is improper. *State v. Knight*, 1965-NMSC-058, 75 N.M. 197, 402 P.2d 380.

**Presumption as to law of sister state.** — When previous conviction is charged to be an offense which is designated by name by the law of New Mexico as one falling within the required category, it is presumed that the conviction in the other state carried with it all the essentials of the crime in New Mexico, as the law of a sister state is presumed to be the same as that of the forum, absent proof to the contrary. *State v. Lott*, 1963-NMSC-219, 73 N.M. 280, 387 P.2d 855.

**Prior felony need not be such on date of prosecution as habitual criminal.** — The habitual offender statute contains no provision requiring the prior felony to be such an offense on the date of subsequent prosecution as an habitual criminal. The date of the conviction in the foreign state is the time to be considered in determining whether the offense charged as the prior conviction would have been a felony in this state. *State v. Lott*, 1963-NMSC-219, 73 N.M. 280, 387 P.2d 855.

**Amendment or repeal of statute subsequent to conviction under it.** — If defendant's violation of a statute was a felony at the time, changes in or repeal of the statute subsequent to that time do not preclude the use of that conviction in prosecutions under the habitual offender statute. *State v. Darrah*, 1966-NMSC-171, 76 N.M. 671, 417 P.2d 805.

**Effect of executive pardon.** — An executive pardon of the offense which provokes the court into imposing a life sentence under the habitual offender statute is unavailing to deny the court authority to employ the same felony convictions again for purpose of imposing a sentence under the habitual offender statute, if subsequent to his pardon the prisoner commits another felony. *Shankle v. Woodruff*, 1958-NMSC-054, 64 N.M. 88, 324 P.2d 1017.

**Effect of pardoned offenses.** — The governor has the power to pardon habitual offender sentences, but the pardoned offense may nevertheless be used to enhance future sentences for future crimes. *State v. Mondragon*, 1988-NMCA-027, 107 N.M. 421, 759 P.2d 1003, cert. denied, 107 N.M. 267, 755 P.2d 605.

**"Purchase" of heroin is felony for purposes of section.** — Where a federal conviction is had in New Mexico upon a purchase of heroin in New Mexico, the "purchase" of heroin necessarily includes the actual or constructive "possession" of heroin, and actual or constructive possession of heroin is a felony under the laws of New Mexico for purposes of this section. *State v. Montoya*, 1980-NMSC-093, 94 N.M. 704, 616 P.2d 417.

**Effect of additional convictions on habitual offender statute.** — Prosecution under the habitual offender statute is not barred upon any conviction in addition to fourth felony conviction, and such additional conviction may be prosecuted for the purpose of enhancing sentence at any time, otherwise lawful, as if it were the fourth felony conviction. *State v. Sanchez*, 1975-NMCA-014, 87 N.M. 256, 531 P.2d 1229.

**Alternative methods of showing prior convictions.** — If a state adopts the policy of imposing heavier punishment for repeated offending, there is manifest propriety in guarding against the escape from this penalty of those whose previous conviction was not suitably made known to the court at the time of their trial. It is to prevent such a frustration of its policy that provision is made for alternative methods, either by alleging the fact of prior conviction in the indictment and showing it upon the trial, or by a subsequent proceeding in which the identity of the prisoner may be ascertained and he may be sentenced to the full punishment fixed by law. *State v. Gonzales*, 1972-NMCA-130, 84 N.M. 275, 502 P.2d 300, cert. denied, 84 N.M. 271, 502 P.2d 296.

**Enhanced sentence may be imposed though maximum for felony served.** — Under this section, imposition of enhanced sentence was proper even though maximum sentence for felony conviction which had given rise to it had been completely served. *Lott v. Cox*, 1966-NMSC-038, 76 N.M. 76, 412 P.2d 249.

**Nolo contendere plea as basis for conviction.** — A plea of nolo contendere, accepted and recorded in open court, may provide a proper sentence for conviction which may be used to enhance a sentence under this habitual



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criminal statute. *State v. Marquez*, 1986-NMCA-119, 105 N.M. 269, 731 P.2d 965, cert. denied, 105 N.M. 211, 730 P.2d 1193.

**Chronologically, factually separate felonies properly used for enhancement.** — Since the facts and elements of defendant's 1986 predicate felony of receiving stolen property and his 1988 felony conviction for felon in possession of a firearm were both separate in time and involved different facts from those underlying his felony convictions in the case under adjudication, they were properly used as separate felonies for purposes of enhancing defendant's later felony convictions under this section. *State v. Yparrea*, 1992-NMCA-128, 114 N.M. 805, 845 P.2d 1259, cert. denied, 114 N.M. 720, 845 P.2d 814 (1993).

**Federal conviction as prior conviction.** — For a federal conviction to be considered as a prior conviction under the habitual offender statute, the conviction must be for a crime which if committed within this state would be a felony. *State v. Garcia*, 1978-NMCA-109, 92 N.M. 730, 594 P.2d 1186, cert. denied, 92 N.M. 532, 591 P.2d 286; *State v. Montoya*, 1979-NMCA-044, 92 N.M. 734, 594 P.2d 1190, *aff'd*, 1980-NMSC-093, 94 N.M. 704, 616 P.2d 417.

III. PROCEDURAL MATTERS.

**The state is not required to make a prima facie showing of defendant's past convictions before the sentencing hearing.** *State v. Godoy*, 2012-NMCA-084, 284 P.3d 410, cert. denied, 2012-NMCERT-007.

Where, eight days after defendant was convicted of possession of cocaine, the state filed a supplemental information alleging that defendant was a habitual offender subject to sentence enhancement; four days later, the state served notice of intent to seek an enhanced sentence and demanded that defendant give notice of defendant's intention to challenge the validity of any prior convictions; defendant did not file a notice that defendant would challenge the validity of prior convictions; at the arraignment on the supplemental information, defense counsel denied the allegations of the previous convictions and told the court that there would be issues with some of the alleged convictions; at the sentencing hearing, the state presented authenticated copies of the previous convictions; defendant did not contest the convictions; and defendant claimed that the trial court filed to provide defendant with adequate process because the state failed to make a prima facie showing of defendant's prior convictions before the sentencing hearing and that defendant did not have a fair opportunity at the sentencing hearing to review and rebut the evidence of the prior convictions, the enhancement of defendant's sentence complied with statutory requirements and was proper because the state provided adequate notice to defendant of its intent and then proved the existence of the prior convictions by a preponderance of the evidence at the sentencing hearing. *State v. Godoy*, 2012-NMCA-084, 284 P.3d 410, cert. denied, 2012-NMCERT-007.

**Violation of plea and disposition agreement.** — Where the defendant entered into a plea and disposition agreement in which the state agreed not to bring habitual offender proceedings "if and only if" the defendant completed at least one year of inpatient alcohol treatment and successfully completed probation without a violation; the defendant violated probation one month after beginning to serve probation and knowingly and voluntarily admitted to the probation violation; the state did not bring habitual offender proceedings based on the probation violation and the district court placed the defendant on a second probation; the defendant violated probation a second time; and the state initiated habitual offender proceedings before the district court held a hearing on the second violation of probation, the district court was authorized to enhance the defendant's sentence. *State v. Leyba*, 2009-NMCA-030, 145 N.M. 712, 204 P.3d 37, cert. denied, 2009-NMCERT-002, 145 N.M. 704, 204 P.3d 29.

**New rule setting order of proof to operate prospectively only.** — The new rule of law in *State v. Linam*, 1979-NMSC-004, 93 N.M. 307, 600 P.2d 253, decided on January 11, 1979, setting forth the order of proof required in habitual offender sentencing, was intended to operate prospectively only. *State v. Valenzuela*, 1980-NMSC-047, 94 N.M. 340, 610 P.2d 744, *overruled in part by Hernandez v. State*, 1981-NMSC-091, 96 N.M. 585, 633 P.2d 693.

**Burden of proof.** — Federal law requires that the state prove a prior conviction by a preponderance of evidence. *State v. Smith*, 2000-NMSC-005, 128 N.M. 588, 995 P.2d 1030.

**State required to prove specific sequence of commissions and convictions.** — In order to justify imposition of the enhanced sentence the state is required to prove a specific sequence of "commissions" and "convictions." *State v. Valenzuela*, 1979-NMCA-072, 94 N.M. 285, 609 P.2d 1241, *aff'd*, 1980-NMSC-047, 94 N.M. 340, 610 P.2d 744, *overruled in part by Hernandez v. State*, 1981-NMSC-091, 96 N.M. 585, 633 P.2d 693.

**Unless waived by the terms of the plea agreement.** — Defendant waived his right to contest the evidence of the prior convictions by agreeing to the terms of the plea agreement. *State v. Sanchez*, 2001-NMCA-060, 130 N.M. 602, 28 P.3d 1143, cert denied, 130 N.M. 713, 30 P.3d 1147.

**Date of commission of offense essential element in prosecution.** — To establish the date of the commission of the offense giving rise to the habitual offender proceeding is an essential element in such a prosecution. *State v. Valenzuela*, 1979-NMCA-072, 94 N.M. 285, 609 P.2d 1241, *aff'd*, 1980-NMSC-047, 94 N.M. 340, 610 P.2d 744, *overruled in part by Hernandez v. State*, 1981-NMSC-091, 96 N.M. 585, 633 P.2d 693.

Where there is no proof as to the date of commission of the second felony by defendant, an enhanced habitual offender sentence cannot stand. *State v. Valenzuela*, 1980-NMSC-047, 94 N.M. 340, 610 P.2d 744, *overruled in part by Hernandez v. State*, 1981-NMSC-091, 96 N.M. 585, 633 P.2d 693.

**Defendant's introduction to jury does not interfere with its duty of determining identity.** — The introduction of the defendant to the jury by his name in no way interferes with the jury's duty of determining whether the named and identified defendant is the same person who was convicted of the crimes for which he is being charged in the supplemental information. *State v. Olivares*, 1980-NMCA-165, 95 N.M. 222, 620 P.2d 380.

**An unrelated plea agreement** containing an admission of the defendant's identity in prior convictions was admissible for purposes of a habitual offender proceeding. *State v. Roybal*, 1995-NMCA-097, 120 N.M. 507, 903 P.2d 249, cert. denied, 120 N.M. 498, 903 P.2d 240.

**State must present some evidence to carry burden of validly obtained pleas.** — Although it is settled law that the absence of the record of the guilty plea proceedings does not establish the invalidity of the pleas, the state must present some evidence in order to carry its burden of persuasion that the pleas were validly obtained. *State v. Garcia*, 1980-NMSC-132, 95 N.M. 246, 620 P.2d 1271.

**Where state's exhibits establish prima facie case establishing valid guilty plea,** the defendant must then produce evidence that supports the asserted invalidity of these pleas. *State v. Garcia*, 1980-NMSC-132, 95 N.M. 246, 620 P.2d 1271.

**Where defendant claims a prior guilty plea was invalid,** the state makes a prima facie case establishing a valid guilty plea upon proof that the defendant has been convicted of a crime. *State v. Garcia*, 1980-NMSC-132, 95 N.M. 246, 620 P.2d 1271.

**When validity of prior convictions becomes proper issue.** — Until the defendant raises an issue as to



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the validity of prior convictions, "validity" is not an issue in the case. *State v. O'Neil*, 1978-NMCA-056, 91 N.M. 727, 580 P.2d 495, cert. denied, 91 N.M. 491, 576 P.2d 297.

**Conditional discharge used to enhance sentence.** — Even though a prior conditional discharge could not be used for enhancement purposes at the time the defendant was originally sentenced, since he had agreed to such use and that he would not challenge it on appeal, the trial court did not err in using the conditional discharge to enhance the defendant's sentence. *State v. Handa*, 1995-NMCA-042, 120 N.M. 38, 897 P.2d 225, cert. denied, 119 N.M. 771, 895 P.2d 671.

Use of the defendant's prior conditional discharge to prove that he was a felon in order to convict him of the crime of felon in possession of a firearm and to enhance his sentence for underlying assault convictions did not violate his double jeopardy rights. *State v. Handa*, 1995-NMCA-042, 120 N.M. 38, 897 P.2d 225, cert. denied, 119 N.M. 771, 895 P.2d 671.

**Guilty pleas, disputed by vague evidence, accepted.** — Once the state's exhibits establish a prima facie case that a defendant has previously pled guilty to felonies, the defendant is entitled to bring forth contrary evidence, but it is his burden to do so. Based on the defendant's vague and somewhat inconsistent recollections about whether he had the advice of counsel before he pled guilty to previous crimes, the judge did not abuse her discretion in accepting those convictions as the basis for the habitual offender enhancements. *State v. Duncan*, 1994-NMCA-030, 117 N.M. 407, 872 P.2d 380, cert. denied, 117 N.M. 524, 873 P.2d 270.

**Asserted invalidity of prior convictions is a defense** to the habitual offender charge. *State v. O'Neil*, 1978-NMCA-056, 91 N.M. 727, 580 P.2d 495, cert. denied, 91 N.M. 491, 576 P.2d 297.

**Burdens of production of evidence and of persuasion distinguished.** — Where defendant's claim of invalidity is raised as a defense to a habitual offender charge, defendant must provide evidence in support of his defense. Once he does so, he is not required to persuade the fact finder concerning his defense; rather, the state has the burden of persuasion because it is the state, not defendant, who must prove a case. *State v. O'Neil*, 1978-NMCA-056, 91 N.M. 727, 580 P.2d 495, cert. denied, 91 N.M. 491, 576 P.2d 297.

**Validity of prior guilty pleas is issue to be decided by court** in a habitual offender proceeding. *State v. O'Neil*, 1978-NMCA-056, 91 N.M. 727, 580 P.2d 495, cert. denied, 91 N.M. 491, 576 P.2d 297.

**Where record in habitual offender proceeding is silent as to invalidity,** there is no basis for holding the prior convictions invalid. *State v. O'Neil*, 1978-NMCA-056, 91 N.M. 727, 580 P.2d 495, cert. denied, 91 N.M. 491, 576 P.2d 297.

**Burden not on state when "record is silent".** — A trial court errs in placing an affirmative burden on the state when the "record is silent" concerning the validity of prior guilty pleas. *State v. O'Neil*, 1978-NMCA-056, 91 N.M. 727, 580 P.2d 495, cert. denied, 91 N.M. 491, 576 P.2d 297.

**Double jeopardy defense waived by plea agreement.** — The defendant waived his double jeopardy defense by entering a plea agreement which provided that the state could pursue additional habitual offender proceedings to enhance the defendant's sentence in the event his probation was revoked or he otherwise failed to fulfill his obligations under the agreement, and Section 30-1-10 NMSA 1978, precluding waiver of a double jeopardy defense, did not apply to prevent waiver in such case. *Montoya v. New Mexico*, 55 F.3d 1496 (10th Cir. 1995).

**Sentence enhancement based on violation of plea agreement.** — Since the defendant violated the terms of a plea agreement providing that the state could pursue additional habitual offender proceedings to enhance the defendant's sentence in the event his probation was revoked or he otherwise failed to fulfill his obligations under the agreement, the imposition of additional sentence enhancements did not constitute an impermissible multiple punishment. *Montoya v. New Mexico*, 55 F.3d 1496 (10th Cir. 1995).

Since the plea agreement provided that the state would pursue additional enhancement if the defendant violated conditions of his probation, when the defendant violated the probation, additional enhancement was authorized based, not on the probation violation, but on the prior felonies. *State v. Freed*, 1996-NMCA-044, 121 N.M. 562, 915 P.2d 325, cert. denied, 121 N.M. 644, 916 P.2d 844.

**Statutory scheme does not delegate legislative responsibility to prosecution.** — In no sense does the habitual offender statutory scheme delegate to the prosecution the legislative responsibility to fix criminal penalties. *Martinez v. Romero*, 626 F.2d 807 (10th Cir.), cert. denied, 449 U.S. 1019, 101 S. Ct. 585, 66 L. Ed. 2d 481 (1980).

**Subsection B only prohibits suspending or deferring one-year sentence imposed by subsection,** and does not affect the trial court's discretion to suspend or defer the basic sentence imposed. *State v. Russell*, 1980-NMCA-074, 94 N.M. 544, 612 P.2d 1355.

**Credit for time served.** — When the defendant who had served one year of an enhanced sentence was subject to a second four-year enhancement, the court was required to give credit for the time served, and giving credit did not convert the second enhancement into an unauthorized three-year sentence. *State v. Freed*, 1996-NMCA-044, 121 N.M. 562, 915 P.2d 325, cert. denied, 121 N.M. 644, 916 P.2d 844.

**Law reviews.** — For note, "State v. Muniz: Authorizing Adult Sentencing of Juveniles Absent a Conviction that Authorizes an Adult Sentence," see 35 N.M.L. Rev. 229 (2005).

For comment, "Definite Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For note, "Negligent Hiring and Retention - Availability of Action Limited By Foreseeability Requirement," see 10 N.M.L. Rev. 491 (1980).

For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

For comment, "The Constitution is Constitutional - A Reply to The Constitutionality of Pretrial Detention Without Bail in New Mexico," see 13 N.M.L. Rev. 145 (1983).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

For annual survey of New Mexico criminal law, see 16 N.M.L. Rev. 9 (1986).

For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Constitutionality and construction of statute enhanced penalty for second or subsequent offenses, 58 A.L.R. 20, 82 A.L.R. 345, 116 A.L.R. 209, 132 A.L.R. 91, 139 A.L.R. 673.

Effect, as to prior offenses, of amendment increasing punishment for crime, 167 A.L.R. 845.

What constitutes former "conviction" within statute enhancing penalty for second or subsequent offenses, 5 A.L.R.2d 1080.

Propriety, under statute enhancing punishment for second or subsequent offense, of restricting new trial to issue of status as habitual criminal, 79 A.L.R.2d 826.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses, 80 A.L.R.2d 1196.



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Right of court in imposing sentence to consider other offenses committed by defendant in absence of statute in that regard, 96 A.L.R.2d 768.

Adequacy of defense counsel's representation of criminal client regarding prior convictions, 14 A.L.R.4th 227.

Propriety of using single prior felony conviction as basis for offense of possessing weapon by convicted felon and to enhance sentence, 37 A.L.R.4th 1168.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes, 7 A.L.R.5th 263.

Use of prior military conviction to establish repeat offender status, 11 A.L.R.5th 218.

Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment, 27 A.L.R. Fed. 110.

## 31-18-18. Habitual offenders; duty of public officers to report.

Whenever it becomes known to any warden or prison official or any prison, probation, parole or police officer or other peace officer that any person charged with or convicted of a noncapital felony is or may be a habitual offender, it is his duty to promptly report the facts to the district attorney of the proper district, who shall then file an information.

**History: 1953 Comp., § 40A-29-31, enacted by Laws 1977, ch. 216, § 7.**

## 31-18-19. Habitual offender; duty of district attorney to prosecute.

If at any time, either after sentence or conviction, it appears that a person convicted of a noncapital felony is or may be a habitual offender, it is the duty of the district attorney of the district in which the present conviction was obtained to file an information charging that person as a habitual offender.

**History: 1953 Comp., § 40A-29-32, enacted by Laws 1977, ch. 216, § 8.**

**Cross references.** — For general consideration of the habitual offender statute, *see* notes to 31-18-17 NMSA 1978.

For procedure and sentence, *see* 31-18-20 NMSA 1978.

ANNOTATIONS

**Habitual offender statute is mandatory and gives district attorney no discretion** as to whether he will invoke the habitual criminal provision. *State v. Sedillo*, 1971-NMCA-003, 82 N.M. 287, 480 P.2d 401.

**Habitual offender statute is mandatory.** — The district attorney had a duty to prosecute defendant as an habitual offender if his conviction brought him within the statute. *State v. Cruz*, 1971-NMCA-047, 82 N.M. 522, 484 P.2d 364.

The provisions of this act have been construed as mandatory. *State v. Baldonado*, 1968-NMCA-025, 79 N.M. 175, 441 P.2d 215.

The provisions of the habitual criminal statute are mandatory. *State v. Santillanes*, 1982-NMCA-118, 98 N.M. 448, 649 P.2d 516.

The provisions of the Habitual Offender Act are mandatory, and the district attorney has an affirmative duty to prosecute habitual offenders. *State v. Davis*, 1986-NMSC-031, 104 N.M. 229, 719 P.2d 807.

**Discretion to seek or not seek enhanced sentencing.** — Despite the mandatory tone of this section, the prosecutor has discretion to seek or not to seek enhanced sentencing. *March v. State*, 1989-NMSC-065, 109 N.M. 110, 782 P.2d 82.

**No vindictiveness in actions of district attorney's office in seeking habitual offender enhancements.** — The prosecution has a statutory duty, at any time, either after sentence or conviction, if it appears that a person convicted of a noncapital felony is or may be a habitual offender, to file an information charging that person as a habitual offender. *State v. Duncan*, 1994-NMCA-030, 117 N.M. 407, 872 P.2d 380, cert. denied, 117 N.M. 524, 873 P.2d 270.

**Enhanced sentence proper even though probation completed, where maximum statutory sentencing period unexpired.** — Under this section, the imposition of an enhanced sentence is proper even though a defendant has completed a period of probation, where the maximum period for which he could have been sentenced for the offense has not yet expired. *State v. Santillanes*, 1982-NMCA-118, 98 N.M. 448, 649 P.2d 516.

**Statutory scheme does not delegate legislative responsibility to prosecution.** — In no sense does the habitual offender statutory scheme delegate to the prosecution the legislative responsibility to fix criminal penalties. *Martinez v. Romero*, 626 F.2d 807 (10th Cir.), cert. denied, 449 U.S. 1019, 101 S. Ct. 585, 66 L. Ed. 2d 481 (1980).

**Specific statute controls over 39-1-1 NMSA 1978.** — As the provisions of the habitual offender statute are mandatory, the specific provision of filing charges "at any time" in the statute controls over the general provision of Section 39-1-1 NMSA 1978, which gives a trial court jurisdiction over its final judgment in a nonjury trial for 30 days after entry of final judgment. *State v. Padilla*, 1978-NMCA-060, 92 N.M. 19, 582 P.2d 396, cert. denied, 92 N.M. 180, 585 P.2d 324.

**State's filing information violated expectation of finality in sentencing.** — State's filing information as to enhanced sentencing after defendant's earning of meritorious deductions brought his service of sentence to an end violated his objectively reasonable expectation of finality in sentencing for double jeopardy purposes. *March v. State*, 1989-NMSC-065, 109 N.M. 110, 782 P.2d 82.

**Defendant's expectation of "final" sentencing.** — Defendant, a three-time felony offender, had no reasonable expectation of finality in a three-year probationary sentence for a larceny conviction; therefore, it was not a violation of his double jeopardy rights for the state to seek a subsequent conviction of defendant, during the



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probationary period, under the habitual offender laws. *State v. Villalobos*, 1998-NMSC-036, 126 N.M. 255, 968 P.2d 766.

**District attorney's or judge's knowledge of prior convictions.** — Knowledge by the district attorney of prior convictions, and even knowledge by the judge, does not bar a prosecution under the habitual offender statute, the setting aside of a former sentence and the imposition of a new one. *State v. McCraw*, 1955-NMSC-050, 59 N.M. 348, 284 P.2d 670.

**Prosecution's knowledge of prior felony conviction.** — Where, before the defendant is convicted for a felony, the prosecutor knows of a prior felony conviction, this knowledge does not require the dismissal of a latter habitual offender charge because of a filing delay. *State v. Mayberry*, 1982-NMCA-061, 97 N.M. 760, 643 P.2d 629.

**Information does not purport to charge criminal offense.** — An information under the habitual offender statutes does not purport to charge a criminal offense, but constitutes only a charge of prior convictions by defendant, which, if true, operates to enhance the penalty to be imposed. *State v. Silva*, 1967-NMCA-008, 78 N.M. 286, 430 P.2d 783.

**Charging by supplemental information.** — The state did not violate its own procedures, and thus did not violate due process, by charging appellant as an habitual offender by supplemental information, since the supplemental information did not charge an offense, but rather a status, that of habitual offender. *Minner v. Kerby*, 30 F.3d 1311 (10th Cir. 1994).

**Charging by information sufficient.** — Defendant had no right, either under New Mexico law or under the United States Constitution, to a grand jury indictment as to his habitual offender status. *Minner v. Kerby*, 30 F.3d 1311 (10th Cir. 1994).

**Pleading prior convictions in information.** — The controlling statute made no requirement that prior convictions be pleaded in the information itself. *Shankle v. Woodruff*, 1958-NMSC-054, 64 N.M. 88, 324 P.2d 1017.

**Courts in which defendant was previously convicted need not be named.** — The habitual offender statutes do not require that the court or courts in which a defendant has been previously convicted be named. *State v. Silva*, 1967-NMCA-008, 78 N.M. 286, 430 P.2d 783.

**Information not insufficient because of improper grammatical construction.** — Assuming the meaning to be plain, information or indictment is not rendered insufficient because of improper grammatical construction. *State v. Silva*, 1967-NMCA-008, 78 N.M. 286, 430 P.2d 783.

**Objection to information not grounds for release on habeas corpus.** — Objection to the information charging prior conviction sufficient to invoke the Habitual Criminal Act might have been made the basis of a timely appeal, but was not grounds for release on habeas corpus. *Shankle v. Woodruff*, 1958-NMSC-054, 64 N.M. 88, 324 P.2d 1017.

**The provisions of the habitual criminal statute are mandatory.** 1987 Op. Att'y Gen. No. 87-23.

**Law reviews.** — For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Duty and discretion of district or prosecuting attorney as regards prosecution for criminal offenses, 155 A.L.R. 10.

## 31-18-20. Habitual offenders; proceedings for prosecution.

A. The court wherein a person has been convicted of a noncapital felony and where that person has been charged as a habitual offender under the provisions of Section 31-18-19 NMSA 1978 shall bring the defendant before it, whether he is confined in prison or not. The court shall inform him of:

(1) the allegations of the information; and

(2) his right to be tried as to the truth thereof according to law.

B. The court shall require the defendant to say whether or not he is the same person as charged in the information. If the defendant denies being the same person or refuses to answer or remains silent, his plea or the fact of his silence shall be entered in the record and the court shall then conduct a hearing to determine if the offender is the same person.

C. If the court finds that the defendant is the same person and that he was in fact convicted of the previous crime or crimes as charged, the court shall sentence him to the punishment as prescribed in Section 31-18-17 NMSA 1978.

**History: 1953 Comp., § 40A-29-33, enacted by Laws 1977, ch. 216, § 9; 1983, ch. 127, § 2.**

**Cross references.** — For general consideration of the habitual offender statute, *see* notes to 31-18-17 NMSA 1978.

ANNOTATIONS

I. GENERAL CONSIDERATION.
II. PROCEDURAL MATTERS.
III. SENTENCES.

I. GENERAL CONSIDERATION.

**Purpose of former law.** — Former section was enacted to give a person convicted of a felony in this state charged with being an habitual criminal the right to a separate trial before a jury and to require the state to prove in such separate proceedings the identity of the accused as the person alleged to have been convicted of the former crimes. *Lott v. Cox*, 1965-NMSC-037, 75 N.M. 102, 401 P.2d 93.

**Habitual offender statute creates no new offense,** but merely provides a proceeding whereby one previously convicted of a felony or felonies may be given an enhanced sentence upon subsequent conviction in this state for another felony. *State v. Bonner*, 1970-NMCA-047, 81 N.M. 471, 468 P.2d 636.

**Habitual offender statute provides for an enhanced sentence.** — The habitual criminal status is not a conviction of a distinct crime. Indeed, a conviction on the merits has occurred and the crime convicted of is unrelated to the habitual criminal provisions, which produce not a judgment of guilt of the offense, but rather an enhanced sentence. *Linam v. Griffin*, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1207, 75 L. Ed. 2d 447 (1983).



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**Habitual criminal proceeding not constitutional adjudication.** — The habitual criminal proceeding in New Mexico is not the kind of adjudication that is referred to in the fifth amendment double jeopardy clause. *Linam v. Griffin*, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1207, 75 L. Ed. 2d 447 (1983).

**New Mexico habitual criminal proceeding is a trial on the issue of punishment** and double jeopardy bars a second try if the prosecution fails. *Linam v. Griffin*, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1207, 75 L. Ed. 2d 447 (1983) (concurring opinion).

**Proceeding not trial for purposes of determining competency.** — The habitual offender proceeding is not a trial in the constitutional sense for purposes of making a determination as to competency and Rule 35(b) N.M.R. Crim. P. (now Rule 5-602B NMRA) does not apply to such proceedings. *State v. Nelson*, 1981-NMSC-100, 96 N.M. 654, 634 P.2d 676.

**Where record in habitual offender proceeding is silent as to invalidity,** there is no basis for holding the prior convictions invalid. *State v. O'Neil*, 1978-NMCA-056, 91 N.M. 727, 580 P.2d 495, cert. denied, 91 N.M. 491, 576 P.2d 297.

**No jeopardy attaches in habitual proceeding.** — A habitual proceeding involves only sentencing, not trial of an offense, therefore jeopardy does not attach. *State v. Rogers*, 1979-NMSC-085, 93 N.M. 519, 602 P.2d 616.

II. PROCEDURAL MATTERS.

**Burden of persuasion.** — The validity of prior convictions is presumed until a defendant produces evidence reasonably tending to establish their invalidity. If the constitutional invalidity of prior convictions is not adequately shown, the burden of persuasion does not shift, and the State has no obligation to come forward with evidence. *State v. Duarte*, 1996-NMCA-038, 121 N.M. 553, 915 P.2d 309, cert. denied, 121 N.M. 444, 913 P.2d 251.

**Strict compliance required.** — Strict compliance with the procedures set forth in this section is required. *State v. Sanchez*, 1972-NMCA-113, 84 N.M. 163, 500 P.2d 448.

**Burden of proof.** — Federal law requires that the state prove a prior conviction by a preponderance of evidence. *State v. Smith*, 2000-NMSC-005, 128 N.M. 588, 995 P.2d 1030.

**Remand following appeal allowed, to obtain evidence on date of prior crime.** — The double jeopardy clause of the fifth amendment does not bar a remand following an appeal, directed at obtaining evidence as to the dates of the prior commission of crimes in order to satisfy the interpretation of the New Mexico habitual criminal statute that there be proof that each felony was committed after a conviction for the preceding felony. *Linam v. Griffin*, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1207, 75 L. Ed. 2d 447 (1983).

**Judge to determine whether offense follows prior felony conviction.** — Whether the commission of an offense was after a conviction for an earlier felony, thus qualifying for an enhanced penalty, may be determined by the trial judge. *Hernandez v. State*, 1981-NMSC-091, 96 N.M. 585, 633 P.2d 693.

**Jury issues limited to identity and prior conviction.** — The only questions that must be submitted to a jury upon a defendant's demand under the habitual offender statutes are those of identity and whether the defendant was previously convicted of the specific crime charged in the enhancement proceedings. *Hernandez v. State*, 1981-NMSC-091, 96 N.M. 585, 633 P.2d 693.

**Unless defendant raises validity of prior conviction as a defense,** there are two issues to be determined in an habitual offender proceeding: (1) whether there was a prior felony conviction, and (2) whether the defendant is the same person who was convicted of the prior felony. *State v. Hernandez*, 1981-NMCA-036, 96 N.M. 604, 633 P.2d 712, *rev'd on other grounds*, 1981-NMSC-091, 96 N.M. 585, 633 P.2d 693.

**There is no need of presentment by grand jury** where the question was simply whether the party had been convicted of an offense, as an indictment is confined to the question whether an offense has been committed. *State v. Gonzales*, 1972-NMCA-130, 84 N.M. 275, 502 P.2d 300, cert. denied, 84 N.M. 271, 502 P.2d 296.

**Allegation of former conviction in indictment not required by constitution.** — Although the state may properly provide for the allegation of the former conviction in the indictment, for a finding by the jury on this point in connection with its verdict as to guilt and thereupon for the imposition of the full sentence prescribed, there is no constitutional mandate which requires the state to adopt this course even where the former conviction is known. *State v. Gonzales*, 1972-NMCA-130, 84 N.M. 275, 502 P.2d 300, cert. denied, 84 N.M. 271, 502 P.2d 296.

**Proof of defendant's identity.** — Where a supplemental information was filed for the purpose of sentencing defendant as an habitual offender, the state was not required to affirmatively prove not only that defendant was the person previously convicted of the crimes listed in the information but also that he was the same person convicted in the underlying case in which the sentencing proceedings were taking place. *State v. Salas*, 1999-NMCA-099, 127 N.M. 686, 986 P.2d 482, cert. denied, 128 N.M. 149, 990 P.2d 823.

**Separate proceeding permissible where only issue is identity.** — The information charging defendant as an habitual offender was filed as a separate cause, and such a separate proceeding is permissible where the only issue is the identity of the accused as the person previously convicted of crimes within the meaning of the habitual offender statute. *State v. Tipton*, 1966-NMSC-202, 77 N.M. 1, 419 P.2d 216.

**Information dismissed where proceedings not commenced within six months of filing.** — Where more than six months had passed since the filing of an information charging defendant under former 31-18-5 NMSA 1978 et seq. with being an habitual offender, the supreme court ordered that it be dismissed with prejudice in accordance with Rule 37(d), N.M.R. Crim. P. (now Rule 5-604D), to the extent that the state was precluded only from filing another such information grounded upon all four of those felonies which were the basis for the information dismissed. *State v. Lopez*, 1976-NMSC-012, 89 N.M. 82, 547 P.2d 565(decided under former law) (now Rule 5-604 NMRA).

**Right to counsel.** — The charge of being a habitual criminal is too serious, and the potential prejudice resulting from the absence of counsel having the legal skill to determine whether there had, in fact, been a previous conviction, is too great, to allow a conviction to stand when it appears a defendant has entered a plea without the assistance of counsel to which he is entitled, or without having effectively waived the right. *Johnson v. Cox*, 1963-NMSC-058, 72 N.M. 55, 380 P.2d 199, cert. denied, 375 U.S. 855, 84 S. Ct. 117, 11 L. Ed. 2d 82 (1963).

**Duty of trial court to inform defendant of rights.** — Under this section the trial court must inform the defendant of the allegations contained in the information and of his right to be tried as to the truth thereof according to law. Therefore, where there was no showing that the judge or an officer of the court so informed the defendant, defendant's confession of being convicted of another crime was disallowed, and the judgment was reversed. *State v. Bonner*, 1974-NMCA-043, 86 N.M. 314, 523 P.2d 812.

**Trial court not specifically required to inform defendant of enhanced penalty.** — This section does not



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specifically require the trial court to advise a defendant of the enhanced penalty. *State v. Madrid*, 1972-NMSC-016, 83 N.M. 603, 495 P.2d 383.

**Trial court's failure to caution not considered on appeal.** — Where defendant claimed that the trial court's procedure prior to his admitting the charge of being an habitual offender was defective in that his admission could not legally be accepted because he was not duly cautioned as to his rights, but did not claim that his admission was involuntary, the issue of the trial court's failure to caution defendant would not be heard on appeal, since it was not raised in the trial court. *State v. Jordan*, 1975-NMCA-102, 88 N.M. 230, 539 P.2d 620.

**Right to trial by jury may be waived.** — Right to be tried by a jury is a requirement which may be waived either expressly or by implication. *State v. Knight*, 1965-NMSC-058, 75 N.M. 197, 402 P.2d 380.

**Circumstances showing waiver of jury trial.** — Where appellant was represented by an attorney throughout the proceedings, had ample notice that habitual criminal charges were involved, and, in reply to questions by the court before the guilty plea was accepted to the forgery charges and prior to any examination by the court concerning the habitual criminal information, both appellant and his attorney assured the court that they had previously discussed the habitual criminal information and that they had also thoroughly discussed it with the district attorney, appellant's right to be tried by a jury was waived. *State v. Knight*, 1965-NMSC-058, 75 N.M. 197, 402 P.2d 380.

**Law requires admission or determination of identity.** — Before defendant can be prosecuted under the habitual offender statute, the law requires an admission or a determination of identity. *State v. Sanchez*, 1972-NMCA-113, 84 N.M. 163, 500 P.2d 448.

**An instruction which reads "aka" deprives defendant of jury determination.** — An instruction which read "aka" (also known as) deprived defendant in a habitual offender prosecution of the right to have the jury determine the issue of identity. *State v. Griffin*, 1980-NMCA-015, 94 N.M. 5, 606 P.2d 543.

**Use of aliases in indictments or jury instructions is proper** where there is evidence of the alias and/or the surrounding circumstances reveal no resulting prejudice to the defendant. *State v. Muniz*, 1981-NMSC-014, 95 N.M. 415, 622 P.2d 1035.

**Jury's function of determining identity issue not preempted by instructions.** — Instructions which simply told the jury to determine whether defendant was the same person that was convicted of several offenses that were charged in the indictments under other names did not preempt the jury's function of determining the issue of identity in a prosecution under the habitual offender statute. *State v. Muniz*, 1981-NMSC-014, 95 N.M. 415, 622 P.2d 1035.

**Judicial determination of identity** may not properly be made prior to conviction in the felony case. *Lott v. Cox*, 1965-NMSC-037, 75 N.M. 102, 401 P.2d 93.

**Waiver of jury trial does not amount to admission of identity.** — Even though defendant affirmatively waived a jury trial on the question of identity, this did not amount to an admission that he was the same person charged in the supplemental information. *State v. Sanchez*, 1972-NMCA-113, 84 N.M. 163, 500 P.2d 448.

**Statute does not provide jury trial where such trial was waived in original proceedings.** — Where defendant seeks to retry, in an habitual offender proceeding, the question of voluntariness of guilty pleas he made a decade ago, and, although the validity of the prior convictions upon which the habitual offender charge is based is subject to attack, the purpose of the statute is not to provide a defendant with a trial by jury on previous convictions where the defendant waived such a trial in the original criminal proceedings. *State v. Martinez*, 1978-NMSC-083, 92 N.M. 256, 586 P.2d 1085.

**Sequence of crimes and convictions is element of the state's case** and not a defense to be raised and established by the defendant; the state's failure to establish the sequence of the crimes is therefor a failure of proof. *State v. Valenzuela*, 1979-NMCA-072, 94 N.M. 285, 609 P.2d 1241, *aff'd*, 1980-NMSC-047, 94 N.M. 340, 610 P.2d 744, *overruled in part by Hernandez v. State*, 1981-NMSC-091, 96 N.M. 585, 633 P.2d 693.

**Determining when subsequent act occurred relevant.** — When a question of the sequence of crimes and convictions is raised, the only relevant determination is the factual question of when the subsequent act occurs. Thus, "sequence" depends upon evidence actually presented to the jury. *State v. Valenzuela*, 1979-NMCA-072, 94 N.M. 285, 609 P.2d 1241, *aff'd*, 1980-NMSC-047, 94 N.M. 340, 610 P.2d 744, *overruled in part by Hernandez v. State*, 1981-NMSC-091, 96 N.M. 585, 633 P.2d 693.

**State must present some evidence to carry burden of validly obtained pleas.** — Although it is settled law that the absence of the record of the guilty plea proceedings does not establish the invalidity of the pleas, the state must present some evidence in order to carry its burden of persuasion that the pleas were validly obtained. *State v. Garcia*, 1980-NMSC-132, 95 N.M. 246, 620 P.2d 1271.

**Where state's exhibits establish prima facie case establishing valid guilty plea,** the defendant must then produce evidence that supports the asserted invalidity of these pleas. *State v. Garcia*, 1980-NMSC-132, 95 N.M. 246, 620 P.2d 1271.

**Where defendant claims a guilty plea was invalid,** the state makes a prima facie case establishing a valid guilty plea upon proof that defendant has been convicted of a crime. *State v. Garcia*, 1980-NMSC-132, 95 N.M. 246, 620 P.2d 1271.

**Issue of whether prior convictions are constitutionally valid is defense** to the habitual offender charge. Defendant was entitled to present evidence in support of this defense. Whether the defense is a matter to be decided by the court or the jury will depend on the issue raised by the defense. *State v. Dawson*, 1977-NMCA-102, 91 N.M. 70, 570 P.2d 608.

**Collateral attack on validity of prior convictions permissible.** — Where defendant's appeal attacks the validity of two prior convictions on grounds: (1) that he did not have a preliminary examination in connection with the two prior convictions, and (2) that the first conviction was for a misdemeanor rather than a felony, such a collateral attack is permissible. *State v. Darrah*, 1966-NMSC-171, 76 N.M. 671, 417 P.2d 805.

**State not required to allege and prove validity of prior conviction.** — This section does not require the state to prove the validity of the prior convictions. The state makes a prima facie case upon proof that defendant has been convicted of a prior felony. *State v. Dawson*, 1977-NMCA-102, 91 N.M. 70, 570 P.2d 608.

**Validity of prior convictions.** — Where defendant moved for a directed verdict, contending that the state had failed to prove an essential element of the habitual offender charge, the assertedly missing essential element being that the prior convictions were valid, the motion was correctly denied. Validity of the prior convictions is a matter of defense. Until defendant raised an issue as to the validity of the prior convictions, validity was not an issue in the case. The state did not have the burden of proving the validity of the prior convictions. *State v. Gallegos*, 1977-NMCA-113, 91 N.M. 107, 570 P.2d 938.

**Evidence of prior convictions prima facie.** — In a habitual offender proceeding, state exhibits showing the prior convictions make a prima facie case as to their prior convictions. *State v. Garcia*, 1978-NMCA-109, 92 N.M.



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730, 594 P.2d 1186, cert. denied, 92 N.M. 675, 591 P.2d 286 (1979).

**When validity of prior convictions becomes proper issue.** — Until the defendant raises an issue as to the validity of prior convictions, "validity" is not an issue in the case. *State v. O'Neil*, 1978-NMCA-056, 91 N.M. 727, 580 P.2d 495, cert. denied, 91 N.M. 491, 576 P.2d 297 (decided under former 31-18-5 NMSA 1978).

**Asserted invalidity of prior convictions is defense to habitual offender charge.** *State v. O'Neil*, 1978-NMCA-056, 91 N.M. 727, 580 P.2d 495, cert. denied, 91 N.M. 491, 576 P.2d 297.

**Defense of invalidity of prior conviction.** — Invalidity of a prior conviction is a defense in a habitual offender proceeding and it is defendant's obligation to present evidence in support of this defense. *State v. Garcia*, 1978-NMCA-109, 92 N.M. 730, 594 P.2d 1186, cert. denied, 92 N.M. 675, 591 P.2d 286 (1979).

**Validity of prior guilty pleas is an issue to be decided by the court** in an habitual offender proceeding. *State v. O'Neil*, 1978-NMCA-056, 91 N.M. 727, 580 P.2d 495, cert. denied, 91 N.M. 491, 576 P.2d 297.

The view that all issues of validity are to be decided by the jury in an habitual offender proceeding cannot be subscribed to, particularly where the attack on the prior convictions goes to the validity of defendant's guilty pleas. *State v. Martinez*, 1978-NMSC-083, 92 N.M. 256, 586 P.2d 1085.

**Burden in habitual offender proceeding on defendant** to produce evidence that a guilty plea in a previous proceeding was not voluntary or intelligent. *State v. Garcia*, 1978-NMCA-109, 92 N.M. 730, 594 P.2d 1186, cert. denied, 92 N.M. 675, 591 P.2d 286 (1979).

**State not required to carry burden on validity of plea where record silent.** — A trial court errs in placing an affirmative burden on the state when the "record is silent" concerning the validity of prior guilty pleas. *State v. O'Neil*, 1978-NMCA-056, 91 N.M. 727, 580 P.2d 495, cert. denied, 91 N.M. 491, 576 P.2d 297.

**Burdens of production of evidence and of persuasion distinguished.** — Where defendant's claim of invalidity is raised as a defense to a habitual offender charge, defendant must provide evidence in support of his defense. Once he does so, he is not required to persuade the fact finder concerning his defense; rather, the state has the burden of persuasion because it is the state, not defendant, who must prove a case. *State v. O'Neil*, 1978-NMCA-056, 91 N.M. 727, 580 P.2d 495, cert. denied, 91 N.M. 491, 576 P.2d 297.

**Noncompliance with Rule 21(e), N.M.R. Crim. P. (now Rule 5-303 NMRA) is not basis for attacking validity of guilty pleas** to prior felonies in habitual offender proceedings. *State v. Gallegos*, 1977-NMCA-113, 91 N.M. 107, 570 P.2d 938.

**Judgment of sister state admissible.** — Admission of an Oklahoma judgment of two prior felonies was proper. The judgment was not inadmissible hearsay, and its admission was not a violation of the constitutional right to confront witnesses. *State v. Whiteshield*, 1977-NMCA-103, 91 N.M. 96, 570 P.2d 927, cert. denied, 91 N.M. 4, 569 P.2d 414.

**Effect of filing notice of appeal.** — Where defendant was charged by supplemental information with being the same person who had been convicted of two felonies and who therefore should be sentenced as an habitual offender, and the jury found that the defendant was the same person who committed both offenses, defendant's contention that the trial court lost jurisdiction after the notice of appeal was filed on the second felony conviction and could not hear the issue to be tried on the supplemental information was without merit. The trial court had jurisdiction to impose sentence, since sentencing, in some prescribed statutory form, was a mandatory requirement of the Criminal Code - appeal or no appeal. If the appeal of the second conviction was affirmed the enhanced sentence would stand. In the event of reversal, the conviction and sentence would be vacated. *State v. Lujan*, 1977-NMCA-093, 90 N.M. 778, 568 P.2d 614.

**Claim not made in trial court not considered on appeal.** — Defendant claimed on appeal that the charge against him for being an habitual offender was defective for failure to name a specific subsection of the statute, but since no such claim was made in the trial court, it would not be considered on appeal. *State v. Jordan*, 1975-NMCA-102, 88 N.M. 230, 539 P.2d 620.

**Procedural requirements of this section were met** and record showed that supplemental information, which sought an enhanced sentence, was read in open court with defendant present, that defendant admitted to being the person convicted as charged in the supplemental information, and that this occurred when defendant was represented by counsel who, immediately after the enhanced sentence was imposed, informed the court that defendant desired to appeal and requested that a bond be set pending the outcome of the appeal. *State v. Madrid*, 1972-NMSC-016, 83 N.M. 603, 495 P.2d 383.

## III. SENTENCES.

**Duty of court to impose sentence enhancement.** — The court has an affirmative duty to impose the appropriate level of sentence enhancement once the factual issues of identity and prior convictions are resolved against the respondent. *State v. Davis*, 1986-NMSC-031, 104 N.M. 229, 719 P.2d 807.

**Jurisdiction of trial court to sentence** is not exhausted until sentence is pronounced, and will carry over from term to term. *Pavlich v. State*, 1968-NMSC-147, 79 N.M. 473, 444 P.2d 984.

**Enhanced sentence may be imposed only in last felony case.** — Even though identity is determined in a separate cause, the enhanced sentence may only be imposed in the last case in which the accused was convicted of a felony in this state. *State v. Tipton*, 1966-NMSC-202, 77 N.M. 1, 419 P.2d 216.

**Identity established.** — Regardless of whether the identity is determined in a separate case or in a separate proceeding in the felony case following conviction therein, if such identity is established, the enhanced sentence required by the Habitual Criminal Act may only be imposed in the felony case. *Lott v. Cox*, 1965-NMSC-037, 75 N.M. 102, 401 P.2d 93.

**Sentence imposed in habitual criminal proceeding void.** — Where defendant's identity as the person previously convicted of two felonies was established in a separate proceeding, and the enhanced sentence was also imposed, the sentence was a nullity and the commitment issued therein is void, as the sentence should have been imposed in the last felony case. *State v. Tipton*, 1966-NMSC-202, 77 N.M. 1, 419 P.2d 216.

**Defendant may be returned for imposition of proper sentence.** — Where defendant has been legally convicted, but no judgment or sentence has been imposed, and defendant's identity as an habitual offender has been established and he was sentenced, defendant's restraint is illegal because sentence was imposed in the wrong case. In such a situation, defendant may be returned to the trial court for imposition of a proper sentence. *State v. Tipton*, 1966-NMSC-202, 77 N.M. 1, 419 P.2d 216.

**Murder sentences.** — A sentence in a cause charging violation of the habitual offender statute by a defendant who pleaded guilty to two murder charges is void and he should be remanded for sentencing in the murder cases. *Miller v. Cox*, 1965-NMSC-031, 75 N.M. 65, 400 P.2d 480.

**Previous regular sentences vacated and enhanced sentences imposed.** — Where regular sentences were



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imposed upon defendants prior to the time their status as habitual offenders was determined, the regular sentences are to be vacated and the enhanced sentences are to be imposed. *State v. Baker*, 1977-NMCA-033, 90 N.M. 291, 562 P.2d 1145.

**Correcting and vacating sentence.** — Although the sentence of the court in the felony case was incomplete until the resentence, as the previous sentence was not vacated and the mandatory statutory increased punishment imposed as required by law, there is no reason, constitutional or otherwise, why the court which imposed sentence may not correct what it did wrongly by vacating the sentence for breaking and entering and imposing the mandatory sentence in place of the one vacated. *State v. Gonzales*, 1972-NMCA-130, 84 N.M. 275, 502 P.2d 300, cert. denied, 84 N.M. 271, 502 P.2d 296.

There is no requirement of law that the punishment for the felony of which accused was convicted be first imposed and then vacated in order to impose the increased punishment prescribed by the habitual offender statute. *Lott v. Cox*, 1965-NMSC-037, 75 N.M. 102, 401 P.2d 93.

**Statute does not require that sentence be first imposed** in the felony conviction and then vacated before the increased punishment prescribed by the habitual offender statute may be imposed. *State v. Bonner*, 1970-NMCA-047, 81 N.M. 471, 468 P.2d 636.

**Arrangement of manner in which enhanced sentence will be served.** — In imposing the new enhanced sentences, the trial court's arrangement of the manner in which the new enhanced sentences will be served is not limited by the arrangement for serving the regular sentences which should have been vacated. *State v. Baker*, 1977-NMCA-033, 90 N.M. 291, 562 P.2d 1145.

**Change from suspended sentence to sentence to be served.** — Inasmuch as the trial court had no authority to suspend the enhanced sentence, a change from a suspended sentence to a sentence to be served when sentence as a habitual offender was imposed was proper. *State v. Baker*, 1977-NMCA-033, 90 N.M. 291, 562 P.2d 1145.

**Right to counsel.** — An indigent defendant facing the imposition of penalties under the habitual criminal statutes is entitled to have an attorney appointed to represent him in such hearing. There is no requirement that such appointed attorney be the same attorney that represented the indigent defendant in the proceeding which resulted in the Habitual Criminal Act becoming applicable. This is so even though the habitual criminal proceedings may be filed in the same action. Such being the case, it necessarily follows that the question of identity of the attorney in the two proceedings is of no consequence and that the court may pay him for his services in the initial proceeding and in the habitual criminal proceeding as well. 1966 Op. Att'y Gen. No. 66-27.

**Law reviews.** — For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 677 et seq.; 39 Am. Jur. 2d Habitual Criminals, etc. § 29 et seq.

Reasonable doubt: rule of reasonable doubt as applicable to proof of previous conviction for purpose of enhancing punishment, 79 A.L.R. 1337.

Overemphasis in proof of former conviction in connection with habitual criminal law, or unnecessary introduction of evidence in that regard, as prejudicial to accused, 144 A.L.R. 240.

Cross-examination of accused: accused who testifies in his own behalf as subject to cross-examination to show previous conviction in order to enhance punishment, 153 A.L.R. 1159.

Habeas Corpus: invalidity of prior conviction or sentence as ground of habeas corpus where one is sentenced as second offender, 171 A.L.R. 541.

Identity: necessity, character and sufficiency of evidence of identity for purpose of statute as to enhanced punishment in case of prior conviction, 11 A.L.R.2d 870.

Right of court in imposing sentence to consider other offenses committed by defendant in absence of statute in that regard, 96 A.L.R.2d 768.

## 31-18-21. Consecutive sentences; inmates and persons at large.

A. Whenever an inmate in a penal institution of this state or of any county therein is sentenced for committing any felony while he is an inmate, the sentence imposed shall be consecutive to the sentence being served, and his period of parole shall be that set according to the provisions of Section 31-21-10 NMSA 1978.

B. Any person, who commits a crime while at large under a suspended or deferred sentence or probation or parole, and who is convicted and sentenced therefor, shall serve the sentence consecutive to the remainder of the term, including remaining parole time, under which he was released unless otherwise ordered by the court in sentencing for the new crime.

**History: 1953 Comp., § 40A-29-34, enacted by Laws 1977, ch. 216, § 10.**

### ANNOTATIONS

**Intent of legislature.** — Construing Subsection A of this section together with the other sentencing statutes in the Criminal Sentencing Act leads to the inescapable conclusion that the legislature intended to impose harsher and more certain punishment on inmates who commit crimes while incarcerated. *State v. Davis*, 2003-NMSC-022, 134 N.M. 172, 74 P.3d 1064.

The legislature intended sentencing courts to stack the sentences of inmates who are convicted of crimes while incarcerated. *State v. Davis*, 2003-NMSC-022, 134 N.M. 172, 74 P.3d 1064.

**Prison disciplinary measures do not bar subsequent prosecution** in a criminal action for violation of a penal statute prohibiting the same act which was the basis of the person's discipline. *Washington v. Rodriguez*, 1971-NMCA-021, 82 N.M. 428, 483 P.2d 309.

**Consecutive sentences proper.** — Court may, at its discretion, impose consecutive sentences. *State v. Frederick*, 1964-NMSC-045, 74 N.M. 42, 390 P.2d 281.

**Modification of sentences in parole revocation.** — In a parole revocation, the court may only modify an existing sentence. When the existing sentence is consecutive to a previous sentence, the court may make the



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existing sentence concurrent because doing so does not increase the sentence. However, the court may not change a sentence that was originally concurrent to be consecutive because doing so would increase the sentence. In a first sentence, however, Subsection B of Section 31-18-21 NMSA 1978 is never applicable and the sentence cannot be made concurrent or consecutive with a later sentence as a result of probation violation because for a first sentence there is no concurrent or consecutive status to be modified. To hold otherwise would allow probation revocations for previous convictions to undermine concurrent or consecutive sentences for later convictions. *State v. Rapchack*, 2011-NMCA-116, 150 N.M. 716, 265 P.3d 1289, cert. denied, 2011-NMCERT-010.

**Subsection B of Section 31-18-21 NMSA 1978 applies to sentences as originally imposed.** The order of probation revocation does not change the character or original order of the sentences. *State v. Rapchack*, 2011-NMCA-116, 150 N.M. 716, 265 P.3d 1289, cert. denied, 2011-NMCERT-010.

**Modification of multiple sentences in parole revocation.** — Where defendant pleaded guilty to burglary of a vehicle and the first judge suspended defendant's sentence; defendant subsequently pleaded guilty to auto-theft related crimes before a second judge and the second judge suspended defendant's sentence and ordered the sentence to be served consecutive to the sentence in the burglary case; defendant was later arrested for a third crime; in 2008, the second judge revoked defendant's probation in the auto-theft case; in 2009, first judge revoked defendant's probation in the burglary case and ordered that the sentence in the burglary case be served concurrently with the sentence in the auto-theft case; and the first judge later corrected the order to state that the sentence in the burglary case would not run concurrently with the sentence in the auto-theft case, the order making the sentence in the burglary case concurrent with the sentence in the auto-theft case was contrary to law and the first judge had the power to correct the order, because the sentence in the burglary case was the first sentence, the first sentence could not originally have been concurrent with or consecutive to anything and could not be modified to become concurrent or consecutive. *State v. Rapchack*, 2011-NMCA-116, 150 N.M. 716, 265 P.3d 1289, cert. denied, 2011-NMCERT-010.

**Sentencing judge has no discretion** under this section regarding whether a sentence is to be served consecutively or concurrently. The legislature's use of the word "shall" in Subsection A makes consecutive sentencing mandatory. *State v. Davis*, 2003-NMSC-022, 134 N.M. 172, 74 P.3d 1064.

**Section alters common-law rule.** — The common-law rule is that in the absence of statute two or more sentences are to be served concurrently unless otherwise ordered by the court. This section alters the common-law rule only as to crimes committed while at large under a sentence for a prior crime. *Deats v. State*, 1972-NMCA-155, 84 N.M. 405, 503 P.2d 1183.

**Unless court orders otherwise, section postpones stated beginning date** of new sentence until the prior sentence is completed. *Herring v. State*, 1969-NMCA-117, 81 N.M. 21, 462 P.2d 468.

**Beginning date of sentence.** — Sentence imposed upon defendant while he was on parole from prior sentence ran consecutive to prior sentence although trial court stated beginning date for new sentence but did not order that it run concurrently with prior sentence. *Herring v. State*, 1969-NMCA-117, 81 N.M. 21, 462 P.2d 468.

Although the beginning date of the new sentences imposed following conviction of forgery was stated in the commitment of defendant on parole, that beginning date was postponed by this section where the trial court did not order otherwise; further, the record showed that the court did not intend the sentences for the three forgeries to run concurrently with any other sentence imposed upon defendant. *State v. Upshaw*, 1968-NMCA-070, 79 N.M. 484, 444 P.2d 995.

**Effect of return of defendant to penitentiary before trial.** — Defendant's assertion that the district court lost jurisdiction over him because he was "released" to the penitentiary for parole violation before being tried did not raise any issue of illegality. The parole authorities could revoke defendant's parole and return him to the penitentiary for a parole violation, and this section clearly contemplates the conviction and sentence of a person for a crime committed while at large under parole. *State v. Ford*, 1970-NMCA-061, 81 N.M. 556, 469 P.2d 535.

**"Presentence" confinement credit not allowed.** — This section mandates that a sentence for a felony committed while serving a sentence in a penal institution run consecutive to the prior sentence. It is impossible to grant "presentence" confinement credit concurrent with time served on the prior sentence and comply with this section, which requires that the sentences run consecutively. *State v. Facteau*, 1990-NMSC-040, 109 N.M. 748, 790 P.2d 1029.

**Discretionary award of presentence confinement credit for offense committed while on probation.** — Since defendant was outside of a penal institution on parole when he committed a second offense (possession of drug paraphernalia), the sentencing judge had discretion under Subsection B to make defendant's sentence run concurrent or consecutive to any sentence defendant was then serving for a parole violation, including the authority to award presentence confinement credit on the facts of the case. *State v. Irvin*, 1992-NMCA-121, 114 N.M. 597, 844 P.2d 847.

**Law reviews.** — For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Sentencing for new offenses committed while accused was on parole or conditional release as concurrent or consecutive, 116 A.L.R. 811.

## 31-18-22. Special incarceration alternative program.

A. The corrections department shall develop and implement a special incarceration alternative program for certain adult male and adult female felony offenders pursuant to this section. The program shall provide substance abuse counseling and treatment, high school equivalency credential preparatory courses, manual labor assignments, physical training and drills, training in decision-making and personal development and pre-release skills training. The programs shall be conducted in a strict disciplinary environment. Emphasis shall be given to rehabilitation of alcohol and substance abusers. The corrections department shall require that program participants complete a structured, ninety-day program.



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B. Participation in the program shall be limited to those offenders sentenced on or after July 1, 1990. Offenders ineligible to participate in the program are offenders:

(1) sentenced to death;

(2) who have received a life sentence;

(3) with a record of prior confinement for a felony conviction;

(4) convicted of murder in the first or second degree, child abuse resulting in death or great bodily harm, criminal sexual penetration in the first or second degree or criminal sexual contact with a minor;

(5) convicted of an offense carrying a mandatory sentence that cannot be suspended or deferred;

(6) who have participated in a special incarceration alternative program in the past;

(7) who are more than thirty years of age at time of sentencing; or

(8) who do not volunteer to participate in the program and who do not agree to the special conditions of probation for successful program participants.

C. The corrections department shall develop and adopt regulations to provide for the screening of all convicted felons sentenced to the custody of the corrections department. The regulations shall provide that the screening occurs within thirty days of sentencing. Persons deemed suitable under the regulations adopted pursuant to this subsection shall not be denied eligibility for participation in the program solely due to physical disability.

D. If the sentencing court accepts the recommendation of the corrections department that the offender is suitable for participation in a special incarceration alternative program, the court shall resentence the offender to provide that, in the event the offender successfully completes the program, the remainder of the sentence shall be suspended and the offender shall be placed on probation for the remainder of the term. The sentencing court shall be notified in writing by the corrections department of the offender's successful completion of the special incarceration alternative program.

E. The corrections department may contract for the design, construction and lease of a facility to house a special incarceration alternative program with public or private agencies, entities or persons capable of providing financing or construction of such a facility. The facility shall be operated by the corrections department.

F. Appropriate post-institutional treatment shall be made available by the corrections department to the offender.

**History: Laws 1990, ch. 51, § 1; 2015, ch. 122, § 16.**

**The 2015 amendment,** effective July 1, 2015, replaced the term "general education diploma" with "high school equivalency credential" in the provision relating to special incarceration alternative programs for certain felony offenders in the custody of the corrections department; in Subsection A, after "treatment", deleted "general education diploma" and added "high school equivalency credential".

## 31-18-23. Three violent felony convictions; mandatory life imprisonment; exception.

A. When a defendant is convicted of a third violent felony, and each violent felony conviction is part of a separate transaction or occurrence, and at least the third violent felony conviction is in New Mexico, the defendant shall, in addition to the sentence imposed for the third violent conviction, be punished by a sentence of life imprisonment. The life imprisonment sentence shall be subject to parole pursuant to the provisions of Section 31-21-10 NMSA 1978.

B. The sentence of life imprisonment shall be imposed after a sentencing hearing, separate from the trial or guilty plea proceeding resulting in the third violent felony conviction, pursuant to the provisions of Section 31-18-24 NMSA 1978.

C. For the purpose of this section, a violent felony conviction incurred by a defendant before the defendant reaches the age of eighteen shall not count as a violent felony conviction.

D. When a defendant has a felony conviction from another state, the felony conviction shall be considered a violent felony for the purposes of the Criminal Sentencing Act if that crime would be considered a violent felony in New Mexico.



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E. As used in the Criminal Sentencing Act:

(1) "great bodily harm" means an injury to the person that creates a high probability of death or that causes serious disfigurement or that results in permanent loss or impairment of the function of any member or organ of the body; and

(2) "violent felony" means:

(a) murder in the first or second degree, as provided in Section 30-2-1 NMSA 1978;

(b) shooting at or from a motor vehicle resulting in great bodily harm, as provided in Subsection B of Section 30-3-8 NMSA 1978;

(c) kidnapping resulting in great bodily harm inflicted upon the victim by the victim's captor, as provided in Subsection B of Section 30-4-1 NMSA 1978;

(d) criminal sexual penetration, as provided in Subsection C or D or Paragraph (5) or (6) of Subsection E of Section 30-9-11 NMSA 1978; and

(e) robbery while armed with a deadly weapon resulting in great bodily harm as provided in Section 30-16-2 NMSA 1978 and Subsection A of Section 30-1-12 NMSA 1978.

**History: 1978 Comp., § 31-18-23, enacted by Laws 1994, ch. 24, § 2; 1996, ch. 79, § 3; 2009, ch. 11, § 2.**

**The 2009 amendment,** effective July 1, 2009, in Subparagraph A, deleted the qualification that a defendant be punished by a sentence of life imprisonment when the sentence for the third violent conviction does not result in death; and in Subparagraph (d) of Paragraph (2) of Subsection E, added the reference to Subsection D of Section 30-9-11 NMSA 1978.

**The 1996 amendment,** effective July 1, 1996, substituted "sentence" for "punishment" and "when" for "and" in the first sentence of Subsection A, substituted "(5) or (6)" for "(4) or (5)" in Subparagraph E(2)(d), and made a stylistic change in Subparagraph E(2)(e).

**Applicability.** — Laws 2009, ch. 11, § 6 provided that the provisions of this section apply to crimes committed on or after July 1, 2009.

## 31-18-24. Violent felony sentencing procedure.

A. The court shall conduct a separate sentencing proceeding to determine any controverted question of fact regarding whether the defendant has been convicted of three violent felonies. Either party to the action may demand a jury trial.

B. In a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury. In a nonjury trial, the sentencing shall be conducted as soon as practicable by the original trial judge. In the case of a plea of guilty, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by a jury upon demand of the defendant.

C. In a jury sentencing proceeding, the judge shall give appropriate instructions and allow arguments. The jury shall retire to determine the verdict. In a nonjury sentencing proceeding, or upon a plea of guilty where no jury has been demanded, the judge shall allow argument and determine the verdict.

**History: 1978 Comp., § 31-18-24, enacted by Laws 1994, ch. 24, § 3.**

## 31-18-25. Two violent sexual offense convictions; mandatory life imprisonment; exception.

A. When a defendant is convicted of a second violent sexual offense, and each violent sexual offense conviction is part of a separate transaction or occurrence, and at least the second violent sexual offense conviction is in New Mexico, the defendant shall, in addition to the punishment imposed for the second violent sexual offense conviction, be punished by a sentence of life imprisonment. The life imprisonment sentence shall be subject to parole pursuant to the provisions of Section 31-21-10 NMSA 1978.

B. Notwithstanding the provisions of Subsection A of this section, when a defendant is convicted of a second violent sexual offense, and each violent sexual offense conviction is part of a separate transaction or occurrence, and the victim of each violent sexual offense was less than thirteen years of age at the time of the offense, and at least the second violent sexual offense



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conviction is in New Mexico, the defendant shall be punished by a sentence of life imprisonment without the possibility of parole.

C. The sentence of life imprisonment shall be imposed after a sentencing hearing, separate from the trial or guilty plea proceeding resulting in the second violent sexual offense conviction, pursuant to the provisions of Section 31-18-26 NMSA 1978.

D. For the purposes of this section, a violent sexual offense conviction incurred by a defendant before the defendant reaches the age of eighteen shall not count as a violent sexual offense conviction.

E. When a defendant has a felony conviction from another state, the felony conviction shall be considered a violent sexual offense for the purposes of the Criminal Sentencing Act if the crime would be considered a violent sexual offense in New Mexico.

F. As used in the Criminal Sentencing Act, "violent sexual offense" means:

(1) criminal sexual penetration in the first degree, as provided in Subsection D of Section 30-9-11 NMSA 1978; or

(2) criminal sexual penetration in the second degree, as provided in Subsection E of Section 30-9-11 NMSA 1978.

**History: 1978 Comp., § 31-18-25, enacted by Laws 1996, ch. 79, § 1; 1997, ch. 140, § 1; 2015, ch. 12, § 1.**

**The 2015 amendment,** effective June 19, 2015, made technical corrections to the Criminal Sentencing Act by providing the correct citations for criminal sexual penetration in the first degree and criminal sexual penetration in the second degree in the NMSA 1978; in Subsection D, after "before", deleted "he" and added "the defendant"; in Paragraph (1) of Subsection F, after "Subsection", deleted "C" and added "D"; in Paragraph (2) of Subsection F, after "Subsection", deleted "D" and added "E".

**The 1997 amendment,** effective July 1, 1997, added Subsection B; redesignated former Subsections B through E as C through F; and rewrote Subsection F.

**ANNOTATIONS**

**Definition of "violent sexual offense".** — In 2004, defendant pleaded guilty to a charge of criminal sexual penetration in the second degree for raping a fourteen-year-old minor; ten years later, defendant was convicted of criminal sexual penetration in the second degree for raping a fifteen-year-old minor; defendant argued that the state could not use 31-18-25(A) NMSA 1978 to sentence defendant to life imprisonment for a second "violent sexual offense" because 31-18-25(F)(2) NMSA 1978 defined "violent sexual offense" by reference to 30-9-11(D) NMSA 1978 which had been amended in 2007 to define criminal sexual penetration in the first degree; and the 2007 amendments moved the definition of criminal sexual penetration in the second degree to Subsection E of 30-9-11 NMSA 1978, but did not change the definition, the reorganization of 30-9-11 NMSA 1978 by the 2007 amendments did not deprive the district court of the authority to impose a life sentence upon defendant because the authority was provided in 31-18-25(A) NMSA 1978 which refers to a second violent sexual offense. *State ex rel. Brandenburg v. Sanchez*, 2014-NMSC-022.

**Multiple enhancements authorized.** — This section authorizes the imposition of multiple enhancements for multiple current convictions. *State v. McClendon*, 2001-NMSC-023, 130 N.M. 551, 28 P.3d 1092.

## 31-18-26. Two violent sexual offense convictions; sentencing procedure.

A. The court shall conduct a separate sentencing proceeding to determine any controverted question of fact regarding whether the defendant has been convicted of two violent sexual offenses. Either party to the sentencing proceeding may demand a jury sentencing proceeding.

B. A jury sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury. A nonjury sentencing proceeding shall be conducted as soon as practicable by the original trial judge. In the case of a plea of guilty, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by the original trial jury, upon demand of the defendant.

C. In a jury sentencing proceeding, the judge shall give appropriate instructions and allow arguments. In a nonjury sentencing proceeding, or upon a plea of guilty when the defendant has not demanded a jury, the judge shall allow arguments and determine the verdict.

**History: 1978 Comp., § 31-18-26, enacted by Laws 1996, ch. 79, § 2.**

**ANNOTATIONS**

**Construction.** — Although the statutory language "as soon as practicable" in Subsection B means that the life enhancement proceeding must be conducted without undue delay, the legislature did not intend to impose a specific time limitation on the commencement of life enhancement proceedings. *State v. Massengill*, 2003-NMCA-024, 133 N.M. 263, 62 P.3d 354, cert. denied, 133 N.M. 126, 61 P.3d 835.

**Continuance.** — In a prosecution of defendant for criminal sexual penetration and abuse of a child by endangerment, defendant's argument that the trial court



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erred by granting a continuance of a life enhancement sentencing proceeding was rejected on appeal, where defendant failed to demonstrate that he suffered actual prejudice in connection with the continuance of the life enhancement proceeding or that the delay violated his rights to due process or a speedy trial. *State v. Massengill*, 2003-NMCA-024, 133 N.M. 263, 62 P.3d 354, cert. denied, 133 N.M. 126, 61 P.3d 835.

# ARTICLE 18A

# Sentencing Guidelines

(Repealed by Laws 1994, ch. 19, § 4.)

## 31-18A-1 to 31-18A-9. Repealed.

**Repeals.** — Laws 1994, ch. 19, § 4, repealed 31-18A-1 to 31-18A-9 NMSA 1978, as enacted by Laws 1988, ch. 116, §§ 1 to 9, the Sentencing Guidelines Act, effective July 1, 1994. For provisions of former sections, *see* the 1993 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 18B

# Hate Crimes

Sec.
31-18B-1. Short title.
31-18B-2. Definitions.
31-18B-3. Hate crimes; noncapital felonies, misdemeanors or petty misdemeanors committed because of the victim's actual or perceived race, religion, color, national origin, ancestry, age, disability, gender, sexual orientation or gender identity; alteration of basic sentence.
31-18B-4. Hate crimes; data collection.
31-18B-5. Hate crimes; law enforcement training.

## 31-18B-1. Short title.

This act [31-18B-1 to 31-18B-5 NMSA 1978] may be cited as the "Hate Crimes Act".

**History: Laws 2003, ch. 384, § 1.**

**Effective dates.** — Laws 2003, ch. 384, § 7 made the act effective July 1, 2003.

## 31-18B-2. Definitions.

As used in the Hate Crimes Act:

A. "age" means sixty years of age or older;

B. "gender identity" means a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord or opposed to the person's physical anatomy, chromosomal sex or sex at birth;

C. "disability" means that the person has a physical or mental disability that substantially limits one or more of that person's functions, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;

D. "motivated by hate" means the commission of a crime with the intent to commit the crime because of the actual or perceived race, religion, color, national origin, ancestry, age, handicapped status, gender, sexual orientation or gender identity of the victim, whether or not the offender's belief or perception was correct; and

E. "sexual orientation" means heterosexuality, homosexuality or bisexuality, whether actual or perceived.



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**History: Laws 2003, ch. 384, § 2; 2007, ch. 46, § 37.** **The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

## 31-18B-3. Hate crimes; noncapital felonies, misdemeanors or petty misdemeanors committed because of the victim's actual or perceived race, religion, color, national origin, ancestry, age, disability, gender, sexual orientation or gender identity; alteration of basic sentence.

A. When a separate finding of fact by the court or jury shows beyond a reasonable doubt that an offender committed a noncapital felony motivated by hate, the basic sentence of imprisonment prescribed for the offense in Section 31-18-15 NMSA 1978 may be increased by one year. An increase in the basic sentence of imprisonment pursuant to the provisions of this subsection shall be in addition to an increase in a basic sentence prescribed for the offense in Section 31-18-17 NMSA 1978. A sentence imposed pursuant to the provisions of this subsection may include an alternative sentence that requires community service, treatment, education or any combination thereof. The court may suspend or defer any or all of the sentence or grant a conditional discharge, unless otherwise provided by law.

B. If a finding was entered in a previous case that the offender was convicted for committing a crime that was motivated by hate, and if a separate finding of fact by the court or jury shows beyond a reasonable doubt that in the instant case the offender committed a noncapital felony that was motivated by hate, the basic sentence of imprisonment prescribed for the offense in Section 31-18-15 NMSA 1978 may be increased by two years. An increase in the basic sentence of imprisonment pursuant to the provisions of this subsection shall be in addition to an increase in a basic sentence prescribed for the offense in Section 31-18-17 NMSA 1978. A sentence imposed pursuant to the provisions of this subsection may include an alternative sentence that requires community service, treatment, education or any combination thereof. The court may suspend or defer any or all of the sentence, or grant a conditional discharge unless otherwise provided by law.

C. If the case is tried before a jury and if a prima facie case has been established showing that in the commission of the offense the offender was motivated by hate, the court shall submit the issue to the jury by special interrogatory. If the case is tried by the court and if a prima facie case has been established showing that in the commission of the offense the offender was motivated by hate, the court shall decide the issue and shall make a separate finding of fact regarding the issue. If the court or jury determines that the offender is guilty of the crime and finds beyond a reasonable doubt that the offender was motivated by hate, the court shall include that determination in the judgment and sentence.

D. When a petty misdemeanor or a misdemeanor is motivated by hate, the basic sentence of imprisonment prescribed for the offense in Section 31-19-1 NMSA 1978 may include an alternative sentence that requires community service, treatment, education or any combination thereof. The court may suspend or defer any or all of the sentence or grant a conditional discharge, unless otherwise provided by law.

**History: Laws 2003, ch. 384, § 3; 2007, ch. 46, § 38.**

**The 2007 amendment,** effective June 15, 2007, made non-substantive language changes.

### ANNOTATIONS

**Decisions under former 31-18-16.1 NMSA 1978.** — In light of the similarity of this section and former Section 31-18-16.1 NMSA 1978, annotations decided under former Section 31-18-16.1 NMSA 1978 have been included in the annotations in this section.

**It is solely within province of legislature to establish penalties for criminal behavior.** *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22, cert. denied, 98 N.M. 478, 649 P.2d 1391.

**Failure to give defendant notice of enhancement.** — Robbery defendant was entitled to notice of the state's intent to seek enhancement under this section, and failure to give him such notice was reversible error. *State v. Smith*, 1990-NMCA-082, 110 N.M. 534, 797 P.2d 984, cert. denied, 110 N.M. 533, 797 P.2d 983.

Where a robbery defendant was not properly notified that the state would seek old-age enhancement of his sentence under this section before he pled and was adjudicated guilty, the state was not precluded from seeking enhancement upon remand of his case for further proceedings. *State v. Smith*, 1990-NMCA-082, 110 N.M. 534, 797 P.2d 984, cert. denied, 110 N.M. 533, 797 P.2d 983.



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## 31-18B-4. Hate crimes; data collection.

Every district attorney and every state, county and municipal law enforcement agency, to the maximum extent possible, shall provide the federal bureau of investigation with data concerning the commission of a crime motivated by hate, in accordance with guidelines established pursuant to the federal Hate Crime Statistics Act.

**History: Laws 2003, ch. 384, § 4.**
**Effective dates.** — Laws 2003, ch. 384, § 7 made the act effective July 1, 2003.

**Cross references.** — For the federal Hate Crime Statistics Act, *see* notes following 28 U.S.C.S. § 534.

## 31-18B-5. Hate crimes; law enforcement training.

A. No later than December 31, 2003, the New Mexico law enforcement academy board shall develop and incorporate into the basic law enforcement training required, pursuant to the Law Enforcement Training Act [29-7-1 NMSA 1978], a course of instruction at least two hours in length concerning the detection, investigation and reporting of a crime motivated by hate.

B. The New Mexico law enforcement academy board shall develop a course of instruction, learning and performance objectives and training standards, in conjunction with appropriate groups and individuals that have an interest in and expertise regarding crimes motivated by hate. The groups and individuals shall include law enforcement agencies, law enforcement academy instructors, experts on crimes motivated by hate and members of the public.

C. In-service law enforcement training, as required pursuant to Section 29-7-7.1 NMSA 1978, shall include at least two hours of instruction that conform with the requirements set forth in Subsection B of this section.

D. Each certified regional law enforcement training facility shall incorporate into its basic law enforcement training and in-service law enforcement training a course of training described in Subsection B of this section that is comparable to or exceeds the standards of the course of instruction developed by the New Mexico law enforcement academy board.

**History: Laws 2003, ch. 384, § 5.**
**Effective dates.** — Laws 2003, ch. 384, § 7 made the act effective July 1, 2003.

# ARTICLE 19

# Sentencing Authority for Misdemeanors

Sec.
31-19-1. Sentencing authority[;]misdemeanors; imprisonment and fines; probation.

## 31-19-1. Sentencing authority[;] misdemeanors; imprisonment and fines; probation.

A. Where the defendant has been convicted of a crime constituting a misdemeanor, the judge shall sentence the person to be imprisoned in the county jail for a definite term less than one year or to the payment of a fine of not more than one thousand dollars ($1,000) or to both such imprisonment and fine in the discretion of the judge.

B. Where the defendant has been convicted of a crime constituting a petty misdemeanor, the judge shall sentence the person to be imprisoned in the county jail for a definite term not to exceed six months or to the payment of a fine of not more than five hundred dollars ($500) or to both such imprisonment and fine in the discretion of the judge.

C. When the court has deferred or suspended sentence, it shall order the defendant placed on supervised or unsupervised probation for all or some portion of the period of deferment or suspension.



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**History: 1953 Comp., § 40A-29-4, enacted by Laws 1963, ch. 303, § 29-4; and recompiled as 1953 Comp., § 40A-29-35, by Laws 1977, ch. 216, § 16; 1981, ch. 18, § 1; 1984, ch. 106, § 1.**

**Cross references.** — For misdemeanor penalty under Motor Vehicle Code, *see* 66-8-7 NMSA 1978.

ANNOTATIONS

**Section was not applicable** where defendant violated former 64-10-1, 1953 Comp., which was not a Criminal Code misdemeanor. *State v. Sawyers*, 1968-NMCA-051, 79 N.M. 557, 445 P.2d 978.

**Special statute controlling.** — Section 30-1-6 NMSA 1978 and this section refer generally to the sentence for misdemeanors; former 64-10-1, 1953 Comp., provided a specific sentence for that misdemeanor. If the general statute, standing alone, would include the same matter as the special statute and thus conflict with the special statute, the special statute controls, since it is considered an exception to the general statute. *State v. Sawyers*, 1968-NMCA-051, 79 N.M. 557, 445 P.2d 978.

**Prosecution for violation of 25-3-15 NMSA 1978 regulation of meat inspection board.** — In a prosecution for violation of Section 25-3-15 NMSA 1978, declaring slaughter without inspection and sale of uninspected meat to be misdemeanors, and Section 77-2-22 NMSA 1978, declaring violation of a regulation of the meat inspection board to be a petty misdemeanor, the trial court's sentencing authority for the offense is this section. *State v. Pina*, 1977-NMCA-020, 90 N.M. 181, 561 P.2d 43.

**Confinement for more than one year in custody of corrections department.** — Defendant whose continuous sentence was for more than one year was properly sentenced to the custody of the corrections department rather than the county jail, as the place of confinement, under Sections 31-20-2A and 33-2-39 NMSA 1978, depends on the length of confinement. *State v. Musgrave*, 1984-NMCA-127, 102 N.M. 148, 692 P.2d 534.

**Maximum period of probation.** — The maximum period of probation that may be assessed in misdemeanor or petty misdemeanor cases is the maximum allowable period of incarceration for that crime, irrespective of whether a defendant is sentenced in district court or in a lower tribunal. *State v. Candelaria*, 1991-NMCA-107, 113 N.M. 288, 825 P.2d 221.

**Place of confinement is county jail.** — The place of confinement for misdemeanors under the Criminal Code is the county jail under this section. *State v. Sawyers*, 1968-NMCA-051, 79 N.M. 557, 445 P.2d 978.

**Specific sentence held lawful.** — A sentence of 364 days in a county detention center, suspended with the exception of eighteen days to be served on the defendant's days off from work or on weekends, with the remainder of the sentence to be served on unsupervised probation, is in accord with this section and is therefore appropriate and legal. *State v. Orquiz*, 2003-NMCA-089, 134 N.M. 157, 74 P.3d 91.

**Jury trial in misdemeanor cases.** — Those misdemeanors triable in district court do not provide for a trial by jury unless such crime was of the type which enjoyed and permitted trial by jury at the time of the adoption of N.M. Const., art. II, § 12. 1964 Op. Att'y Gen. No. 64-37.

**Magistrate court may order restitution.** — The magistrate court may, as part of its sentencing power, order a Criminal Code or Motor Vehicle Code violator to make restitution. 1979 Op. Att'y Gen. No. 79-18.

**Law reviews.** — For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

For comment, "The Constitution is Constitutional - A Reply to The Constitutionality of Pretrial Detention Without Bail in New Mexico," see 13 N.M.L. Rev. 145 (1983).

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 27, 29, 825.

Admissibility of expert testimony as to appropriate punishment for convicted defendant, 47 A.L.R.4th 1069.

Appealability of order suspending imposition or execution of sentence, 51 A.L.R.4th 939.

# ARTICLE 19A

# Penalty Assessments

Sec.
31-19A-1. Penalty assessment.

## 31-19A-1. Penalty assessment.

A. Payment of a fine pursuant to a penalty assessment citation shall not be considered a criminal conviction.

B. Whenever a person is issued a penalty assessment under the Criminal Code [30-1-1 NMSA 1978], the officer shall advise the person of the option either to accept the penalty assessment and pay it to the court or to appear in court. The officer, using a uniform non-traffic citation, shall complete the information section, prepare the penalty assessment and prepare a notice to appear in court specifying the time and place to appear. The citation shall state the address to which the penalty assessment is to be paid if the person accepts the penalty assessment and does not elect to appear in court. The officer shall have the person sign the citation as a promise either to pay the penalty assessment as prescribed or to appear in court as specified, give a copy of the citation to the person and release the person from custody. An officer shall not accept custody of payment of any penalty assessment.



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C. The officer may issue a warning notice, but shall fill in the information section of the citation and give a copy to the person after requiring a signature on the warning notice as an acknowledgment of receipt.

D. In order to secure release, the person shall give a written promise to appear in court or to pay the penalty assessment prescribed or acknowledge receipt of a warning notice.

E. The magistrate court or metropolitan court in the county where the alleged violation occurred has jurisdiction for any case arising from a penalty assessment under the Criminal Code.

F. A penalty assessment citation issued by a law enforcement officer shall be submitted to the appropriate magistrate court or metropolitan court within five business days of issuance. If the citation is not submitted within three business days, it may be dismissed with prejudice.

G. A citation with a written promise to appear in court or to pay the penalty assessment is a summons. If a person fails to appear or to pay the penalty assessment by the appearance date, a warrant for failure to appear may be issued.

H. A written promise to appear in court may be complied with by appearance of counsel.

I. When a person issued a penalty assessment elects to appear in court rather than to pay the penalty assessment to the court, no fine imposed upon later conviction shall exceed the penalty assessment established for the particular penalty assessment. A person who elects to appear in court shall pay the costs required by law to be collected by magistrate or metropolitan court judges.

J. Penalty assessments collected by a magistrate court or metropolitan court pursuant to this section shall be transferred to the administrative office of the courts for credit to the magistrate drug court fund.

**History: Laws 2019, ch. 217, § 3.** **Effective dates.** — Laws 2019, ch. 217, § 5 made Laws 2019, ch. 217, § 3 effective July 1, 2019.

# ARTICLE 20

# Sentencing


Sec.
31-20-1. Sentence of corporations.
31-20-2. Place of imprisonment; commitments.
31-20-3. Order deferring or suspending sentence; diagnostic commitment.
31-20-4. Application of order deferring or suspending sentence.
31-20-5. Placing defendant on probation.
31-20-5.1. Misdemeanor compliance programs; counties may establish; fees.
31-20-5.2. Sex offenders; period of probation; terms and conditions of probation.
31-20-6. Conditions of order deferring or suspending sentence.
31-20-7. Repealed.
31-20-8. Effect of termination of period of suspension without revocation of order.
31-20-9. Completion of total term of deferment.
31-20-10. Character of order.
31-20-11. Credit for time pending appellate review.
31-20-12. Credit for time prior to conviction.
31-20-13. Conditional discharge order; exception.


## 31-20-1. Sentence of corporations.

The court may sentence any corporation, club, organization or unincorporated association which has been convicted of a crime to pay a fine authorized by the Criminal Code [30-1-1 NMSA 1978].

**History: 1953 Comp., § 40A-29-12, enacted by Laws 1963, ch. 303, § 29-12; and recompiled as 1953 Comp., § 40A-29-36 by Laws 1977, ch. 216, § 16.**

ANNOTATIONS

**Law reviews.** — For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 18B Am. Jur. 2d Corporations § 2146.

Applicability of criminal statute to corporation as affected by character of punishment or penalty imposed, 80 A.L.R.3d 1220.

19 C.J.S. Corporations §§ 736 to 739.



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## 31-20-2. Place of imprisonment; commitments.

A. Persons sentenced to imprisonment for a term of one year or more shall be imprisoned in a corrections facility designated by the corrections department, unless a new trial is granted or a portion of the sentence is suspended so as to provide for imprisonment for not more than eighteen months; then the imprisonment may be in such place of incarceration, other than a corrections facility under the jurisdiction of the corrections department, as the sentencing judge, in his discretion, may prescribe; provided that a sentence of imprisonment for one year or more but not more than eighteen months shall be subject to the provisions of Subsections D and E of this section and shall not be imposed unless the requirements set forth in Subsection D of this section are satisfied.

B. All commitments, judgments and orders of the courts of this state for the imprisonment or release of persons in the penitentiary shall run to the corrections department, but nothing contained in this section shall invalidate or impair the validity of any commitment, judgment or order of any court in this state directed to the secretary of corrections, the warden of the penitentiary of New Mexico or to the penitentiary of New Mexico, and all such commitments, judgments and orders shall be treated and construed as running to the corrections department.

C. There is created within the corrections department an "intake and classification center". The intake and classification center shall have the following duties:

(1) process all inmates sentenced or committed for purposes of diagnosis to the corrections department;

(2) classify inmates for housing assignments;

(3) develop an individualized plan for participation by each inmate in programs, work assignments and special needs;

(4) monitor each inmate's progress during incarceration and reclassify or modify classification assignments as may be necessary, taking into consideration the overall needs of the inmate population, institutional and facility requirements and the individual inmate's needs;

(5) with the approval of the secretary of corrections, may transfer inmates of the penitentiary to an institution under the control of another state if that state has entered into a corrections control agreement with New Mexico; and

(6) with the approval of the secretary of corrections, may transfer inmates to any facility, including the forensic hospital under the jurisdiction of the department of health.

D. A sentence of one year or more but not more than eighteen months and providing for imprisonment in a place of incarceration other than a corrections facility under the jurisdiction of the corrections department pursuant to Subsection A of this section, which shall be known as the local sentencing option, shall not be imposed unless:

(1) the place of incarceration is located within the county in which the crime was committed; and

(2) the governing authority in charge of the place of incarceration has entered into a joint powers agreement with the corrections department setting forth:

(a) the amount of money the corrections department shall pay for offenders sentenced to a term of one year or more but not more than eighteen months and the number of offenders which may be sentenced to such terms; and

(b) any other provisions deemed appropriate and agreed to by the local governing body and the corrections department.

E. If a judge imposes a sentence of one year or more but not more than eighteen months and provides for imprisonment in a place of incarceration other than a corrections facility under the jurisdiction of the corrections department:

(1) the local governing body or its agent shall have the ability to petition that judge when the capacity of the place of incarceration is filled or when any problem develops concerning that offender requesting the judge to issue an order committing the offender to the corrections department for completion of the remainder of his sentence. A hearing on a petition pursuant to this paragraph shall be held within three days of the filing of the petition. Notwithstanding any other provision of law, the judge shall retain jurisdiction over the offender for the purpose of implementing the local sentencing option; and



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(2) the local governing body or its agent shall keep the district judges for the judicial district in which the place of incarceration is located informed as to the capacity for the sentencing of offenders in accordance with the local sentencing option. No judge shall sentence an offender in accordance with the local sentencing option if that sentence will result in exceeding the number of offenders set forth in the joint powers agreement.

F. The corrections department shall file an annual report with the legislature which shall contain the number of joint powers agreements in operation pursuant to this section, copies of those agreements, the number of offenders currently incarcerated pursuant to those agreements and any other relevant information relating to the implementation of this section.

G. The corrections department may enter into contracts with public or private detention facilities for the purpose of housing inmates lawfully committed to the corrections department. Any facility with which the department contracts shall meet or exceed corrections department standards prior to the housing of any inmates within the facility and shall meet certification requirements for prisons within eighteen months of entering into such contracts. The contractor shall adhere to all appropriate corrections department policies and procedures and shall agree to have staff trained at the corrections department training academy.

**History: 1953 Comp., § 40A-29-13, enacted by Laws 1963, ch. 303, § 29-13; 1972, ch. 71, § 3; 1973, ch. 383, § 1; and recompiled as 1953 Comp., § 40A-29-37, by Laws 1977, ch. 216, § 16; 1978, ch. 106, § 1; 1981, ch. 9, § 1; 1987, ch. 51, § 1; 1993, ch. 81, § 1.**

**Cross references.** — For Interstate Corrections Compact, *see* 31-5-17 and 31-5-18 NMSA 1978.

For contracts with the United States attorney general for the housing of convicted offenders, *see* 31-5-19 NMSA 1978.

For judgment of imprisonment for more than one year to be in corrections facility, *see* 33-2-19 NMSA 1978.

For determination of sentence upon several commitments, *see* 33-2-39 NMSA 1978.

**The 1993 amendment,** effective July 1, 1993, substituted "contained in this section" for "herein contained" and "secretary of corrections" for "superintendent" in Subsection B; substituted "department of health" for "health and environment department" in Subsection C(6); substituted "this section" for "this act" in two places in Subsection F; and added Subsection G.

## ANNOTATIONS

**Liability for cost of incarceration in county jail.** — The department of corrections is responsible for the costs of housing parole violators who are incarcerated in a county jail at the request of the department of corrections. *State ex rel., San Miguel Bd of Cnty. Comm'rs v. Williams*, 2007-NMCA-036, 141 N. M. 356, 155 P.3d 761, cert. denied, 2007-NMCERT-003, 141 N.M. 401, 156 P.3d 39.

**The provisions of Subsection D are mandatory,** not discretionary. *State v. Ruiz*, 1989-NMCA-109, 109 N.M. 437, 786 P.2d 51, cert. denied, 109 N.M. 419, 785 P.2d 1038 (1990).

**Once the defendant's plea is accepted and judgment entered, court has four options:** (1) it can sentence the defendant and execute the sentence, committing him to prison; (2) it can commit the defendant for a 60-day diagnostic term; (3) it can sentence the defendant and suspend the execution of the sentence; or (4) it can enter an order deferring the imposition of the sentence. *State v. Kenneman*, 1982-NMCA-145, 98 N.M. 794, 653 P.2d 170, cert. denied, 99 N.M. 47, 653 P.2d 878.

**Rights not created.** — Provisions relating to mechanisms by which corrections officials can arrange to transfer inmates needing psychiatric care to an appropriate facility were not meant to create rights enforceable by inmates against state officials; thus, this section did not create a liberty interest subject to due process protections. *Riddle v. Mondragon*, 83 F.3d 1197 (10th Cir. 1996).

**Order committing defendant to state hospital for indeterminate period not valid sentence.** — An order directing that the defendant be transported to the state hospital for an indeterminate period and then be returned to the district court for sentencing is not a valid sentence permitted by law, nor does it constitute a final judgment and sentence for purposes of an appeal. *State v. Garcia*, 1983-NMCA-017, 99 N.M. 466, 659 P.2d 918.

**Effect of commitment flaws on judgment.** — Valid judgment is not to be nullified by the flaws in the commitment. *Shankle v. Woodruff*, 1958-NMSC-054, 64 N.M. 88, 324 P.2d 1017.

**Effect of misnomer.** — Prisoners were not denied habeas corpus where they were sentenced to the "New Mexico penitentiary" instead of "to the penitentiary of New Mexico" because the misnomer, if one existed, was a clerical error which did not affect any substantial right of the appellants. *Carter v. New Mexico*, 358 F.2d 710 (10th Cir.), cert. denied, 385 U.S. 873, 87 S. Ct. 146, 17 L. Ed. 2d 100 (1966).

**Effect of section where one-year maximum sentence.** — Where defendant has a valid maximum sentence of not more than one year, under Section 33-2-19 NMSA 1978 or this section, the proper place of his confinement is the state penitentiary. *State v. Sawyers*, 1968-NMCA-051, 79 N.M. 557, 445 P.2d 978.

**Calculation of sentence.** — Under Section 33-2-19 NMSA 1978, defendant's sentence to one year would be calculated as a sentence of less than one year after crediting his pre-sentence time served; thus, the law did not require the court to sentence him to prison, and his sentence to jail was legal. *State v. Brown*, 1999-NMSC-004, 126 N.M. 642, 974 P.2d 136.

**Transfer from New Mexico to Texas.** — Because a transfer of prisoners from New Mexico to Texas does not affect the duration of a sentence, a transfer must impose an atypical or a significant hardship before it can be held to create a liberty interest under state law. *Jordan v. Bowles*, No. 96-2169, 124 F.3d 217 (Table) (unpublished) (10th Cir. 1997).

**Confinement in county jail held improper.** — District court lacked authority to order defendant confined in the county jail, where defendant's "sentence" was the one-year term imposed by the judgment of the district court, not the 363 days remaining to be served on that sentence after imposition of the sentence. *State v. Ruiz*, 1989-NMCA-109, 109 N.M. 437, 786 P.2d 51, cert. denied, 109 N.M. 419, 785 P.2d 1038 (1990).



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**Contracting with counties for housing of inmates.** — Corrections department cannot contract with counties for the housing of inmates committed to the department. 1987 Op. Att'y Gen. No. 87-53.

**Law reviews.** — For annual survey of New Mexico criminal procedure, see 16 N.M.L. Rev. 25 (1986).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 24 et seq., 825; 32 Am. Jur. 2d False Imprisonment § 16; 60 Am. Jur. 2d Penal and Correctional Institutions, § 13; 75B Am. Jur. 2d Trial § 1828.

When, under terms of Federal Youth Corrections Act (18 USCS §§ 5005 et seq.), must prisoner serving youth corrections sentence be segregated from adult prison population, 59 A.L.R. Fed. 746.

24 C.J.S. Criminal Law §§ 1589, 1590.

## 31-20-3. Order deferring or suspending sentence; diagnostic commitment.

Upon entry of a judgment of conviction of any crime not constituting a capital or first degree felony, any court having jurisdiction when it is satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may either:

A. enter an order deferring the imposition of sentence;

B. sentence the defendant and enter an order suspending in whole or in part the execution of the sentence; or

C. commit the convicted person, if convicted of a felony and not committed for diagnostic purposes within the twelve-month period immediately preceding that conviction, to the department of corrections [corrections department] for an indeterminate period not to exceed sixty days for purposes of diagnosis, with direction that the court be given a report when the diagnosis is complete as to what disposition appears best when the interest of the public and the individual are evaluated.

**History: 1953 Comp., § 40A-29-15, enacted by Laws 1963, ch. 303, § 29-15; 1971, ch. 204, § 4; and recompiled as 1953 Comp., § 40A-29-39, by Laws 1977, ch. 216, § 16; 1985, ch. 159, § 1.**

**Bracketed material.** — The bracketed material in Subsection C was inserted by the compiler, as Laws 1977, ch. 257, § 4, abolished the department of corrections. Laws 1977, ch. 257, § 14, transferred all employees, equipment, etc., of this department to the criminal justice department. Laws 1980, ch. 150, § 3, changed the name of this department to the "corrections and criminal rehabilitations department." Laws 1981, ch. 73, § 1, changed the name of this department to the "corrections department." *See* 9-3-3 NMSA 1978. The bracketed material is not part of the law.

### ANNOTATIONS

**Constitutionality.** — Laws 1909, ch. 32, § 1 (repealed), giving court power to suspend sentences, did not encroach upon constitutional power of execution to grant reprieves and pardons. *Ex parte Bates*, 1915-NMSC-060, 20 N.M. 542, 151 P. 698.

**It is solely within province of legislature to establish penalties for criminal behavior.** *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22, cert. denied, 98 N.M. 478, 649 P.2d 1391.

**Once the defendant's plea is accepted and judgment entered, court has four options:** (1) it can sentence the defendant and execute the sentence, committing him to prison; (2) it can commit the defendant for a 60-day diagnostic term; (3) it can sentence the defendant and suspend the execution of the sentence; or (4) it can enter an order deferring the imposition of the sentence. *State v. Kenneman*, 1982-NMCA-145, 98 N.M. 794, 653 P.2d 170, cert. denied, 99 N.M. 47, 653 P.2d 878.

**Prior conviction, not prior sentence, is dispositive for repeat offender status.** — Where defendant was convicted of drug charges in New Mexico; the New Mexico court deferred defendant's sentence for a two-year probationary period; the sentence was a final judgment subject to appeal; and after defendant successfully completed the probation, defendant was entitled to have the New Mexico charges dismissed, the deferred sentence was a prior conviction for purposes of sentence enhancement. *United States v. Meraz*, 998 F.2d 182 (10th Cir. 1993).

**Deferred sentence modified to conditional discharge.** — Modification from a deferred sentence to a conditional discharge was an authorized sentence reduction under this section and Rule 5-801 NMRA. *State v. Herbstman*, 1999-NMCA-014, 126 N.M. 683, 974 P.2d 177.

**Mandatory sentencing does not violate doctrine of separation of powers** contained in N.M. Const., art. III, § 1. *State v. Mabry*, 1981-NMSC-067, 96 N.M. 317, 630 P.2d 269.

**Effect of excepting sentencing for capital or first-degree felony.** — The exception of capital or first-degree felonies from the list of the offenses for which the court may defer or suspend all or a portion of a sentence does not make sentencing for capital or first-degree felonies unconstitutional as cruel and unusual punishment. *State v. Garcia*, 1983-NMCA-069, 100 N.M. 120, 666 P.2d 1267, cert. denied, 100 N.M. 192, 668 P.2d 308.

**Sentencing scheme for suspension and deferment is not unconstitutionally vague.** *State v. Kenneman*, 1982-NMCA-145, 98 N.M. 794, 653 P.2d 170, cert. denied, 99 N.M. 47, 653 P.2d 878.

**Jurisdiction to increase punishment by new sentence.** — A trial court is without power to set aside a valid sentence after the defendant has been committed thereunder, and impose a new or different sentence increasing the punishment. A judgment which attempts to do so is void and the original judgment remains in force. *State v. Baros*, 1968-NMSC-001, 78 N.M. 623, 435 P.2d 1005.

**Suspended or deferred sentence within court's discretion.** — Of the sentencing alternatives available, a suspended or deferred sentence is within the discretion of the trial court. *State v. Madrigal*, 1973-NMCA-116, 85 N.M. 496, 513 P.2d 1278, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**Suspension matter of clemency.** — Suspension of a sentence is a matter of clemency committed to the discretion of the trial court. *Ewing v. State*, 1969-NMCA-080, 80 N.M. 558, 458 P.2d 810.



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**Suspension not a matter of right.** — Suspension or deferment of sentence is not a matter of right but is an act of clemency and committed to the discretion of the trial court. *State v. Serrano*, 1966-NMSC-166, 76 N.M. 655, 417 P.2d 795.

**Suspension within court's discretion.** — The suspension of execution of a sentence, or any portion thereof, is not a matter of right in the defendant, but is a matter of clemency committed to the discretion of the sentencing court in the criminal proceedings. *State v. Knight*, 1967-NMSC-241, 78 N.M. 482, 432 P.2d 838.

**No authority to defer until conviction.** — The court has no power or authority to defer a sentence and impose obligations of probation upon a person charged with a crime, until that person is convicted of the crime. *State v. Apodaca*, 1969-NMCA-020, 80 N.M. 155, 452 P.2d 489.

**Express adjudication of guilt not needed.** — An express adjudication of conviction, or finding of guilt, is not necessary if it is apparent from other matters in the record that the court made a judicial determination of conviction or guilt. *State v. Apodaca*, 1969-NMCA-020, 80 N.M. 155, 452 P.2d 489.

**Effect of nolo contendere plea.** — Upon the acceptance of the plea of nolo contendere and entry of "judgment and sentence," by which the court deferred sentence and imposed conditions of probation, there was a determination of guilt, or a pronouncement of judgment. *State v. Apodaca*, 1969-NMCA-020, 80 N.M. 155, 452 P.2d 489.

**Effect of sentence deferral.** — An order deferring sentence in no way represents a suspension or a final sentence, at least for purposes of jurisdiction. Where deferral is ordered for the purpose of additional evaluation as recommended by department of corrections, a statutory sentence subsequently imposed is not a second sentence, but the first sentence imposed in the case. There is no second sentence raising a double jeopardy issue and no absence of authority in the trial court to impose the statutory sentence. *State v. Wood*, 1974-NMCA-113, 86 N.M. 731, 527 P.2d 494, cert. denied, 86 N.M. 730, 527 P.2d 493.

**No abuse of discretion.** — Trial court did not abuse its discretion by not adopting report of the psychiatrist or in not requesting diagnosis and recommendation from the department of corrections (now corrections department) as pertaining to defendant who pleaded guilty to count of contributing to delinquency of a minor. *State v. Hogan*, 1972-NMCA-037, 83 N.M. 608, 495 P.2d 388.

**Sentence not unjust or improper.** — Where the sentence in this case was in accordance with law, an appellate court cannot say it was unjust or improper in the circumstances because recommendations for a more lenient sentence were not followed or by imposing the statutory sentence on a 17-year-old first offender. *State v. Madrigal*, 1973-NMCA-116, 85 N.M. 496, 513 P.2d 1278, cert. denied, 85 N.M. 483, 513 P.2d 1265.

**Difference between suspension and deferral** is that suspension involves a sentence imposed while deferral does not. With suspension, the sentence having been imposed, the court cannot later alter the sentence upwards. With deferral, no sentence having been imposed, the court may give any sentence it could originally have given. *State v. Kenneman*, 1982-NMCA-145, 98 N.M. 794, 653 P.2d 170, cert. denied, 99 N.M. 47, 653 P.2d 878.

**Invalid grounds of sentence deferral.** — A trial court may not defer sentencing after a conviction on condition that the defendant serve a certain period of time in a county jail and abide by terms of a probation agreement. *State v. Lopez*, 1982-NMCA-163, 99 N.M. 791, 664 P.2d 989.

**Constitutional to impose three-year sentence when sentencing originally deferred for two years.** — The imposition of a three-year sentence when sentencing was originally deferred for two years does not violate the prohibition on double jeopardy, when the first sentence imposed is when the defendant's probation is revoked. *State v. Kenneman*, 1982-NMCA-145, 98 N.M. 794, 653 P.2d 170, cert. denied, 99 N.M. 47, 653 P.2d 878.

**Suspension order must include any restrictions.** — Restrictions to be imposed upon conduct of person under suspended sentence were to be specified in order of suspension. *Ex parte Selig*, 1924-NMSC-020, 29 N.M. 430, 223 P. 97; *Ex parte Hamm*, 1918-NMSC-058, 24 N.M. 33, 172 P. 190, 1918D L.R.A. 694.

**Effect where good behavior required.** — The words "good behavior," as used in order suspending sentence during good behavior, meant conduct conformable to law, and required no higher standard of conduct than the law demanded. *Ex parte Hamm*, 1918-NMSC-058, 24 N.M. 33, 172 P. 190, 1918D L.R.A. 694.

**Jurisdiction after seven years.** — Where defendant entered plea of nolo contendere to charge of contributing to delinquency of a minor and sentence was deferred until further order of court, lapse of almost seven years time did not deprive court of jurisdiction to impose sentence. *State v. Sorrows*, 1957-NMSC-091, 63 N.M. 277, 317 P.2d 324.

**Reasonable investigation contemplated.** — The statutes permitting the court to suspend or defer a sentence contemplate that reasonable investigation be made by the court in cases where probation is indicated, but no procedure is prescribed for such investigation, nor does the statute specify the character or quantum of evidence necessary to warrant the suspension or deferral of sentence. *State v. Serrano*, 1966-NMSC-166, 76 N.M. 655, 417 P.2d 795.

**Effect of refusal to hear testimony.** — The refusal of the trial court to hear the offered testimony upon application for suspension, or deferral of sentence, does not justify reversal since the statute makes no requirement that the contemplated investigation shall include a trial, or hearing, nor does the statute by implication, or otherwise, grant the defendant the right to introduce testimony in support of his request. *State v. Serrano*, 1966-NMSC-166, 76 N.M. 655, 417 P.2d 795.

**Presumption where no reason for denial given.** — Where defendant's counsel asked the court to place defendant on probation before sentence was imposed, and no reasons were given by the court for denying probation, it is presumed the court considered the question of probation before sentencing defendant to the penitentiary. *State v. Follis*, 1970-NMCA-083, 81 N.M. 690, 472 P.2d 655.

**Credits allowed on unsuspended portion of sentence.** — Good time credits shall be allowed to be deducted from the maximum unsuspended portion of a sentence for purposes of determining entitlement of right to release from imprisonment where other provisions of the law do not circumscribe the minimum imprisonment to be served. *Coutts v. Cox*, 1966-NMSC-027, 75 N.M. 761, 411 P.2d 347.

**Additional sentences for firearm use and habitual offender status cannot be served concurrently.** *State v. Mayberry*, 1982-NMCA-061, 97 N.M. 760, 643 P.2d 629.

**Partial suspension with probation authorized.** — A sentencing judge has the authority to suspend a sentence in part and then order probation for all or some of the portion which is suspended. *State v. Sinyard*, 1983-NMCA-150, 100 N.M. 694, 675 P.2d 426, cert. denied, 100 N.M. 689, 675 P.2d 421.

**Court authorized to suspend or defer sentence for second heroin trafficking conviction.** — A life sentence is not mandatory for a second conviction of trafficking in heroin and the court has the authority to suspend or defer the sentence imposed. *State v. Sanchez*, 1982-NMSC-032, 97 N.M. 521, 641 P.2d 1068.

**Order committing defendant to state hospital for indeterminate period not valid sentence.** — An order directing that the defendant be transported to the state hospital for an indeterminate period and then be returned to the district court for sentencing is not a valid sentence



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permitted by law, nor does it constitute a final judgment and sentence for purposes of an appeal. *State v. Garcia*, 1983-NMCA-017, 99 N.M. 466, 659 P.2d 918.

**The legislature has imposed a 60-day maximum limitation on diagnostic commitments,** and the court is without authority to impose a second diagnostic commitment or an indefinite commitment in the same cause. *State v. Garcia*, 1983-NMCA-017, 99 N.M. 466, 659 P.2d 918.

**Diagnostic commitment not required prior to imposing sentence.** — The court is not required to order a diagnostic commitment prior to imposing sentence. *State v. Watchman*, 1991-NMCA-010, 111 N.M. 727, 809 P.2d 641, cert. denied, 111 N.M. 529, 807 P.2d 227, *overruled in part on other grounds by State v. Hosteen*, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

**Diagnostic evaluation not merited.** — Where the state argued that a 60-day evaluation was not necessary because the trial court had before it evidence of nine years of psychological evaluations, as well as the testimony of two mental health experts, it was within the court's discretion, based on the information before it, to conclude that a diagnostic evaluation was not merited. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

**Suspended sentence void.** — A court which is not encompassed in this statute does not have the authority to suspend a sentence and any suspension of a sentence by those courts is void. 1955-56 Op. Att'y Gen. No. 55-6163.

**Indefinite deferral not allowed.** — In the case of a defendant in a felony case who is convicted or pleads guilty, a district judge may not enter an order stating that the judgment and sentence of the court is "deferred indefinitely." 1959-60 Op. Att'y Gen. No. 60-31.

**Requirement to leave jurisdiction void.** — A suspended sentence, whether valid or invalid as to the right of the court to suspend, is absolutely a void sentence when imposed with the condition that the defendant leave and remain away from the jurisdiction. 1955-56 Op. Att'y Gen. No. 55-6163.

**Sentencing where released person apprehended.** — If the suspension of the sentence is void and the person after sentence is released, the sentence may then be imposed at any time the person is apprehended. The defendant falls into the category of an escaped convict at the time he is released after a void sentence suspension. 1955-56 Op. Att'y Gen. No. 55-6163.

**Payment of transportation costs for diagnostic evaluation.** — The state is required to pay transportation costs for prisoners committed for diagnostic evaluation under this section. 1972 Op. Att'y Gen. No. 72-20.

**Magistrate court may order restitution.** — The magistrate court may, as part of its sentencing power, order a Criminal Code or Motor Vehicle Code violator to make restitution. 1979 Op. Att'y Gen. No. 79-18.

**Law reviews.** — For article, " 'To Purify the Bar': A Constitutional Approach to Non-Professional Misconduct," see 5 Nat. Resources J. 299 (1965).

For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M.L. Rev. 247 (1974).

For article, "Defending the Criminal Alien in New Mexico: Tactics and Strategy to Avoid Deportation," see 9 N.M.L. Rev. 45 (1978-79).

For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 896 et seq.

Constitutionality of statute conferring on court power to suspend sentence, 26 A.L.R. 399, 101 A.L.R. 402.

Are sentences on different counts to be regarded as for a single term or for separate terms as regards suspension of sentence, 107 A.L.R. 634.

Imposition or enforcement of sentence which has been suspended without authority, 141 A.L.R. 1225.

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

Admissibility of expert testimony as to appropriate punishment for convicted defendant, 47 A.L.R.4th 1069.

24 C.J.S. Criminal Law §§ 1550 to 1552.

## 31-20-4. Application of order deferring or suspending sentence.

An order deferring or suspending sentence may be limited to one or more counts or indictments, but, in the absence of express limitation, it shall extend to the entire judgment.

**History: 1953 Comp., § 40A-29-16, enacted by Laws 1963, ch. 303, § 29-16; and recompiled as 1953 Comp., § 40A-29-40, by Laws 1977, ch. 216, § 16.**

ANNOTATIONS

**Suspension or deferment not matter of right.** — The suspension or deferment of a sentence is not a matter of right but is an act of clemency within the trial court's discretion. *State v. Follis*, 1970-NMCA-083, 81 N.M. 690, 472 P.2d 655.

**Contradictory judgment renders improper sentence.** — Where the trial court deferred a sentence of imprisonment and imposed sentence of a fine for the same offense, either the deferral or the fine is subject to being stricken as an improper sentence, and the execution of either part of the sentence renders the remaining part void. *State v. Aragon*, 1979-NMCA-074, 93 N.M. 132, 597 P.2d 317.

**When probation requirements ineffective.** — Once a deferred sentence becomes void, the probation requirements are no longer in effect. *State v. Aragon*, 1979-NMCA-074, 93 N.M. 132, 597 P.2d 317.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 898.

## 31-20-5. Placing defendant on probation.

A. When a person has been convicted of a crime for which a sentence of imprisonment is authorized and when the magistrate, metropolitan or district court has deferred or suspended sentence, it shall order the defendant to be placed on probation for all or some portion of the period



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of deferment or suspension if the defendant is in need of supervision, guidance or direction that is feasible for the corrections department to furnish. Except for sex offenders as provided in Section 31-20-5.2 NMSA 1978, the total period of probation for district court shall not exceed five years and the total period of probation for the magistrate or metropolitan courts shall be no longer than the maximum allowable incarceration time for the offense or as otherwise provided by law.

B. If a defendant is required to serve a period of probation subsequent to a period of incarceration:

(1) the period of probation shall be served subsequent to any required period of parole, with the time served on parole credited as time served on the period of probation and the conditions of probation imposed by the court deemed as additional conditions of parole; and

(2) in the event that the defendant violates any condition of that parole, the parole board shall cause him to be brought before it pursuant to the provisions of Section 31-21-14 NMSA 1978 and may make any disposition authorized pursuant to that section and, if parole is revoked, the period of parole served in the custody of a correctional facility shall not be credited as time served on probation.

**History: 1953 Comp., § 40A-29-17, enacted by Laws 1963, ch. 303, § 29-17; and recompiled as 1953 Comp., § 40A-29-41, by Laws 1977, ch. 216, § 16; 1984, ch. 106, § 2; 1985, ch. 75, § 1; 2003 (1st S.S.), ch. 1, § 6.**

**The 2003 (1st S.S.) amendment,** effective February 3, 2004, substituted "corrections department to furnish. Except for sex offenders as provided in Section 31-20-5.2 NMSA 1978" for "field services division of the corrections department to furnish; provided, however" near the middle of Subsection A.

## ANNOTATIONS

**Application to multiple sentences.** — Where the defendant was serving two separate sentences for two separate convictions, the defendant's failure to successfully complete parole in one case tolled the time for bringing a probation revocation petition in the second case. *State v. Neal*, 2007-NMCA-086, 142 N.M. 487, 167 P.3d 935.

**Legislative intent.** — Legislature clearly intended in this section to give the sentencing judge authority to withhold the imposition of probation upon suspending a sentence. Probation was not "automatic" where defendant's sentence was suspended and this is further buttressed by the permissive language of Section 31-20-6 NMSA 1978. *State v. Soria*, 1971-NMCA-042, 82 N.M. 509, 484 P.2d 351.

**Probation required.** — This section provides that where a defendant receives a deferred or suspended sentence, the court must order probation. *State v. Leslie*, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

**Deferred or suspended sentence always entails mandatory probation** with conditions attached. *State v. Leslie*, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

**Probation is part of suspended or deferred sentence.** *State v. Baca*, 2005-NMCA-001, 136 N.M. 667, 104 P.3d 533, cert. denied, 2004-NMCERT-012, 136 N.M. 665, 103 P.3d 1097.

**Difference between suspension and deferral** is that suspension involves a sentence imposed while deferral does not. With suspension, the sentence having been imposed, the court cannot later alter the sentence upwards. With deferral, no sentence having been imposed, the court may give any sentence it could originally have given. *State v. Kenneman*, 1982-NMCA-145, 98 N.M. 794, 653 P.2d 170, cert. denied, 99 N.M. 47, 653 P.2d 878.

**Five-year probation limitation applies in aggregate.** — Both the internal wording of this section and the legislative history suggest that the five-year limitation applies in the aggregate. *State v. Devigne*, 1981-NMCA-088, 96 N.M. 561, 632 P.2d 1199.

The total period of probation that may be imposed on a defendant for convictions that occurred at one trial is five years, even though the aggregate sum of the suspended sentences exceeds five years. *State v. Devigne*, 1981-NMCA-088, 96 N.M. 561, 632 P.2d 1199.

**Maximum period of probation that court may impose as sentencing is a total of five years,** regardless of the number of convictions, not that five years is the total amount of time a defendant can serve on probation, regardless of the number of violations. *State v. Baca*, 2005-NMCA-001, 136 N.M. 667, 104 P.3d 533, cert. denied, 2004-NMCERT-012, 136 N.M. 665, 103 P.3d 1097.

**Effect where no fixed period of probation specified.** — When a defendant is placed on probation, without a fixed period being specified, then that period of probation is the maximum set by this section. *State v. Baca*, 1977-NMCA-030, 90 N.M. 280, 562 P.2d 841.

**Probation may not exceed maximum sentence.** — Trial court erred in setting six-year probation period for defendant who pleaded guilty to two fourth-degree felony charges where sentences were to be served concurrently, since the maximum sentence for a fourth-degree felony was a penitentiary term of five years, and the period of probation could not exceed that of the maximum sentence prescribed by law for the commission of the crime for which he was convicted. *State v. Crespin*, 1977-NMCA-046, 90 N.M. 434, 564 P.2d 998.

**Maximum length of probation.** — This section limits the maximum length of probation to the maximum imprisonment which could have been imposed. *State v. Gonzales*, 1981-NMCA-086, 96 N.M. 556, 632 P.2d 1194.

**Maximum period for misdemeanors.** — The maximum period of probation that may be assessed in misdemeanor or petty misdemeanor cases is the maximum allowable period of incarceration for that crime, irrespective of whether a defendant is sentenced in district court or in a lower tribunal. *State v. Candelaria*, 1991-NMCA-107, 113 N.M. 288, 825 P.2d 221.

**Partial suspension with probation authorized.** — A sentencing judge has the authority to suspend a sentence in part and then order probation for all or some of the portion which is suspended. *State v. Sinyard*, 1983-NMCA-150, 100 N.M. 694, 675 P.2d 426, cert. denied, 100 N.M. 689, 675 P.2d 421.

**Court may suspend defendant's 18-month term, impose five-year probation.** — The trial court's judgment in suspending part of defendant's term of incarceration and imposing a five-year term of supervised probation was upheld by this section, even though defendant had been convicted of a fourth-degree felony with a basic



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term of incarceration of 18 months. *State v. Encinias*, 1986-NMCA-049, 104 N.M. 740, 726 P.2d 1174, cert. denied, 104 N.M. 632, 725 P.2d 832.

**Parole term not part of maximum sentence for determining probation.** — The term of parole included in the original sentence is not to be utilized in determining the maximum length of probation under a suspended sentence. *State v. Gonzales*, 1981-NMCA-086, 96 N.M. 556, 632 P.2d 1194.

**When probation requirements ineffective.** — Once a deferred sentence becomes void, the probation requirements are no longer in effect. *State v. Aragon*, 1979-NMCA-074, 93 N.M. 132, 597 P.2d 317.

**When probationary part of sentence void.** — Where the court ordered a defendant placed on probation without deferring or suspending any of his sentences, this action is not within the bounds prescribed by law, and therefore, the probationary part of defendant's sentence is void. *State v. Nolan*, 1979-NMCA-116, 93 N.M. 472, 601 P.2d 442, cert. denied, 93 N.M. 683, 604 P.2d 821.

**Parole time to be credited in all cases.** — The legislature clearly intended that the parole time served prior to a period of probation would be credited in all cases; there is nothing in the statute indicating that it is to be applied only in those cases where the sentencing order is not specific in ordering that probation be served after the term of incarceration. Furthermore, the trial court may not ignore the mandate of the legislature in crafting a sentence. *State v. Muniz*, 1995-NMCA-024, 119 N.M. 634, 894 P.2d 411.

The trial court does not have the authority to order that a probation period be served consecutively to a parole period without the credit that is awarded by statute. *State v. Muniz*, 1995-NMCA-024, 119 N.M. 634, 894 P.2d 411.

**Time served on probation not credited as time served on parole.** — Because the court sentenced defendant to jail and not to prison, parole was not authorized; and, although Subsection B allows the time served on parole to be credited as time served on probation, no provision exists allowing the time served on probation to be credited as time served on parole. *State v. Brown*, 1999-NMSC-004, 126 N.M. 642, 974 P.2d 136.

**When court may revoke suspension.** — The court has the power to revoke the suspension of sentence and to thereupon invoke the same, upon proof being made of the violation of the conditions of probation. *State v. Baca*, 1969-NMCA-076, 80 N.M. 527, 458 P.2d 602.

**Subsequent criminal conviction not necessary.** — A conviction of a subsequent criminal offense is not necessary to the revocation of suspension and the invocation of a prior suspended sentence. *State v. Baca*, 1969-NMCA-076, 80 N.M. 527, 458 P.2d 602.

**Degree of proof of violation.** — The degree of proof required to support a finding of a violation of probation is met when the evidence establishes a violation of the conditions of probation with such reasonable certainty as to satisfy the conscience of the court of the truth of the violation. It does not have to be established beyond a reasonable doubt. *State v. Baca*, 1969-NMCA-076, 80 N.M. 527, 458 P.2d 602.

**Statutory handling for probation violation.** — Because the terms of probation are defined by the probation statutes, a probation violation must be handled as prescribed in 31-21-15 NMSA 1978. *State v. Leslie*, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

**Violation of probation must be established with reasonable certainty** so as to satisfy the conscience of the court as to the truth of the violation; however, a violation of probation need not be established beyond a reasonable doubt. *State v. Martinez*, 1972-NMCA-135, 84 N.M. 295, 502 P.2d 320.

**No power to defer until conviction.** — The court has no power or authority to defer a sentence and impose obligations of probation upon a person charged with a crime, until that person is convicted of the crime. *State v. Apodaca*, 1969-NMCA-020, 80 N.M. 155, 452 P.2d 489.

**Express adjudication of guilt not necessary.** — An express adjudication of conviction, or finding of guilt, is not necessary if it is apparent from other matters in the record that the court made a judicial determination of conviction or guilt. *State v. Apodaca*, 1969-NMCA-020, 80 N.M. 155, 452 P.2d 489.

**Effect of nolo contendere plea.** — Upon the acceptance of the plea of nolo contendere and entry of "judgment and sentence," by which the court deferred sentence and imposed conditions of probation, there was a determination of guilt, or a pronouncement of judgment. *State v. Apodaca*, 1969-NMCA-020, 80 N.M. 155, 452 P.2d 489.

**Suspension or deferment not matter of right.** — Suspension or deferment of a sentence is not a matter of right but is an act of clemency. *State v. Baca*, 1977-NMCA-030, 90 N.M. 280, 562 P.2d 841.

**No amendment of judgment or sentence allowed.** — Where district court, when it sentenced defendant to six months in county jail and suspended the balance of the sentence without probation, issued a valid original judgment and sentence, accordingly could not amend that judgment and sentence to add the conditions of probation, since a valid sentence may not be amended by increasing the penalty. *State v. Soria*, 1971-NMCA-042, 82 N.M. 509, 484 P.2d 351.

**Effect where probation conditions not in deferred sentence; amendment.** — In determining whether there is a violation of probation, an appellate court must look to the trial court's order. If the deferred sentence does not set out the conditions of probation, there are no conditions to be violated and conditions may not be added by amendment subsequent to imposition of a valid original judgment. *State v. Martinez*, 1972-NMCA-135, 84 N.M. 295, 502 P.2d 320.

**Conditions of probation should be made clear in judgment.** *State v. Martinez*, 1972-NMCA-135, 84 N.M. 295, 502 P.2d 320.

**Probation violation necessary to revoke probation.** — The trial court has authority to revoke defendant's probation and impose the penitentiary sentence; however, to do so, a violation of probation must be established. *State v. Martinez*, 1972-NMCA-135, 84 N.M. 295, 502 P.2d 320.

**Incarceration after violation not required.** — Neither this section nor Section 31-21-15 NMSA 1978 require the trial court to impose incarceration if the defendant violates the conditions of his probation. *State v. Mares*, 1994-NMSC-123, 119 N.M. 48, 888 P.2d 930.

**Reasonable investigation contemplated.** — The statutes permitting the court to suspend or defer a sentence contemplate that reasonable investigation be made by the court in cases where probation is indicated, but no procedure is prescribed for such investigation, nor does the statute specify the character or quantum of evidence necessary to warrant the suspension or deferral of sentence. *State v. Serrano*, 1966-NMSC-166, 76 N.M. 655, 417 P.2d 795.

**Probation where no reason for denial given.** — Where defendant's counsel asked the court to place defendant on probation before sentence was imposed, and no reasons were given by the court for denying probation, it is presumed the court considered the question of probation before sentencing defendant to the penitentiary. *State v. Follis*, 1970-NMCA-083, 81 N.M. 690, 472 P.2d 655.

**Habeas corpus action moot where petitioner on probation.** — Because petitioner had begun serving his mandatory period of probation under this section, his incarceration was complete; therefore, his habeas corpus action, alleging that amended regulations affecting his good time credits were impermissible, ex post facto laws, was



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moot, since such credits cannot be applied to a probationary term. *Aragon v. Shanks*, 144 F.3d 690 (10th Cir.), cert. denied, 525 U.S. 1005, 119 S. Ct. 518, 142 L. Ed. 2d 430 (1998).

**Law reviews.** — For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 904 et seq.

Power to impose sentence with direction that after defendant shall have served part of time he be placed on probation for the remainder of term, 147 A.L.R. 656.

Probation conditioned on restitution in connection with application for, or receipt of, public relief, 80 A.L.R.3d 1280.

Criminal liability under state laws in connection with application for, or receipt of, public welfare payments, 22 A.L.R.4th 534.

24 C.J.S. Criminal Law §§ 1549 to 1552, 1554, 1557, 1559.

## 31-20-5.1. Misdemeanor compliance programs; counties may establish; fees.

A. A county may create a "misdemeanor compliance program" to monitor defendants' compliance with the conditions of probation imposed by a district or magistrate court. The program shall be limited to participation by persons who have been convicted of a misdemeanor criminal offense specified in the Criminal Code [30-1-1 through 30-1-15, NMSA 1978], convicted of driving while under the influence of intoxicating liquor or drugs or convicted of driving while the person's driver's license is suspended or revoked pursuant to the Motor Vehicle Code [Chapter 66, Articles 1 through 8 NMSA 1978]. A county's program shall comply with guidelines established by the administrative office of the courts.

B. As a condition of probation, the district or magistrate court may require the defendant to pay a fee of not less than fifteen dollars ($15.00) nor more than fifty dollars ($50.00) per month to the county for a public probation program for the term of the defendant's probation. Money collected by the county pursuant to this subsection shall be used only to operate the misdemeanor compliance program.

**History: Laws 2000, ch. 49, § 1; 2013, ch. 104, § 1.**

**The 2013 amendment,** effective June 14, 2013, increased the cost to defendants for probation; and in Subsection B, in the first sentence, after "nor more than", deleted "thirty dollars ($30.00)" and added "fifty dollars ($50.00)" and in the second sentence, after "collected by the county", added "for a public probation program".

## 31-20-5.2. Sex offenders; period of probation; terms and conditions of probation.

A. When a district court defers imposition of a sentence for a sex offender, or suspends all or any portion of a sentence for a sex offender, the district court shall include a provision in the judgment and sentence that specifically requires the sex offender to serve an indeterminate period of supervised probation for a period of not less than five years and not in excess of twenty years. A sex offender's period of supervised probation may be for a period of less than twenty years if, at a review hearing provided for in Subsection B of this section, the state is unable to prove that the sex offender should remain on probation. Prior to placing a sex offender on probation, the district court shall conduct a hearing to determine the terms and conditions of supervised probation for the sex offender. The district court may consider any relevant factors, including:

(1) the nature and circumstances of the offense for which the sex offender was convicted or adjudicated;

(2) the nature and circumstances of a prior sex offense committed by the sex offender;

(3) rehabilitation efforts engaged in by the sex offender, including participation in treatment programs while incarcerated or elsewhere;

(4) the danger to the community posed by the sex offender; and

(5) a risk and needs assessment regarding the sex offender, developed by the sex offender management board of the New Mexico sentencing commission or another appropriate entity, to be used by appropriate district court personnel.

B. A district court shall review the terms and conditions of a sex offender's supervised probation at two and one-half year intervals. When a sex offender has served the initial five years of



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supervised probation, the district court shall also review the duration of the sex offender's supervised probation at two and one-half year intervals. When a sex offender has served the initial five years of supervised probation, at each review hearing the state shall bear the burden of proving to a reasonable certainty that the sex offender should remain on probation.

C. The district court may order a sex offender placed on probation to abide by reasonable terms and conditions of probation, including:

(1) being subject to intensive supervision by a probation officer of the corrections department;

(2) participating in an outpatient or inpatient sex offender treatment program;

(3) a probationary agreement by the sex offender not to use alcohol or drugs;

(4) a probationary agreement by the sex offender not to have contact with certain persons or classes of persons; and

(5) being subject to alcohol testing, drug testing or polygraph examinations used to determine if the sex offender is in compliance with the terms and conditions of his probation.

D. The district court shall notify the sex offender's counsel of record of an upcoming probation hearing for a sex offender, and the sex offender's counsel of record shall represent the sex offender at the probation hearing. When a sex offender's counsel of record provides the court with good cause that the counsel of record should not represent the sex offender at the probation hearing and the sex offender is subsequently unable to obtain counsel, the district court shall notify the chief public defender of the upcoming probation hearing and the chief public defender shall make representation available to the sex offender at that hearing.

E. If the district court finds that a sex offender has violated the terms and conditions of his probation, the district court may revoke his probation or may order additional terms and conditions of probation.

F. As used in this section, "sex offender" means a person who is convicted of, pleads guilty to or pleads nolo contendere to any one of the following offenses:

(1) kidnapping, as provided in Section 30-4-1 NMSA 1978, when committed with intent to inflict a sexual offense upon the victim;

(2) criminal sexual penetration in the first, second or third degree, as provided in Section 30-9-11 NMSA 1978;

(3) criminal sexual contact of a minor in the second or third degree, as provided in Section 30-9-13 NMSA 1978;

(4) sexual exploitation of children in the second degree, as provided in Section 30-6A-3 NMSA 1978; or

(5) sexual exploitation of children by prostitution in the first or second degree, as provided in Section 30-6A-4 NMSA 1978.

**History: Laws 2003 (1st S.S.), ch. 1, § 7.**

**Effective dates.** — Laws 2003 (1st S.S.), ch. 1 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective February 3, 2004, 90 days after adjournment of the legislature.

**ANNOTATIONS**

**Subsection B of this section is not void for vagueness.** — In resolving whether a probationer should remain on probation for additional time under 31-20-5.2(B) NMSA 1978, "reasonable certainty" means evidence that a reasonable and impartial mind would be inclined to conclude justifies that the sex offender should remain on probation, and in deciding whether a sex offender should remain on probation under Subsection B, the district court may remain guided by the relevant factors set forth in 31-20-5.2(A) NMSA 1978. Subsection B is not so vague that it allows, if not encourages, subjective and ad hoc application. *State v. Chavez*, 2019-NMCA-068, cert. denied.

**The district court did not abuse its discretion in ordering defendant to remain on probation.** — Where defendant was serving a mandatory five-year probationary term for convictions of two counts of criminal sexual contact of a minor and contributing to the delinquency of a minor, and where the state filed a motion under 31-20-5.2(B) NMSA 1978 requesting that defendant remain on probation for an additional two and one-half years, the district court did not abuse its discretion in ordering defendant to remain on probation for the additional period with the same terms and conditions based on a finding of two violations of the terms and conditions of defendant's probation. *State v. Chavez*, 2019-NMCA-068, cert. denied.

**The district court erred by sentencing defendant to sex offender parole and probation.** — Where defendant was convicted of attempt to commit second-degree criminal sexual contact of a minor (CSCM), the district court erred when it imposed a sentence to sex offender probation and parole instead of a sentence in accordance with the general probation and parole statutes, because while CSCM is among the enumerated offenses triggering a sentence to sex offender probation or parole, *attempt* to commit CSCM is not included among the offenses. *State v. Notah*, 2022-NMCA-005, cert. denied.



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## 31-20-6. Conditions of order deferring or suspending sentence.

The magistrate, metropolitan or district court shall attach to its order deferring or suspending sentence reasonable conditions as it may deem necessary to ensure that the defendant will observe the laws of the United States and the various states and the ordinances of any municipality. The defendant upon conviction shall be required to reimburse a law enforcement agency or local crime stopper program for the amount of any reward paid by the agency or program for information leading to the defendant's arrest, prosecution or conviction, but in no event shall reimbursement to the crime stopper program preempt restitution to victims pursuant to the provisions of Section 31-17-1 NMSA 1978. The defendant upon conviction shall be required to pay the actual costs of the defendant's supervised probation service to the adult probation and parole division of the corrections department or appropriate responsible agency for deposit to the corrections department intensive supervision fund not exceeding one thousand eight hundred dollars ($1,800) annually to be paid in monthly installments of not less than twenty-five dollars ($25.00) and not more than one hundred fifty dollars ($150), as set by the appropriate district supervisor of the adult probation and parole division, based upon the financial circumstances of the defendant. The defendant's payment of the supervised probation costs shall not be waived unless the court holds an evidentiary hearing and finds that the defendant is unable to pay the costs. If the court waives the defendant's payment of the supervised probation costs and the defendant's financial circumstances subsequently change so that the defendant is able to pay the costs, the appropriate district supervisor of the adult probation and parole division shall advise the court and the court shall hold an evidentiary hearing to determine whether the waiver should be rescinded. The court may also require the defendant to:

A. provide for the support of persons for whose support the defendant is legally responsible;

B. undergo available medical or psychiatric treatment and enter and remain in a specified institution when required for that purpose;

C. be placed on probation under the supervision, guidance or direction of the adult probation and parole division for a term not to exceed five years;

D. serve a period of time in volunteer labor to be known as "community service". The type of labor and period of service shall be at the sole discretion of the court; provided that a person receiving community service shall be immune from any civil liability other than gross negligence arising out of the community service, and a person who performs community service pursuant to court order or a criminal diversion program shall not be entitled to wages, shall not be considered an employee and shall not be entitled to workers' compensation, unemployment benefits or any other benefits otherwise provided by law. As used in this subsection, "community service" means labor that benefits the public at large or a public, charitable or educational entity or institution;

E. make a contribution of not less than ten dollars ($10.00) and not more than one hundred dollars ($100), to be paid in monthly installments of not less than five dollars ($5.00), to a local crime stopper program, a local domestic violence prevention or treatment program or a local drug abuse resistance education program that operates in the territorial jurisdiction of the court; and

F. satisfy any other conditions reasonably related to the defendant's rehabilitation.

**History: 1953 Comp., § 40A-29-18, enacted by Laws 1963, ch. 303, § 29-18; and recompiled as 1953 Comp., § 40A-29-42, by Laws 1977, ch. 216, § 16; 1977, ch. 217, § 1; 1981, ch. 285, § 2; 1983, ch. 159, § 1; 1984, ch. 106, § 3; 1985, ch. 23, § 15; 1985, ch. 75, § 2; 1987, ch. 139, § 2; 1988, ch. 62, § 1; 1997, ch. 215, § 1; 2004, ch. 38, § 1; 2007, ch. 101, § 1.**

**Cross references.** — For Crime Victims Reparation Act, *see* 31-22-1 NMSA 1978.

**The 2007 amendment,** effective June 15, 2007, added local domestic violence prevention or treatment programs to the list of optional contributions the court may require a defendant to make as a condition of a deferred or suspended sentence.

**The 2004 amendment,** effective July 1, 2004, amended the first paragraph to change one thousand twenty dollars ($1,020) to one thousand eight hundred dollars ($1,800), fifteen dollars ($15.00) to twenty-five dollars ($25.00), eighty-five dollars ($85.00) to one hundred fifty dollars ($150), delete "or the local supervisor of the responsible agency on the basis of changed financial circumstances, as may be required" and insert in its place: "based upon the financial circumstances of the defendant. The defendant's payment of the supervised probation costs shall not be waived unless the court holds an evidentiary hearing and finds that the defendant is unable to pay the costs. If the court waives the defendant's payment of the supervised probation costs and the defendant's financial circumstances subsequently change so that the defendant is able to pay the costs, the appropriate district supervisor of the adult probation and parole division shall advise the court and the court shall hold an evidentiary hearing to determine whether the



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waiver should be rescinded. The court may also require the defendant to:" and amended Subsection E to delete "If there is no program in that area, the contribution shall be made to the crime stoppers commission".

**The 1997 amendment,** effective June 20, 1997, substituted "adult probation and parole division" for "field services division" twice in the third sentence of the introductory paragraph and in Subsection C, and substituted "crime stopper program or a local drug abuse resistance education program that operates in the territorial jurisdiction of the court" for "crime stopper program that operates in the territorial jurisdiction of the court and is approved by the crime stoppers commission" at the end of the first sentence in Subsection E.

## ANNOTATIONS

**Legislative intent.** — Legislature clearly intended in Section 31-20-5 NMSA 1978 to give the sentencing judge authority to withhold the imposition of probation upon suspending a sentence. Probation was not "automatic" where defendant's sentence was suspended and this is further buttressed by the permissive language of this section. *State v. Soria*, 1971-NMCA-042, 82 N.M. 509, 484 P.2d 351.

**It is solely within province of legislature to establish penalties for criminal behavior.** *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22, cert. denied, 98 N.M. 478, 649 P.2d 1391.

**Difference between suspension and deferral** is that suspension involves a sentence imposed while deferral does not. With suspension, the sentence having been imposed, the court cannot later alter the sentence upwards. With deferral, no sentence having been imposed, the court may give any sentence it could originally have given. *State v. Kenneman*, 1982-NMCA-145, 98 N.M. 794, 653 P.2d 170, cert. denied, 99 N.M. 47, 653 P.2d 878.

**General purposes of probation** are education and rehabilitation, without the requirement of serving the suspended period of incarceration. Probation is not meant to be painless. *State v. Donaldson*, 1983-NMCA-064, 100 N.M. 111, 666 P.2d 1258, cert. denied, 100 N.M. 53, 665 P.2d 809.

**Policy for probation.** — In placing a criminal under strict conditions of probation and under probation supervision, the policy of the State of New Mexico and the obligation of the courts of New Mexico are to place guarded trust in the probationer to consciously conduct himself in a manner to prove he can remain free from criminal activity. *State v. Baca*, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

**Supervised probation authorized.** — A New Mexico district court has statutory authority to place a convicted defendant on supervised probation. *State v. Baca*, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

**Deferred or suspended sentence always entails mandatory probation** with conditions attached. *State v. Leslie*, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

**Section 31-20-13 A NMSA 1978 expressly incorporates probation statutes** that apply to a person serving a deferred sentence. *State v. Leslie*, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

**Standards for assessing conditions of probation.** — The trial court, at the time of sentencing, is allowed to consider a wide range of options to assure defendant's rehabilitation, and the conditions of probation will not be set aside unless they: (1) have no reasonable relation to the offense for which the defendant was convicted; (2) relate to activity which is not itself criminal in nature; and (3) require or forbid conduct which is not reasonably related to deterring future criminality. *State v. Taylor*, 1986-NMCA-011, 104 N.M. 88, 717 P.2d 64, cert. denied, 104 N.M. 237, 719 P.2d 815.

**Requiring the defendant to execute promissory notes** to the victims of his fraud and embezzlement was reasonably related to his rehabilitation and was a proper condition of his probation. *State v. Jensen*, 1998-NMCA-034, 124 N.M. 726, 955 P.2d 195.

**Guidelines for review of imposition of probation.** — A trial court has broad discretion in imposing probation upon a convicted defendant, and the court's discretion will not be set aside on review unless the terms and conditions of probation: (1) have no reasonable relationship to the offense for which defendant was convicted; (2) relate to activity which is not itself criminal in nature; and (3) require or forbid conduct which is not reasonably related to deterring future criminality. *State v. Donaldson*, 1983-NMCA-064, 100 N.M. 111, 666 P.2d 1258, cert. denied, 100 N.M. 53, 665 P.2d 809.

**Probation is a discretionary act of the sentencing court.** — New Mexico law places squarely within the purview of the district court the authority to order a defendant to satisfy any other conditions reasonably related to rehabilitation, and such order is reviewed on appeal only for an abuse of discretion. *State v. Green*, 2015-NMCA-007, cert. denied, 2014-NMCERT-012.

**Abuse of discretion.** — Under the abuse of discretion standard of appellate review, conditions of probation will not be set aside unless they have no reasonable relationship to the offense for which the defendant was convicted, relate to activity which is not itself criminal in nature, and require or forbid conduct which is not reasonably related to deferring future criminality. *State v. Green*, 2015-NMCA-007, cert. denied, 2014-NMCERT-012.

**District court order may incorporate conditions of probation.** — Where a district court's order generally states that a defendant must comply with reasonable conditions specified by the probation authorities, such language is sufficient to incorporate specific terms and conditions of probation set by the probation office. *State v. Green*, 2015-NMCA-007, cert. denied, 2014-NMCERT-012.

**Sex offender behavior contract as a condition of probation.** — Where defendant was convicted of kidnapping, an element of which is that the victim be held for service against the victim's will, and where that holding for service can include holding a victim for sexual purposes, and where defendant's conviction involved criminal sexual contact with the victim, the district court did not abuse its discretion in ruling that the requirement that defendant comply with a sex offender behavior contract was reasonably related to defendant's current conviction. *State v. Green*, 2015-NMCA-007, cert. denied, 2014-NMCERT-012.

**Maximum period of probation for misdemeanors.** — The maximum period of probation that may be assessed in misdemeanor or petty misdemeanor cases is the maximum allowable period of incarceration for that crime, irrespective of whether a defendant is sentenced in district court or in a lower tribunal. *State v. Candelaria*, 1991-NMCA-107, 113 N.M. 288, 825 P.2d 221.

**No power to defer until conviction.** — The court has no power or authority to defer a sentence and impose obligations of probation upon a person charged with a crime, until that person is convicted of the crime. *State v. Apodaca*, 1969-NMCA-020, 80 N.M. 155, 452 P.2d 489.

**Express adjudication not necessary.** — An express adjudication of conviction, or finding of guilt, is not necessary if it is apparent from other matters in the record that the court made a judicial determination of conviction or guilt. *State v. Apodaca*, 1969-NMCA-020, 80 N.M. 155, 452 P.2d 489.

**Court may suspend defendant's 18-month term, impose five-year probation.** — The trial court's judgment in suspending part of defendant's term of incarceration and imposing a five-year term of supervised probation was upheld by this section, even though defendant had been convicted of a fourth-degree felony with a basic



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term of incarceration of 18 months. *State v. Encinias*, 1986-NMCA-049, 104 N.M. 740, 726 P.2d 1174, cert. denied, 104 N.M. 632, 725 P.2d 832.

**Trial court may impose conditions of probation authorized by law;** conditions of probation unauthorized by law are void. *State v. Ayala*, 1981-NMCA-008, 95 N.M. 464, 623 P.2d 584.

**Provision for costs controls over 31-12-6 NMSA 1978.** — The legislature having made a specific provision for costs as a condition of probation in Subsection A that specific provision controls over the general provision of 31-12-6 NMSA 1978. *State v. Ayala*, 1981-NMCA-008, 95 N.M. 464, 623 P.2d 584.

**Assessment of costs against defendant upon deferred sentence permitted.** — The authorization in 31-12-6 NMSA 1978 that cost may be adjudged against the defendant, based on a conviction, permits assessment of costs against a defendant whose sentence is deferred. *State v. Ayala*, 1981-NMCA-008, 95 N.M. 464, 623 P.2d 584.

**Defendant cannot challenge amount or method of paying costs when objections initially waived.** — Having requested the court's exercise of discretion, and having waived all objections to an assessment of costs in lieu of a fine, the defendant may not later challenge either the amount or method of payment ordered. *State v. Padilla*, 1982-NMCA-100, 98 N.M. 349, 648 P.2d 807, cert. denied, 98 N.M. 336, 648 P.2d 794.

**This section does not authorize jury and bailiff costs** in prosecuting a defendant as a condition of probation. *State v. Ayala*, 1981-NMCA-008, 95 N.M. 464, 623 P.2d 584.

**Jury and bailiff costs are part of expense of maintaining system of courts** and the administration of justice and may not be assessed against a defendant if they were assessed independently of any condition of probation. *State v. Ayala*, 1981-NMCA-008, 95 N.M. 464, 623 P.2d 584.

**Required contribution to sheriff's department unauthorized.** — A probation condition requiring the defendant to contribute $500 to a county sheriff's department was unauthorized and therefore void. On remand, the trial court had to reconsider imposition of a fine not to exceed $500. *State v. Dominguez*, 1993-NMCA-042, 115 N.M. 445, 853 P.2d 147, cert. denied, 115 N.M. 409, 852 P.2d 682.

**Restitution, ordered as a condition of probation, must be reasonably related to a proper rehabilitative purpose.** — Where defendant was ordered as part of her sentence, following a guilty plea to the offense of forgery, to pay restitution for the costs of her extradition from New York, the restitution order could not have been authorized by the district court pursuant to this section because the order to pay extradition costs was not reasonably related to a proper rehabilitative purpose. *State v. George*, 2020-NMCA-039.

**Warrantless search condition is fairly and reasonably placed in probation order** to facilitate the probation officer's important supervisory and protective duties to help assure that the probationer assumes his responsibility – a responsibility both to the probationer himself and to society to stay on a path of rehabilitation. *State v. Baca*, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

**Warrantless probation searches cannot be without a proper showing** of an adequate degree of likelihood of criminal activity. *State v. Baca*, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

**And such searches can and must be supported by reasonable suspicion** as defined in New Mexico law to be an awareness of specific articulable facts, judged objectively, that would lead a reasonable person to believe criminal activity occurred or was occurring. *State v. Baca*, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

**Exigent circumstances are not required in connection with warrantless probation search** supported by reasonable suspicion. *State v. Baca*, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

For rehabilitation and community safety purposes, probation officers have the right to conduct warrantless searches without the added requirement of exigent circumstances. *State v. Baca*, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

**Condition of probation requiring prior narcotics offender to submit to search** is reasonably related the probationer's prior criminal conduct and is aimed at deterring or discovering subsequent criminal offenses. *State v. Gardner*, 1980-NMCA-122, 95 N.M. 171, 619 P.2d 847.

**Statutory handling for probation violation.** — Because the terms of probation are defined by the probation statutes, a probation violation must be handled as prescribed in Section 31-21-15 NMSA 1978. *State v. Leslie*, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

**When jurisdiction to vacate and revoke suspension exists.** — The power of a district court to vacate and revoke an order of suspension exists only when some one or more of such terms or conditions specified in the order of suspension have been breached. *State v. Baros*, 1968-NMSC-001, 78 N.M. 623, 435 P.2d 1005.

**Proof of violation needed.** — The court has the power to revoke the suspension of sentence and to thereupon invoke the same, upon proof being made of the violation of the conditions of probation. *State v. Baca*, 1969-NMCA-076, 80 N.M. 527, 458 P.2d 602.

**Subsequent criminal conviction not necessary.** — A conviction of a subsequent criminal offense is not necessary to the revocation of suspension and the invocation of a prior suspended sentence. *State v. Baca*, 1969-NMCA-076, 80 N.M. 527, 458 P.2d 602.

**Degree of proof.** — The degree of proof required to support a finding of a violation of probation is met when the evidence establishes a violation of the conditions of probation with such reasonable certainty as to satisfy the conscience of the court of the truth of the violation. It does not have to be established beyond a reasonable doubt. *State v. Baca*, 1969-NMCA-076, 80 N.M. 527, 458 P.2d 602.

**Violation of probation must be established with reasonable certainty** so as to satisfy the conscience of the court as to the truth of the violation; however, a violation of probation need not be established beyond a reasonable doubt. *State v. Martinez*, 1972-NMCA-135, 84 N.M. 295, 502 P.2d 320.

**Sufficiency of terms.** — Where the trial judge imposed as a condition of probation that defendant report to the probation office as directed by the probation office and ordered that the conditions and terms of probation are made conditions and terms of the deferred sentence, the fact that the times when defendant was to report to the probation office, and that the terms of the probation office were not spelled out in the deferred sentence, did not show that such times and terms were not conditions of probation imposed by the trial court and the conditions of probation were sufficiently stated. *State v. Martinez*, 1972-NMCA-135, 84 N.M. 295, 502 P.2d 320.

**Where no amendment of judgment or sentence allowed.** — Where district court, when it sentenced defendant to six months in county jail and suspended the balance of the sentence without probation, issued a valid original judgment and sentence, accordingly could not amend that judgment and sentence to add the conditions of probation, since a valid sentence may not be amended by increasing the penalty. *State v. Soria*, 1971-NMCA-042, 82 N.M. 509, 484 P.2d 351.

**Community service may be condition of probation for gambling.** — No one would dispute that criminal activity is anti-social by nature; ergo, community service as a condition of probation is not unrelated to the offense of gambling. *State v. Padilla*, 1982-NMCA-100, 98 N.M. 349, 648 P.2d 807, cert. denied, 98 N.M. 336, 648 P.2d 794.



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**Jury trial limited to identity question.** — In proceedings to revoke a suspended sentence, the right to a jury trial is limited to the question of identity. *State v. Raines*, 1967-NMCA-026, 78 N.M. 579, 434 P.2d 698.

**Application of increased probation costs limited.** — Increased probation costs, i.e., any amount in excess of $200 annually, can only constitutionally be applied to offenses which occur on or after June 19, 1981, at least to the extent the 1981 amendment to this section is relied upon as authority for the increased probation costs. 1981 Op. Att'y Gen. No. 81-15.

**Increased probation terms limited.** — The increased probation term of five years authorized by the 1981 amendment, i.e., any term in excess of four years for a third degree felony or any term in excess of two years for a fourth degree felony, can only constitutionally be applied to a third or fourth degree felony which occurs on or after June 19, 1981. 1981 Op. Att'y Gen. No. 81-15.

**Parole costs limited.** — Parole costs authorized by Section 31-21-10 NMSA 1978 can only constitutionally be applied to prisoners who are placed on parole for crimes committed on or after June 19, 1981, at least to the extent the 1981 amendment to this section is relied on as authority for parole costs. 1981 Op. Att'y Gen. No. 81-15.

**Limit on charitable contributions required of defendant.** — Absent a clear legislative determination to the contrary, state judges do not have the power to require a defendant to pay money to a charitable organization unaggrieved by the defendant's offense. 1987 Op. Att'y Gen. No. 87-09.

**Law reviews.** — For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 907 et seq.

Validity of probation on condition of leaving state or locality, 70 A.L.R. 100.

Propriety of requirement, as condition of probation, that defendant refrain from use of intoxicants, 19 A.L.R.4th 1251.

Propriety, under 18 U.S.C.S. § 3651, of district court's requiring contribution of money or services to charity or to community service as condition of suspending sentence and granting probation, 66 A.L.R. Fed. 825.

Propriety, in criminal case, of Federal District Court order restricting defendant's right to re-enter or stay in United States, 94 A.L.R. Fed. 619.

## 31-20-7. Repealed.

**Repeals.** — Laws 1985, ch. 75, § 3 repealed 31-20-7 NMSA 1978, as amended by Laws 1977, ch. 216, § 16, relating to the length of period of deferment or suspension of sentence, effective April 1, 1985.

**Compiler's notes.** — Laws 1993, ch. 283, § 2 enacted a new 31-20-7 NMSA 1978. That section was compiled as 31-20-13 NMSA 1978 in order to avoid confusion with repealed Section 31-20-7 NMSA 1978, which has been construed or cited in a number of New Mexico decisions.

## 31-20-8. Effect of termination of period of suspension without revocation of order.

Whenever the period of suspension expires without revocation of the order, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime. He shall thereupon be entitled to a certificate from the court so reciting such facts, and upon presenting the same to the governor, the defendant may, in the discretion of the governor, be granted a pardon or a certificate restoring such person to full rights of citizenship.

**History: 1953 Comp., § 40A-29-21, enacted by Laws 1963, ch. 303, § 29-21; and recompiled as 1953 Comp., § 40A-29-44, by Laws 1977, ch. 216, § 16.**

ANNOTATIONS

**Lack of jurisdiction to deny credit for time served on probation.** — Where defendant, who was convicted of DWI, violated probation and the district court did not revoke defendant's probation before the probationary period expired, the court lost jurisdiction under Section 31-20-8 NMSA 1978 to deny defendant credit for time served on probation as provided in Subsection S of Section 66-8-102 NMSA 1978. *State v. Ordunez*, 2010-NMCA-095, 148 N.M. 620, 241 P.3d 621, cert. granted, 2010-NMCERT-010, 49 N.M. 64, 243 P.3d 1146.

**Order of unsatisfactory completion not authorized.** — A trial court is without jurisdiction to enter an order of unsatisfactory completion after the probation period ends. *State v. Lara*, 2000-NMCA-073, 129 N.M. 391, 9 P.3d 74.

**A trial court is not deprived of jurisdiction to revoke probation if a defendant's original probationary period expires while the defendant is an absconder.** — Where defendant was convicted of battery in magistrate court, received a suspended sentence, was placed on probation in lieu of serving a prison sentence, violated the terms of his probation and could not be located to answer for this violation until after the period of his suspended sentence expired, the magistrate court had the authority to issue its order revoking defendant's original probationary sentence and imposing a new sentence, because defendant's probationary period did not run from the date the magistrate court issued the bench warrant to the date of defendant's arrest. The phrase "whenever the period of suspension expires" cannot be read to include those instances when a probationary period expires while a defendant has absconded after allegedly violating probation. *State v. Begay*, 2017-NMSC-009, *rev'g* 2016-NMCA-039, 368 P.3d 1246.

**Difference between suspension and deferral** is that suspension involves a sentence imposed while deferral does not. With suspension, the sentence having been imposed, the court cannot later alter the sentence upwards. With deferral, no sentence having been imposed, the court may give any sentence it could originally have given. *State v. Kenneman*, 1982-NMCA-145, 98 N.M. 794, 653 P.2d 170, cert. denied, 99 N.M. 47, 653 P.2d 878.

**Defendant's probation could not be revoked after it had expired.** — Where, in 2004, defendant pleaded



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guilty to a fourth-degree aggravated DWI; in 2007, defendant was arrested for another DWI in violation of the 2004 probation conditions; on September 7, 2007, the State filed a petition to revoke defendant probation; the district court scheduled a probation revocation hearing for October 25, 2007 and later reset the hearing for December 20, 2007; and the applicable statutory provisions of Section 66-8-102 NMSA 1978 governing sentence credit for time served on probation were those in effect in 2004, which gave defendant full credit for time served on probation, not those in effect in 2007, which gave defendant no credit for time served on probation; and under the 2004 version of the statute, defendant's probation was scheduled to expire on October 19, 2007, defendant's probation had expired before the probation revocation hearing and the district court did not have authority to revoke defendant's probation. *State v. Ordunez*, 2012-NMSC-024, 283 P.3d 282.

**The district court is divested of jurisdiction when a probation term expires, and the expiration of jurisdiction cannot be waived.** — This section divests the district court of jurisdiction to revoke a defendant's probation when a probation term expires, and this loss of jurisdiction is unaffected by a defendant's waiver of the time limits within which a revocation hearing must be held after a violation of probation is alleged, and staying revocation proceedings to determine the defendant's competency likewise does not toll the district court's loss of jurisdiction. *State v. Godkin*, 2015-NMCA-114.

Where defendant appealed the denial of his motion to dismiss for lack of jurisdiction following remand from a prior appeal in which the New Mexico court of appeals remanded the case for a competency evaluation and for a new revocation hearing, the district court was without jurisdiction to revoke defendant's probation when the probation period expired prior to the revocation hearing, and the stay of proceedings to determine competency likewise did not toll defendant's probation. *State v. Godkin*, 2015-NMCA-114.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Right to assistance of counsel at proceedings to revoke probation, 44 A.L.R.3d 306.

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

Pardoned or expunged conviction as "prior offense" under state statute or regulation enhancing punishment for subsequent conviction, 97 A.L.R.5th 293.

## 31-20-9. Completion of total term of deferment.

Whenever the period of deferment expires, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime, the court shall enter a dismissal of the criminal charges.

**History: 1953 Comp., § 40A-29-22, enacted by Laws 1963, ch. 303, § 29-22; and recompiled as 1953 Comp., § 40A-29-45, by Laws 1977, ch. 216, § 16.**

ANNOTATION

**Difference between suspension and deferral** is that suspension involves a sentence imposed while deferral does not. With suspension, the sentence having been imposed, the court cannot later alter the sentence upwards. With deferral, no sentence having been imposed, the court may give any sentence it could originally have given. *State v. Kenneman*, 98 N.M. 794, 653 P.2d 170 (Ct. App.), cert. denied, 99 N.M. 47, 653 P.2d 878 (1982).

**Legislature authorized to define court's jurisdiction over sentencing.** — It is within the power of the legislature alone to define the court's jurisdiction over the sentencing of offenders. *State v. Travarez*, 99 N.M. 309, 657 P.2d 636 (Ct. App. 1983).

**Court lacks jurisdiction in probation revocation matter when period of deferred sentence expires.** — This section relieves the defendant of any obligations imposed on him by order of the court when the period of his deferred sentence expires, and he is deemed then to have satisfied his liability for the crime. The trial court thereafter lacks jurisdiction to proceed in a probation revocation matter. *State v. Travarez*, 99 N.M. 309, 657 P.2d 636 (Ct. App. 1983).

**Prior conviction, not prior sentence, is dispositive for repeat offender status.** — Where defendant was convicted of drug charges in New Mexico; the New Mexico court deferred defendant's sentence for a two-year probationary period; the deferred sentence was a final judgment subject to appeal; and after defendant successfully completed the probation, defendant was entitled to have the New Mexico charges dismissed, the deferred sentence was a prior conviction for purposes of sentence enhancement. United States v. Meraz, 998 F.2d 182 (10th Cir. 1993).

**Sex offender registration.** — When a deferred sentence expires and charges are dismissed, a conviction is not eradicated: thus, a defendant convicted under the Sex Offender Registration and Notification Act, Sections 29-11A-1 to 29-11A-8 NMSA 1978, is still subject to the registration requirements of that act. *State v. Brothers*, 2002-NMCA-110, 133 N.M. 36, 59 P.3d 1268, cert. denied, 133 N.M. 30, 59 P.3d 1262 (2002).

**Restoration of right to vote.** — A person seeking restoration of franchise after a suspended sentence must go to the governor for relief, but a dismissal order under this section is intended to restore the right to vote automatically. 1973 Op. Att'y Gen. No. 73-44.

**Restoration of firearms privileges.** — A defendant who receives a deferred sentence is not subject to the criminal sanctions imposed by Section 30-7-16 NMSA 1978, governing receipt, transportation or possession of firearms by felons. Firearms privileges are automatically restored when a person successfully completes the period of a deferred sentence. 1988 Op. Att'y Gen. No. 88-03.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Pardoned or expunged conviction as "prior offense" under state statute or regulation enhancing punishment for subsequent conviction, 97 A.L.R.5th 293.

## 31-20-10. Character of order.

An order deferring or suspending sentence for the purposes of appeal shall be deemed a final judgment.



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**History: 1953 Comp., § 40A-29-23, enacted by Laws 1963, ch. 303, § 29-23; and recompiled as 1953 Comp., § 40A-29-46, by Laws 1977, ch. 216, § 16.**

ANNOTATIONS

**Prior conviction, not prior sentence, is dispositive for repeat offender status.** — Where defendant was convicted of drug charges in New Mexico; the New Mexico court deferred defendant's sentence for a two-year probationary period; the deferred sentence was a final judgment subject to appeal; and after defendant successfully completed the probation, defendant was entitled to have the New Mexico charges dismissed, the deferred sentence was a prior conviction for purposes of sentence enhancement. *United States v. Meraz*, 998 F.2d 182 (10th Cir. 1993).

**It is solely within province of legislature to establish penalties for criminal behavior.** *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22, cert. denied, 98 N.M. 478, 649 P.2d 1391.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Reduction by appellate court of punishment imposed by trial court, 29 A.L.R. 313, 89 A.L.R. 295.

Acceptance of probation, parole or suspension of sentence as waiver of error or right to appeal or to move for new trial, 117 A.L.R. 929.

Appealability of order suspending imposition or execution of sentence, 51 A.L.R.4th 939.

## 31-20-11. Credit for time pending appellate review.

A person convicted of a felony in the district court and held in official confinement while awaiting the outcome of an appeal, writ of error to, or writ of certiorari from, a state or federal appellate court or prior to his release as a result of postconviction proceedings or habeas corpus, shall be given credit for the period spent in confinement against any sentence finally imposed for that offense.

**History: 1953 Comp., § 40A-29-24, enacted by Laws 1967, ch. 221, § 1; and recompiled as 1953 Comp., § 40A-29-47, by Laws 1977, ch. 216, § 16.**

ANNOTATIONS

**Section operates prospectively.** — This section was enacted in 1967 and operates prospectively only. Defendant's motion for retroactive application provided no grounds for post-conviction relief under Rule 1-093 NMRA. *State v. Montoya*, 1968-NMSC-113, 79 N.M. 353, 443 P.2d 743 (decided under prior law).

**"Official confinement".** — Official confinement, in this section, includes an electronic monitoring program (EMP) within a community custody program. *State v. Frost*, 2003-NMCA-002, 133 N.M. 45, 60 P.3d 492, cert. denied, 133 N.M. 126, 61 P.3d 835.

**Judgment suspending firearm enhancement provision of original sentence void, and no credit accrued.** — Since a judgment purporting to suspend a firearm enhancement provision of an original sentence is void, where the defendant is not sentenced to serve any time of official confinement, he cannot be said to have served any portion thereof and he cannot be held to have accrued a right to a credit against the enhanced portion of his sentence as later imposed. Double jeopardy does not attach, and a resentencing for the mandatory enhancement provision of Section 31-18-16 NMSA 1978 must stand. State v. Aguilar, 1982-NMCA-116, 98 N.M. 510, 650 P.2d 32, cert. denied, 98 N.M. 478, 649 P.2d 1391.

**No credit allowed for void conviction when defendant convicted again.** — Defendant discharged on writ of habeas corpus after his sentence was held void was not entitled to credit for time served for void conviction when he was convicted again for same crime. *State v. Sedillo*, 1968-NMSC-049, 79 N.M. 9, 439 P.2d 226.

**Credit given for time served on original invalid conviction.** — A prisoner, after being awarded a new trial and having again been convicted of the crime originally charged, is entitled to credit for time he spent in custody from the time of his first conviction. 1969 Op. Att'y Gen. No. 69-114.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Computation of incarceration time under work-release or "hardship" sentences, 28 A.L.R.4th 1265.

## 31-20-12. Credit for time prior to conviction.

A person held in official confinement on suspicion or charges of the commission of a felony shall, upon conviction of that or a lesser included offense, be given credit for the period spent in presentence confinement against any sentence finally imposed for that offense.

**History: 1953 Comp., § 40A-29-25, enacted by Laws 1967, ch. 221, § 2; and recompiled as 1953 Comp., § 40A-29-48, by Laws 1977, ch. 216, § 16.**

ANNOTATIONS

**Legislative intent.** — The legislative intent in enacting Section 31-20-12 NMSA 1978 was to entitle a defendant to one day's credit against his total sentence for each day spent in presentence confinement. *State v. Aaron*, 1985-NMCA-060, 103 N.M. 138, 703 P.2d 915.

**Applying credit.** — Section 31-20-12 NMSA 1978 does not authorize presentence confinement credit unless the confinement was in connection with the offense charged. If, however, the defendant is held in confinement prior to trial or sentencing, simultaneously on two or more charges, presentence confinement credit should be given. *State v. Page*, 1984-NMCA-012, 100 N.M. 788, 676 P.2d 1353.

**Constitutionality.** — New Mexico's good time credit statutory scheme does not offend the constitutional guarantee of equal protection of the law; it is reasonable not to award good time credits for presentence confinement to detainees who are presumed innocent and therefore are not yet subject to rehabilitation efforts or to compulsory labor requirements, especially when they are held without systematic evaluation in county jails lacking rehabilitation programs. *State v. Aqui*, 1986-NMSC-048, 104 N.M. 345, 721 P.2d 771, cert. denied, 479 U.S. 917, 107 S. Ct. 321, 93 L. Ed. 2d 294 (1986).

**Double jeopardy.** — Failure to allow good time credit for presentence confinement does not subject a prisoner



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to double jeopardy. *Enright v. State*, 1986-NMSC-070, 104 N.M. 672, 726 P.2d 349.

**Equal protection and due process.** — New Mexico's statutory scheme, which does not allow good time credit for presentence confinement, does not offend the equal protection and due process guarantees of the New Mexico and United States constitutions. *Enright v. State*, 1986-NMSC-070, 104 N.M. 672, 726 P.2d 349.

**Equal protection does not compel retroactive application.** — The equal protection guarantee of the state and federal constitutions does not compel a retroactive application of the provisions of this section, which gives credit for time served prior to conviction. *State v. Sedillo*, 1968-NMCA-033, 79 N.M. 255, 442 P.2d 213.

Failure to give retroactive effect did not violate equal protection provisions of the state and federal constitutions. *State v. Dalrymple*, 1968-NMCA-083, 79 N.M. 670, 448 P.2d 182.

**No violation due to newly created right.** — There is no denial of equal protection of the laws in failing to give retroactive effect to a newly created right which allows credit for presentence confinement. *State v. Thomas*, 1968-NMCA-043, 79 N.M. 346, 443 P.2d 516

**Statute inapplicable to sentence before its effective date.** — This act became effective in 1967. The statute is not applicable to a sentence which was imposed upon defendant in 1963. To so apply it would require that it be given retrospective effect. *State v. Padilla*, 1968-NMCA-004, 78 N.M. 702, 437 P.2d 163.

**No retroactive effect where presentence confinement preceded effective dates.** — Where defendant's presentence confinement time occurred prior to the effective date of this section, the statute is not to be given retroactive effect. *State v. Luna*, 1968-NMCA-041, 79 N.M. 307, 442 P.2d 797.

**Purpose of section.** — The purpose of this section is to give some relief to persons who, because of an inability to obtain bail, are held in custody. *State v. Howard*, 1989-NMCA-029, 108 N.M. 560, 775 P.2d 762, cert. denied, 108 N.M. 433, 773 P.2d 1240.

**Section has been strictly interpreted, with resulting benefits to the defendant.** *State v. Ramzy*, 1982-NMCA-113, 98 N.M. 436, 649 P.2d 504.

**Compliance with 31-18-21 NMSA 1978.** — Section 31-18-21 NMSA 1978 mandates that a sentence for a felony committed while serving a sentence in a penal institution run consecutive to the prior sentence. It is impossible to grant "presentence" confinement credit concurrent with time served on the prior sentence and comply with that section, which requires that the sentences run consecutively. *State v. Facteau*, 1990-NMSC-040, 109 N.M. 748, 790 P.2d 1029.

**Sentence must have been direct result of felony committed.** — This section allows for presentence confinement credit only if the sentence was a direct result of the felony committed. *State v. Facteau*, 1990-NMSC-040, 109 N.M. 748, 790 P.2d 1029.

**Defendant was entitled to presentence confinement credit where charges related to the sentence triggered probation revocation.** — Where defendant was convicted of possession of methamphetamine, aggravated fleeing of a law enforcement officer, and resisting, evading or obstructing an officer after leading law enforcement on a vehicle chase from Logan, New Mexico to Tucumcari, New Mexico and, after stopping and exiting the vehicle, leading the officers on a foot chase until he was located in a shed in possession of methamphetamine, and where, at the time of his arrest, defendant was serving a term of probation in two separate criminal cases, and where, at sentencing, the district court denied defendant presentence confinement credit for the time spent in custody due to his probation violations, it was error to deny presentence confinement credit, because the charges in the instant case led to defendant's probation being revoked and triggered defendant's confinement. *State v. French*, 2021-NMCA-052.

**Discretion of court to determine time credited.** — It is for the trial court to determine at the time of sentencing, from relevant documents or other evidence to be made a part of the record, the specific presentence confinement to be credited against any sentence finally imposed for offenses on which an accused has been held. *Stewart v. State*, 1991-NMSC-095, 112 N.M. 653, 818 P.2d 854.

**Discretion not to apply pre-sentence confinement credit to probation time.** — Under Section 31-20-12 NMSA 1978, it is within discretion of the district court not to credit pre-sentence confinement credit to probation time. *State v. Nieto*, 2013-NMCA-065, 303 P.3d 855, cert. denied, 2013-NMCERT-004.

Where defendant spent 103 days in custody pending trial for aggravated assault; defendant's sentence of three years' imprisonment was suspended and defendant was ordered to complete a three-year period of probation; the district court ordered that if defendant's probation were revoked, defendant would be given credit for defendant's pre-sentence confinement of 103 days; and the district court declined to apply the pre-sentence confinement credit to defendant's probation sentence, the district court did not abuse its discretion. *State v. Nieto*, 2013-NMCA-065, 303 P.3d 855, cert. denied, 2013-NMCERT-004.

**Credit for multiple DWI offenses.** — Because the legislature provides in Section 66-8-102 NMSA 1978 that, for a first DWI offender, time spent in jail prior to conviction is to be credited against the offender's sentence, and because fourth and subsequent offenders are felons, who are also granted such credit pursuant to this section, the legislature's silence as to second and third offenses implies an intent to afford courts discretion to grant credit to third and fourth offenders. *State v. Martinez*, 1998-NMSC-023, 126 N.M. 39, 966 P.2d 747.

**Court may revise sentence to give credit.** — Rule 93, N.M.R. Civ. P. (now Rule 1-093 NMRA), specifically authorizes the trial court to correct a sentence. *McCroskey v. State*, 1970-NMCA-109, 82 N.M. 49, 475 P.2d 49 (decided under prior law).

**No time limit for request for credit.** — The authorization contained in Rule 93, N.M.R. Civ. P. (now Rule 1-093 NMRA), is not limited to the term of court during which the incorrect sentence was imposed as a motion for such relief may be made at any time. *McCroskey v. State*, 1970-NMCA-109, 82 N.M. 49, 475 P.2d 49 (decided under prior law).

**Credit to equal presentence confinement period.** — A defendant is entitled to one day's credit against his total sentence for each day spent in presentence confinement. Regardless of whether the sentences for multiple felonies are to run concurrently or consecutively, credit is given only for that period actually spent in presentence confinement. *State v. Howard*, 1989-NMCA-029, 108 N.M. 560, 775 P.2d 762, cert. denied, 108 N.M. 433, 773 P.2d 1240.

**How credit should be granted.** — A one-day credit should be granted for every 24 hours, or fraction thereof. For example, if someone is arrested at 10:00 p.m. and released at 9:30 a.m. the next morning, he or she should only get a one-day credit because the confinement is less than 24 hours. If, on the other hand, someone is arrested at 8:00 a.m. and released at 9:30 a.m. the following day, the confinement would amount to a two-day credit because the confinement exceeded a 24 hour period. *State v. Miranda*, 1989-NMCA-068, 108 N.M. 789, 779 P.2d 976, cert. denied, 108 N.M. 771, 779 P.2d 549.

**No multiplication by number of sentences.** — Presentence confinement credit is not to be multiplied by the number of different sentences imposed. *State v. Miranda*, 1989-NMCA-068, 108 N.M. 789, 779 P.2d 976, cert. denied, 108 N.M. 771, 779 P.2d 549.



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**Consecutive and concurrent sentences.** — An offender who receives consecutive sentences is entitled to presentence incarceration credit only once against the aggregate of all the sentences, while an offender sentenced to concurrent terms in effect receives credit against each sentence. *State v. Miranda*, 1989-NMCA-068, 108 N.M. 789, 779 P.2d 976, cert. denied, 108 N.M. 771, 779 P.2d 549.

**"Double credit".** — Where defendant was out on bond for aggravated battery, arrested for a second crime of domestic violence, had his bond revoked, and was incarcerated until his trials on the separate charges, and was convicted on both charges, he did not have a right to presentence credit for the entire time of his presentence incarceration against both consecutive sentences. *State v. Romero*, 2002-NMCA-106, 132 N.M. 745, 55 P.3d 441, cert. denied, 132 N.M. 732, 55 P.3d 428.

**Presentence confinement must be for crime charged.** — This section was not applicable to prisoner who pleaded guilty to a misdemeanor committed in the state penitentiary while he was serving a prior sentence, and sought credit on his sentence for the days which elapsed between the day he was served with a warrant for his arrest and the day when judgment and sentence was entered on his plea of guilty, as confinement during this period was pursuant to his prior sentence. *State v. Brewton*, 1971-NMCA-120, 83 N.M. 50, 487 P.2d 1355.

The decisive factor in allowing credit for presentence confinement in a case is whether the confinement was actually related to the charges of that particular case. It is not necessary that the confinement be related exclusively to the charges in question. *State v. Ramzy*, 1982-NMCA-113, 98 N.M. 436, 649 P.2d 504.

This section does not authorize credit for presentence confinement that is not actually related to the charges of the particular offense. *State v. Laskay*, 1986-NMCA-008, 103 N.M. 799, 715 P.2d 72, cert. denied, 103 N.M. 798, 715 P.2d 71.

The determinative issue for presentence confinement credit is whether the basis for the confinement was actually related to the charge upon which the final conviction and sentence are based. *State v. Miranda*, 1989-NMCA-068, 108 N.M. 789, 779 P.2d 976, cert. denied, 108 N.M. 771, 779 P.2d 549.

**Confinement for multiple offenses.** — It is not necessary that the confinement in question relate exclusively to the charges against which a defendant seeks credit. Since the defendant in this case was in a Texas jail on both a Texas charge and a New Mexico warrant, he was entitled to credit in New Mexico. *State v. Barrios*, 1993-NMCA-138, 116 N.M. 580, 865 P.2d 1224.

**Credit for time served on invalidated guilty plea.** — The defendant was entitled to time served pursuant to a sentence on an invalidated guilty plea even though the counts on which she was convicted at trial were different from the counts to which she had pleaded guilty; there was a causal connection between the charges on which the defendant was convicted and the sentence pursuant to the invalidated plea. *State v. Wittgenstein*, 1995-NMCA-010, 119 N.M. 565, 893 P.2d 461.

**If transfer of confinement unrelated to charge in question, no confinement credit.** — Where the defendant is already confined on an unrelated charge and there is a transfer of the place of confinement, the actual confinement being unrelated to the charge in question, the trial court is correct in denying the defendant's motion for presentence confinement credit. *State v. Orona*, 1982-NMCA-143, 98 N.M. 668, 651 P.2d 1312.

**Presentence confinement credit properly awarded.** — The trial court had discretion to award defendant presentence confinement credit for that time spent in custody after his parole was revoked based on the drug paraphernalia charge for which he was ultimately sentenced in this case. *State v. Irvin*, 1992-NMCA-121, 114 N.M. 597, 844 P.2d 847.

**Hospitalization after being taken into custody.** — The fact that defendant was hospitalized following his being taken into custody did not preclude award of presentence confinement credit for the time spent in the hospital. *State v. Watchman*, 1991-NMCA-010, 111 N.M. 727, 809 P.2d 641, cert. denied, 111 N.M. 529, 807 P.2d 227, *overruled in part on other grounds by State v. Hosteen*, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

**Confinement in mental hospital after arrest constitutes "official confinement".** — Defendant was committed under Section 31-9-1 NMSA 1978 to the state hospital and confined therein for 463 days after being found incapable of assisting in his defense on pending felony charges, lacking in the mental capacity to stand trial, and in need of care, custody and treatment in a mental hospital, with provision that he be at all times under maximum security conditions and not be released without further written order of the court, it was held that defendant had been under official confinement on charges of committing a felony and was therefore entitled under this statute to credit against his sentence for presentence confinement time spent in the hospital. *State v. La Badie*, 1975-NMCA-032, 87 N.M. 391, 534 P.2d 483.

**Mental hospital confinement.** — Confinement in a mental hospital after arrest constitutes "official confinement", as outlined in this section. *State v. Miranda*, 1989-NMCA-068, 108 N.M. 789, 779 P.2d 976, cert. denied, 108 N.M. 771, 779 P.2d 549.

**Electronic monitoring program.** — A defendant is entitled to presentence confinement credit for time under house arrest pursuant to an electronic monitoring program if the defendant is in constructive custody and can be punished for escape for non-compilance with the house arrest order. *State v. Duhon*, 2005-NMCA-120, 138 N.M. 466, 122 P.3d 50, cert. quashed, 2006-NMCERT-003, 139 N.M. 352, 132 P.3d 1038.

**Voluntary treatment program not "confinement" under this section.** — Presentence confinement credit against a felony DWI jail sentence may not be given for time spent in an inpatient alcohol treatment program, where the state did not require defendant's participation in the program and exercised no control over him while he was in the program. *State v. Clah*, 1997-NMCA-091, 124 N.M. 6, 946 P.2d 210, cert. denied, 123 N.M. 626, 944 P.2d 274.

**House arrest as "official confinement".** — Time spent outside of jail may qualify as "official confinement" for the purposes of receiving presentence confinement credit under this section when: (1) a court has entered an order releasing the defendant from a facility but has imposed limitations on the defendant's freedom of movement, or the defendant is in the actual or constructive custody of state or local law enforcement or correctional officers; and (2) the defendant is punishable for a crime of escape if there is an unauthorized departure from the place of confinement or other non-compliance with the court's order. *State v. Fellhauer*, 1997-NMCA-064, 123 N.M. 476, 943 P.2d 123, cert. denied, 123 N.M. 446, 942 P.2d 189.

Condition that a drunk driving defendant remain at his home at all times except to attend alcohol counseling, work, or religious services was a sufficient limitation on his freedom of movement to meet the first subprong of the *Fellhauer* test and to therefore entitle him to presentence credit for time spent under house arrest. *State v. Guillen*, 2001-NMCA-079, 130 N.M. 803, 32 P.3d 812.

**Presentence confinement credit allowed where conditions of release were sufficiently onerous to be deemed official confinement.** — Where defendant was charged with kidnapping, attempted first-degree murder, aggravated burglary with a deadly weapon, or in the alternative, aggravated burglary by battery, aggravated battery with a deadly weapon, or alternatively, resulting in great



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bodily harm, aggravated assault with a deadly weapon, and child abuse, and where, following defendant's arrest, the district court ordered defendant released from jail into third-party custody under conditions that defendant was required to be on pretrial service supervision, required to abide by all conditions set by the court and pretrial services, prohibited from leaving his residence without prior permission of pretrial services, and required to submit to GPS monitoring to ensure compliance, the district court erred in denying defendant presentence confinement credit where defendant was subject to limitations on movement such that he could have been charged with escape from a community custody release program if there was an unauthorized departure from the place of confinement or other non-compliance with the court's order. Defendant's freedom of movement was sufficiently onerous to be deemed official confinement, entitling him to presentence confinement credit. *State v. Hansen*, 2021-NMCA-048, cert. denied.

**Defendant was not entitled to presentence confinement credit for pretrial release that was insufficiently restrictive.** — Where defendant was convicted of two counts of criminal sexual penetration of a minor in the second degree, and where, at sentencing, the district court entered a judgment and sentence that credited defendant with 205 days of presentence confinement and additional time spent incarcerated prior to sentencing, but denied credit for pretrial release where defendant was subject to a conventional curfew, the trial court did not err in determining that defendant was not entitled to credit for time he spent on conditions of release because the conditions were insufficiently restrictive. *State v. Figueroa*, 2020-NMCA-007, cert. denied.

**When no credit authorized by section.** — If a past confinement is not in connection with the present offense charged, this section does not authorize a credit. *State v. Barefield*, 1979-NMCA-060, 92 N.M. 768, 595 P.2d 406.

**Defendant was not entitled to 11 months of presentence confinement** credit against his sentence for escape from the penitentiary, where he was serving time on a burglary charge when he escaped, where he was captured and was immediately incarcerated to continue to serve time on his burglary charge, and where he was later sentenced to an additional nine years for the escape to run consecutively to his original charge. *State v. Facteau*, 1990-NMSC-040, 109 N.M. 748, 790 P.2d 1029.

**Conditions of confinement not relevant.** — When the defendant had not appeared for sentencing following a guilty plea, was later found in California serving a sentence for another crime, and a New Mexico detainer was lodged against him as a result of which the conditions of his confinement became more onerous, he was not entitled to credit for the time served in California after lodging of the detainer since his confinement there was not due to the New Mexico charges. *State v. Ruiz*, 1995-NMCA-093, 120 N.M. 420, 902 P.2d 575, cert. denied, 120 N.M. 394, 902 P.2d 76.

**Application to delinquent offenders.** — The presentence confinement credit provided for in Sections 31-18-15.3 and 31-20-12 NMSA 1978 applies only to serious youthful offenders sentenced as adults, and not to a child adjudicated as a delinquent offender for a lesser-included offense. *State v. Nanco*, 2012-NMCA-109, 288 P.3d 527, cert. granted, 2012-NMCERT-010.

Where the child, who was fifteen years old, was charged with committing first degree murder and two counts of tampering with evidence, and the jury determined that the child had committed the delinquent acts of voluntary manslaughter and one count with tampering with evidence, the child was not entitled to presentence confinement credit for the twenty-five months the child was detained in a juvenile detention facility before the district court adjudicated the child a delinquent offender. *State v. Nanco*, 2012-NMCA-109, 288 P.3d 527, cert. granted, 2012-NMCERT-010.

**Application of section prospective only.** — All persons convicted of a felony or of a lesser included offense, as of March 31, 1967, are to be given credit against any sentence imposed for that offense for all time spent in presentence confinement. This section is prospective only, and does not apply to those convicted before that date. 1973 Op. Att'y Gen. No. 73-66.

**Law reviews.** — For note, "Home Alone: Why House Arrest Doesn't Qualify for Presentence Confinement Credit in New Mexico - State v. Fellhauer," see 28 N.M.L. Rev. 519 (1998).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Time which convict spends in hospital as credit on his sentence, 62 A.L.R. 246.

Right of state or federal prisoner to credit for time served in another jurisdiction before delivery to state or federal authorities, 18 A.L.R.2d 511.

Right to credit for time served under void sentence, 35 A.L.R.2d 1283.

Computation of incarceration time under work-release or "hardship" sentences, 28 A.L.R.4th 1265.

Validity, construction, and application of concurrent-sentence doctrine - state cases, 56 A.L.R.5th 385.

## 31-20-13. Conditional discharge order; exception.

A. When a person who has not been previously convicted of a felony offense is found guilty of a crime for which a deferred or suspended sentence is authorized, the court may, without entering an adjudication of guilt, enter a conditional discharge order and place the person on probation on terms and conditions authorized by Sections 31-20-5 and 31-20-6 NMSA 1978. A conditional discharge order may only be made available once with respect to any person.

B. If the person violates any of the conditions of probation, the court may enter an adjudication of guilt and proceed as otherwise provided by law.

C. The court shall not enter a conditional discharge order for a person found guilty of driving a motor vehicle while under the influence of intoxicating liquor or drugs, pursuant to the provisions of Section 66-8-102 NMSA 1978.

**History: Laws 1993, ch. 283, § 2 enacted as 31-20-7 NMSA 1978 and recompiled as 31-20-13 NMSA 1978; 1994, ch. 15, § 1.**

**The 1994 amendment,** effective February 25, 1994, added "exception" at the end of the section heading, added the second sentence in Subsection A and added Subsection C.

**Compiler's notes.** — Laws 1993, ch. 283, § 2 enacted this section as a new 31-20-7 NMSA 1978. However, this section has been compiled as 31-20-13 NMSA 1978 in order to avoid confusion with repealed section 31-20-7 NMSA 1978 which has been construed or cited in a number of New Mexico decisions.



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**ANNOTATIONS**

**A conditional discharge is not a conviction.** — Where the district court had entered a conditional discharge order in a prior criminal proceeding against defendant; the order was entered without an adjudication of guilt and with a sentencing term; defendant's probation was subsequently revoked and defendant was placed back on probation; a year later, defendant's probation was again revoked and the district court ordered that defendant be incarcerated; and the district court did not revoke defendant's conditional discharge, the district court did not err by dismissing a later felon in possession charge against defendant on the ground that defendant's conditional discharge had not been revoked and could not serve as the predicate felony for the felon in possession charge. *State v. Harris*, 2013-NMCA-031, 297 P.3d 374.

**A conditional discharge constitutes a "prior sentence" for federal sentencing purposes.** — Where defendant pled guilty to possession with intent to distribute controlled substances in federal court, defendant's conditional discharge in a prior state criminal proceeding was considered a "prior sentence" rather than a prior conviction for purposes of federal sentencing, because the New Mexico conditional discharge statute requires a finding of guilt. *United States v. Ornelas-Yanez*, 77 F.Supp.3d 1083 (D.N.M. 2014)

**An offender subject to a conditional discharge is still "under indictment" for purposes of federal firearms statute.** — An offender subject to a conditional discharge in state court is still "under indictment" within the meaning of federal firearms statute, 18 U.S.C. § 922(n), until the condition, the completion of the term of probation, is met, because under a conditional discharge, the charges in the indictment are not extinguished upon the guilty plea or verdict, but remain in suspension until the defendant completes his term of probation. *United States v. Saiz*, 797 F.3d 853 (10th. Cir. 2015)

Where defendant committed federal firearms offenses while still on probation in state court pursuant to a conditional discharge where he pleaded guilty to burglary, larceny and battery, and where the state district court judge placed defendant on probation without an adjudication of guilt on the state crimes, the federal district court judge did not err in adding two sentencing enhancements after finding that defendant was "under indictment" for the state crimes as long as he was subject to the terms of conditional discharge and, therefore, had been under indictment when he committed the federal crimes. *United States v. Saiz*, 797 F.3d 853 (10th. Cir. 2015)

**The conditional discharge statute does not grant the authority to expunge criminal records.** *State v. C. L.*, 2010-NMCA-050, 148 N.M. 837, 242 P.3d 404.

**Failure to show exceptional circumstances to expunge criminal records.** — Where defendant was charged as an accessory to negligent child abuse; defendant pleaded guilty to child abuse resulting in great bodily harm; defendant was granted a conditional discharge and was released early due to defendant's satisfactory compliance with the terms of release; defendant was denied employment opportunities as a result of defendant's criminal record; defendant had been industrious and continued defendant's education; and defendant had no prior criminal record, assuming that the district court has inherent authority to order the expungement of criminal records, defendant failed to demonstrate the existence of exceptional circumstances necessary to exercise that authority. *State v. C. L.*, 2010-NMCA-050, 148 N.M. 837, 242 P.3d 404.

**Legislative intent.** — The legislature's intent is that a defendant receive credit for time served on supervised probation under the terms of a conditional discharge. *State v. Leslie*, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

**This section provides an exception for certain first-time felons** whose convictions meet requirements in addition to the eligibility requirements for a deferred or suspended sentence. *State v. Leslie*, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

**Subsection A of this section expressly incorporates probation statutes** that apply to a person serving a deferred sentence. *State v. Leslie*, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

**Person who is eligible to receive conditional discharge** is by definition one who is entitled to a deferred sentence. *State v. Leslie*, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

**Deferred sentence modified to conditional discharge.** — Modification from a deferred sentence to a conditional discharge was an authorized sentence reduction under this section and Rule 5-801 NMRA. *State v. Herbstman*, 1999-NMCA-014, 126 N.M. 683, 974 P.2d 177.

**Sex offender registration.** — A person granted a conditional discharge under this section is not required to register as a sex offender. *State v. Herbstman*, 1999-NMCA-014, 126 N.M. 683, 974 P.2d 177.

Notice requiring defendant to register as a sex offender pursuant to 29-11A-7 NMSA 1978 did not need to be placed in a conditional discharge order. *State v. Herbstman*, 1999-NMCA-014, 126 N.M. 683, 974 P.2d 177.

**Appealability of order.** — A conditional discharge order in a felony prosecution is sufficiently final to be appealable, but a similar order in a criminal contempt prosecution is not, at least when the order does not require any action or behavior on the part of the contemnor other than to obey the law in the future. *State v. Durant*, 2000-NMCA-066, 129 N.M. 345, 7 P.3d 495.

**Conditional discharge order final for purposes of appeal.** — Where defendant appealed from an order of conditional discharge following his trial for criminal trespass, the district court's order was final for purposes of appeal because defendant was subject to significant collateral consequences as a result of his conditional discharge, including claims that he would be required to disclose the fact of his conviction on applications for employment, college, and other future pursuits. *State v. Merhege*, 2016-NMCA-059, *rev'd on other grounds*, 2017-NMSC-016.

# ARTICLE 20A

# Capital Felony Sentencing

Sec.
31-20A-1. Repealed.
31-20A-2. Capital felony; determination of sentence.
31-20A-2.1. Repealed.
31-20A-3. Repealed.
31-20A-4. Repealed.
31-20A-5. Aggravating circumstances.
31-20A-6. Repealed.



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## 31-20A-1. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-20A-1 NMSA 1978, as enacted by Laws 1979, ch. 150, § 2, relating to capital felony sentencing procedures, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

## 31-20A-2. Capital felony; determination of sentence.

If a jury finds, beyond a reasonable doubt, that one or more aggravating circumstances exist, as enumerated in Section 31-20A-5 NMSA 1978, the defendant shall be sentenced to life imprisonment without possibility of release or parole. If the jury does not make the finding that one or more aggravating circumstances exist, the defendant shall be sentenced to life imprisonment.

**History: Laws 1979, ch. 150, § 3.; 2009, ch. 11, § 3.**

**The 2009 amendment,** effective July 1, 2009, deleted former Subsections A and B, which provided for capital sentencing deliberations, and added the sentence of life imprisonment without possibility of release or parole upon a finding of aggravating circumstances.

**Applicability clause.** — Laws 2009, ch. 11, § 6 provided that the provisions of this section apply to crimes committed on or after July 1, 2009.

### ANNOTATIONS

**Admission of evidence.** — In the penalty phase of a capital felony case, evidence of the defendant's prior convictions may be admitted only if the state first establishes the relevance of the prior convictions to the jury's selection of the sentence and the district court must facilitate the weighing by the jury of aggravating and mitigating circumstances, on a case-by-case basis, according to the evidentiary rules of relevance and reliability and the Capital Felony Sentencing Act's [repealed] statutory directives. *State v. Sanchez*, 2008-NMSC-066, 145 N.M. 31, 198 P.3d 337.

**Constitutionality.** — This section, directing the jury to weigh aggravating and mitigating circumstances, consider the defendant and the crime, and then determine the sentence, is not vague and indefinite, and thus does not violate a defendant's due process and equal protection rights. *State v. Clark*, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

**Aggravating circumstances need not be beyond reasonable doubt.** — There is no requirement that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. *State v. Finnell*, 1984-NMSC-064, 101 N.M. 732, 688 P.2d 769, cert. denied, 469 U.S. 918, 105 S. Ct. 297, 83 L. Ed. 2d 232 (1984).

The jury is not required to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt in order to specify a sentence of death. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

**Victim impact testimony.** — Victim impact testimony is consistent with the Capital Felony Sentencing Act [repealed] because it constitutes additional evidence as to the circumstances of the crime under Section 31-20A-1C NMSA 1978 [repealed] and Subsection B of this section. *State v. Clark*, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

The effective date of the victim's rights laws did not affect the admission of victim impact evidence in a death penalty case. States are free to admit this type of evidence following the United States supreme court's ruling in *Payne v. Tennessee*, 501 U.S. 808 (1991), and Section 31-20A-1C NMSA 1978 [repealed] and Subsection B of this section already provide authority for the admission of this type of evidence. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

The Rules of Evidence requiring relevance and the balancing of unfair prejudice also apply to testimony and exhibits that are introduced in a capital felony sentencing proceeding for the purpose of showing victim impact. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Defendant was not unfairly prejudiced by impact evidence that included a videotaped depiction of the victim prior to her death in addition to the testimony of two witnesses. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

**Lack of mitigating circumstances.** — Defendant's failure to show any mitigating circumstances, in and of itself, is not an aggravating circumstance. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

**Sentencing scheme is silent with regard to bifurcated proceedings.** — In an interlocutory appeal, where defendant was charged with first-degree murder, a capital felony, and with one count each of first-degree kidnapping, robbery, and conspiracy to commit robbery, and where defendant argued that due to her possible sentence of life without the possibility of parole, she must be afforded heightened procedural protections that apply when the state seeks the death penalty, the New Mexico supreme court held that the Capital Felony Sentencing Act neither requires nor prohibits bifurcated guilt and sentencing proceedings, and whether bifurcated proceedings are appropriate must be determined on a case-by-case basis, after the issue has been properly raised and argued under the rules of criminal procedure for the district courts. *State v. Chadwick-Mcnally*, 2018-NMSC-018.

**Evidence of mitigating circumstances prohibited.** — In an interlocutory appeal, where defendant was charged with first-degree murder, a capital felony, and with one count each of first-degree kidnapping, robbery, and conspiracy to commit robbery, and where defendant argued that the sentencing scheme under the Capital Felony Sentencing Act (Act) does not prohibit the presentation of mitigating circumstances, the district court did not err in concluding that defendant is precluded under the Act from presenting evidence of mitigating circumstances for sentencing purposes, because under the statute's plain language, the determinative factors are the jury's findings of guilt and of one or more aggravating circumstances. When both findings are present, a sentence of life without parole is mandatory and cannot be mitigated. *State v. Chadwick-Mcnally*, 2018-NMSC-018.

**Comparative proportionality review under former statute.** — A comparative proportionality review is a post-sentence inquiry into whether a death sentence is disproportionate to the punishment imposed on others convicted of the same crime. *Fry v. Lopez and Allen v. LeMaster*, 2019-NMSC-013.



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**Modified approach to comparative proportionality review of a death sentence under former statute.** — In New Mexico's modified approach to comparative proportionality review, the reviewing court defines a universe of cases from which similar cases are to be drawn, defines what constitutes a similar case, which produces a pool of cases to be used for comparison purposes, and defines the test used to establish that a sentence is disproportionate. The universe of cases is properly limited to those cases in which the prosecutor decided to seek the death penalty, which advanced to a death penalty sentencing hearing in which the jury found at least one aggravating circumstance, which resulted in a sentence of death or life imprisonment and which was affirmed on appeal, the pool of cases is expanded to include both cases involving the same aggravating circumstance and factually similar cases in which the jury had the option to impose the death penalty, and New Mexico adheres to a precedent-seeking approach, which involves comparing the case to the pool of comparison cases. *Fry v. Lopez and Allen v. LeMaster*, 2019-NMSC-013.

**Disproportionate death sentence under former statute construed.** — A death sentence is disproportionate if juries do not generally impose a death sentence in similar cases and there is no real justification for the death sentence. *Fry v. Lopez and Allen v. LeMaster*, 2019-NMSC-013.

**Death penalties under former statute vacated where petitioners' death sentences were statutorily disproportionate to the penalties imposed in similar cases.** — Where petitioners were sentenced to death for their respective convictions for first-degree murder and after a finding by their respective juries of certain aggravating circumstances, petitioners' death sentences were statutorily disproportionate, because cases involving the same aggravating circumstances as well as other factually similar cases as in *Fry* and *Allen* did not generally result in death sentences, and there was no real justification for affirming the death sentences. *Fry v. Lopez and Allen v. LeMaster*, 2019-NMSC-013.

**Law reviews.** — For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

For comment, "State v. Jacobs: A Comment on One State's Choice to Restrict Victim Impact Evidence at Death Penalty Sentencing," see 31 N.M.L. Rev. 539 (2001).

## 31-20A-2.1. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-20A-2.1 NMSA 1978, as enacted by Laws 1981, ch. 30, § 1, relating to the prohibition against capital punishment of mentally retarded persons, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

## 31-20A-3. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-20A-3 NMSA 1978, as enacted by Laws 1979, ch. 150, § 4, relating to court sentencing in death sentences, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

## 31-20A-4. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-20A-4 NMSA 1978, as enacted by Laws 1979, ch. 150, § 5, relating to automatic review by supreme court of death sentences, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

## 31-20A-5. Aggravating circumstances.

The aggravating circumstances to be considered by the sentencing court or jury pursuant to the provisions of Section 31-20A-2 NMSA 1978 are limited to the following:

A. the victim was a peace officer who was acting in the lawful discharge of an official duty when he was murdered;

B. the murder was committed with intent to kill in the commission of or attempt to commit kidnaping, criminal sexual contact of a minor or criminal sexual penetration;

C. the murder was committed with the intent to kill by the defendant while attempting to escape from a penal institution of New Mexico;

D. while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered a person who was at the time incarcerated in or lawfully on the premises of a penal institution in New Mexico. As used in this subsection "penal institution" includes facilities under the jurisdiction of the corrections and criminal rehabilitation department [corrections department] and county and municipal jails;

E. while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered an employee of the corrections and criminal rehabilitation department [corrections department];

F. the capital felony was committed for hire; and



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G. the capital felony was murder of a witness to a crime or any person likely to become a witness to a crime, for the purpose of preventing report of the crime or testimony in any criminal proceeding, or for retaliation for the victim having testified in any criminal proceeding.

**History: Laws 1979, ch. 150, § 6; 1981, ch. 23, § 1.**

**Bracketed material.** — The bracketed material in Subsections D and E was inserted by the compiler, as Laws 1981, ch. 73, § 1, changed the name of the former corrections and criminal rehabilitation department, referred to in Subsections D and E, to the corrections department. *See* 9-3-3 NMSA 1978. The bracketed material is not part of the law.

## ANNOTATIONS

I. GENERAL CONSIDERATION.
II. PEACE OFFICER.
III. MURDER.

### I. GENERAL CONSIDERATION.

**Aggravating circumstance.** — The only underlying felonies for felony murder that can serve as an aggravating circumstance for capital sentencing are kidnapping, criminal sexual contact of a minor and criminal sexual penetration. In addition, prosecution must establish beyond a reasonable doubt that defendant had an intent to kill. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

**Legislative intent.** — The legislature has demonstrated its intent to protect corrections officers and jailers and to deter crimes against them during the course of their duties of maintaining order in penal facilities. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

**This section provides sufficiently clear and objective standards** that provide specific and detailed guidance and that make the process for imposing the death sentence rationally reviewable. *State v. Garcia*, 1983-NMSC-008, 99 N.M. 771, 664 P.2d 969.

**Guadalupe county correctional facility is a penal institution** within the plain language of this section. The fact that the correctional facility housed inmates from the department of corrections rather than county inmates is immaterial both for the definition of "local jail" in Section 33-3-28 NMSA 1978 and the definition of "penal institution" in this section. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

**Elements of crime and elements of aggravating circumstance distinguished.** — Simply because there are sufficient elements present to prove more than one crime in the same transaction does not mean that more than one aggravating circumstance has been proven. While the same elements may be present in both instances, establishing the elements of an aggravating circumstance is not the same thing as establishing the elements of a crime. *State v. Henderson*, 1990-NMSC-030, 109 N.M. 655, 789 P.2d 603, *overruled on other grounds by Clark v. Tansey*, 1994-NMSC-098, 118 N.M. 486, 882 P.2d 527.

**Invalidation of one where more than one aggravating circumstance.** — When two or more aggravating circumstances are found, the invalidation of one will not invalidate the sentencing proceeding unless the invalidation is due to constitutionally protected conduct. *State v. Cheadle*, 1983-NMSC-093, 101 N.M. 282, 681 P.2d 708, cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

**Failure to allege aggravating circumstances.** — Death penalty proceedings are not precluded where the indictment does not allege the existence of aggravating circumstances. Since aggravating circumstances are not elements of the crime of murder, an indictment is not deficient for failure to allege them. *State v. Morton*, 1988-NMCA-063, 107 N.M. 478, 760 P.2d 170 (decided under prior law).

**Lack of mitigating circumstances.** — Defendant's failure to show any mitigating circumstances, in and of itself, is not an aggravating circumstance. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

### II. PEACE OFFICER.

**Subsection A concerns penalty for crime against peace officer,** and therefore, Sections 33-1-10 NMSA 1978 and 33-3-28 NMSA 1978 serve as powerful indicators of the legislature's intent in Subsection A of this section. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

**Legislature intended broad interpretation of Subsection A's aggravating circumstance** to advance the purpose of protecting those who maintain order. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

**Subsection A is not duplicative of Subsection E.** *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

**"Peace officer" in Subsection A includes jailers and corrections officers** while they are engaged in the duties for which the legislature designated them to be peace officers in Sections 33-3-28 and 33-1-10 NMSA 1978. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

By designating corrections officers and jailers as peace officers under certain circumstances, the legislature intended to provide them with the extra protection and added deterrent value of Subsection A of this section. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

The legislature intended to include corrections officers and jailers as peace officers in Subsection A of this section. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

There is an intent on the part of the legislature to treat corrections officers, jailers, and any employee of a local jail whose principal duty is to hold inmates in custody as peace officers for purposes of Subsection A of this section when these individuals are murdered during the discharge of duties conferring peace officer status. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

**Definition of "peace officer" in Section 30-1-12C NMSA 1978 is not directly applicable** to Subsection A of this section because that definition applies only to the Criminal Code. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

**Defendant need not know victim was police officer.** — The aggravating circumstance of killing a peace officer, as outlined in Subsection A, can constitutionally support the imposition of the death sentence even where the jury does not find that a defendant knew that his victim was a peace officer. *State v. Compton*, 1986-NMSC-010, 104 N.M. 683, 726 P.2d 837, cert. denied, 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986).

**Community service officers are peace officers** under this section. *State v. Ogden*, 1994-NMSC-029, 118 N.M. 234, 880 P.2d 845, cert. denied, 513 U.S. 936, 115 S. Ct. 336, 130 L. Ed. 2d 294.

**Probable cause established that deceased was peace officer.** — By establishing that the Guadalupe county correctional facility had a contract with the County, that deceased was employed by the correctional



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facility as a corrections officer, and that he was performing the duties of a corrections officer at the time of his death, the state established probable cause to believe that deceased was a peace officer within the meaning of Subsection A of this section. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

III. MURDER.

**Subsection D is not duplicative of Subsection A** because Subsection D of this section also applies to individuals other than corrections officers, including visitors and other inmates. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

**Subsection B allows jury to consider any or all listed crimes as separate aggravating circumstances.** *State v. Guzman*, 1984-NMSC-016, 100 N.M. 756, 676 P.2d 1321, cert. denied, 467 U.S. 1256, 104 S. Ct. 3548, 82 L. Ed. 2d 851 (1984).

When the evidence shows that more than one aggravating circumstance exists under Subsection B, any and all of the listed crimes may be considered as separate aggravating circumstances. The use of multiple instructions in these circumstances is proper. *State v. Jacobs*, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127, *overruled on other grounds by State v. Martinez*, 2021-NMSC-002.

**Subsection D applies to anyone lawfully on premises** of a penal institution, not just certified corrections officers. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

**Completeness of corrections officer's training had no effect on officer's lawful presence** at the correctional facility. Where the officer was an employee of the facility and was authorized by the facility administrators to be on the premises at the time of his killing, the officer was lawfully present at the facility within the plain meaning of Subsection D of this section. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

**Legislative purpose of aggravating circumstance in Subsection D** of this section is to deter inmates from committing murder. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

**Subsection E and Subsection D are designed** to deter murders committed by inmates. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

**Murder in the commission of kidnapping.** — The fact that all of the elements of the crime of kidnapping were satisfied before the murder occurred did not preclude a finding that the victim was murdered in the commission of kidnapping. The evidence substantially supported a finding that the kidnapping continued throughout the course of defendant's other crimes and until the time of the victim's death. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Although evidence was presented that defendant initiated the kidnapping well before and separately from the commission of other felonies, the kidnapping continued until the time of the victim's death; thus, there was sufficient evidence for the jury to find that the victim was murdered during the commission of a kidnapping. *State v. Jacobs*, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127, *overruled on other grounds by State v. Martinez*, 2021-NMSC-002.

**"Murder in commission of kidnapping" properly applied.** — Evidence that murder victim was found with hands bound behind her back and had severe injuries from which she died, that victim's injuries were inflicted after she was kidnapped, that victim was beaten and stabbed multiple times, and that defendant laughed at victim when she begged him to stop was sufficient to establish defendant's intent to kill in the commission of a kidnapping. *State v. Martinez*, 2006-NMSC-007, 139 N.M.152, 130 P.3d 731.

Death penalty sentencing is the subject of its own statute, which defines a limited number of aggravating circumstances, and the absence of mitigating circumstances is simply not one of them. *State v. Roper*, 2001-NMCA-093, 131 N.M. 189, 34 P.3d 133, cert. quashed, 131 N.M. 619, 41 P.3d 345 (decided under prior law).

**Hiding, then shooting victim, supports death sentence.** — Defendant's death penalty sentence was not disproportionate or excessive where defendant walked from his hotel room to a position of hiding and, when the opportunity presented itself, he shot his victim, a police officer, through the heart. *State v. Compton*, 1986-NMSC-010, 104 N.M. 683, 726 P.2d 837, cert. denied, 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986)(decided under prior law).

**Subsection G not overbroad.** — There is no merit to the argument that the aggravating circumstance of murder of a witness to a crime for the purpose of preventing the reporting of that crime is overbroad and unconstitutional. In order to prove the existence of this aggravating circumstance the state must prove that the killing was motivated by a desire to escape criminal prosecution for an earlier felony committed against the victim or some other person. The need for proof of motivation is sufficient to distinguish between this aggravating circumstance and that of a killing committed during the commission of a kidnapping, the second statutory aggravating circumstance submitted to the jury in defendant's case. *Clark v. Tansy*, 1994-NMSC-098, 118 N.M. 486, 882 P.2d 527.

**Death penalty eligibility in Subsection G of Section 31-20A-5 NMSA 1978,** requires compelling evidence that makes it reasonably probable, not just possible, that defendant's motive for committing murder was to silence a witness. To the extent *State v. Henderson*, 109 N.M. 655, 789 P.2d 603 (1990), upholds the murder-of-a-witness motive, when the only evidence of motive is the lack of other plausible motives and defendant's attempts to destroy evidence to conceal involvement in a crime, then to that extent State v. Henderson, 1990-NMSC-030, 109 N.M. 655, 789 P.2d 603, is overturned. *State v. Martinez*, 2006-NMSC-007, 139 N.M.152, 130 P.3d 731 (decided under prior law).

**"Murder of witness" aggravating circumstance properly applied** to defendant, who murdered a child he had kidnapped in order to prevent her from testifying against him. *State v. Clark*, 1989-NMSC-010, 108 N.M. 288, 772 P.2d 322, cert. denied, 493 U.S. 923, 110 S. Ct. 291, 107 L. Ed. 2d 271 (1989), *overruled on other grounds by State v. Henderson*, 1996-NMCA-089, 109 N.M. 655, 789 P.2d 603.

**Murder of witness.** — Evidence showing that defendant raped and murdered his victim, and then attempted to avoid detection by destroying evidence at the scene that would tie him to the crime, was sufficient to establish the aggravating circumstance of murder of a witness. *State v. Henderson*, 1990-NMSC-030, 109 N.M. 655, 789 P.2d 603, *overruled on other grounds by Clark v. Tansey*, 1994-NMSC-098, 118 N.M. 486, 882 P.2d 527.

Evidence did not establish the statutory aggravating circumstance of killing in the commission of a kidnapping, where it was not clear that defendant intended to kill his victim during the commission of a kidnapping and it was more likely that he intended to kill the victim because she was a potential witness against him. *State v. Henderson*, 1990-NMSC-030, 109 N.M. 655, 789 P.2d 603, *overruled on other grounds by Clark v. Tansey*, 1994-NMSC-098, 118 N.M. 486, 882 P.2d 527.

Evidence that the defendant went to the victim's house with the intent to rob her and formed the intent to kill her only after he discovered that the police were outside was sufficient to show there was probable cause that the aggravating circumstance of killing of a witness existed. *State v. Willis*, 1997-NMSC-014, 123 N.M. 55, 933 P.2d 854.



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Evidence, including statements that defendant made to his wife to the effect that he had raped a girl and killed her to prevent her from reporting the rape, was sufficient to support the aggravating circumstance of murder of a witness. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Evidence that victim of ongoing robbery grabbed the telephone immediately before being shot was insufficient to support a reasonable inference that defendant formed a specific intent to kill for the purpose of silencing a witness. *State v. Treadway*, 2006-NMSC-008, 139 N.M. 167, 130 P.3d 746.

**"Murder of witness" not properly applied.** — The "murder of a witness" aggravating circumstance was not properly applied since there was no evidence that the defendant intended to kill his son as a witness to other crimes of the defendant, and there was evidence supporting the theory that the defendant suffered from the paranoid hallucination that he was being pursued by the devil and that he killed his son because he believed the devil had entered his son's body. *State v. Smith*, 1997-NMSC-017, 123 N.M. 52, 933 P.2d 851.

Where evidence established that defendant placed shirt over window to conceal his involvement in a robbery in which two persons were murdered, that defendant attempted to hide gems and a gun he took in the robbery, that defendant admitted to police that he went to the victim's house to steal gems and that the robbery had gone bad, and that defendant lied to police about his role in the killings and where the evidence indicated that defendant killed one victim quickly leaving defendant little time to form a specific intent to kill for the purpose of silencing a witness, and where evidence implied that it was possible that the other victim was killed to silence her, the evidence was insufficient to establish a reasonable probability that defendant's motive for the killings was to silence witnesses. *State v. Martinez*, 2006-NMSC-007, 139 N.M.152, 130 P.3d 731.

**Use of factors at pretrial hearing.** — At a pretrial hearing to consider whether the state may seek the death penalty, the state could show there was probable cause that the aggravating circumstance of killing a witness was present, and the state was not required to prove the aggravating circumstance beyond a reasonable doubt. *State v. Willis*, 1997-NMSC-014, 123 N.M. 55, 933 P.2d 854 (decided under prior law).

**Law reviews.** — For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was heinous, cruel, depraved, or the like - post-Gregg cases, 63 A.L.R.4th 478.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like - post-Gregg cases, 64 A.L.R.4th 755.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that in committing murder, defendant created risk of death or injury to more than one person, to many persons, and the like - post-Gregg cases, 64 A.L.R.4th 837.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like - post-Gregg cases, 65 A.L.R.4th 838.

Sufficiency of evidence, for purpose of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like - post-Gregg cases, 66 A.L.R.4th 417.

Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like - post-Gregg cases, 67 A.L.R.4th 887.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement or correctional custody, and the like - post-Gregg cases, 67 A.L.R.4th 942.

Vulnerability of victim as aggravating factor under state sentencing guidelines, 73 A.L.R.5th 383.

## 31-20A-6. Repealed.

**Repeals.** — Laws 2009, ch. 11, § 5 repealed 31-20A-6 NMSA 1978, as enacted by Laws 1979, ch. 150, § 7, relating to mitigating circumstances, effective July 1, 2009. For provisions of former section, *see* the 2008 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 21

# Sentence, Pardons and Paroles

Sec.
31-21-1. Construction of statutory provisions prescribing term of imprisonment; maximum or minimum.
31-21-2. Clothing, money and transportation furnished to prisoners on release from correctional facility.
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31-21-27. Reentry drug court program for inmates; district court supervision.

## 31-21-1. [Construction of statutory provisions prescribing term of imprisonment; maximum or minimum.]

In all penal statutes of the state where by the terms of such statutes a definite punishment of imprisonment in the penitentiary is prescribed the time of such imprisonment in such statute shall be construed to be the maximum of imprisonment, unless such statutes expressly provide that such time is the minimum.

**History: Laws 1909, ch. 32, § 10; Code 1915, § 5425; C.S. 1929, § 139-103; 1941 Comp., § 42-1702; 1953 Comp., § 41-17-2.**

**Cross references.** — For juvenile probation services, *see* 32A-2-5 and 32A-2-24 NMSA 1978.

For separate sentences construed as cumulative, *see* 33-2-39 NMSA 1978.

For inapplicability of the Rules of Evidence to sentencing procedures, *see* Rule 11-1101 NMRA.

ANNOTATIONS

**Credit for time already served.** — Prisoner was entitled to credit for time served under prior void sentence when he was resentenced following habeas corpus proceeding to correct improper sentence. *Sneed v. Cox*, 1964-NMSC-250, 74 N.M. 659, 397 P.2d 308.

**No credit for time served under void, original proceeding.** — The *Sneed v. Cox, 1964-NMSC-250*, 74 N.M. 659, 397 P.2d 308, rule is applicable when an erroneous sentence is being corrected, but does not apply where the original proceeding was void for lack of jurisdiction even though time was served under a conviction found to be void because of absence of jurisdiction, credit may not be give for such time served when the prisoner is, on a subsequent trial, validly convicted of the same offense and given a new sentence. *Morgan v. Cox*, 1965-NMSC-108, 75 N.M. 472, 406 P.2d 347.

**Section inapplicable when sentence prescribes indefinite punishment.** — Section 42-1-61, 1953 Comp. (repealed), which provided for a sentence of "not less than two years," does not by its terms prescribe a definite punishment, but only a minimum, and this section is therefore inapplicable by its own terms. *Jones v. Cox*, 1964-NMSC-023, 73 N.M. 450, 389 P.2d 214 (decided under prior law).

**Section inapplicable in determining maximum sentence for sodomy.** — This section was inapplicable in determining maximum sentence imposed under 40-7-7, 1953 Comp. (repealed), providing imprisonment for not less than one year for sodomy. *Starkey v. Cox*, 1964-NMSC-020, 73 N.M. 434, 389 P.2d 203 (decided under prior law).

**Court must consider whether petitioner deprived of section's benefits.** — The right to see the parole board which arises under the parole laws is not a matter of grace, and in order to fully comply with the purpose intended to be served by the indeterminate sentencing statute and the parole statutes, the supreme court must consider whether petitioner is deprived of the benefits arising under the statutory minimum when his parole board interview is denied by virtue of a sentence which did not conform to the statute. *Sneed v. Cox*, 1964-NMSC-250, 74 N.M. 659, 397 P.2d 308.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law §§ 613, 829, 830, 942, 972, 973.

Validity, under indeterminate sentence law, of sentence fixing identical minimum and maximum terms of imprisonment, 29 A.L.R. 1344.

24 C.J.S. Criminal Law §§ 1468, 1505.

## 31-21-2. Clothing, money and transportation furnished to prisoners on release from correctional facility.

Upon the release of any prisoner from a correctional facility of the corrections department:

A. the superintendent shall provide him with suitable clothing as required and:

(1) in the case of release on parole, transportation to his place of employment if within this state, or if not within this state, then to any place within this state; or

(2) in the case of all other types of release, transportation to his home, if within the state, or if not within this state, then to the place of his conviction or to any other place within the state; and

B. the superintendent may provide him with not more than one hundred dollars ($100) and, in case of an exceptional situation, with the prior approval of the secretary of corrections, an additional amount not to exceed three hundred fifty dollars ($350) for purchase of transportation to a location in another state within the continental limits of the United States.



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**History: Laws 1909, ch. 32, § 7; Code 1915, § 5081; C.S. 1929, § 130-169; Laws 1939, ch. 55, § 18; 1941 Comp., § 42-1708; Laws 1951, ch. 99, § 1; 1953 Comp., § 41-17-8; Laws 1967, ch. 30, § 1; 1969, ch. 10, § 1; 1977, ch. 145, § 1; 1982, ch. 59, § 1.**

ANNOTATIONS

**Statute's provisions mandatory.** — The statute is mandatory. No exceptions are incorporated in it. The plain language of this statute makes it incumbent upon superintendent to provide clothing, money and transportation in these two instances. 1955-56 Op. Att'y Gen. No. 55-6122.

**Effective upon prisoner's release.** — Where prisoner had served the maximum sentence for the crime committed, the person is entitled to the items which the statute affords a prisoner upon expiration of his maximum sentence. 1955-56 Op. Att'y Gen. No. 55-6170.

## 31-21-3. Short title.

Sections 31-21-3 through 31-21-19 NMSA 1978 may be cited as the "Probation and Parole Act".

**History: 1953 Comp., § 41-17-12, enacted by Laws 1955, ch. 232, § 1; 1963, ch. 301, § 1.**

**Cross references.** — For inmate-release program, *see* 33-2-43 to 33-2-47 NMSA 1978.

For inapplicability of the Rules of Evidence to sentencing procedures, *see* Rule 11-1101 NMRA.

ANNOTATIONS

**No contract between state and prisoner.** — No act of the parole board can constitute a contract between a prisoner and the state. *Aragon v. Cox*, 1965-NMSC-132, 75 N.M. 537, 407 P.2d 673.

**Void order of parole is without force or effect** to justify the release of a prisoner. *Aragon v. Cox*, 1965-NMSC-132, 75 N.M. 537, 407 P.2d 673.

**Law reviews.** — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

For note, "Negligent Hiring and Retention - Availability of Action Limited By Foreseeability Requirement," see 10 N.M.L. Rev. 491 (1980).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Propriety of conditioning probation on defendant's remaining childless or having no additional children during probationary period, 94 A.L.R.3d 1218.

Jury's discussion of parole law as ground for reversal for new trial, 21 A.L.R.4th 420.

Right of convicted defendant to refuse probation, 28 A.L.R.4th 736.

## 31-21-4. Construction and purpose of act.

The Probation and Parole Act [31-21-3 NMSA 1978] shall be liberally construed to the end that the treatment of persons convicted of crime shall take into consideration their individual characteristics, circumstances, needs and potentialities as revealed by case study, and that such persons shall be dealt with in the community by a uniformly organized system of constructive rehabilitation under probation supervision instead of in an institution, or under parole supervision when a period of institutional treatment is deemed essential in the light of the needs of public safety and their own welfare.

**History: 1953 Comp., § 41-17-13, enacted by Laws 1955, ch. 232, § 2; 1963, ch. 301, § 2.**

ANNOTATIONS

**Law reviews.** — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 59 Am. Jur. 2d Pardon and Parole §§ 39 to 44.

67A Pardon and Parole §§ 39, 40, 43.

## 31-21-5. Definitions.

As used in the Probation and Parole Act:

A. "probation" means the procedure under which an adult defendant, found guilty of a crime upon verdict or plea, is released by the court without imprisonment under a suspended or deferred sentence and subject to conditions;

B. "parole" means the release to the community of an inmate of an institution by decision of the board or by operation of law subject to conditions imposed by the board and to its supervision;

C. "institution" means the state penitentiary and any other similar state institution hereinafter created;

D. "board" means the parole board;

E. "director" means the director of the field services division of the corrections department or any employee designated by him; and

F. "adult" means any person convicted of a crime by a district court.



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**History: 1953 Comp., § 41-17-14, enacted by Laws 1978, ch. 41, § 1; 1991, ch. 52, § 1.**

**Repeals and reenactments.** — Laws 1978, ch. 41, § 1, repealed 41-17-14, 1953 Comp. (former 31-21-5 NMSA 1978), relating to definitions in the Probation and Parole Act, and enacted a new section.

**Cross references.** — For state board of probation and parole as referring to corrections division, *see* 33-1-7 NMSA 1978.

**The 1991 amendment,** effective July 1, 1991, in Subsection D, substituted "parole board" for "state board of probation and parole" and in Subsection E substituted "director of the field services division of the corrections department" for "chief of the fields services bureau of the corrections division of the criminal justice department".

ANNOTATIONS

**Where judgment contains no reference to probation.** — Defendant was on "probation" within meaning of statute, where sentence was suspended subject to conditions stated in judgment and defendant had signed an agreement concerning rules, regulations and conditions of probation, even though judgment entered at time of the original sentence contained no specific reference to probation. *State v. Sublett*, 1968-NMCA-001, 78 N.M. 655, 436 P.2d 515.

**Presumption that court considers probation before sentencing.** — Where defendant's counsel asked the court to place defendant on probation before sentence was imposed, and no reasons were given by the court for denying probation, it is presumed the court considered the question of probation before sentencing defendant to the penitentiary. *State v. Follis*, 1970-NMCA-083, 81 N.M. 690, 472 P.2d 655.

**Court not required to enforce abstention from searches by probation officers.** — Statutory provisions that require the director to supervise probationers, direct the work of probation officers and formulate methods of supervision do not require a court to enforce the provisions of the manual concerning abstention from searches by probation officers. *State v. Gardner*, 1980-NMCA-122, 95 N.M. 171, 619 P.2d 847.

**Law reviews.** — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

For note, "Parole Revocation and the Right to Counsel," see 5 N.M.L. Rev. 311 (1975).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 59 Am. Jur. 2d Pardon and Parole §§ 1 to 9, 74.

67A C.J.S. Pardon and Parole §§ 2 to 4, 39.

## 31-21-6. Protection of records.

All social records, including presentence reports, pre-parole reports and supervision histories, obtained by the board are privileged and shall not be disclosed directly or indirectly to anyone other than the board, director, sentencing guidelines commission or sentencing judge, but authorities of the institution in which the prisoner is confined shall have access to all records and reports concerning the prisoner, and the sentencing judge, board and director shall have access to all records concerning the prisoner. The board, in the case of parole records, and the sentencing judge, in the case of probation records, in their discretion, whenever the best interest or welfare of a particular probationer or prisoner makes such action desirable or helpful, may permit inspection of the reports, or parts thereof, by the probationer, prisoner or his attorney. The sentencing guidelines commission shall have access to the social records for statistical and policymaking purposes only and shall not release any information identifying any individual.

**History: 1953 Comp., § 41-17-18, enacted by Laws 1955, ch. 232, § 7; 1963, ch. 301, § 7; 1989, ch. 362, § 1.**

**Cross references.** — For state board of probation and parole referring to the corrections division, *see* 33-1-7 NMSA 1978.

**The 1989 amendment,** effective April 7, 1989, inserted "sentencing guidelines commission" near the middle of the first sentence and added the last sentence.

ANNOTATIONS

**No privilege regarding communications made by inmate to probation officer.** — Nothing in this section makes privileged a communication made by a criminal to a probation and parole officer in the course of a presentence investigation. *State v. Silva*, 1967-NMCA-008, 78 N.M. 286, 430 P.2d 783.

**Privilege inapplicable to drug tests.** — Defendants were subjected to random urinalysis testing as a condition of probation or parole and tested positive for the presence of cocaine. Subsequently, they argued that their drug test results should not have been used to prosecute them for possession of cocaine because disclosure of the drug test results violates the privilege against disclosure found in this section. However the drug test results are more akin to investigative reports than social records; thus, the privilege set forth is inapplicable. *State v. Rickard*, 1994-NMCA-083, 118 N.M. 312, 881 P.2d 57, *rev'd in part on other grounds*, 1994-NMSC-111, 118 N.M. 586, 884 P.2d 477.

A defendant could not assert a privilege against the disclosure of drug test results since the drug test results are not social records. *State v. Ware*, 1994-NMCA-132, 118 N.M. 703, 884 P.2d 1182, cert. denied, 118 N.M. 731, 885 P.2d 1325.

**Privilege inapplicable to status as parolee or probationer.** — This section did not apply to a list containing the defendant's name and parole status obtained from the probation and parole board by agents of the Immigration and Naturalization Service. *U. S. v. Guerrero-Hernandez*, 95 F.3d 983 (10th Cir. 1996).

**Time to raise claim of privilege, when available.** — Defendant cannot on appeal be heard to complain that a communication made by defendant to a probation and parole officer in the course of a presentence investigation was privileged, when no claim of privilege was ever raised in the trial court. *State v. Silva*, 1967-NMCA-008, 78 N.M. 286, 430 P.2d 783.

**Reference to records during board's deliberations.** — If in the board's deliberations any reference is made to any of these records, such references and the information contained therein must be made under circumstances such that the prohibited disclosure may not occur.



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It is the board's duty, imposed by the legislature, to keep and guard this information from those not authorized to receive it. And the statute makes no exception of members of the press, even if these would not divulge the information further. 1955-56 Op. Att'y Gen. No. 56-6509.

**When board's minutes may be distributed to press.** — There is no objection to a distribution to the press of the minutes of the board's meetings so long as these do not contain references or information secured from privileged records covered by this section. 1955-56 Op. Att'y Gen. No. 56-6509.

**Mailing of probation records.** — The decision to allow probation records to be mailed to an attorney is within the discretion of the sentencing judge. 1971 Op. Att'y Gen. No. 71-25.

**Law reviews.** — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M. L. Rev. 234 (1972).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 62A Am. Jur. 2d Privacy §§ 60, 206.

Defendant's right to disclosure of presentence report, 40 A.L.R.3d 681.

## 31-21-7. Duties of director.

The director shall:

A. provide probation and parole services and supervise probationers and parolees;

B. assign officers to serve in each judicial district. Selection and assignment of officers to each judicial district shall be made by the director;

C. obtain office quarters for the staff in each district as necessary;

D. assign the secretarial, bookkeeping and accounting work to clerical employees;

E. direct the work of the officers and other employees;

F. formulate methods of investigation, supervision, recordkeeping and reports;

G. conduct training courses for the staff;

H. seek to cooperate with all agencies, public and private, that are concerned with the treatment or welfare of persons on probation or parole;

I. report to the parole board concerning the status of parolees under his supervision; and

J. perform such other duties as directed by the secretary of corrections.

**History: 1953 Comp., § 41-17-21, enacted by Laws 1955, ch. 232, § 10; 1963, ch. 301, § 9; 1975, ch. 194, § 7; 1977, ch. 257, § 56; 1990, ch. 7, § 1.**

**Cross references.** — For state board of probation and parole as referring to corrections division, *see* 33-1-7 NMSA 1978.

**The 1990 amendment,** effective May 16, 1990, deleted "with the advice and consent of the judge of the district" at the end of Subsection B, made a minor stylistic change in Subsection H, and substituted "secretary of corrections" for "secretary of the criminal justice department" at the end of Subsection J.

ANNOTATIONS

**Court not required to enforce abstention from searches by probation officers.** — Statutory provisions that require the director to supervise probationers, direct the work of probation officers and formulate methods of supervision do not require a court to enforce the provisions of the manual of instructions for parole officers concerning abstention from searches by probation officers. *State v. Gardner*, 1980-NMCA-122, 95 N.M. 171, 619 P.2d 847.

**Law reviews.** — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

## 31-21-8. Director to administer interstate compacts relating to convicts on probation and parole.

The director is the administrator of interstate compacts relating to convicts on probation and parole.

**History: 1953 Comp., § 41-17-21.1, enacted by Laws 1959, ch. 33, § 1; 1977, ch. 257, § 57.**

ANNOTATIONS

**Law reviews.** — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

## 31-21-9. Presentence and prerelease investigations.

A. Upon the order of any district or magistrate court, the director shall prepare a presentence report which shall include such information as the court may request.

B. Upon the order of any district court the director shall prepare a prerelease report which the court shall use to determine the accused's qualifications for bail. The report shall include available



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information about the accused's family ties, employment, financial resources, character, physical and mental condition, the length of his residence in the community, his record of convictions, his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings and any history of drug or alcohol abuse.

C. All local and state law enforcement agencies shall furnish to the director any requested criminal records.

**History: 1953 Comp., § 41-17-23, enacted by Laws 1972, ch. 71, § 17.**

**Repeals and reenactments.** — Laws 1972, ch. 71, § 17, repealed 41-17-23, 1953 Comp., relating to presentence investigation, and enacted the above section.

**Compiler's notes.** — Laws 1972, ch. 71, § 19, provided that this act shall not be construed to repeal the provisions of 66-8-131 to 66-8-133 NMSA 1978, relating to the issuance of uniform traffic citations.

ANNOTATIONS

**Obtaining of presentence report is not matter of right;** the report is discretionary with the court. *State v. Follis*, 1970-NMCA-083, 81 N.M. 690, 472 P.2d 655.

**Judge's request for presentence report discretionary.** — The trial judge has discretion to impose sentence immediately after conviction or request a presentence report, and where the jury had returned its verdict, it could not be said that immediate sentencing deprived defendant of a fair trial. *State v. Mireles*, 1972-NMCA-105, 84 N.M. 146, 500 P.2d 431.

**Absence of presentence report provides no basis for relief.** *State v. Follis*, 1970-NMCA-083, 81 N.M. 690, 472 P.2d 655.

**"Statement" before court for purpose of altering sentence under Section 31-18-15.1 NMSA 1978 is presentence report.** *State v. Wilson*, 1982-NMCA-019, 97 N.M. 534, 641 P.2d 1081, cert. denied, 98 N.M. 50, 644 P.2d 1039.

**No statutory limitations upon contents.** — There are no statutory limitations upon the contents of the presentence report. *State v. Montoya*, 1978-NMCA-009, 91 N.M. 425, 575 P.2d 609, cert. denied, 91 N.M. 491, 576 P.2d 297.

**Inclusion of arrest record in presentence report does not violate due process.** *State v. Montoya*, 1978-NMCA-009, 91 N.M. 425, 575 P.2d 609, cert. denied, 91 N.M. 491, 576 P.2d 297.

**Time spent in boys' school may also be considered.** — The parole board entirely within its own discretion may consider the time spent at the New Mexico boys' school towards eligibility for consideration for parole. 1957-58 Op. Att'y Gen. No. 58-109.

**Law reviews.** — For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For comment, "A Comment on State v. Montoya and the use of Arrest Records in Sentencing," see 9 N.M.L. Rev. 443 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 807.

Right of defendant to inspect report of presentence investigation of witness previously convicted of crime, under Rule 32(c) of Federal Rules of Criminal Procedure, 38 A.L.R. Fed. 786.

24 C.J.S. Criminal Law §§ 1480, 1492, 1493, 1496.

## 31-21-10. Parole authority and procedure.

A. An inmate of an institution who was sentenced to life imprisonment becomes eligible for a parole hearing after the inmate has served thirty years of the sentence. Before ordering the parole of an inmate sentenced to life imprisonment, the board shall:

(1) interview the inmate at the institution where the inmate is committed;

(2) consider all pertinent information concerning the inmate, including:

(a) the circumstances of the offense;

(b) mitigating and aggravating circumstances;

(c) whether a deadly weapon was used in the commission of the offense;

(d) whether the inmate is a habitual offender;

(e) the reports filed under Section 31-21-9 NMSA 1978; and

(f) the reports of such physical and mental examinations as have been made while in an institution;

(3) make a finding that a parole is in the best interest of society and the inmate; and

(4) make a finding that the inmate is able and willing to fulfill the obligations of a law-abiding citizen.

If parole is denied, the inmate sentenced to life imprisonment shall again become entitled to a parole hearing at two-year intervals. The board may, on its own motion, reopen any case in which a hearing has already been granted and parole denied.

B. Unless the board finds that it is in the best interest of society and the parolee to reduce the period of parole, a person who was sentenced to life imprisonment shall be required to undergo a minimum period of parole of five years. During the period of parole, the person shall be under the guidance and supervision of the board.



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C. An inmate of an institution who was sentenced to life imprisonment without possibility of release or parole is not eligible for parole and shall remain incarcerated for the entirety of the inmate's natural life.

D. Except for certain sex offenders as provided in Section 31-21-10.1 NMSA 1978, an inmate who was convicted of a first, second or third degree felony and who has served the sentence of imprisonment imposed by the court in an institution designated by the corrections department shall be required to undergo a two-year period of parole. An inmate who was convicted of a fourth degree felony and who has served the sentence of imprisonment imposed by the court in an institution designated by the corrections department shall be required to undergo a one-year period of parole. During the period of parole, the person shall be under the guidance and supervision of the board.

E. Every person while on parole shall remain in the legal custody of the institution from which the person was released, but shall be subject to the orders of the board. The board shall furnish to each inmate as a prerequisite to release under its supervision a written statement of the conditions of parole that shall be accepted and agreed to by the inmate as evidenced by the inmate's signature affixed to a duplicate copy to be retained in the files of the board. The board shall also require as a prerequisite to release the submission and approval of a parole plan. If an inmate refuses to affix the inmate's signature to the written statement of the conditions of parole or does not have an approved parole plan, the inmate shall not be released and shall remain in the custody of the institution in which the inmate has served the inmate's sentence, excepting parole, until such time as the period of parole the inmate was required to serve, less meritorious deductions, if any, expires, at which time the inmate shall be released from that institution without parole, or until such time that the inmate evidences acceptance and agreement to the conditions of parole as required or receives approval for the inmate's parole plan or both. Time served from the date that an inmate refuses to accept and agree to the conditions of parole or fails to receive approval for the inmate's parole plan shall reduce the period, if any, to be served under parole at a later date. If the district court has ordered that the inmate make restitution to a victim as provided in Section 31-17-1 NMSA 1978, the board shall include restitution as a condition of parole. The board shall also personally apprise the inmate of the conditions of parole and the inmate's duties relating thereto.

F. When a person on parole has performed the obligations of the person's release for the period of parole provided in this section, the board shall make a final order of discharge and issue the person a certificate of discharge.

G. Pursuant to the provisions of Section 31-18-15 NMSA 1978, the board shall require the inmate as a condition of parole:

(1) to pay the actual costs of parole services to the adult probation and parole division of the corrections department for deposit to the corrections department intensive supervision fund not exceeding one thousand eight hundred dollars ($1,800) annually to be paid in monthly installments of not less than twenty-five dollars ($25.00) and not more than one hundred fifty dollars ($150), as set by the appropriate district supervisor of the adult probation and parole division, based upon the financial circumstances of the defendant. The defendant's payment of the supervised parole costs shall not be waived unless the board holds an evidentiary hearing and finds that the defendant is unable to pay the costs. If the board waives the defendant's payment of the supervised parole costs and the defendant's financial circumstances subsequently change so that the defendant is able to pay the costs, the appropriate district supervisor of the adult probation and parole division shall advise the board and the board shall hold an evidentiary hearing to determine whether the waiver should be rescinded; and

(2) to reimburse a law enforcement agency or local crime stopper program for the amount of any reward paid by the agency or program for information leading to the inmate's arrest, prosecution or conviction.

H. The provisions of this section shall apply to all inmates except geriatric, permanently incapacitated and terminally ill inmates eligible for the medical and geriatric parole program as provided by the Parole Board Act.

**History: 1978 Comp., § 31-21-10, enacted by Laws 1980, ch. 28, § 1; 1981, ch. 285, § 3; 1982, ch. 107, § 1; 1983, ch. 136, § 1; 1987, ch. 139, § 4; 1988, ch. 62, § 2; 1994, ch. 21, § 1; 1994, ch. 24, § 4; 1996, ch. 79, § 4; 1997,**



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**ch. 140, § 2; 2003 (1st S.S.), ch. 1, § 8; 2004, ch. 38, § 2; 2005, ch. 59, § 3; 2007, ch. 69, § 3; 2009, ch. 11, § 4.**

**The 2009 amendment,** effective July 1, 2009, in Subsection B, replaced "convicted of a capital felony" with "sentenced to life imprisonment" and added Subsection C.

**The 2007 amendment,** effective July 1, 2007, made the section applicable to all crimes for which an inmate has been sentenced to life imprisonment.

**The 2005 amendment,** effective June 17, 2005, provided that an inmate sentenced to life imprisonment for a first degree felony resulting in the death of a child becomes eligible for a parole hearing after serving thirty years of the sentence.

**The 2004 amendments,** effective July 1, 2004, amended Paragraph (1) of Subsection F to change one thousand twenty dollars ($1,020) to one thousand eight hundred dollars ($1,800), fifteen dollars ($15.00) to twenty-five dollars ($25.00), eighty-five dollars ($85.00) to one hundred fifty dollars ($150) and to add after "($150) "as set by the appropriate district supervisor of the adult probation and parole division, based upon the financial circumstances of the defendant. The defendant's payment of the supervised parole costs shall not be waived unless the board holds an evidentiary hearing and finds that the defendant is unable to pay the costs. If the board waives the defendant's payment of the supervised parole costs and the defendant's financial circumstances subsequently change so that the defendant is able to pay the costs, the appropriate district supervisor of the adult probation and parole division shall advise the board and the board shall hold an evidentiary hearing to determine whether the waiver should be rescinded".

**The 2003 (1st S.S.) amendment,** effective February 3, 2004, substituted "an institution" for "prison" in Subparagraph (2)(f) of Subsection A, added "except for sex offenders as provided in Section 31-21-10.1 NMSA 1978" at the beginning of the first sentence of Subsection C and substituted "an institution" for "a corrections facility" in the first and second sentences of that subsection, and substituted "institution" for both "correction facility" and "facility" in the fourth sentence of Subsection D.

**Applicability.** — Laws 2009, ch. 11, § 6 provided that the provisions of this section apply to crimes committed on or after July 1, 2009.

ANNOTATIONS

**Commencement of parole.** — Subsection C of Section 31-21-10 (now Subsection D) requires commencement of the parole period as soon as the felony sentence has been completed. *Gillespie v. State*, 1988-NMSC-068, 107 N.M. 455, 760 P.2d 147.

**A court may attach a two-year parole period** to a consecutive sentence for third and fourth degree felonies. *State v. Utley*, 2008-NMCA-080, 144 N.M. 275, 186 P.3d 904, cert. denied, 2008-NMCERT-004, 144 N.M. 47, 183 P.3d 932.

**Subsection A of this section does not create a minimum sentence for those sentenced to life imprisonment.** *Compton v. Lytle*, 2003-NMSC-031, 134 N.M. 586, 81 P.3d 39.

**Good time credit not available.** — The legislature intended to differentiate between capital and noncapital felons by allowing for good-time credits for the latter and denying them to the former; a life sentence does not have a determinate maximum sentence to be reduced by good-time credits. *Compton v. Lytle*, 2003-NMSC-031, 134 N.M. 586, 81 P.3d 39.

**Minimum period of incarceration for parole eligibility for life sentences prior to 1980.** — Where petitioner pled guilty to four murder charges and was sentenced to four life sentences; three of the sentences ran concurrently with each other and consecutive to the fourth sentence; during plea negotiations petitioner's attorney advised petitioner that based on the law at that time, petitioner would be eligible for parole after serving ten years on each of the two consecutive life sentences; once incarcerated, however, petitioner was notified that the eligibility period for parole was thirty years on each life sentence; petitioner filed a petition for writ of habeas corpus challenging the timing of petitioner's eligibility for parole; prior to 1977, the statute provided for a minimum ten-year period of incarceration for eligibility for parole; in 1977, the legislature first enacted a provision, effective July 1, 1979, that repealed the statute and established a new, thirty-year minimum period of incarceration for eligibility for parole and then enacted an amendment, effective June 21, 1977, to the same statute that did not change the pre-1977 minimum ten-year period of incarceration for eligibility for parole; the 1978 recompilation of the statutes compiled the 1977 amended version of the statute as Section 31-21-10 NMSA 1978 and referred to the first 1977 enactment requiring a minimum thirty-year period of incarceration for parole eligibility in a compiler's note without including the text; in 1980, to resolve the confusion, the legislature repealed and reenacted Section 31-21-10 NMSA 1978, effective February 22, 1980, to provide for a thirty-year period of incarceration before eligibility for parole and purported to make the new statute apply retroactively to all crimes committed on or after July 1, 1979; petitioner's crimes were committed on September 17, 1979 and petitioner was sentenced on May 14,1980; in *Quintana v. New Mexico Department of Corrections*, 100 N.M. 224, 668 P.2d 1101 (1983), the court held that the first 1977 enactment repealed the statute so that the 1977 amendment of the statute was ineffective with the result that in 1977, the statute provided for a minimum thirty-year period of incarceration for eligibility for parole; in *Devine v. New Mexico Department of Corrections*, 866 F.2d 339 (10th Cir. 1989), the court ruled that the holding in Quintana was unforeseeable and retroactively enhanced the petitioner's sentence in violation of ex post facto principles and violated the petitioner's federal due process rights; and in this case, in reliance on Quintana, the district court dismissed petitioner's petition and ordered petitioner to serve thirty years instead of ten years before consideration for parole, petitioner was eligible for parole upon the completion of ten years of incarceration on the second life sentence. *Skidgel v. Hatch*, 2013-NMSC-019, 301 P.3d 854, *overruling Quintana v. New Mexico Dep't of Corrs.*, 1983-NMSC-066, 100 N.M. 224, 668 P.2d 1101.

## 31-21-10.1. Sex offenders; period of parole; terms and conditions of parole.

A. If the district court sentences a sex offender to a term of incarceration in a facility designated by the corrections department, the district court shall include a provision in the judgment and sentence that specifically requires the sex offender to serve an indeterminate period of supervised parole for a period of:

(1) not less than five years and not in excess of twenty years for the offense of kidnapping when committed with intent to inflict a sexual offense upon the victim, criminal sexual penetration



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in the third degree, criminal sexual contact of a minor in the fourth degree or sexual exploitation of children in the second degree; or

(2) not less than five years and up to the natural life of the sex offender for the offense of aggravated criminal sexual penetration, criminal sexual penetration in the first or second degree, criminal sexual contact of a minor in the second or third degree or sexual exploitation of children by prostitution in the first or second degree.

A sex offender's period of supervised parole may be for a period of less than the maximum if, at a review hearing provided for in Subsection C of this section, the state is unable to prove that the sex offender should remain on parole.

B. Prior to placing a sex offender on parole, the board shall conduct a hearing to determine the terms and conditions of supervised parole for the sex offender. The board may consider any relevant factors, including:

(1) the nature and circumstances of the offense for which the sex offender was incarcerated;

(2) the nature and circumstances of a prior sex offense committed by the sex offender;

(3) rehabilitation efforts engaged in by the sex offender, including participation in treatment programs while incarcerated or elsewhere;

(4) the danger to the community posed by the sex offender; and

(5) a risk and needs assessment regarding the sex offender, developed by the sex offender management board of the New Mexico sentencing commission or another appropriate entity, to be used by appropriate parole board personnel.

C. When a sex offender has served the initial five years of supervised parole, and at two and one-half year intervals thereafter, the board shall review the duration of the sex offender's supervised parole. At each review hearing, the attorney general shall bear the burden of proving by clear and convincing evidence that the sex offender should remain on parole.

D. The board may order a sex offender released on parole to abide by reasonable terms and conditions of parole, including:

(1) being subject to intensive supervision by a parole officer of the corrections department;

(2) participating in an outpatient or inpatient sex offender treatment program;

(3) a parole agreement by the sex offender not to use alcohol or drugs;

(4) a parole agreement by the sex offender not to have contact with certain persons or classes of persons; and

(5) being subject to alcohol testing, drug testing or polygraph examinations used to determine if the sex offender is in compliance with the terms and conditions of the sex offender's parole.

E. The board shall require electronic real-time monitoring of every sex offender released on parole for the entire time the sex offender is on parole. The electronic monitoring shall use global positioning system monitoring technology or any successor technology that would give continuous information on the sex offender's whereabouts and enable law enforcement and the corrections department to determine the real-time position of a sex offender to a high level of accuracy.

F. The board shall notify the chief public defender of an upcoming parole hearing for a sex offender pursuant to Subsection C of this section, and the chief public defender shall make representation available to the sex offender at the parole hearing.

G. If the board finds that a sex offender has violated the terms and conditions of the sex offender's parole, the board may revoke the sex offender's parole or may modify the terms and conditions of parole.

H. The provisions of this section shall apply to all sex offenders, except geriatric, permanently incapacitated and terminally ill inmates eligible for the medical and geriatric parole program as provided by the Parole Board Act [31-21-22 through 31-21-26 NMSA 1978].

I. As used in this section, "sex offender" means a person who is convicted of, pleads guilty to or pleads nolo contendere to any one of the following offenses:

(1) kidnapping, as provided in Section 30-4-1 NMSA 1978, when committed with intent to inflict a sexual offense upon the victim;

(2) aggravated criminal sexual penetration or criminal sexual penetration in the first, second or third degree, as provided in Section 30-9-11 NMSA 1978;

(3) criminal sexual contact of a minor in the second, third or fourth degree, as provided in Section 30-9-13 NMSA 1978;



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(4) sexual exploitation of children in the second degree, as provided in Section 30-6A-3 NMSA 1978;

(5) sexual exploitation of children by prostitution in the first or second degree, as provided in Section 30-6A-4 NMSA 1978; or

(6) child solicitation by electronic communication device, as provided in Section 30-37-3.2 NMSA 1978.

**History: Laws 2003 (1st S.S.), ch. 1, § 9; 2007, ch. 68, § 4; 2007, ch. 69, § 4.**

**2007 Multiple Amendments.** — Laws 2007, ch. 68, § 4 and Laws 2007, ch. 69, § 4 enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2007, ch. 69, § 4, as the last act signed by the governor, is set out above and incorporates both amendments. Laws 2007, ch. 68, § 4 and Laws 2007, ch. 69, § 4 are described below. To view the session laws in their entirety, *see* the 2007 session laws on *NMOneSource.com*.

Laws 2007, ch. 69, § 4, effective July 1, 2007, required a parole period of not less than five years and not more than twenty years for certain sexual offenses and not less than five years up to natural life for more serious sexual offenses; permitted the imposition of supervised parole for the maximum period; required electronic monitoring during parole; and defined "sex offender" as a person convicted of aggravated criminal sexual penetration.

Laws 2007, ch. 68, § 4, effective July 1, 2007, defined "sex offender" to include a person convicted of child solicitation by electronic communication device.

ANNOTATIONS

**District court erred in sentencing defendant in accordance with the terms of the sex offender parole statute.** — Where defendant entered into a conditional plea to one count of child solicitation by electronic communication device, contrary to § 30-37-3.2(C)(1) NMSA 1978, for conduct committed in 2015, and where the district court, as a part of defendant's sentence, sentenced defendant to parole pursuant to the sex offender parole statute, § 31-21-10.1 NMSA 1978, rather than pursuant to the general parole statute, § 31-21-10(D), NMSA 1978, the district court erred by sentencing defendant in accordance with the terms of § 31-21-10.1(A)(1), because competing amendments to this section in 2007 were irreconcilable, and it cannot be concluded that the legislature meant to subject those convicted of child solicitation by electronic communication to the enhanced sex offender parole terms. *State v. Sena*, 2021-NMCA-047, cert. granted.

**The district court erred by sentencing defendant to sex offender parole and probation.** — Where defendant was convicted of attempt to commit second-degree criminal sexual contact of a minor (CSCM), the district court erred when it imposed a sentence to sex offender probation and parole instead of a sentence in accordance with the general probation and parole statutes, because while CSCM is among the enumerated offenses triggering a sentence to sex offender probation or parole, *attempt* to commit CSCM is not included among the offenses. *State v. Notah*, 2022-NMCA-005, cert. denied.

## 31-21-11. Parole to detainers to serve another sentence or for hospitalization and treatment.

Prisoners who are otherwise eligible for parole may be paroled to detainers to serve another sentence within the penitentiary or to the forensic treatment or alcohol treatment unit of the New Mexico behavioral health institute at Las Vegas or to any other specific hospital or residential treatment program determined necessary by the board.

**History: 1953 Comp., § 41-17-24.1, enacted by Laws 1959, ch. 30, § 1; 1977, ch. 216, § 13; 1982, ch. 107, § 2; 2005, ch. 313, § 10.**

**Cross references.** — For state board of probation and parole as referring to corrections division, *see* 33-1-7 NMSA 1978.

**The 2005 amendment,** effective June 17, 2005, changed the name of the New Mexico state hospital to the New Mexico behavioral institute at Las Vegas.

ANNOTATIONS

**No loss of state's jurisdiction.** — Petitioner is not denied due process in violation of state and federal constitutions by his imprisonment and detention in New Mexico for violation of terms of parole agreement whereby New Mexico had paroled him to detainer in Arizona without surrendering its jurisdiction over him. *Snow v. Cox*, 1966-NMSC-082, 76 N.M. 238, 414 P.2d 217.

**Effect of two life sentences on "outside" parole.** — As a practical matter a person committed under two life sentences cannot be granted an "outside" parole until he has served 20 years but he can be granted an "in custody" parole after serving 10 years. 1961-62 Op. Att'y Gen. No. 61-59.

**Cumulative sentences.** — If it were mandatory upon a penitentiary to construe cumulative sentences as one continuous sentence, the provisions of this section would not be effective. 1963-64 Op. Att'y Gen. No. 63-165.

**Cancellation of detainers.** — The issuing and cancellation of detainers is properly a matter for the parole agency of this state. The board has authority to cancel, if it deems such advisable, an outstanding detainer or warrant based upon a violation of parole. 1955-56 Op. Att'y Gen. No. 56-6371.

## 31-21-12. Conditional release.

A. Any prisoner who is released by authority of the governor under any conditional release or other disposition made under the pardoning power, other than full pardon, shall, upon release, be deemed



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as released on parole until the expiration of the basic term or terms of imprisonment for which he was sentenced and until the expiration of any period of parole included as a part of sentence.

B. Except for a full pardon, the governor may not conditionally release or otherwise pardon a prisoner during the period for which such person is serving any enhanced term of his sentence pursuant to Section 31-18-16 NMSA 1978.

**History: 1953 Comp., § 41-17-25, enacted by Laws 1955, ch. 232, § 14; 1977, ch. 216, § 14.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 59 Am. Jur. 2d Pardon and Parole §§ 63 to 72; 60 Am. Jur. 2d Penal and Correctional Institutions §§ 226, 229, 230, 232 to 235.

Conditional pardon, 60 A.L.R. 1410.

Offenses and convictions covered by pardon, 35 A.L.R.2d 1261.

Denial of state prisoner's application for, or revocation of, participation in work or study release program or furlough program as actionable under Civil Rights Act of 1871 (42 USCS § 1983), 55 A.L.R. Fed. 208.

67A C.J.S. Pardon and Parole §§ 23 to 28.

## 31-21-13. Information from prison officials.

It shall be the duty of all prison officials to grant to the members of the board, or its properly accredited representatives, access at all reasonable times to any prisoner over whom the board has jurisdiction under this act [31-21-3 to 31-21-19 NMSA 1978], to provide for the board or such representatives facilities for communicating with and interviewing such prisoner and to furnish to the board such reports and records as the board shall require concerning the conduct and character of any prisoner in their custody and any other facts deemed by the board pertinent in determining whether such prisoner shall be paroled.

**History: 1953 Comp., § 41-17-26, enacted by Laws 1955, ch. 232, § 15.**

**Cross references.** — For state board of probation and parole as referring to corrections division, *see* 33-1-7 NMSA 1978.

## 31-21-13.1. Intensive supervision programs.

A. As used in this section, "intensive supervision programs" means programs that provide highly structured and intense supervision, with stringent reporting requirements, of certain individuals who represent an excessively high assessment of risk of violation of probation or parole, emphasize meaningful rehabilitative activities and reasonable alternatives without seriously increasing the risk of recidivist crime and facilitate the payment of restitution by the offender to the victim. "Intensive supervision programs" include house arrest programs or electronic surveillance programs or both.

B. The corrections department shall implement and operate intensive supervision programs in various local communities. The programs shall provide services for appropriate individuals by probation and parole officers of the corrections department. The corrections department shall promulgate rules and regulations to provide that the officers providing these services have a maximum case load of forty offenders and to provide for offender selection and other criteria. The corrections department may cooperate with all recognized law enforcement authorities and share all necessary and pertinent information, records or documents regarding probationers or parolees in order to implement and operate these intensive supervision programs.

C. For purposes of this section, a judge contemplating imposition of an intensive supervision program for an individual shall consult with the adult probation and parole division of the corrections department and consider the recommendations before imposing such probation. The adult probation and parole division of the corrections department shall recommend only those individuals who would have otherwise been recommended for incarceration for intensive supervision programs. A judge has discretion to impose an intensive supervision program for an individual, regardless of recommendations made by the adult probation and parole division. Inmates eligible for parole, or within twelve months of eligibility for parole, or inmates who would otherwise remain in a correctional institution for lack of a parole plan or those parolees whose parole the board would otherwise revoke are eligible for intensive supervision programs. The provisions of this section do



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not limit or reduce the statutory authority vested in probation and parole supervision as defined by any other section of the Probation and Parole Act.

D. There is created in the state treasury the "corrections department intensive supervision fund" to be administered by the corrections department upon vouchers signed by the secretary of corrections. Balances in the corrections department intensive supervision fund shall not revert to the general fund. Beginning July 1, 1988, the intensive supervision programs established pursuant to this section shall be funded by those supervision costs collected pursuant to the provisions of Sections 31-20-6 and 31-21-10 NMSA 1978. The corrections department is specifically authorized to hire additional permanent or term full-time equivalent positions for the purpose of implementing the provisions of this section.

**History: 1978 Comp., § 31-21-13.1, enacted by Laws 1988, ch. 62, § 3; 1991, ch. 52, § 2; 2013, ch. 48, § 1.**

**The 2013 amendment,** effective June 14, 2013, increased the maximum case load of probation and parole officers working in intensive supervision programs from twenty to forty offenders; and in Subsection B, in the third sentence, after "maximum case load of", deleted "twenty" and added "forty".

**The 1991 amendment,** effective July 1, 1991, in the first sentence of Subsection A, substituted "individuals who represent an excessively high assessment to risk of violation of probation or parole, emphasize" for "probationers and parolees who represent an excessively high assessment of risk to the community, emphasizes"; in the second sentence of Subsection B, substituted "individuals" for "probationers and parolees"; Subsection C, substituted "adult probation and parole division" for "field services division" in the first two sentences, added the present third sentence, and in the present fourth sentence substituted "Inmates eligible for parole, or within twelve months of eligibility for parole, or inmates" for "Only those parolees"; and made minor stylistic changes throughout the section.

**ANNOTATIONS**

**Warrantless searches and seizures.** — Defendant's expectations of privacy, particularly as to his vehicle parked outside the probation office, were necessarily reduced by his status and by the provisions in the probation order and intensive supervision program agreement regarding warrantless searches and seizures where he was under arrest, and had undergone a patdown search that aroused suspicions and a key-lock match that caught him in a lie. Defendant's probation status, together with his prior convictions and current probation violation for which he was arrested, the patdown discovery of a large sum of cash in small bills, and defendant's lie about how he arrived at the probation office were sufficient to give the officers a reasonable basis to search the vehicle for evidence of another violation of his probation conditions. *State v. Ponce*, 2004-NMCA-137, 136 N.M. 614, 103 P.3d 54, cert. quashed, 2006-NMCERT-004, 139 N.M. 429, 134 P.3d 120.

## 31-21-14. Return of parole violator.

A. At any time during release on parole the board or the director may issue a warrant for the arrest of the released prisoner for violation of any of the conditions of release, or issue a notice to appear to answer a charge of violation. The notice shall be served personally upon the prisoner. The warrant shall authorize the superintendent of the institution from which the prisoner was released to return the prisoner to the actual custody of the institution or to any other suitable detention facility designated by the board or the director. If the prisoner is out of the state, the warrant shall authorize the superintendent to return him to the state.

B. The director may arrest the prisoner without a warrant or may deputize any officer with power of arrest to do so by giving him a written statement setting forth that the prisoner has, in the judgment of the director, violated the conditions of his release. Where an arrest is made without a warrant, the prisoner shall not be returned to the institution unless authorized by the director or the board. Pending hearing as provided by law upon any charge of violation, the prisoner shall remain incarcerated in the institution.

C. Upon arrest and detention, the board shall cause the prisoner to be promptly brought before it for a parole revocation hearing on the parole violation charged, under rules and regulations the board may adopt. If violation is established, the board may continue or revoke the parole or enter any other order as it sees fit.

D. A prisoner for whose return a warrant has been issued shall, if it is found that the warrant cannot be served, be a fugitive from justice. If it appears that he has violated the provisions of his release, the board shall determine whether the time from the date of the violation to the date of his arrest, or any part of it, shall be counted as time served under the sentence.

**History: 1953 Comp., § 41-17-28, enacted by Laws 1955, ch. 232, § 17; 1959, ch. 31, § 1; 1963, ch. 301, § 12.**

**Cross references.** — For state board of probation and parole as referring to corrections division, *see* 33-1-7 NMSA 1978.



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## ANNOTATIONS

**No violation of due process rights.** — Defendant's due process rights are not violated by a deferral of a parole revocation hearing, following service of an intervening sentence. The granting of a writ of habeas corpus to defendant by the district court was error. *Moody v. Quintana*, 1976-NMSC-070, 89 N.M. 574, 555 P.2d 695.

**Meaning of section.** — It is not within the meaning of this section to require a hearing subsequent to the granting of a parole, which is contingent upon approval of a parole "plan" and the various other steps necessary for release but prior to actual release. To give the statute any other construction would be to destroy the object sought to be accomplished by the legislature. *Williams v. N.M. Dep't of Corrs.*, 1972-NMSC-086, 84 N.M. 421, 504 P.2d 631.

**Board under no obligation to issue warrant.** — This section is intended to permit the board to determine whether to issue a warrant for the parole violator's return and to consider the matter of his parole revocation. The board is not obligated to issue such a warrant, and if it does not do so the parolee continues on parole. *Conston v. N.M. State Bd. of Prob. & Parole*, 1968-NMSC-129, 79 N.M. 385, 444 P.2d 296.

**Credit for time spent out of custody.** — Denial of credit for time spent out of custody after breach of parole conditions is not contemplated or permitted. *Conston v. N.M. State Bd. of Prob. & Parole*, 1968-NMSC-129, 79 N.M. 385, 444 P.2d 296.

**Imprisonment not part of sentence.** — Imprisonment for noncompliance with parole matters is not a term of imprisonment which can be imposed by sentence, as such imprisonment results only after sentence has been imposed. *State v. Gonzales*, 1981-NMCA-086, 96 N.M. 556, 632 P.2d 1194.

**Subsection C relates to procedure when violation occurs.** — Subsection C regarding a parole revocation hearing relates to the statutory procedures to be followed when an inmate released on parole is charged with violating any of the conditions of release. *Williams v. N.M. Dep't of Corrs.*, 1972-NMSC-086, 84 N.M. 421, 504 P.2d 631.

**Prisoner is not on parole from time original resolution is passed,** and an order of rescission does not take from him a vested right without due process of law. *Williams v. N.M. Dep't of Corrs.*, 1972-NMSC-086, 84 N.M. 421, 504 P.2d 631.

**Parole begins upon actual release.** — Until the prisoner is actually released, the board has the power to "reopen and advance, postpone or deny a parole which has been granted." *Williams v. N.M. Dep't of Corrs.*, 1972-NMSC-086, 84 N.M. 421, 504 P.2d 631.

**Parolee must sign parole agreement.** — There must be an acceptance of the terms and conditions of the parole agreement, which must be signed by the convict, before the said parole becomes legally effective to secure his release from the institution. *Williams v. N.M. Dep't of Corrs.*, 1972-NMSC-086, 84 N.M. 421, 504 P.2d 631.

**Board may revoke "pending" parole without revocation hearing.** — Where the necessary steps to complete petitioner's release on parole had not been accomplished, the parole board's action in revoking a "pending" parole was within the discretion of the board, and petitioner was not entitled to a parole revocation hearing. *Williams v. N.M. Dep't of Corrs.*, 1972-NMSC-086, 84 N.M. 421, 504 P.2d 631.

**Only under limited circumstances may director order rehearing.** — Field services division director acted within his statutory and inherent authority in ordering a new preliminary revocation hearing when the initial hearing officer's finding of no probable cause for revocation was based on an erroneous legal conclusion. This decision should not be interpreted as allowing the director to order a rehearing when he is merely dissatisfied with the result of the initial hearing. Only upon a clear misapplication of the law or for other strong and compelling reasons should this authority be exercised. *Barnett v. Malley*, 1977-NMSC-065, 90 N.M. 633, 567 P.2d 482.

**Right to due process by waiver of counsel was not violated.** — Where defendant was notified twice of defendant's right to be represented by counsel at defendant's parole revocation hearing; defendant elected to waive representation at the preliminary hearing stage and confirmed the waiver of counsel at the parole revocation hearing; and defendant had no difficulty presenting a defense and explanations for the parole violations, defendant did not establish that the waiver of counsel at the parole revocation hearing resulted in a violation of due process. *State v. Triggs*, 2012-NMCA-068, 281 P.3d 1256.

**Deferral of parole revocation hearing** following service of an intervening sentence is without prejudice and does not violate a defendant's due process rights where the parole violation was established by an intervening conviction. *Moody v. Quintana*, 1976-NMSC-070, 89 N.M. 574, 555 P.2d 695.

**Right to counsel at hearing discretionary.** — The state authority charged with the responsibility for administering the probation and parole system has discretion to determine the need for counsel at revocation hearings on a case-by-case basis, but if the determination is made to supply counsel to indigent parolees, then counsel must be made available and given the opportunity to participate in any subsequent rehearings. *Barnett v. Malley*, 1977-NMSC-065, 90 N.M. 633, 567 P.2d 482.

**Term "as it sees fit" gives board restricted powers.** — While the authority granted the board under this section to enter any order "as it sees fit" might seem to be sufficiently broad to permit a denial of credit of eight and one-half months as time served on a sentence during which time parolee was not in custody, the use of such language was not intended to grant unrestricted power. *Conston v. N. M. State Bd. of Prob. & Parole*, 1968-NMSC-129, 79 N.M. 385, 444 P.2d 296.

**No court review of revocation decision.** — Laws 1909, ch. 32, § 5, having conferred upon superintendent of penitentiary the power to retake and reimprison paroled convicts, his revocation of a parole was in the exercise of a sole discretion, not reviewable by the courts. *Ex parte Vigil*, 1918-NMSC-117, 24 N.M. 640, 175 P. 713.

**Parole violator is to be treated as escaped prisoner** and liable, when arrested, to serve out the unexpired term of his maximum possible imprisonment, excluding the time of his absence. 1912-13 Op. Att'y Gen. No. 12-878.

**Board determines what time counts as time served.** — Whether the time from the issuance of a warrant for violation of the parole to the date of arrest of the parole violator is to be counted as time served is to be determined by the parole board. 1955-56 Op. Att'y Gen. No. 55-6304.

**Parole supervisor may personally arrest violator.** — There is no authority for the director of parole or a parole supervisor to issue a warrant in the name of the parole board. A parole supervisor can personally arrest a parole violator and, if he does, he must furnish a written statement setting forth the facts of violation and this is sufficient for the detention authorities to hold the parolee. The parole supervisor, by issuing a written statement that there has been a violation of parole in his judgment, may deputize an officer to arrest a parole violator and this statement is sufficient authority to hold the parolee. 1955-56 Op. Att'y Gen. No. 55-6335.

**Right to make bail.** — Parole violation, and commission of crime while on parole, gives rise to two separate and distinct proceedings. Accordingly, a parolee if accused of a crime is entitled to bail, as an accused in a criminal case, the same as any other person. But as a parolee, he



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is not entitled to make bail. This might be academic if the parole board revokes the parole and returns the man to prison for parole violation. On the other hand, the parole board may not find a violation and would permit continuation of the parole, in which case the man has every right to bail in accordance with law, as if he had never been convicted. If charges have been filed, and the parolee makes bail, it follows that nonetheless the parole authorities can arrest and detain pending investigation of parole violation, or violations at a subsequent time. 1957-58 Op. Att'y Gen. No. 58-171.

**Criminal justice department bears cost for arrested parolee.** — A parolee arrested pursuant to this section is in the control and custody of the state penitentiary, and the department of corrections (corrections department) must bear the cost of such control and custody. 1970 Op. Att'y Gen. No. 70-62.

**State penitentiary responsible for parolee's medical costs.** — Where a parolee from the state penitentiary is arrested for a parole violation, placed in a county jail, attempts suicide, and is rushed to a hospital, he is in the legal custody and control of the state penitentiary when he injured himself, and the state penitentiary, not the county, is responsible for the medical costs. 1968 Op. Att'y Gen. No. 68-26.

**Law reviews.** — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 59 Am. Jur. 2d Pardon and Parole §§ 84, 96 to 98, 100 to 102, 106, 110, 112, 113.

Right to assistance of counsel at proceedings to revoke probation, 44 A.L.R.3d 306.

67A C.J.S. Pardon and Parole §§ 61, 64, 67, 79, 80, 83.

## 31-21-15. Return of probation violator.

A. At any time during probation:

(1) the court may issue a warrant for the arrest of a probationer for violation of any of the conditions of release. The warrant shall authorize the return of the probationer to the custody of the court or to any suitable detention facility designated by the court;

(2) the court may issue a notice to appear to answer a charge of violation. The notice shall be personally served upon the probationer; or

(3) the director may arrest a probationer without warrant or may deputize any officer with power of arrest to do so by giving the officer a written statement setting forth that the probationer has, in the judgment of the director, violated the conditions of the probationer's release. The written statement, delivered with the probationer by the arresting officer to the official in charge of a county jail or other place of detention, is sufficient warrant for the detention of the probationer. Upon the probationer's arrest and detention, the director shall immediately notify the court and submit in writing a report showing in what manner the probationer has violated the conditions of release.

B. The court shall then hold a hearing, which may be informal, on the violation charged. If the violation is established, the court may continue the original probation or revoke the probation and either order a new probation with any condition provided for in Section 31-20-5 or 31-20-6 NMSA 1978 or require the probationer to serve the balance of the sentence imposed or any lesser sentence. If imposition of sentence was deferred, the court may impose any sentence that might originally have been imposed, but credit shall be given for time served on probation.

C. If it is found that a warrant for the return of a probationer cannot be served, the probationer is a fugitive from justice. After hearing upon return, if it appears that the probationer has violated the provisions of the probationer's release, the court shall determine whether the time from the date of violation to the date of the probationer's arrest, or any part of it, shall be counted as time served on probation. For the purposes of this subsection, "probationer" means a person convicted of a crime by a district, metropolitan, magistrate or municipal court.

D. The board shall budget funds to cover expenses of returning probationers to the court. The sheriff of the county in which the probationer was convicted is the court's agent in the transportation of the probationer, but the director, with the consent of the court, may utilize other state agencies for this purpose when it is in the best interest of the state.

**History: 1953 Comp., § 41-17-28.1, enacted by Laws 1963, ch. 301, § 13; 1989, ch. 139, § 1; 2016, ch. 27, § 1; 2016, ch. 31, § 1.**

**Cross references.** — For state board of probation and parole referring to corrections division, *see* 33-1-7 NMSA 1978.

**The 2016 amendment,** effective March 2, 2016, defined "probationer" for purposes of this section; in Subsection A, Paragraph (3), after "by giving", deleted "him" and added "the officer", after "violated the conditions of", deleted "his" and added "probationer's", and after "Upon", added "the probationer's"; in Subsection B, after "any sentence", deleted "which" and added "that"; and in Subsection C, after "if it appears that", deleted "he" and added "the probationer", after "violated the provisions of", deleted "his" and added "the probationer's", after "violation to the date



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of", deleted "his" and added "the probationer's", and added the last sentence.

Laws 2016, ch. 27, § 1 and Laws 2016, ch. 31, § 1, both effective March 2, 2016, enacted identical amendments to this section. The section was set out as amended by Laws 2016, ch. 31, § 1. *See* 12-1-8 NMSA 1978.

**The 1989 amendment,** effective June 16, 1989, in Subsection B substituted "continue the original probation, revoke the probation and either order a new probation with any condition provided for in Section 31-20-5 or 31-20-6 NMSA 1978, or" for "continue or revoke the probation and may" in the second sentence.

## ANNOTATIONS

I. GENERAL CONSIDERATION.
II. HEARING ON REVOCATION.
III. REVOCATION.
IV. FUGITIVE STATUS.

### I. GENERAL CONSIDERATION.

**Rule 5-805 NMRA does not violate separation of powers.** — Subsection H of Rule 5-805 NMRA, which requires dismissal of a probation violation proceeding if the time limits to hold an adjudicatory hearing are not met, does not infringe upon the substantive rights granted by the legislature in Sections 31-11-1 and 31-21-15 NMSA 1978 and does not violate the separation of powers doctrine. *State v. Montoya*, 2011-NMCA-009, 149 N.M. 242, 247 P.3d 1127, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

**Legislature has expressly determined procedures** to bring a person on probation before the court for violation of a condition of probation. *State v. Ponce*, 2004-NMCA-137, 136 N.M. 614, 103 P.3d 54, cert. quashed, 2006-NMCERT-004, 139 N.M. 429, 134 P.3d 120.

**Generally as to probation.** — Probation is conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. He is still a person convicted of an offense, and the suspension of his sentence remains within the control of the court. *State v. Brusenhan*, 1968-NMCA-006, 78 N.M. 764, 438 P.2d 174.

**Legislature authorized to define court's jurisdiction over sentencing.** — It is within the power of the legislature alone to define the court's jurisdiction over the sentencing of offenders. *State v. Travarez*, 1983-NMCA-003, 99 N.M. 309, 657 P.2d 636.

**Sentencing scheme for suspension and deferment is not unconstitutionally vague.** *State v. Kenneman*, 1982-NMCA-145, 98 N.M. 794, 653 P.2d 170, cert. denied, 99 N.M. 47, 653 P.2d 878.

**Probation is conditional liberty intended to alleviate aspects of punishment** by incarceration. It offers rehabilitation and restoration to society. *State v. Chavez*, 1979-NMCA-143, 94 N.M. 102, 607 P.2d 640, cert. denied, 94 N.M. 629, 614 P.2d 546.

**For probation to be legally effective,** defendant did not have to report to the probation office, open his file, and sign a probation order. Defendant was constructively on probation from the date of his sentencing. *State v. Jimenez*, 2004-NMSC-012, 135 N.M. 442, 90 P.3d 461.

**Probation served while in custody of another jurisdiction.** — Where defendant was placed on supervised probation for a term of five years; before defendant was released from custody or had an opportunity to meet with probation officers, defendant was extradited to Texas; Texas dropped the charges against defendant, but continued to hold defendant in custody until defendant was extradited to Colorado; defendant was imprisoned in Colorado for four years based on a probation violation; when defendant finished the Colorado prison term, defendant was extradited to New Mexico and remained in custody until defendant appeared before the district court; defendant was never able to report to New Mexico probation authorities; at a probation violation hearing held after the expiration date of defendant's probationary period, the district court found that defendant had not violated the terms of probation and was not an absconder or a fugitive; and the district court retroactively reinstated defendant's probation during the period of time defendant was incarcerated outside New Mexico, defendant was entitled to credit for probation throughout the time defendant was in custody in Texas and incarcerated in Colorado, the term of defendant's probationary period expired before the district court entered its order, and the district court did not have jurisdiction to reinstate defendant's probation. *State v. Hinojos*, 2014-NMCA-067.

**Nolo plea not basis for revocation of probation.** — A court may not use a conviction based on a nolo contendere plea as the sole basis to revoke probation. *State v. Baca*, 1984-NMCA-056, 101 N.M. 415, 683 P.2d 970.

**Constitutional to impose three-year sentence when sentencing originally deferred for two years.** — The imposition of a three-year sentence when sentencing was originally deferred for two years does not violate the prohibition on double jeopardy, when the first sentence imposed is where the defendant's probation is revoked. *State v. Kenneman*, 1982-NMCA-145, 98 N.M. 794, 653 P.2d 170, cert. denied, 99 N.M. 47, 653 P.2d 878.

**Court lacks jurisdiction in probation revocation matter when period of deferred sentence expires.** — Section 31-20-9 NMSA 1978 relieves the defendant of any obligations imposed on him by order of the court when the period of a deferred sentence expires, and he is deemed then to have satisfied his liability for the crime. The trial court thereafter lacks jurisdiction to proceed in a probation revocation matter. *State v. Travarez*, 1983-NMCA-003, 99 N.M. 309, 657 P.2d 636.

**Court may not order defendant to live in halfway house as condition of probation.** — Ordering defendant to live in a halfway house as an additional condition of probation amounts to an increased penalty under *State v. Crespin*, 1981-NMCA-095, 96 N.M. 640, 633 P.2d 1238, and thus the court has no jurisdiction to make such an order. *State v. Chavez*, 1984-NMCA-006, 100 N.M. 750, 676 P.2d 827.

**Incarceration for probation violation not required.** — Neither Section 31-20-5 NMSA 1978 nor this section require the trial court to impose incarceration if the defendant violates the conditions of his probation. *State v. Mares*, 1994-NMSC-123, 119 N.M. 48, 888 P.2d 930.

**Delay waives probation revocation.** — Where it is contended that the right of New Mexico to revoke defendant's probation was waived by reason of the long delay in apprehending defendant, based on the claim that defendant's whereabouts were known to the state or should have been known to the state had it exercised ordinary care to ascertain the location of defendant, such a claim provides a legal basis for relief. *State v. Murray*, 1970-NMCA-045, 81 N.M. 445, 468 P.2d 416.

**Unreasonable delay in arrest results in state's waiver of defendant's violations.** — Unreasonable delay between knowledge of violation and notice or arrest, or between arrest and hearing, resulting in prejudice or oppressive detriment would result, as a matter of law, in the state's waiver of defendant's violations. *State v. Sanchez*, 1980-NMCA-055, 94 N.M. 521, 612 P.2d 1332, cert. denied, 94 N.M. 675, 615 P.2d 992.

**Seven-month delay between arrest for probation violation and revocation hearing** is denial of procedural due process. *State v. Chavez*, 1979-NMCA-143, 94



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N.M. 102, 607 P.2d 640, cert. denied, 94 N.M. 629, 614 P.2d 546.

**Effect on revocation of conviction or acquittal of subsequent offense.** — Conviction of a subsequent offense is not a prerequisite for revocation of probation but if revocation was solely on the basis of the charge of an offense and defendant was thereafter acquitted of the charge, revocation was improper. *Maes v. State*, 1972-NMCA-124, 84 N.M. 251, 501 P.2d 695.

**Fixing of penalties is legislative function** and what constitutes an adequate punishment is a matter for legislative judgment. *State v. Sublett*, 1968-NMCA-001, 78 N.M. 655, 436 P.2d 515.

**District court abused its discretion by modifying defendant's probation condition** which had been agreed upon pursuant to a plea bargain. *State v. Trujillo*, 1994-NMSC-066, 117 N.M. 769, 877 P.2d 575.

## II. HEARING ON REVOCATION.

**Confrontation of witnesses.** — The right protected in probation revocations is not the sixth amendment right to confrontation, which is guaranteed every accused in a criminal trial, but rather the more generally worded right to due process of law secured by the fourteenth amendment and a probationer is entitled to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation. *State v. Guthrie*, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904, *rev'g* 2009-NMCA-036, 145 N.M. 761, 204 P.3d 1271, and *overruling State v. Phillips*, 2006-NMCA-001, 138 N.M. 730, 126 P.3d 546.

The need-for-confrontation analysis in probation revocations is a spectrum that requires the trial court to focus on the relative need for confrontation to protect the truth-finding process and the substantial reliability of the evidence. If the need is significant and the court specifies the reasons why, then the witness must appear and be subject to confrontation, regardless of the reasons for the witness's absence. If the need for confrontation is not significant and the court specifies why, then it does not matter whether the witness is available or not. The end of the spectrum where there is good cause for not requiring confrontation, where live testimony and cross-examination has no utility to the fact-finding process, includes situations in which the state's evidence is uncontested, corroborated by other reliable evidence, and documented by a reliable source without a motive to fabricate and situations where an objective conclusion, a routine recording, or a negative fact, make the demeanor and credibility of the witness less relevant to the truth-finding process. The end of the spectrum where there is no good cause for not requiring confrontation, where the state's failure to produce the witness deprives the defendant of due process, includes situations where evidence is contested by the defendant, unsupported or contradicted, and its source has a motive to fabricate and situations where the evidence is about a subjective, judgment-based observation that is subject to inference and interpretation, and makes a conclusion that is central to the necessary proof that the defendant violated probation. *State v. Guthrie*, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904, *rev'g* 2009-NMCA-036, 145 N.M. 761, 204 P.3d 1271, and *overruling State v. Phillips*, 2006-NMCA-001, 138 N.M. 730, 126 P.3d 546.

Where defendant agreed to attend a residential treatment program as a condition of supervised probation; defendant failed to complete the treatment program; defendant's probation officer, who had filed the probation violation report, was not called to testify at the probation revocation hearing; the probation officer's supervisor, who was called to testify, referred to documents in defendant's probation file, including the probation violation report and a fax from the treatment center, to testify that defendant had not completed the treatment program; the supervisor had no personal knowledge about defendant or about the case, had never spoken to anyone from the treatment center and had not independently investigated the allegations against defendant; defendant did not contest the allegations or offer any evidence in mitigation; the fact of defendant's non-compliance with the condition of probation was established by the written statement from the treatment center; and the trial judge's observation that defendant had been arrested in a county in which there was no residential treatment center corroborated the state's evidence that defendant had violated probation, the district judge had good cause for not allowing defendant to confront and cross-examine defendant's probation officer. *State v. Guthrie*, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904, *rev'g* 2009-NMCA-036, 145 N.M. 761, 204 P.3d 1271, and *overruling State v. Phillips*, 2006-NMCA-001, 138 N.M. 730, 126 P.3d 546.

The right to confront and cross-examine witnesses at probation revocation hearings is guaranteed by the due process clause of the fourteenth amendment, not by the confrontation clause of the sixth amendment. *State v. Guthrie*, 2009-NMCA-036, 145 N.M. 761, 204 P.3d 1271, *rev'd*, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904.

Before revoking a defendant's probation base on hearsay, the district court must make as specific finding of good cause for not requiring confrontation by specifically addressing the state's problems in securing the presence of an absent witness or specifically stating the reasons that the hearsay evidence offered has particular indicia of accuracy and reliability such that it has probative value. *State v. Guthrie*, 2009-NMCA-036, 145 N.M. 761, 204 P.3d 1271, *rev'd*, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904.

Where the defendant's probation officer did not appear at the hearing to revoke the defendant's probation; the only witness who testified at the hearing was the probation officer's supervisor who was the custodian of probation violation reports filed by probation officers; the supervisor had no personal knowledge of the defendant's case except for what was contained the probation officer's file; the supervisor read into evidence statements the were in the defendant's probation file; and the district court did not state reasons why the evidence was sufficiently accurate or reliable so as to excuse the presence of the defendant's probation officer, the district court failed to make a specific finding of good cause for not calling the defendant's probation officer as a witness and the revocation of the defendant's probation based on the supervisor's testimony about statements included in the defendant's file violated the defendant's due process rights. *State v. Guthrie*, 2009-NMCA-036, 145 N.M. 761, 204 P.3d 1271, *rev'd*, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904.

**Formal rules of evidence do not apply** to probation revocation hearings. *State v. Phillips*, 2006-NMCA-001, 138 N.M. 730, 126 P.3d 546, cert. quashed, 2006-NMCERT-009, 140 N.M. 543, 144 P.3d 102, *overruled by State v. Guthrie*, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904.

**Where, in a probation revocation hearing,** the real witness against defendant is allowed to testify via another without identification, verification, confrontation, with a complete lack of demonstration or even discussion of good cause for not calling the real witness, defendant's due process rights have been stripped from him and a lack of formality should not excuse a lack of due process. *State v. Phillips*, 2006-NMCA-001, 138 N.M. 730, 126 P.3d 546, cert. quashed, 2006-NMCERT-009, 140 N.M. 543, 144 P.3d 102, *overruled by State v. Guthrie*, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904.

**Due process violation.** — It is impermissible to allow a probation officer to read from documents in a file where it is unclear where, when, or from whom the documents were obtained and there was no factual showing or finding



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of good cause for not calling the persons who submitted the documents to testify as required by due process. *State v. Phillips*, 2006-NMCA-001, 138 N.M. 730, 126 P.3d 546, cert. quashed, 2006-NMCERT-009, 140 N.M. 543, 144 P.3d 102, *overruled by State v. Guthrie*, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904.

**Degree of proof necessary to establish probation violation.** — At a probation violation hearing, the violation must be established with reasonable certainty. The violation does not have to be established beyond a reasonable doubt. *State v. Murray*, 1970-NMCA-045, 81 N.M. 445, 468 P.2d 416.

**Conscience of court to be satisfied.** — A violation of the conditions of probation must be established with such reasonable certainty as to satisfy the conscience of the court of the truth of the violation. If the evidence inclines a reasonable and impartial mind to the belief that the defendant had violated the terms of his probation, it is sufficient. *State v. Brusenhan*, 1968-NMCA-006, 78 N.M. 764, 438 P.2d 174.

**Reasonable and impartial mind to be inclined.** — The degree of proof necessary to establish a violation of probation in revocation hearings is that which inclines a reasonable and impartial mind to the belief that defendant had violated the terms of probation, and a reasonable and impartial mind is one which hears before it condemns, which proceeds on inquiry, and only renders a decision after hearing all the evidence. *State v. Pacheco*, 1973-NMCA-155, 85 N.M. 778, 517 P.2d 1304.

**Probationer must have opportunity to be heard** and to show, if he can, that he did not violate the conditions of his suspended sentence, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation. *State v. Montoya*, 1979-NMCA-073, 93 N.M. 84, 596 P.2d 527.

**Right to allocution in probation revocation hearings.** — A defendant has a right to allocution in probation revocation hearings, because in a probation revocation hearing the district court has a multitude of options in sentencing, all of which have the potential to impact a defendant's liberty interests, and allowing a defendant to address the district court prior to sentencing in a probation revocation hearing allows the defendant to ask for mercy based on factors that might not otherwise be brought to the court's attention and retains the same practical significance as it would in the original sentencing hearing. *State v. Williams*, 2021-NMCA-021, cert. denied.

Where defendant pled guilty to residential burglary, two counts of receiving stolen property, receiving or transferring a stolen motor vehicle, battery upon a peace officer, and larceny, and where the district court suspended defendant's entire sentence and placed him on supervised probation for a total of nine years, the conditions of which required defendant to get permission from his probation officer before leaving the county and not consume illegal drugs, and where several months later, the state filed a petition to revoke defendant's probation, alleging that he failed to adhere to his curfew and used illegal drugs, and where, based on defendant's admission that he used methamphetamine while on probation, the district revoked defendant's probation but failed to advise defendant that he had the right to personally address the court before the court proceeded to disposition, the court denied defendant his right of allocution. It is the duty of the court to inform a defendant of his or her right to allocution, and when the district court does not fulfill this duty, the sentence is invalid. *State v. Williams*, 2021-NMCA-021, cert. denied.

**Sufficient evidence that defendant willfully violated the condition of his probation.** — Where defendant pled guilty to residential burglary, two counts of receiving stolen property, receiving or transferring a stolen motor vehicle, battery upon a peace officer, and larceny, and where the district court suspended defendant's entire sentence and placed him on supervised probation for a total of nine years, the conditions of which required defendant to get permission from his probation officer before leaving the county and not consume illegal drugs, and where several months later, the state filed a petition to revoke probation, alleging that defendant failed to adhere to his curfew and used illegal drugs in violation of his conditions of probation, the district court did not abuse its discretion by finding that defendant willfully violated conditions of his probation based on a signed admission form in which defendant admitted that he used methamphetamine on the day that he violated his curfew, and where defendant, at his probation revocation hearing, further admitted to using methamphetamine while on probation. *State v. Williams*, 2021-NMCA-021, cert. denied.

**Notice and hearing constitutionally mandated.** — The right of personal liberty is one of the highest rights of citizenship and cannot be taken from a defendant in a probation revocation proceeding without notice and an opportunity to be heard without invading his constitutional rights. *State v. Brusenhan*, 1968-NMCA-006, 78 N.M. 764, 438 P.2d 174.

**Hearing on revocation of probation or parole is not trial** on a criminal charge, but is a hearing to determine whether, during the probationary or parole period, the defendant has conformed to or breached the course of conduct outlined in the probation or parole order. *State v. Sanchez*, 1980-NMCA-055, 94 N.M. 521, 612 P.2d 1332, cert. denied, 94 N.M. 675, 615 P.2d 992.

**Formal trial not required.** — Where defendant claimed that neither the judge nor his counsel advised him of his right to a "trial" on whether he had violated the conditions of his probation, it was held that he was not entitled to a trial in any strict or formal sense. He was entitled to a hearing on the alleged violations, but that hearing could be informal. *State v. Murray*, 1970-NMCA-045, 81 N.M. 445, 468 P.2d 416.

**Hearing to revoke probation may be informal.** — This does not mean that he may insist upon a trial in any strict or formal sense. *State v. Brusenhan*, 1968-NMCA-006, 78 N.M. 764, 438 P.2d 174.

Probation revocation proceedings are by nature informal. *State v. Phillips*, 2006-NMCA-001, 138 N.M. 730, 126 P.3d 546, cert. granted, 2006-NMCERT-001, 139 N.M. 272, 131 P.3d 659, *overruled by State v. Guthrie*, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904.

**Testimony not coerced.** — Where defendant at probation revocation hearing was not called or sworn as a witness, but was advised by the court as to the nature of each charge made against him and was asked whether or not the charge was true, and thereby was given an opportunity to admit or deny the charge, and where he was also given an opportunity to explain his plea to each charge, and in some instances he offered an explanation, this did not constitute compelled, coerced or required testimony by defendant against himself. These proceedings were in the nature of an arraignment. *State v. Brusenhan*, 1968-NMCA-006, 78 N.M. 764, 438 P.2d 174.

**Competence of counsel.** — The competence of court-appointed counsel at probation revocation hearings could not be determined by the amount of time he spent or failed to spend with the accused. The failure of an attorney to confer with his client, without more, could not establish the incompetence of that attorney. *State v. Brusenhan*, 1968-NMCA-006, 78 N.M. 764, 438 P.2d 174.

**When effective use of counsel denied.** — Probation revocation hearing must have constituted a sham, a farce or a mockery of justice before a defendant can be said to have been denied the effective assistance of counsel. *State v. Brusenhan*, 1968-NMCA-006, 78 N.M. 764, 438 P.2d 174.

**Right to jury trial on identity.** — Defendant has a right to a jury trial on the question of his identity. *State v. Murray*, 1970-NMCA-045, 81 N.M. 445, 468 P.2d 416.



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**When jury trial waived.** — Having failed to raise the question of want of identity defendant waives his right to a trial by jury on that issue at his probation revocation proceeding. *State v. Paul*, 1971-NMCA-107, 82 N.M. 791, 487 P.2d 493.

**Revocation hearing by court granting probation constitutional if held immediately after probationer notified.** — A hearing for revocation of probation by a court which granted probation will satisfy due process if the hearing is held immediately after a notice to appear to answer a charge of violation is personally served upon a probationer. *State v. Chavez*, 1979-NMCA-143, 94 N.M. 102, 607 P.2d 640, cert. denied, 94 N.M. 629, 614 P.2d 546.

**Evidentiary hearing required where arrest delayed.** — Defendant is entitled to an evidentiary hearing on the question of whether there was an unreasonable delay in executing the arrest warrants where the record indicates the probation authorities promptly had a warrant issued on the basis of the probation violations, but nothing is indicated of their attempts to execute the warrants for defendant's arrest. *State v. Murray*, 1970-NMCA-045, 81 N.M. 445, 468 P.2d 416.

## III. REVOCATION.

**Evidentiary standard.** — In a probation revocation, the evidentiary standard is that the violation must be established with a reasonable certainty, such that a reasonable and impartial mind would believe that the defendant violated the terms of probation. *State v. Green*, 2015-NMCA-007, cert. denied, 2014-NMCERT-012.

**Violation of sex offender behavior contract.** — Where defendant was required, as a condition of his probation, to comply with a sex offender behavior contract as a result of his conviction for kidnapping which involved criminal sexual contact with the victim, the district court did not err in finding that defendant violated the sex offender behavior contract when defendant was found with sexually oriented material on his computer. *State v. Green*, 2015-NMCA-007, cert. denied, 2014-NMCERT-012.

**A court's decision to revoke a defendant's probation is discretionary.** — In exercising its discretion to revoke a defendant's probation, a court may consider that the purpose of probation is the rehabilitation of the defendant. A court has the authority to revoke probation for a probation violation when rehabilitation is not occurring. *State v. Dinapoli*, 2015-NMCA-066, cert. denied, 2015-NMCERT-006.

Where defendant's probation was revoked for possessing sexually explicit materials in violation of his sex offender contract, defendant claimed that the district court improperly revoked his probation because he did not have sufficient notice that his possession of popular, mainstream R-rated movies would be in violation of the terms of his probation; the district court did not err in finding that defendant had sufficient notice that the materials he possessed were a violation of the terms of his probation where the DVD covers stated that the movies contained violent content, including rape and torture, strong sexuality, and graphic nudity as well as sexual abuse; a reasonable person would be on notice of the sexually oriented material in the DVDs; moreover, defendant was aware, based on a previous probation revocation, that possession of sexually oriented or sexually stimulating material was prohibited by the sex offender contract even if it were not considered pornographic. The district court did not err in revoking defendant's probation. *State v. Dinapoli*, 2015-NMCA-066, cert. denied, 2015-NMCERT-006.

**Violating the terms of sex offender contract.** — Probation is a criminal sanction, and the district court may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens. The purposes of probation are to both prevent an offender from engaging in additional criminal activity and to rehabilitate the offender. The restrictions of the sex offender contract further these purpose by limiting a defendant's access to materials that may reasonably lead to susceptibility of other criminal acts or impede rehabilitation. *State v. Dinapoli*, 2015-NMCA-066, cert. denied, 2015-NMCERT-006.

Where defendant's probation was revoked for possessing sexually explicit materials in violation of his sex offender contract, defendant claimed that the district court improperly revoked his probation because he did not have sufficient notice that his possession of popular, mainstream R-rated movies would be in violation of the terms of his probation; the issue was not whether the movies, taken as a whole, would not be considered "sexually oriented", the issue was whether the movies contained sexually oriented material that would undermine the purposes of defendant's probation. *State v. Dinapoli*, 2015-NMCA-066, cert. denied, 2015-NMCERT-006.

**Revocation of probation before sentence is served.** — After the court has entered an order of probation and before the full suspended sentence has expired, the court has the authority to revoke probation regardless of whether the probationary term has commenced or whether the defendant is serving a portion of the underlying sentence. *State v. Lopez*, 2007-NMSC-011, 141 N.M. 293, 154 P.3d 668.

**Probation violation options of court.** — Three courses (now four) are open to the trial court upon the establishment of a violation of the terms or conditions of probation, and these courses are: (1) the court may continue the probation; (2) the court may revoke the probation and require the defendant to serve the balance of the sentence previously imposed; or (3) the court may revoke the probation and require the defendant to serve a sentence which is less than the balance of the sentence previously imposed. *State v. Reinhart*, 1968-NMSC-059, 79 N.M. 36, 439 P.2d 554.

**Defendant's failure to rebut the state's prima facie case that defendant willfully violated his probation.** — Where defendant, who was on probation, was told by his probation officer on multiple occasions to find and complete an outpatient drug treatment program, and where defendant never enrolled or participated in programs suggested by his probation officer or any other outpatient drug treatment program, the district court did not abuse its discretion in finding that defendant's failure to enter and complete treatment constituted a probation violation, because defendant did not present any evidence at the hearing to rebut the reasonable inference set forth by the probation officer's testimony that defendant's noncompliance was willful. *State v. Aslin*, 2018-NMCA-043, cert. granted.

**Technical violation program.** — Where defendant, while on probation, opted into a technical violation program (TVP) where a probationer who commits a technical violation of his or her order of probation could waive the right to due process procedures as provided by Rule 5-805 NMRA and would instead be sanctioned based on a progressive disciplinary scheme, and where the district court found that defendant violated his conditions of probation by failing to enroll in treatment as ordered by his probation officer, the district court erred in revoking defendant's probation based on the court's finding that the violation was not a mere technical violation under the TVP, because there was no finding below that defendant committed a new violation of state law, and Rule 5-805(C)(3) clearly and unambiguously defines a "technical violation" as any violation that does not involve new criminal charges. *State v. Aslin*, 2018-NMCA-043, cert. granted.

**Section provides alternatives.**— Subsection B of this section presents a district court with several alternatives for dealing with a defendant who has



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violated the conditions of his or her release. *State v. Baca*, 2005-NMCA-001, 136 N.M. 667, 104 P.3d 533, cert. denied, 2004-NMCERT-012, 136 N.M. 665, 103 P.3d 1097.

**Revocation of probation where defendant unable to pay fine or restitution.** — There are substantive limits on the automatic revocation of probation where an indigent defendant is unable to pay a fine or restitution. Those substantive limits require that: (1) There must be an inquiry into the reasons for the failure to pay; (2) if the reasons for defendant's failure to pay are either not willful or indicate an inability to pay, the court must consider alternatives to incarceration; and (3) only if alternative measures do not meet the state's interests, then the court may order confinement. *State v. Parsons*, 1986-NMCA-027, 104 N.M. 123, 717 P.2d 99.

**Court cannot defer credit for probation time.** — All time served on probation shall be credited (unless a defendant is a fugitive) and the trial court thus errs in purporting to defer credit for time served on probation. *State v. Encinias*, 1986-NMCA-049, 104 N.M. 740, 726 P.2d 1174, cert. denied, 104 N.M. 632, 725 P.2d 832.

**Probation condition may be changed upon violation, but not to increase penalty.** — When a violation of probation is established, the trial court may relieve a defendant of the conditions of probation or continue the existing conditions, but the trial court may not change any probation condition so that the penalty is increased, even if the defendant is agreeable to such change. *State v. Crespin*, 1981-NMCA-095, 96 N.M. 640, 633 P.2d 1238.

**Imposition of additional sanctions authorized.** — This section does not foreclose the imposition of additional otherwise permissible sanctions for the acts that form the basis for revocation or modification of probation and, in appropriate circumstances, the state had authority to seek enhancement of a defendant's sentence under the habitual-offender statute. *State v. Freed*, 1996-NMCA-044, 121 N.M. 562, 915 P.2d 325, cert. denied, 121 N.M. 644, 916 P.2d 844.

**Revocation of only one of several concurrent suspended sentences.** — When a defendant is sentenced to multiple concurrent sentences, the trial court suspends the sentences and places the defendant on probation and the defendant violates the terms of his probation, the trial court cannot invoke the original sentence on count I only and provide that probation would continue on the other counts. The effect of applying revocation to one count only and reserving probation on the remaining counts for possible imposition of imprisonment on any or all of the remaining counts upon future violations is to change an original valid concurrent sentence into consecutive sentences. That effect, of course, creates an increase in penalty and violates the constitutional prohibition against double jeopardy. *State v. Martinez*, 1982-NMCA-185, 99 N.M. 248, 656 P.2d 911.

**All time served on probation shall be credited** unless defendant is a fugitive. *State v. Kenneman*, 1982-NMCA-145, 98 N.M. 794, 653 P.2d 170, cert. denied, 99 N.M. 47, 653 P.2d 878.

**Time served shall be credited.** — Language in this section unambiguously mandates credit for time served on probation in the case of a defendant whose initial sentence was deferred. *State v. Leslie*, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

Subsection B of this section mandates credit for time served, the only exception being where a defendant is a "fugitive from justice" as defined in Subsection C of this section. *State v. Leslie*, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

**Person eligible to receive conditional discharge.** — Although Subsection B of this section refers only to a deferred sentence and not to a conditional discharge, a person who is eligible to receive a conditional discharge is by definition one who is entitled to a deferred sentence. *State v. Leslie*, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

**Revocation of probation and suspended sentence compared.** — A violation of the conditions of the probation during the probationary period was also a violation of the conditions of the suspension, because probation was merely the status of one released under a suspended sentence. Therefore, there was no difference between proceedings to revoke a suspended sentence under 40A-29-20, 1953 Comp. (repealed) and proceedings to revoke an order of probation under this section. *State v. Holland*, 1967-NMSC-186, 78 N.M. 324, 431 P.2d 57.

**Scope of language of suspension.** — In order to avoid the contention that the conditions of the order of suspension do not embrace the conditions and terms of probation, the trial courts, by appropriate language, should expressly provide that the conditions and terms of probation are made conditions and terms of the suspension. *State v. Holland*, 1967-NMSC-186, 78 N.M. 324, 431 P.2d 57.

**Effect of post-conviction relief on improper probation revocation.** — There being nothing in the record indicating that being with a minor after curfew hours was a violation of the conditions of probation, the trial court could not properly rule that defendant was not entitled to post-conviction relief under any state of facts provable under his claim that his probation was revoked because he was with a minor after curfew hours. *Maes v. State*, 1972-NMCA-124, 84 N.M. 251, 501 P.2d 695.

**Credit if probation and suspended sentence.** — Where defendant was released without imprisonment under a suspended sentence and subject to conditions, and at the time of release, defendant was on "probation" as that word is used in the Probation and Parole Act, defendant was entitled to credit for probation time served while his sentence was suspended. *State v. Sublett*, 1968-NMCA-001, 78 N.M. 655, 436 P.2d 515.

**Discretion of court as to credit.** — Under Subsection B of this section, upon revocation of a suspended sentence, the trial court may require the defendant to serve (1) the balance of the sentence imposed - that is, the term remaining after giving credit for allowable probation time or (2) a lesser term. The trial court does not have authority under this statute to withhold credit for allowable probation time. *State v. Sublett*, 1968-NMCA-001, 78 N.M. 655, 436 P.2d 515.

**Meaning of "balance".** — The word "balance" in the statute means "remainder", or that portion of the term of the sentence which remains after deducting therefrom the time during which defendant has been on probation. *State v. Reinhart*, 1968-NMSC-059, 79 N.M. 36, 439 P.2d 554.

**Minimum requirement of court.** — Under Subsection B of this section trial court must, as a minimum, credit allowable probation time on the original sentence that has been invoked. *State v. Sublett*, 1968-NMCA-001, 78 N.M. 655, 436 P.2d 515.

## IV. FUGITIVE STATUS.

**Proof of fugitive status.** — To support a finding of fugitive status, the state must prove that it issued a warrant for the probationer's arrest and entered it into the national crime information center database and that the state unsuccessfully attempted to serve the warrant on the defendant or that any attempt to serve the defendant would have been futile. *State v. Neal*, 2007-NMCA-086, 142 N.M. 487, 167 P.3d 935.

**Legislative intent.** — In enacting Subsection C of this statute, the legislature intended to ensure that probationers could not defeat the trial court's authority to revoke probation by absconding from the jurisdiction. *State v. Apache*, 1986-NMCA-051, 104 N.M. 290, 720 P.2d 709, cert. denied, 104 N.M. 289, 720 P.2d 708.

**Determination of fugitive status after expiration of probationary term.** — Section 31-21-15(C) NMSA 1978 allows a court to exercise jurisdiction over a probationer after the expiration of the probationary term for the



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limited purpose of determining fugitive status even when a fugitive defendant is returned to New Mexico prior to the expiration of the original probationary term. *State v. Sosa*, 2014-NMCA-091, cert. denied, 2014-NMCERT-008.

Where defendant's sentence was suspended and defendant was placed on five years of supervised probation; defendant failed to report to a probation officer on October 20, 2010; the state sought to revoke defendant's probation on the ground that defendant was a fugitive; defendant was arrested in Georgia and returned to New Mexico on August 4, 2011; the hearing to revoke defendant's probation was held on August 1, 2012; defendant claimed that the district court lost jurisdiction to revoke defendant's probation on December 23, 2011 when defendant's original probationary term expired; the district court found that the state was diligent in its efforts to serve a warrant on defendant and that defendant was a fugitive from October 20, 2010 to August 4, 2011; and the district court did not err in determining that defendant had been a fugitive for a portion of defendant's probationary term, in tolling the probationary term for the time defendant was a fugitive and thereby extending its jurisdiction over defendant, and in determining that it had jurisdiction on August 1, 2012 to revoke defendant's probation. *State v. Sosa*, 2014-NMCA-091, cert. denied, 2014-NMCERT-008.

**Courts of limited jurisdiction have power to revoke probation if a defendant's original probationary period expires while the defendant is an absconder.** — Where defendant was convicted of battery in magistrate court, received a suspended sentence, placed on probation in lieu of serving a prison sentence, violated the terms of his probation and could not be located to answer for this violation until after the period of his suspended sentence expired, this section does not empower courts of limited jurisdiction to toll the running of a probationary period, but 31-20-8 NMSA 1978 does not deprive a trial court of the power to revoke probation when, at the time the defendant's probationary term expired, the defendant had allegedly violated the terms of probation and the court subsequently issued a bench warrant. *State v. Begay*, 2017-NMSC-009, *rev'g* 2016-NMCA-039.

**Tolling provision does not apply to persons convicted in magistrate court.** — Where defendant was convicted of battery in magistrate court, received a suspended sentence, placed on probation in lieu of serving a prison sentence, violated the terms of his probation and could not be located to answer for this violation until after the period of his suspended sentence expired, the district court erred in determining that this section permitted it to toll the running of defendant's sentence and in revoking defendant's probation, because the legislature expressly limited the application of the tolling provision to adult persons convicted of crimes in the district court. *State v. Begay*, 2016-NMCA-039, cert. granted.

**Extradition not required.** — The state was not required to extradite defendant from Arizona so as to prevent his classification as a fugitive under this section and the resulting revocation of probation. *State v. McDonald*, 1991-NMCA-132, 113 N.M. 305, 825 P.2d 238, cert. denied, 113 N.M. 44, 822 P.2d 1127.

**When fugitive status determined.** — It is implicit in this statute that the judicial determination of fugitive status shall be made only after the probationer has been found and brought before the court, regardless of whether this occurs before or after the date on which probation was originally to have expired. *State v. Apache*, 1986-NMCA-051, 104 N.M. 290, 720 P.2d 709, cert. denied, 104 N.M. 289, 720 P.2d 708.

**Inadequate notice of status.** — Where at the probation revocation hearing, the state requested that the court find that defendant violated his probation, find him to be an absconder, and impose the sentence authorized by law, the state's use of the word "absconder" referring to defendant's failure to report for probation in the two probation violation reports filed, failed to provide adequate notice to defendant that he may be found a fugitive and denied credit pursuant to Subsection C of this section. *State v. Jimenez*, 2004-NMSC-012, 135 N.M. 442, 90 P.3d 461.

**Attempt to serve warrant.** — To establish that probationer is "fugitive" under this provision, the state is required, at a minimum, to show that it attempted to serve a warrant on probationer but was unable to or that it would have failed to serve the warrant if it had attempted to do so. *State v. Thomas*, 1991-NMCA-131, 113 N.M. 298, 825 P.2d 231, cert. denied, 113 N.M. 44, 822 P.2d 1127.

Lack of evidence that authorities actually attempted to serve a warrant does not amount to a failure of proof under Subsection C of this statute which requires a finding that the arrest warrant "cannot be served." *State v. Apache*, 1986-NMCA-051, 104 N.M. 290, 720 P.2d 709, cert. denied, 104 N.M. 289, 720 P.2d 708.

**Effect of fugitive status on credit.** — The trial court's discretion to credit or disallow probation time from violation of probation to arrest depends upon defendant being a fugitive from justice. Whether defendant was a fugitive requires a determination that the warrant for the return of defendant cannot be served. Where the trial court may have made a judicial determination of the above matters in fixing the credit to be given on the reinstated sentence, but the record does not reflect such a determination, since the question of allowable credit is cognizable in a post-conviction motion, defendant is entitled to an evidentiary hearing on the question of the propriety of the credit given. *State v. Murray*, 1970-NMCA-045, 81 N.M. 445, 468 P.2d 416.

**Evidence.** — There was sufficient evidence to support the trial court's ruling that defendant was not entitled to credit for all of the time he was found to have been a fugitive. *State v. Apache*, 1986-NMCA-051, 104 N.M. 290, 720 P.2d 709 (Ct. App.), cert. denied, 104 N.M. 289, 720 P.2d 708.

Where the state made no showing that the warrant was entered into the national crime information center database, that it attempted to serve defendant with a warrant, or that any attempt to serve defendant would have been futile, evidence in the record does not sufficiently demonstrate that defendant was a fugitive under Subsection C of this section. *State v. Jimenez*, 2004-NMSC-012, 135 N.M. 442, 90 P.3d 461.

**Failure to object to status did not preclude appeal.** — Where the petition to revoke defendant's parole did not mention Subsection C of this section or allege that defendant was a fugitive, defendant could not have known that his status as a fugitive was at issue until the district court filed its order revoking probation and denying defendant credit for time served on probation. Under these circumstances, defendant had no opportunity to object to the court's ruling at the time it was made, and thus, the failure to object does not prejudice his ability to raise this claim on appeal. *State v. Jimenez*, 2004-NMSC-012, 135 N.M. 442, 90 P.3d 461.

**Fugitive defendant incarcerated in another jurisdiction.** — A defendant is a fugitive within the meaning of this section if he cannot be taken into actual custody and brought before the court pursuant to an arrest warrant. Thus defendant who could not be taken into custody under authority of the warrant because he was incarcerated in Arizona was properly denied credit against his sentence. *State v. McDonald*, 1991-NMCA-132, 113 N.M. 305, 825 P.2d 238, cert. denied, 113 N.M. 44, 822 P.2d 1127.

**Constitutionality of section.** — This section does not provide for mandatory notice to the probationer before revocation of his probation, thus creating a question of constitutionality. 1964 Op. Att'y Gen. No. 64-106.

**Legislative intent.** — The legislature intended the Probation and Parole Act to be read along with the criminal code provisions concerning revocation of probation. 1964 Op. Att'y Gen. No. 64-106.



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**Scope of arrest options.** — In revoking an order suspending sentence, an arrest may be accomplished in one of the four following ways: the district court which placed the defendant on probation may issue a warrant upon the filing of a petition by the district attorney; the district court which placed the defendant on probation may issue a notice to appear to answer a charge of violation brought by the probation office; the director of the probation and parole board may arrest the probationer without warrant; and a written statement issued by the director may be used as a warrant for arrest by an officer deputized by the director. 1964 Op. Att'y Gen. No. 64-106.

**Arrest without warrant by director restricted.** — The procedure whereby the director makes an arrest without a warrant probably should not be utilized when arresting suspected probation violators who are not presently within the jurisdiction of the court which granted probation. 1964 Op. Att'y Gen. No. 64-106.

**Revocation hearing part of original order.** — The hearing on revocation authorized by this section is a continuation of the original probation order. 1965 Op. Att'y Gen. No. 65-213.

**Commitment under suspended sentence.** — A defendant may not be committed under a suspended sentence until he is given notice of the alleged violation of his probation and has had an opportunity to be heard; to deny either of these is to violate due process of law. 1964 Op. Att'y Gen. No. 64-106.

**Effect of probation grant.** — Although the granting of probation is a matter of grace, once it has been granted the probationer has a vested right to his conditional liberty and he may not be deprived of this right without due process of law. 1964 Op. Att'y Gen. No. 64-106.

**Procedure where subsequent criminal charge in another jurisdiction.** — Where a defendant is being held on a subsequent criminal charge in a jurisdiction other than the one which placed him on probation, the board should delay proceeding against him for violation of probation until the subsequent charge is disposed of. 1964 Op. Att'y Gen. No. 64-106.

**Bail allowed if violation not criminal offense.** — If a violation of probation is not a criminal offense the defendant should be allowed bail. 1964 Op. Att'y Gen. No. 64-106.

**Bail where arrested in other county.** — A probationer, arrested in a county other than the county which granted him probation, has a right to be admitted to bail in the county in which he is arrested. 1964 Op. Att'y Gen. No. 64-106.

**Board to pay expenses of returning probationers.** — The state board of probation and parole is responsible for the payment of expenses incurred in the returning of probation violators to the court. 1969 Op. Att'y Gen. No. 69-30.

**Limitation on expenses.** — The phrase "expenses of returning probationers" is not meant to include the cost of detention prior to the return. 1970 Op. Att'y Gen. No. 70-62.

**Law reviews.** — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

For annual survey of New Mexico criminal law, see 16 N.M.L. Rev. 9 (1986).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21 Am. Jur. 2d Criminal Law § 913 et seq.

Right of defendant sentenced after revocation of probation to credit for jail time served as condition of probation, 99 A.L.R.3d 781.

Immunity of public officer from liability for injuries caused by negligently released individual, 5 A.L.R.4th 773.

Admissibility of hearsay evidence in probation revocation hearings, 11 A.L.R.4th 999.

Power of court, after expiration of probation term, to revoke or modify probation for violations committed during the probation term, 13 A.L.R.4th 1240.

Power of court to revoke probation for acts committed after imposition of sentence but prior to commencement of probation term, 22 A.L.R.4th 755.

Propriety of increased sentence following revocation of probation, 23 A.L.R.4th 883.

Defendant's right to credit for time spent in halfway house, rehabilitation center, or other restrictive environment as condition of probation, 24 A.L.R.4th 789.

Revocation of probation based on defendant's misrepresentation or concealment of information from trial court, 36 A.L.R.4th 1182.

Probation officer's liability for negligent supervision of probationer, 44 A.L.R.4th 638.

Probation revocation: insanity as defense, 56 A.L.R.4th 1178.

Determination that state failed to prove charges relied upon for revocation of probation as barring subsequent criminal action based on same underlying charges, 2 A.L.R.5th 262.

Who may institute proceedings to revoke probation, 21 A.L.R.5th 275.

Validity, construction, and application of concurrent-sentence doctrine - state cases, 56 A.L.R.5th 385.

24 C.J.S. Criminal Law §§ 1562 to 1564.

## 31-21-16. Repealed.

**Repeals.** — Laws 1977, ch. 216, § 17, repealed 41-17-30 1953 Comp. (31-21-16 NMSA 1978), relating to discharge of prisoner or parolee.

## 31-21-17. Executive clemency; investigation and reports.

On request of the governor the board shall investigate and report to him with respect to any case of pardon, commutation of sentence or reprieve.

**History: 1953 Comp., § 41-17-31, enacted by Laws 1955, ch. 232, § 20.**

ANNOTATIONS

**Law reviews.** — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).



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**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Executive clemency to remove disqualification for office or other disqualification, resulting from conviction of crime, as applicable in case of conviction in federal court or court of another state, 135 A.L.R. 1493.

Revocation of order commuting state criminal sentence, 88 A.L.R.5th 463.

## 31-21-17.1. Administration by department.

The corrections department shall identify geriatric, permanently incapacitated and terminally ill inmates eligible for geriatric or medical parole based on rules established by the board. The department shall forward an application and documentation in support of parole eligibility to the board within thirty days of receipt of an application from an inmate. The documentation shall include information concerning the inmate's age, medical history and prognosis, institutional behavior and adjustment and criminal history. The inmate or inmate's representative may submit an application to the board.

**History: Laws 1994, ch. 21, § 2.**

**Cross references.** — For powers and duties of board in regard to medical and geriatric parole program, *see* 31-21-25.1 NMSA 1978.

## 31-21-18. Application to persons now on probation or parole.

The provisions of the Probation and Parole Act [31-21-3 NMSA 1978] apply to all persons who, at the effective date, are on probation or parole, or eligible to be placed on probation or parole under existing laws, with the same effect as if the act had been in operation at the time they were placed on probation or parole or become [became] eligible to be placed thereon.

**History: 1953 Comp., § 41-17-32, enacted by Laws 1955, ch. 232, § 21; 1963, ch. 301, § 14.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

ANNOTATIONS

**"Effective date" interpreted.** — The phrase "at the effective date" in this section cannot reasonably be read to mean that all subsequent amendments to the Parole Act are retroactive to 1963, the effective date of this section. Therefore, because the petitioner's offenses were committed before February 22, 1980, the effective date of Section 31-21-10 NMSA 1978, Section 31-21-10 NMSA 1978 did not apply to him, he was not entitled to determinate parole, and he could not establish a liberty interest to support his due process claim. *Helker v. Shanks*, 47 F.3d 1065 (10th Cir. 1995).

**Law reviews.** — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

## 31-21-19. Participation of the United States and other states.

The board, in its discretion and with the written consent of the governor, may accept from the United States or any of its agencies, and from any state of the United States, advisory services, funds, equipment and supplies available to this state for any of the purposes contemplated by the Probation and Parole Act, and may enter into contracts and agreements with the United States or any of its agencies, and any state of the United States as necessary, proper and convenient.

**History: 1953 Comp., § 41-17-33, enacted by Laws 1955, ch. 232, § 22; 1959, ch. 48, § 1; 1963, ch. 301, § 15.**

**Cross references.** — For state board of probation and parole as referring to the corrections division, *see* 33-1-7 NMSA 1978.

ANNOTATIONS

**Law reviews.** — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 91 C.J.S. United States § 222 et seq.

## 31-21-20. Information from courts.

The director shall obtain from each district court statistical data regarding dispositions of all defendants, whether found guilty or discharged.



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**History: 1953 Comp., § 41-17-35, enacted by Laws 1963, ch. 301, § 16.**

ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — The propriety of conditioning parole on defendant's not entering specified geographical area, 54 A.L.R.5th 743.

## 31-21-21. Conditions of probation.

The board shall adopt general regulations concerning the conditions of probation which apply in the absence of specific conditions imposed by the court. All probationers are subject to supervision of the board unless otherwise specifically ordered by the court in the particular case. Nothing in the Probation and Parole Act limits the authority of the court to impose or modify any general or specific condition of probation. The board may recommend and by order the court may impose and modify any conditions of probation. The court shall transmit to the board and to the probationer a copy of any order.

**History: 1953 Comp., § 41-17-36, enacted by Laws 1963, ch. 301, § 17.**

**Cross references.** — For state board of probation and parole as referring to the corrections division, *see* 33-1-7 NMSA 1978.

ANNOTATIONS

**Specific condition requiring search of defendant's car overrides contrary manual provisions.** — A specific condition requiring that a defendant submit to a search of his car upon request of his probation officer overrides manual provisions directing that probation officers abstain from searches of probationers. *State v. Gardner*, 1980-NMCA-122, 95 N.M. 171, 619 P.2d 847.

**District court abused its discretion by modifying defendant's probation condition** which had been agreed upon pursuant to a plea bargain. *State v. Trujillo*, 1994-NMSC-066, 117 N.M. 769, 877 P.2d 575.

**Law reviews.** — For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

21 Am. Jur. 2d Criminal Law § 908 et seq.

Propriety of conditioning probation on defendant's remaining childless or having no additional children during probationary period, 94 A.L.R.3d 1218.

Right of defendant sentenced after revocation of probation to credit for jail time served as condition of probation, 99 A.L.R.3d 781.

Propriety of conditioning probation on defendant's not associating with particular person, 99 A.L.R.3d 967.

Propriety of conditioning probation on defendant's serving part of probationary period in jail or prison, 6 A.L.R.4th 446.

Power of court, after expiration of probation term, to revoke or modify probation for violations committed during the probation term, 13 A.L.R.4th 1240.

Propriety of requirement, as condition of probation, that defendant refrain from use of intoxicants, 19 A.L.R.4th 1251.

Power of court to revoke probation for acts committed after imposition of sentence but prior to commencement of probation term, 22 A.L.R.4th 755.

Defendant's right to credit for time spent in halfway house, rehabilitation center, or other restrictive environment as condition of probation, 24 A.L.R.4th 789.

Propriety of conditioning probation on defendant's not entering specified geographical area, 28 A.L.R.4th 725.

Propriety of conditioning probation on defendant's submission to polygraph or other lie detector testing, 86 A.L.R.4th 709.

Propriety of conditioning probation on defendant's submission to drug testing, 87 A.L.R.4th 929.

Who may institute proceedings to revoke probation, 21 A.L.R.5th 275.

Propriety of probation condition exposing defendant to public shame or ridicule, 65 A.L.R.5th 187.

Propriety, as condition of probation granted pursuant to 18 USCS § 3651, of requiring that probationer refrain from consumption of alcoholic beverages, 37 A.L.R. Fed. 843.

Denial of state prisoner's application for, or revocation of, participation in work or study release program or furlough program as actionable under Civil Rights Act of 1871 (42 USCS § 1983), 55 A.L.R. Fed. 208.

Propriety, in criminal case, of Federal District Court order restricting defendant's right to re-enter or stay in United States, 94 A.L.R. Fed. 619.

24 C.J.S. Criminal Law § 1556.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity of requirement that, as condition of probation, defendant submit to warrantless searches, 99 A.L.R.5th 557.

## 31-21-22. Short title.

Sections 1 through 5 [31-21-22 to 31-21-26 NMSA 1978] of this act may be cited as the "Parole Board Act".

**History: 1953 Comp., § 41-17-37, enacted by Laws 1975, ch. 194, § 1.**

ANNOTATIONS

**Law reviews.** — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

For note, "Parole Revocation and the Right to Counsel," see 5 N.M. L. Rev. 331 (1975).



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## 31-21-23. Purpose.

The purpose of the Parole Board Act [31-21-22 NMSA 1978] is to create a professional parole board.

**History: 1953 Comp., § 41-17-38, enacted by Laws 1975, ch. 194, § 2; 1999, ch. 202, § 2.**

**The 1999 amendment,** effective July 1, 1999, deleted "full-time," preceding "professional" and "salaried" preceding "parole board".

## 31-21-24. Parole board; members; appointment; terms; qualifications; compensation; organization.

A. The "parole board" is created, consisting of fifteen members appointed by the governor with the consent of the senate.

B. The terms of the members of the parole board shall be six years. To provide for staggered terms, five members shall be appointed every two years. Members serve until their successors have been appointed and qualified.

C. Members of the parole board may be removed by the governor as provided in Article 5, Section 5 of the constitution of New Mexico. Vacancies shall be filled by appointment by the governor for the remainder of the unexpired term.

D. Members of the parole board shall be persons qualified by such academic training or professional experience as is deemed necessary to render them fit to serve as members of the board. No member of the board shall be an official or employee of any other federal, state or local government entity.

E. Members of the parole board shall receive per diem and mileage as provided for nonsalaried public officers in the Per Diem and Mileage Act [10-8-1 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

F. The governor shall designate one member of the parole board to serve as chair, who in addition to other duties shall coordinate with the corrections department in the furnishing of services pursuant to Section 9-3-11 NMSA 1978.

G. A parole may be granted, denied or revoked by a quorum of two on a panel consisting of three parole board members appointed on a rotating basis by the chair of the board.

**History: 1953 Comp., § 41-17-39, enacted by Laws 1975, ch. 194, § 3; 1976, ch. 18, § 1; 1989, ch. 23, § 1; 1999, ch. 202, § 1; 2005, ch. 227, § 1.**

**The 2005 amendment,** effective July 1, 2005, increased the number of members of the parole board from nine to fifteen in Subsection A and provided in Subsection B that five members shall be appointed every two years and that members serve until their successors have been appointed and qualified.

**Temporary provision.** — Laws 2005, ch. 227, § 2 added a temporary provision which provided that members of the parole board serving on July 1, 2005 may continue to serve until their terms expire and their successors have been appointed and qualified, and that of the six additional members of the parole board to be appointed pursuant to the provisions of this act, two shall serve an initial term of two years, two shall serve an initial term of four years, and two shall serve an initial term of six years. Thereafter, all members shall serve six-year staggered terms.

**The 1999 amendment,** effective July 1, 1999, in Subsection A, substituted "nine members" for "four members" and deleted the last sentence which read: "Each member of the board shall devote his full time to the duties of the board"; inserted "parole" preceding "board" in Subsections C, F and G; inserted "appointment by" preceding "the governor" in Subsection C; and rewrote Subsection E which read: "For purposes of salary for the chairman and the other three members of the board, the provisions of Section 10-9-5 NMSA 1978 shall apply. Members of the board shall be reimbursed as provided in the Per Diem and Mileage Act in lieu of actual expenses for transportation, lodging and subsistence while on the official business of the board".

**The 1989 amendment,** effective June 16, 1989, in Subsection A substituted "four" for "three" in the first sentence, deleted at the end of Subsection B "except that the members of the initial board shall be appointed for staggered terms of one, two and three years respectively", in Subsection E substituted "three" for "two" and "10-9-5 NMSA 1978" for "5-4-31.1 NMSA 1953" in the first sentence, and substituted all of the present language of Subsection G beginning with "majority of the board".

### ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 59 Am. Jur. 2d Pardon and Parole §§ 17, 32, 45, 76.

16A C.J.S. Constitutional Law §§ 262, 505.

## 31-21-25. Powers and duties of the board.

A. The parole board shall have the powers and duties of the former state board of probation and parole pursuant to Sections 31-21-6 and 31-21-10 through 31-21-17 NMSA 1978 and such additional powers and duties relating to the parole of adults as are enumerated in this section.



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B. The parole board shall have the following powers and duties to:

(1) grant, deny or revoke parole;

(2) conduct or cause to be conducted such investigations, examinations, interviews, hearings and other proceedings as may be necessary for the effectual discharge of the duties of the board;

(3) summon witnesses, books, papers, reports, documents or tangible things and administer oaths as may be necessary for the effectual discharge of the duties of the board;

(4) maintain records of its acts, decisions and orders and notify each corrections facility of its decisions relating to persons who are or have been confined therein;

(5) adopt an official seal of which the courts shall take judicial notice;

(6) employ such officers, agents, assistants and other employees as may be necessary for the effectual discharge of the duties of the board;

(7) contract for services, supplies, equipment, office space and such other provisions as may be necessary for the effectual discharge of the duties of the board; and

(8) adopt such rules and regulations as may be necessary for the effectual discharge of the duties of the board.

C. The parole board shall provide a prisoner or parolee with a written statement of the reason or reasons for denying or revoking parole.

D. The parole board shall adopt a written policy specifying the criteria to be considered by the board in determining whether to grant, deny or revoke parole or to discharge a parolee.

E. When the parole board conducts a parole hearing for an offender, and upon request of the victim or family member the board shall allow the victim of the offender's crime or a family member of the victim to be present during the parole hearing. If the victim or a family member of the victim requests an opportunity to speak to the board during the hearing in public or private, the board shall grant that request. As used in this subsection, "family member of the victim" means a mother, father, sister, brother, child or spouse of the victim or a person who has custody of the victim.

**History: 1953 Comp., § 41-17-40, enacted by Laws 1975, ch. 194, § 4; 1983, ch. 320, § 1; 1989, ch. 210, § 1; 2001, ch. 224, § 1.**

**Cross references.** — For administrative attachment to the criminal justice department, *see* 9-3-11 NMSA 1978.

**The 2001 amendment,** effective July 1, 2001, inserted "parole" preceding "board" in Subsections A, C and D; and added Subsection E.

**The 1989 amendment,** effective July 1, 1989, deleted former Subsection E, regarding various notification requirements of the board in connection with its docket and in connection with release of prisoners.

## ANNOTATIONS

**Generally as to granting or revoking of parole.** — The power to grant parole and to revoke it is exercised pursuant to explicit statutory authority, and that power is exercised by a person or persons experienced in sifting, weighing and evaluating the factors involved in the grant or revocation of conditional freedom. The real problem before the parole board is one of rehabilitation, which must be measured, not by legal rules, but by the judgment of those who make it their professional business. *Robinson v. Cox*, 1966-NMSC-210, 77 N.M. 55, 419 P.2d 253.

**Release on parole is act of clemency** or grace resting entirely within the discretion of the parole board. *Robinson v. Cox*, 1966-NMSC-210, 77 N.M. 55, 419 P.2d 253.

**Paroled prisoner is not discharged from custody of prison authorities,** but is at all times under the complete custody and control, and subject to the orders of the parole board. *Robinson v. Cox*, 1966-NMSC-210, 77 N.M. 55, 419 P.2d 253.

**No constitutional right to hearing prior to revocation.** — A prisoner on probation has no constitutional right to a hearing prior to its revocation, and any such right depends entirely upon the existence of a statutory provision. *Robinson v. Cox*, 1966-NMSC-210, 77 N.M. 55, 419 P.2d 253.

**No right to counsel at revocation hearing.** — Neither due process nor the applicable statutes require that parolees be provided with appointed counsel or represented by employed counsel when they appear before the parole board in a revocation hearing. *Robinson v. Cox*, 1966-NMSC-210, 77 N.M. 55, 419 P.2d 253.

**Scope of evidence at parole revocation hearing.** — A parole revocation hearing cannot be restricted to legal evidence derived from examinations and cross-examinations of witnesses in open hearing. Any information of probative value, even though it may be in the form of letters, reports of probation officers and similar matter, which can help the board in making its determination may properly be considered. *Robinson v. Cox*, 1966-NMSC-210, 77 N.M. 55, 419 P.2d 253.

**Effect of considering hearsay evidence.** — The consideration of the board of hearsay evidence does not invalidate the action taken. *Robinson v. Cox*, 1966-NMSC-210, 77 N.M. 55, 419 P.2d 253.

**Law reviews.** — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 59 Am. Jur. 2d Pardon and Parole §§ 17, 32, 45, 76.

Liability of governmental officer or entity for failure to warn or notify of release of potentially dangerous individual from custody, 12 A.L.R.4th 722.

Probation officer's liability for negligent supervision of probationer, 44 A.L.R.4th 638.

United States Parole Commission Guidelines for federal prisoners, 61 A.L.R. Fed. 135.

16A C.J.S. Constitutional Law §§ 262, 505; 31A C.J.S. Evidence § 159 et seq.; 39 C.J.S. Habeas Corpus § 77.



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## 31-21-25.1. Parole board; additional powers and duties; medical and geriatric parole program.

A. The parole board shall:

(1) establish rules and implement a "medical and geriatric parole program", in cooperation with the corrections department, by December 31, 1994;

(2) determine the appropriate level of supervision following parole and develop a comprehensive discharge plan for geriatric, permanently incapacitated and terminally ill inmates released under the medical and geriatric parole program;

(3) report annually to the corrections department and the legislature the number of applications for medical and geriatric parole it receives, the nature of the illnesses, disease or condition of applicants, the reasons for denial of applications for medical or geriatric parole and the number of persons on medical and geriatric parole who have been returned to the custody of the department and the reasons for their return;

(4) make a determination whether to grant geriatric or medical parole within thirty days of receipt of an application and supporting documentation from the corrections department;

(5) at the time of release, prescribe terms and conditions of geriatric or medical parole, including medical supervision and intervals of periodic medical evaluations; and

(6) authorize the release of geriatric, permanently incapacitated and terminally ill inmates upon terms and conditions as the board may prescribe, if the board determines that an inmate is geriatric, permanently incapacitated or terminally ill, parole is not incompatible with the welfare of society and the inmate is not a first degree murder felon.

B. Inmates who have not served their minimum sentences may be considered eligible for parole under the medical and geriatric parole program. Medical and geriatric parole consideration shall be in addition to any other parole for which a geriatric, permanently incapacitated or terminally ill inmate may be eligible.

C. When considering an inmate for medical or geriatric parole, the parole board may request that certain medical evidence be produced or that reasonable medical examinations be conducted.

D. The parole term of a geriatric, permanently incapacitated or terminally ill inmate on medical or geriatric parole shall be for the remainder of the inmate's sentence, without diminution of sentence for good behavior.

E. When determining an inmate's eligibility for geriatric or medical parole, the parole board shall consider the following criteria concerning the inmate's:

(1) age;

(2) severity of illness, disease or infirmities;

(3) comprehensive health evaluation;

(4) institutional behavior;

(5) level of risk for violence;

(6) criminal history; and

(7) alternatives to maintaining geriatric or medical inmates in traditional settings.

F. As used in this section:

(1) "geriatric inmate" means a male or female offender who:

(a) is under sentence to or confined in a prison or other correctional institution under the control of the corrections department;

(b) is sixty-five years of age or older;

(c) suffers from a chronic infirmity, illness or disease related to aging; and

(d) does not constitute a danger to himself or society;

(2) "permanently incapacitated inmate" means a male or female offender who:

(a) is under sentence to or confined in a prison or other correctional institution under the control of the corrections department;

(b) by reason of an existing medical condition, is permanently and irreversibly physically incapacitated; and

(c) does not constitute a danger to himself or to society; and

(3) "terminally ill inmate" means a male or female offender who:



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(a) is under sentence or confined in a prison or other correctional institution under the control of the corrections department;

(b) has an incurable condition caused by illness or disease that would, within reasonable medical judgment, produce death within six months; and

(c) does not constitute a danger to himself or society.

**History: Laws 1994, ch. 21, § 3.**

**Cross references.** — For administration of medical and geriatric parole program by department, *see* 31-21-17.1 NMSA 1978.

## 31-21-26. Transitional provisions.

A. The records, property, equipment and unencumbered and unexpended funds previously belonging to or appropriated for the use of the former parole hearing board shall become, on the effective date of the Parole Board Act, a part of the property of the parole board.

B. The provisions of the Parole Board Act [31-21-22 NMSA 1978] apply to all persons who, on the effective date, are on parole or eligible to be placed on parole with the same effect as if that act had been in effect at the time they were placed on parole or became eligible to be placed on parole.

**History: 1953 Comp., § 41-17-41, enacted by Laws 1975, ch. 194, § 5.**

## 31-21-27. Reentry drug court program for inmates; district court supervision.

A. The corrections department shall develop criteria regarding the eligibility of an inmate for early release into a reentry drug court program, including requirements that the inmate:

(1) was incarcerated following conviction for a nonviolent, drug-related offense; and

(2) is within eighteen months of release or eligibility for parole.

B. The corrections department may petition a district court that operates a reentry drug court program to accept limited jurisdiction of an inmate. If the district court grants the petition, the district court shall have jurisdiction over the inmate and the corrections department shall retain its jurisdiction over the inmate pursuant to the terms of the inmate's judgment and sentence.

C. The provisions of this section shall not be interpreted to change the jurisdictional authority of the sentencing court, pursuant to the provisions of the Rules of Criminal Procedure for the District Courts, as promulgated by the supreme court. The jurisdictional authority conferred upon a reentry drug court pursuant to this section is limited to acceptance and supervision of a released inmate by the reentry drug court program.

D. The provisions of this section shall not be interpreted to limit the statutory authority vested in the adult probation and parole division of the corrections department, pursuant to the provisions of the Probation and Parole Act [31-21-3 NMSA 1978].

**History: Laws 2001, ch. 35, § 1.**

**Effective dates.** — Laws 2001, ch. 35, § 2 made the act effective on July 1, 2001.

**Cross references.** — For Rules of Criminal procedure for the District Courts, *see* Rule 5-101 NMRA et seq.

# ARTICLE 22

# Crime Victims Reparations

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## 31-22-1. Short title.

Chapter 31, Article 22 NMSA 1978 may be cited as the "Crime Victims Reparation Act".

**History: Laws 1981, ch. 325, § 1; 1993, ch. 207, § 1.**

**The 1993 amendment,** effective June 18, 1993, substituted "Chapter 31, Article 22 NMSA 1978" for "This act".

**Compiler's notes.** — Laws 1990, ch. 10, § 4 repealed Laws 1981, ch. 325, § 26, as amended, which had provided for delayed repeals of sections of this article on specified dates.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 21A Am. Jur. 2d Criminal Law § 1321 et seq.

Statutes providing for governmental compensation for victims of crime, 20 A.L.R.4th 63.

## 31-22-2. Purpose.

The purpose of the Crime Victims Reparation Act [31-22-1 NMSA 1978] is to protect the citizens of New Mexico from the impact of crime and to promote a stronger criminal justice system through the encouragement of all citizens to cooperate with law enforcement efforts. Implementation of the Crime Victims Reparation Act will promote the public health, welfare and safety of the citizens of New Mexico.

**History: Laws 1981, ch. 325, § 2.**

## 31-22-3. Definitions.

As used in the Crime Victims Reparation Act:

A. "child" means an unmarried person who is under the age of majority and includes a stepchild and an adopted child;

B. "collateral source" includes benefits for economic loss otherwise reparable under the Crime Victims Reparation Act which the victim or claimant has received or which are readily available to him from:

(1) the offender;

(2) social security, medicare and medicaid;

(3) workers' compensation;

(4) proceeds of a contract of insurance payable to the victim;

(5) a contract providing prepaid hospital and other health care services or benefits for disability, except for the benefits of any life insurance policy;

(6) applicable indigent funds; or

(7) cash donations;

C. "commission" means the crime victims reparation commission;

D. "dependents" means those relatives of the deceased or disabled victim who are more than fifty percent dependent upon the victim's income at the time of his death or disability and includes the child of a victim born after his death or disability;

E. "family relationship group" means any person related to another person within the fourth degree of consanguinity or affinity;

F. "injury" means actual bodily harm or disfigurement and includes pregnancy and extreme mental distress. For the purposes of this subsection, "extreme mental distress" means a substantial personal disorder of emotional processes, thought or cognition that impairs judgment, behavior or ability to cope with the ordinary demands of life;



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G. "permanent total disability" means loss of both legs or arms, loss of one leg and one arm, total loss of eyesight, paralysis or other physical condition permanently incapacitating the worker from performing any work at any gainful occupation;

H. "relative" means a person's spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, half-brother, half-sister or spouse's parents; and

I. "victim" means:

(1) a person in New Mexico who is injured or killed by any act or omission of any other person that is a crime enumerated in Section 31-22-8 NMSA 1978;

(2) a resident of New Mexico who is injured or killed by such a crime occurring in a state other than New Mexico if that state does not have an eligible crime victims compensation program; or

(3) a resident of New Mexico who is injured or killed by an act of international terrorism, as provided in 18 U.S.C. Section 2331.

**History: Laws 1981, ch. 325, § 3; 1985 (1st S.S.), ch. 5, § 1; 1989, ch. 246, § 1; 1990, ch. 10, § 1; 1993, ch. 207, § 2; 1997, ch. 268, § 1; 2001, ch. 214, § 1.**

**The 2001 amendment,** effective June 15, 2001, deleted former Paragraph B(4), which read "any program of any employer for continuation of wages in the event of the illness or injury of an employee" and renumbered the remaining paragraphs accordingly; added Subsection G and renumbered the remaining subsections accordingly; and in Subsection H, deleted "minor" preceding "brother", "sister", "half-brother", and "half-sister".

**The 1997 amendment,** effective July 1, 1997, added Paragraph H(3) and made a stylistic change.

**The 1993 amendment,** effective June 18, 1993, added Paragraphs (7) and (8) to Subsection B, making related grammatical changes.

**The 1990 amendment,** effective May 16, 1990, in Subsection H, inserted the paragraph designation "(1)", substituted "person that" for "person which", added "or" at the end, and added Paragraph (2).

**The 1989 amendment,** effective June 16, 1989, made a minor stylistic change in Subsection B(3), substituted the present language of Subsection B(4) for "wage continuation programs of any employer", and added all of the language of Subsection B(6) following "disability".

## 31-22-4. Crime victims reparation commission created; membership; reimbursement.

A. There is created in the executive branch of government a "crime victims reparation commission" which shall consist of five members appointed by the governor for staggered terms of four years each. Not more than three of the members shall belong to the same political party. One of the members shall be an attorney licensed to practice law in the state, one of the members shall be a physician licensed to practice medicine in the state and one of the members shall be a representative of a law enforcement agency. In making the initial appointments, the governor shall appoint three members for a term of two years each and two members for a term of four years each. Thereafter, appointments shall be for a term of four years. The governor may appoint a person to fill a vacancy for the balance of the unexpired term.

B. The members of the commission shall annually elect from their membership a chairman and vice chairman.

C. Members of the commission, while in the actual performance of their duties pursuant to the Crime Victims Reparation Act, shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 NMSA 1978].

D. The commission may employ a director and such staff as is necessary to perform its functions.

**History: Laws 1981, ch. 325, § 4; 1989, ch. 246, § 2; 1993, ch. 207, § 3.**

**The 1993 amendment,** effective June 18, 1993, deleted "and" following "practice law in the state" and added the language beginning "and one of the members" to the end, in the third sentence of Subsection A.

**The 1989 amendment,** effective June 16, 1989, inserted "a director and" in Subsection D.

## 31-22-4.1. Domestic violence homicide review team; creation; membership; duties; confidentiality; civil liability.

A. The "domestic violence homicide review team" is created within the commission for the purpose of reviewing the facts and circumstances of domestic violence related homicides and sexual assault related homicides in New Mexico, identifying the causes of the fatalities and their



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relationship to government and nongovernment service delivery systems and developing methods of domestic violence prevention.

B. The team shall consist of the following members appointed by the director of the commission:

(1) medical personnel with expertise in domestic violence;

(2) criminologists;

(3) representatives from the New Mexico district attorneys association;

(4) representatives from the attorney general;

(5) victim services providers;

(6) civil legal services providers;

(7) representatives from the public defender department;

(8) members of the judiciary;

(9) law enforcement personnel;

(10) representatives from the department of health, the aging and long-term services department and the children, youth and families department who deal with domestic violence victims' issues;

(11) representatives from tribal organizations who deal with domestic violence; and

(12) any other members the director of the commission deems appropriate.

C. The domestic violence homicide review team shall:

(1) review trends and patterns of domestic violence related homicides and sexual assault related homicides in New Mexico;

(2) evaluate the responses of government and nongovernment service delivery systems and offer recommendations for improvement of the responses;

(3) identify and characterize high-risk groups for the purpose of recommending developments in public policy;

(4) collect statistical data in a consistent and uniform manner on the occurrence of domestic violence related homicides and sexual assault related homicides; and

(5) improve collaboration between tribal, state and local agencies and organizations to develop initiatives to prevent domestic violence.

D. The following items are confidential:

(1) all records, reports or other information obtained or created by the domestic violence homicide review team for the purpose of reviewing domestic violence related homicides or sexual assault related homicides pursuant to this section; and

(2) all communications made by domestic violence homicide review team members or other persons during a review conducted by the team of a domestic violence related homicide or a sexual assault related homicide.

E. The following persons shall honor the confidentiality requirements of this section and shall not make disclosure of any matter related to the team's review of a domestic violence related homicide or a sexual assault related homicide, except pursuant to appropriate court orders:

(1) domestic violence homicide review team members;

(2) persons who provide records, reports or other information to the team for the purpose of reviewing domestic violence related homicides and sexual assault related homicides; and

(3) persons who participate in a review conducted by the team.

F. Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable or admissible merely because the evidence was presented during the review of a domestic violence related homicide or a sexual assault related homicide pursuant to this section.

G. Domestic violence homicide review team members shall not be subject to civil liability for any act related to the review of a domestic violence related homicide or a sexual assault related homicide; provided that the members act in good faith, without malice and in compliance with other state or federal law.

H. An organization, institution, agency or person who provides testimony, records, reports or other information to the domestic violence homicide review team for the purpose of reviewing domestic violence related homicides or sexual assault related homicides shall not be subject to civil liability for providing the testimony, records, reports or other information to the team; provided



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that the organization, institution, agency or person acts in good faith, without malice and in compliance with other state or federal law.

I. At least thirty days prior to the convening of each regular session of the legislature, the domestic violence homicide review team shall transmit a report of its activities pursuant to this section to:

(1) the governor;
(2) the legislative council;
(3) the chief justice of the supreme court;
(4) the secretary of public safety;
(5) the secretary of children, youth and families;
(6) the secretary of health; and
(7) any other persons the team deems appropriate.

**History: Laws 2007, ch. 235, § 1.** **Effective dates.** — Laws 2007, ch. 235, § 2 made this section effective July 1, 2007.

## 31-22-5. Claims; review; hearings and evidence.

A. Where an application is made to the commission pursuant to the Crime Victims Reparation Act, the director of the commission shall determine if a claim for a reparation award is eligible for consideration pursuant to the provisions of the Crime Victims Reparation Act. All claims arising from the injury or death of a person as a direct result of a single crime shall be considered together by a single staff member. When the director determines that a claim for a reparation award is not eligible for consideration, the director shall notify the commission of his determination at the next regular meeting of the commission. If the commission concurs with the director's determination that a claim for a reparation award is not eligible for consideration, the claimant shall be notified that his claim was denied. When the director determines that a claim for a reparation award is eligible for consideration, the director shall order that the claim be processed and he shall assign the claim to a member of the commission staff.

B. The staff member to whom such claim is assigned shall examine the papers filed in support of the claim and shall cause an investigation to be conducted into the validity of the claim. The investigation may include, but not be limited to, an examination of police, court and official records and reports concerning the crime and an examination of medical and hospital reports relating to the injury or death upon which the claim is based and other benefits received or to be received.

C. The staff member to whom a claim is assigned may make his recommendation regarding the claim on the basis of the papers filed in support thereof and the report of the investigation of the claim. If the staff member is unable to make a recommendation upon the basis of the papers and report, he shall present the claim to the commission without a recommendation.

D. When the claim has been processed, the director shall assign the claim to a commission member.

E. After examining the papers filed in support of the claim and the report of investigation and after a hearing, if any, the commission member to whom the claim was assigned shall make a recommendation to the entire commission either granting an award or denying the claim.

F. A quorum of the commission shall act upon the recommendation of the commission member. A quorum of the commission, by majority vote, may affirm, increase, decrease or deny the award.

G. Upon a request from a victim or claimant, the commission shall grant the victim or claimant an informal appearance at a commission meeting. The purpose of the informal appearance shall be for the victim or claimant to present any evidence or information in support of his claim.

H. A formal hearing may be called for by a majority of the commission. The purpose of the hearing shall be for the commission to hear evidence to assist it in making a determination regarding a claim.

I. At the hearing, the claimant and the commission's legal advisor shall be entitled to appear and be heard, and any other person may appear and be heard who has satisfied the commission member that he has a substantial interest in the proceedings. In any case in which the claimant is a child or is mentally incompetent, the application may be made on behalf of such claimant by his parent, guardian, custodian or any other person authorized to administer his estate.



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J. Where any person is entitled to appear and be heard, that person may appear in person or by his attorney. All hearings shall be open to the public unless in a particular case the member of the commission assigned to the claim determines that the hearing or a portion thereof shall be held in private, having regard to the fact that the offender has not been convicted or in the interest of the victim of an alleged sexual offense.

K. Every person appearing under the provisions of this section shall have the right to produce evidence and to cross-examine witnesses. The commission member may receive in evidence any statement, document, information or matter that may, in his opinion, contribute to the functions of the hearing under the Crime Victims Reparation Act, whether or not such statement, document, information or other matter would be admissible in a court of law.

**History: Laws 1981, ch. 325, § 5; 1989, ch. 246, § 3; 1991, ch. 36, § 1; 1993, ch. 207, § 4.**

**The 1993 amendment,** effective June 18, 1993, in Subsection A, substituted the language beginning "determine if a claim" for "assign the claim to a member of the commission staff" at the end of the first sentence and added the last three sentences; in Subsection B, substituted "may" for "shall" before "include" in the second sentence; and in Subsection D, deleted "and a claim summary has been prepared" after "processed".

**The 1991 amendment,** effective July 1, 1991, in Subsection A, in the first sentence, substituted "director" for "chairman" and "to a member" for "to himself or to another member" and added "staff", in the second sentence, and, in Subsections B and C, substituted "staff member" for "commission member"; in the second sentence of Subsection C substituted "make a" for "decide his" and added the language beginning with "present the claim"; deleted former Subsections D to F pertaining to the appearance of a claimant at the hearings; added Subsection D; redesignated former Subsections G and H as Subsections E and F; and added Subsections G to K.

**The 1989 amendment,** effective June 16, 1989, in Subsection H substituted "A quorum of the commission" for "The entire commission" in the first sentence and "The commission" in the second sentence, and deleted the former third sentence which read: "No decision shall be valid unless a majority of the commission members are in agreement on the decision."

## 31-22-6. Medical examination; attorneys' fees; penalty.

A. The commission may appoint an impartial physician, licensed in New Mexico, to examine any person making an application for reparation under the Crime Victims Reparation Act, and the fees for the examination shall be paid from funds appropriated for the commission's administrative expenses.

B. None of the appropriation in this act [31-22-1 to 31-22-21 NMSA 1978] shall be used to pay attorney fees either as part of or in addition to awards of reparation. In cases where no reparation is awarded, attorney fees shall not be paid.

**History: Laws 1981, ch. 325, § 6.**

## 31-22-7. Eligibility for reparation.

A. If a person is injured or killed by an act or omission of another person coming within the criminal jurisdiction of the state after July 1, 1981, which act or omission includes a crime enumerated in Section 31-22-8 NMSA 1978, and upon application for reparation, the commission may award reparation in accordance with the Crime Victims Reparation Act:

(1) to the victim;

(2) in the case of the victim's death, to or for the benefit of any one or more of the deceased victim's dependents; or

(3) to any individual who voluntarily assumes funeral or medical expenses of the victim.

B. For the purpose of the Crime Victims Reparation Act, a person shall be deemed to have intentionally committed an act or omission constituting a crime, notwithstanding that by reason of age, insanity, drunkenness or otherwise the person was legally incapable of forming a criminal intent.

C. In determining whether to make an order under this section, the commission may consider any circumstances it determines to be relevant. The commission shall consider the behavior of the victim and whether, because of provocation or otherwise, the victim bears responsibility for the act or omission constituting a crime that caused the victim's injury or death and shall reduce the amount of reparation in accordance with its assessment of the degree of responsibility attributable to the victim.



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D. An order may be made under this section whether or not any person is prosecuted for or convicted of a crime enumerated in Section 31-22-8 NMSA 1978; provided an arrest has been made or the act or omission constituting a crime has been reported to the police in a reasonable time or the act or omission constituting a crime has been reported to a licensed medical, mental health or counseling provider, or tribal health provider. No order may be made under this section unless the commission finds that:

(1) the act or omission constituting a crime did occur;

(2) the injury or death of the victim resulted from the act or omission constituting a crime; and

(3) the claimant or victim fully cooperated with the appropriate law enforcement agencies or the commission finds that the claimant or victim acted reasonably under the circumstances.

E. Upon application from the district attorney of the appropriate district, the commission may suspend proceedings under the Crime Victims Reparation Act for such period as it deems desirable on the grounds that a prosecution for the act or omission constituting a crime has commenced or is imminent.

**History: Laws 1981, ch. 325, § 7; 1993, ch. 207, § 5; 2019, ch. 211, § 8.**

**The 2019 amendment,** effective July 1, 2019, expanded the eligibility for reparation by including that the act or omission constituting a crime may be reported to a licensed medical, mental health or counseling provider, or tribal health provider, and provided that the commission may award reparation upon a finding that the victim fully cooperated with the appropriate law enforcement agencies or that the claimant acted reasonably under the circumstances; in Subsection D, after "police in a reasonable time", added "or the act or omission constituting a crime has been reported to a licensed medical, mental health or counseling provider, or tribal health provider", and in Paragraph D(3), after "law enforcement agencies", added "or the commission finds that the claimant or victim acted reasonably under the circumstances".

**The 1993 amendment,** effective June 18, 1993, substituted "31-22-8 NMSA 1978" for "9 of that act" in the introductory language of Subsection A and for "9 of the Crime Victims Reparation Act" in the first sentence of Subsection D; and made stylistic changes in Subsection A(3) and in Subsection E.

## 31-22-8. Crimes enumerated.

A. The crimes to which the Crime Victims Reparation Act applies and for which reparation to victims may be made are the following enumerated offenses and all other offenses in which any enumerated offense is necessarily included:

(1) arson resulting in bodily injury;

(2) aggravated assault or aggravated battery;

(3) dangerous use of explosives resulting in bodily injury;

(4) negligent use of a deadly weapon;

(5) murder;

(6) voluntary manslaughter;

(7) involuntary manslaughter;

(8) kidnapping;

(9) criminal sexual penetration;

(10) criminal sexual contact of a minor;

(11) failure to give information and render aid, as provided in Section 66-7-201 or 66-7-203 NMSA 1978;

(12) homicide by vehicle or great bodily injury by vehicle, as provided in Section 66-8-101 NMSA 1978;

(13) abandonment or abuse of a child;

(14) aggravated indecent exposure, as provided in Section 30-9-14.3 NMSA 1978;

(15) stalking;

(16) human trafficking;

(17) assault against a household member; and

(18) battery against a household member.

B. No award shall be made for any loss or damage to property.



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**History: Laws 1981, ch. 325, § 8; 1983, ch. 319, § 1; 1989, ch. 246, § 4; 1990, ch. 10, § 2; 1997, ch. 268, § 2; 2001, ch. 214, § 2; 2013, ch. 200, § 4; 2015, ch. 10, § 1; 2018, ch. 33, § 1.**

**The 2018 amendment,** effective May 16, 2018, added failure to give information and render aid to the list of crimes for which crime victim reparation may be made under the Crime Victims Reparation Act; and added a new Paragraph A(11) and redesignated the succeeding paragraphs accordingly.

**The 2015 amendment,** effective July 1, 2015, provided for new crimes to which the Crime Victims Reparation Act applies, and removed certain crimes from the list to which the Crime Victims Reparation Act applies; deleted former Paragraph (2) of Subsection A and renumbered the succeeding paragraphs accordingly; in Subsection A, Paragraph (3), after "explosives", added "resulting in bodily injury"; in Subsection A, Paragraph (14), deleted "aggravated" preceding "stalking", and after "stalking", deleted "as provided in Section 30-3A-3.1 NMSA 1978"; and added new Paragraphs (16) and (17).

**The 2013 amendment,** effective July 1, 2013, added the crime of human trafficking; and added Paragraph (16) of Subsection A.

**The 2001 amendment,** effective June 15, 2001, rewrote Paragraph A(15), which formerly read "stalking, as provided in Section 30-3A-3 NMSA 1978, when the offender has at least one prior conviction for stalking".

**The 1997 amendment,** effective July 1, 1997, added Paragraphs A(14) and A(15) and made stylistic changes.

**The 1990 amendment,** effective May 16, 1990, inserted "as defined in Section 66-8-101 NMSA 1978" in Paragraph (12) of Subsection A.

**The 1989 amendment,** effective June 16, 1989, substituted "kidnaping" for "kidnapping" in Subsection A(9), and added Subsection A(13).

## 31-22-9. Award of reparation.

The commission may order payment of reparation for:

A. expenses actually and reasonably incurred as a result of the victim's injury or death;

B. loss to the victim of earning power as a result of total or partial incapacity;

C. any other pecuniary loss directly resulting from the victim's injury or death which the commission determines to be reasonable and proper; and

D. any expenses incurred for rehabilitation services provided to a victim of child abuse or neglect, including child sexual abuse, but awards made pursuant to this subsection shall be made directly to the provider of the rehabilitation services for payment of those services.

**History: Laws 1981, ch. 325, § 9; 1989, ch. 246, § 5.**

**The 1989 amendment,** effective June 16, 1989, added Subsection D.

## 31-22-10. Relationship to offender.

Except for amounts payable pursuant to Subsection D of Section 31-22-9 NMSA 1978, no reparation shall be awarded if the victim:

A. was a member of the offender's family relationship group where payment of reparation would unjustly enrich the offender; or

B. was an accomplice of the offender.

**History: Laws 1981, ch. 325, § 10; 1989, ch. 246, § 6; 1990, ch. 10, § 3.**

**The 1990 amendment,** effective May 16, 1990, deleted former Subsection A which read "is a relative of the offender" and redesignated former Subsections B and C as present Subsections A and B.

**The 1989 amendment,** effective June 16, 1989, added "Except for amounts payable pursuant to Subsection D of Section 31-22-9 NMSA 1978" at the beginning of the undesignated introductory paragraph, and added all of the language of Subsection B following "group".

## 31-22-11. No award to certain confined persons.

No award shall be made pursuant to the provisions of the Crime Victims Reparation Act to a victim injured while confined in a county or municipal jail, penitentiary or other correctional facility.

**History: Laws 1981, ch. 325, § 11.**

## 31-22-12. Recovery from offender.

Whenever an award of reparation is made pursuant to the Crime Victims Reparation Act, the state is, upon payment of the award, subrogated to the right of action of the victim or his



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dependents against the person responsible for the injury or death and may bring an action against such person for the amount of the reparation paid.

**History: Laws 1981, ch. 325, § 12.**

## 31-22-13. Terms of order.

Any order for the payment of reparation under the Crime Victims Reparation Act may be made on such terms as the commission deems appropriate. The order may provide for apportionment of reparation or for the holding of reparation or any part thereof in trust and for the payment of reparation in a lump sum or in periodic installments. All such orders shall contain words clearly informing the claimant that all awards and orders for reparation under the Crime Victims Reparation Act are subject to the making of an appropriation by the legislature to pay the claim.

**History: Laws 1981, ch. 325, § 13.**

## 31-22-14. Limitations on award; collateral recovery; preliminary award.

A. No order for the payment of reparation shall be made unless application has been made within two years after the date of the injury or death and the injury or death was the result of a crime enumerated in Section 31-22-8 NMSA 1978. An application for reparation shall be made within two years after the injury or death, except for minors who are victims of criminal activity under the provisions of Section 30-6-1 NMSA 1978, regarding abandonment or abuse of a child, Section 30-9-11 NMSA 1978, regarding criminal sexual penetration, or Section 30-9-13 NMSA 1978, regarding criminal sexual contact of a minor.

B. No award of reparation shall be in excess of twenty thousand dollars ($20,000) per victim, except that the commission may award up to an additional thirty thousand dollars ($30,000) for extraordinary pecuniary losses, if the personal injury to a victim is catastrophic and results in a permanent total disability. The extraordinary losses compensated may include:

(1) loss of wages;
(2) the cost of home health care;
(3) the cost of making a home or automobile accessible;
(4) the cost of training in the use of special application; or
(5) job training.

C. Except as provided by Subsection E of this section, the commission shall deduct from any reparation awarded any payments received from a collateral source or from the United States or the state or any of its political subdivisions for injury or death subject to reparation under the Crime Victims Reparation Act. If the claimant receives an award of reparation from the commission and also receives payment as set forth in the preceding sentence for which no deduction was made, the claimant shall refund to the state the lesser of the amount of reparation paid or the sums not so deducted.

D. If the claimant receives an award of reparation from the commission and also receives an award pursuant to a civil judgment arising from a criminal occurrence for which a reparation award was paid, the claimant shall refund to the state the amount of the reparation paid to the claimant. The commission may negotiate a reasonable settlement regarding repayment of the reparation award if special circumstances exist.

E. If it appears that a final award of reparation will be made by the commission, a preliminary award may be authorized by the director of the commission or the commission's designee when the commission chair concurs. The amount of the preliminary award shall be deducted from any final award made by the commission.

**History: Laws 1981, ch. 325, § 14; 1989, ch. 246, § 7; 1991, ch. 37, § 1; 1993, ch. 207, § 6; 1997, ch. 268, § 3; 2001, ch. 214, § 3; 2015, ch. 10, § 2; 2019, ch. 211, § 9.**

**The 2019 amendment,** effective July 1, 2019, removed the requirement that crimes covered by the act have to be reported to the police within thirty days, and removed certain waivers to the requirement that a crime be reported to



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police within thirty days; in Subsection A, after "Section 31-22-8 NMSA 1978", deleted "that had been reported to the police within thirty days after its occurrence unless a longer period is allowed pursuant to Subsection F of this section", and deleted the last two sentences of the subsection, which provided "The date of incident for minors who are victims of these types of criminal activity shall be the date the victim attains the age of eighteen years or the date that the criminal activity is reported to a law enforcement agency, whichever occurs first. The commission may extend the time for filing an application for good cause shown by a claimant or a victim."; and deleted former Subsection F, which related to waivers to the thirty-day reporting requirement.

**The 2015 amendment,** effective July 1, 2015, provided the crime victims reparation commission the authority to extend the time for filing an application for reparation upon good cause shown by a claimant or a victim; in Subsection A, after "Subsection F of this section.", deleted "In no event shall reparation be given unless application has been" and added "An application for reparation shall be", and added the last sentence of the subsection relating to extending the time for filing an application for reparation.

**The 2001 amendment,** effective June 15, 2001, inserted "unless a longer period is allowed pursuant to Subsection F of this section" in Subsection A; added the exception and Paragraphs B(1) through B(5) in Subsection B; deleted "not to exceed three thousand five hundred dollars ($3,500)" following "preliminary award" in Subsection E; and added Subsection F.

**The 1997 amendment,** effective July 1, 1997, in Subsection A, substituted "two year" for "one year" near the beginning of the first sentence, and deleted language at the end of the first sentence and deleted the former second sentence relating to application allowed for good cause and providing for regulations specifying good cause; added Subsection D and redesignated former Subsection D as Subsection E, and made stylistic changes in Subsections A and C.

**The 1993 amendment,** effective June 18, 1993, substituted a reference to 30-9-13 NMSA 1978 for a reference to 30-9-14 NMSA 1978 near the end of the third sentence of Subsection A; and added "when the commission chairman concurs" to the end of the first sentence of Subsection D.

**The 1991 amendment,** effective July 1, 1991, in Subsection A, added the exception at the end of the third sentence and added the last sentence.

**The 1989 amendment,** effective June 16, 1989, added "preliminary award" to the catchline; in Subsection A made a minor stylistic change in the first sentence and added all of the language of that sentence beginning with "unless", and added the second and third sentences; in Subsection B substituted "twenty thousand dollars ($20,000)" for "twelve thousand five hundred dollars ($12,500)"; in Subsection C added "Except as provided by Subsection D of this section" at the beginning of the first sentence; and added Subsection D.

## 31-22-15. Exemption from execution.

No reparation payable under the Crime Victims Reparation Act shall be, prior to its actual receipt by the victim or dependents entitled thereto or their legal representatives, assignable or subject to garnishment, execution, attachment or other process whatsoever, including process to satisfy an order or judgment for support or alimony.

**History: Laws 1981, ch. 325, § 15.**

**Cross references.** — For rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, *see* Rules 1-065.1, 2-801, and 3-801 NMRA, respectively.

For form for claim of exemptions on executions, *see* Rule 4-803 NMRA.

For form for order on claim of exemption and order to pay in execution proceedings, *see* Rule 4-804 NMRA.

For form for application for writ of garnishment and affidavit, *see* Rule 4-805 NMRA.

For form for notice of right to claim exemptions from execution, *see* Rule 4-808A NMRA.

For form for claim of exemption from garnishment, *see* Rule 4-809 NMRA.

## 31-22-16. Survival or abatement.

The rights to reparation created by the Crime Victims Reparation Act are personal and shall not survive the death of the victim or dependents entitled thereto; provided that if such death occurs after an application for reparation has been filed with the commission, the proceeding shall not abate, but may be continued by the legal representative of the decedent's estate.

**History: Laws 1981, ch. 325, § 16.**

## 31-22-17. Rule-making powers.

In performance of its functions the commission may adopt, amend and repeal rules and regulations in accordance with the State Rules Act [14-4-1 NMSA 1978], not inconsistent with the Crime Victims Reparation Act, prescribing procedures to be followed in the filing of applications and the proceedings under the Crime Victims Reparation Act and such other matters as the commission deems appropriate. Unless otherwise provided by law, no regulation affecting any person or agency outside the commission shall be adopted, amended or repealed without a public hearing on the proposed action before the commission or a hearing officer designated by them. Notice of the subject matter of the regulation,



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the action proposed to be taken, the time and place of the hearing, the manner in which interested persons may present their views and the method by which copies of the proposed regulation, proposed amendment or repeal of an existing regulation may be obtained shall be published once at least thirty days prior to the hearing date in a newspaper of general circulation and mailed at least thirty days prior to the hearing date to all persons who have made a written request for advance notice of hearing. All rules and regulations shall be filed in accordance with the State Rules Act. In filing the rule or regulation with the state records center, the commission shall certify that the record contains arguments presented both for and against each rule or regulation promulgated.

**History: Laws 1981, ch. 325, § 17.**

## 31-22-18. Confidentiality of records, reports and claim files.

Any record or report acquired by the commission, the confidentiality of which is protected by law, rule or regulation, shall be disclosed only under the same terms and conditions which protected its confidentiality prior to such acquisition. The claim file, which contains confidential reports, records and personal information, shall not be released.

**History: Laws 1981, ch. 325, § 18; 1993, ch. 207, § 7; 2001, ch. 214, § 4.**

**The 2001 amendment,** effective June 15, 2001, substituted "confidential reports, records and personal information" for "the victim's name, address, telephone number and other personal information regarding the victim" in the last sentence.

**The 1993 amendment,** effective June 18, 1993, substituted "reports and claim files" for "and reports" in the catchline and added the second sentence.

## 31-22-19. Annual report.

At least thirty days prior to the convening of each regular session of the legislature, the commission shall transmit to the governor, the department of finance and administration and the legislature a report of its activities under the Crime Victims Reparation Act. The department of finance and administration shall, within five days after the opening of the legislative session, transmit the report, together with a tabulation of the total amount awarded and the amount of any judgments collected, to the senate finance committee and to the house appropriations and finance committee or any successor committees.

**History: Laws 1981, ch. 325, § 19; 1989, ch. 246, § 8; 1993, ch. 207, § 8.**

**The 1993 amendment,** effective June 18, 1993, deleted "including a brief description of the facts in each case and the amount, if any, of reparation awarded" from the end of the first sentence.

**The 1989 amendment,** effective June 16, 1989, deleted "the name of each applicant," following "including" in the first sentence.

## 31-22-20. Penalty.

Any person who knowingly makes a false claim or a false statement in connection with a claim filed pursuant to the Crime Victims Reparation Act shall be guilty of a fourth degree felony and for conviction thereof shall:

A. be punished by imprisonment in the state penitentiary for a determinate term of not less than one year nor more than five years; or by the payment of a fine not to exceed five thousand dollars ($5,000) or both such imprisonment and fine in the discretion of the court; and

B. forfeit any reparation paid pursuant to the Crime Victims Reparation Act.

**History: Laws 1981, ch. 325, § 20.**

## 31-22-21. Crime victims reparation fund created; purposes.

A. There is created in the state treasury the "crime victims reparation fund".

B. Money in the crime victims reparation fund may be expended by the commission to:



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(1) pay any award of reparation to victims made pursuant to the Crime Victims Reparation Act;

(2) pay costs and expenses including staff salaries and expenses incurred in carrying out the provisions of the Crime Victims Reparation Act; and

(3) contract with one or more attorneys or law firms on a per hour basis to provide legal services to the commission.

C. The provisions of this section are effective July 1, 1990.

**History: Laws 1981, ch. 325, § 21; 1989, ch. 324, § 24.** **The 1989 amendment,** effective July 1, 1990, in Subsection A, inserted "in the state treasury" and deleted the former second sentence which read " The fund and any income from the fund shall be held in trust, deposited in a segregated account and invested by the department of finance and administration with the prior approval of the state board of finance".

## 31-22-22. Distribution of money received as result of crime; escrow account.

A. Every firm, person, corporation, association or other legal entity contracting with a person or the representative or assignee of any person charged or convicted of a violent crime in this state, with respect to the reenactment of the crime in a movie, book, magazine article, tape recording, phonograph record, radio or television presentation or live entertainment or with respect to the expression of the accused or convicted person's thoughts, feelings, opinions or emotions regarding the crime shall submit a copy of the contract to the crime victims reparation commission and pay to the commission any money that would otherwise by terms of such contract be owing to the accused or convicted person or his representatives. The commission shall deposit the money in an escrow account.

B. Money placed in an escrow account pursuant to this section shall be available to satisfy a civil judgment against the convicted person or the accused person, if eventually convicted of the crime, in favor of a victim of the crime if the court in which the civil judgment is taken finds that the judgment is for damages incurred by the victim caused by the commission of the crime.

C. Upon dismissal of charges or acquittal of any accused person, the commission shall immediately pay over to the accused person the money in the escrow account.

D. For purposes of this section, a person found not guilty by reason of insanity at the time of commission of an offense shall be deemed to be a convicted person.

E. Notwithstanding the provisions of Subsections A through C of this section, the commission shall make payments from the escrow account to any person accused or convicted of a crime upon the order of a court of competent jurisdiction after a showing by such person that the money shall be used for the exclusive purpose of retaining legal representation at any stage of the criminal proceedings against such person, including the appeals process.

F. Upon a showing by any accused or convicted person that five years have elapsed from the establishment of the escrow account, that any claims brought pursuant to this section have been disposed of and that no such claims are pending against him, the commission shall immediately pay over to such accused or convicted person any money in the escrow account.

G. Any action taken by any person accused or convicted of a crime, whether by way of execution of a power of attorney, creation of corporate entities or otherwise to defeat the purpose of this section, shall be null and void as against the public policy of the state.

**History: 1978 Comp., § 31-22-22, enacted by Laws 1983, ch. 321, § 1.**

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and application of "Son of Sam" laws regulating or prohibiting distribution of crime-related book, film, or comparable revenues to criminals, 60 A.L.R.4th 1210.

## 31-22-23. Authority to compel production.

The commission has the power to compel the production of books, records and papers pertinent to any investigation or hearing authorized by the Crime Victims Reparation Act and can seek



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enforcement of any subpoena so issued through the district court in the county in which the custodian of the document is located to be held in camera.

**History: 1978 Comp., § 31-22-23, enacted by Laws 1989, ch. 246, § 9.**

## 31-22-24. Repealed.

**Repeals.** — Laws 2005, ch. 208, § 27 repealed 31-22-24 NMSA 1978, as enacted by Laws 1993, ch. 207, § 10, relating to termination of the crime victims reparation commission, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 23

# Crime Victims Immunity

Sec.
31-23-1. Civil action; crime; damages; immunity.

## 31-23-1. Civil action; crime; damages; immunity.

No person shall be liable to a plaintiff in any civil action for damages if by a preponderance of the evidence the damages were incurred as a consequence of:

A. the commission, attempted commission or flight subsequent to the commission of a crime by the plaintiff; and

B. the use of force or deadly force by the defendant which is justified pursuant to common law or the law of the state.

**History: Laws 1985, ch. 152, § 1.**

# ARTICLE 24

# Crime Victims' and Witnesses' Bill of Rights

(Repealed by Laws 1994, ch. 144, § 15.)

## 31-24-1 to 31-24-7. Repealed.

**Repeals.** — Laws 1994, ch. 144, § 15 repealed 31-24-1 to 31-24-7 NMSA 1978, as enacted by Laws 1989, ch. 210, §§ 2, 3 and Laws 1987, ch. 19, §§ 1-7, relating to crime victims' and witnessess' bill of rights, effective January 1, 1995. For provisions of former sections, *see* the 1993 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 31-26-1 NMSA 1978 et seq.

# ARTICLE 25

# Victim Counselor Confidentiality

Sec.
31-25-1. Short title.
31-25-2. Definitions.
31-25-3. Confidential communications; information; privileged.
31-25-4. Waiver.
31-25-5. Interpretation.
31-25-6. Rules.



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## 31-25-1. Short title.

This act [31-25-1 to 31-25-6 NMSA 1978] may be cited as the "Victim Counselor Confidentiality Act".

**History: Laws 1987, ch. 349, § 1.**

## 31-25-2. Definitions.

As used in the Victim Counselor Confidentiality Act:

A. "confidential communication" means any information exchanged between a victim and a victim counselor in private or in the presence of a third party who is necessary to facilitate communication or further the counseling process and which is disclosed in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from a sexual assault or family violence;

B. "victim" means a person who consults a victim counselor for assistance in overcoming adverse emotional or psychological effects of a sexual assault or family violence;

C. "victim counseling" means assessment, diagnosis and treatment to alleviate the adverse emotional or psychological impact of a sexual assault or family violence on the victim. Victim counseling includes crisis intervention;

D. "victim counseling center" means a private organization or unit of a government agency which has as one of its primary purposes the treatment of victims for any emotional or psychological condition resulting from a sexual assault or family violence; and

E. "victim counselor" means any employee or supervised volunteer of a victim counseling center or other agency, business or organization that provides counseling to victims who is not affiliated with a law enforcement agency or the office of a district attorney, has successfully completed forty hours of academic or other formal victim counseling training or has had a minimum of one year of experience in providing victim counseling and whose duties include victim counseling.

**History: Laws 1987, ch. 349, § 2.**

**ANNOTATIONS**

**Exclusion of victim advocates from definition of "victim counselor"** in the Victim Counselor Confidentiality Act indicates the possibility that their work might be viewed as counseling. *State v. Blackmer*, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

## 31-25-3. Confidential communications; information; privileged.

A. A victim, a victim counselor without the consent of the victim or a minor or incapacitated victim without the consent of a custodial guardian or a guardian ad litem appointed upon application of either party shall not be compelled to provide testimony or to produce records concerning confidential communications for any purpose in any criminal action or other judicial, legislative or administrative proceeding.

B. A victim counselor or a victim shall not be compelled to provide testimony in any civil or criminal proceeding that would identify the name, address, location or telephone number of a safe house, abuse shelter or other facility that provided temporary emergency shelter to the victim of the offense or occurrence that is the subject of a judicial, legislative or administrative proceeding unless the facility is a party to the proceeding.

**History: Laws 1987, ch. 349, § 3.**

**ANNOTATIONS**

**Consistent with court rule.** — The Victim Counselor Confidentiality Act is consistent with the psychotherapist-patient privilege in Rule 11-504 NMRA and it is to be given effect. *Albuquerque Rape Crisis Center v. Blackmer*, 2005-NMSC-032, 138 N.M. 398, 120 P.3d 820.

**Law reviews.** — For note and comment, "The Unstated Tension in Albuquerque Rape Crisis Center v. Blackmer: A Divergence Between Formalism and Functionalism", see 36 N.M. L. Rev. 661 (2006).



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## 31-25-4. Waiver.

A. A victim does not waive the protections afforded by the Victim Counselor Confidentiality Act by testifying in court about the crime; provided that if the victim partially discloses the contents of a confidential communication in the course of his testimony, then either party to the action may request the court to rule that justice requires the protections of that act be waived to the extent they apply to that portion of the communication. Waiver shall apply only to the extent necessary to require any witness to respond to questions concerning the confidential communication that are relevant to the facts and circumstances of the case.

B. A victim counselor shall not have authority to waive the protections afforded to a victim under the Victim Counselor Confidentiality Act; provided that if a victim brings suit against a victim counselor or the agency, business or organization in which the victim counselor was employed or served as a volunteer at the time of the counseling relationship and the suit alleges malpractice during the counseling relationship, the victim counselor may testify or produce records regarding confidential communications with the victim without liability for those actions.

**History: Laws 1987, ch. 349, § 4.**

## 31-25-5. Interpretation.

The Victim Counselor Confidentiality Act shall not be construed to relieve a victim counselor of a duty to report suspected child abuse or neglect pursuant to Section 32-1-15 NMSA 1978 [repealed], to report any evidence that the victim is about to commit a crime or to limit any testimonial privileges available to any person pursuant to other provisions of law.

**History: Laws 1987, ch. 349, § 5.**

**Compiler's notes.** — Section 32-1-15 NMSA 1978 was repealed in 1993. For present comparable provisions, *see* 32A-4-3 NMSA 1978.

## 31-25-6. Rules.

The supreme court may adopt rules of procedure and evidence to govern and implement the provisions of the Victim Couselor [Counselor] Confidentiality Act.

**History: Laws 1987, ch. 349, § 6.**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

# ARTICLE 26

# Victims of Crime


Sec.
31-26-1. Short title.
31-26-2. Purpose of act.
31-26-3. Definitions.
31-26-4. Victim's rights.
31-26-5. Exercise of rights; requirements for victim.
31-26-6. When rights and duties take effect; termination of rights and duties.
31-26-7. Designation or appointment of victim's representative.
31-26-8. Procedures for providing victims with preliminary information; law enforcement agencies.
31-26-9. Procedures for providing victims with notice of rights and information regarding prosecution of a criminal offense; district attorneys.
31-26-10. Procedures for providing victims with notice of a court proceeding; courts; district attorneys.
31-26-10.1. Crime victim presence at court proceedings; plea agreement notification.
31-26-11. Procedures when an inmate or delinquent child escapes; corrections department; children, youth and families department.
31-26-12. Procedures when an inmate is released from incarceration; adult parole board; corrections department; procedures when a delinquent child is released from custody; juvenile parole board; children, youth and families department; district attorneys.
31-26-13. Disclaimer.
31-26-14. Effect of noncompliance.
31-26-15. Identity theft passport; database.
31-26-16. Repealed.




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## 31-26-1. Short title.

Chapter 31, Article 26 NMSA 1978 may be cited as the "Victims of Crime Act".

**History: Laws 1994, ch. 144, § 1; 2005, ch. 283, § 2.**

**The 2005 amendment,** effective June 17, 2005, added the statutory reference to the act.

**ANNOTATIONS**

**Law reviews.** — For note and comment, "Complying with Nunez: The Necessary Procedure for Obtaining Forfeiture of Property and Avoiding Double Jeopardy after State v. Esparza," see 34 N.M. L. Rev. 561 (2004).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Validity, construction, and application of state constitutional or statutory victims' bill of rights, 91 A.L.R.5th 343.

## 31-26-2. Purpose of act.

Recognizing the state's concern for victims of crime, it is the purpose of the Victims of Crime Act to assure that:

A. the full impact of a crime is brought to the attention of a court;

B. victims of violent crimes are treated with dignity, respect and sensitivity at all stages of the criminal justice process;

C. victims' rights are protected by law enforcement agencies, prosecutors and judges as vigorously as are the rights of criminal defendants; and

D. the provisions of Article 2, Section 24 of the constitution of New Mexico are implemented in statute.

**History: Laws 1994, ch. 144, § 2.**

## 31-26-3. Definitions.

As used in the Victims of Crime Act:

A. "court" means magistrate court, metropolitan court, children's court, district court, the court of appeals or the supreme court;

B. "criminal offense" means:

(1) negligent arson resulting in death or bodily injury, as provided in Subsection B of Section 30-17-5 NMSA 1978;

(2) aggravated arson, as provided in Section 30-17-6 NMSA 1978;

(3) aggravated assault, as provided in Section 30-3-2 NMSA 1978;

(4) aggravated battery, as provided in Section 30-3-5 NMSA 1978;

(5) dangerous use of explosives, as provided in Section 30-7-5 NMSA 1978;

(6) negligent use of a deadly weapon, as provided in Section 30-7-4 NMSA 1978;

(7) murder, as provided in Section 30-2-1 NMSA 1978;

(8) voluntary manslaughter, as provided in Section 30-2-3 NMSA 1978;

(9) involuntary manslaughter, as provided in Section 30-2-3 NMSA 1978;

(10) kidnapping, as provided in Section 30-4-1 NMSA 1978;

(11) criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978;

(12) criminal sexual contact of a minor, as provided in Section 30-9-13 NMSA 1978;

(13) armed robbery, as provided in Section 30-16-2 NMSA 1978;

(14) homicide by vehicle, as provided in Section 66-8-101 NMSA 1978;

(15) great bodily injury by vehicle, as provided in Section 66-8-101 NMSA 1978;

(16) abandonment or abuse of a child, as provided in Section 30-6-1 NMSA 1978;

(17) stalking or aggravated stalking, as provided in the Harassment and Stalking Act [30-3A-1 NMSA 1978];

(18) aggravated assault against a household member, as provided in Section 30-3-13 NMSA 1978;

(19) assault against a household member with intent to commit a violent felony, as provided in Section 30-3-14 NMSA 1978;



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(20) battery against a household member, as provided in Section 30-3-15 NMSA 1978; or

(21) aggravated battery against a household member, as provided in Section 30-3-16 NMSA 1978;

C. "court proceeding" means a hearing, argument or other action scheduled by and held before a court;

D. "family member" means a spouse, child, sibling, parent or grandparent;

E. "formally charged" means the filing of an indictment, the filing of a criminal information pursuant to a bind-over order, the filing of a petition or the setting of a preliminary hearing;

F. "victim" means an individual against whom a criminal offense is committed. "Victim" also means a family member or a victim's representative when the individual against whom a criminal offense was committed is a minor, is incompetent or is a homicide victim; and

G. "victim's representative" means an individual designated by a victim or appointed by the court to act in the best interests of the victim.

**History: Laws 1994, ch. 144, § 3; 1997, ch. 10, § 6; 2003, ch. 411, § 1.**

**The 2003 amendment,** effective July 1, 2003, inserted "Harassment and" in Paragraph B(17) and added Paragraphs B(18) to (21).

**The 1997 amendment,** effective July 1, 1997, inserted "negligent" and "death or" in Paragraph B(1), substituted "kidnapping" for "kidnaping" in Paragraph B(10), added Paragraph B(13) and redesignated the remaining paragraphs, and added Paragraph B(17).

ANNOTATIONS

**Victim advocates.** — Because victim advocates perform many tasks similar to those of other members of the prosecution, even if some of their duties differ, victim advocates are part of the prosecution team and the relevant rules of attorney-client confidentiality and state disclosure are applicable. *State v. Blackmer*, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

## 31-26-4. Victim's rights.

A victim shall have the right to:

A. be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process;

B. timely disposition of the case;

C. be reasonably protected from the accused throughout the criminal justice process;

D. notification of court proceedings;

E. attend all public court proceedings the accused has the right to attend;

F. confer with the prosecution;

G. make a statement to the court at sentencing and at any post-sentencing hearings for the accused;

H. restitution from the person convicted of the criminal offense that caused the victim's loss or injury;

I. information about the conviction, sentencing, imprisonment, escape or release of the accused;

J. have the prosecuting attorney notify the victim's employer, if requested by the victim, of the necessity of the victim's cooperation and testimony in a court proceeding that may necessitate the absence of the victim from work for good cause;

K. promptly receive any property belonging to the victim that is being held for evidentiary purposes by a law enforcement agency or the prosecuting attorney, unless there are compelling evidentiary reasons for retention of the victim's property;

L. be informed by the court at a sentencing proceeding that the offender is eligible to earn meritorious deductions from the offender's sentence and the amount of meritorious deductions that may be earned by the offender; and

M. be notified by the district attorney of the availability of and procedures to apply for crime victims reparation.

**History: Laws 1994, ch. 144, § 4; 1999, ch. 238, § 6; 2019, ch. 211, § 10.**

**The 2019 amendment,** effective July 1, 2019, required that victims be notified by the district attorney of the



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availability of and procedures to apply for crime victims reparation; added new Subsection M.

**The 1999 amendment,** effective July 1, 1999, added Subsection L.

**ANNOTATIONS**

**Victim impact testimony.** — The application of N.M. Const., art. II, § 24 and Subsection G of this section, granting the representatives of a murder victim the right to make a statement to the court at sentencing and at any post-sentencing hearings, does not violate ex post facto prohibitions. Nor do these provisions prevent the jury from hearing victim impact testimony. *State v. Clark*, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

The Rules of Evidence requiring relevance and the balancing of unfair prejudice also apply to testimony and exhibits that are introduced in a capital felony sentencing proceeding for the purpose of showing victim impact. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Defendant was not unfairly prejudiced by impact evidence that included a videotaped depiction of the victim prior to her death in addition to the testimony of two witnesses. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Testimony of the victim's mother regarding actions of defendant while he was awaiting trial should not have been admitted as victim impact testimony because it was not relevant to the crimes for which he was standing trial. *State v. Jacobs*, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127, *overruled on other grounds by State v. Martinez*, 2021-NMSC-002.

**Crimes committed before effective date of victim's rights laws** — The effective date of the victim's rights laws did not affect the admission of victim impact evidence in a death penalty case. States are free to admit this type of evidence following the United States supreme court's ruling in *Payne v. Tennessee*, 501 U.S. 808 (1991), and Section 31-20A-1C NMSA 1978 (repealed) and Section 31-20A-2B NMSA 1978 already provide authority for the admission of this type of evidence. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Court may consider letters or statements from non-victims when sentencing a defendant in a non-capital case. *State v. Aker*, 2005-NMCA-063, 137 N.M. 561, 113 P.3d 384, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

**Error did not warrant reversal.** — Where defense counsel claims that it was only able to review 120 of the 192 letters of the victim's unit before the sentencing hearing, and even though the state erred in submitting the letters to the court without notifying defendant, while this error may have deprived defense counsel of an opportunity to fully review the letters, the state's error does not warrant reversal because there is no evidence that defendant was prejudiced by the admission of the letters. *State v. Aker*, 2005-NMCA-063, 137 N.M. 561, 113 P.3d 384, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

**Law reviews.** — For comment, "State v. Jacobs: A Comment on One State's Choice to Restrict Victim Impact Evidence at Death Penalty Sentencing," see 31 N.M.L. Rev. 539 (2001).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Victim impact evidence in capital sentencing hearings - post-*Payne v. Tennessee*, 79 A.L.R.5th 33.

## 31-26-5. Exercise of rights; requirements for victim.

A victim may exercise his rights pursuant to the provisions of the Victims of Crime Act only if he:

A. reports the criminal offense within five days of the occurrence or discovery of the criminal offense, unless the district attorney determines that the victim had a reasonable excuse for failing to do so;

B. provides the district attorney with current and updated information regarding the victim's name, address and telephone number; and

C. fully cooperates with and fully responds to reasonable requests made by law enforcement agencies and district attorneys.

**History: Laws 1994, ch. 144, § 5.**

## 31-26-6. When rights and duties take effect; termination of rights and duties.

The rights and duties established pursuant to the provisions of the Victims of Crime Act take effect when an individual is formally charged by a district attorney for allegedly committing a criminal offense against a victim. Those rights and duties remain in effect until final disposition of the court proceedings attendant to the charged criminal offense.

**History: Laws 1994, ch. 144, § 6.**

## 31-26-7. Designation or appointment of victim's representative.

A. A victim may designate a victim's representative to exercise all rights provided to the victim pursuant to the provisions of the Victims of Crime Act. A victim may revoke his designation of a victim's representative at any time.



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B. When a victim is deceased, incompetent or unable to designate a victim's representative, the court may appoint a victim's representative for the victim. If a victim regains his competency, he may revoke the court's appointment of a victim's representative.

C. When the victim is a minor, the victim's parent or grandparent may exercise the victim's rights; provided, that when the person accused of committing the criminal offense against the victim is the parent or grandparent of the victim, the court may appoint a victim's representative for the victim.

**History: Laws 1994, ch. 144, § 7.**

## 31-26-8. Procedures for providing victims with preliminary information; law enforcement agencies.

The law enforcement agency that investigates a criminal offense shall:

A. inform the victim of medical services and crisis intervention services available to victims;

B. provide the victim with the police report number for the criminal offense and a copy of the following statement: "If within thirty days you are not notified of an arrest in your case, you may call (telephone number for the law enforcement agency) to obtain information on the status of your case."; and

C. provide the victim with the name of the district attorney for the judicial district in which the criminal offense was committed and the address and telephone number for that district attorney's office.

**History: Laws 1994, ch. 144, § 8.**

## 31-26-9. Procedures for providing victims with notice of rights and information regarding prosecution of a criminal offense; district attorneys.

A. Within seven working days after a district attorney files a formal charge against the accused for a criminal offense, the district attorney shall provide the victim of the criminal offense with:

(1) a copy of Article 2, Section 24 of the constitution of New Mexico, regarding victims' rights;

(2) a copy of the Victims of Crime Act;

(3) a copy of the charge filed against the accused for the criminal offense;

(4) a clear and concise statement of the procedural steps generally involved in prosecuting a criminal offense; and

(5) the name of a person within the district attorney's office whom the victim may contact for additional information regarding prosecution of the criminal offense.

B. The district attorney's office shall provide the victim with oral or written notice, in a timely fashion, of a scheduled court proceeding attendant to the criminal offense.

**History: Laws 1994, ch. 144, § 9; 2005, ch. 283, § 3.**

**The 2005 amendment,** effective June 17, 2005, changed the former reference to the legislation that implements the provisions of art. 11, § 24 of the N.M. Const. to the Victims of Crime Act in Subsection A(2) and deleted the phrase "if requested by the victim" in Subsection B.

## 31-26-10. Procedures for providing victims with notice of a court proceeding; courts; district attorneys.

A court shall provide a district attorney's office with oral or written notice no later than seven working days prior to a scheduled court proceeding attendant to a criminal offense, unless a shorter notice period is reasonable under the circumstances. The district attorney's office shall convey the information concerning the scheduled court proceeding to the victim, as provided in Subsection B of Section 9 [31-26-9 NMSA 1978] of the Victims of Crime Act.

**History: Laws 1994, ch. 144, § 10.**



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## 31-26-10.1. Crime victim presence at court proceedings; plea agreement notification.

A. At any scheduled court proceeding, the court shall inquire on the record whether a victim is present for the purpose of making an oral statement or submitting a written statement respecting the victim's rights enumerated in Section 31-26-4 NMSA 1978. If the victim is not present, the court shall inquire on the record whether an attempt has been made to notify the victim of the proceeding. If the district attorney cannot verify that an attempt has been made, the court shall:

(1) reschedule the hearing; or

(2) continue with the hearing but reserve ruling until the victim has been notified and given an opportunity to make a statement; and

(3) order the district attorney to notify the victim of the rescheduled hearing.

B. The provisions of this section shall not limit the district attorney's ability to exercise prosecutorial discretion on behalf of the state in a criminal case.

C. The provisions of this section shall not require the court to continue or reschedule any proceedings if it would result in a violation of a jurisdictional rule.

**History: Laws 2005, ch. 283, § 1.**

**Effective dates.** — Laws 2005, ch. 283 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

## 31-26-11. Procedures when an inmate or delinquent child escapes; corrections department; children, youth and families department.

A. The corrections department or the children, youth and families department shall immediately notify the sentencing judge or the children's court judge, the district attorney of the judicial district from which the inmate or delinquent child was committed and the probation officer who authored the presentence report when an inmate or delinquent child:

(1) escapes from a correctional facility or juvenile justice facility under the jurisdiction of the corrections department or the children, youth and families department; or

(2) convicted in New Mexico of a capital, first degree or second degree felony and transferred to a facility under the jurisdiction of another state escapes from that facility.

B. The district attorney shall immediately notify any person known to reside in his district who was a victim of the criminal or delinquent offense for which the inmate or delinquent child was committed.

**History: Laws 1994, ch. 144, § 11; 1999, ch. 103, § 1.**

**The 1999 amendment,** effective July 1, 1999, inserted "or delinquent child" and "children, youth and families department" in the catchline and throughout the section; in Subsection A inserted "or the children's court judge" in the introductory language and "or juvenile justice facility" in Paragraph (1); and inserted "or delinquent" preceding "offense" in Subsection B.

## 31-26-12. Procedures when an inmate is released from incarceration; adult parole board; corrections department; procedures when a delinquent child is released from custody; juvenile parole board; children, youth and families department; district attorneys.

A. The adult parole board and the children, youth and families department shall provide a copy of their respective regular release dockets to each district attorney in the state at least ten working days before the docket is considered. The district attorney shall notify any person known to reside in the district who was a victim of the criminal offense for which the inmate was incarcerated or the delinquent child was committed.



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B. The adult parole board or the children, youth and families department shall provide a copy of a supplemental, addendum or special docket to each district attorney at least five working days before the release docket is considered.

C. Following consideration of a release docket by the adult parole board or the children, youth and families department, the board and department shall promptly notify each district attorney of recommendations for release of an inmate from incarceration or a delinquent child from custody. The district attorney shall notify any person known to reside in the district attorney's district who was a victim of the criminal offense for which the inmate was incarcerated or the delinquent child was committed.

D. In the case of an inmate scheduled to be released from incarceration without parole or prior to parole for any reason, or a delinquent child scheduled to be released from custody, the corrections department or the children, youth and families department shall notify each district attorney at least fifteen working days before the inmate's or delinquent child's release. The district attorney shall notify any person known to reside in the district who was a victim of the criminal offense for which the inmate was incarcerated or the delinquent child was committed.

**History: Laws 1994, ch. 144, § 12; 1999, ch. 103, § 2; 2009, ch. 239, § 5.**

**The 2009 amendment,** effective July 1, 2009, in Subsections A, after "adult parole board and the", deleted "juvenile parole board" and added "children, youth and families department"; in Subsections B, after "adult parole board or the", deleted "juvenile parole board" and added "children, youth and families department"; and in Subsections C, after "adult parole board or the", deleted "juvenile parole board, each board" and added "children, youth and families department, the board and department"; after "recommendations", deleted "adopted by the board"; and after "reside in the district", added "attorney's district".

**Applicability.** — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

**The 1999 amendment,** effective July 1, 1999, inserted "adult" in the catchline and in Subsections A and B; added "procedures when a delinquent child is released from custody; juvenile parole board; children, youth and families department" to the catchline; inserted references to the juvenile parole board and "release" throughout the section; in Subsection A added the second sentence; in Subsection C added "or a delinquent child from custody" at the end of the first sentence and added "or the delinquent child was committed" at the end of the second sentence; in Subsection D in the first sentence, inserted the language beginning "or prior" and ending "from custody", inserted "or the children, youth and families department", and inserted "or delinquent child's", and at the end of the second sentence added "or the delinquent child was committed"; and made minor stylistic changes.

## 31-26-13. Disclaimer.

Nothing in the Victims of Crime Act creates a cause of action on behalf of a person against a public employer, public employee, public agency, the state or any agency responsible for the enforcement of rights or provision of services set forth in that act.

**History: Laws 1994, ch. 144, § 13.**

## 31-26-14. Effect of noncompliance.

A person accused or convicted of a crime against a victim shall have no standing to object to any failure by any person to comply with the provisions of the Victims of Crime Act.

**History: Laws 1994, ch. 144, § 14.**

## 31-26-15. Identity theft passport; database.

A. The attorney general, in cooperation with the department of public safety and the motor vehicle division of the taxation and revenue department, shall issue an identity theft passport to a person who claims to be a victim of identity theft pursuant to Section 30-16-24.1 NMSA 1978 and who provides to the attorney general:

(1) a certified copy of a court order obtained pursuant to Section 5 [31-26-16 NMSA 1978] of this 2009 act or a full set of fingerprints;

(2) a driver's license or other government-issued identification or record; and

(3) other information as required by the attorney general.



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B. An identity theft passport shall contain a picture of the person to whom it was issued and other information as the attorney general deems appropriate.

C. The attorney general may enter into a memorandum of understanding with the motor vehicle division of the taxation and revenue department for the development and issuance of a secure form of identity theft passport. When an identity theft passport is issued, the motor vehicle division shall note on the person's driver record that an identity theft passport has been issued.

D. An identify [identity] theft passport shall be accepted as evidence of identity by law enforcement officers and others who may challenge the person's identity.

E. The attorney general shall maintain a database of identity theft victims who have reported to a law enforcement agency or have been issued an identity theft passport. The attorney general may provide access to the database only to criminal justice agencies. For purposes of identification and authentication, the attorney general may allow access to specific information about a person who has become a victim of identity theft to that person or to that person's authorized representative.

F. The attorney general shall keep on file each application for an identity theft passport and each police report of identity theft submitted by a law enforcement agency.

G. The attorney general shall prepare and make available to local law enforcement agencies and to the general public an information packet that includes information on how to prevent and stop identity theft.

**History: Laws 2009, ch. 95, § 4.**

**Bracketed material.** — The bracketed word "identity" in Subsection D was inserted by the compiler to correct a typographical error and is not part of the law.

**Effective dates.** — Laws 2009, ch. 95, § 6 made Laws 2009, ch. 95, § 4 effective July 1, 2009.

## 31-26-16. Repealed.

**Repeals.** — Laws 2019, ch. 203, § 8 repealed 31-26-16 NMSA 1978, as enacted by Laws 2009, ch. 95, § 5, relating to expungement from police and court records, effective January 1, 2020. For provisions of former section, *see* the 2019 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 27

# Forfeiture

Sec.
31-27-1. Short title.
31-27-2. Purpose of act; applicability; no additional remedies.
31-27-3. Definitions.
31-27-4. Forfeiture; conviction required; seizure of property; with process; without process.
31-27-4.1. Receipt for seized property; replevin hearing.
31-27-5. Notice of intent to forfeit; service of process.
31-27-6. Forfeiture proceedings; determination; substitution of property; constitutionality; appeal.
31-27-7. Title to seized property; disposition of forfeited property and abandoned property; proceeds.
31-27-7.1. Innocent owners.
31-27-8. Safekeeping of seized property pending disposition.
31-27-9. Reporting.
31-27-10. Return of property; damages; costs.
31-27-11. Transfer of forfeitable property to the federal government.

## 31-27-1. Short title.

Chapter 31, Article 27 NMSA 1978 may be cited as the "Forfeiture Act".

**History: Laws 2002, ch. 4, § 1; 2015, ch. 152, § 1.**

**Cross references.** — For forfeitures for violations of hunting and fishing regulations, *see* 17-2-20.1 NMSA 1978.

For forfeitures under the Cultural Properties Act, *see* 18-6-9.3 NMSA 1978.

For forfeitures for offenses of shooting at or from motor vehicles, *see* 30-3-8.1 NMSA 1978.

For forfeitures for offense of unlawful possession of a handgun, *see* 30-7-2.3 NMSA 1978.

For forfeitures under the Unauthorized Recording Act, *see* 30-16B-9 NMSA 1978.



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For forfeitures under the Controlled Substances Act, *see* 30-31-35 NMSA 1978.

For forfeitures under the Imitation Controlled Substances Act, *see* 30-31A-10 NMSA 1978.

For forfeitures under the Racketeering Act, *see* 30-42-4 NMSA 1978.

For forfeitures under the Computer Crimes Act, *see* 30-45-7 NMSA 1978.

For forfeitures for crimes related to the unlawful sale of alcoholic beverages, *see* 60-7A-4.1 NMSA 1978.

For forfeitures under the Liquor Control Act, *see* 60-7A-5 NMSA 1978.

For forfeitures for crimes related to unlawful manufacture or transportation of alcoholic beverages, *see* 60-7A-6 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, changed the statutory reference of the Forfeiture Act from "Sections 1 through 8 of this act" to "Chapter 31, Article 27 NMSA 1978".

## 31-27-2. Purpose of act; applicability; no additional remedies.

A. The purposes of the Forfeiture Act are to:

(1) make uniform the standards and procedures for the seizure and forfeiture of property subject to forfeiture;

(2) protect the constitutional rights of persons whose property is subject to forfeiture and of innocent owners holding interests in property subject to forfeiture;

(3) deter criminal activity by reducing its economic incentives;

(4) increase the pecuniary loss from criminal activity;

(5) protect against the wrongful forfeiture of property; and

(6) ensure that only criminal forfeiture is allowed in this state and only pursuant to state law.

B. The Forfeiture Act:

(1) applies to all seizures, forfeitures and dispositions of property subject to forfeiture pursuant to laws that specifically apply the Forfeiture Act in this state; and

(2) does not apply to:

(a) contraband, which is subject to seizure pursuant to applicable state laws, but is not subject to forfeiture pursuant to the Forfeiture Act;

(b) animals that are subject to seizure, impoundment, alteration, permanent removal from custody or destruction for animal welfare, public health and safety or compliance and enforcement purposes pursuant to applicable state and local laws;

(c) real property or personal property that is located on that real property that is subject to destruction pursuant to state and local laws to protect public health and safety; and

(d) forfeiture that results from a lien for charges or assessments that are provided for or fixed by state or local laws.

**History: Laws 2002, ch. 4, § 2; 2015, ch. 152, § 2; 2019, ch. 133, § 1.**

**The 2019 amendment,** effective April 2, 2019, clarified that the purposes of the Forfeiture Act are to ensure that only criminal forfeiture is allowed in this state and only pursuant to state law, and revised the applicability provisions of the Forfeiture Act; in Subsection A, in Paragraph A(6), after "in this state", added "and only pursuant to state law"; and in Subsection B, in Paragraph B(1), after "applies to", added "all", after "the Forfeiture Act", added "in this state", and in Paragraph B(2), added subparagraph designation "(a)" and new Subparagraphs B(2)(b) through B(2)(d).

**Applicability.** — Laws 2019, ch. 133, § 13 provided that the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to seized and abandoned property in the possession of a law enforcement agency or the state treasurer on and after April 2, 2019.

**Temporary provisions.** — Laws 2019, ch. 133, § 11 provided that the New Mexico supreme court shall issue procedural court rules to implement the provisions of this act.

Laws 2019, ch. 133, § 12 provided that abandoned property in the possession of a law enforcement agency or the state treasurer on April 2, 2019 shall be disposed of pursuant to Section 29-1-14 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, provided for additional purposes of the Forfeiture Act; removed the reference to seizures and forfeitures pursuant to other laws consistent with the Forfeiture Act; in the catchline, added "no additional remedies"; at the end of Paragraph (1) of Subsection A, deleted "and"; in Paragraph (2) of Subsection A, after "rights of persons", deleted "accused of a crime" and added "whose property is subject to forfeiture", and after "innocent", deleted "persons" and added "owners"; added new Paragraphs (3) through (6) of Subsection A; and in Subsection B, deleted all the language in Paragraph (2) and added the new language.

**ANNOTATIONS**

**Civil forfeiture ordinance preempted by New Mexico Forfeiture Act.** — Where the City of Santa Fe (City) appealed the district court's order directing the return of claimant's car, which was seized pursuant to the City's forfeiture ordinance, which provides that a motor vehicle is declared to be a nuisance and subject to immediate forfeiture if the vehicle is operated by a person in the commission of a DWI offense or by a person whose license is suspended or revoked as a result of a DWI arrest, the New Mexico Forfeiture Act (NMFA), NMSA 1978, §§ 31-27-1 to -11, a general law that is intended to ensure that only



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criminal forfeiture is allowed in this state, expressly denies municipalities' authority to enforce civil asset forfeiture proceedings. The NMFA comprehensively addresses asset forfeiture, and because the City's civil forfeiture ordinance is at odds with the NMFA, the NMFA preempts the ordinance. *City of Santa Fe ex rel. Santa Fe Police Dep't v. 1989 Black Saab Sedan*, 2019-NMCA-028, cert. denied.

**Forfeiture of cash.** — State police officers who seize cash under the authority of the Controlled Substances Act are required to comply with the requirements of the Forfeiture Act. *Albin v. Bakas*, 2007-NMCA-076, 141 N.M. 742, 160 P.3d 923, cert. denied, 2007-NMCERT-006, 142 N.M. 16, 162 P.3d 171.

**Municipal civil forfeiture ordinance preempted by New Mexico Forfeiture Act.** — Where the city of Albuquerque (city) seized plaintiff's vehicle pursuant to the city's civil forfeiture ordinance, which provides that a motor vehicle is declared to be a nuisance and subject to immediate forfeiture if the vehicle is operated by a person in the commission of a DWI offense or by a person whose license is suspended or revoked as a result of a DWI conviction or arrest, the district court erred in dismissing plaintiff's complaint for declaratory and injunctive relief, because the New Mexico Forfeiture Act (NMFA), 31-27-1 to -11 NMSA 1978, a general law that is intended to ensure that only criminal forfeiture is allowed in this state, expressly denies home-rule municipalities' authority to enforce civil asset forfeiture proceedings. The NMFA comprehensively addresses asset forfeiture, and because the city's civil forfeiture ordinance is at odds with the NMFA, the NMFA preempts the ordinance. *Espinoza v. City of Albuquerque*, 2019-NMCA-014.

**New Mexico Forfeiture Act preempts municipal forfeiture ordinance.** — A state law preempts a local ordinance if the local ordinance interferes with the state law's objectives or purposes, and one of the New Mexico Forfeiture Act's (NMFA) stated purposes is to ensure that only criminal forfeiture is allowed in New Mexico. This purpose limiting forfeitures to criminal actions is expressly at odds with the city of Albuquerque's civil forfeiture ordinance. The NMFA also states that one of its purposes is to make uniform the standards and procedures for the seizure and forfeiture of property subject to forfeiture. The New Mexico legislature's desire for uniformity in the standards and procedures also suggests that it intends to supplant local forfeiture laws, which might have different standards and procedures. *Harjo v. City of Albuquerque*, 307 F.Supp.3d 1163 (D. N.M. 2018).

## 31-27-3. Definitions.

As used in the Forfeiture Act:

A. "abandoned property":

(1) is not subject to the provisions of Section 29-1-14 NMSA 1978;

(2) means personal property the rights to which and the control of which an owner has intentionally relinquished; and

(3) does not mean real property;

B. "actual knowledge" means a direct and clear awareness of information, a fact or a condition;

C. "contraband" means goods that may not be lawfully imported, exported or possessed, including drugs that are listed in Schedule I, II, III, IV or V of the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978] and that are possessed without a valid prescription;

D. "conveyance" means a device used for transportation and:

(1) includes a motor vehicle, trailer, snowmobile, airplane, vessel and any equipment attached to the conveyance; but

(2) does not include property that is stolen or taken in violation of a law;

E. "conviction" or "convicted" means that a person has been found guilty of a crime in a trial court whether by a plea of guilty or nolo contendere or otherwise and whether the sentence is deferred or suspended;

F. "crime" means a violation of a criminal statute for which property of the offender is subject to seizure and forfeiture;

G. "instrumentality" means all property that is otherwise lawful to possess that is used in the furtherance or commission of an offense to which forfeiture applies and includes land, a building, a container, a conveyance, equipment, materials, a product, a computer, computer software, a telecommunications device, a firearm, ammunition, a tool, money, a security and a negotiable instrument and other devices used for exchange of property;

H. "law enforcement agency" means the employer of a law enforcement officer who is authorized to seize or has seized property pursuant to the Forfeiture Act;

I. "law enforcement officer":

(1) means a state or municipal police officer, county sheriff, deputy sheriff, conservation officer, motor transportation enforcement officer or other state employee authorized by state law to enforce criminal statutes; but

(2) does not mean a correctional officer;

J. "owner" means a person who has a legal or equitable ownership interest in property;

K. "property" means tangible or intangible personal property or real property;



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L. "property subject to forfeiture" means property or an instrumentality declared to be subject to forfeiture by the Forfeiture Act or a state law outside of the Forfeiture Act; and

M. "secured party" means a person with a security or other protected interest in property, whether the interest arose by mortgage, security agreement, lien, lease or otherwise; the purpose of which interest is to secure the payment of a debt or protect a potential debt owed to the secured party.

**History: Laws 2002, ch. 4, § 3; 2015, ch. 152, § 3; 2019, ch. 133, § 2.**

**The 2019 amendment,** effective April 2, 2019, revised the definition of "abandoned property" as used in the Forfeiture Act; in Subsection A, added new Paragraph A(1) and redesignated former Paragraphs A(1) and A(2) as Paragraphs A(2) and A(3), respectively.

**Applicability.** — Laws 2019, ch. 133, § 13 provided that the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to seized and abandoned property in the possession of a law enforcement agency or the state treasurer on and after April 2, 2019.

**Temporary provisions.** — Laws 2019, ch. 133, § 11 provided that the New Mexico supreme court shall issue procedural court rules to implement the provisions of this act.

Laws 2019, ch. 133, § 12 provided that abandoned property in the possession of a law enforcement agency or the state treasurer on April 2, 2019 shall be disposed of pursuant to Section 29-1-14 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, added definitions for "abandoned property", "actual knowledge", "contraband", "conveyance", and "instrumentality" and amended certain definitions as used in the Forfeiture Act; added new Subsections A through D and redesignated former Subsections A and B as Subsections E and F, respectively; in Subsection E, after "guilty of a crime in", deleted "the" and added "a"; added new Subsection G and redesignated Subsections C through H as Subsections H through M, respectively; in Subsection H, after "law enforcement officer that", deleted "has made a seizure of" and added "is authorized to seize or has seized"; in Subsection I, after "means:", added the designation for Paragraph (1), and after "criminal statutes; but", deleted "'law enforcement officer'", added the designation for Paragraph (2), and after "does not", deleted "include" and added "mean a", and after "correctional", deleted "officers" and added "officer"; in Subsection L, after "property", added "or an instrumentality", and after "subject to forfeiture by", added "the Forfeiture Act or"; and in Subsection M, after "whether", deleted "arising" and added "the interest arose".

## 31-27-4. Forfeiture; conviction required; seizure of property; with process; without process.

A. A person's property is subject to forfeiture pursuant to state law if:

(1) the person was arrested for an offense to which forfeiture applies;

(2) the person is convicted by a criminal court of the offense; and

(3) the state establishes by clear and convincing evidence that the property is subject to forfeiture as provided in Subsection B of this section.

B. Following a person's conviction for an offense to which forfeiture applies, a court may order the person to forfeit:

(1) property the person acquired through commission of the offense;

(2) property directly traceable to property acquired through the commission of the offense; and

(3) any instrumentality the person used in the commission of the offense.

C. Nothing in this section shall prevent property from being forfeited by the terms of a plea agreement to a felony that is approved by a court or by other agreement of the parties to a criminal proceeding.

D. Subject to the provisions of Section 31-27-5 NMSA 1978, at any time, at the request of the state, a court may issue an ex parte preliminary order to seize property that is subject to forfeiture and for which forfeiture is sought and to provide for the custody of the property. The execution on the order to seize the property and the return of the property, if applicable, are subject to the Forfeiture Act and other applicable state laws. Before issuing an order pursuant to this subsection, the court shall make a determination that:

(1) there is a substantial probability that:

(a) the property is subject to forfeiture;

(b) the state will prevail on the issue of forfeiture; and

(c) failure to enter the order will result in the property being destroyed, removed from the state or otherwise made unavailable for forfeiture; and

(2) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship to the owner and other parties known to be claiming interests in the property.



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E. Property subject to forfeiture may be seized at any time, without a prior court order, if:

(1) the seizure is incident to a lawful arrest for a crime or a search lawfully conducted pursuant to a search warrant and the law enforcement officer making the arrest or executing the search has probable cause to believe the property is subject to forfeiture and that the subject of the arrest or search warrant is an owner of the property;

(2) the property subject to seizure is the subject of a previous judgment in favor of the state; or

(3) the law enforcement officer making the seizure has probable cause to believe the property is subject to forfeiture and that the delay occasioned by the need to obtain a court order would result in the removal or destruction of the property or otherwise frustrate the seizure.

**History: Laws 2002, ch. 4, § 4; 2015, ch. 152, § 4; 2019, ch. 133, § 3.**

**The 2019 amendment,** effective April 2, 2019, clarified that the purposes of the Forfeiture Act are to ensure that only criminal forfeiture is allowed in this state and only pursuant to state law, and clarified that nothing in this section prohibits forfeitures by the terms of a plea agreement to a felony that is approved by a court or by other agreement of the parties to a criminal proceeding; in Subsection A, in the introductory clause, after "subject to forfeiture", added "pursuant to state law"; and in Subsection C, after "plea agreement", added "to a felony".

**Applicability.** — Laws 2019, ch. 133, § 13 provided that the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to seized and abandoned property in the possession of a law enforcement agency or the state treasurer on and after April 2, 2019.

**Temporary provisions.** — Laws 2019, ch. 133, § 11 provided that the New Mexico supreme court shall issue procedural court rules to implement the provisions of this act.

Laws 2019, ch. 133, § 12 provided that abandoned property in the possession of a law enforcement agency or the state treasurer on April 2, 2019 shall be disposed of pursuant to Section 29-1-14 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, provided that a conviction of a criminal offense is required before property is subject to forfeiture; in the catchline, added "Forfeiture; conviction required", and "with process; without process"; at the beginning of the section, deleted "Property may be seized by a law enforcement officer:"; in former Subsection A, deleted "pursuant to an order of seizure issued by a district court based on a sworn application of a law enforcement officer from which a determination is made by the court"; added new Subsections A through C; added Subsection D with an introductory paragraph; designated Paragraphs (1) and (2) of former Subsection A as Paragraphs (1) and (2) of Subsection D; designated former Subsection B as Subsection E and added "Property subject to forfeiture may be seized at any time", after "court order, if", deleted "the property alleged to be property subject to forfeiture is not a residence or a business, when"; in Paragraph (1) of Subsection E, after "incident to", deleted "an" and added "a lawful", after "arrest for a crime", added "or", after "search", added "lawfully", after "search warrant", deleted "or an inspection conducted pursuant to an administrative inspection warrant", after "executing the search", deleted "or inspection warrant" in two places, after "believe the property", deleted "to be property" and added "is", after "subject to arrest", added "or", after "search warrant", deleted "or inspection warrant", after the semicolon, deleted "or"; added a new Paragraph (2) of Subsection E and redesignated the succeeding paragraph accordingly; and in Paragraph (3) of Subsection E, after "property is", deleted "property", and after "court order would", added "result in the removal or destruction of the property or otherwise".

## ANNOTATIONS

**Civil forfeiture ordinance preempted by New Mexico Forfeiture Act.** — Where the City of Santa Fe (City) appealed the district court's order directing the return of claimant's car, which was seized pursuant to the City's forfeiture ordinance, which provides that a motor vehicle is declared to be a nuisance and subject to immediate forfeiture if the vehicle is operated by a person in the commission of a DWI offense or by a person whose license is suspended or revoked as a result of a DWI arrest, the New Mexico Forfeiture Act (NMFA), NMSA 1978, §§ 31-27-1 to -11, a general law that is intended to ensure that only criminal forfeiture is allowed in this state, expressly denies municipalities' authority to enforce civil asset forfeiture proceedings. The NMFA comprehensively addresses asset forfeiture, and because the City's civil forfeiture ordinance is at odds with the NMFA, the NMFA preempts the ordinance. *City of Santa Fe ex rel. Santa Fe Police Dep't v. 1989 Black Saab Sedan*, 2019-NMCA-028, cert. denied.

**Municipal civil forfeiture ordinance preempted by New Mexico Forfeiture Act.** — Where the city of Albuquerque (city) seized plaintiff's vehicle pursuant to the city's civil forfeiture ordinance, which provides that a motor vehicle is declared to be a nuisance and subject to immediate forfeiture if the vehicle is operated by a person in the commission of a DWI offense or by a person whose license is suspended or revoked as a result of a DWI conviction or arrest, the district court erred in dismissing plaintiff's complaint for declaratory and injunctive relief, because the New Mexico Forfeiture Act (NMFA), 31-27-1 to -11 NMSA 1978, a general law that is intended to ensure that only criminal forfeiture is allowed in this state, expressly denies home-rule municipalities' authority to enforce civil asset forfeiture proceedings. The NMFA comprehensively addresses asset forfeiture, and because the City's civil forfeiture ordinance is at odds with the NMFA, the NMFA preempts the ordinance. *Espinoza v. City of Albuquerque*, 2019-NMCA-014.

**New Mexico Forfeiture Act preempts municipal forfeiture ordinance.** — A state law preempts a local ordinance if the local ordinance interferes with the state law's objectives or purposes, and one of the New Mexico Forfeiture Act's (NMFA) stated purposes is to ensure that only criminal forfeiture is allowed in New Mexico. This purpose limiting forfeitures to criminal actions is expressly at odds with the city of Albuquerque's civil forfeiture ordinance. The NMFA also states that one of its purposes is to make uniform the standards and procedures for the seizure and forfeiture of property subject to forfeiture. The New Mexico legislature's desire for uniformity in the standards and procedures also suggests that it intends to supplant local forfeiture laws, which might have different standards and procedures. *Harjo v. City of Albuquerque*, 307 F.Supp.3d 1163 (D. N.M. 2018).



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## 31-27-4.1. Receipt for seized property; replevin hearing.

A. When a law enforcement officer seizes property that is subject to forfeiture, the officer shall provide an itemized receipt to the person possessing the property or, in the absence of a person to whom the receipt could be given, shall leave the receipt in the place where the property was found, if possible.

B. Within five business days of the seizure, the law enforcement officer shall provide notice by personal service or first class mail to all owners of record of the seized property.

C. Following the seizure of property, the defendant in the related criminal matter or another person who claims an interest in the seized property may, at any time before the one-hundred-twentieth day following the filing of the forfeiture action in court, claim an interest in the seized property by a motion requesting the court to issue a writ of replevin. A motion filed pursuant to this section shall include facts to support the person's alleged interest in the seized property.

D. A person who makes a timely motion pursuant to this section shall have a right to a hearing on the motion before the resolution of any related criminal matter or forfeiture proceeding and within sixty days of the date on which the motion is filed.

E. At least ten days before a hearing on a motion filed pursuant to this section, the state shall file an answer or responsive motion that shows probable cause for the seizure.

F. A court shall grant a claimant's motion if the court finds that:

(1) it is likely that the final judgment will require the state to return the property to the claimant;

(2) the property is not reasonably required to be held for investigatory reasons; or

(3) the property is the only reasonable means for a defendant to pay for legal representation in a related criminal or forfeiture proceeding and the law enforcement agency did not make a prima facie showing that the property was stolen or proceeds from or is an instrumentality of a crime.

G. In its discretion, the court may order the return of funds or property sufficient for a defendant to obtain legal counsel but less than the total amount seized. If the court makes such an order, it shall require an accounting. An accounting report of reasonable legal fees held before the resolution of the relevant criminal and forfeiture proceedings shall be held in camera. If the court finds in favor of the state in both the criminal and forfeiture proceedings, the court shall:

(1) hear arguments by the parties as to what portion of the funds or property should be paid to the defendant's counsel and what portion should be forfeited; and

(2) issue an order on how the funds or property shall be distributed.

H. In lieu of ordering the issuance of a writ of replevin, a court may order:

(1) the state to give security or written assurance for satisfaction of any judgment, including damages, that may be rendered in a related forfeiture action; or

(2) any other relief the court deems to be just; provided that the relief does not prejudice an innocent owner, including a secured lienholder.

**History: 1978 Comp., § 31-27-4.1, enacted by Laws 2015, ch. 152, § 5; 2019, ch. 133, § 4.**

**The 2019 amendment,** effective April 2, 2019, revised the procedures related to forfeiture proceedings; added new Subsection B and redesignated former Subsections B through G as Subsections C through H, respectively; in Subsection C, after "at any time before", deleted "sixty days prior to a related criminal trial" and added "the one-hundred-twentieth day following the filing of the forfeiture action in court"; in Subsection D, after "forfeiture proceeding and within", deleted "thirty" and added "sixty"; in Subsection F, in Paragraph F(3), after "criminal or forfeiture proceeding", added "and the law enforcement agency did not make a prima facie showing that the property was stolen or proceeds from or is an instrumentality of a crime"; in Subsection G, in the introductory paragraph, after "property sufficient", added "for a defendant", after "total amount seized", deleted "and it may" and added "If the court makes such an order, it shall", and after "require an accounting", added the remainder of the introductory paragraph, and added new Paragraphs G(1) and G(2); and in Subsection H, in Paragraph H(2), after "deems to be just;", added "provided that the relief does not prejudice an innocent owner, including a secured lienholder".

**Applicability.** — Laws 2019, ch. 133, § 13 provided that the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to seized and abandoned property in the possession of a law enforcement agency or the state treasurer on and after April 2, 2019.

**Temporary provisions.** — Laws 2019, ch. 133, § 11 provided that the New Mexico supreme court shall issue procedural court rules to implement the provisions of this act.

Laws 2019, ch. 133, § 12 provided that abandoned property in the possession of a law enforcement agency or the state treasurer on April 2, 2019 shall be disposed of pursuant to Section 29-1-14 NMSA 1978.



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## 31-27-5. Notice of intent to forfeit; service of process.

A. Within thirty days of making a seizure of property or simultaneously upon filing a related criminal indictment, the state shall file a notice of intent to forfeit or return the property to the person from whom it was seized. The notice shall include:

(1) a description of the property seized;

(2) the date and place of seizure of the property;

(3) the name and address of the law enforcement agency making the seizure;

(4) the specific statutory and factual grounds for the seizure;

(5) whether the property was seized pursuant to an order of seizure, and if the property was seized without an order of seizure, an affidavit from a law enforcement officer stating the legal and factual grounds why an order of seizure was not required; and

(6) in the notice, the names of persons known to the state who may claim an interest in the property and the basis for each person's alleged interest.

B. The notice shall be served upon the person from whom the property was seized, the person's attorney of record and all persons known or reasonably believed by the state to claim an interest in the property. A copy of the notice shall also be published on the sunshine portal until the forfeiture proceeding is resolved.

**History: Laws 2002, ch. 4, § 5; 2015, ch. 152, § 6; 2019, ch. 133, § 5.**

**The 2019 amendment,** effective April 2, 2019, revised the notice procedures related to forfeiture proceedings; in the section heading, deleted "complaint of forfeiture" and added "Notice of intent to forfeit"; in Subsection A, in the introductory paragraph, after "the state shall file a", deleted "complaint of ancillary forfeiture proceedings" and added "notice of intent to forfeit", and after "from whom it was seized.", deleted "A complaint of ancillary forfeiture proceedings" and added "The notice", in Paragraph A(6), after "in the", deleted "complaint caption and in the complaint" and added "notice"; and in Subsection B, after "The", deleted "complaint" and added "notice", after "A copy of the", deleted "complaint" and added "notice", and after "shall also be published", deleted "at least three times in a newspaper of general circulation in the district of the court having jurisdiction or".

**Applicability.** — Laws 2019, ch. 133, § 13 provided that the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to seized and abandoned property in the possession of a law enforcement agency or the state treasurer on and after April 2, 2019.

**Temporary provisions.** — Laws 2019, ch. 133, § 11 provided that the New Mexico supreme court shall issue procedural court rules to implement the provisions of this act.

Laws 2019, ch. 133, § 12 provided that abandoned property in the possession of a law enforcement agency or the state treasurer on April 2, 2019 shall be disposed of pursuant to Section 29-1-14 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, amended the procedures for service of process on a complaint of forfeiture; in Subsection A, after "making a seizure", added "of property or simultaneously upon filing a related criminal indictment", after "file a complaint", added "ancillary", after "forfeiture", added "proceedings" in two places, and after "A complaint of", added "ancillary"; in Paragraph (5) of Subsection A, deleted "if" and added "whether", after "seizure", deleted "the sworn application of the law enforcement officer for the order"; in Paragraph (6) of Subsection A, added "in the complaint caption and in the complaint", and after "property", deleted "set forth in both the caption and in the complaint"; in Subsection B, after "property was seized", deleted "and, if that person is a criminal defendant, upon", after "attorney of record and", deleted "upon", after "shall also be published", deleted "no less than" and added "at least", and after "jurisdiction", added "or on the sunshine portal until the forfeiture proceeding is resolved".

### ANNOTATIONS

**Triggering event under former 31-27-5(A) NMSA 1978.** — Under 31-27-5(A) NMSA 1978 (2002), the state was required to file a forfeiture complaint within thirty days of making a seizure, that is, within thirty days of when the state first interfered with a person's possessory interests in his or her property. *State v. Benally*, 2016-NMSC-010, *aff'g* 2015-NMCA-053, 348 P.3d 1039.

Where law enforcement officers seized, impounded and sealed a vehicle belonging to defendant, officers "seized" the vehicle and also made a seizure of the contents of the vehicle because it deprived defendant of his possessory interests in them; where officers filed a forfeiture complaint thirty-four days after seizing defendant's property, but within thirty days of discovering a large amount of currency in defendant's vehicle, the forfeiture complaint was untimely because the state, under the former version of the statute, was required to file the forfeiture complaint within thirty days of when the state first interfered with defendant's property interests in the contents of the vehicle, including the money subject to the forfeiture complaint. *State v. Benally*, 2016-NMSC-010, *aff'g* 2015-NMCA-053, 348 P.3d 1039.

**Triggering event for 30-day time limit.** — The legislature intended forfeiture complaints to be filed within thirty days of the date the state takes possession of the subject property, rather than when the property subject to forfeiture may have been discovered. *State v. Benally*, 2015-NMCA-053, cert. granted, 2015-NMCERT-005.

Where officers impounded defendant's vehicle, searched the vehicle six days later and discovered certain property subject to forfeiture, filed a complaint for forfeiture 28 days after discovering the subject property, but 34 days after seizing the vehicle which contained the subject property, the court of appeals held that because the officers meaningfully interfered with defendant's possessory interests, the impoundment of the vehicle was a seizure of the vehicle, and the contents of the vehicle were also seized by virtue of being in the impounded vehicle, and therefore the thirty-day time limit began to run when the officers impounded defendant's car and its contents, rather than when the subject property was discovered, the state failed to file a complaint for forfeiture within thirty days of the seizure and the district court properly dismissed the forfeiture action. *State v. Benally*, 2015-NMCA-053, cert. granted, 2015-NMCERT-005.



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## 31-27-6. Forfeiture proceedings; determination; substitution of property; constitutionality; appeal.

A. A person who claims an interest in seized property shall file a response within thirty days of the date of service of the notice of intent to forfeit. The response shall include facts to support the claimant's alleged interest in the property.

B. The district courts have jurisdiction over forfeiture proceedings, and venue for a forfeiture proceeding is in the same court in which venue lies for the criminal matter related to the seized property.

C. The forfeiture proceeding shall begin after the conclusion of the trial for the related criminal matter in an ancillary proceeding that relates to a defendant's property before the same judge and jury, if applicable, and the court, and the jury, if applicable, may consider the forfeiture of property seized from other persons at the same time or in a later proceeding. If the criminal defendant in the related criminal matter is represented by the public defender department, the chief public defender or the district public defender may authorize department representation of the defendant in the forfeiture proceeding.

D. Discovery conducted in an ancillary forfeiture proceeding is subject to the rules of criminal procedure.

E. An ancillary forfeiture proceeding that relates to the forfeiture of property valued at less than twenty thousand dollars ($20,000) shall be held before a judge only.

F. If the state fails to prove, by clear and convincing evidence, that a person whose property is alleged to be subject to forfeiture is an owner of the property:

(1) the forfeiture proceeding shall be dismissed and the property shall be delivered to the owner, unless the owner's possession of the property is illegal; and

(2) the owner shall not be subject to any charges by the state for storage of the property or expenses incurred in the preservation of the property.

G. The court shall enter a judgment of forfeiture and the seized property shall be forfeited to the state if the state proves by clear and convincing evidence that:

(1) the seized property is subject to forfeiture;

(2) the criminal prosecution of the owner of the seized property resulted in a conviction; and

(3) the value of the property to be forfeited does not unreasonably exceed:

(a) the pecuniary gain derived or sought to be derived by the crime;

(b) the pecuniary loss caused or sought to be caused by the crime; or

(c) the value of the convicted owner's interest in the property.

H. A court shall not accept a plea agreement or other arrangement by which a defendant contributes or donates property to a person, charity or other organization in full or partial fulfillment of responsibility established in the court's proceeding.

I. Following a person's conviction, the state may make a motion for forfeiture of substitute property owned by the person that is equal to but does not exceed the value of the property that is subject to forfeiture but that the state is unable to seize. The court shall order the forfeiture of substitute property only if the state proves by a preponderance of the evidence that the person intentionally transferred, sold or deposited property with a third party to avoid the court's jurisdiction and the forfeiture of the property.

J. A person is not jointly and severally liable for orders for forfeiture of another person's property. When ownership of property is unclear, a court may order each person to forfeit the person's property on a pro rata basis or by another means the court deems equitable.

K. Within the time period for filing an appeal following the conclusion of a forfeiture proceeding, the person whose property was forfeited may petition the court to determine whether the forfeiture was unconstitutionally excessive pursuant to the state or federal constitution.

L. At a non-jury hearing on the petition, the petitioner has the burden of establishing by a preponderance of the evidence that the forfeiture was grossly disproportional to the seriousness of the criminal offense for which the person was convicted.

M. In determining whether the forfeiture is unconstitutionally excessive, the court may consider all relevant factors, including:



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(1) the seriousness of the criminal offense and its impact on the community, the duration of the criminal activity and the harm caused by the defendant;

(2) the extent to which the defendant participated in the offense;

(3) the extent to which the property was used in committing the offense;

(4) the sentence imposed for the commission of the crime that relates to the property that is subject to forfeiture; and

(5) whether the criminal offense was completed or attempted.

N. In determining the value of the property subject to forfeiture, the court may consider relevant factors, including the fair market value of the property and the hardship from the loss of a primary residence, motor vehicle or other property to the defendant's family members or others if the property is forfeited, in addition to any non-monetary intrinsic value of property that would cause the defendant to suffer if the forfeiture is realized.

O. The court shall not consider the value of the property to the state when it determines whether the forfeiture of the property is constitutionally excessive.

P. A party to a forfeiture proceeding may appeal a district court's decision regarding the seizure, forfeiture and distribution of property.

**History: Laws 2002, ch. 4, § 6; 2015, ch. 152, § 7; 2019, ch. 133, § 6.**

**The 2019 amendment,** effective April 2, 2019, revised procedures related to forfeiture proceedings; in Subsection A, after "shall file", deleted "an answer to the complaint of forfeiture" and added "a response", after "date of service of the", deleted "complaint" and added "notice of intent to forfeit", and after "The", deleted "answer" and added "response"; in Subsection G, in Paragraph G(1), after "the", added "seized"; in Subsection K, after the subsection designation, deleted "At any time" and added "Within the time period for filing an appeal"; in Subsection N, deleted paragraph designation "(1)", deleted former Paragraph N(2) and deleted paragraph designation "(3)", and after "if the property is forfeited,", added "in addition to any non-monetary intrinsic value of property that would cause the defendant to suffer if the forfeiture is realized"; and in Subsection P, after "distribution of property", deleted "pursuant to the Forfeiture Act".

**Applicability.** — Laws 2019, ch. 133, § 13 provided that the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to seized and abandoned property in the possession of a law enforcement agency or the state treasurer on and after April 2, 2019.

**Temporary provisions.** — Laws 2019, ch. 133, § 11 provided that the New Mexico supreme court shall issue procedural court rules to implement the provisions of this act.

Laws 2019, ch. 133, § 12 provided that abandoned property in the possession of a law enforcement agency or the state treasurer on April 2, 2019 shall be disposed of pursuant to Section 29-1-14 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, amended the procedures in forfeiture proceedings; in the catchline, deleted "Court hearing and" and added "forfeiture proceedings" and "substitution of property; constitutionality; appeal"; in Subsection A, added "A person who", after "claims", deleted "to the" and added "an interest in seized", after "property shall", deleted "be filed by way of" and added "file an", after "complaint of forfeiture", deleted "and shall be filed", and added the last sentence; in Subsection B, after "criminal matter", deleted "for which" and added "related to", after "the", added "seized", and after "property", deleted "is alleged to be subject to forfeiture"; in Subsection C, after "proceeding shall", deleted "be brought in the same proceeding as the criminal matter and presented to the same trier of fact; provided" and deleted Paragraphs (1) and (2) and the paragraph designation for Paragraph (3), added "begin after the conclusion of the trial for the related criminal matter in an ancillary proceeding that relates to a defendant's property before the same judge and jury, if applicable, and the court, and the jury, if applicable, may consider the forfeiture of property seized from other persons at the same time or in a later proceeding", and after "If the criminal defendant", added "in the related criminal matter"; added new Subsections D and E and redesignated former Subsections D and E as Subsections F and G, respectively; in Subsection F, after "evidence, that", deleted "the" and added "a", after "person", deleted "charged with the crime for which the" and added "whose", after "alleged to be", deleted "property, and after "subject to forfeiture is", deleted "the" and added "an"; in Paragraph (1) of Subsection F, after "unless", added "the owner's"; in Subsection G, after "forfeiture and the", added "seized"; in Paragraph (2) of Subsection G, after "owner", deleted "has" and added "of the seized property"; and added new Subsections H through P.

## 31-27-7. Title to seized property; disposition of forfeited property and abandoned property; proceeds.

A. The state acquires provisional title to seized property at the time the property was used or acquired in connection with an offense that subjects the property to forfeiture. Provisional title authorizes the state to hold and protect the property. Title to the property shall vest with the state when a trier of fact renders a final forfeiture verdict and the title relates back to the time when the state acquired provisional title; provided that the title is not subject to claims by third parties that are adjudicated pursuant to the Forfeiture Act.

B. Unless possession of the property is illegal or a different disposition is specifically provided for by law and except as provided in this section, forfeited property that is not currency shall be



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delivered along with any abandoned property to the state treasurer or the state treasurer's designee for disposition at a public auction. Forfeited currency and all proceeds of the sale of forfeited or abandoned property shall be distributed by the state treasurer as follows:

(1) first, to reimburse the reasonable expenses related to the storage, protection and transfer of the property incurred by a law enforcement agency or the state treasurer;

(2) second, to pay any reasonable expenses incurred to dispose of the property by a law enforcement agency or the state treasurer; and

(3) third, any remaining balance shall be deposited in the general fund.

C. Proceeds from the sale of forfeited property received by the state from another jurisdiction shall be deposited in the general fund.

D. A law enforcement agency or public body that receives reimbursement pursuant to Subsection B of this section shall inform the state auditor of that fact at the time of the agency's or body's annual audit.

E. A forfeited property interest is subject to the interest of a secured party unless, in the forfeiture proceeding, the state proves by clear and convincing evidence that the secured party had actual knowledge of the crime that relates to the seizure of the property.

F. Abandoned property shall be disposed of in the same manner as provided in Subsection B of this section.

G. Property subject to forfeiture that is in a law enforcement agency's possession becomes abandoned property and may be disposed of as such without a conviction if:

(1) there is no innocent owner; and

(2) the criminal prosecution of the owner of the seized property cannot proceed because for a period in excess of one year and one day:

(a) a bench warrant has been pending as a result of the defendant failing to appear; or

(b) the owner fugitates.

**History: Laws 2002, ch. 4, § 7; 2015, ch. 152, § 8; 2019, ch. 133, § 7.**

**The 2019 amendment,** effective April 2, 2019, included abandoned property in the provisions related to the disposition of forfeited property, provided the order in which the proceeds of the sale of forfeited or abandoned property shall be distributed, and required law enforcement agencies that receive proceeds from the sale of forfeited or abandoned property to provide this information to the state auditor; in the section heading, after "forfeited property and", added "abandoned property"; in Subsection B, in the introductory paragraph, after "state treasurer", added "or the state treasurer's designee", and after "property shall be", added "distributed by the state treasurer as follows:", added new Paragraphs B(1) and B(2) and new paragraph designation "(3)", in Paragraph B(3), after the paragraph designation, added "third, any remaining balance shall be"; added new Subsection D and redesignated former Subsection D as Subsection E; in Subsection E, after "A", added "forfeited", and after "property interest", deleted "forfeited to the state pursuant to the Forfeiture Act"; and added new Subsections F and G.

**Applicability.** — Laws 2019, ch. 133, § 13 provided that the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to seized and abandoned property in the possession of a law enforcement agency or the state treasurer on and after April 2, 2019.

**Temporary provisions.** — Laws 2019, ch. 133, § 11 provided that the New Mexico supreme court shall issue procedural court rules to implement the provisions of this act.

Laws 2019, ch. 133, § 12 provided that abandoned property in the possession of a law enforcement agency or the state treasurer on April 2, 2019 shall be disposed of pursuant to Section 29-1-14 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, amended the provisions relating to title of seized property; in the catchline, added "Title to seized property", and "and proceeds"; added a new Subsection A and redesignated former Subsection A as Subsection B; in new Subsection B, after "provided in", deleted "Subsection C of", after "forfeited property", deleted "if it" and added "that", after "currency shall be", deleted "sold at public sale by the law enforcement agency in possession of the property" and added "delivered along with any abandoned property to the state treasurer for disposition at a public auction", after "sale or forfeited", added "or abandoned", and after "property shall be", deleted "distributed", and deleted Paragraphs (1) through (3); added a new Subsection C and redesignated former Subsection B as Subsection D; in new Subsection D, deleted "Any" and added "A", after "forfeited to the state", deleted "and disposed of", after "unless", deleted "at" and added "in", after "secured party", deleted "knew or should have known" and added "had actual knowledge", and after "crime", added "that relates to the seizure of the property"; and deleted former Subsections C and D.

## 31-27-7.1. Innocent owners.

A. The property of an innocent owner, as provided in this section, shall not be forfeited.

B. A person who claims to be an innocent owner has the burden of production to show that the person:



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(1) holds a legal right, title or interest in the property seized; and

(2) held an ownership interest in the seized property at the time the illegal conduct that gave rise to the seizure of the property occurred or was a bona fide purchaser for fair value.

C. The state shall immediately return property to an established innocent owner who has an interest in homesteaded property, a motor vehicle valued at less than ten thousand dollars ($10,000) or a conveyance that is encumbered by a security interest that was perfected pursuant to state law or that is subject to a lease or rental agreement, unless the secured party or lessor had actual knowledge of the criminal act upon which the forfeiture was based.

D. If a person establishes that the person is an innocent owner pursuant to Subsection B of this section and the state pursues a forfeiture proceeding with respect to that person's property, other than property described in Subsection D of Section 31-27-7 NMSA 1978, to successfully forfeit the property, the state shall prove by clear and convincing evidence that the innocent owner had actual knowledge of the underlying crime giving rise to the forfeiture.

E. A person who acquired an ownership interest in property subject to forfeiture after the commission of a crime that gave rise to the forfeiture and who claims to be an innocent owner has the burden of production to show that the person has legal right, title or interest in the property seized under this section.

F. If a person establishes that the person is an innocent owner as provided in Subsection B of this section and the state pursues a forfeiture proceeding against the person's property, to successfully forfeit the property, the state shall prove by clear and convincing evidence that at the time the person acquired the property or an interest in the property, the person:

(1) had actual knowledge that the property was subject to forfeiture; or

(2) was not a bona fide purchaser who was without notice of any defect in title and who gave valuable consideration.

G. If the state fails to meet its burdens as provided in Subsections C and D of this section, the court shall find that the person is an innocent owner and shall order the state to relinquish all claims of title to the innocent owner's property without delay and the property shall be released without assessment of fees or costs.

H. Seized property that is firearms, ammunition or explosives subject to forfeiture under the protections of this section and that is not returned to an innocent owner shall be destroyed upon a motion by the law enforcement agency and an order of the court.

**History: 1978 Comp., § 31-27-7.1, enacted by Laws 2015, ch. 152, § 9; 2019, ch. 133, § 8.**

**The 2019 amendment,** effective April 2, 2019, revised the procedures related to seized firearms, ammunition or explosives subject to forfeiture and that are not returned to an innocent owner; in Subsection F, after "the person acquired the property", added "or an interest in the property"; in Subsection G, after "innocent owner's property", added "without delay and the property shall be released without assessment of fees or costs"; and added new Subsection H.

**Applicability.** — Laws 2019, ch. 133, § 13 provided that the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to seized and abandoned property in the possession of a law enforcement agency or the state treasurer on and after April 2, 2019.

**Temporary provisions.** — Laws 2019, ch. 133, § 11 provided that the New Mexico supreme court shall issue procedural court rules to implement the provisions of this act.

Laws 2019, ch. 133, § 12 provided that abandoned property in the possession of a law enforcement agency or the state treasurer on April 2, 2019 shall be disposed of pursuant to Section 29-1-14 NMSA 1978.

## 31-27-8. Safekeeping of seized property pending disposition.

With regard to seized property in the state courts:

A. seized currency alleged to be subject to forfeiture shall be deposited with the clerk of the district court in an interest-bearing account;

B. seized property other than currency or real property, not required by federal or state law to be destroyed, shall be placed under seal at a place designated by the district court;

C. seized property shall be kept by the custodian in a manner to protect it from theft or damage and, if ordered by the district court, insured against those risks; and

D. unless it is returned to an owner, a law enforcement agency shall dispose of forfeited or abandoned property as provided in Section 31-27-7 NMSA 1978.



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**History: Laws 2002, ch. 4, § 8; 2015, ch. 152, § 10; 2019, ch. 133, § 9.**

**The 2019 amendment,** effective April 2, 2019, revised the procedures related to storage, transfer and destruction of seized property; in the section heading, after "disposition", deleted "selling or retaining seized property prohibited"; after the section heading, added "With regard to seized property in the state courts:"; in Subsection B, deleted paragraph designations "(1)" and "(2)", after "placed under seal", deleted "and removed to" and added "at", and deleted Paragraph B(3); and in Subsection D, after the subsection designation, added "unless it is returned to an owner", after "law enforcement agency shall", deleted "not retain" and added "dispose of", and after "abandoned property", added "as provided in Section 31-27-7 NMSA 1978".

**Applicability.** — Laws 2019, ch. 133, § 13 provided that the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to seized and abandoned property in the possession of a law enforcement agency or the state treasurer on and after April 2, 2019.

**Temporary provisions.** — Laws 2019, ch. 133, § 11 provided that the New Mexico supreme court shall issue procedural court rules to implement the provisions of this act.

Laws 2019, ch. 133, § 12 provided that abandoned property in the possession of a law enforcement agency or the state treasurer on April 2, 2019 shall be disposed of pursuant to Section 29-1-14 NMSA 1978.

**The 2015 amendment,** effective July 1, 2015, prohibited a law enforcement agency from retaining forfeited or abandoned property; in the catchline, added "selling or retaining seized property prohibited"; in Subsection C, added "Seized"; and added Subsection D.

## 31-27-9. Reporting.

A. Within sixty days following the conclusion of each fiscal year, every law enforcement agency shall prepare on a form approved by the department of public safety an annual report of the agency's seizures and forfeitures conducted pursuant to applicable state law, and seizures and forfeitures conducted pursuant to federal forfeiture law, and the report shall include:

(1) the total number of seizures of currency and the total amount of currency seized in each seizure;

(2) the total number of seizures of property and the number and types of items seized in each seizure;

(3) the market value of each item of property seized;

(4) the total number of occurrences of each class of crime that resulted in the agency's seizure of property;

(5) the costs incurred by the agency for storage, maintenance and transportation of seized property; and

(6) any proceeds received through equitable sharing, along with the federal case number and the final disposition of the case.

B. A law enforcement agency shall submit its annual reports to the department of public safety and to the district attorney's office in the agency's district. An agency that did not engage in seizure or forfeiture pursuant to the Forfeiture Act or local, state or federal forfeiture law shall report that fact in its annual report.

C. The department of public safety shall compile the reports submitted by each law enforcement agency and issue an aggregate report of all forfeitures in the state.

D. By November 1 of each year, the department of public safety shall publish on its website the department's aggregate report and individual law enforcement agency reports submitted for the previous fiscal year.

**History: Laws 2015, ch. 152, § 11; 2019, ch. 133, § 10.**

**The 2019 amendment,** effective April 2, 2019, revised the reporting requirements related to an agency's seizures and forfeitures conducted pursuant to state law; in Subsection A, in the introductory clause, after the subsection designation, added "Within sixty days following the conclusion of each fiscal year", after "shall prepare", added "on a form approved by the department of public safety", and after "pursuant to", deleted "the Forfeiture Act" and added "applicable state law", and added new Paragraphs A(5) and A(6); in Subsection B, after "Forfeiture Act", added "or local, state"; and in Subsection D, after "By", deleted "April" and added "November", and after "submitted for the previous", added "fiscal".

**Applicability.** — Laws 2019, ch. 133, § 13 provided that the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to seized and abandoned property in the possession of a law enforcement agency or the state treasurer on and after April 2, 2019.

**Temporary provisions.** — Laws 2019, ch. 133, § 11 provided that the New Mexico supreme court shall issue procedural court rules to implement the provisions of this act.

Laws 2019, ch. 133, § 12 provided that abandoned property in the possession of a law enforcement agency or the state treasurer on April 2, 2019 shall be disposed of pursuant to Section 29-1-14 NMSA 1978.



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## 31-27-10. Return of property; damages; costs.

A. A law enforcement agency that holds seized property shall return the seized property to the owner of the property within a reasonable period of time that does not exceed five days after:

(1) a court finds that a person had a bona fide security interest in the property;

(2) a court finds that the owner was an innocent owner;

(3) the acquittal of or dismissal of related criminal charges against the owner of the property; or

(4) the disposal of the criminal charge that was the basis of the forfeiture proceedings by nolle prosequi.

B. A law enforcement agency that holds seized property is responsible for any damages, storage fees and related costs applicable to property that is returned to an owner pursuant to this section.

**History: Laws 2015, ch. 152, § 12.**

**Effective dates.** — Laws 2015, ch. 152, § 21 made Laws 2015, ch. 152, § 12 effective July 1, 2015.

## 31-27-11. Transfer of forfeitable property to the federal government.

A. A law enforcement agency shall not directly or indirectly transfer seized property to a federal law enforcement authority or other federal agency unless:

(1) the value of the seized property exceeds fifty thousand dollars ($50,000), excluding the potential value of the sale of contraband; and

(2) the law enforcement agency determines that the criminal conduct that gave rise to the seizure is interstate in nature and sufficiently complex to justify the transfer of the property; or

(3) the seized property may only be forfeited under federal law.

B. The law enforcement agency shall not transfer property to the federal government if the transfer would circumvent the protections of the Forfeiture Act that would otherwise be available to a putative interest holder in the property.

**History: Laws 2015, ch. 152, § 13.**

**Effective dates.** — Laws 2015, ch. 152, § 21 made Laws 2015, ch. 152, § 13 effective July 1, 2015.

# ARTICLE 28

# Crime Reduction Grant

Sec.
31-28-1. Short title.
31-28-2. Definitions.
31-28-3. Criminal justice coordinating councils created; composition; duties.
31-28-4. Applications for grants; purposes; conditions.
31-28-5. Rules.
31-28-6. Reports.

## 31-28-1. Short title.

Chapter 31, Article 28 NMSA 1978 may be cited as the "Crime Reduction Grant Act".

**History: Laws 2019, ch. 192, § 5; 2022, ch. 56, § 31.**

**The 2022 amendment,** effective May 18, 2022, changed "Section 5 through 10 of this act" to "Chapter 31, Article 28 NMSA 1978".

## 31-28-2. Definitions.

As used in the Crime Reduction Grant Act:

A. "commission" means the New Mexico sentencing commission; and



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B. "grant administration agency" means a state agency that receives appropriations for grants to criminal justice coordinating council members for the purposes specified in the Crime Reduction Grant Act.

**History: Laws 2019, ch. 192, § 6.** **Effective dates.** — Laws 2019, ch. 192, § 11 made Laws 2019, ch. 192, § 6 effective July 1, 2019.

## 31-28-3. Criminal justice coordinating councils created; composition; duties.

A. A criminal justice coordinating council is created for each judicial district and may include representation from within the district for:

(1) each court in the district;
(2) the district attorney;
(3) the district public defender office;
(4) law enforcement agencies;
(5) jails;
(6) correctional facilities;
(7) behavioral health programs; or
(8) other agencies and entities agreed upon by the council.

B. Each criminal justice coordinating council shall be convened by the chief judge of the district court in the judicial district.

C. Each criminal justice coordinating council shall select a chair at its first meeting. The first meeting of each council shall take place by August 1, 2019, and the council shall subsequently meet at the call of the chair, but not less than ten months per year.

D. Each criminal justice coordinating council shall organize itself and adopt rules in a manner appropriate to accomplish its duties pursuant to the Crime Reduction Grant Act.

E. A criminal justice coordinating council shall, to the extent possible, develop a strategic plan to meet the requirements of this section and shall:

(1) review the criminal justice system in the judicial district, including judicial processes, law enforcement, community corrections alternatives and sufficiency of jail and detention facilities;

(2) identify criminal justice system problems in the judicial district;

(3) develop data-driven policies and evidence-based best practices designed to improve public safety outcomes, cost-effective responses to crime and fair and efficient adjudication processes;

(4) apply as necessary to grant administration agencies for crime reduction grants pursuant to the Crime Reduction Grant Act;

(5) facilitate sharing of criminal justice information between agencies as permitted by law; and

(6) in consultation with the commission, develop data-sharing agreements and methods of data sharing to allow system-wide analysis of criminal justice operations within the judicial district and throughout the state.

F. Executive agencies and the administrative office of the courts shall provide prompt responses to criminal justice coordinating council requests for information.

**History: Laws 2019, ch. 192, § 7.** **Effective dates.** — Laws 2019, ch. 192, § 11 made Laws 2019, ch. 192, § 7 effective July 1, 2019.

## 31-28-4. Applications for grants; purposes; conditions.

A. A member of a criminal justice coordinating council with the consent of the council may apply to a grant administration agency for a grant to accomplish any of the enumerated purposes provided in Subsection B of this section.



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B. Crime reduction grants may be made to:

(1) develop, expand and improve evidence-based treatment and supervision alternatives to incarceration;

(2) reduce barriers to participation by criminal offenders in preprosecution diversion or specialty court programs;

(3) develop or improve pretrial service programs;

(4) develop or improve coordination of services between law enforcement agencies and treatment programs;

(5) establish law enforcement crisis intervention teams;

(6) coordinate access to programs for transitional or reentry homes for individuals recently released from incarceration;

(7) recruit or retain law enforcement officers, prosecutors, public defenders, corrections officers and mental health workers;

(8) develop or expand data-driven policing programs and pretrial services;

(9) staff a criminal justice coordinating council; and

(10) purchase equipment or provide training to support any of the purposes provided in this section.

C. Crime reduction grants shall be conditioned on the criminal justice coordinating council and the recipient member complying with the following:

(1) using not more than five percent of a grant for administrative costs of the recipient;

(2) in consultation with the commission, developing data-sharing agreements and methods of data sharing among criminal justice agencies and with the commission to allow systemwide analysis of criminal justice operations within the judicial district and statewide;

(3) using or developing evidence-based best practices for any programs operated with crime reduction grants;

(4) developing performance measures in consultation with the commission and the grant administration agency relevant to the grantee's application;

(5) collecting data to evaluate the effectiveness of programs operated with crime reduction grants;

(6) evaluating quarterly the process, outputs, outcomes and other performance measures of programs funded with grants for compliance with all provisions of the Crime Reduction Grant Act;

(7) providing a quarterly report to the commission for review and comparison with other programs receiving grants for similar purposes; and

(8) providing an annual report to the grant administration agency by October 1 of each year regarding program outcomes from use of the grant.

D. The commission shall assist with the implementation of data-sharing agreements to ensure compliance with crime reduction grants.

E. Each grant administration agency shall identify and require the use or development of evidence-based best practices for programs operated with crime reduction grants distributed by that grant administration agency.

F. A grant administration agency may consider any outcome reported to it by a grant recipient from a previous year in making a determination of whether to make subsequent grants or the amount of a subsequent grant.

**History: Laws 2019, ch. 192, § 8; 2022, ch. 56, § 32.**

**The 2022 amendment,** effective May 18, 2022, expanded the purposes for which crime reduction grants may be awarded; and in Subsection B, added new Paragraphs B(4) through B(9) and redesignated former Paragraph B(4) as Paragraph B(10).

## 31-28-5. Rules.

The New Mexico sentencing commission, in consultation with each grant administration agency, shall promulgate uniform procedural rules necessary to administer the provisions of the Crime Reduction Grant Act. Each grant administration agency shall adopt the uniform procedures along with other grant award criteria unique to the grant administration agency.



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**History: Laws 2019, ch. 192, § 9.** **Effective dates.** — Laws 2019, ch. 192, § 11 made Laws 2019, ch. 192, § 9 effective July 1, 2019.

## 31-28-6. Reports.

A. Each grant administration agency shall report to the commission annually by November 1 of each year regarding the:

(1) applications for grants made during the previous fiscal year by each criminal justice coordinating council;

(2) purpose and amount of each grant approved by the grant administration agency for each member for the previous fiscal year; and

(3) processes, outputs and outcomes resulting from the use of the grant.

B. The commission shall report to the legislature annually by December 1 of each year regarding the data-sharing network, including data derived from crime reduction grant data-sharing agreements.

**History: Laws 2019, ch. 192, § 10.** **Effective dates.** — Laws 2019, ch. 192, § 11 made Laws 2019, ch. 192, § 10 effective July 1, 2019.

# ARTICLE 29

# Uniform Collateral Consequences of Conviction

Sec.
31-29-1. Short title.
31-29-2. Definitions.
31-29-3. Limitation on scope.
31-29-4. Identification, collection and publication of laws regarding collateral consequences.
31-29-5. Notice of collateral consequences in pretrial proceeding and at guilty plea.
31-29-6. Notice of collateral consequences at sentencing and upon release.
31-29-7. Authorization required for sanction; ambiguity.
31-29-8. Decision to disqualify.
31-29-9. Effect of conviction by another state or the united states; relieved or pardoned conviction.
31-29-10. Order of limited relief.
31-29-11. Collateral sanctions not subject to order of limited relief.
31-29-12. Issuance of order of limited relief.
31-29-13. Reliance on order as evidence of due care.
31-29-14. Victim's rights.
31-29-15. Uniformity of application and construction.
31-29-16. Saving and transitional provisions.

## 31-29-1. Short title.

This act [31-29-1 to 31-29-16 NMSA 1978] may be cited as the "Uniform Collateral Consequences of Conviction Act".

**History: Laws 2021, ch. 58, § 1.** **Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 1 effective January 1, 2022.

## 31-29-2. Definitions.

As used in the Uniform Collateral Consequences of Conviction Act:

A. "collateral consequence" means a collateral sanction or a disqualification;

B. "collateral sanction" means a penalty, disability or disadvantage, however denominated, imposed on an individual as a result of the individual's conviction of an offense that applies by operation of law, whether or not the penalty, disability or disadvantage is included in the judgment or sentence. "Collateral sanction" does not include imprisonment, probation, parole, supervised release, forfeiture, restitution, fine, assessment or costs of prosecution;

C. "convicted" and "conviction" include an adjudication as a youthful offender or serious youthful offender that results in an adult sentence;

D. "decision-maker" means the state acting through the following entities or their employees:

(1) a department;



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(2) an agency;

(3) an officer; or

(4) an instrumentality, including a political subdivision, an educational institution, a board or a commission or a government contractor, including a subcontractor, made subject to the Uniform Collateral Consequences of Conviction Act by contract, by law other than the Uniform Collateral Consequences of Conviction Act or by ordinance;

E. "disqualification" means a penalty, disability or disadvantage, however denominated, that an administrative agency, governmental official or court in a civil proceeding is authorized, but not required, to impose on an individual on grounds relating to the individual's conviction of an offense;

F. "identification agency" means the New Mexico sentencing commission, acting in conjunction with the district attorneys of New Mexico and the attorney general;

G. "offense" means a felony pursuant to the law of New Mexico, another state or the United States;

H. "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality or any other legal or commercial entity; and

I. "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States.

**History: Laws 2021, ch. 58, § 2.** **Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 2 effective January 1, 2022.

## 31-29-3. Limitation on scope.

A. The Uniform Collateral Consequences of Conviction Act does not provide a basis for:

(1) invalidating a plea, conviction or sentence;

(2) a cause of action for money damages; or

(3) a claim for relief from or defense to the application of a collateral consequence based on a failure to comply with the Uniform Collateral Consequences of Conviction Act.

B. The Uniform Collateral Consequences of Conviction Act does not affect:

(1) the duty an individual's attorney owes to the individual, except as provided in Section 5 [31-29-5 NMSA 1978] of the Uniform Collateral Consequences of Conviction Act;

(2) a claim or right of a victim of an offense; or

(3) a right or remedy pursuant to law other than the Uniform Collateral Consequences of Conviction Act available to an individual convicted of an offense.

**History: Laws 2021, ch. 58, § 3.** **Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 3 effective January 1, 2022.

## 31-29-4. Identification, collection and publication of laws regarding collateral consequences.

A. The identification agency:

(1) shall identify or cause to be identified:

(a) any provision in the constitution of New Mexico and New Mexico's statutes published in the New Mexico Statutes Annotated that imposes a collateral sanction or authorizes the imposition of a disqualification; and

(b) any provision of law that may afford relief from a collateral consequence;

(2) not later than six months after the effective date of the Uniform Collateral Consequences of Conviction Act, shall prepare or cause to be prepared a collection of citations to, and the text or short descriptions of, the provisions identified pursuant to Paragraph (1) of this subsection;



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(3) shall update or cause to be updated the collection provided for in Paragraph (2) of this subsection within three months after the laws enacted during each session of the legislature are published in the New Mexico Statutes Annotated; and

(4) in complying with Paragraphs (1) and (2) of this subsection, may rely on the study of New Mexico's collateral sanctions, disqualifications and relief provisions prepared by the national institute of justice described in Section 510 of the federal Court Security Improvement Act of 2007, Pub. L. 110-177.

B. As required by Subsection A of this section, the identification agency shall include or cause to be included the following statements in a prominent manner at the beginning of the collection:

(1) "This collection has not been enacted into law and does not have the force of law.";

(2) "An error or omission in this collection, or in any reference work cited in this collection, is not a reason for invalidating a plea, conviction or sentence or for not imposing a collateral sanction or authorizing a disqualification.";

(3) "The laws of other jurisdictions and New Mexico counties and municipalities and the New Mexico Administrative Code [14-4-7.2 NMSA 1978] are not included in this collection and may impose additional collateral sanctions and authorize additional disqualifications."; and

(4) "This collection does not include any law or other provision regarding the imposition of or relief from a collateral sanction or a disqualification enacted or adopted after [insert date the collection was prepared or last updated].".

C. The identification agency shall publish or cause to be published in the manner provided in Subsection D of this section the collection prepared and updated as required by Subsection A of this section. If available, the identification agency shall publish or cause to be published, as part of the collection, the title and internet address of:

(1) the most recent collection of collateral consequences imposed by federal law; and

(2) any provision of federal law that may afford relief from a collateral consequence.

D. The collection provided for in Subsection C of this section shall be published on the website of the identification agency and shall be available to the public on the internet without charge not later than three weeks after it is created or updated.

**History: Laws 2021, ch. 58, § 4.** **Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 4 effective January 1, 2022.

## 31-29-5. Notice of collateral consequences in pretrial proceeding and at guilty plea.

A. Except as provided in Subsection C of this section, counsel representing an individual charged with an offense shall cause written notice substantially similar to the following to be communicated to the individual:

"NOTICE OF ADDITIONAL LEGAL CONSEQUENCES

If you plead guilty or no contest to an offense, or are convicted of an offense, you may suffer additional legal consequences beyond jail or prison, probation, periods of parole and fines. These consequences may include:

1. being unable to get or keep some licenses, permits or jobs;
2. being unable to get or keep benefits such as public housing or education;
3. receiving a harsher sentence if you are convicted of another offense in the future;
4. having the government take your property; and
5. being unable to vote or possess a firearm.

If you are not a United States citizen, a guilty plea or no contest plea or conviction may also result in your deportation, removal or exclusion from admission to the United States or denial of citizenship.

The law may provide ways to obtain some relief from these consequences.

Further information about the consequences of conviction is available on the internet at [insert internet address of the collection of laws published pursuant to Subsections C and D of Section 4 [31-29-4 NMSA 1978] of the Uniform Collateral Consequences of Conviction Act].".



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B. Before a court accepts a plea of guilty or no contest from an individual, the court shall confirm that the individual received and understands the notice required by Subsection A of this section and has had an opportunity to discuss the notice with counsel.

C. The notice required pursuant to Subsection A of this section need not be given until six months have elapsed after the collection of laws required pursuant to Section 4 of the Uniform Collateral Consequences of Conviction Act is first available on the internet pursuant to Subsections C and D of Section 4 of that act.

D. This section does not limit the duty that an individual's counsel otherwise owes to the individual.

**History: Laws 2021, ch. 58, § 5.** **Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 5 effective January 1, 2022.

## 31-29-6. Notice of collateral consequences at sentencing and upon release.

A. An individual convicted of an offense shall be given notice as provided in Subsections B and C of this section:

(1) that collateral consequences may apply because of the conviction;

(2) of the internet address of the collection of laws published pursuant to Subsections C and D of Section 4 [31-29-4 NMSA 1978] of the Uniform Collateral Consequences of Conviction Act;

(3) that there may be ways to obtain relief from collateral consequences;

(4) of contact information for government or nonprofit agencies, groups or organizations, if any, offering assistance to individuals seeking relief from collateral consequences; and

(5) of when an individual convicted of an offense may vote pursuant to New Mexico law.

B. Except as provided in Subsection D of this section, the court shall provide the notice set forth in Subsection A of this section as a part of sentencing.

C. Except as provided in Subsection D of this section, if an individual is sentenced to imprisonment or other incarceration, the officer or agency releasing the individual shall provide the notice set forth in Subsection A of this section not more than thirty and, if practicable, at least five days before release.

D. The notice required pursuant to Subsection A of this section need not be given until six months have elapsed after the collection of laws required pursuant to Section 4 of the Uniform Collateral Consequences of Conviction Act is first available on the internet pursuant to Subsections C and D of Section 4 of that act.

**History: Laws 2021, ch. 58, § 6.** **Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 6 effective January 1, 2022.

## 31-29-7. Authorization required for sanction; ambiguity.

A. A collateral sanction may be imposed only by statute or ordinance or by a rule authorized by law and adopted in accordance with applicable law.

B. A law creating a collateral consequence that is ambiguous as to whether it imposes a collateral sanction or authorizes a disqualification shall be construed as authorizing a disqualification.

**History: Laws 2021, ch. 58, § 7.** **Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 7 effective January 1, 2022.

## 31-29-8. Decision to disqualify.

In deciding whether to impose a disqualification, a decision-maker shall undertake an individualized assessment to determine whether the benefit or opportunity at issue should be denied the individual. In making that decision, the decision-maker may consider, if substantially related to the benefit or opportunity at issue, the particular facts and circumstances involved in the offense and the essential elements of the offense. A conviction itself shall not be considered except as



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having established the elements of the offense. The decision-maker shall also consider other relevant information, including the effect on third parties of granting the benefit or opportunity and whether the individual has been granted relief such as an order of limited relief.

**History: Laws 2021, ch. 58, § 8.** **Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 8 effective January 1, 2022.

## 31-29-9. Effect of conviction by another state or the united states; relieved or pardoned conviction.

A. For purposes of authorizing or imposing a collateral consequence in New Mexico, a conviction of an offense in a court of another state or the United States is deemed a conviction of the offense in New Mexico with the same elements. If there is no offense in New Mexico with the same elements, the conviction is deemed a conviction of the most serious offense in New Mexico that is established by the elements of the offense. A misdemeanor in the jurisdiction of conviction shall not be deemed a felony in New Mexico, and an offense lesser than a misdemeanor in the jurisdiction of conviction shall not be deemed a conviction of a felony or misdemeanor in New Mexico.

B. For purposes of authorizing or imposing a collateral consequence in New Mexico, a juvenile adjudication in another state or the United States shall not be deemed a conviction of a felony, misdemeanor or offense lesser than a misdemeanor in New Mexico.

C. A conviction that is reversed, overturned or otherwise vacated by a court of competent jurisdiction of New Mexico, another state or the United States on grounds other than rehabilitation or good behavior shall not serve as the basis for authorizing or imposing a collateral consequence in New Mexico.

D. A pardon issued by another state or the United States has the same effect for purposes of authorizing, imposing and relieving a collateral consequence in New Mexico as it has in the issuing jurisdiction.

E. A conviction that has been relieved by expungement, sealing, annulment, set-aside or vacation by a court of competent jurisdiction of another state or the United States on grounds of rehabilitation or good behavior, or for which civil rights are restored pursuant to statute, has the same effect for purposes of authorizing or imposing collateral consequences in New Mexico as it has in the jurisdiction of conviction; provided, however, that such relief or restoration of civil rights does not relieve collateral consequences applicable pursuant to the law of New Mexico for which relief could not be granted pursuant to Section 11 [31-29-11 NMSA 1978] of the Uniform Collateral Consequences of Conviction Act or for which relief was expressly withheld by the court order or by the law of the jurisdiction that relieved the conviction. An individual convicted in another jurisdiction may seek relief pursuant to Section 10 [31-29-10 NMSA 1978] of the Uniform Collateral Consequences of Conviction Act from any collateral consequence for which relief was not granted in the issuing jurisdiction except those consequences listed in Section 11 of that act.

F. A charge or prosecution in any jurisdiction that has been finally terminated without a conviction and imposition of sentence based on participation in a deferred adjudication or diversion program shall not serve as the basis for authorizing or imposing a collateral consequence in New Mexico. This subsection does not affect the validity of any restriction or condition imposed by law as part of participation in the deferred adjudication or diversion program before or after the termination of the charge or prosecution.

**History: Laws 2021, ch. 58, § 9.** **Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 9 effective January 1, 2022.

## 31-29-10. Order of limited relief.

A. An individual convicted of an offense may petition for an order of limited relief from one or more collateral sanctions related to employment, education, housing, public benefits or occupational licensing. The petition shall be presented to the sentencing court before sentencing.



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B. Except as otherwise provided in Section 11 [31-29-11 NMSA 1978] of the Uniform Collateral Consequences of Conviction Act, the court may issue an order of limited relief relieving one or more of the collateral sanctions described in Subsection A of this section only if, after reviewing the petition, the individual's criminal history, any filing by a victim pursuant to Section 14 [31-29-14 NMSA 1978] of the Uniform Collateral Consequences of Conviction Act or a prosecutor and any other relevant evidence, the court finds the individual has established by a preponderance of the evidence that:

(1) granting the petition will materially assist the individual in obtaining or maintaining employment, education, housing, public benefits or occupational licensing;

(2) the individual has substantial need for the relief requested in order to live a law-abiding life; and

(3) granting the petition would not pose an unreasonable risk to the safety or welfare of the public or any individual.

C. An order of limited relief may be issued as a part of sentencing. The order of limited relief shall specify:

(1) the collateral sanction from which relief is granted; and

(2) any restriction imposed pursuant to Subsection A of Section 12 [31-29-12 NMSA 1978] of the Uniform Collateral Consequences of Conviction Act.

D. An order of limited relief relieves a collateral sanction to the extent provided in the order.

E. If a collateral sanction has been relieved pursuant to this section, a decision-maker may consider the conduct underlying a conviction as provided in Section 8 [31-29-8 NMSA 1978] of the Uniform Collateral Consequences of Conviction Act.

**History: Laws 2021, ch. 58, § 10.** **Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 10 effective January 1, 2022.

## 31-29-11. Collateral sanctions not subject to order of limited relief.

An order of limited relief shall not be issued to relieve the following collateral sanctions:

A. requirements imposed by the Sex Offender Registration and Notification Act;

B. a motor vehicle license suspension, revocation, limitation or ineligibility pursuant to the Motor Vehicle Code [66-1-1 NMSA 1978], for which restoration or relief is available pursuant to law other than the Uniform Collateral Consequences of Conviction Act;

C. ineligibility for certification as a law enforcement officer pursuant to the Law Enforcement Training Act [Chapter 29, Article 7 NMSA 1978] or for employment as a correctional officer pursuant to the Corrections Act [33-1-1 tO 33-1-9 NMSA 1978]; or

D. prohibitions imposed pursuant to Section 30-7-16 NMSA 1978 making it unlawful for felons to receive, transport or possess a firearm or destructive device while in this state.

**History: Laws 2021, ch. 58, § 11.** **Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 11 effective January 1, 2022.

## 31-29-12. Issuance of order of limited relief.

A. The prosecutor shall be notified of a request for an order of limited relief. The court may issue an order of limited relief subject to restriction, condition or additional requirement.

B. The court shall order any test, report, investigation or disclosure by the individual it reasonably believes necessary to its decision to issue an order of limited relief. If there are disputed issues of material fact or law, the individual and any prosecutor notified pursuant to Subsection A of this section or another prosecutorial agency designated by a prosecutor notified pursuant to Subsection A of this section may submit evidence and be heard on those issues.

**History: Laws 2021, ch. 58, § 12.** **Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 12 effective January 1, 2022.



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## 31-29-13. Reliance on order as evidence of due care.

In a judicial or administrative proceeding alleging negligence or other fault, an order of limited relief may be introduced as evidence of a person's due care in hiring, retaining, licensing, leasing to, admitting to a school or program or otherwise transacting business or engaging in activity with the individual to whom the order was issued if the person knew of the order at the time of the alleged negligence or other fault.

**History: Laws 2021, ch. 58, § 13.**

**Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 13 effective January 1, 2022.

## 31-29-14. Victim's rights.

A victim of an offense may participate in a proceeding for issuance of an order of limited relief in the same manner as at a sentencing proceeding pursuant to the Victims of Crime Act [Chapter 31, Article 26 NMSA 1978].

**History: Laws 2021, ch. 58, § 14.**

**Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 14 effective January 1, 2022.

## 31-29-15. Uniformity of application and construction.

In applying and construing the Uniform Collateral Consequences of Conviction Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**History: Laws 2021, ch. 58, § 15.**

**Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 15 effective January 1, 2022.

## 31-29-16. Saving and transitional provisions.

A. Except as provided in Subsection B of this section, the Uniform Collateral Consequences of Conviction Act applies to collateral consequences whenever enacted or imposed unless the law creating the collateral consequence expressly states that the Uniform Collateral Consequences of Conviction Act does not apply.

B. The Uniform Collateral Consequences of Conviction Act does not apply to the imposition of a collateral sanction on an individual until the date that is six months after the collection of laws required pursuant to Section 4 [31-29-4 NMSA 1978] of the Uniform Collateral Consequences of Conviction Act is first available on the internet pursuant to Subsections C and D of Section 4 of that act, but a collateral sanction validly imposed before that date may be the subject of relief pursuant to that act.

**History: Laws 2021, ch. 58, § 16.**

**Effective dates.** — Laws 2021, ch. 58, § 17 made Laws 2021, ch. 58, § 16 effective January 1, 2022.

# ARTICLE 30

# Violence Intervention Program

Sec.
31-30-1. Short title.
31-30-2. Definitions.
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31-30-4. Violence intervention program requirements.
31-30-5. Grant awards.
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## 31-30-1. Short title.

Sections 38 through 46 [31-30-1 to 31-30-9 NMSA 1978] of this act may be cited as the "Violence Intervention Program Act".

**History: Laws 2022, ch. 56, § 38.** art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

**ANNOTATIONS**

**Effective dates.** — Laws 2022, ch. 56, § 38 contained no effective date provision, but, pursuant to N.M. Const.,

## 31-30-2. Definitions.

As used in the Violence Intervention Program Act:

A. "commission" means the New Mexico sentencing commission;

B. "community-based service provider" means an entity that is eligible to be awarded a contract to provide services that accomplish the purposes of the Violence Intervention Program Act;

C. "department" means the department of health; and

D. "grantee" means a state agency, county, municipality or tribal government that has applied for and received funding pursuant to the Violence Intervention Program Act for the purposes of addressing gun violence and aggravated assaults in a locally focused geographic area.

**History: Laws 2022, ch. 56, § 39.** art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

**ANNOTATIONS**

**Effective dates.** — Laws 2022, ch. 56, § 39 contained no effective date provision, but, pursuant to N.M. Const.,

## 31-30-3. Violence intervention program fund; created; purpose.

The "violence intervention program fund" is created as a nonreverting fund in the state treasury. The fund consists of appropriations, gifts, grants and donations. The department shall administer the fund, and money in the fund is appropriated to the department to administer the provisions of the Violence Intervention Program Act and award violence intervention program grants to state agencies, counties, municipalities or tribal governments that the department finds are disproportionately impacted by violent crimes, including homicides, shootings and aggravated assaults. Expenditures from the fund shall be made on warrant of the secretary of finance and administration pursuant to vouchers signed by the secretary of health. The department may expend no more than three percent of the balance of the fund each fiscal year for administering the Violence Intervention Program Act. No money in the fund may be expended in any way except as provided by the Violence Intervention Program Act.

**History: Laws 2022, ch. 56, § 40.** art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

**ANNOTATIONS**

**Effective dates.** — Laws 2022, ch. 56, § 40 contained no effective date provision, but, pursuant to N.M. Const.,

## 31-30-4. Violence intervention program requirements.

A violence intervention program shall:

A. use an evidence- or research-based public health approach to reduce gun violence and aggravated assaults;

B. use focused deterrence, problem-oriented policing and proven law enforcement strategies to reduce gun violence and aggravated assaults;

C. target a population that is at high risk for victimization or retaliation that results from gun violence or aggravated assault through engaging in the cycles of violence in the community;



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D. use data-driven methods for program development; and

E. use program funding in a manner that is directly related to the reduction of gun violence and aggravated assaults.

**History: Laws 2022, ch. 56, § 41.** art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

**ANNOTATIONS**

**Effective dates.** — Laws 2022, ch. 56, § 41 contained no effective date provision, but, pursuant to N.M. Const.,

## 31-30-5. Grant awards.

A. On or after July 1, 2022, the department shall receive and review applications for grants from the violence intervention program fund. The department may make grants from the fund to state agencies, counties, municipalities or tribal governments that the department finds are disproportionately impacted by violent crimes, including homicides, shootings and aggravated assaults.

B. The department shall make awards of grants from the fund in accordance with the following limitations:

(1) grant awards shall be made to at least two counties, municipalities or tribal governments with a population of fifty thousand or less according to the most recent annual university of New Mexico intercensal population estimate;

(2) at least twenty percent of the total annual amount appropriated to the fund shall be awarded to counties or municipalities with a population of five hundred forty thousand or greater according to the most recent federal decennial census; and

(3) the department of health shall utilize the funds in accordance with department of finance and administration guidelines.

**History: Laws 2022, ch. 56, § 42.** art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

**ANNOTATIONS**

**Effective dates.** — Laws 2022, ch. 56, § 42 contained no effective date provision, but, pursuant to N.M. Const.,

## 31-30-6. Application requirements.

A. Each application for a grant from the violence intervention program fund shall include:

(1) clearly defined, measurable objectives for a proposal to improve public health and safety through evidence-based violence reduction interventions;

(2) a comprehensive violence reduction strategic plan, including consistent quality improvement and quality assurance measures, and a description of the strategies and tasks developed by a state agency, county, municipality or tribal government describing the goals of the plan, including community-based services or joint community-based services and law enforcement intervention strategies;

(3) a description of how a grant award would be used if awarded; and

(4) a list of community-based service providers in the locally focused geographic area in which the grant funds would be used, including those with an expressed commitment to participating in a violence intervention program.

B. The commission shall provide state agencies, counties, municipalities and tribal governments with data relevant to grant applications.

C. An applicant shall notify the appropriate criminal justice coordinating council established pursuant to Section 31-28-3 NMSA 1978 of its grant application.

**History: Laws 2022, ch. 56, § 43.** art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

**ANNOTATIONS**

**Effective dates.** — Laws 2022, ch. 56, § 43 contained no effective date provision, but, pursuant to N.M. Const.,



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## 31-30-7. Conditions of grant.

A. As a condition of each grant made pursuant to the Violence Intervention Program Act, the department shall require each grantee to use at least fifty percent of its grant for the purpose of entering into contracts with one or more community-based service providers.

B. Each grantee shall report to the appropriate criminal justice coordinating council established pursuant to Section 31-28-3 NMSA 1978 regarding outcomes of the grant.

C. A grant may be awarded to a county or municipality, but shall not be awarded to both a county and a municipality falling within the county.

**History: Laws 2022, ch. 56, § 44.** art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

**ANNOTATIONS**

**Effective dates.** — Laws 2022, ch. 56, § 44 contained no effective date provision, but, pursuant to N.M. Const.,

## 31-30-8. Rules.

The department shall adopt rules necessary to administer the provisions of the Violence Intervention Program Act, including standardized rules pertaining to the collection and sharing of data by grantees.

**History: Laws 2022, ch. 56, § 45.** art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

**ANNOTATIONS**

**Effective dates.** — Laws 2022, ch. 56, § 45 contained no effective date provision, but, pursuant to N.M. Const.,

## 31-30-9. Reports.

A. Each grantee shall report to the department and the commission by November 1 of each year regarding the:

(1) purpose and amount of each grant received by the grantee for the previous fiscal year; and

(2) processes, outputs and outcomes resulting from each grant approved by the department for the previous fiscal year, including relevant data as required by department rules.

B. Each year through 2027, the department and the commission shall report to the legislature by December 1 regarding the awards and outcomes of each grantee.

**History: Laws 2022, ch. 56, § 46.** art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

**ANNOTATIONS**

**Effective dates.** — Laws 2022, ch. 56, § 46 contained no effective date provision, but, pursuant to N.M. Const.,



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